

The Proportionality Standard and Constitutional Culture:
A Comparative Analysis of Rights Adjudication in Canada and the French Republic

by

James Peter Barry

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Abstract

It has been suggested that the migration of proportionality as a standard of constitutional review is bringing about a degree of convergence in rights norms across common and civil law jurisdictions. While scholars have noted its potential to shape rights norms in legal systems into which it is incorporated, few have analysed the ways in which proportionality is affected by the constitutional culture in which it is received.

This thesis is a comparative analysis of the application of proportionality in Canada and the French Republic. It sheds light on the extent to which the operation of that standard is affected by constitutional culture; that is, by interpretive perspectives and modes of reasoning prevailing in a given jurisdiction. It isolates the ways in which the standard is modified, both consciously through the efforts of judges to give meaning to its requirements and unconsciously through the normative presumptions they bring to bear.

List of Abbreviations Used

BNA Act	<i>British North America Act, 1867</i>
CVLA	<i>Colonial Laws Validity Act 1865</i>
DDHC	Declaration of the Rights of Man and Citizen of 1789 (<i>Déclaration des droits de l’homme et du citoyen de 1789</i>)
ECHR	European Court of Human Rights
ECJ	European Court of Justice
PFRLR	In French Law, a range of judicially-developed “fundamental principles recognized by the laws of the Republic” having constitutional status (<i>Principes fondamentaux reconnus par les lois de la République</i>)
QPC	In French law, a petition for a priority preliminary ruling on a question of constitutionality (<i>une question prioritaire constitutionnel</i>)
SCC	Supreme Court of Canada

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Chapter 1: Introduction

i) Introduction

This thesis lends critical insight into the use of proportionality as supra-national tool of rights adjudication by analysing the role of rights normativity in the application of that legal standard. By rights “normativity” it is meant the extent to which rights are historically and culturally contingent, rather than merely the result of positive law. This analysis is intended to counter-balance the claims of scholars who stress proportionality’s potential as a universal standard for determining permissible limitations on constitutional rights. It is suggested that such claims are insufficiently reflective about the relation between proportionality’s three-step structure and the constitutional culture in which it is applied. The use of proportionality to review statutory restrictions on religious expression in the public sphere in Canada and the French Republic is analysed to illustrate this point.

Indeed, the application of proportionality as a standard of constitutional review is widely regarded as a key vector driving global convergence in constitutional rights norms. As a three-step means-end rational review for the constitutionality of sub-constitutional laws (i.e. statute or common law), it involves a “hybrid” exercise of inductive, fact-sensitive reasoning and deduction from general principles.¹ Accordingly, it has migrated easily across common and civil law jurisdictions. Developed in German Basic Law, review on a proportionality standard was first adopted by the European Court of Justice (the “ECJ”) in 1970, followed by the European Court of Human Rights (the “ECHR”) in 1976, and by the Supreme Court of Canada (the “SCC”) in 1986. Its primacy in European law lead in turn to its gradual incorporation into the law of most EU member states.² It is for this reason that proportionality has been identified as affirming a convergence of common and civil law into a “globalised *jus commune*.”³ The principles

¹ Eric Engel, “The History of the General Principle of Proportionality: An Overview” (2012) 10 *Dartmouth LJ* 1 at 1.

² For a history of the migration of proportionality see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) at 181-210.

³ Engel, *supra* note 1. Note that the term *jus commune* is Latin for “common law” and used by civil law jurists to refer to those aspects of a civil law system’s invariant legal principles.

of that hybridized body of law it is argued, drive substantive national laws toward uniform global standards.

It is perhaps unsurprising that many scholars ascribe “neutrality” to the proportionality standard given the ease with which it has been woven into both common law and civilian fabric. It is widely contended that the test’s three-step structure, which again requires both inductive reasoning by analogy and deduction from general principles, can exert the same methodological pressures in both common law and civilian legal systems. As David M. Beatty has put it, the proportionality principle is not only “neutral” but possessed of a “capacity for rationalism” sufficient to justify its status as an “ultimate rule of law.”⁴ For their part, Moshe Cohen-Eliya and Iddo Porat have argued migration of proportionality as a constitutional methodology may in fact be more effective at transmitting substantive legal doctrines than efforts to secure their direct adoption.⁵ The implication is that the formal methodology of proportionality can be incorporated more or less seamlessly into jurisdictions with different juridical structures and modes of legal reasoning and yield substantively similar results.

Yet in spite of this “standardizing effect,”⁶ the three-step proportionality test does yield different results on similar sets of facts when applied by different constitutional courts, a point implicitly acknowledged in the European Court of Human Rights’ (the “ECHR”) decision in *SAS v France*.⁷ In its judgment of 1 July 2014, a majority of the court upheld Law no. 2010-1192 of the French Republic as being a “proportional” infringement of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the “Convention”).⁸ Enacted on 11 October 2014, the impugned statute had affected in France and its overseas territories a full ban on the wearing of clothing designed to conceal the face in public places. The applicant SAS challenged Law

⁴ David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 171.

⁵ Moshe Cohen-Eliya and Iddot Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) at 139-140.

⁶ *Ibid.*

⁷ *SAS v France* [GC], no. 43835/11, ECHR 2014.

⁸ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5, online: European Court of Human Rights <<http://www.echr.coe.int>>

no. 2010-1192 as violating her right to freedom of religion under Art. 9(1) of the *Convention*, because it prevented her from covering her face with a veil or *niqāb* in accordance with her Islamic faith. The applicant's Art. 9(1) rights were determined to be adversely affected, but a majority of the ECHR proceeded to find the law to be a "proportionate" limitation under Art. 9(2) of the *Convention*.

Article 9(2) holds that the right to freedom of religion "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society." It proceeds to define proper legislative purposes in a democratic society as "public safety, health or morals, [or] protection of the rights and freedoms of others."⁹ The French government submitted that all Art. 9(2) purposes were engaged by Law no. 2010-1192. The only argument accepted by the majority, however, was that the impugned legislation was required to reinforce the egalitarian and fraternal civic bonds at the heart of the French republican pact, and as such, in Art. 9(2) terms, necessary to "protect the rights and freedoms others." This formulation served as the objective of Law no. 2010-1192 that grounded the ECHR's proportionality analysis. It is in the majority's application of that three-part test that an acknowledgement of proportionality's limitations as an instrument of rights harmonization can be inferred.

Indeed, having found the prohibition imposed by Law no. 2010-1192 to be (1) rationally connected to the legislative objective and (2) necessary for its realization, the majority in *SAS* proceeded to the more evaluative exercise of (3) determining whether the ban was proportionate in its effects; that is, whether the salutary effects of the ban were proportionate to its deleterious effects on the Art. 9 right. A majority of the ECHR concluded that the legislature of the member state was owed a degree of deference in formulating legislative policy on which "opinions within a democratic society may reasonably differ."¹⁰ Specifically, while acknowledging that "from a strictly normative standpoint, France [was] very much in a minority position in Europe,"¹¹ its legislature was owed "a broad margin of appreciation" to determine the minimum standards

⁹ *Ibid* at Art 9(2).

¹⁰ *Supra* note 7 at para 16.

¹¹ *Ibid* at para 156.

necessary for democratic life.¹² In so deciding, the ECHR was applying its long-standing practice of conferring latitude on member states to craft legislation in light of local factual and normative conditions as determined by the legislature.

By relying on the “margin of appreciation” doctrine with explicit reference to the practices of other EU jurisdictions, the majority in *SAS* acknowledged that other courts might legitimately arrive at different conclusions as to the proportionality of such bans. The review of Law no. 2010-1192 by the French Constitutional Council in Decision 2010-613 DC of 7 October 2010 provides such an instance of a court reaching a “minority position” in Europe, normatively speaking. In this thesis, the Constitutional Council’s decision in Decision 2010-613 DC respecting concealment of the face in public will be analysed in light of related case law of the Supreme Court of Canada. In doing so, it seeks to isolate points of divergence in the application of the proportionality test and to explain them by relating them to constitutional culture. It is suggested that proportionality has been modified, both consciously and unconsciously, by Canadian and French jurists to ease its incorporation into their respective legal systems. Accordingly, it is urged that there are limits to the potential of proportionality as a standard of review to act as a vector of constitutional norm convergence across legal systems.

This thesis is divided into three chapters. The first lays the ground-work for comparative analysis by reviewing the incorporation of proportionality in Canada and the French Republic, both of which until recently were systems of legislative supremacy. The focus is mainly on how that inductive-deductive “hybrid” standard is applied in systems with different modes of legal reasoning. In the second chapter, the actual application of proportionality is analysed, with reference mainly to Decision 2010-613 DC and relevant Canadian case law. It is proposed that the decisive step of the proportionality test from a comparative standpoint is the final step of “proportionate effect” or “balancing,” because it allows for the expression of culturally-based value judgements. The last chapter focuses on the way in which balancing is conducted in each jurisdiction, revealing how the rules of its application have been judicially-developed to reflect local modes of legal reasoning and established rights norms.

¹² *Ibid* at para 16.

ii) Methodology

This thesis attempts to initiate a discussion about constitutional culture, and its methodology has been developed to that end. The term “constitutional culture” is used to refer to what might be called the “cultural grounding” of a particular constitutional text; that is, the socially-construed and historically-transmitted “shared meanings” and interpretive perspectives which guide its operation as a legal instrument in a given society.¹³ It presumes, therefore, that constitutional texts are not “fixed orders,” but instruments for the expression of notions of order that have been arrived at through historical development. In other words, all constitutional texts are embedded in a culture which gives to them their authority and substantive content. Cultural notions are expressed *through* the text, both consciously by way of judicial efforts to give meaning to particular provisions, and unconsciously through the modes of legal reasoning and normative presumptions that are brought to bear in that task.

This thesis uses a contextualist methodology derived from the precepts of legal historicism to shed light on differences in the application of proportionality related to the interaction of that standard with the constitutional culture in which it is applied. As it is used in this project, the term “historicism” does not denote an effort to comprehensively review particular aspects of Canadian or French legal history. Rather, legal historicism is best understood as an interpretive tool based on a recognition of the organic embeddedness of law in culture. It is suggested that the application of proportionality should not be analysed merely as matter of positive law, but with a view to the ways in which it intersects with intellectual and cultural life. Legal historicism presumes the organic and particular nature of such disciplines to a given jurisdiction. Thus, cultural and intellectual history may be leveraged as part of a cautious, rigorous, and contextual interpretation of the law’s operation in that jurisdiction. In this way, differences which are not readily apparent from the law’s text alone may be better analysed.

