Democracy, Judging and Bertha Wilson

Robert E. Hawkins & Robert Martin*

This paper offers a critical review of Supreme Court Justice Bertha Wilson's career, through an analysis of both her judgments and speeches. The authors argue that Justice Wilson failed to respect the limits which should constrain judicial review in a democratic society. In Part I, they provide a sketch of basic principles of liberal democracy as well as fundamental concepts associated with statutory interpretation and constitutional adjudication.

Part II examines more closely the work of Justice Wilson and her expansive view of the role of the courts under the *Canadian Charter of Rights and Freedoms*. They contrast this view with the proposition that the framers of the *Charter* never intended the courts to exercise such broad powers. By appropriating a *quasi*-legislative role for the judiciary, the authors suggest, Justice Wilson neglected to respect the separation of powers doctrine, with the result that she breached the basic democratic principles of elected governance and accountability.

Part III is highly critical of the "contextual approach" developed by Justice Wilson in her judgments and argues that it leads to decisions which are divorced from principle and based solely on a subjective theory of interpretation. Her contextual approach, they argue, offends the liberal notion of equality.

In Part IV, the authors examine influences which shaped Justice Wilson's approach to the law and suggest that she saw judicial review as an inherently subjective activity. The authors conclude that the approach to adjudication undertaken by Justice Wilson was inappropriate in and an affront to liberal democracy.

Cet article offre une revue critique de la carrière de Mme le juge Bertha Wilson à travers une analyse de ses décisions et de ses discours. Les auteurs soutiennent que Mme le juge Wilson n'a pas respecté les limites qui devraient encadrer la révision judiciaire dans une société démocratique. Dans la première partie, ils fournissent un aperçu des principes de base de la démocratie libérale ainsi que des concepts fondamentaux associés à l'interprétation et à l'adjudication constitutionnelle. La deuxième partie s'attarde plus précisément sur le travail de Mme le juge Wilson et sur sa vision expansive du rôle des tribunaux sous la *Charte canadienne des droits et libertés*. Les auteurs soumettent que les rédacteurs de la *Charte* n'ont jamais eu l'intention d'octroyer aux tribunaux des pouvoirs aussi étendus. Ils suggèrent qu'en accordant un rôle quasi-législatif au domaine judiciaire, Mme le juge Wilson n'a pas respecté la doctrine de la séparation des pouvoirs, ayant ainsi pour résultat de briser les principes démocratiques fondamentaux, soit un gouvernement élu et responsable.

La troisième partie est hautement critique de l'approche contextuelle développée par Mme le juge Wilson dans ses jugements. Les auteurs prétendent que cette approche mène à des décisions dénuées de principes et fondées uniquement sur une théorie d'interprétation subjective. Son approche contextuelle entre en contradiction avec la notion libérale d'égalité. Dans la quatrième partie, les auteurs examinent les facteurs qui ont influencé l'approche de Mme le juge Wilson face au droit et suggèrent qu'elle a perçu la révision judiciaire comme une activité subjective en soi. Les auteurs concluent que l'approche prise par Mme le juge Wilson envers l'adjudication était inappropriée et constituait un affront à la démocratie libérale.

* Robert E. Hawkins is the Associate Dean (Administration) of the Faculty of Law at the University of Western Ontario. Robert Martin is a Professor of Law at the Faculty of Law at the University of Western Ontario. The authors would like to thank: Roderick A. Macdonald, F.R. Scott Professor of Public and Constitutional Law, McGill University, Faculty of Law; Dean Peter F. Neary, Faculty of Social Science, University of Western Ontario; and Professor R. Kostal and Professor B. Hovius, Faculty of Law at the University of Western Ontario, for insightful comments on an earlier draft of this paper. We would like to thank David Adderley and Craig McTaggart who assisted with the research. We would also like to acknowledge the Law Foundation of Ontario which provided assistance in hiring research students.

To be cited as: (1995) 41 McGill L.J. 1
Mode de référence : (1995) 41 R.D. McGill 1

Synopsis

I. Democracy and Judicial Review

> *I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?*[1]
>
> Herbert Wechsler

This essay is a critical review of the career of one Canadian judge. We argue that this judge, Justice Bertha Wilson, failed to respect the limits which should constrain judicial review in a democracy. Before looking in detail at the way Justice Wilson behaved as a judge and the way she herself assessed that behaviour, it is necessary to set out our views about liberalism and democracy and about the proper role of judges in a liberal democracy.

A. *Liberalism and Democracy*

The meaning of democracy as a political principle is clear: it is the exercise of government by the people. This straightforward notion requires some elaboration.

First, for better or worse, politics will likely continue to be organized around the existence of nation states. When we speak of rule by the people, we mean, therefore, rule within a particular state by citizens of that state. While aliens — persons who do not belong to the state — may be denied participation in politics, the contemporary understanding of democracy requires that no adult citizen be unreasonably excluded. Unreasonable bases for exclusion would include such things as race, sex, religion or language.

Second, it may be that a fully-democratic political system would be based on direct or participatory politics. Unfortunately, institutional forms that would permit direct democracy in larger societies have yet to be devised, and as a result, the most typical democratic model involves some form of representation. Adult citizens choose their representatives by voting at periodic elections, and those representatives make the laws and have the last word on state policy. Democracy, thus, demands that the votes of all citizens be equal, and that a majority of the citizens' representatives be constitutionally empowered to make formal and binding decisions. This brief statement does not exhaust all the possibilities for democratic government, nor does it seek to address ongoing debates over matters of detail, such as whether some variant of proportional representation is preferable to a system of

---

[1] H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1 at 15.

single-member constituencies. It does, however, set out the essential formal elements that are required for a particular political system to be described as democratic.

Third, it is crucial to understand that democracy and liberalism are not the same thing.[2] The distinctions and, indeed, the antinomies between democracy and liberalism are at the heart of the debates over the proper role of judges within a democracy and over both the desirability and the limits of judicial review.

While democracy is about majority rule, liberalism is concerned with the individual and, in particular, the rights of the individual as against the state, that is, as against the majority. As C.B. Macpherson has argued, the liberal-democratic state was liberal before it became democratic. What he meant was that states had established formal legal protection for the rights of individuals at a time when the majority of the people were still excluded from participation in their own governance.[3] Indeed, Macpherson believed that the popular struggle for democracy was very much a struggle against the liberal state.

Liberal democracy has institutionalized a permanent and irreconcilable contradiction: the simultaneous imperatives that, on the one hand, the claims of individuals be respected despite the express wishes of the majority and, on the other, that the wishes of the majority be implemented despite those claims. Politics in liberal democracies is largely taken up with the ceaseless, but impossible, attempt to resolve this contradiction or, at least, to address its most egregious manifestations.

It is normal in liberal democracies to establish rules which define in advance how to address the various manifestations of this contradiction. This is one of the functions of a constitution. Constitutions express the popular commitment to democracy by creating legislatures and, more to the point, by identifying them as the primary instruments for the making of public policy. Moreover, constitutions often limit the authority of the legislature by giving formal recognition to the rights of individuals. Liberalism becomes a constitutional fetter on democracy just as, of course, democracy becomes a fetter on liberalism.

Liberal-democratic constitutions normally assign the task of managing the ongoing contradiction between liberalism and democracy to the judiciary. The judicial-review function, whether expressly or impliedly included in the constitution, gives judges the last word on what is or is not constitutional. Concretely, this means that judges have the authority to invalidate legislation. That is, they can overrule deliberate decisions taken both by the elected representatives of the people and by

[2] The clearest and most succinct introduction to these issues is to be found in C.B. Macpherson, *The Real World of Democracy* (Oxford: Clarendon Press, 1966) [hereinafter *The Real World*]. See also C.B. Macpherson, *The Life and Times of Liberal Democracy* (New York: Oxford University Press, 1977).

[3] See *The Real World*, *ibid.* at c. 1.

executive authorities. Interfering with legislation is the element of judicial review that has caused the most difficulty for U.S. and Canadian commentators, in that the act of an unelected, unaccountable judge in quashing the decision of elected, accountable political representatives appears, on its face, to be anti-democratic.[4] The question, therefore, is whether judicial review is a legitimate function in a democracy.

Turning briefly to the experience in the United States, the period from the mid 1880s to 1937 created real problems for proponents of judicial review. The unmistakable trend of democracy in those years was towards the creation of a mixed economy, towards both the establishment of a minimal-welfare state and the limitation of absolute freedom of contract in economic relations. The United States Supreme Court opposed this trend and was successful in resisting it for half a century, abandoning its efforts only after the re-election of Franklin D. Roosevelt in 1936.[5] Contemporary writers on the United States Constitution seem to forget this earlier period, possibly because their thoughts about judicial review have, largely, been shaped by *Brown* v. *Board of Education of Topeka*[6] and the overwhelmingly positive response that it and subsequent decisions evoked.

It is unusual to find direct questioning of the legitimacy of judicial review on the part of commentators in the United States.[7] Alexander Bickel was aware that there was a problem but went some way towards obfuscating the anti-democratic nature of judicial review by describing it as "counter-majoritarian".[8] Perhaps the most influential of recent writers on the subject is J.H. Ely, who effectively finessed the issue by arguing that judicial review is justified because it allows judges to intervene to ensure that democratic institutions actually work as intended.[9] Judicial review is seen as an essential adjunct to democracy. Even more recently, E. Chemerinsky tried to reverse the argument by suggesting that democratic institutions are not, in practice, democratic, and as a result, concerns about the anti-democratic nature of judicial review are misconceived.[10]

---

[4] See discussion, below, at text accompanying notes 7ff.

[5] See the discussion in R. Martin, "The Judges and the Charter" (1984) 2 Socialist Stud. 66.

[6] 347 U.S. 483, 74 S. Ct. 686 (1954) [hereinafter *Brown*]. *Brown* and the decisions which followed it, especially in the areas of race relations and criminal procedure, were warmly received by intellectuals in the United States and abroad. We believe that the widespread popularity of the results in *Brown* and subsequent cases did a great deal to legitimate activist judicial review.

[7] An interesting recent example is C.R. Massey, "The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States" [1990] Duke L.J. 1229.

[8] A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 16.

[9] See J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[10] See E. Chemerinsky, "Foreword: The Vanishing Constitution" (1989) 103 Harv. L. Rev. 43. The argument that since democratic institutions are not working quite the way we wish they would, the proper course should be to forget about them is both arrogant and defeatist. The proper response of a democrat should be that if democratic institutions are working improperly, then we had better fix them.

Canadians were once skeptical about judicial review. Anglophone commentators, in particular, tended to be unenthusiastic about the Judicial Committee of the Privy Council, especially after it eviscerated R.B. Bennett's "recovery" programme in 1937.[11] The adoption of the *Canadian Charter of Rights and Freedoms*,[12] however, induced a profound ideological and cultural transformation. David Beatty has produced rhapsodic prose in favour of *Charter*-based judicial review.[13] Dale Gibson has defended the anti-democratic nature of judicial review. In one article, he praised judges for "amending" the constitution, asserting that it did not bother him if judges were to "bypass the democratic process", as long as they got the answers "right".[14] There is, however, also a large and growing body of literature that has criticized the Supreme Court of Canada for the anti-democratic fashion in which it has exercised its authority to engage in judicial review.[15]

The simple conclusion is that, while judicial review may be justified on other grounds, it is a practice which is, by its nature, anti-democratic. What, then, should be the approach of judges within a democratic state who, we assume, are committed to the maintenance of democracy, but who are, nonetheless, obliged to exercise the power of judicial review? In order to answer this question, it is necessary to understand the differences between legislators and judges. These differences, which mirror the distinctions between democracy and liberalism, are four-fold.

B. Legislators and Judges

The first and defining difference relates to the roles assigned to legislators and to judges by liberal-democratic constitutions under the separation of powers doctrine. The legislator personifies the democratic element in a liberal democracy. Democracy permits the expression of what the people want, at least insofar as the legislator can comprehend and support such desires. The legislator also has the primary role in the formulation of public policy.

---

[11] Much of the 1937 volume of the Canadian Bar Review was devoted to criticism of these decisions (see (1937) 15 Can. Bar Rev.).

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

[13] See D.M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Montreal: McGill-Queen's University Press, 1987).

[14] D. Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution" (1992) 55:1 Law & Contemp. Probs. 261 at note 58, p. 284.

[15] The most prominent of these crities are Professor F.L. Morton and Professor Rainer Knopff at the University of Calgary. They have, jointly and individually, written a great deal about the *Charter*. The fullest exposition of their views can be found in F.L. Morton & R. Knopff, *Charter Politics* (Scarborough: Nelson Canada, 1992). Michael Mandel of Osgoode Hall Law School is also a prominent *Charter* critic. His most recent book, M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994), attempts the, seemingly, impossible feat of simultaneously being politically correct and criticizing judicial activism.

The judge embodies the liberal element. This element explicitly constrains the democratic element. The judge also acts as arbiter between a constitution's contradictory democratic and liberal tendencies. In this capacity, it is not the judge's role to substitute his or her policy preferences — or view of the right and the good — for those adopted by the legislators.

The separation of powers doctrine maintains the distinction between the legislative and judicial roles. It ensures that the elected, accountable organs of the state have the stewardship of the democratic principle, and that the unelected, unaccountable organ — the judiciary — has the stewardship of the liberal principle. Even more important, however, it ensures that none of these organs interferes with the work of the others.

Now it is true that, because Canada is a parliamentary democracy, its Constitution[16] does not fully recognize the separation of powers. This does not mean, however, that the principle is foreign or unknown to its Constitution.[17] It has long been accepted that the Canadian Constitution contains a limited separation of powers doctrine, one that protects the integrity of the judicial function. That is, the legislature's ability to remove decision-making functions from the judiciary and vest them in non-curial bodies is limited. The Constitution prohibits the legislature from arrogating to itself the functions of the judiciary. But just as the legislature must respect the integrity of the judiciary, the separation of powers doctrine also demands that the judiciary respect the integrity of the legislature.[18]

The second difference between legislators and judges has to do with the way they attain and maintain their offices. Both the selection processes and the rules about their tenures differ. With respect to selection, any adult citizen in a democracy will normally be entitled to stand as a candidate for election to the legislature. No special education or training is required; there is no formal, institutional screening of candidates before they present themselves to the people. By contrast, not every citizen is, on the usual model, entitled to become a judge. Employment in the judiciary is reserved for lawyers. Furthermore, except in a minority of jurisdictions in the United States, the people are excluded from direct participation in the selection of judges. Judges may be selected by political figures or by more or less independent bodies, but the people themselves do not take part in the process.

---

[16] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Constitution].

[17] See *Reference Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, Dickson J.

[18] Supreme Court of Canada judges have, from time to time, been prepared to concede this much (see *e.g. Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297, Sopinka J.).

With respect to tenure, legislators are directly accountable to the people. They know that after a specified period in office they will have to face the people to be re-elected. Judges are guaranteed their office until they reach a specified retirement age. It is true that judges can be removed from office if they fail to meet the standards of behaviour expected of them. These standards demand that judges observe certain norms of personal and professional probity; they do not, however, demand that judges account for the substance of their decisions in particular cases. As a matter of principle, and as a matter of definition, judges are not to be accountable to anyone.

The third difference between legislators and judges relates to temperament. The judiciary must always be conscious of the role it is playing and, especially, of the anti-democratic elements of that role. This requires that judicial review be undertaken with modesty, dispassion and circumspection. These attitudes are less necessary in a legislator. The judge must strive to foresake political power in order to exercise judicial power within the constraints of the law. Justice Frankfurter described the judicial temperament in the following words:

> "To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ... judicial power."[19]

Fourth, there is a fundamental difference between the ways by which legislators and judges reason and make decisions. The legislator is assumed to make expressly political decisions; that is, to base decisions on such things as the wishes of constituents, the policies of the party and one's own subjective views as to what is socially desirable. This is not the way we expect judges to make decisions. Rather, we assume that the primary element in any judicial decision is the law. It may well be that the law is uncertain or contradictory; nevertheless, it is widely understood that judicial decision-making must involve an effort to reach conclusions on the basis of established principles, rather than through public opinion polls, party policy or some other set of purely subjective criteria. However it is to be formulated, there must be a distinction between the way legislators make decisions and the way judges make distinctions. If there is no such distinction, why bother having judges?

This difference in approaches to decision-making finds outward expression in the different justifications used by legislators and judges for their decisions. The legislator acts because he or she has become convinced that a particular policy is wise or desirable. He or she argues: "This policy, in my opinion or in my party's opinion, is wise or good;" or "This is what my constituents wanted;" or "I have

---

[19] Quoted in L.R. Yankwich, "The Art of Being a Judge" in G.R. Winters, ed., *Handbook for Judges: An Anthology of Inspirational and Educational Writings for Members of the Judiciary* (Chicago: American Judicature Society, 1975) 3 at 4.

done what is best for the country." The judge, however, is not entitled to act on these bases; the constitution constrains him or her. Interference with the democratic principle by judges can only be justified on the ground that it is necessary to ensure continued observance of the constitution. The judge may only intervene when he or she is satisfied that the state's political organs have failed to act in conformity with overriding constitutional principles. The judge reasons, "I have done what I have done because that is what the constitution's principles, as I understand and interpret them, require."

In a democracy, judicial review must be principled. Principled judging is the opposite of *ad hoc*, result-oriented judging. The outcome of the case must transcend the personal characteristics of the litigants, the specific context of the particular facts and the subjective preferences of the judge in light of those characteristics and that context. The reasoning underlying the decision must be susceptible to generalization.

To maintain neutrality, the relevant principle must originate in a source external to the judge. One such source is statute law, the other is common law. The Canadian Constitution is a statute; while there is a residual common law of the Constitution, that common law cannot be applied to contradict directly the Constitutional text.[20] In looking for the principle contained in a statute, including a constitution, a judge's law-making role is, therefore, constrained by the statute's text, its purpose and its historical development. The framework is given; the judge fills in the details.

In a democracy, the legitimate exercise of the power of judicial review by unelected, unaccountable judges depends on the principled exercise of that power. A judge in a democracy can only properly declare unconstitutional a law passed by the legislature on the basis of a principle that has its source in the constitution. The judge interprets the constitution in order to define the principle and, then, applies the principle in order to determine whether the effect created by the challenged legislation violates the constitution. Subject to certain special rules of statutory interpretation, the process is similar to the one a judge follows in interpreting an ordinary piece of legislation and applying it to a particular set of facts.[21]

[20] Constitutional conventions, which evolve in common law-like fashion, have moral force, if not legal force (see *Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* 125 D.L.R. (3d) 1; *New Brunswick Broadcasting Co.* v. *Speaker of the House of Assembly (N.S.)*, [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212).

[21] The process is not as linear as this description makes it seem. J.A. Corry wrote that the judge simultaneously thinks of the statute in relation to the facts, and the facts inevitably colour that interpretation of the statute. Corry wrote that "[i]n considering his decision, [the judge] goes back and forth from facts to statute and from statute to facts, and the processes of interpretation and application are telescoped together in a manner which defies separation" (J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936) 1 U.T.L.J. 286 at 291). This does not mean that the statute has no import. The words of a statute always set limits beyond which it cannot be extended or restricted by a judge acting in good faith (see *ibid.* at 291-92).

C. Constitutional Interpretation

The traditional rules of statutory interpretation are well known, although their application in particular cases may be controversial.[22] One starts with the words of the enactment; if those words can be given an ordinary or plain meaning which is applicable to the facts at hand, that is done. Usually, that is not enough. If ambiguities remain, one looks to the purpose the statute was intended to achieve (that is, the good sought or the evil to be remedied), the scheme of the act and the legislative history of the enactment. Two judges may disagree on the outcome. What matters, however, is that the disagreement must be premised on something other than the judge's personal preference as to who should win the case.

Constitutions are to be given a "large and liberal" interpretation as opposed to a "cramped and legalistic" one. This means that constitutional provisions are to be interpreted in light of their purpose. That purpose must be applied over a wide range of circumstances and a long period of time. There is nothing unusual about this interpretive principle: the same "canon of construction" applies when interpreting remedial legislation.[23] A large and liberal interpretation, however, does not give a judge licence to read purposes into a constitutional provision that were never intended when the provision was adopted. Justice Dickson argued in *R.* v. *Big M Drug Mart Ltd.*[24] for a large and liberal interpretation of the *Charter*, one which recognized the purpose the particular guarantee was intended to fulfil. "At the same time," he stated, "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts."[25]

Mr. Justice McIntyre, in *Reference Re Public Service Employee Relations Act (Alta.)*,[26] stated that the interpretation of the *Charter* was constrained by the lan-

---

[22] See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at 403-16, 809-28, 1283-297. Madam Justice Wilson set out these rules for herself:

> The search for the true meaning of ordinary legislation was prior to the *Charter* necessarily the search for the intention of Parliament in passing it [*sic*]. Whether you applied the plain meaning rule, the mischief rule, the statutory presumptions or the scheme of the Act approach, the objective was always the same — to identify what Parliament intended by the words it used — because that intention represented the true meaning of the legislation (B. Wilson, "Statutory Interpretation: The Use of Extrinsic Evidence Pre and Post *Charter*" (Paper delivered at the Commonwealth Law Conference, New Zealand, April 1990) [hereinafter "Extrinsic Evidence"] in *Speeches Delivered by the Honourable Bertha Wilson: 1976-1991* (Ottawa: Supreme Court of Canada, 1992) 639 at 641 [hereinafter *Speeches*]).

[23] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[24] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.].

[25] *Ibid.* at 344.

[26] [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [hereinafter *Re Public Service Employee* cited to S.C.R.].

guage, structure and history of the Constitutional text, by constitutional tradition, and by the history, traditions and philosophies of our society. In *R.* v. *Morgentaler*,[27] he stated:

> I take this [purposive approach] to mean that the Courts should interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing. This approach marks out the limits of appropriate *Charter* adjudication. It confines the content of *Charter* guaranteed rights and freedoms to the purposes given expression in the *Charter*. Consequently, while the Courts must continue to give a fair, large and liberal construction to the *Charter* provisions, this approach prevents the Court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this Court has said on numerous occasions it must not take.[28]

If a judge concludes that a statute does not govern the fact situation in issue, the judging exercise ends. The judge does not have the authority to extend the statutory principle, through judicial amendment, to cover situations that the judge thinks the elected representatives ought to have or might have included in the statute. If a statute stipulates that mechanics' liens can only be registered against public dwellings, it is not open to a judge to expand that principle to permit a lien to be registered against a private cottage, simply because the judge thinks the legislation is too restrictive. Similarly, if the Constitution does not guarantee the right to purchase contraceptives, it should not be open to a judge to write such a provision into the Constitution by inventing a right to privacy which the Constitution does not contain or by contorting a right, such as the right to liberty, which the Canadian Constitution does contain. The words of the Constitution can be given a principled definition based on the common understanding of those words when they were adopted, on the scheme of the Constitution and on the purpose for which those words were included in the Constitution. The words should not be defined on the basis of a subjective meaning which the judge wishes they had.[29]

We reject the deconstructionist view that texts do not, and cannot, have meaning. A well-known deconstructionist aphorism holds that the works of Shakespeare have no more inherent meaning than the New York City telephone directory. Like most deconstructionist thought, this view disregards concrete human experience. Literature students do not, in fact, study the New York City telephone directory. More to the point, in the early 1980s, when the entire country was engaged in debate over constitutional amendment, the central issue was the precise words that should go into our Constitution.[30]

---

[27] [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.].

[28] *Ibid.* at 140.

[29] In considering the purpose of constitutional guarantees, it is useful to recollect Mr. Justice Strayer's observation that "the Charter was not intended to guarantee good government in all its aspects ... There was no presumption created that every wrong must find a remedy in the Charter" (B.L. Strayer, "Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts" (1988) Pub. L. 347 at 352).

[30] See *ibid.*

D. *Justice Wilson's Approach to Judicial Review*

Where does Justice Wilson's approach to judging fit within our theory? For judicial review to be acceptable in a democracy, it must be based on a principle that is external to the will of the judge; for it to be constitutional, it must be based on a principle that is contained in the constitution; for it to be honest, it must be based on a fair reading of the words chosen by the elected representatives who adopted the constitution. On one occasion, at any rate, Justice Wilson believed these assertions to be true. In speeches delivered in Windsor, Canada and Edinburgh, Scotland, she said:

> As Canadian judges we are appointed, not elected, officials. There would be something deeply illegitimate about our forays into judicial review of legislation if all there was to them was a desire to substitute our own personal values for those of our duly elected representatives.
>
> We cannot placidly assume that by some mysterious process we, the judges, have been given access to the true answers to fundamental social and political dilemmas. If anything, the converse may be true. ...
>
> While things are slowly changing, it cannot be said that judges in Canada are broadly representative of the general public. There is, therefore, no plausible justification for us to substitute *our* personal values and *our* moral choices for those of the elected legislature. The metaphor of the living tree is a harmless one so long as it is used merely to suggest that a constitution must adapt and grow to meet modern realities. It could, however, become dangerous and anti-democratic if it were used to justify the shaping of the constitution according to the personal values of individual judges.[31]

The difficulty is that this does not reflect Justice Wilson's practice of judicial review either before or after these speeches were given. In *Morgentaler*, released two and one-half months prior to the above-quoted speech, Justice Wilson held that the *Criminal Code*[32] provisions restricting abortion should be struck down as offending substantive, fundamental justice and the *Charter*'s guarantees of personal liberty and freedom of religion and conscience. As will be shown below, this decision reflects Justice Wilson's personal views rather than a principled approach to constitutional adjudication.

In her nine years on the Supreme Court of Canada (1982-1991), Justice Wilson wrote over fifty major *Charter* decisions and made over sixty public speeches. This paper could not have been written without the speeches. They provide a kind of

[31] B. Wilson, "The Making of a Constitution" (Public Lecture on the *Charter of Rights and Freedoms*, Windsor, Canada, 12 April 1988) in *Speeches, supra* note 22, 527 at 538-39. See also B. Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (Paper delivered at a Seminar on "Constitutional Protection of Human Rights — The Canadian Experience Since 1982" at the University of Edinburgh, Scotland, 20-21 May 1988) in *Speeches, supra* note 22, 549 at 562-63 [hereinafter "Making of a Constitution"].

[32] R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

Rosetta Stone for understanding her judgments. This paper will examine the theory and practice of judicial review adopted by Justice Wilson in these judgments and speeches. We will consider: her understanding of the role of the post-*Charter* Court; the "contextual approach" that she devised for constitutional interpretation; and her view of the judge as a representative for certain groups. We will argue that she used judicial review as a vehicle for promoting her personal, ideological agenda. In so doing, she became the most political Supreme Court judge in Canadian history. She did not simply transgress the boundaries that restrain the behaviour of judges in a liberal democracy, she denied their existence.

II. The Role of the Court

> *And so judges fear for the survival of passionately held presuppositions of their own and wish to preserve them for the ages in the deathless body of the Constitution.*[33]
>
> Alexander Bickel

A. *The* Charter *and its Effect on the Judicial Role*

1. Justice Wilson's View

Justice Wilson argued that the *Charter* created a new role for the courts.[34] It "dealt a body blow" to the idea of Parliamentary sovereignty[35] and cast "the judiciary in a clearly interventionist role".[36] She explained:

---

[33] Bickel, *supra* note 8 at 98.

[34] See: B. Wilson, "Guaranteed Freedoms in a Free and Democratic Society — A New Role for the Courts?" (Address to the 22nd Australian Legal Convention, Brisbane, Australia, July 1983) in *Speeches, supra* note 22, 99 at 119; B. Wilson, "Guaranteed Freedoms in a Free and Democratic Society — A New Role for the Courts?" (Address to the Carleton University Faculty Club, Ottawa, Canada, 2 February 1984) in *Speeches, ibid.* 155 at 156ff [hereinafter "New Role for the Courts"]; B. Wilson, "The *Charter of Rights and Freedoms*" (Address to the Student Body, University of British Columbia Law School, Vancouver, Canada, September 1984) in *Speeches, ibid.* 187 at 188ff; B. Wilson, Legislative Notes, "The *Charter of Rights and Freedoms*" (Address to the Student Body, College of Law, University of Saskatchewan, 12 November 1984) (1985) 50 Sask. L. Rev. 169 [hereinafter "The *Charter* (U. of S.)"]; B. Wilson, "The *Charter of Rights and Freedoms*" (Address to University of Calgary Law School, Calgary, Canada, March 1985) in *Speeches, supra* note 22, 331 at 332ff; B. Wilson, "Decision-Making in the Supreme Court" (David B. Goodman Memorial Lecture delivered at the University of Toronto, 26 & 27 November 1985) (1986) 36 U.T.L.J. 227 [hereinafter "Decision-Making"]; "Extrinsic Evidence" in *Speeches, supra* note 22 at 641.

[35] "The *Charter* (U. of S.)", *ibid.* at 171. See also "Extrinsic Evidence" in *Speeches*, where Justice Wilson wrote that *Charter* review "strikes at the very root of the doctrine of parliamentary sovereignty ..." (*ibid.* at 642).

[36] "Decision-Making", *supra* note 34 at 238.

> We can no longer rely on the doctrine of the supremacy of Parliament as a reason for staying our hand. We have to examine any impugned legislation to see whether it interferes with the fundamental rights of the citizen and, if it does, strike it down. ...
>
> I think the conclusion is inescapable that the scope of judicial review of legislative and executive acts has been vastly expanded under the Charter and that, indeed, the courts have become mediators between the state and the individual.[37]
>
> ...
>
> I think that the new role under the Charter represents a fundamental reordering of the political balance of power. ... The judicial role under the Charter ... has, in my opinion, effected a major change in the relationship between the three branches of government. It challenges the right of government to enact certain laws at all and makes the courts the watchdogs over the rights of citizen.[38]

Justice Wilson rejected the notion that judicial review of alleged *Charter* violations should follow the model of review created by division of powers jurisprudence. At a 1988 conference in Edinburgh, Scotland, Barry L. Strayer, now a judge of the Federal Court of Canada but Assistant Deputy Minister of Justice at the time the *Charter* was written, suggested that the principle of Parliamentary supremacy had been limited in Canada since pre-Confederation. Even then, the laws of any Canadian legislative body could be invalidated if they were inconsistent with an applicable imperial law or Order-in-Council. Seen thus, the *Charter* was not a radical break but, rather, a development along a "continuum of judicial review".[39] Justice Wilson, who spoke at the same conference, abruptly rejected this idea:

> Is there a significant difference between the Court's role prior to and after the *Charter*? Unlike Justice Strayer, I believe there is. ... Striking down legislation because it was enacted by the wrong level of government was not in any way at variance with the theory of representative government as such; the legislation had simply been enacted by the wrong set of representatives. The [C]ourt's role under the *Charter*, however, seems to me to be different in kind. It *is* at variance with the theory of representative government. It challenges the right of government to enact certain laws at all. This strikes at the very root of the doctrine of parliamentary supremacy.[40]

---

[37] *Ibid.* at 238-39.

[38] *Ibid.* at 240. See also: "*The Charter* (U.of S.)", *supra* note 34 at 170-72; "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 641-42.

[39] Strayer, *supra* note 29 at 348-54. Strayer was instrumental in negotiating the inclusion of the *Charter* in the Constitution. His paper was originally presented at a seminar at the University of Edinburgh, in May, 1988 on "Constitutional Protection of Human Rights — The Canadian Experience Since 1982".

[40] "Making of a Constitution" in *Speeches*, *supra* note 22 at 551-52. Query whether, when looked at from the point of view of the disempowered legislative body, the result of striking down legislation for division of powers reasons as opposed to *Charter* reasons is not the same. Does it follow that the method of judicial review should be different?

Justice Wilson also rejectcd the idea that the role of the Court in applying the *Charter* could be analogized to the role of the Court in applying statute law. She saw the traditional approach to construing statutes as a technical, legalistic exercise.[41] The organizing principle underlying the traditional rules of statutory interpretation — rules aimed at identifying the intention of Parliament — was the doctrine of Parliamentary supremacy. According to Justice Wilson, the introduction of the *Charter* meant that this doctrine was no longer appropriate. Instead, all that mattered was the effect that the challenged legislation had on the guaranteed rights of citizens.[42] She, thus, expressly repudiated the democratic principle in favour of the liberal principle.

Further, Justice Wilson believed the language of the *Charter* — in particular, words like "liberty", "equality", "fundamental justice" and "free and democratic society" — was too imprecise, too open-textured to be approached in the same way as words found in most other statutes. She found the *Charter* remarkable for "its refusal to present a sharply etched picture of the draughtsman's intentions."[43] Instead, *Charter* words were broad and flexible so as to "accommodate and respond to social change".[44] Thus, ordinary statutory interpretation would not do; an approach was needed that would "leave [the courts] room to manoeuvre in the future".[45] To those who worried that the courts' treatment of the broad language of the *Charter* risked transforming the judiciary into a super-legislature adjudicating on the merits of public policy beyond the reach of any parliament, Justice Wilson replied that the critics had simply failed to understand the new judicial role.[46]

---

[41] See "Extrinsic Evidence" in *Speeches, ibid.* at 645.

[42] See *ibid.* at 641.

[43] *Ibid.* at 643.

[44] *Ibid.*

[45] *Ibid.* at 646.

[46] B. Wilson, "Constitutional Law — Section 7" (Lecture given at College of Law, University of Saskatchewan, Saskatoon, Canada, March 1987) in *Speeches, ibid.* 447 at 449. Concern had been expressed about the Court's broad interpretation of the phrase "fundamental justice" in section 7 of the *Charter*. The Court's interpretation expressly disregarded the common understanding of those words, an understanding held by all informed persons at the time the *Charter* was negotiated. That Wilson saw a difference between statutory interpretation and *Charter* interpretation is evident from the following statement:

> The principle of parliamentary sovereignty must clearly act as a curb upon what we might call too creative an approach to the interpretation of ordinary statutes. There is obviously a point at which interpretation becomes legislation and the legitimate function of Parliament is usurped. While this may be acceptable in *Charter* interpretation where the judiciary has been expressly made the custodian of the citizens' rights, it clearly is not acceptable in the case of the interpretation of ordinary statutes where the will of Parliament must prevail ("Extrinsic Evidence" in *Speeches, ibid.* at 653).