¹³ Hands Vorländer, “What is ‘Constitutional Culture?’” in Silke Hensel et al, eds, *Constitutional Cultures: On the Concept and Representation of Constitutions in the Atlantic World* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012) at 28.

As Frederick C. Beiser has documented, the historicist tendency in law first emerged in the early nineteenth century in reaction to the alleged “ahistorical” or “philosophical” character of “natural law” theories. Indeed, modes of thinking associated with the eighteenth century Enlightenment tended to insist that law should reflect a conception of human nature as absolute, eternal, and universal. In contrast, historicists held that human nature, including morality and reason itself, was relative, particular, and determined by historical context.¹⁴ It was inadvisable, on the historicist view, to abstract what are essentially local and variable cultural constructs and to represent them as holding for humanity in general. It is for this reason that the Italian intellectual Benedetto Croce (1866-1952) defined historicism broadly as an “affirmation that life and reality are history alone,”¹⁵ and not the result of absolute or universal “natural” laws.

Given that a range of different and often contradictory meanings have been ascribed to “historicism,”¹⁶ it is urged that the term should be thought of less as a uniform intellectual tradition and more as an epistemological orientation. As Beiser has suggested, to “historicize” one’s thinking is merely to recognize that law, like everything in the human world is made by history.¹⁷ For the historicist, the essence or identity of everything, including law, is entirely the product of the particular historical processes that brought it into being.¹⁸ While it is not possible to attain a comprehensive knowledge of those processes, it is possible to shed some light on them by identifying parallels and points of intersection in the historical development of a range of disciplines such as philosophy, literature, art or other aesthetic disciplines. Those points of commonality speak to underlying intellectual and cultural currents which exert a formative influence even if they are difficult to account for empirically. The objective of historicism is to situate one type of cultural development (i.e. the formulation of legal doctrine) within a

¹⁴ Frederick C Beiser, *The German Historicist Tradition* (Oxford: Oxford University Press, 2011) at 1-2.

¹⁵ Benedetto Croce, *History as the Story of Liberty* (London: Allen & Unwin, 1941) as cited in Christopher Thornhill, “Historicism” in the *Routledge Encyclopedia of Philosophy* (London: Routledge, 1998), IV, at 445.

¹⁶ For an overview of the different intellectual traditions which have been described as “historicist,” see Thornhill, *ibid* at 443-446.

¹⁷ *Supra* note 14 at 2.

¹⁸ *Ibid*.

broader context of intellectual development in order to deepen understanding of law as culture.

It is critical to appreciate, however, that by referring to historical “processes” this thesis is not invoking forms of historicism which incorporate metaphysical claims about historical progress or history’s ultimate ends. A range of philosophies that have been described as “historicist” have suggested that the acquisition of historical knowledge is necessary in order to uncover general laws of history in a metaphysical sense. For instance, both Hegel and Marx saw history as a process of “dialectical” development toward a particular end.¹⁹ On a dialectical reading, any historical subject would be analysed with a view to its situatedness in the progress of history toward its ultimate ends. Forms of historicism suggest dialectical or other fixed laws or patterns of historical development, including but not limited to Hegel and Marx, are not relied on in this thesis. To the contrary, the historicism used here repudiates all metaphysical claims, and rejects the suggestion that the study of history can have a predictive power.

References to historical “processes” are above all meant to indicate a “holistic” interpretation of law as organic to cultural history. As a basic precept of early legal historicism, interpretive “holism” suggests that for all aspects of human anthropology, including law, the cultural “whole” is prior to its parts and irreducible to them.²⁰ On a holistic view, then, a given legal rule is not to be regarded merely as a singular, autonomous element, but one which derives its very meaning from the broader social and historical context of which it is a part. This is not to say that the “whole” – be it society, epoch or culture generally – is to be thought of as an aggregate or composite of otherwise autonomous parts, but rather as a unity determining the essence of its parts.²¹ In

¹⁹ Hegel’s conception of the dialectical development of history is often described as involving three stages: a thesis gives rise to an antithesis which contradicts the thesis, and the resolution of the tension between the two yields a synthesis. For Hegel, such development took place in *geist*, a concept associated with the workings of the human mind. The real world merely reflected in an external, phenomenal sense changes in *geist*. In contrast, Marx argued that dialectic development took place primarily in the material world, and that development was reflected in human thought. See Anthony Kenny, *The New History of Western Philosophy* (Oxford: Oxford University Press, 2010) at 585-586 and 769-773.

²⁰ *Supra* note 14 at 4-5.

²¹ *Ibid.*

contemporary terms, this project may be said to embrace a deeply “relational” approach to interpreting law. A holistic approach assists comparative analysis by relating the operation of positive law to established norms and entrenched modes of reasoning.

In order to give some form to the cultural “whole” in which law is embedded, the German jurist Friedrich Karl von Savigny (1779-1861) used the term “*Volksgeist*,” or the “spirit” of a given people. While that term is now considered antiquated given its methodological obscurity and somewhat mystical associations, its basic methodological function is served by what are now referred to as “contextualist” approaches to intellectual and cultural history. As Mathias Riemann has written, the notion of *Volksgeist* was essentially a cultural notion,²² and “culture” for Savigny and early legal historicists was seen not so much as an anthropological term as an intellectual one.²³ The purpose of the *Volksgeist* concept was to attune legal methodology to the formative influence of history and the intersectionality of law with other intellectual disciplines, given their situatedness within a larger context. It is here argued that through assiduous study of the intellectual history that may reasonably affect the operation of the legal instrument being studied, (be they linguistic, aesthetic, or otherwise) meaning may ascribed to given legal rules in way that recognizes their inextricability from culture.

While unempirical, a holistic or contextualist interpretation need not be excessively broad or ill-focused. Legal historicism has long been concentrated on the study of “discourses.” By referring to “context,” an historicist in fact signals an effort to analyse what Jacco Bomhoff defined as “the system of words and concepts within which [a] relevant community of disputants moved at [a] relevant time.”²⁴ In this thesis, historical sources are analysed with a view to shedding light on the historical development of relevant discourses. This requires knowledge of the way in which particular language is used in conveying certain concepts, for linguistic choices are in every temporal period leveraged to “perform rhetorical and paradigmatic functions

²² Mathias Reimann, “Nineteenth Century German Legal Science” (1990) 31 BCL Rev 4 at 853.

²³ *Ibid* at 854.

²⁴ Jacco Bomhoff, “Comparing Legal Argument” in Maurice Adams and Jacco Bomhoff, eds, *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012) at 81.

related to the conceptualization and conduct of politics.” This thesis assumes that proportionality as a matter of positive law should be analysed with the understanding that it is subject to the influence of locally variable legal “grammars,” which can only be apprehended through familiarity with the intellectual and cultural context of the jurisdiction in which it is applied.²⁵

This methodology can be contrasted with what has been called an “abstracting” or “analytic” approach to comparative law. Such approaches attempt to filter out what is historically and culturally peculiar to a constitutional text in order to facilitate a comparative analysis of solutions to legal problems.²⁶ While such an approach may be suited to comparative law with an explicit reform or advocacy objective, it is not appropriate for a project such as this, which is oriented to developing understanding rather than reform of the law. It suggested, however, that reform-oriented comparative scholarship might benefit from an effort to read law on its own terms, as embedded in a context of particular historical, political and social forces.

Accordingly, doctrinal sources are used in this thesis in an expository, rather than evaluative or critical manner. For the purposes of this analysis, the word “doctrine” is used in such a way as to reflect its Latin root “*doctrina*,” connoting “instruction, knowledge [and] learning,”²⁷ rather than critical engagement. Again, the analysis is not reform-oriented but concerned with what may be called “legal science in its narrow and most basic sense.”²⁸ Thus, prevailing juridical structures and modes of legal reasoning in each jurisdiction are not only the object of the inquiry, but also as its (principle) theoretical frame of reference.²⁹ In sum, this thesis adopts a comparative method that strives for the interpretation of laws individually and in detail, coupled with a thorough-

²⁵ *Ibid* at 82.

²⁶ Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2007) at 2-4..

²⁷ Terry Hutchinson and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17 *Deakin LR* 83 at 84.

²⁸ Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) at 6.

²⁹ Pauline Westerman, “Open or Autonomous: The Debate on Legal Methodology as a Reflection on the Debate on Law” in M v Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011) at 87.

going effort to analyse the ways in which the operation of law is affected by unarticulated norms related to what might be called constitutional culture.

Chapter 2: How Proportionality is Shaped in its Application by Established Modes of Legal Reasoning

i) Introduction

In Canada and the French Republic, the constitutionality of legislative limitations on freedom of religion is determined by the use of a proportionality test in its standard triadic formulation. However, application of the test's substantive requirements proceeds very differently in each jurisdiction. Canadian courts tend to apply proportionality's adjudicative machinery in a formal, three-step structure, with each step initiating a searching and thorough-going inquiry into facts of the case. In contrast, the French Constitutional Council applies the test by way of a distinctively terse and syllogistic form of legal reasoning, whereby application of each requirement is often perceptible only in references to "*disproportion manifeste*," "*atteintes excessives*," or "*mesure approprié*."¹ Facially, the difference between Canadian and French modes legal reasoning are stark, and must be accounted for before a comparative analysis of the legal texts and case law relevant to this thesis can be undertaken.

The aim of this chapter is to set the stage for analysis of legal doctrine by explaining why application of proportionality in Canada is so facts-oriented, while in France it is essentially syllogistic. In doing so, light will be shed on how the use of proportionality is affecting a degree of convergence in rights adjudication across common law and civilian jurisdictions. It may be recalled that proportionality is a "hybrid" exercise, involving inductive, fact-sensitive reasoning and deduction from general principles.² The facts of a case are invariably measured against general principles. It will be argued that the difference between Canadian and French application of the test is a matter of the extent to which each legal system focuses on facts or principles, both of which are, again, inherent in the test. That orientation is shaped largely by traditions of legal reasoning prevailing in each jurisdiction.