Nor did the common-law method provide a useful model for Justice Wilson.[47] The problem was precisely the lack of precedent. Given the novelty of the *Charter*, "[the judiciary's] concern must be with the *creation* of precedent rather than [with] the *application* of it."[48] Where precedent existed, it could be "viewed as an ultimate formulation of pure principle independent of context, or it [could] be seen as merely a useful mechani[sm] for marshalling past experience for present choice."[49] Where the context of the case differed from the one in which the precedent developed, Justice Wilson felt the judge was free to disregard the precedent in favour of a result more attuned to his or her personal view of what was "right and fair".[50]

If the Court's old role was inadequate, what was its new role to be? We believe that for Justice Wilson, the *Charter* was an Order of Mandamus issued by the High Court of Parliament directing the judges of the Supreme Court to write a constitution for the country. It was a kind of "anti-grnndnorm" — a book of blank pages:

> [W]hile the constitutional document is static, the Constitution is dynamic and is progressively shaped as judges apply deeply contestable conceptions of rights to particular, and sometimes peculiar, facts. Thus, the Constitution is always unfinished and is always evolving. Ronald Dworkin likens constitutional interpretation to the writing of a "chain novel" where each successive judge produces a chapter. Each judge is constrained to a degree by what has gone on before but at the same time is obliged to make the novel the best that it can be.[51]

The judge was not to be the guardian of the Constitution but, rather, its author.

Justice Wilson stated this view repeatedly. At the end of her time on the bench, she told a group of lawyers that the Court was "to develop the meaning and content of *Charter* rights and guarantees".[52] She continued:

> Ultimately, judges must make fundamental choices about what the Constitution is or is not to protect. In other words, judges must decide which *values* in our society are so important that we must both protect and promote them under our Constitution.[53]

---

[47] There is a nuance here. As will be discussed below, Justice Wilson was interested in the judge's policy-making function at common law.

[48] "The *Charter* (U. of S.)", *supra* note 34 at 173.

[49] "Decision-Making", *supra* note 34 at 233.

[50] *Ibid.* at 231.

[51] "Making of a Constitution" in *Speeches*, *supra* note 22 at 554. The opposite view was expressed by Justice McIntyre in *Re Public Service Employee* where he said, "[T]he *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time" (*supra* note 26 at 394).

[52] B. Wilson, "Constitutional Advocacy" (Address to The Briars, Toronto, 2 June 1991) (1992) 24 Ottawa L. Rev. 265 at 270.

[53] *Ibid.*

She spoke of the "substantial new power and responsibility"[54] given to the Supreme Court of Canada in the following terms:

> The challenge for the courts then is to develop norms against which the reasonableness of the impairment of a person's rights can be measured in a vast variety of different contexts. ... Could there be a broader mandate for judicial creativity? ...
>
> The Court must, it seems to me, develop some kind of balance between the fundamental freedoms of the citizens on the one hand and the right and obligations of democratically elected governments to govern on the other.[55]

Justice Wilson did not accept the idea that the *Charter* could be interpreted in a principled way independent of the subjective value choices of the judge deciding the case. As her speeches indicate, Justice Wilson felt that judges were to give content to the *Charter* by deciding which values were to be constitutionalized. When she spoke of "values", we believe she meant subjective preferences and not established principles external to judges. Nowhere, for example, do any of our constitutional texts refer to "values". She may have been influenced by a work that she cited on several occasions: John Rawls' *A Theory of Justice*.[56] In our reading of Rawls, when he uses the word "values" he means subjective preferences. He regards choices about values as analogous to the choices that consumers make in the marketplace. In abandoning principles in favour of subjective value choices, Justice Wilson expressly mandated for judges an anti-democratic, constitution-writing role.

There is a temporal element to this. The content of legislation — the purpose for which it is adopted — is fixed at the moment of its adoption. Justice Wilson felt, however, that the content of the *Charter* was in a state of constant change. "The scope of the right," she stated, "must be continually reassessed in light of changing social circumstances and contemporary social theory."[57] Legislatures do not continually rewrite laws. For Justice Wilson, therefore, the judge had to perform that task; the judge had to legislate.

a. *Political Implications*

Justice Wilson did not approach constitutional interpretation with restraint but with relish. In *Operation Dismantle* v. *R.*,[58] she went out of her way to reject the idea that "political questions" were beyond the scope of the judiciary's domain.[59] The political

[54] "The *Charter* (U. of S.)", *supra* note 34 at 172.

[55] *Ibid.* at 171-72. See also "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 646-47.

[56] J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971).

[57] "Making of a Constitution" in *Speeches*, *supra* note 22 at 567.

[58] [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.].

[59] The principal allegation in the plaintiff's Statement of Claim was that the testing of cruise missiles in Canada posed a threat to the lives and security of Canadians. The testing was said to increase the risk of nuclear conflict and, thus, to violate the section 7 "security of the person" guarantee. The government sought to have the Statement of Claim struck out as disclosing no cause of action. The ma-

questions doctrine holds that certain issues, because of their relation to public policy, raise moral and political questions beyond the purview of the courts.[60] Justice Wilson maintained not only that the Court could decide such questions, but that in the *Charter* era it had a duty to do so.[61] No issue was to be outside the scope of judicial review.

---

jority of the Court struck out the Statement of Claim on the basis that the allegations "could never be proven". Justice Wilson rejected this approach, an approach which would have left for another day the issue of whether or not a political-questions doctrine existed in *Charter* litigation. She pointed out that on this kind of motion the facts must be taken as having been proven (*Operation Dismantle, ibid.* at 464). Chief Justice Dickson, writing for the majority, had no problem dismissing Justice Wilson's technical point: "No violence is done to the rule [that facts must be taken as proven] where allegations, incapable of proof, are not taken as proven" (*ibid.* at 455). Of course, this means that Justice Wilson's rejection of the political-questions doctrine in *Operation Dismantle* is *obiter* and will have to be recousidered by the Court.

[60] The concept of non-justiciability is not restricted simply to the idea that our courts are institutionally incapable of dealing with certain issues because of difficulties of evidence and proof (the grounds relied upon by the majority in *Operation Dismantle*). Non-justiciability, in a wider sense, suggests that it is institutionally inappropriate for courts to deal with certain issues of a politieal nature. Lord Radcliffe's observations are helpful on this point:

> The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technieal, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury (*Chandler* v. *Director of Public Prosecutions*, [1962] 3 W.L.R. 694 at 712, 3 All E.R. 142 (H.L.)).

[61] See *Operation Dismantle*, *supra* note 58 at 467. Section 52 of the *Charter* states that the Constitution is the supreme law of Canada, and that any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force and effect. This section authorizes judicial review but does not require it. Moreover, nothing in this section authorizes judicial review where judicial review would require judges to decide questions not properly within their domain under separation of powers theory or that are unsuited to judicial review, because any outcome would simply be an exercise in judicial *ad hoc* decision-making.

The argument which says that judges have a duty, in all cases, not to permit unconstitutional laws or executive acts to stand is superficially attractive. It goes to the merits of the case. However, it is legitimate for the Court to refuse to reach the merits of the case, even in a Constitutional case, where other principles so dictate. The doctrines of ripeness and mootness are examples of this. Justice Wilson accepted this in other contexts. In a 1991 speech she made the following statement:

> If the required material is not in the record, this will be a very important factor in the decision whether or not to grant leave. The necessary evidentiary base is often absent when the *Charter* issue has not been raised at trial but is raised only at the Court of Appeal stage or in some cases only when the matter comes from a grant of leave to the Supreme Court of Canada. Leave in these cases is frequently denied on the ground that the issue is bound to arise again when the Court will have a better record on whieh to proceed ("Constitutional Advocacy", *supra* note 52 at 267).

This is all part of the idea that it is sometimes necessary for the Court to "stay its hand" or "do nothing" in order not to exacerbate the undemocratie nature of judicial review. Alexander Biekel discusses this under the heading, "The Passive Virtues" (*supra* note 8 at c. 4). Justice Wilson clearly felt uneasy with this notion of self-restraint. See also R.H. Bork, *The Tempting of America: The Political*

In our opinion, if judges are empowered by the *Charter* to create constitutional norms, as Justice Wilson argues, the judicial function and the legislative function become indistinguishable. Under such circumstances, it no longer makes sense to say that certain kinds of questions are out of bounds to the judiciary simply because their political nature reserves them for the political authorities. Indeed, Justice Wilson's view of the courts' role under the *Charter* sounds the death knell for the doctrine of separation of powers.

b. Implications for Private Law

In Justice Wilson's view, the *Charter* gave judges power to adjudicate not only on a broad range of political issues but over a broad range of private activities as well. Section 32(1) makes the *Charter* applicable to "the Parliament and government of Canada" and to "the legislature and government of each province".[62] In *McKinney* v. *University of Guelph*[63] and in *Stoffman* v. *Vancouver General Hospital*,[64] a majority of the Supreme Court held that the *Charter* does not apply to private institutions, such as universities or hospitals. Justice LaForest, writing for the majority in *McKinney*, and following the Court's decision on this point in *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*,[65] relied on the clear words of section 32, the deliberate legislative choice to exclude private activity from *Charter* review. He also used the historical development of Human Rights Commissions as the basis for restricting the application of the *Charter* to the actions of the legislative, executive and administrative branches of the state.[66] The majority distinguished between state activity and private activity, between the activities of private individuals or organizations and tasks either assigned to government or engaging governmental responsibility.[67]

By contrast, Justice Wilson, in dissent, rejected the view that "the *Charter* applies only to government in its narrowest sense."[68] She set out three questions to determine what constitutes government action: the control question; the govern-

---

Seduction of the Law (New York: Free Press, 1990).

[62] Section 32(1) of the *Charter* reads as follows:

This Charter applies

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province (*supra* note 12).

[63] [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to S.C.R.].

[64] [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700 [hereinafter *Stoffman* cited to S.C.R.].

[65] [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

[66] See *McKinney*, *supra* note 63 at 261-65.

[67] See *ibid.* at 266.

[68] *Ibid.* at 342.

ment function question; and the government entity question.[69] She then treated the various questions as "practical guidelines" which might, or might not, influence her decision in an individual case.[70] So long as the activity in question qualified under one of these questions, even if it did not qualify under any of the others, the *Charter* would apply. She indicated that her three questions were not "carved in stone" but must evolve as governments "enter or withdraw from different fields."[71] It would always be open to the parties to argue and to a judge to decide that a body was "self-evidently" part of government for the purpose of *Charter* application.[72]

From Justice Wilson's reasons, it is difficult to see what, if anything, might limit the scope of judicial discretion in deciding what could qualify as government action. Too many questions, sometimes asked, sometimes not, add up to a rejection of principled decision-making. Justice Wilson was interpreting the scope of *Charter* application on an *ad hoc* basis. The role of the Court, it seems, was not only to devise *Charter* norms but also to decide to which activities the *Charter* should apply. Judicial will — and not legislative will — would determine both the content and the scope of the *Charter.*

Justice Wilson argued that, to the extent the Court was unsuited to its new role, it would have to change. She noted that public concern about the legitimacy of an expanded judicial role was becoming manifest in greater public interest in the process of judicial appointments.[73] Moreover, she saw the quartet of Supreme Court decisions dealing with standing[74] as a logical culmination of the tacit acceptance of judicial review.[75] Justice Wilson argued that liberalized rules governing intervention before the courts by a broad range of individuals and interest groups that are not actually parties to the dispute would legitimate the courts' new role: "If constitutional decisions have ramifications for a broad range of interests and involve distinct choices between conflicting social policies, then we must devise some way of bringing those interests before the Court."[76] Seemingly, the courts were to become not only a legislative forum, but a forum for public debate as well. She wondered whether the introduction, in 1976, of the process requiring leave to appeal to the Supreme Court was meant to presage an increase in the Court's law-making power: "In dealing with matters of 'public importance' are we to become policy-makers as well as adjudicators?" she asked.[77]

---

[69] See *ibid.* at 359-71.

[70] *Ibid.* at 370-71.

[71] *Ibid.* at 371.

[72] *Ibid.*

[73] "Decision-Making", *supra* note 34 at 239.

[74] See *Thorson* v. *Canada (A.G.)* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Canada (Minister of Justice)* v. *Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97; *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1987] 1 W.W.R. 603; *MacNeil* v. *Nova Scotia (Board of Censors)*, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85.

[75] See *McKinney*, *supra* note 63 at 371.

[76] *Ibid.* at 242.

[77] B. Wilson, "Leave to Appeal to the Supreme Court of Canada" (Address delivered at the Law-

If the Court were to engage in a "new type of adjudication", evidentiary rules would have to be expanded. Justice Wilson called for more legislative facts, facts that would portray the contextual framework, the socio-political and economic environment, in which the litigation was taking place.[78] She noted that the choices judges made were "inevitably influenced by the judiciary's perception of the larger social context in which these factors come into play".[79] Counsel were therefore to "inform themselves thoroughly on the social context in which the issue arises and ... must appreciate it not only intellectually but emotionally as well".[80] She further stated that "[the judiciary is] in the business now of weighing competing values and values have an emotional and spiritual as well as an intellectual content."[81] No mere legislators: these judges were to speak from the Mount.

c. *Certainty versus Flexibility*

Justice Wilson felt comfortable with the new role which she believed the *Charter* created for the judiciary. She believed that the *Charter*, of which she was "an unabashed and enthusiastic supporter",[82] resolved the long standing legal tension felt by judges between the need for certainty and the need for flexibility.[83] She stated that "some judges have a tendency to favour certainty and ... judicial restraint while others are disposed to put their emphasis on the need to bring the law into conformity with current social mores."[84] The choices judges make are influenced by their perceptions of the appropriate role of the judiciary.[85]

---

yers' Club, Toronto, Canada, 6 January 1983) (1983) 4 Advocates' Q. 1 at 7.

[78] See B. Wilson, "Evidence under the *Charter of Rights*" (Lecture to Upper Year Class, College of Law, University of Saskatchewan, Saskatoon, Canada, November 1984) in *Speeches, supra* note 22, 287 at 289 [hereinafter "Evidence under the *Charter*"].

[79] "Extrinsic Evidence" in *Speeches, supra* note 22 at 646.

[80] "Constitutional Advocacy", *supra* note 52 at 273.

[81] *Ibid.*

[82] B. Wilson, "Retirement Ceremony of the Honourable Bertha Wilson, Supreme Court of Canada" (Supreme Court of Canada, 4 December 1990) (1990) 25 L. Soc. Gaz. 6 at 18 [hereinafter "Retirement Ceremony"].

[83] Justice Wilson began many speeches by describing the tension that these two forces created for judges. She cited Lord Gardiner:

> There are two very desirable things about a system of justice; one is that it should be certain, because nothing is worse when people go to a solicitor, and he says, "I cannot tell you what the answer is. It entirely depends which judge we get." On the other hand, it is desirable that the law should be flexible so as to meet changing social and economic conditions, and these two very desirable things are in permanent conflict (cited in "New Role for the Courts" in *Speeches, supra* note 22 at 157).

She also cited H.L.A. Hart to the same effect (see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 127, cited in "Extrinsic Evidence" in *Speeches, supra* note 22 at 642).

[84] "Decision-Making", *supra* note 34 at 231; "The *Charter* (U. of S.)", *supra* note 34 at 169.

[85] See: "Decision-Making", *ibid.*; B. Wilson, "Law and Policy in a Court of Last Resort" in F. McArdle, ed., *The Cambridge Lectures, 1989* (Montreal: Yvon Blais, 1990) 219 at 232 [hereinafter "Court of Last Resort"].

There is no doubt about where Justice Wilson placed herself on the certainty/flexibility spectrum. In 1982, she told the Ottawa Women's Club that as a student at Dalhousie University she had taken to the law "like a duck to water" because of the flexibility she saw in the law: "I was fascinated by the history of the law and how it had developed over the years as social conditions changed and I marvelled at its flexibility."[86] For her, the *Charter* was the culmination of this trend; it invited the judge to write the Constitution according to the judge's view of a caring society's values:

> [The *Charter*] put law into the kind of perspective in which I had always seen it — as large as life itself — not a narrow legalistic discipline in which inflexible rules are applied regardless of the justice of the result, but a set of values that we, as a civilized caring and cultured people, endorse as the right of all our citizens, black or white, male or female, rich or poor, to enjoy.[87]

In December 1985, just after the equality provisions of the *Charter* took effect,[88] Justice Lamer, writing for the majority of the Supreme Court in *Reference Re Section 94(2) of the Motor Vehicle Act*,[89] announced that any lingering doubts as to the legitimacy of judicial review under the *Charter* had been laid to rest. Despite warnings of a judicial "super-legislature", Justice Lamer reminded us not to forget that the historic decision to entrench the *Charter* had been taken by the elected representatives of the people of Canada.[90] The ghost of illegitimacy, however, continued to haunt Justice Wilson's speeches.

She cited tradition as one way of justifying the Court's new *quasi*-legislative role. She pointed out that the common law was a body of judge-made law created by courts weighing competing policy considerations. After the *Morgentaler* case, Robert Fulford observed that courts had accepted some of the power to set priorities for society: "[T]he Charter has turned judges into politicians."[91] Justice Wilson answered by pointing out that policy decisions had always, to a greater or lesser extent, been an essential component of judicial decision-making. She referred with approval to the following statement of former Supreme Court Justice Emmett Hall: "Traditionally the common law grew and became a civilizing force in our society only because it considered social, political and economic facts. Indeed, every rule

---

[86] B. Wilson (Address to Ottawa Women's Canadian Club, Ottawa, Canada, 23 September 1982) in *Speeches*, *supra* note 22, 19 at 25.