¹ Daphne Akoumianaki and Georges Katrougalos. "L'application du principe de proportionnalité dans le champ des droits sociaux" (2012) 5 *Revue du droit public et de la science politique en France et à l'étranger* 1221 at 15-16.

² See for example Eric Engel, "The History of the General Principle of Proportionality: An Overview" (2012) 10 *Dartmouth LJ*.

In this chapter, it will be argued that modes of legal reasoning in Canada and French Republic are predicated on very different conceptions of the relationship of facts to legal principles, and that this difference is due to historical divergence in the normative underpinnings of legislative supremacy. Indeed, before the incorporation of *a posteriori* judicial review for rights violations in Canada and the French Republic, both jurisdictions had histories of what may be called legislative supremacy. But as this chapter will argue, the normative bases of legislative authority in each jurisdiction were (and arguably remain) different. Those historically-contingent differences account for divergent conceptions of the judicial function and have powerfully shaped accepted methods of judicial reasoning. Thus, while proportionality always involves both fact-dependent induction and principle-based deduction, prevailing common law and civilian norms in each jurisdiction have heavily influenced its application.

This chapter proceeds in five sections. First, the normative bases of legislative supremacy in Canada are assessed. This involves an inquiry into the historical emergence of the notion of legislative sovereignty as an institutional concept. The second section examines the French principle of national sovereignty in historical perspective. The third and fourth sections of this chapter detail how established practices of judicial review for jurisdiction issues in each country influenced the incorporation of judicial review for rights violations on a proportionality standard. Finally, the fifth section reveals an ongoing convergence in the way in which proportionality is applied in each jurisdiction. It is concluded that differences in application are deeply-rooted but whatever substantive differences they yield are decreasing as a result of ongoing convergence.

ii) The Nature of Legislative Supremacy in Canada

Any account of legislative sovereignty in Canada must concentrate heavily on the development of parliamentary institutions in Britain. The preamble of the *British North America Act, 1867* (the “*BNA Act*”), prescribed that Canada is to have a constitution “similar in principle to that of the United Kingdom.”³ Indeed, the Supreme Court of

³ Now the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982) c. 11, pmbl.

Canada has held that the preamble of the *BNA Act* “gives expression to the nature of the legislative bodies that were continued or established by it.”⁴ To discern the normative bases of legislative sovereignty in Canada, therefore, reference must be made to the competence “historically ascribed” to the Parliament at Westminster.⁵ It is critical to note, however, that the “nature” of such authority is not coterminous with its scope. Canadian legislatures were long bound by jurisdictional strictures set by the U.K. Parliament. But within such limits, legislative sovereignty in Canada may be said to be akin to that enjoyed by Westminster in terms of the normative bases from which it derived its legitimizing force.

The legislative sovereignty to which federal and provincial legislatures in Canada may lay claim is a form of what may be called “inherent” sovereignty. That is, it is generally recognized that the British Parliament is not representative of a sovereign people, but enjoys sovereignty in its own right, in the sense that its authority to legislate neither derives from nor depends on popular consent. In other words, Parliament is not a “trustee” of its electors.⁶ Rather, the term “parliamentary sovereignty” in the U.K. connotes institutional independence and the right to make law without being fettered by external quarters. This jealously-guarded institutional independence was not deduced from some higher principle of natural law, but emerged slowly and half-consciously through a process of gradual historical development. The “nature” of the legislative supremacy, which the *BNA Act* sought to retain is thus deeply historical, and in the U.K., legitimated by appeals to inherited right and precedent.

Indeed, as this section will explain, the “nature” of parliamentary sovereignty in Canada and the U.K. (in a normative sense) remains contentious. The most that can be discerned from constitutional scholarship, taken in historical perspective, is a shifting orientation between polarities of strict parliamentary sovereignty and what may be called

⁴ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] SCJ No 2, 100 DLR (4th) 212 at para 93.

⁵ The Supreme Court of Canada has also said that the preamble evinces “the clear and stated intention of the founders of our country that Canada *retain* the fundamental constitutional tenets upon which British Parliamentary democracy rested.” *Ibid* at paras 112 and 116.

⁶ Elizabeth Zoller, *Introduction to Public Law: A Comparative Study* (Leiden, Netherlands: Koninklijke Brill NV, 2008) at 105.

“ancient” or “common law constitutionalism.” Simply put, while the former gives parliament an absolute peremptory right to make law, the latter situates every legal text – whatever its formal status – within a larger constitutional structure. As T.R.S. Allan put it, legislative competence within a common law constitution is less a right to “make” law, than a right to participate in its adaption.⁷ That is, laws may be enacted and applied, but only within a range of “reasonableness,” within an organic constitutional framework. To be sure, these are merely “orientations” in legal scholarship which have long ebbed and flowed, but they do lend insight into the “nature” of parliamentary sovereignty in British and Canadian constitutionalism.

While it is beyond the limited scope of this inquiry to undertake a thorough-going review of the ascendancy of strict parliamentary sovereignty relative to various forms of “ancient” or “common law” constitutionalism, some attempt must be made to give a sense of this development in order to convey the true “nature” of legislative sovereignty as contemplated by the *BNA Act* in 1867. This chapter thus proceeds with a brief and necessarily reductionist account of the emergence of parliamentary sovereignty since the period 1800 to 1830 when common law constitutional thought last crested in English constitutional scholarship. It is argued that this period, referred to by A.V. Dicey as an era of “Old Toryism” or “legislative quiescence,” yielded to a gradual rise of parliamentary sovereignty that would not abate until the late-twentieth century. An analysis of the emergence of parliamentary sovereignty in this period will reveal a form of legislative supremacy that is less a premise of constitutional order, than a postulate of it.

To begin, the work of English jurists and legal theorists in the period 1800 to 1830 must be read in light of a broader reaction against the strict rationalism of the French Revolution of 1789-99. As Maniquis has written, for late-Georgian constitutional theorists, the violence of the Jacobin project was something so unsettlingly new, so as not to fit within the normal “dystoles and systoles of [the] organic rhythm” of human life.⁸

⁷ TRS Allan, “Text, Context, and the Constitution: The Common Law as Public Reason” in Douglas E Edlin, ed, *Common Law Theory* (Cambridge: Cambridge University Press, 2007) at 186.

⁸ Robert M Maniquis, “Holy Savagery and Wild Justice: English Romanticism and the Terror” (1989) 28 *Studies in Romanticism* 365 at 370-371.

Writers from Burke, to Halam, to John Scott, Lord Eldon reacted against the puritanical rationalism they attributed to the Revolution by extolling an “ancient constitution” which they felt had grown in a decidedly uncontrived way. In the distinctive tones of British Romanticism, they appealed to antiquity, indulged heavily in organic metaphors, and wrote in forms (notionally) construed in local and rural terms. As A.V. Dicey later observed, for these writers, the English constitution was “a fabric more subtly wrought than any work of conscious art.”⁹ In their view, it had been built up “much as bees construct a honeycomb,”¹⁰ through slow, half-conscious growth, rather than discursive reason.

As Leo Strauss put it, the turn of the nineteenth century affected a kind of “emancipation of sentiment and instinct from reason.”¹¹ The era’s juristic fixation on things “organic” was part of this preoccupation with feeling, for by definition, the sensory required tact or a certain closeness. The focus, then, was not on the object studied *per se*, but on how it was experienced by an inquiring mind. Accordingly, the work of jurists and legal theorists in the late-Georgian period was markedly emotive in its tenor. The sort of history which they expressed was deeply subjective and ideational; that is, premised on a view that it is ideas that make history and that ideas must be imparted aesthetically. For example, Burke’s *Reflections on the Revolution in France* is infused with lofty repetitions of the hereditary principle in English constitutionalism, with only cursory reference to its actual historicity.¹² This sort of legal scholarship yielded a nebulous yet deeply felt form of ancient or common law constitutionalism which flattered the period’s prevailing institutional norms.

⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed, (London: MacMillan, 1915) at cxxvi.

¹⁰ Henry Hallam, *History of Europe During the Middle Ages* (London: The Colonial Press, 1899) at ii.

¹¹ Leo Strauss, *Liberlism: Ancient and Modern* (Ithica, NY: Cornell University Press, 1989), at 17.

¹² Edmund Burke, *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event*, by Conor Cruise O’Brien (London: Penguin Books, 2004).

The effect of such appeals to organic growth and heredity was a tendency to recognize “rights” as vested in a multiplicity of institutions.¹³ For example, Burke felt that the British constitution was predicated on an institutional balance arrived at by “slow, but well sustained progress.” By resisting excessive speculation, he wrote:

[o]ne [institutional] advantage is as little as possible sacrificed to another. We compensate, we reconcile, we balance. We are enabled to unite into a constituent whole the various anomalies and contending principles that are found in the minds and affairs of men. From hence arises, not an excellence in simplicity, but one far superior, an excellence in composition.¹⁴

This short excerpt from Burke’s *Reflections*, written to a young partisan of the French Revolution,¹⁵ captures both the emotive tenor of the era’s writing, and the essence of “ancient” or “common law” constitutionalism, which sees legislative authority as embedded within a larger body of customary and common law principles.

A century later, Dicey would argue that constitutional scholarship in the years 1800 to 1830 was of little use to modern legal science given the extent to which it was tied-up in a dialectic with French Jacobinism.¹⁶ In his view, English jurists and legal theorists had been so preoccupied with the disorder and blood-letting of the Revolution, that they had taken up as their “proper task” the work of “pacification.”¹⁷ By extolling the virtues of an “ancient constitution” they had reinforced in the law the late-Georgian and Regency era *status quo*. It was in part from the holy awe with which they had dealt with their subject that Dicey sought to distance himself in his 1885 treatise *An Introduction to the Study of the Law of the Constitution*. Urging his readers to eschew the “religious

¹³ In his *Reflections*, Burke wrote: “We have an inheritable crown, an inheritable peerage, and a House of Commons and a people inheriting privileges, franchises, and liberties from a long line of ancestors.” *Ibid* at 170.

¹⁴ *Ibid* at 160.

¹⁵ Burke wrote *Reflections on the Revolution in France* in 1790 in response to a letter he received from the French député Charles-Jean-François Depont who had written Burke asking for his impressions of events in France since the storming of the Bastille on July 14, 1789.