[87] B. Wilson, "Law as Large as Life" (Lecture on Legal Education delivered to First Year Students at Queen's University Faculty of Law, Kingston, Canada, 6 September 1990) in *Speeches*, *supra* note 22, 681 at 684-85.

[88] See subsection 32(2) of the *Charter*, which provided that the equality provisions set out in section 15 of the *Charter* would not come into effect until three years after the *Charter* came into force.

[89] [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *B.C. Motor Vehicle Reference* cited to S.C.R.].

[90] See *ibid.* at 497.

[91] R. Fulford, "Probing the Supreme Court" (January/February 1989) *The New Federation* 42 at 43, quoted in "Court of Last Resort", *supra* note 85 at 220.

of law is simply an earlier court's decision about how competing interests and values ought to be reconciled."[92]

The analogy Justice Wilson sought to make is inapt. Constitutional law is legislated law; the common law is judge-made law. The norms contained in the *Charter* are not earlier court decisions to be altered by subsequent cases. They are principles that legislators have established and which define, among other things, the role of judges. As such, they are to be respected, not rewritten, by judges. It is one thing for a judge to alter a judge-made policy; it is quite another to rewrite the legislature's policy.

Even at common law, the elaboration of policy is not rooted in the judge's personal, economic and social beliefs. It is rooted in precedent and in its reasoned elaboration as it evolves interstitially when applied to new fact situations. The former Chief Justice of the Australian High Court, Sir Owen Dixon, in an address delivered at Yale University in September 1955, entitled "Concerning Judicial Method", described this process:

> "It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforseen [*sic*] instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change."[93]

Justice Wilson may have sensed this, for she also looked to natural law theory to justify the new constitutional role she assigned to the Court. She suggested that the courts' *quasi*-legislative activity could be justified on the basis of morality:

> Judges occupy the unusual position in a democracy of being non-elected officials who are given significant decision-making power over the lives and property of their fellow citizens without being subject to removal if their decisions are unpopular. Those judges who advocate judicial restraint have a proper concern over their lack of accountability to the public and tend to think that any significant change in the law should be made by the duly elected representatives of the people. However, while constitutional considerations may favour the exercise of judicial restraint, moral considerations may impel a judge in the opposite direction. All judges would like to think that their decisions, as well as

[92] E. Hall, "Law Reform and the Judiciary's Role" (1972) 10 Osgoode Hall L.J. 399 at 405, quoted in "Court of Last Resort", *ibid.*

[93] Quoted in *Harrison* v. *Carswell*, [1976] 2 S.C.R. 200 at 218-19, 62 D.L.R. (3d) 68, Dickson J.

> constituting a proper application of legal principle, reflect current notions of what is right and fair. The difficulty, however, is to determine what current notions of justice and fairness are.[94]

Subjectivity is, of course, the difficulty. Justice Wilson offered two approaches to this difficulty. According to advocates of judicial activism, judges who employ "concepts of equity and justice" in resolving constitutional problems are not imposing their own personal values but, rather, are resorting to what they perceive to be "the generally accepted values of the community."[95] Noting the risk inherent in this subjective approach, she referred to the work of Professor Abram Chayes, who wrote that judicial review can only be justified "on the basis of the justice of the substantive results reached by the court."[96] These results are justified if "they reflect a general consensus of the people as to what justice requires in a given situation".[97]

This is nonsense, but we welcome its frankness. There is no general consensus on matters such as euthanasia, mandatory retirement, abortion, the language to be used on commercial signs, procedures for processing refugee claimants, and the like. If there were, one would expect it to be reflected in legislation. Indeed, if there were consensus, such issues would not be sufficiently controversial to warrant being heard by the Supreme Court of Canada. To accept that judicial review can be justified on the basis of "good" outcomes concedes to the judge the role of benevolent dictator. It begs the fundamental question whether the Constitution grants judges such a role, benevolent or otherwise.

Justice Wilson believed the other safeguard against subjectivity lay in the Court's role under the Charter as protector of disadvantaged individuals and groups. In Morgentaler, she wrote that "the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."[98] She spoke earlier of a "huge, impersonal bureaucracy which threatens us with new forms of injustice and hardship."[99] Destiny

---

[94] "Decision-Making", *supra* note 34 at 231.

[95] *Ibid.* Madame Justice McLachlin later suggested that an objective, responsible approach to *Charter* litigation could be achieved by judges examining the purposes of the *Charter* guarantee in question and by "seeking the dominant views being expressed in society at large on the question in issue" (B.M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540 at 547). Normally, one thinks that this is a function of the legislature.

[96] "Decision-Making", *ibid.* at 240, referring to A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1316.

[97] "Decision-Making", *ibid.* at 240-41.

[98] *Morgentaler*, *supra* note 27 at 164.

[99] B. Wilson, "Respecting the Law and our Democratic Institutions" (Fifth R.W.B. Jackson Lecture at The Ontario Institute for Studies in Education, Toronto, Canada, 15 April 1985) in *Speeches*, *supra* note 22, 357 at 361 [hereinafter "Law and Democratic Institutions"]. See also her discussion of "The Historical Development of the Canadian State" in *McKinney*, *supra* note 63 at 344-52. There is some inconsistency here. In "Law and Democratic Institutions", government was the enemy; in her *McKinney* remarks, the growth of the government was praised for the services that it provided to the population.

cast the Court in the role of the white knight:

> The infusion into the system in April 1982 of the *Canadian Charter of Rights and Freedoms* was not in my opinion coincidental. It was, in a sense, preordained. The stresses created by the absence of adequate mechanisms to check the monolithic power of the state had put the democratic process into serious imbalance and the individual was left with a sense of powerlessness and frustration. The public has high expectations that the *Charter* interpreted and administered by an independent judiciary will provide a bulwark against big government, and the abuse of power which frequently goes with it, and be an effective instrument to restore that balance.[100]

The text of the *Charter* does not erect a metaphorical fence around individuals. This statement suggests that Justice Wilson saw in the *Charter* a general guarantee of individual autonomy as against the state. If this is indeed what the *Charter* was intended to do, why does its text, in fact, set out six sets of quite specific guarantees that, taken in the aggregate, do not even approximate the open-ended affirmation of individual freedom of action posited by Justice Wilson?

d. *Equality Rights*

Justice Wilson's concern with the effect of "big government" led her to argue that the courts must be particularly vigilant in protecting the rights of those most likely to be iguored when laws are made: the poor; the oppressed; the powerless; racial minorities; accused criminals; and others shut out of the political process.[101] In the Jackson lecture, she cited Professor Russell who stated that the *Charter* "gives minority groups a kind of leverage on policy-making that they could not obtain through the legislative process".[102] She interpreted Professor Russell as saying that the courts, through the *Charter*, were being called upon to defend individuals and minority groups against the greater political power of the majority.[103]

In *R.* v. *Turpin*,[104] Justice Wilson held that the guarantee of equal treatment under the law set out in section 15 of the *Charter* only extends to those who have suffered social, political or legal disadvantage as a result of stereotyping, historical disadvantage or vulnerability to political or social prejudice. In a speech in 1993, she argued that in *Andrews* v. *Law Society of British Columbia*,[105] *Turpin*'s predecessor, the Court rejected a neutral, abstract concept of inequality and focused instead

---

[100] "Law and Democratic Institutions" in *Speeches*, *ibid.* This view of government may help explain why Justice Wilson, in *McKinney* and in *Stoffman*, discussed earlier at text accompanying notes 63-65, wished to give section 32 of the *Charter* the broadest possible interpretation.

[101] "Making of a Constitution" in *Speeches*, *ibid.* at 564.

[102] "Law and Democratic Institutions" in *Speeches*, *ibid.* at 361.

[103] *Ibid.* Although Professor Russell gave the *Charter* this interpretation, it was a judicial role with which he was uneasy because of its anti-democratic implications.

[104] [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.].

[105] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

on the historical reality of disadvantaged groups in our society.[106] In other words, a person who is under no current or historical disadvantage could have no claim to equality rights, no matter how arbitrarily a particular law treated him or her. This reading of section 15(1) appears to lack a textual or legal basis.[107] Rather, it is based on Justice Wilson's view that the meaning of the Constitution is to be determined in accordance with what the judge feels is morally right. The outcome in any case would thus depend on whether, in the judge's opinion, the individual or minority group was being subjected to oppressive majoritarian laws.[108]

Justice Wilson's approach to section 15 is unprincipled in two respects. First, it is a blatant rejection of the democratic principle. Section 15(1) begins with remarkably clear words: "Every individual is equal". Justice Wilson's interpretation

---

[106] See B. Wilson, Address to National Association of Women and the Law conference (Vancouver, Canada, April 1993), quoted in "*Dolphin Delivery* doesn't preclude use of Charter in private litigation: Wilson" *The Lawyers' Weekly* (12 March 1993) 9 [hereinafter "Charter in Private Litigation"].

[107] See R.E. Hawkins, "Interpretivism and Sections 7 & 15 of the *Canadian Charter of Rights and Freedoms*" (1990) 22 Ottawa L. Rev. 275 [hereinafter "Interpretivism"].

[108] One theory of judicial review identifies disadvantaged groups in terms of their lack of access to the political process. The idea that judicial review can be legitimized by focusing on procedure rather than substance (see *United States* v. *Carolene Products Co.*, 304 U.S. 144 at note 4, p. 152, 58 S. Ct. 771 (1938)), has been transported, through the writing of J.H. Ely (see *supra* note 9) to Canada by, among others, Professor Monahan. These scholars suggest that the Court will do considerably less offence to our democratic principles by ensuring that the democratic process is truly democratic than it will by striking down the substantive laws passed by legislatures. Hence, particular minority groups are favoured because they have not had the same democratic input as other groups and in order to ensure that this situation will be corrected in the future.

Professor Hogg offers two criticisms of this "process-based" theory: "First, many of the broader Charter guarantees are inescapably substantive ... Secondly, the legal rights guarantees, although procedural in form, are ultimately directed to the substantive goal of respect for individual liberty, dignity and privacy" (Hogg, *supra* note 22 at 816).

Professor Bork is also critical:

> The minority [Ely] would have the Courts protect is one that "keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable." ... Ely's theory, which purports to take judges out of the business of making policy decisions, in fact plunges them into such decisions by requiring that they distinguish between cases in which groups lost in the legislative process for good reason (burglars) and those in which they lost for discreditable reasons (aliens, the poor, homosexuals, etc.) I fear that this is another point at which his system collapses. The results it produces turn out to be just another list of results on the liberal agenda which the Court must enact because legislatures won't (Bork, *supra* note 61 at 198-99).

Justice Wilson, in favouring certain groups, does not appear to do so because they had been disadvantaged in the legislative process, although some may have been. Rather, she views these groups as disadvantaged because of the prejudice they have suffered historically or are currently suffering. In her view, that is reason enough for the Court to protect them, regardless of the influence they may or may not have had in the political process. For example, she felt women were a disadvantaged group, but they are not without political influence: witness the amendments they obtained to the *Charter* during its passage (see P. Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983)).

is an unabashed judicial rewriting of the section. Even her supporters have conceded this point.[109] Second, Wilson's interpretation is also a rejection of the liberal principle. The principle of equality before the law — that is, that every citizen has, and must have, the same legal rights as every other citizen — is the fundamental liberal notion. According to Justice Wilson's interpretation of section 15, a law that infringed upon the civil and political rights of white males would not be regarded as violating the *Charter*'s equality guarantee. In these decisions, Justice Wilson demonstrated her disregard for the basic principles of liberal-democratic constitutionalism.

A theory that justifies judicial review on the ground that the courts are morally obligated to protect disadvantaged groups, with only the whim of the judge to define the nature of the disadvantage in question, is entirely subjective. Any democratic theory of law-making assigns to elected law-makers the authority to decide which groups in society are to receive benefits or to shoulder burdens. That is the essence of law-making. These decisions are assigned to representatives who are accountable at election time precisely because such decisions are by their nature subjective. Because of the subjective character of these choices, it is illegitimate for judges to make them under the guise of judicial review.

Justice Wilson never found a satisfactory way around the problem of subjectivity in her effort to use socio-political factors to legitimate judicial constitutional law-making. So long as she was a prisoner of her own subjective value system, and so long as she sought to advance that value system through judicial review, she lacked an external standard by which to justify her actions. The protection of certain preferred, discrete minorities may have, in her opinion, provided a moral justification for her decisions, but it was one that was neither objective, constitutional nor democratic. For some other judge, protection of *laissez-faire* capitalism might provide a moral justification for judicial review, but the same critical observations would apply.[110]

Ultimately, Justice Wilson sought an interpretivist justification for the new role that she ascribed to the Court. She looked to the text and historical origins of the *Charter*. At her retirement ceremony on December 4, 1990, she again raised the legitimacy issue by offering the following observation:

> It was the high court of Parliament itself which gave us our *Charter*. It was Parliament itself which made this national political choice, and it was Parliament itself which charged the judiciary with the solemn and awesome task of

[109] See *e.g.* Gibson, *supra* note 14 at 266.

[110] In a conferenee held at Osgoode Hall Law School in 1976, Mr. Justice Dickson cautioned those who would argue for a more activist judiciary: "Those who are the strongest in promoting or advocating that the courts be activists in one direction would perhaps be among the first to be critical if the same power that they would accord the court was manifested in the opposite direction" (R.G.B. Dickson, Comment on W.R. Lederman's *The Independence of the Judiciary* in A.M. Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 80 at 81).

> determining the constitutionality of the laws it passes. Judicial review is not designed to inhibit responsible government, but to facilitate it, by making sure that the objectives of government are achieved in a constitutionally permissible way.[111]

It was the intent of the Constitution's authors, therefore, that the courts should write the *Charter*. This national political choice meant there was no conflict between the roles of the courts and of Parliament.[112] Parliament had "reposed substantial new power and responsibility in the courts and particularly in the Supreme Court of Canada".[113]

e. *Section 1 and the Override*

Justice Wilson's reading of section 1 confirmed for her the theory that the *Charter* gave the court a new role. That section requires the courts to balance competing values against each other in order to determine, "which is the more important value in a democracy such as ours."[114] In her view, the section obliges the courts to "help to make our society more caring, more tolerant and more civilized".[115]

As will be discussed in detail below, the original purpose of section 1 was to limit the courts' ability to strike down democratically enacted legislation. Legislation, even if it infringes a *Charter* guarantee, is allowed to stand if the government can show that it is demonstrably justifiable in a free and democratic society. For Justice Wilson, however, section 1 is not meant as a means of saving legislation designed to forward important government objectives.[116] Rather, the section is to be read in a way that would prevent the *Charter* from being "emasculated".[117] that is to say, in a way that gives the widest possible scope to judicial review.

---

[111] "Retirement Ceremony", *supra* note 82 at 18. See also B. Wilson, "Human Rights and the Courts" (Paper delivered at the Seminar on the Functioning of Government: The Canadian Experience, Ottawa, Canada, 30 May 1991) in *Speeches*, *supra* note 22, 741 at 743 [hereinafter "Human Rights and the Courts"].

[112] See "Human Rights and the Courts" in *Speeches*, *ibid.* These words echoed Justice Lamer in *B.C. Motor Vehicle Reference* (see text accompanying notes 89ff, above).

[113] "The *Charter* (U. of S.)", *supra* note 34 at 172.

[114] "Human Rights and the Courts" in *Speeches*, *supra* note 22 at 746.

[115] *Ibid.* at 748.

[116] This is the usual use for section 1 (see *e.g.* *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 138-40, 26 D.L.R. (4th) 200).

[117] "Human Rights and the Courts" in *Speeches*, *supra* note 22 at 747. A similar approach to section 1, which would read the saving provision narrowly, is reflected in the following statements of Justice Wilson:

> Certainly the gnarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so ... The constitutional entrenchment of the principles of fundamental justice in s. 7 ... implicitly recognize[s] that a balance of administrative convenience does not override the need to adhere to these principles (*Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218-19, (*sub nom. Re Singh and Minister of Employment and Immigration*) 17 D.L.R. (4th) 422).

It is not the job of a judge in a democracy to "make" society anything. In constitutional litigation, judges must only ensure that the other organs of the state have acted in accordance with the constitution.

Section 33 of the *Charter* contains an override provision which permits a legislature to preclude the application of the *Charter* sections that guarantee civil rights to certain acts. This provision justified, in Justice Wilson's view, an aggressive legislative role for the courts. If legislators felt that the courts were wrong in declaring a law unconstitutional, or simply wanted to proceed despite the law's unconstitutionality, they could simply pass the legislation again, this time invoking the *Charter* override. Referring to section 33, Justice Wilson stated:

> I don't think that judicial review and deference to the legislature are concepts that sit very well together and I believe that the government must have appreciated this. I think this is why it took out some insurance. It preserved to itself the last word on any issue coming before the Court by including in the *Charter* the so-called opting out provision, s. 33 ...[118]

If Justice Wilson's interpretation of the *Charter*'s text and its history were accurate, she would have succeeded in grounding her vision of the Court as a superlegislature in a set of external and democratic principles. However, her reading was incorrect.

2. The Legislator's View

As will be shown, the legislators who entrenched the *Charter* in the Constitution had no intention of abandoning the doctrine of parliamentary supremacy in favour of a doctrine of aggressive judicial review. They never intended to pass the legislative torch. Instead, the *Charter* was a typically Canadian compromise, a deal struck after a very politicized negotiation in which it was decided that rights would be protected by the Constitution but in such a way as to respect, to the greatest degree possible, the supremacy of Parliament. There was to be judicial review, but a fair reading of the historical record shows that it was intended to be careful and restrained judicial review.

The negotiation over the *Charter* is familiar to those who lived through it. This includes, of course, every Justice on the Supreme Court during Justice Wilson's tenure. Premier Lyon of Manitoba had been fighting Prime Minister Trudeau's desire for an entrenched *Charter* since they were both Attorneys-General in the late

---

Justice Wilson again expressed these sentiments in a 1988 speech:

> The courts must careful [*sic*] scrutinize this legislation to ensure that it does not sacrifice the rights of the few simply to enhance the welfare of the many. For if the courts allowed rights to be overridden for merely utilitarian reasons the protection afforded to the individual would be illusory indeed ("Making of a Constitution" in *Speeches, supra* note 22 at 563-64).

[118] "Human Rights and the Courts" in *Speeches, ibid.* at 745.

1960s."[119] At the Federal-Provincial Conference of First Ministers on the Constitution, held in September 1980, Premier Lyon rejected the suggestion of entrenching a charter of rights. He argued for the principle of parliamentary sovereignty.[120] Premiers MacLean, of Prince Edward Island, and Blakeney, of Saskatchewan, both supported the Lyon position before the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada.[121]

---

[119] See R. Sheppard & M. Valpy, *The National Deal: The Fight For a Canadian Constitution* (Toronto: Fleet, 1982) at 183.

[120] The nature of Premier Lyon's opposition is made clear in the following extracts from his statement to the conference:

> Prime Minister, while Manitoba actively supports the protection of human rights it opposes the entrenchment of a charter of rights on principle. ... We and other provinces in short find entrenchment to be totally contrary to our traditional and our successful parliamentary government and thereby not in the best interests of Canadians.
>
> ...
>
> Apart from the absence of historical justification for this proposal, we oppose the concept on the basis of the following principles:
>
> (1) An entrenched charter of rights would remove the supremacy of Parliament and of legislatures which, because it leaves the determination and protection of rights in the hands of elected and accountable representatives of the people, is the corner stone of our Parliamentary system of government;
>
> (2) Parliament and the legislatures are better equipped to resolve social issues than are judges who are not accountable to the people;
>
> (3) An entrenched charter would involve the courts in political matters ...
>
> ...
>
> Throughout our history, Mr. Prime Minister, our rights have been protected by those people whom we elect, that the people elect to represent them. I can see no reason to transfer that function and responsibility to appointees who, however capable in their own areas, are not involved with the consequences, that recognition of rights has on economic resources, on social activities, nor with the need for pragmatic compromises (Federal-Provincial Conference of First Ministers on the Constitution (Ottawa, 8-13 September 1980) vol. 1 at 476-81 [hereinafter First Ministers' Conference]).

[121] See *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (Ottawa: Queen's Printer, 1980-81) at 30:38 (Blakeney), 14:81 (MacLean) [hereinafter *Minutes of Proceedings and Evidence*]. On November 27, 1980, Premier MacLean quoted his own statement, originally delivered at the First Ministers' Conference of September 8-13, 1980:

> In no sense is Prince Edward Island's position one of opposition to fundamental rights, but, rather, how these time-honoured rights are best protected and developed. Our unease on this matter is based on our fear that an entrenched Charter of Rights would weaken our parliamentary democracy. Our position is one of principle. Our parliamentary institutions over centuries have not just defined and nurtured our rights, but in many instances Parliament, expressing the will of the people, has devised our rights. Transferring the definition of our basic social values from our legislatures to the Supreme Court would weaken, I believe, our parliamentary traditions and weaken the very rights which now concern us (*Minutes of Proceedings and Evidence*, *ibid.* at 14:81).

The "gang of eight" premiers opposed to the federal government's plan to "patriate" the Constitution with a new amending formula and the *Charter*, presented their counter-proposal in April 1981.[122] Their counter proposal called for patriation with a different formula for constitutional amendment and without the *Charter*. At the final constitutional conference in November 1981, Premier Blakeney repeated his opposition to an entrenched charter of rights and defended parliamentary supremacy.[123] He was supported by Premier Lougheed.[124] The way was paved for constitutional amendment only when the federal government agreed to accept the premiers' amending formula and the premiers agreed to accept entrenchment of a charter of rights but a weakened rights guarantee containing an override clause. It was generally accepted that a deal had been struck in which all parties got part, but not all, of what they wanted.[125]

Although a general limitation clause, one that would make it clear that rights were not absolute, had been discussed for some time, it first appeared as section 1, in more or less its current form, in a Federal Draft of August 22, 1980.[126] The draft

---

[122] At this stage, only the Premiers of Ontario and New Brunswick supported the Trudeau government's proposed constitutional changes. The other eight premiers, who opposed the package, were popularly referred to as the "gang of eight".

[123] Premier Blakeney stated:

> I am tempted to take issue with those who advocate an entrenched Charter of Rights. The argument that to take power from the voters and their elected representatives and to give that power all but irrevocably to appointed judges, the argument that that somehow enlarges rights and freedoms has always been a difficult argument for me and I am unconvinced by it. ... I continue to believe that in a democratic society [issues that deal with the basic structure of our society] ought to be decided by the political process and not by the judicial process (Federal-Provincial Conference of First Ministers on the Constitution (Ottawa, 2-5 November 1981) at 59-60).

[124] See *ibid.* at 128.

[125] The newspaper accounts in the several days following the agreement are instructive. *The Ottawa Citizen* carried the following comment: "When future chroniclers of Canada's constitution examine the events of this week, they will likely conclude that the first ministers haggled like merchants in a bazaar until they made a deal that nobody could claim was a victory" ("History in the bazaar" *The Ottawa Citizen* (6 November 1981) 8). Lise Bissonnette, writing in *Le Devoir* observed:

> Que les marchands de tapis et les négociateurs professionnels me pardonnent, cela tient à la fois du souk et des grandes "rondes" du secteur public et parapublic, sauf qu'il ne s'agit ni de tapis ni de salaires, mais des droits des citoyens. La manière, seule et unique, est le marchandage. La tactique va du bluff à la tromperie, en passant par la menace. L'attitude mentale, générale, est le cynisme (L. Bissonnette, "Quatre jours de troc" *Le Devoir* (7 novembre 1981) 18).

See also: Sheppard & Valpy, *supra* note 119 at c. 13; R.E. Hawkins, *L'enchassement de la Charte canadienne des droits et libertés dans la Constitution canadienne* (D.E.A. Thesis, Université de Paris 1, 1988).

[126] See Meeting of the Continuing Committee of Ministers on the Constitution, *The Canadian Charter of Rights and Freedoms, Federal Draft, August 22, 1980* (Ottawa, 26-29 August 1980), cited in A. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2

was produced by a sub-committee of officials which was an off-shoot of the Continuing Committee of Ministers on the Constitution. The sub-committee, which included representatives of the federal and all the provincial governments, was chaired by Deputy Minister of Justice Roger Tassé and was formed to examine *Charter* issues referred to it by the Ministers. In a July 24, 1980 report, the sub-committee stated:

> 10.a. *Limitation clauses*: On several occasions during discussion of the foregoing rights, concerns were expressed about the scope and meaning of the limitation clauses found in various sections. As one possible means of overcoming this problem federal representatives suggested that consideration be given to an opening clause in the Charter that would indicate that none of the rights and freedoms were absolutes but must be balanced against the interests of an organized free and democratic society operating under the rule of law. This could eliminate the need for any specific limitation clauses. This proposal was not favourably received by most provinces that responded to it.[127]

Barry L. Strayer, Assistant Deputy Minister of Justice at the time of the negotiations, has described the bargaining over section 1 as follows:

> For those of us who were representing the Government of Canada in these negotiations, acting as advocates for the Charter, we sought structure and terminology which would make the Charter effective while making it as acceptable as possible to the legislative supremacists. ...
>
> The political considerations which dictated a certain narrowing of the terms of the Charter, in order to achieve an acceptable balance between individual rights and majoritarian democracy, also found explicit expression in Sections 1 and 33.
>
> Section 1 ... also expressly recognises that such rights are not absolute. It preserves the possibility of eertain limits being placed on those rights, as long as legislatures take the responsibility for prescribing such limitations, and as long as such limits are "reasonable" and "demonstrably justified in a free and democratic society." It was thought that this would at least avoid some of the problems experienced under the United States Constitution by expressly recognising that individual rights must yield to reasonable limitations imposed in the protection of valid collective interests or in the protection of the rights of others. Thus an important measure of legislative freedom to qualify individual rights is preserved, although the onus is on those relying on such qualifications to justify them before a court if necessary. The "free and democratic society" test did leave much margin for judicial creativity in adjudging permissible limitations on those rights, but here it would be for the legislature to postulate a given limitation on a guaranteed right and for the courts to react to that limitation. Courts were not given a roving mandate — a kind of "search and destroy" mission — to ensure that all our laws are suitable for a free and democratic country.[128]

(Toronto: McGraw-Hill, 1989) at 669.

[127] See Meeting of the Continuing Committee of Ministers on the Constitution, *Report by the Sub-Committee of Officials on a Charter of Rights, July 24, 1980* (Vancouver, 22-24 July 1980), cited in Bayefsky, *ibid.*, vol. 2 at 661.

[128] Strayer, *supra* note 29 at 351-53. Strayer further points out that the political consensus reached in

The legislative history of the section 33 override provision is similar to that of section 1. The override was not included to enable judges to legislate at will. Quite the contrary. It was included because it was feared, largely on the basis of the American experience, that judges might *attempt* to strike down legislation at will. The hope was that they would not; the fear was that they might. Contrary to Justice Wilson's interpretation, the inclusion of section 33 provides no justification for letting judges embark on a "search and destroy" mission with respect to legislation

---

favour of the *Charter*

> was premised on positivism — that the language of the Charter so painfully arrived at by elected representatives was to define the rights being guaranteed by it. There was no invitation to Courts to look instead to natural law (by whatever label they might call it) to prescribe the rights which, to the judicial mind, *should* be protected (Strayer, *ibid.* at 352).

This makes sense: if the *Charter* was to be an open invitation to judges to do what they wanted, why would there have been such extensive negotiation over its content? This contradicts Professors Hogg's view of the process. He has written:

> With respect to the Constitution Act, 1867, it is quite likely that the "interpretative intention" of the framers was something like the doctrine of progressive interpretation. They knew that their handiwork would have to adapt to changes in society, and yet they did not seem to contemplate amendment as a frequent method of adaptation, because they made no provision for amendment of the constitutional text, and amendment was in fact only possible by the agency of the imperial Parliament of Great Britain. With respect to the Constitution Act, 1982, the proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada indicate rather clearly that the civil servants who drafted the text and the ministers and members of Parliament who adopted it assumed that the courts would not be bound by the views of the framers, and would interpret the text in ways that could not be predicted with eertainty (Hogg, *supra* note 22 at 1290 [footnotes omitted], citing P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 78-82).

Justice Strayer's recollection can be confirmed by reviewing the transcript of the Special Committee. On November 12, 1980, Justice Minister Chrétien responded to a question from Senator Austin as follows:

> Senator Austin: I appreciate that, but it seems to me that the draft of paragraph 1, as you have it, section 1 as you have it really could send the Courts off on, at the request of counsel, on quite a wide ranging and, up until now, quite unusual search into other parliamentary jurisdictions for precedence.
>
> Justice Minister Chrétien: If I can make a comment on that, I do think that when we discussed during the summer with the provinces this general clause number one, that it was at the insistenee of the provinces that we made that qualification there, so that it will not be too strict a proposition of the guarantee of rights and freedoms, that we will restrict too much the activities of, traditional activities of the different levels of government.
>
> It is a very complex problem, and at the insistence of the provinces we put that, I do not know how to describe it, but, not a caveat, but this kind of limitation clause so that it will not limit too extensively the power of the provincial legislature, and of course the National parliament, to legislate what is considered legitimate in a free and democratic society (*Minutes of Proceedings and Evidence, supra* note 121 at 3:78).

they do not like. Rather, it was a corrective device to be used if judges did precisely that which they were not supposed to do.

Justice Wilson's effort to legitimate the courts' role as author of the Constitution was a failure. The common law did not provide her with an appropriate model of interpretation; natural law did not resolve the problem of subjectivity; and her positivist reading of the *Charter*'s text and its history was wrong. Sensing this failure, she finally settled on a fatalistic justification: "[The courts'] role is, of necessity, an anti-majoritarian one."[129] "I must confess," she added, "that to me judicial review and deference to the legislature are an incompatible pair and I fear that our attempt to combine them has simply resulted in a muddying of the jurisprudential waters!"[130] In order to purify those waters, she chose judicial activism and turned her attention to developing a new interpretive method, one which would enable the Court to carry out its own rewriting of the Constitution.

III. The Contextual Approach

> *Interpretivism does seem to retain the substantial virtue of fitting better our ordinary notion of how law works; if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time.*[131]
>
> J.H. Ely

A. *Textual and Purposive Interpretation*

When interpreting any law, a judge is not engaged in an exercise of free will but, rather, in a search to discover what the legislature intended in passing the law. The judge is not concerned with a hidden or subjective intention. Such a search would be futile and irrelevant. Instead, the search commences by examining the ordinary meaning or common understanding that the words conveyed when the law was adopted. If the ordinary meaning of the words is clear, the judge is bound by that meaning. Judges, however, are often faced with textual ambiguity. In order to clarify that ambiguity, the judge moves on to a second stage of interpretation and looks beyond the text. For example, he or she can resort to the "mischief rule" of interpretation, and ask what "good" were the legislators trying to achieve; what "evil" were they trying to remedy? To answer these questions, the judge can consider the social context in which the legislation was passed, as well as the social context in which that legislation is proposed to apply. Context is considered in order to find an interpretation that will forward the purpose intended by the legislators.[132]

---

[129] "Making of a Constitution" in *Speeches*, *supra* note 22 at 563.

[130] "Constitutional Advocacy", *supra* note 52 at 270.

[131] *Supra* note 9 at 12.

[132] This interpretive method applies equally to both constitutional and statute law. In *Big M*, Chief

This approach to interpretation does not necessitate accepting the notion that the words used in a constitution have an inherently fixed and immutable meaning. Reasonable people may disagree over the ordinary meaning that the words conveyed at the time of their adoption, over legislative purposes and over the significance of contextual facts. Nonetheless, certain patterns — a range of meanings — will emerge from many cases decided by many judges acting in good faith over time. This range of meanings contains limits which restrain possible interpretations. It is a range of meanings bounded by the search for the legislative will as opposed to one that is an unbridled and naked exercise of judicial power.

Justice Wilson questioned this interpretive method. She dismissed its "textual" or "abstract" approach, that is, the effort to give *Charter* rights a principled definition based on the intentions of the Constitution's authors[133] and to find the ordinary meaning or common understanding that the words in the *Charter* carried at the time of their adoption. Instead, she adopted the "contextual" approach.[134]

B. The Contextual Approach

In her later speeches, often under the heading "The Making of a Constitution", Justice Wilson sought to develop a new method of constitutional interpretation.[135] She called her method the contextual approach. In speeches referring to *Edmonton Journal* v. *Alberta (A.G.)*,[136] she explained the method as follows:

Justice Dickson set out the way in which rights were to be given a principled definition. He focused on the *Charter*'s text (the plain meaning rule), the structure of the *Charter* (the scheme of the Act), the purpose for which the right was protected (the mischief rule) and the historical background of the *Charter* clauses in question:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts (*Big M*, *supra* note 24 at 344).

[133] See "Decision-Making", *supra* note 34 at 245-47.

[134] *Ibid.* at 247.

[135] The cat is already out of the bag. One might have thought that the legislators had made the Constitution, but as the speech title suggests, Justice Wilson had concluded that this task was up to the judges. Her speeches tell how they are to do this.

[136] [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to S.C.R.].

> I distinguished what I referred to as an abstract interpretative approach from a contextual approach. Under the abstract approach, the underlying value sought to be protected by a given section of the Charter is determined at large. Under the contextual approach inquiries into the nature of a right are rooted firmly in the context of the case. I pointed out that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smokestacks. It was entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. I concluded therefore that the importance of the right or freedom had to be assessed in context rather than in the abstract and that its purpose had to be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of the Court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.[137]

In *Edmonton Journal*, itself, Justice Wilson wrote:

> One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute.[138]

The contextual approach used by Justice Wilson had three characteristics. First, the meaning of *Charter* words varied depending upon the social context in which they were being asserted and upon the personal characteristics of the parties who were asserting them. She was prepared to give those words whatever meaning was required in the factual context before her to promote the social objectives to which she was personally committed. Words like "liberty", "equality" or "freedom of expression" were not defined by a constitutional principle, which referred to the purpose that the Constitution's authors sought when those rights were enshrined. Rather, the definition of such words could vary from one context to another, potentially accommodating a judge's preference or certain ideological positions or certain classes of persons.

As discussed above, the "mischief rule" of statutory interpretation also takes context into account. It treats context, however, in a manner different from the nominalistic treatment accorded to it by Justice Wilson. In the former sense, context restrains judicial review by helping the judge to determine the objectives sought by the constitution's authors. In the Wilsonian sense, context frees the judge to further his or her personal political agenda by making the meaning of words infinitely flexible.[139]

---

[137] "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 650. See also "Making of a Constitution" in *Speeches*, *ibid.* at 567.