¹⁶ AV Dicey, *Introduction to the Relation between Law and Public Opinion in England During the Nineteenth Century*, by Richard VandeWetering (Indianapolis: Liberty Fund Inc, 2008) at 52-53.

¹⁷ *Ibid* at 56.

enthusiasm of Burke,” and the “fervent self-complacency of Hallam,” Dicey proposed a “modern view of [the] constitution.”¹⁸ His work would reflect the high point of a gradual shift from a methodology imbued with British Romanticism to a form of “positivism” according to which law as to be regarded as a scientific discipline.

Again, this shift was gradual, and part of broader changes in intellectual and cultural life. Changes in philosophical and especially epistemological concerns, strongly affect notions of what makes for sound methodology. As Richard Bowser and Stanley McQuade have suggested, in the mid-1800s, both the rational and the Romantic impulse yielded increasingly to an empiricism associated with the physical sciences.¹⁹ Indeed, the air of objectivity which Dicey sought to give his *Law of the Constitution* in 1885 reflected the spirit of an age which, as Bernard Hibbits put it, equated the “scientific” with “the ‘modern,’ the ‘good,’ and the ‘true.’”²⁰ His focus on the empirical precluded reliance on either the strict rationalism of natural law, or modes of thinking enamoured of subjective human feeling. Again, methodological priorities reflect the ends to which legal scholarship is to be put, and those ends are related to culture. In Dicey’s age, legal scholarship was to assist in progress of an empirical kind, which did not fixate on ideal standards.

While the constitutional theories of the late-eighteenth century had been impressive in their theoretical depth, the “methodologies” they yielded were (by later standards) shallow and confused. If theorists had sought truth in “reason,” and others had sought it in the subjective experience, after about 1830, legal scholars self-consciously demurred on questions of the law’s normativity. They instead focused on the law’s black letter as an empirically-verifiable object of study from an objective standpoint.

¹⁸ Dicey, *Law of the Constitution*, *supra* note 10 at cxxvi.

¹⁹ Richard T Bowser and J Stanley McQuade, “Austin’s Intentions: A Critical Reconstruction of his Concept of Legal Science” (2006) 29 *Campbell Law Rev* 46 at 46.

²⁰ Bernard J Hibbits, “The Politics of Principle: Albert Venn Dicey and the Rule of Law” (1994) 23 *Anglo-American Law Review* 1 at 7. Dicey wrote a series of articles on the subject of legal education in which he repeatedly referred to law as a “scientific” discipline. See AV Dicey, “Legal Education” (1871) 25 *MacMillans* 115; AV Dicey, “The Teaching of English Law at Harvard” (1899) 76 *Contemp Rev* 742; AV Dicey, “The Study of Jurisprudence” (1800) 5 *L Mag & Rev* 382; AV Dicey, “Law Teaching, Oral and Written” in Hebert Hensley Henson, ed, *A Memoir of the Right Honourable Sir William Anson* (Oxford: Clarendon Press, 1920) 84.

Accordingly, they elevated methods of “doing” legal science to a higher level of concern. A new emphasis was placed on the systematization of positive law, either as an end in and of itself, or for the more forward-looking aim of reforming the law along utilitarian lines. What is notable is that is a general retreat from theory and speculative approaches to the law in favour of what was objectively knowable. Still, as with any cultural development, traces of past practice remained discernable within the discipline.

The subtle pull exerted by the natural law and Romantic eras remained evident. This was particularly so in the role played by history within legal science. Positivists like Jeremy Bentham and John Austin, both utilitarians,²¹ eschewed the use of historical insight, dismissing “what directions of human effort” went into the law’s creation as “irrelevancies.” Neither felt that the work of a legal scholar should extend beyond the objectively “observable phenomena” of the law’s black letter.²² In contrast, as Hoeflich has documented, the historicist methodology developed by the German jurist Friedrich Carl von Savigny exerted a formative effect on work of English legal scientists, including John Phillimore, William Burge, and Dicey.²³ While Savigny also sought to raise jurisprudence to the status of a science, he felt that doing so involved stressing the law’s local origins and historical context.²⁴ For Savigny, assiduously systemizing the law as an organic and historically-contingent whole was meant to sustain order, not to facilitate reform along utilitarian lines.

Thus, in spite of the discipline’s new objectivity, legal scholarship remained affected by the polarities of the rational and the Romantic. Between the two, Dicey’s *Law*

²¹ Note that Bentham was an act utilitarian, while Austin was a rule utilitarian. Rule utilitarians hold that an action is morally right if it conforms to a rule that leads to the greatest good. In contrast, act utilitarians judge an act in terms of the consequences of that act alone. See Kent Greenwalt, “Too Thin and Too Rich: Distinguishing Features of Legal Positivism” in Robert P George, ed, in *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) at 25.

²² Lon L Fuller, *The Anatomy of Law* (New York: Praeger, 1968) at 160.

²³ Michael H Hoelich, “Savigny and his Anglo American Disciples” (1989) 37 *Am J Comp L* 17 at 18.

²⁴ Savigny felt that to assume that there is a natural law that transcends history, its specific time and place, is only an “hypostatis”, an illegitimate abstraction of positive or customary law from its local origins and context. See Frederick C Beiser, *The German Historicist Tradition* (Oxford: Oxford University Press, 2011) at 216.

of the Constitution was clearly closer to the unhistorical, reform-oriented end of the spectrum. While replete with historical references, his seminal work was very much a positivist treatise, aimed at showing, among other things, the “existence” of Parliamentary sovereignty “as a legal fact.”²⁵ To be sure, as Hoeflich has suggested, Dicey was not unaffected by historicist trends in legal science, but his use of historical methodology, particularly in his *Law of the Constitution*, was quite secondary. His use of historical sources was aimed at substantiating the “fact” of legislative sovereignty rather than legitimating it in a normative sense. This methodological choice was of course a result of the ends to which Dicey’s work was directed.

In his view, his task as a legal scholar was primarily to analyse and codify formal legal rules so as to facilitate pedagogy and a “renovation of legal literature.”²⁶ He accordingly sought to cast his work as that of “neither a critic, nor an apologist, nor of an eulogist” but merely of an “expounder.”²⁷ Situating his work within the school of Bentham, a man he extolled as a “genius of the rarest quality,”²⁸ Dicey felt that law could be thought of mathematically, and the greatest good secured by way of a utilitarian calculus. The “Orthodox” or “Diceyan” method of constitutional theory has thus been described as “analytical, formalist, scientific, mechanical, descriptive and positivist,”²⁹ with little heed given to the normative questions which had so concerned jurists in the late-Georgian period. In Dicey’s view, an era of “Benthamite Individualism” had eclipsed the age of “Old Toryism” or “legislative quiescence” and affected a cleansing of legal scholarship of its Romantic intonations.

A self-styled “unrepentant Benthamite,”³⁰ Dicey’s work typified the utilitarian school in its methodological preoccupation with systematizing and codifying the law.

²⁵ Dicey, *Law of the Constitution*, *supra* note 10 at 3.

²⁶ AV Dicey, *Can English Law Be Taught At The Universities? An Inaugural Lecture, Delivered At All Souls College, 21st April 1883* (London: Macmillan & Co., 1883) as cited in Matthew Lewans, “Rethinking the Diceyan Dialectic” (2008) 58 UTLJ 75 at 80-81.

²⁷ Dicey, *Law of the Constitution*, *supra* note 10 at cxxvii.

²⁸ Dicey, *Lectures*, *supra* note 14 at 93.

²⁹ Mark D Walters, “Dicey on Writing the Law of the Constitution” (2012) 32 Oxford J Legal Stud 21 at 22.

³⁰ Richard A Cosgrove, *Albert Venn Dicey: Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980) at 184.

Admirers of Bentham, Dicey included, sought to restate the law in prospective, ordered, textual instruments. This meant that *Law of the Constitution* took the form of a deliberate effort to systematize a body of law that had to that point remained self-consciously unsystematic. Dicey set out to “state” the laws of the constitution, to “arrange them in their order,” to “explain their meaning,” and to show their “logical connection.”³¹ He proceeded to identify three principles of British constitutionalism, of which parliamentary sovereignty was “most dominant.” For Dicey, the most basic principle of the constitution was that of an “absolutely sovereign legislature” having the “right to make or unmake any law whatever.” This “unlimited legislative authority” operated in conjunction with institutional convention and the rule of law, but was otherwise unnuanced.³²

In summary, after about 1830, the discourse of ancient or common law constitutionalism was gradually displaced by the principle of strict legislative supremacy. This was due in large measure to methodological pressures associated with the rise of legal science. Again, methodological choices depend on the questions asked by a scholar, which are themselves embedded in intellectual and culture life. The epistemological concerns of the age with which Dicey is associated yielded particular methodological priorities, which in turn affected the substance of the law. Restricting itself to the systematization of objectively verifiable legal rules, the methodology of legal science could not account for – indeed, it sought not to account for – the unempirical claims of late-Georgian constitutionalism. To be sure, Parliamentary sovereignty was a principle which emerged slowly and cannot be comprehensively traced here.³³ It is sufficient to note for the purposes of this analysis, that the mid-nineteenth century, methodological pressures yielded a principle of strict parliamentary sovereignty as a key postulate of constitutional order in the U.K.

The “nature” of legislative supremacy in Canada was derived from traditions of Parliamentary sovereignty in Britain. In neither country was the absolute right of the legislature to make law a textually-entrenched premise, from which all other

³¹ Dicey, *Law of the Constitution*, *supra* note 10 at cxxvii.

³² *Ibid* at 3-4.