[138] *Edmonton Journal*, *supra* note 136 at 1355.

[139] Justice Wilson used context in the same manner as it is typically used in feminist literature. One feminist author has written:

The variable meaning that this contextual approach gives to words results in decisions of little precedential value. Freedom of association might mean one thing when dealing with a union and quite another when dealing with a golf club;[140] "security of the person" might mean one thing in an environmental context and another in the context of the prison system; "equality" is guaranteed to people facing mandatory retirement but not to accused murderers seeking trial by judge alone in Alberta.[141] One is tempted to ask why; but that question can only be answered by reference to a principled definition — exactly what the contextual approach eschews. The answer that the contextual approach gives is: "Because the judge thinks so" or "Because the judge wishes to promote certain ideological positions or favour certain classes of litigants." We argue that such an approach robs jurisprudence of its consistency and jeopardizes the basic liberal principle of equality before the law.

The second characteristic of the contextual approach is the importance that it places on the effect of the impugned legislation. Contextualism shifts the focus of interpretation from an inquiry into the underlying purpose of the legislation at issue to an inquiry into the effect of the legislation that is the subject of *Charter* challenge. Justice Wilson wrote:

> I argue that it is in women's interest to refuse to subscribe to, or commit themselves to, any single meaning of equality. Feminist advocates need to learn to use the equality discourse on behalf of women in as many and in as diverse situations as the term can bear. The needs and experiences of women will dictate the meaning of equality in each particular context. It is these needs and experiences which should be brought into the open and promoted, not some reified idea of equality (D. Majury, "Strategizing in Equality" (1987) 3 Wis. Women's L.J. 169 at 186).

Contrast this with Justice LaForest's description of how context is normally used in statutory interpretation to facilitate the discovery and advancement of legislative purpose. In holding that the words "family status" in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, were not intended to encompass same-sex couples, Justice LaForest stated:

> In human terms, it is certainly arguable that bereavement leave should he granted to homosexual couples in a long-term relationship in the same way as it applies to heterosexual couples, but that is an issue for Parliament to address. It is not argued here that anything in the context supports the contention that this was the legislative purpose ... But this brings us back to the question whether the addition of the words "family status" had as one of its legislative purposes the protection of persons living in the position of the appellant ... Nor is there any evidence in the surrounding context that this was the mischief Parliament intended to address, which could afford some credence to the argument that Parliament was using the words "family status" other than in their ordinary sense ...
>
> In sum, neither ordinary meaning, context, or purpose indicates a legislative intention to include same sex couples within "family status" (*Canada (A.-G.)* v. *Mossop*, [1993] 1 S.C.R. 554 at 586-87, 100 D.L.R. (4th) 658).

[140] See *Re Public Service Employee*, *supra* note 26. See text accompanying notes 152ff, below, for a discussion of this case.

[141] See *Turpin*, *supra* note 104.

> When the courts are reviewing legislation under the *Charter* they are primarily concerned with the *effect* of the legislation. The first question they must answer is: does it violate the fundamental rights of the citizen? At this stage the *purpose* or *intent* of the legislation plays a secondary role. ... [T]he relevance of legislative purpose or intent arises at the second stage of the inquiry, namely under s. 1 of the *Charter*, when a rights violation has already been found to have occurred and the government is seeking to justify the violation on the basis of some overriding social objective which the legislation was designed to achieve. This, in my view, is a crucial distinction for the interpretive function because an effects approach focuses attention on the context of the dispute before the Court rather than on an analysis of the text of the *Charter*. It requires the Court to determine the content of *Charter* rights such as freedom of expression, equality, fundamental justice, etc, in the context of real life situations and on the basis of empirical data rather than on an illusive presumed or fictional legislative intent.[142]

Without the restraining effect of a constitutional principle that defines the *Charter* right at issue — a principle derived from the intention of the Constitution's authors — any judicial appraisal of the effects of a piece of legislation is nothing other than an exercise in second-guessing legislative value choices. As such, it is inherently undemocratic.

The third characteristic of the contextual approach involves the way the *Charter* was meant to be applied in determining the constitutionality of legislation. Because of the structure of the *Charter*, and in particular because of the effect of section 1, *Charter* adjudication is a two-stage process.[143] In the first stage, a judge is required to determine whether the impugned legislation violates a right protected by the *Charter*. In order to do this, the judge must determine the scope of the right by giving it a principled definition based on the intentions of the Constitution's authors. If the legislation is found to violate the principle protected by the *Charter*, then, in a second stage, the judge weighs the importance of the objectives sought by the legislation against the significance of the violation of the right. Both factors are balanced, under the rubric of section 1, in order to determine whether the legislation is constitutional.

Justice Wilson initially endorsed this two-stage process. Shortly after the passage of the *Charter*, she issued the following caution: "It is important, I believe, in the early cases that we not make the mistake of rolling these two steps into one. For we must, for starters, lay a base of jurisprudence under the individual rights and freedoms."[144]

---

[142] "Making of a Constitution" in *Speeches*, *supra* note 22 at 552-53.
[143] See Hogg, *supra* note 22 at 802 for this two-stage process.
[144] "The Charter (U. of S.)", *supra* note 34 at 173.

The contextual approach, by downplaying the search for "abstract" or "textual" constitutional principles — the hallmark of the first step in *Charter* adjudication — and by emphasizing the judge's "balancing" role under section 1, effectively collapses *Charter* adjudication into a one-step subjective process. Justice Wilson argued that Canadian courts should not adopt the U.S. practice of reading internal, principled limits into the definitions of rights themselves.[145] Instead, the existence of section 1 enabled her to directly make a choice between competing social policies on the basis of social-science data.[146]

The two-stage process of *Charter* adjudication reflects the balance established by the drafters between judicial review and parliamentary supremacy. Section 1 was included in the *Charter*, in part, to guarantee rights and freedoms and, in part, to prevent judicial review from encroaching too far on parliamentary sovereignty. It was intended to allow law-makers a defence that would restrict the Court's ability to strike down legislation. If the standard of justification were set high — as it would be if the state had to show that its legislation was pressing and substantial and only impaired rights minimally — judges would have a broad discretion to strike down legislation. However, if the standard were set low — as it would be if the State were only required to show that its legislation was reasonable — the scope of judicial discretion would be restricted.

The justification standard required under section 1 is related to the definition of *Charter* rights. If, initially, rights are narrowly defined, fewer cases would reach the second step. The State could, therefore, be held to a higher standard of justification at the second step without the risk that legislation would often be struck down by the courts. If, however, rights are broadly defined, or in absolute terms, most *Charter* challenges would be decided at the second step by judges balancing competing policy objectives. The only way to prevent judicial review from constantly threatening established democratic priorities in such circumstances would be to make it easier for the State to justify its legislation.[147]

Justice Wilson coupled her one-step contextual approach with a strong endorsement of the test developed in *R.* v. *Oakes*, which required the State to meet the highest possible standard when attempting to defend its legislation under section 1.[148] The refusal of those endorsing the contextual approach to start with a principled definition of rights, and their insistence on going straight to balancing, leaves

[145] See "Making of a Constitution" in *Speeches*, *supra* note 22 at 556.

[146] See "Evidence Under the Charter" in *Speeches*, *ibid.* at 294.

[147] See Hogg, *supra* note 22 at 813.

[148] See "Constitutional Advocacy", *supra* note 52 at 269. Justice Wilson spoke of "clinging" to the *Oakes* test out of a concern that the *Charter* not be "emasculated". She was concerned that, "the shift towards the much more flexible standard of reasonableness makes it increasingly likely that governments' immediate objectives will take precedence over the rights and freedoms of the individual" (*ibid.*).

judges with the widest possible discretion. When that is coupled with a narrow interpretation of the arguments available to government for saving its legislation under section 1, the wide judicial discretion claimed by Justice Wilson under the contextual approach is left almost entirely unfettered.

Three cases illustrate Justice Wilson's rejection of the abstract approach in favour of her contextual method. In *B.C. Motor Vehicle Reference*, Justice Lamer, as he then was, attempted to define the words "fundamental justice" in section 7 of the *Charter*. He held that "[t]he principles of fundamental justice are to be found in the basic tenets of our legal system" and located these rules "in the domain of the judiciary as guardians of the justice system".[149] While highly idiosyncratic, this was intended to be a principled definition; it would have application in all cases in which a violation of the right to fundamental justice was asserted. The principle that Justice Lamer adopted, however, was a judge-made principle. He expressly refused to accept the principle that the legislators who drafted section 7 had in mind. The record established unambiguously that the legislators intended fundamental justice to be limited to the traditional procedural principles of natural justice and fairness.[150]

In her speeches, Justice Wilson criticized Justice Lamer's reasoning, his unwillingness to meet "social, economic and political values head on" and his insistence on channelling those values through "existing legal sources such as ... provisions of the *Charter* or the basic tenets of the justice system". She noted that Justice Lamer's approach did not permit the Court to "address the role of the particular piece of legislation in a context which goes beyond the purely legal".[151] In dismissing the use of principle as "abstract", Justice Wilson was claiming that judges should be free to decide cases unconstrained by traditional rules. She would give judges absolute power to write the Constitution afresh, according to an individual judge's preferences, in each new case that arose.

In *Re Public Service Employee*, the issue was whether the freedom of association provision of the *Charter* protected the right to bargain collectively and the right to strike. Justice McIntyre, after indicating that the interpretation of all constitutional documents was to be constrained by the language, structure and history of the constitutional text, as well as by the history, traditions and underlying philosophy of our society,[152] concluded that collective bargaining and striking were not constitutionally protected. Freedom of association protected the right of individuals to come together for lawful pursuits; it did not create *Charter* rights for groups, which were unavailable to individuals.[153] Justice LeDain supported this reasoning and added that the concept of freedom of association applied to a wide range of associations with a wide range of activities. He maintained, however, that the legislature

[149] *B.C. Motor Vehicle Reference*, *supra* note 89 at 503.
[150] See *ibid.* at 501.
[151] "Court of Last Resort", *supra* note 85 at 223-24.
[152] See *Re Public Service Employee*, *supra* note 26 at 394.
[153] See *ibid.* at 398.

could not have intended to constitutionalize all the various activities of all the various groups in society.[154]

Justice Wilson criticized Justice LeDain for using an abstract rather than a contextual approach:

> The issue, for [Justice LeDain, writing for] the majority, was whether associational activities generally were constitutionally protected by s. 2(d), not whether the special kind of associational activities forming the subject of the dispute before us were protected by the section.[155]

She also said:

> Once Justice LeDain had characterized the issue in that way, the answer to the question whether the collective bargaining process was protected under the *Charter* was obviously no. No one could think that the activities of a golf club, for example, should be constitutionalized.[156]

In the first step of the process, Justices McIntyre and LeDain defined freedom of association in a principled way. Their definition (the right to associate and to carry out lawful pursuits) would apply in every case regardless of the particular factual context. By contrast, the contextual approach produces no principle of universal application. For example, using the contextual approach, one wonders why the activities of a golf club are not also constitutionalized. The contextual approach turns the first stage of *Charter* adjudication into a process whereby judges express subjective value preferences, rather than one in which they elaborate principles.

This point is also illustrated by the *Edmonton Journal* case. In a four to three decision, the Supreme Court held that certain provisions of the Alberta *Judicature Act*[157] violated the *Charter*. All seven judges agreed that the impugned section of the legislation violated freedom of expression; however, the three dissenting judges held that the legislation could be saved under section 1. The provisions at issue were designed to protect the privacy of litigants in matrimonial disputes by prohibiting publication of some of the details of the dispute. Mr. Justice Cory wrote for the majority. As the passage quoted below makes clear, at the first step of *Charter* adjudication, he looked to the intention of the framers as a way of giving freedom of expression a principled definition:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates

[154] See *ibid.* at 390.
[155] "Making of a Constitution" in *Speeches*, *supra* note 22 at 566.
[156] "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 652.
[157] R.S.A. 1980, c. J-1.

> all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.[158]

Justice Wilson in a separate, concurring opinion rejected the methodology employed by Justice Cory. She referred to it as an "abstract approach" by which the "value sought to be protected by s. 2(b) of the *Charter* is determined at large".[159] Instead, for her, freedom of expression took its meaning, in this context, from the desire to preserve privacy in matrimonial disputes. Justice Wilson stated:

> I do not disagree with my colleague [Justice Cory] that freedom of expression plays that vital role in a political democracy. The problem is that the values in conflict in the context of this particular case are the right of the litigants to protection of their privacy in matrimonial disputes and the right of the public to an open court process. Both cannot be fully respected. One must yield to the exigencies of the other. I ask myself therefore whether a contextual approach in balancing a right to privacy against freedom of the press under s. 1 is not more appropriate than an approach which assesses the relative importance of the competing values in the abstract or at large.[160]

Justice Wilson tells us what freedom of expression means in the context of matrimonial litigation. Her reasons, however, do not tell us what freedom of expression means in the entertainment context, the advertising context, the defamation context, the tabloid context or any other context but the one before her. They do not, and cannot, yield, therefore, a principled definition of freedom of expression that could be generalized to other cases.

The so-called abstract approach, which Justice Wilson rejected, is nothing other than the purposive approach to interpretation embodied by the mischief rule. The textual approach, which she also rejected, seeks to give words the ordinary meaning or the common understanding which they conveyed when they were adopted. Justice Wilson did not feel bound by such meanings. Her problem, however, was that she had to find some way of dealing with the words of the *Charter*. Her solution was to dismiss them:

> While [the contextual approach] acknowledges the legal framework of the Charter, it emphasizes the context in which the dispute before the Court has arisen rather than the text itself. ...[161]
>
> ...

[158] *Edmonton Journal*, *supra* note 136 at 1336.
[159] *Ibid.* at 1352.
[160] *Ibid.* at 1353.
[161] "Decision-Making", *supra* note 34 at 245.

> It recognizes that an analysis of the text itself to distil [*sic*] a meaning in the abstract may not be particularly helpful and that it is only when an attempt is made to relate the text to the context of the dispute that the social values enshrined in it start to come alive ... The approach is pragmatic and functional rather than theoretical and formal.[162]

Justice Wilson emptied the words in the *Charter* of meaning. The words were open-textured, imprecise, flexible — words for the long haul:[163] "The rights and freedoms guaranteed by the *Charter* are expressed in the broadest and most general terms ... [so that] the court must determine the content and substance of each of these rights and freedoms".[164] The terms of the *Charter* were to mean "different things in different settings at different times".[165] In other words, Justice Wilson gave herself the authority to have the *Charter* mean whatever she pleased.

Justice Wilson attacked the underlying assumption of the textual approach by denying the possibility of ever determining legislative intent:

> The textual approach focuses on the words of the constitutional document as signifiers of legislative intent ... which is the organizing principle of the rules of statutory interpretation. ...
>
> Now the emphasis on legislative intent as the reference point for Charter interpretation undoubtedly serves an important function. It represents an effort to solve the problem of the Court's lack of political accountability by expressing a judicial deference to the will of the legislature. One may query, however, whether the largely fictional notion of legislative intent is an appropriate solution when the Charter has explicitly designated the Court as the forum for choosing from among a variety of policy options. Our crities may well say the Court is once again refusing to face up to what it is doing and trying to pretend that nothing has changed.[166]

It is ironic that Justice Wilson would dismiss the idea that the text of the *Charter* could have a determinate meaning, all the while asserting that that text "explicitly" enjoined judges to choose from "among a variety of policy options". She did not cite *Charter* provisions that granted this power. Indeed, as set out above, the legislative history of the *Charter* does not suggest that the courts were to be the forum for choosing among a variety of policy options.

---

[162] *Ibid.* at 247.

[163] See "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 643-44.

[164] "The Charter (U. of S.)", *supra* note 34 at 173.

[165] "Extrinsic Evidence" in *Speeches*, *supra* note 22 at 643.

[166] "Decision-Making", *supra* note 34 at 246-47. The "once again" reference is to the "frozen rights" approach adopted in dealing with the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill*]. Judges refused to apply the *Bill* to fact situations unforeseen at the time of the *Bill*'s adoption. Justice Wilson understood the problem, but she got the remedy wrong. A judge who refuses to apply a democratically adopted law is as guilty of judicial revisionism as a judge who makes up his or her own law.

Justice Wilson adopted the standard critique of interpretivism made by some American scholars:

> [Interpretivism] presented some serious problems for United States judges. How were they to know what the framers meant 200 years ago? Even if they could actually talk to the framers of their constitution, would the framers' intention emerge as uniform and clear? And what of modern constitutional problems that hinge on issues that didn't even exist two hundred years ago. ...
>
> Why should a group of men (and I stress men) long since deceased be allowed to constrain the progressive development of the American constitution? ...
>
> Let us ask ourselves what the United States framers' intent was on the issue of the rights of women.[167]

There are four arguments here, all of which are supposed to lead to the conclusion that judges are free to ignore the text of the Constitution. The first is that the words have no inherent meaning; the second is that the notion of legislative intent is ephemeral and subjective; the third is that times change; and the fourth is that the Constitution was made by dead men. The fourth objection can be dealt with quickly. The *Charter* was passed (for the most part) by men who are (for the most part) still very much alive and who were voted into office by an electorate which was half female and who received substantial argument from women — much of which was heeded — on what should go into the *Charter*.[168] In any event, many of our laws were passed by dead men and we still consider them binding. The other three objections are more serious.