³³ For a comprehensive account of the historical development of legislative supremacy in the United Kingdom, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010).

constitutional realities were necessarily deduced. To the contrary, as this section has made clear, legislative sovereignty was a postulate arrived at rather more inductively, through interpretation of the institutional realities of British constitutionalism in a given historical period. That interpretation was itself heavily influenced by changing norms as to what constitutes sound epistemology. As the rest of this chapter will indicate, the consequence of this particular historical development, is that legislative supremacy in Canada was comparatively easy to abridge through an expansion of the power of judicial review in the last-quarter of the twentieth century. Again, the legislature's authority was long subjected to shifting institutional balances. Therefore, the "nature" of legislative supremacy in Canada, quite apart from its scope, was highly amenable to the incorporation of judicial review.

iii) The Nature of Legislative Supremacy in France

The nature of legislative sovereignty in France is textually-prescribed in Art. 3 of the 1789 *Declaration of the Rights of Man and Citizen* (the "DDHC") and Art. 3 of the *Constitution of 4 October 1958*, both of which are in force (*en vigueur*) as constitutional instruments of the Fifth Republic.³⁴ It is important to emphasize that the legal force of these articles derives not from their black letter as constitutional texts, but from the extent to which they reflect "republican principles" (*principes républicains*) of constitutional value. In French constitutionalism, the textual instrument is not the "source" for a given principle *per se*, but a *locus* of its transcription from centuries of republican literary, philosophical and aesthetic representation. The so-called "constitutional value" of such principles derive from their status as norms at the apex of a deductive system of truths in development since the French Enlightenment. Like all principles of constitutional value, those respecting legislative authority are to be regarded as innate or *a priori* truths, knowable by the light of human reason and irreproachable as a matter of natural law.

³⁴ "La souveraineté nationale appartient au peuple; ses représentants et par la voie du référendum; "[a]ucune section du peuple ni aucun individu peut s'en attribuer l'exercise." See *Déclaration des Droits de l'Homme et du Citoyen de 1789* at Art 3 and *Constitution du 4 octobre 1958, Version consolidée au 21 juin 2015* at Art 3, online: Legifrance <<http://www.legifrance.gouv.fr>>

Article 3 of the 1958 Constitution iterates *verbatim* Art. 3 of that of 1946 (now obsolete), stating that “National sovereignty vests in the people.” It proceeds to prescribe that the people will exercise its sovereignty through “their representatives and by means of referendum.” Finally, in both documents, the principle is supplemented by the proviso “no section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof.”³⁵ Thus, the effect of the 1946 and 1958 sovereignty clauses is to reinforce the principle of sovereignty set out in Art. 3 of the 1789 *DDHC*. That is, that “the principle of all sovereignty resides essentially in the Nation,” and that “[N]o corporate body, no individual may exercise any authority that does not emanate expressly from it.” Thus, it is a principle of constitutional value in the Fifth Republic, quite apart from its formal constitutional texts, that sovereignty resides inalienably in the “nation,” and is to be exercised by its representatives to the exclusion of all other institutional actors.

Given the extent to which republican principles are derived from literary, philosophical, and artistic disciplines, it should be unsurprising that the principle of national sovereignty enjoys a theoretical depth that belies the historical ephemerality of French constitutional instruments. Indeed, since the *DDHC* of 1789 was incorporated as the preamble of the constitution of 1791,³⁶ the sovereignty principle has infrequently enjoyed a status which may be considered as legally operative.³⁷ After 1791, the principle of sovereignty residing in the nation was in declining measures sustained by the

³⁵ “Le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu peut exercer d’autorité qui n’en émane expressément.” *Constitution du 4 octobre 1958, ibid*, and *Préambule de la Constitution du 27 octobre 1946*, online: Legifrance <<http://www.legifrance.gouv.fr>>

³⁶ The *Acte constitutionnel de 30 septembre 1791* was France’s first written constitution after the collapse of absolute monarchy. The *Déclaration des Droits de l’Homme et du Citoyen* of 1789 was incorporated as its preamble. It fell out of disuse on 22 September 1792 with the declaration of the first French Republic (1792 – 1804).

³⁷ It should be cautioned that what it means for a constitutional provision to be “legally operative” has changed much since the end of the eighteenth century. Modern notions of “judicial review,” while frequently traced to the decision of the Supreme Court of the United States in *Marybury v Madison*, 5 US 137 (1803), arguably did not take on anything like their present meaning until the mid to late-nineteenth century. Early French constitutional provisions were certainly intended to be hortatory and aspirational in their nature, rather than legally enforceable by an independent judiciary in the modern sense.

constitutions of 1793, 1795, and 1799³⁸ until being displaced by the adoption of the 1804 constitution, which established the First French Empire. While the constitution of the Second French Republic (1848-1851) reinstated sovereignty in the nation to the exclusion of individuals or factions, it too was rendered obsolete by the establishment of the Second French Empire in 1851. It was not until the 1946 constitutional that national sovereignty again had a textual basis in a constitutional document, given that the Third Republic (1870 – 1940) lacked a formal constitutional structure.³⁹

Indeed, as Martin Rogoff has suggested, national sovereignty is one of many republican principles which have found their true expression in a vast body of “literary, philosophical, and political works,”⁴⁰ extending at least as far back as the Enlightenment. In Rogoff’s view, the French Revolutionary era (1789-1804) was in essence an “apotheosis of the Law [*la Loi*],” a development yielded by a century of intense literary criticism of Ancien Régime institutions by such luminaries as Montesquieu, Rousseau, Mably, and Diderot. To be sure, in French “*la Loi*,” refers to statutory law, and does not connote constitutional norms or general principles of justice (those may be implied by the

³⁸ The *Acte constitutionnelle du 24 juin 1793*, also known as the *Constitution de l’An I* or the *Constitution Montagnard* was in effect until suspended indefinitely on 10 October 1793 when the a decree from the Committee for Public Safety declared that “The Provisional Government of France is revolutionary until there is peace.” See Micahel Kennedy, *The Jacobin Clubs in the French Revolution: 1793-1795* (New York, Berghahn Books, 2000) at 53. The *Constitution de août 1795 (Constitution de 5 fructidor an III)* established France as a bicameral directorial republic. The constitution of the Directory was abolished in 1799 and replaced by the *Constitution de 13 décembre 1799* (also called the *Constitution de 22 frimaire an VII*) which established the French Consulate (1799-1804). The Consulate was a more conservative and authoritarian republic with a three-person executive. The *Constitution de 10 mai 1802 (Constitution de 15 thermidor an X)* conferred near ditatorial power on Napoleon Bonaparte as First Consul for Life. Finally, the *Constitution de 18 mai 1804 (Constitution de 28 floréal an XII)* did away with republican notions of national sovereignty and inaugurated the First French Empire with Bonaparte as Emperor.

³⁹ The three principle laws which organized the Third Republic are: *la loi du 24 février 1875* which concerned the organization of the French senate, *la loi du 25 février 1875* which dealt with the organization of the government, and *la loi du 16 julliet 1875* which clarified aspects of the operation of the government. See Leslie Derfler, *The Third French Republic, 1870-1840* (France: Van Nostrand, 1966).

⁴⁰ Martin A Rogoff, *French Constitutional Law: Cases and Materials*, 2nd ed, (Durham, North Carolina: Carolina Academic Press, 2014) at 8-9.

term “*le droit.*”)⁴¹ Therefore, by suggesting that the period of 1789-1804 represented an “apotheosis of the law,” Rogoff was referring to the revolutionary ascendancy of strict legislative supremacy and the concomitant decline of Ancien Régime institutions.⁴² The implication of an “apotheosis” in this context is that legislative authority, at least in theory, attained primacy after a long process of becoming, akin to a deification.

To be sure, in this thesis, any discussion of the literary, philosophical and aesthetic traditions from which the sovereignty principle emerged must be somewhat cursory. It may generally be said, however, is that the French Enlightenment was attended by a search for first principles and origins in all fields of human endeavour. Accordingly, for most forms of French architecture, art and philosophy developed during the eighteenth century, the effects of a “neo-classical” preoccupation with the “true style of the ancients” is intelligible.⁴³ This is no less true of philosophy where an ideal of the “citizen” inspired by the Roman Republic became an objective of scholarly fixation. The public “*citoyen*” was stoic, austere, and dismissive of worldly vanities. Indeed, it may be said that literary and aesthetic trends in late-eighteenth century France reflected a sustained deliberation on the association between primitive simplicity and virtue. It is an association that remains at the heart of sovereignty in French republican thought.

Arguably, the most influential writer on such matters was Jean-Jacques Rousseau (1712-1788). In his view, man, in a pre-social “state of nature,” had been happy and good, but had been corrupted by social institutions. The social institutions of mid-eighteenth century France, he contended, were sustained by the conceit of “*amour propre*,” or an acute awareness of, and regard for, oneself in relation to others.⁴⁴ The impulse to seek advantage relative to others had so corrupted man, Rousseau held, that man had become defined by relations of inequity. He was materially and psychologically dependent on other men, and as such, bound by laws to which he did not consent.

⁴¹ Martin A Rogoff, “The French Revolution of 1789-1804” as cited in Rogoff, *ibid* at 47.

⁴² See Peter S Campbell, “Absolute Monarchy” in William Doyle, ed, *The Oxford Handbook of the Ancien Régime* (Oxford: Oxford University Press, 2012) at 16-17.

⁴³ Grafton, Most, and Settis, eds. *The Classical Tradition* (Cambridge, Mass: Harvard University Press, 2010) at 629.

⁴⁴ See for example Jean-Jacques Rousseau, *Émile, or on Education*, trans by Allan Bloom (Washington: Pegasus Books, 1979) at 67-8.

Rousseau thus began his 1762 treatise, *On the Social Contract* by declaring that “[m]an is born free, and everywhere is in chains.”⁴⁵ To be sure, the manacles which he decried were of a kind forged in the mind. For Rousseau, it was the mental bondage of “*amour propre*” which gave rise to inequitable relations. Accordingly, he urged, he who “thinks he is the master of others” would find himself “more enslaved than they.”

In order for man’s freedom to be “restored,” Rousseau wrote, man as an individual had to be governed by the general will (“*volonté générale*”). Since it was volition that infused human action with moral content, he reasoned, in order to be legitimately bound by a law in moral terms, the individual had to be active in the law’s authorship. To be free in civil society, the individual was thus obliged to join with others, as a citizen, in the work of self-government. Rousseau believed that if men gathered in a “single body,” a general will would be discernable to the extent that it referenced interests related to their “common preservation and general well-being.” The general will would be “so manifestly evident” that “only common sense [would be] needed to discern it.”⁴⁶ As Judith Shklar has written, the notion of general will “conveys everything [Rousseau] most wanted to say,” because it is a “transposition of the most essential individual moral faculty [volition] to the realm of public experience” reconciling individual freedom with civil society.⁴⁷

It must be emphasized, however, that for Rousseau, “general will” was not coterminous with “majority rule.” He felt that the counter-egoistic influence of a classically-inspired form of “civic virtue” was necessary to prevent government according to the self-interest of a majority of individuals taken in aggregate. What was required for man to be free was a “healing education” that relieved him from the bondage of *amour propre* and returned him to himself.⁴⁸ The education he contemplated was one

⁴⁵ Jean-Jacques Rousseau, *The Social Contract* (Bedford: St. Martin’s 1978) at 3.

⁴⁶ *Ibid* at 4.

⁴⁷ Judith N Shklar, *Men and Citizens: A Study of Rousseau’s Social Theory* (Cambridge: Cambridge University Press, 1969) as cited in Patrick Riley, ed, *The Cambridge Companion to Rousseau* (Cambridge: Cambridge University Press, 2001) at 124.

⁴⁸ *Émile*, *supra* note 44 at 3. *Émile* is a treatise on the nature of education and on the nature of man. He applies the novelistic device of a child named Émile and his tutor to illustrate how an ideal citizen might be educated. During the French Revolution, Émile served as the inspiration for what became a new national system of education.

that enabled “natural man” to survive corrupt society. In Rousseau’s view, man needed to rediscover “*amour de soi*,” a natural impulse for self-preservation which, guided by reason and empathy (“*pitié*”) yielded virtue. It is for this reason that education figured so strongly in Rousseau’s thought. The formative influence of civic virtue was required to draw the individual out of himself, and re-orient him to the general or common good. By definition then, the virtuous citizen was “non-particularist,”⁴⁹ and saw his good as co-extensive with the common good.

Rousseau’s *On the Social Contract* deeply influenced the drafters of the *DDHC* of 1789.⁵⁰ This was certainly true of the Abbé Emmanuel Joseph Sieyès (1748-1836),⁵¹ who authored the document’s sovereignty clause in Art. 3, and prescribed in Art. 6 that law must express the “general will.” In his highly influential pamphlet *What is the Third Estate?*, which was widely-circulated prior to the convening of the Estates General in 1789,⁵² Sieyès urged that the standing of clergy and nobility as separate “estates” be nullified and that all legislative authority be vested in a unicameral “national assembly.” Such a legislative body would give expression to the “general will,” which was, he wrote, the “source of all legality” as a matter of natural law.⁵³ He urged that within such a body, “private interests are bound to remain insulated” for self-government to be achieved.⁵⁴ Thus, Sieyès articulated a view of sovereignty that equated the pursuit of private interests

⁴⁹ See for example Patrick Riley, “Rousseau’s General Will” in Riley, *supra* note 56 at 124.

⁵⁰ For more on the influence of Rousseau over the National Constituent Assembly see Eric Thompson, *Popular Sovereignty and the French Constituent Assembly, 1789 – 1791* (Manchester: Manchester University Press, 1952) at 25-26.

⁵¹ Emmanuel Joseph Sieyès (1748-1836) was a Roman Catholic abbé, clergyman and political writer. He was one of the main political theorists of the French Revolution, and also played a prominent role in the French Consulate (1799-1804) and First French Empire (1804-1814/5). His pamphlet *Qu’est-ce que le tiers état* (What is the Third Estate?) became the *de facto* manifesto of the Revolution, helping to transform the Estates General into the National Assembly in July 1789.

⁵² The Estates General of 1789 was the first meeting since 1614 of the Estates General, a general assembly representing the French estates of the realm: the clergy (First Estate), nobility (Second Estate), and the commons (Third Estate).

⁵³ Emmanuel Joseph Sieyès, “Qu’est-ce que le tiers État?” as cited in Rogoff, *supra* note 41 at 258 – 262.

⁵⁴ *Ibid.*

with the seeking of advantage relative to others, an impulse which on its face frustrated the emancipatory purposes of political association.

In addition to the period's most influential philosophical tracts, the republican ideal of sovereignty residing in the "nation" was exalted in the visual arts. In the years of the National Convention (1792-1795) and Directory governments (1795-1799) in particular, Rousseau's sentiments were seized upon and reified by artists with a passionate imagination for antiquity, such as Jacques-Louis David, and his pupils, Jean-Germain Drouais, and Anne-Louis Girodet-Trioson. These artists set about re-constructing through visual representation the entire spectrum of admirable human qualities, from displays of virtue to corporeal beauty, in classical terms.⁵⁵ Calling upon the "noble simplicity and calm grandeur"⁵⁶ of antiquity as stylistic points of reference these artists ensured that aesthetic representation in the last years of the eighteenth century both reinforced the association perceived between civic virtue and self-government, and stressed the stylistic desirability of austerity and simplicity. In doing so, David and his disciples not only revolutionized French art, but embedded a particular vision of republican sovereignty in the national memory.

The republican notion of national sovereignty would be richly and fulsomely developed in a vast body of political, literary and philosophical works throughout the nineteenth century. Importantly, it remained a relatively stable concept given the rigour with which it was developed during the Revolutionary years. Indeed, in republican discourse, national sovereignty was recognized as an *a priori* truth, as a principle of natural law not requiring empirical confirmation. So basic and self-evident was the principle that it was understood as a premise from which all other constitutional realities were to be deduced. It was not, in contrast, a postulate of constitutional order, arrived at inductively, from scholarly attempts to make sense of or to legitimate their institutions. Were that the case, the principle may have been more vulnerable to different methodological pressures associated with different temporal periods. The principle of

⁵⁵ For a full account of these developments see Thomas Crow, *Emulation: David, Drouais, and Girodet in the Art of Revolutionary France* (New Haven: Yale University Press, 2006).

⁵⁶ Grafton, *supra* note 43 at 629.

national sovereignty, while not operative as a constitutional provision after 1804, persisted in arts, philosophy, and literature, as an inheritance of the Revolution, and an ideal quite independent of institutional realities.

A century later, in a lecture delivered on March 11, 1882, the philosopher Ernest Renan reflected on the meaning of the word “nation” as it had come to be used in republican discourse. After dismissing race, religion, language, and geography as “essential elements” of the nation, he declared the nation to be a no less than “a soul, [and] a spiritual principle.”⁵⁷ He proceeded to delineate two constituent elements of that principle, which he said were “in truth but one.” The “nation,” he urged, was a kind of unity of both past and present. It was an historical concept, he held, which derived its meaning from “a rich legacy of memories” transcribed in philosophy, literature, and art. It was also very much a present concept, connoting “present-day consent, the desire to live together, [and] the will to perpetuate the value of the inheritance that one has received in an undivided form.”⁵⁸ Renan’s formulation of the “nation” implicates the importance of the history of republican thought and the term’s inextricability from literary, artistic and other cultural expression since the Revolution.

In summary, in the Fifth Republic, sovereignty is vested in the “nation” and is exercised by the nation’s elected representatives in a sort of trustee capacity. While it is twice articulated in the republic’s operative constitutional instruments, its real significance as a principle is to be found in centuries of republican philosophy, literary and artistic endeavour. The notion of sovereignty in France remains deeply embedded in a particular theory of republican government which emerged out of the French Revolution of the late-eighteenth century. Indeed, it is in the context of a revolutionary assertion of force that the principle must be understood. For instance, its peculiar stress on the essential unity of the people as a fraternal civic community is only intelligible in light of the social and institutional corporatism of the *Ancien Régime*.⁵⁹ It is because of those inequities that Rousseau and his disciples came to stress the necessity of equality

⁵⁷ Ernest Renan, *Qu’est-ce qu’une nation?*, Lecture delivered at the Sorbonne, March 11, 1882 as cited in Rogoff, *supra* note 41 at 265.

⁵⁸ *Ibid.*

⁵⁹ For a comprehensive study of the institutional make-up of the *Ancien Régime* see Doyle, *supra* note 42.

for liberty and self-government. The natural result is a system of strict legislative supremacy that is *prima facie* ill-suited to the influence of other institutional actors.

iv) The Origins of Judicial Review as a Substantive Exercise in Canada

The historical development of legislative supremacy in Canada and the French Republic has powerfully shaped judicial reasoning in both jurisdictions. Again, in France, legislative supremacy was part of an assertion of national sovereignty as a principle or norm of constitutional value with which all other laws must comport. In Canada, in the tradition of British constitutionalism, the supremacy of legislative authority has tended to be seen as more of a postulate, arrived at inductively from the study of institutional realities in relation to custom and historical precedent. Arguably, the traditional view of the role of the legislature was in Canada, at least at a conceptual level, better able to tolerate an expanded role for judicial review when a constitutional rights instrument was adopted in 1982.⁶⁰ As this section will reveal, in Canada, the development of a comparatively searching and fact-sensitive form of judicial review for rights violations was further assisted by a well-established practice of review for legislative competence with the division of powers between federal and provincial governments as required by the *BNA Act*, 1867.⁶¹

Again, after Dicey published his *Law of the Constitution* in 1885, legislative supremacy was the norm in Canada. As William Robson noted, by 1939 there was “scarcely anyone who studied law, politics or constitutional history in England or the British Dominions” who had not been “brought up on Dicey.”⁶² To this Mark D. Walters added that Dicey’s celebrated treatise attained “canonical” status throughout the common law world.⁶³ Indeed, in their recent accounts of the role of legislative supremacy in

⁶⁰ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁶¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss. 91-95.

⁶² William Robson, “Dicey’s Law of the Constitution: A Review” (1939) 38 Michigan LR 205 at 205.

⁶³ Mark D Walters, “Legality as Reason: Dicey, Rand, and the Rule of Law” (2010) 55 McGill LJ 565 at 565.