First, the argument that the words used in the Constitution are too general to be given a clear meaning is attractive to a judge who makes decisions on the basis of personal preference, and who is, therefore, disinclined to look hard for the meaning intended by the authors of the Constitution. In 1982, the concepts of freedom of expression, fundamental justice, freedom of association and equality had a working meaning for Canadians. If they had not, legislators would not have spent so much time debating the precise wording of the *Charter*. The debate over wording was a debate about making choices among alternative forms of wording. The meanings of the various alternatives were clearly understood.

The debate over the wording of section 15 indicates that the word "equality" was to have its usual meaning. Likes were to be treated alike; "unalikes" were to be treated "unalike", according to their differences. Any objective reading of the words of section 15(1) suggests that the provision protects against arbitrary treatment resulting from legislative distinctions not rationally related to legislative purposes. Furthermore, the section is expressly made applicable to "every individual", yet Justice Wilson concluded that the notion of formal equality was not a part of

---

[167] "Making of a Constitution" in *Speeches*, *supra* note 22 at 558.

[168] See Kome, *supra* note 108 for an account of the political lobbying by women that led to the adoption of section 28 of the *Charter*.

section 15(1). She concluded that only members of groups "suffering, political and legal disadvantage" apart from the disadvantage posed by the challenged law were entitled to claim equality rights.[169] The section does, in fact, enumerate a series of groups which are to be protected from discrimination. The legislative debates show that, in addition to those groups, other analogous groups were to be protected from discrimination. The debates also indicate the criteria by which analogous groups were to be determined. Those criteria do not restrict equality rights only to those who have suffered social, political and legal disadvantage sometime in the past.[170] Justice Wilson effectively stripped the word "equality" of the meaning it was generally understood to have in 1982 and replaced it with the meaning she wanted it to have.

In *Morgentaler*, Wilson adopted a similar approach in dealing with the words in section 7 of the *Charter*. One of the issues in the case was whether section 251 of the *Criminal Code*, which restricted a woman's access to abortion, violated a woman's right not to be deprived of liberty except in accordance with the principles of fundamental justice. Justice Wilson held that the section violated a woman's right to liberty by preventing her from deciding for herself whether to terminate her pregnancy.[171] At the beginning of the judgment, Justice Wilson expressly declined to set out any general principle that would "delineate the full content of ... liberty". "This would be an impossible task," she wrote, "because we cannot envisage all the contexts in which such a right might be asserted." Instead, she believed that she was asked to "define the content of the right in the context of the legislation under attack."[172] Using the contextual approach, "liberty" could potentially mean whatever a judge feels it should mean to advance his or her political goals in any particular context.

Focusing on the need to respect "individual decision-making in matters of fundamental personal importance," Justice Wilson concluded that "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."[173] Decisions having "profound psychological, economic and social consequences",[174] decisions of an "intimate and private nature",[175] were protected by "an invisible fence over which the state will not be allowed to trespass".[176] Justice Wilson also held that because a woman's decision to seek an abortion was "a matter of conscience", it was also protected by section 2(a) of the *Charter*, which guarantees freedom of conscience

[169] *Turpin, supra* note 104. See also *McKinney, supra* note 63 at 390-92.
[170] See "Interpretivism", *supra* note 107.
[171] See *Morgentaler, supra* note 27 at 172.
[172] *Ibid.* at 162.
[173] *Ibid.* at 171.
[174] *Ibid.*
[175] *Ibid.* at 172.
[176] *Ibid.* at 164.

and religion.[177] Consequently, any deprivation of the right to an abortion would violate the principles of fundamental justice.

Applying this approach, the word "liberty" could encompass any decision that an individual might make of an "intimate and private nature" and that profoundly affected his or her psychological, economic or social well-being. This definition is very broad and very subjective. How is a court to determine if a decision is of an "intimate and private nature"? As Justice McIntyre pointed out in his dissent, under this definition, much of the *Income Tax Act*,[178] which many Canadians feel profoundly interferes with their priorities and aspirations, would be unconstitutional.[179]

Justice Wilson used a similar technique when dealing with the word "conscience" in *Morgentaler*. She failed to explain why the right to an abortion is a "matter of conscience and religion". Indeed, could one not argue that everything is potentially a matter of conscience? The effect of Justice Wilson's decision in *Morgentaler* is to constitutionalize the right to an abortion regardless of any procedure, however fundamentally fair or just, that the legislature might devise as a means of restricting abortion.[180] Justice Wilson treated section 7 as a substantive due process section,[181] ignoring the common understanding that this section carried at the time it was adopted.

Moreover, as Justice McIntyre pointed out in his dissent, those who drafted the *Charter* specifically discussed whether its words would remove the abortion issue from Parliament and hand it over to the courts: no one suggested that the words ultimately chosen had that effect. Justice McIntyre cited an exchange on this issue from the Special Joint Committee in the House of Commons.[182] Equally persuasive, he could have cited a similar exchange in the House of Commons in which the Prime Minister reassured a Member of the Opposition by indicating to him that the *Charter* had nothing to say about the abortion issue and that the matter was one for the House to decide.[183]

The contextual approach was not the only approach available in deciding *Morgentaler*. Justice McIntyre, in dissent, pointed out that the text of the *Charter* was silent on the issue of abortion even though the issue was a matter of public contro-

[177] *Ibid.* at 175.

[178] S.C. 1970-71-72, c. 63.

[179] See *Morgentaler*, *supra* note 27 at 142.

[180] Justice Wilson allowed that some restriction on abortion, while violating a woman's section 7 rights, might be saved as "reasonably and demonstrably justifiable" under section 1.

[181] In this she follows Chief Justice Lamer in *B.C. Motor Vehicle Reference*, but the legislative history on this point is conclusive in the opposite direction (see: Hogg, *supra* note 22 at 1291; "Interpretivism", *supra* note 107).

[182] Cited in *Morgentaler*, *supra* note 27 at 143-44.

[183] Prime Minister Trudeau stated: "The Charter is absolutely neutral on this matter" (*House of Commons Debates* (27 November 1981) at 13438).

versy at the time the *Charter* was adopted.[184] Referring to the contextual approach, he observed:

> [The Supreme Court] has enjoined what has been termed a "purposive approach" in applying the *Charter* and its provisions. I take this to mean that the Courts should interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing ... That *Charter* interpretation is to be purposive necessarily implies the converse: it is not to be "non-purposive". A court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect ... The approach, as I understand it, does not mean that judges may not make some policy choices when confronted with competing conceptions of the extent of rights or freedoms. Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the *Charter*. It is not for the courts to manufacture a constitutional right out of whole cloth.[185]

Even if one were persuaded that the words of the *Charter* had no inherent meaning it does not follow that judges, under the guise of interpreting the text, can write their own values into the Constitution in order to strike down democratically enacted legislation. Our conclusion is just the opposite. If the words of the Constitution do not prohibit the legislative activity in question, the legislation must stand. As the U.S. jurist Robert Bork pointed out, where the law stops, the judge must stop:

> Oddly enough, the people who relish agnosticism about the meaning of our most basic compact do not explore the consequeuces of their own notiou. They view the impossibility of knowing what the Constitution means as justification for saying that it means anything they would prefer it to mean. But they too easily glide over a difficulty fatal to their conclusion. If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics, the conclusion is not that the judge may write his own Constitutiou. The conclusion is that judges must stand aside and let current democratic majorities rule, because there is no law superior to theirs.[186]

The second argument that Justice Wilson put forward for going beyond the ordinary meaning of the text was that we cannot know the intent of its framers. The argument is that no one can ever determine an individual legislator's intention, and even if one could, a legislature, as a collectivity, could have no specific intent. In the case of the *Charter*, this problem is exacerbated because of the participation of a number of different legislative bodies. If this objection were valid, it would apply to the search for legislative intent in all statutory interpretation.[187]

---

[184] This argument is expanded upon in *Morgentaler*, *supra* note 27 at 141-46.

[185] *Ibid.* at 140-41 [citations omitted].

[186] Bork, *supra* note 61 at 151, 166-67.

[187] Justice Wilson did not have much confidence in that endeavour either. In a speech on statutory interpretation, she said:

Justice Wilson is here fighting a straw man. The suggestion that we are somehow seeking to determine the subjective intentions of any legislator, or any group of legislators, is one which "no one holds, one that is not only indefensible but undefended."[188] When one talks of legislative intent, whether dealing with a statute or with a constitution, one is referring to the ordinary meaning that the words had at the time the legislation was adopted. This common understanding "is manifest in the words used in secondary materials, such as debates at conventions, public discussions, newspaper articles, dictionaries in use at the time, and the like."[189] It may also be decipherable through the scheme of the *Charter* and through the usual canons of statutory interpretation, such as the mischief rule.

Justice Wilson's third argument against the textual approach is one that has a long lineage in Canadian constitutional law. She suggests that because the authors of the Constitution could not have thought of, or could not have foreseen, modern circumstances, the words of the Constitution must be given a "progressive interpretation", lest the Constitution lose its relevance. If the doctrine of progressive interpretation means, as it must, that judges are to take the principles of the Constitution as they find them and apply those principles to new fact situations, then there is nothing remarkable about her objection. This approach is appropriate not only for the Constitution but for every piece of legislation and especially those statutes which are expected to remain in operation for a long time. Legislators expect this interpretive approach will be taken when they pass legislation and adopt a constitution. This is why we have judges: if legislators could foresee all possible situations, a computer with sophisticated software could be appointed to the bench. It is the job of the judge to determine when a principle contained in a law applies, and when it does not; but it is not the judge's job to manufacture the principle according to the judge's personal predilections.

If, by contrast, Justice Wilson is suggesting that changing circumstances give judges the authority to rewrite the Constitution at will, she is mistaken. It is one thing to apply a principle to new fact situations and, in the course of applying that principle, to develop the law in a minor, interstitial way. It is another to create a whole new principle. On this point, Bork has made the following comment:

> Nevertheless, one must ask oneself [*sic*] whether our traditional approach to statutory interpretation really does disclose Parliament's intention if indeed such a thing exists. I have been harbouring the suspicion for some time now that the sole virtue of a collection of technical rules from among which we may pick and choose at will is not that they lead us to a result but that they support a result that we have already reached. The very fact that the plain meaning rule will usually lead us to quite a different result from the mischief rule suggests to me that we use them as a crutch to give legitimacy to something no nobler than our "gut reaction" ("Extrinsic Evidence" in *Speeches, supra* note 22 at 653).

[188] Bork, *supra* note 61 at 162.

[189] *Ibid.* at 144. This is the normal course in interpreting law.

> No doubt there is a spectrum along which the adjustments of doctrine to take account of new social, technological, and legal developments may gradually become so great as to amount to the creation of new principle. But that observation notes a danger; it does not justify letting the process slide out of control. Judges and lawyers live on the slippery slope of analogy; they are not supposed to ski it to the bottom. ... When we say that social circumstances have changed so as to require the evolution of doctrine to maintain the vigour of an existing principle we do mean that society's values are perceived by the judge to have changed so that it would be good to have a new constitutional principle.[190]

In any event, the notion of "progressive interpretation" is irrelevant when it comes to the *Charter*. Justice Wilson was appointed to the Supreme Court the same month that the *Charter* became part of the Canadian Constitution. There was no reason that the principles contained in that document, as reflected in its text, could not be applied. They did not have to be abandoned in favour of principles that judges found more agreeable. Times, it is true, change. But they had not changed in respect of the *Charter* that Justice Wilson was required to interpret.

Words, even words which express broad concepts, have commonly understood meanings that should constrain judges. It is self-evident that the judge's mission is to find the meaning carried by the words. We successfully communicate with each other each day. Our democracy is premised on the notion that the will of the people, through its elected representatives, can be communicated to citizens who are expected to abide by the law of the state. The textual approach and the abstract approach make objective judging possible because they respect a will that is external to the judge. By repudiating these approaches, and by substituting a contextual approach, which makes the outcome of the case entirely dependent upon what a given judge thinks is fair and just in a particular situation, Justice Wilson created an entirely subjective theory of interpretation.

As discussed in Part II of this article, Justice Wilson's understanding of the role of the post-*Charter* Court was one which denied the democratic principle. Her contextual approach to interpretation also denied the liberal principle. In order to understand how this is so, Wilson's contextual approach can itself be contextualized. A central element of the liberal principle is the notion that all citizens are equally subject to the law. Wilson used context as the basis for denying this. She focused, instead, on the personal characteristics of the litigants, especially their sex, as *Morgentaler* makes clear. The result is that "good guys" win and "bad guys" lose.

---

[190] *Ibid.* at 169.

IV. Judicial Integrity

> *The job of the judge is not to embrace an ideology but to render a fair judgment. ... I can tell you that as chief justice, I am nervous of a judge who is very popular; I despair of one who wants to be popular.*[191]
>
> Chief Justice Lamer

Justice Wilson developed her own political agenda while on the Supreme Court. As a general matter, she was concerned about the threat posed by "big government", and about the freedom of groups and individuals. These concerns could have produced a generous reading of *Charter* rights; however, her ideology did not treat all individuals or all groups equally. She was particularly concerned about those who, in her view, had suffered historical, social or political disadvantage.[192] This concern tended to produce a selective application of *Charter* rights.

Justice Wilson was the first woman to sit on the Supreme Court of Canada. Upon taking her oath of office, she spoke of becoming the focus of the hopes and aspirations of those who saw the appointment of a woman as the fulfilment of a long-standing dream.[193] This was the culmination of a series of "firsts" for Bertha Wilson: the first woman to be hired by the large Toronto firm of Osler, Hoskin & Harcourt; the first lawyer to head that firm's research department; the firm's first female partner; and the first woman to be appointed to the Ontario Court of Appeal.[194] A month after leaving the bench, at a ceremony in which she accepted the President's award of the Women's Law Association of Ontario, Justice Wilson observed, upon looking back, what pleased her most was that "I am the last of the firsts."[195]

---

[191] Lamer C.J.C. (Address to the Annual Meeting of the Canadian Association of Provincial Court Judges, St. John's, Newfoundland, Canada, 25 September 1993), quoted in C. Schmitz, "Judges shouldn't use 'trivial or instinctive appeals to judicial independence' to reject reform: Lamer" *The Lawyers' Weekly* (8 October 1993) 6.

[192] See "Charter in Private Litigation", *supra* note 106. In March 1993, Justice Wilson spoke of the utility of the *Charter* in promoting women's values. She argued that the *Andrews* interpretation of section 15(1) meant that the section was no longer concerned with rights of equality (as it says) but rather dealt with the problem of inequality (and, hence, the problem faced by women). Its emphasis was not on arbitrary treatment, but, rather, on the individual's current and historical disadvantage. "'The court rejected a neutral, abstract concept of inequality,'" she said, "'and focused instead on the historieal reality of severely disadvantaged groups in society'" ("Charter in Private Litigation", *ibid.*). This opened the door for judicial relativism, in Justice Wilson's case favouring women.

[193] See B. Wilson, "The Honourable Madame Justice Bertha Wilson" (Ceremonial remarks made upon taking the oath, Supreme Court of Canada, 30 March 1982) (1982) 16 L. Soc. Gaz. 172 at 179.

[194] Then Justice Minister and Attorney-General of Canada Kim Campbell listed these firsts in a speech upon Wilson's retirement from the Supreme Court ("Retirement Ceremony", *supra* note 82 at 11).

[195] B. Wilson, "Acceptance Speech — The President's Award, The Women's Law Association of Ontario" (Toronto, Ontario, February 1991) in *Speeches*, *supra* note 22, 719 at 722. She overlooked the fact that one day the Supreme Court will have its first female Chief Justice.

While on the Court, Justice Wilson considered herself "a moderate feminist".[196] An interviewer wrote that the groundwork for Justice Wilson's feminist education came from her role as a parish minister's wife in Scotland. Justice Wilson explained during the interview that women's issues were a topic of her parish study group: "I was part of [a] group that met regularly to consider to what extent religious doctrine and dogma had evolved because of men, the effect of the priest and theologians being male."[197] Prior to becoming a judge, Justice Wilson wrote much of the brief that the United Church of Canada presented to the Royal Commission on the Status of Women. She also chaired the committee on abortion of the United Church which advocated a "careful pro-choice position", a fact which she did not acknowledge in her judgment in *Morgentaler*.[198]

In 1990, Justice Wilson presented a lecture entitled "Will Women Judges Really Make a Difference?" It concluded that they would, for four reasons. First, the appointment of women to the Bench would help "shatter stereotypes about the role of women in society that are held by male judges and lawyers, as well as by litigants, jurors, and witnesses".[199] Second, it would help preserve the public trust if judges were perceived as representative of the diversity of the people being judged.[200] Third, it would be easier for women counsel to appear before a female judge.[201] Finally, the appointment of women judges would have an effect on the process of judicial decision-making and on the substance of the law, particularly in areas such as

---

Essayist Sandra Gwyn, the first journalist to interview Justice Wilson, claimed that Justice Wilson knew she would never have gotten to the Ontario Court of Appeal had she not been a woman (see S. Gwyn, "Sense & Sensibility" *Saturday Night* (July 1985) 13 at 17). In the same article, Gwyn noted that distinguished Toronto lawyer Pierre Genest, Mr. Justice Charles Dubin of the Ontario Court of Appeal and Justice Wilson, were all considered in 1982 for the vacant Supreme Court seat. Gwyn cites one insider as saying: "'[T]he women in [Prime Minister Trudeau's] office got to him'" (*ibid.* at 18). Wilson told Gwyn that she hoped, due to her age, not to get the appointment but knew that if she were called she would accept: "'[T]oo many women were counting on me'" (*ibid.*).