Canadian constitutional law, both Peter Hogg and Patrick Monahan have cited the Diceyan concept of that principle as a starting point. But both have hastened to add that the federal character of Canadian legislative institutions precluded a strict application of a parliamentary right to “make or unmake any law whatever.” For Hogg, the federal division of powers set out in ss. 91 to 95 of the Constitution Act, 1982,⁶⁴ “forced some fundamental departures” from the Diceyan standard.⁶⁵ In Monahan’s view, a “moderate” form of legislative sovereignty has been applied to comport with the federal principle.⁶⁶

Thus, legislative supremacy in Canada has long referred to the notion that, within their respective jurisdictions, federal and provincial legislatures enjoy an absolute right to make law. That is, but for questions of *vires*, the “sovereign power to legislate” was an otherwise “absolute privilege”⁶⁷ and could not be abridged if exercised pursuant to the authority conferred by ss. 91 to 95. The “Diceyan” notion of legislative sovereignty was repeatedly affirmed in early decisions of the Judicial Committee of the Privy Council, and formed the basis of the principle of exhaustive distribution of legislative authority. Per *Attorney General for Ontario v. Attorney General for Canada*, “whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the *British North America Act*.”⁶⁸ While this dictum hints at the supremacy of imperial statutes, its real import is the extent to which it implicates the principle of parliamentary sovereignty as it came to be recognized in Canada. That is, an absolute right to make law, so long as such law was enacted *intra vires*.

This division of powers is the basis upon which judicial review of legislation for constitutionality developed after 1982. The strictures imposed by ss. 91 to 95 obliged Canadian courts to invalidate laws enacted *ultra vires*, or outside of a legislature’s circumscribed jurisdiction. Courts have also developed rules they have said are entailed

⁶⁴ Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters Canada Ltd, 2011) at 12-1.

⁶⁵ Patrick J Monahan, *Constitutional Law*, 3rd ed (Toronto: Irwin Law, Inc, 2006), at 81.

⁶⁶ *Ibid.*

⁶⁷ *Canada (Commission des droits de la personne) v Canada (AG)*, [1982] SCJ No 3 at para 66.

⁶⁸ *Attorney General for Ontario v Attorney General for Canada*, [1912] AC 571, at paras 581, 584.

by the federal principle, such as restriction on the drafting of excessively vague laws,⁶⁹ legislative inter-delegation,⁷⁰ and the use of privative clauses to preclude judicial review of statutes.⁷¹ For the purposes of this chapter, however, the focus will be on the process by which legislation is “struck down” for violating the text of ss. 91 to 95. In certain key respects, the way in which courts have dealt with legislation engaging these provisions was carried over for review of alleged rights violations in constitutional rights adjudication. As will be revealed in the rest of this chapter, the jurisprudential techniques applied in Canada for review of statutes is highly inductive, involving a thorough-going inquiry into the substance of the challenged law.

The normative bases for review on federal grounds are not entirely clear. In Hogg’s view, the overriding force of the limits imposed by ss. 91 to 95 of the *BNA Act*, 1867 is derived from their status as imperial legislation protected from alteration by the *Colonial Laws Validity Act* of 1865 (the “*CVLA*”). Section 2 of the *CVLA* prescribed that any colonial law which was “in any respect repugnant” to legislation of the UK Parliament, would, “to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.”⁷² Thus, if either the federal or provincial legislature purported to make law beyond the jurisdiction granted by the *BNA Act*, such legislation would be voided as “repugnant” to imperial legislation. While doctrine of repugnancy was nullified by the Statute of Westminster, it persisted as a rationale for giving primacy to the *BNA Act* after 1931, due to an exception in s. 7 of that *Act* protecting the country’s constituent statute from domestic amendment.⁷³

For his part, Norman Siebrasse has argued that the doctrine of repugnancy was not the established means of justifying review for compliance with ss. 91 to 95. Indeed, in his work on the origins of Canadian judicial review, Siebrasse located only three cases making explicit reference to the *CVLA* or to conflict with imperial statutes in order to strike down a federal or provincial law. He urged that in fact established practice in the

⁶⁹ Hogg, *supra* note 68 at 7.3(f).

⁷⁰ *Ibid* at 14.3(a).

⁷¹ *Ibid* at 15.5(a).

⁷² *Colonial Laws Validity Act 1865*, 28 & 29 Vict c 63, s 2.

⁷³ *Statute of Westminster 1931*, 22 & 23 Geo 5, c 5, s 7.

country had been to relate such measures to “excess of jurisdiction.”⁷⁴ That doctrine did not justify invalidity of a Canadian law based on its hierarchical relationship to an imperial statute, but upon the text of the *BNA Act* itself as the source for the legislature’s authority.⁷⁵ While Sebrasse conceded that in practice the distinction between the two rationales may be “so fine as to be invisible,”⁷⁶ the lack of clarity as to the theoretical basis for judicial review until 1982 again speaks to the comparatively *ad hoc* and half-conscious development of Canadian constitutionalism.

The best account of the normative bases of judicial review in Canada is one that is sufficiently capacious to take in both rationales. Sebrasse’s finding of scant reference to the *CLVA* or to the supremacy of imperial statutes does not conclusively indicate that repugnancy played a negligible role. Indeed, it was not in keeping with the inductive culture of the common law for reviewing courts to elaborate on the rationale for the textual provision they cited in applying the law absent some material reason for doing so. Further, Sebrasse understated the extent to which the excess of jurisdiction doctrine emerged from repugnancy as an historical rationale for judicial review. Though conceptually distinct in the strict sense, both were sourced in the practice of English competition law of constraining corporate ordinances by requiring that they not be “repugnant” to the laws of the state.⁷⁷ The authority of federal and provincial legislatures in Canada must be thought of in these terms; that is, as “grants” of power, determining the outer limits of which was an exercise in discerning the will of the UK Parliament.

In any case, since 1867, British and Canadian courts have been tasked with arbitrating the division of powers set out in the *BNA Act*.⁷⁸ The JCPC established early on that a law’s compatibility with the jurisdictional limits set by ss. 91 and 92 is determined

⁷⁴ N Sebrasse, “The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act” (1993) 1 *Rev of Const Stud* 75 at 75.

⁷⁵ *Ibid* at 91.

⁷⁶ *Ibid* at 92.

⁷⁷ For a more comprehensive overview of the practices out of which judicial review developed see Mary Sarah Bilder, “The Corporate Origins of Judicial Review” (2006) 116 *Yale LJ* 502.

⁷⁸ Until 1949, the Judicial Committee of the Privy Council in England was the final court of appeal for British North America.

by an inquiry into its “pith and substance,”⁷⁹ and Canadian courts have proceeded as *stare decisis*. Application of the so-called “pith and substance doctrine” has generally involved two stages, the first of which obliges the court to ascertain the “matter” of the impugned legislation. The “matter” has been variously described as the law’s “true meaning,” its “true nature and character,” but most commonly, its “pith and substance.”⁸⁰ This determination is made by scrutinizing both the law’s purpose and its effects.⁸¹ Once a court has identified the law’s pith and substance, it proceeds to a second stage, at which it decides whether such a law fits within the jurisdiction conferred on the enacting legislature by the *BNA Act*.

For the purposes of this chapter, it is sufficient to note that review for compliance with the federal principle has always been a deeply inductive exercise in which the “true” substance of a law is probed by the court. Indeed, given the potential for legislation to affect multiple and over-lapping “matters,” application of the pith and substance doctrine may more accurately be said to involve identifying the “dominant” or “most important” matter of an enacted law.⁸² Again, the court assesses the relevant “facts” of a statute, namely its purpose and effects, and reasons inductively from them to arrive at what may be said to be its “proper matter.” It is well-established that the inquiry is not a technical, formal exercise, narrowly focused on the strict legal operation of the law. Rather, consistent with inductive reasoning’s orientation to probability rather than absolute truth, courts have stressed that the inquiry must be thorough-going with respect to the facts and heavily reliant on the court’s independent judgment.

It should be added that in division of powers jurisprudence, as elsewhere, the binding nature of precedent requires the court to reason in a highly fact-sensitive way. The application of a rule for which a given precedent stands is of course the end point of reasoning from precedent. That application can only take place after assiduous review of the facts in order to determine whether a given rule applies or whether it should be re-

⁷⁹ Hogg, *Constitutional Law*, *supra* note 34 at 13.3(c).

⁸⁰ The phrase “pith and substance” was first used in this context in *Union Colliery Co v Bryden* [1899] AC 580, 587 per Lord Watson. See Hogg, *Constitutional Law*, *supra* note 34 at 15.5(a).

⁸¹ See for example *Re Firearms Act* [2000] 1 SCR 783.

⁸² Hogg, *supra* note 34 at 15.5(a).

formulated by carving out an exception that better suits the case at hand (what in common law is referred to as “distinguishing”). That decision is generally arrived at in a way that is heavily reliant on analogy, a form of reasoning which, again, only makes sense if previous judicial decisions constitute a binding source of law. It may therefore be said that the facts of the case are not merely the object of review, but a “tool” of review, leveraged in such a way that would not be possible in civilian systems where the judiciary is assigned a more passive role.

To conclude, by the time the *Charter* was incorporated on 17 April 1982, Canadian courts were well-practiced in probing the substance of legislation, and delving into the purposes for which it was enacted. In so-called “division of powers” jurisprudence, before the “matter” of the legislation is assigned to a proper head of power, the reviewing court engages in a thorough and often highly discretionary assessment of the substance of the challenged law. This form of review was complimented by the inductive nature of common law reasoning, which required working from the facts and rendering inferences about probability. In this sense, between the polarities of facts and principles, both of which would be engaged by a proportionality inquiry, Canadian courts were historically oriented to facts. With the incorporation of a supra-national tool of rights adjudication, well-established methods of legal reasoning were brought to bear and yielded a comparatively searching form of that test.

v) The Origins of Judicial Review as a Deductive Exercise in France

In France, judicial review of legislation for constitutionality was incorporated in a series of steps beginning in 1958 with the establishment of the Constitutional Council. It is generally agreed that the competence to review promulgated statutes for conformity with constitutional rights instruments was not contemplated by that body’s founders.⁸³ To the contrary, the council was set up with the general objective of ensuring the proper functioning of French governmental institutions, with particular emphasis on protecting

⁸³ See John Bell, et al, *Principles of French Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 146-7.

the executive from encroachment by the legislative branch.⁸⁴ Notably, the Constitutional Council did not exercise a judicial function in the strict sense, and there remains no formal requirement that appointees have legal qualifications.⁸⁵ Thus, while the 1958 constitution initiated the beginning of a form of judicial review for constitutionality, the Constitutional Council was an essentially passive body set up in such a way as not to compromise legislative supremacy. The first sign of a potential for real intrusion of the council into the substantive work of the legislature would not arise until 1971.