One thinks of the following words which Chief Justice Laskin delivered upon joining the Supreme Court of Canada:

> When I took my seat on the Supreme Court of Canada I told my colleagues and others who attended the induction ceremony that (1) I had no expectations to live up to save those I placed upon myself; (2) I had no constituency to serve save the realm of reason; (3) I had no influences to dispel unless there was a threat to my own intellectual disinterestedness; and (4) I had no one to answer to save my own conscience and my personal standards of integrity (B. Laskin, "The Institutional Character of the Judge" (1972) 7 Isr. L. Rev. 329 at 330).

[196] "Sense & Sensibility", *supra* note 195 at 19.

[197] S. Lightstone, "Bertha Wilson: A personal view on women and the law" *National* (August/September, 1993) 12 at 14 [hereinafter "A personal view"].

[198] "Sense & Sensibility", *supra* note 195 at 19.

[199] B. Wilson, "Will Women Judges Really Make a Difference?" (Fourth Annual Barbara Betcherman Memorial Lecture given at Osgoode Hall Law School, Toronto, Canada, 8 February 1990) (1990) 28 Osgoode Hall L.J. 507 at 517 [hereinafter "Women Judges"].

[200] See *ibid.* at 517-18.

[201] See *ibid.* at 518.

tort, criminal and family law.[202] She argued that men and women have different experiences, they think differently and they approach law differently because of their gender differences.[203]

Justice Wilson's speech has been described as a "cry from the soul".[204] It was her coming out on the issue of sexual bias in the legal system. At the start of her Osgoode speech, she spoke of the "rejoicing of women in her appointment". She went on to say that although women might have finally felt represented, she was concerned that the nature of judicial office and the incremental nature of change in the law would constrain her attempts to respond to the changes women sought.[205] It was not just the nature of judicial office and the pace of change in the law that restricted Justice Wilson in the promotion of her cause. Her sense of strategy also suggested that one bide one's time:

> The candour with which Wilson acknowledges gender bias within the legal profession is a recent phenomenon. She explains that, at the time of her appointment to the Supreme Court of Canada, "I couldn't have (spoken out) because I think that there was a fair measure of apprehension on the part of the members of the court about having a woman join that group. I realized that there was going to have to be a period of probation, of having to prove myself.
>
> "I don't believe when I went on the court that the male judges took it for granted that I was going to be able to do the job. I think, maybe, that the view was contrary. So, to go on there and start throwing your weight around when you were, in their eyes, a novice... Well, you have to gain acceptance through your ability, as they perceive it first and then they will listen to you... A lot of women, I think, are of the view that as soon as you get into a group, you can start trying to change things. I don't think it works. I think you have to go through this process of proving yourself first."[206]

The Osgoode speech was a "cry from the soul" which had been building for some time. Early in her career on the Supreme Court of Canada, Justice Wilson spoke out on the subjugated status of women. In April 1983, she told a Winnipeg audience that the main obstacle to the implementation of the sexual equality provisions of the *Charter* was social attitudes conditioned by the church, school and family; men were the villains. She spoke of how "[t]he history of canon law reveals the subordinate and inferior status to which woman is relegated when her nature is defined by men."[207] She saw the family and the school as the site of sexual stereotyping, but fortunately, in her opinion, the feminist movement was changing this.[208]

---

[202] See *ibid.* at 512, 519-20.

[203] See *ibid.* at 519.

[204] "A personal view", *supra* note 197 at 14.

[205] See "Women Judges", *supra* note 199 at 507. This could be the language of a newly-elected Member of Parliament anxious to achieve reform.

[206] "A personal view", *supra* note 197 at 13-14.

[207] B. Wilson, "Law in Society: The Principle of Sexual Equality" (Lecture delivered at Winnipeg, Canada, 9 April 1983) (1983) 13 Man. L.J. 221 at 228 [hereinafter "Principle of Sexual Equality"].

[208] See *ibid.* at 225-6. She recounted the following anecdote, perhaps of her own creation,

In January 1988, in *Morgentaler*, she wrote of women's unique experience:

> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows ... has pointed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* ... [t]he more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men ... It has *not* been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.[209]

The Osgoode speech was the culmination of these ideas. In that speech, she stated:

> Gilligan's work on conceptions of morality among adults suggests that women's ethical sense is significantly different from men's. Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other; the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but, rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.

---

in one speech:

> Mother and father also constitute role models for their children and the child subconsciously absorbs the values implicit in the parents' conduct. This is well illustrated by the following anecdote. The scene is set in a fairly expensive restaurant to which a man has taken his wife and six year old daughter for dinner. The black tie waiter is politely taking the order. "Yes, I think I will have the soup and veal; my wife is rather fond of fish so she will have the broiled lobster; and Suzanne here will have the child's portion of chicken." The waiter then turned to the wife "And for you, Ma'am?" "Yes, I think I'll have the lobster as my husband suggested." The waiter then turned to the young girl "And you, young lady, what will you have?" Before she could answer the husband interjected "The child's portion of chicken for her." Completely ignoring him the waiter insisted "Suzanne, what would *you* like?" Astonished, she turned to her father and blurted out "Gee, Daddy, he thinks I'm real!" ("Principle of Sexual Equality", *ibid.* at 226).

See also B. Wilson, "Sexual Equality Before and After s. 15" (Address to University of Calgary Law School, Calgary, Canada, March 1985) in *Speeches*, *supra* note 22, 341.

[209] *Morgentaler*, *supra* note 27 at 171-72 [citation omitted].

> There is merit in Gilligan's analysis. In part, it may explain the traditional reluctance of courts to get too deeply into the circumstances of a case, their anxiety to reduce the context of the dispute to its bare bones through a complex system of exclusionary evidentiary rules. This is one of the characteristic features of the adversarial process. We are all familiar with the witness on cross-examination who wants to explain his or her answer, who feels that a simple yes or no is not an adequate response, and who is frustrated and angry at being cut off with a half-truth. It is so much easier to come up with a black and white answer if you are unencumbered by a broader context which might prompt you, in Lord MacMillan's words, to temper the cold light of reason with the warmer tints of imagination and sympathy.
>
> Gilligan's analysis may also explain the hostility of some male judges to permitting intervenors in human rights cases. The main purpose of having intervenors is to broaden the context of the dispute, to show the issue in a larger perspective or as impacting on other groups not directly involved in the litigation at all. But it certainly does complicate the issues to have them presented in polyeentric terms.[210]

One must ask some simple questions here. How does Justice Wilson know these things? How does she know that women's "ethical sense" is "significantly different" from men's? How does she know that a man cannot "respond" to the ethical "dilemma" faced by a pregnant woman contemplating an abortion? How does she know there is something called the "female psyche"? The answer would seem to be either because she was convinced by the work of Carol Gilligan or that she just knows. This will not do. Justice Wilson delivered herself of observations about men and women that have profound social and political, not to mention legal, significance. Surely, a more solid intellectual foundation than a single book, which has been much criticized,[211] is required.

Justice Wilson's logic lapses into solipsism at this point. When she argues that a man cannot understand the ethical dilemmas faced by a woman, she is really arguing that a person of one sex cannot understand the way a person of the other sex thinks. If that assertion is correct, then she, as a woman, cannot know how a man thinks. On her own logic, she cannot know whether a man can respond to a woman's dilemma.

In raising the issue of the representative character of the bench, Justice Wilson raised an issue more profound than the question of whether women should be represented on the Court in proportion to their qualified numbers. No one can seriously doubt that they should be. The judiciary should reflect society as a whole, but

---

[210] "Women Judges", *supra* note 199 at 520-21 [footnotes omitted]. Wilson is relying on C. Gilligan, *In a Different Voice: psychological theory and women's development* (Cambridge, Mass.: Harvard University Press, 1982).

[211] A summary of Gilligan's ideas by a feminist Canadian lawyer can be found in C. Boyle, "The Role of the Judiciary in the Work of Madame Justice Wilson" (1992) 15 Dalhousie L.J. 241 at 245. For criticism of Gilligan's ideas see *e.g.* C. Hoff Sommers, *Who Stole Feminism? How Women Have Betrayed Women* (New York: Simon and Schuster, 1994) at 151-54 and the works cited therein.

it should represent no one.[212] By suggesting that women should be *represented* because they think differently from men, Justice Wilson has simply extended the logic of her thesis, reflected in her contextual approach to interpretation, that judging is an inherently subjective activity. The theory is complete: the role, the method and the membership of the Court are all political in nature. It is this combination which makes Justice Wilson's theory of judicial review incompatible with democracy.

If one believes, as Justice Wilson did, that cases are to be determined not by principle but by their context, which includes the personal characteristics of the litigants, and that what counts is a subjective appraisal of the dispute, then one must necessarily believe that the personal characteristics of the judge deciding the matter also count for a great deal. If context is the touch-stone, then the fact that the judge has lived the contextual experience in issue is central. One judges not only on the basis of who the litigant is (the context) but, also, on the basis that one has walked in the litigant's shoes and shared the litigant's burdens and aspirations. The rights of women are determined not by reference to abstract standards but, rather, by women's reality and by judges who have lived that reality. The contextual approach seems to have been designed for the politically-committed judge. The court takes on all of the trappings of a legislature except, of course, that it is made up of judges who are unelected and unaccountable to the citizens of the country.[213]

Apart from the anti-democratic nature of Justice Wilson's theory of judicial review, it also raises another issue related to the unaccountable exercise of power by the judiciary. Judges are required to exercise that power, to the furthest extent humanly possible, impartially. On taking the judicial oath of office, one must strip one's self of personal preconceptions in order to hear cases dispassionately and decide them without prejudice. Justice Wilson was aware of this. She began her Osgoode speech with apparent approval of this concept, by citing a number of authorities on the integrity of judging. Their general conclusion was that the judge must not approach his or her task with preconceived notions about law or policy,

---

[212] If one believes that judging is an activity constrained by the law, and that judges are not free to do anything they like, then not only is the identity of an individual litigant irrelevant to the decision-making process but so also are the personal characteristics of the judge. The only facts that matter are those that are rationally related to the application of the legal principle in issue. The only judicial characteristics that matter are those that relate to the competence and impartiality of the judge. Perfect objectivity can never be achieved. It is enough to protect democracy, however, if judges do their best to recognize and restrain the exercise of their personal prejudices.

We expect our judiciary to broadly reflect the population eligible to serve as judges not because the individual judge is a delegate of any particular constituency but, rather, because an unrepresentative bench would suggest bias in the selection of judges. It would be a sign that criteria unrelated to competence were being used in the selection process. This, in turn, would raise concerns about judicial neutrality.

[213] Parenthetically, the notion that judges should represent different constituencies is unworkable. The bench is not large enough to accommodate the different "views of the world" from the different perspectives of men, women, pregnant women, heterosexuals, homosexuals, young, old, handicapped and so on. The electoral process — and Parliament itself — is conceived on a scale to do this (see "Women Judges", *supra* note 199 at 519).

with personal prejudice against parties or issues or with bias towards a particular outcome.[214]

She also doubted whether it was possible for men or women to overcome their biological and experiential prejudices.[215] Just as she could not accept that external principles could give content to *Charter* rights, she could not accept that an abstract standard of impartiality could govern judicial conduct. Her solution for giving content to rights was to adopt a subjective balancing technique. Similarly, her solution for creating an impartial bench was to balance judges of one subjectivity against judges of another. Rather than acknowledge that judges are the product of their unique experience and must struggle to recognize and transcend their biases, she decided that the only course was to acquiesce in subjectivity. Justice Wilson was, in fact, recommending the creation of a legislature, that is, a body which, ideally, brings together persons with differing ideologies, experiences and backgrounds and, in the process of balancing these differences, creates laws.[216]

While a judge, Justice Wilson spoke out on the issue of sexual discrimination. Her ideas on the subjugation of women by men were current, political and highly controversial. In the *Charter* era, particularly after the equality provisions came into effect, the ideological views espoused by Justice Wilson could, and did, have a direct bearing on issues likely to come before the courts. In adjudicating the Berger affair in 1982,[217] the Committee of Investigation of the Canadian Judicial Council reached the following conclusion:

> "We say again if a judge becomes so moved by conscience to speak out on a matter of great importance, on which there are opposing and conflicting views, then he should not speak with the trappings and from the platform of a judge but rather resign and enter the arena where he, and not the judiciary, becomes not only the exponent of those views but also the target of those who oppose them."[218]

---

[214] See *ibid.* at 507-508.

[215] See *ibid.* at 515-16.

[216] Cogent criticism of this view can be found in J. Smith, "Executive Appointment of the Judiciary: A Reconsideration" in Ontario Law Reform Commission, ed., *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Queen's Printer, 1991) at 189.

[217] Justice Berger commented publically and critically on the negotiations between the Prime Minister and the Premiers over the inclusion of native rights in the *Charter* at the time the provisions of the *Charter* were being negotiated. Subsequently, the Canadian Judicial Council strongly criticized Justice Berger for becoming involved in a matter of great political controversy (see J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984) 29 McGill L.J. 369).

[218] Quoted in F.L. Morton, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1984) at 109. Chief Justice Laskin made it crystal clear in a speech to the Canadian Bar Association on September 2, 1982, that the impartiality, independence and integrity of a judge are compromised if he or she speaks out on a political issue (quoted in Morton, *ibid.* at 115).

Justice Robins, of the Ontario Court of Appeal, argued that Chief Justice Laskin's concerns were even more relevant in the *Charter* era. In a debate with Justice Sopinka of the Supreme Court

Conclusion

When Justice Wilson argued for flexibility in law and for the contextual approach, she was really arguing for the freedom to decide cases in accordance with her own preferences. We argue that she believed the *Charter* had turned the Court into a political body, a kind of unaccountable legislature. The Court's role was to constitutionalize the content that judges gave to rights; the Court's method was to elevate judicial value preferences into law; the Court's membership was to represent the different social groups with whom they shared common characteristics.

Justice Wilson's philosophy of judicial review demanded that judges be constrained only by their personal opinions. It is a philosophy which has nothing to do with principle, nothing to do with the rule of law and nothing to do with democracy. It turns the Court into an organ of naked power, and contravenes both the letter and the spirit of the *Charter*.

Justice Wilson has been the object of adulation by fellow lawyers and by journalists. The nature of that adulation can be gleaned by reading volume 15 of the Dalhousie Law Journal, published in 1992. This was a collection of papers given a year earlier at a symposium to honour Justice Wilson. Former Chief Justice Brian Dickson set the tone for the other papers when he referred to her as a "Trailblazer for Justice".[219] He called concerns about Justice Wilson's behaviour as a judge a "facile exercise in labelling"[220] and characterized debate over the proper limits of judicial activism as "increasingly sterile".[221] More to the point, Justice Dickson said that Justice Wilson's judicial philosophy, which he described as a "vision", "embodies a distinctive and profoundly democratic conception of the role of a judge."[222]

This volume of the Dalhousie Law Journal is in fact entitled *The Democratic Intellect*. One can only describe Justice Wilson's approach to judging as "democratic" by utterly transforming the meaning of that word. This is precisely what James Macpherson, one of the contributors to the volume, did. He observed:

---

of Canada, he stated:

> Appearances count, perceptions are important. By speaking out about issues of this nature, the danger is that the judge may call into question in the public mind whether he or she can put aside the personal beliefs and rule even-handedly if and when the issue comes before the court.
>
> This is particularly so at this juncture in our constitutional history of Canada where more and more social issues can, and do, become legal issues ("Sopinka, Robins lock horns over right of judges to speak" *The Lawyers' Weekly* (26 July 1991) 2).

See also, Canadian Judicial Council, "When the Judge Makes a Speech" in *Commentaries on Judicial Conduct* (Cowansville, Qué.: Yvon Blais, 1991) c. 4.

[219] B. Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1.

[220] *Ibid.* at 15.

[221] *Ibid.* at 18.

[222] *Ibid.* at 21.

> [M]any of the major political issues of our times, national and provincial, have been "constitutionalized". They have not been, as some have contended, removed from the political arena. Politicians and governments still must address and try to resolve them. However, the issues no longer stay or end in the political arena. They move from there to the courts, especially the Supreme Court of Canada, because the Charter gives people unhappy with a result in the political arena an opportunity to challenge that result in the judicial arena.[223]

What a strange notion of democracy. "Democracy" now means disregarding the legislatures; democracy means you should go to the courts if you cannot get what you want through the political process.[224]

Politicians communicate through their speeches; judges through their decisions. Justice Wilson was the first Justice of the Supreme Court of Canada to use her public speeches as a vehicle equal in importance to her reasons for decision for expressing her views. The subjective nature of her decisions — wherein she "legislated" her personal views — did real damage to the democratic choices of our elected representatives. Worse, the political nature of her speeches — wherein she undertook to give the post-*Charter* Court a new role, method and ideology — did damage to our very idea of democracy.

---

[223] J. MacPherson, "Canadian Constitutional Law and Madame Justice Wilson — Patriot, Visionary and Heretic" (1992) 15 Dalhousie L.J. 217 at 220.

[224] A thorough discussion of the way the *Charter* has been used in this fashion can be found in Morton & Knopff, *supra* note 15.