In that year, the Constitutional Council effected an establishment of an *a priori* form of judicial review in its landmark decision in *Dec. No 71-33 DC* (“*Liberté d’association*”). Seized on 1 July 1971 of draft legislation allowing the state to withhold recognition of an association perceived to have an “illicit purpose,”⁸⁶ the proposed law was held to offend the 1946 constitution’s preambular reference to the “fundamental principles recognized by the laws of the Republic” (the “*PFRLR*”), which surely included freedom of association.⁸⁷ Thus, in what has been referred to as a “*coup d’état constitutionnel*,”⁸⁸ the Constitutional Council rendered legally operative a set of rights thereafter referred to as the “*bloc de constitutionnalité*.”⁸⁹ After *Liberté d’association*, all sub-constitutional laws were required to comply not only with the provisions of the 1958 constitution, but with the rights set out in the 1789 *DDHC* and the preamble of the 1946 Constitution, including its preambular reference to any number of unspecified *PFRLR*.⁹⁰

It should be emphasized that until 1 March 2010, judicial review by the Constitutional Council was only available in a narrow window after the passage of a statute but before its promulgation,⁹¹ and only if a sufficient number of legislators

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Rogoff, *supra* note 108 at 191.

⁸⁷ Cons const, 16 July 1971, *Liberté d’association*, (1971), 71-44 DC.

⁸⁸ Burt Neuborne, “Judicial Review and Separation of Powers in France and the United States,” 57 *NYUL Rev* (1982) at 363.

⁸⁹ Rogoff, *supra* note 108 at 7.

⁹⁰ It should be noted that in 2004, a fourth constitutional rights instrument was added to the *bloc de constitutionnalité*, the Charter of the Environment, enacted as *Loi constitutionnelle* No 2005-205 du 1er mars 2005.

⁹¹ Promulgation is the act by the President of the Republic formally proclaiming or declaring a new statutory law after its enactment.

assented to its review.⁹² This form of *a priori* judicial review effectively preserved legislative supremacy. However, judicial review of promulgated statutes became possible with the 2008 enactment of the *Loi constitutionnelle de modernisation des institutions de la V^e République*.⁹³ As of March 1, 2010, the date on which that reform took effect, a party may file a petition in the course of litigation (a QPC or “*une question prioritaire constitutionnelle*”) to have a law reviewed for its constitutionality by the Constitutional Council.⁹⁴ The council thus engaged in full *a posteriori* review of promulgated legislation for conformity with the texts and principles of the *bloc de constitutionalité*. In doing so, it has preserved the French practice of reasoning by deduction, which developed to give the appearance of judicial restraint.

Indeed, the French aversion to judicial authority is deeply-rooted. Given the extent to which the French republican tradition emphasized volition and consent for laws to be legitimate, it is unsurprising that it was stipulated in Art. 3 of the 1789 *DDHC* that no individual or body could exercise authority unless such authority emanated expressly (*émane expressément*) from the people. That document’s exclusion of non-representative institutional actors was reinforced by the constitutions of 1946 and 1958. Indeed, this long-standing antipathy to the emergence of non-representative institutional actors, or what Pierre Levy has called “other legitimacies,” has had a profound effect on the development of the judiciary in France.⁹⁵ Indeed, the country’s distinctive form of judicial reasoning (which will be explored in greater depth as this analysis proceeds), was developed to comport with a comparatively passive role that has been ascribed to the French judiciary. The republican principle of sovereignty residing in the nation has long been ill-suited to recognition of other sources of authority outside the legislative branch.

It should be noted this distrust of judicial authority also has a specific historical cause. While republican resistance to the influence of “other legitimacies” is informed by

⁹² Ann Creelman, “US Style Judicial Review for France?” Vatie & Associés, 12 rue d’Astorg, Paris F 75008, France. Online: Primerus < <http://www.primerus.com>>.

⁹³ *Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^e République*, JO, 23 July 2008. Online: Legifrance, <legifrance.gouv.fr>

⁹⁴ Ann Creelman, *US Style Judicial Review*, *supra* note 81.

⁹⁵ Pierre Levy, “Laïcité et souveraineté” (2005) 18 *Revue Républicaine* 9 as cited in Bronwyn Winter, *Hijab & the Republic: Uncovering the French Headscarf Debate* (New York: Syracuse University Press, 2009) at 60.

a wide array of institutional inequities attributed to the *Ancien Régime*, the unrepresentative nature of its court structure left an enduring distrust of the judicial role. Prior to their abolition in 1789, the highest courts of appeal in France were provincial appellate courts or “parlements,” made up of members of the nobility referred to as the “*noblesse de robe*.”⁹⁶ Membership in the parlements was in the vast majority of cases based on inherited title and the influence wielded by them was widely perceived to be inequitable.⁹⁷ Accordingly, as Jean Louis Goutal has noted, since 1790 French judges have practiced “deduction and nothing but deduction”⁹⁸ in an effort to avoid the application of judicial discretion in applying the law as developed by the legislature.

Indeed, the appearance of judicial discretion is ably avoided through strict deduction. Heeding Rousseau’s instruction in *On the Social Contract* that “the scope (*la portée*) of legislation is always general,”⁹⁹ legal rules, including rights, most often take the form of statements of general principle, radically compressed into broad language and short sentences, expressing essential content but no more, through a drafting technique known as “concision.”¹⁰⁰ The role of the judge is to apply that law mechanically, as though the legislature at issue “has already judged.”¹⁰¹ In doing so, the reviewing court refers to the legislation using the language of “assertion, not of argument;” and renders a decision that is “existential and descriptive, not formative and prescriptive.”¹⁰² Not admitting of dissenting opinions and disallowing the use of verbs suggesting the exercise of judgment by the judge,¹⁰³ the court’s opinion is presented as a strict exercise in

⁹⁶ Julian Swain, “Parlements and Provincial Estates” in Doyle, *supra* note 45 at 93.

⁹⁷ *Ibid*.

⁹⁸ Michael Wells, “French and American Judicial Opinions” (1994) 19 *Yale J Int’l* 81 at 96.

⁹⁹ Rousseau, *supra* note 16 at 45.

¹⁰⁰ Eva Steiner, *French Law: A Comparative Approach* (Oxford: Oxford University Press, 2010) at 16.

¹⁰¹ *Ibid* at 17.

¹⁰² Wells, *supra* 98 at 102.

¹⁰³ Jean Louis Goutal, “Characteristics of Judicial Style in France, Britain, and the USA” (1976) 24 *Am J Comp L* 43 at 45. However, it should be noted that some jurists in France have ascribed to a teleological approach to statutory interpretation, reasoning deductively but with a conscious view to the social objective of the statute. For a thorough discussion of variations of teleological reasoning in French judicial opinions, see Claire M Germain,

deduction. Through the deductive technique of *sylogisme judiciaire*, the facts of a case are subsumed under a general legal rule as the “end point” in chain of stringently logical steps.

As the next chapter will show, the Constitutional Council has been able to review legislation for compliance with the three requirements of proportionality through essentially deductive reasoning. Prevailing methods of rights adjudication therefore reflect both the institutional development of the Constitutional Council, which long resisted probing the merits or “substance” of legislation, and long-established practices in French legal reasoning more generally. Accordingly, in the context of the proportionality inquiry, which again is a hybrid exercise, the reasoning of the Constitutional Council is more principle-oriented, with the facts of the case taking a secondary role. To be sure, the facts of the case are probed and evaluated in some measure but only to the extent necessary to determine the principle under which they are to be subsumed. The facts are not leveraged to formulate principles through induction, and the council does not, at least in the strict sense, set precedent and craft jurisprudence as a formal source of law.

Still, the Constitutional Council does review promulgated legislation for conformity with the constitution and its authority to do so remains un-reconciled with the practice of legislative supremacy and the principle of national sovereignty from which it is derived. Both Art. 3. of the 1789 *DDHC* and Art. 3 of the 1958 constitution expressly deny the legitimacy of all authority that does not emanate expressly from the people (“*qui n’en émane expressément*”). The text of Art 6. of the 2008 amendment, dealing with constitutional review (“*contrôle de constitutionnalité*,”) does not address the upset to institutional norms affected by an expansion of judicial review. No attempt is made to reconcile facially discordant constitutional requirements. The amendment merely makes provision for judicial review of enacted statutes and specifies the procedures by which it may be sought by a complainant. The justificatory basis of judicial review therefore remains ambiguous and subject to much scholarly debate.

The most widely accepted explanation for reconciling judicial review with legislative supremacy and national sovereignty was developed at least as early as 1982 by

“Approaches to Statutory Interpretation and Legislative History in France” (2003) 13 *Duke J Comp & Int’l L* 195.

the French constitutional scholar Louis Favoreu. He developed a theory of judicial review based on the analogy of the “pointsman” (“*la théorie de l’aiguilleur*”). In Favoreu’s view, any finding of unconstitutionality would be analysed as a lack of institutional competence by the ordinary legislator (as “*le pouvoir constitué*”) to make a decision solely within the jurisdiction of the authority that *made* the constitution (“*le pouvoir constituant*”). Not expressing a view on the substance or merits of the law, the role of the reviewing body is merely to indicate which way ought to be taken at an unclear juncture between legislative and constitutional procedure. The exercise is a purely procedural and highly compatible with syllogistic reasoning. The Constitutional Council serves as a sort of “pointsman,” directing trains down one track or another.¹⁰⁴ According to Favoreu, so long as the *pouvoirs constitués* are aligned with the will of the *pouvoir constituant*, the general will is undisturbed.

While Favoreu’s “pointsman” theory forms the basis of a considerable amount of literature on the justificatory bases of French judicial review, it has been criticized for conflating constitutional rights instruments with the general will. It effectively forges two sources of general will, that to which current representatives give expression and that of the constituent authority. In terms of the practical result of this line of reasoning, it is difficult to argue that the idea of general will ever contemplated the authority of unelected judges prevailing over representative assemblies in constitutional matters. It is for this reason that Georges Vedel posited that Favoreu’s approach could be legitimated by the potential for affected a constitutional amendment (“*une révision*”).¹⁰⁵ Simply put, in Vidal’s view, the availability of constitutional revision or amendment allowed the nation to re-assert its will over the Constitutional Council if it was so determined. National sovereignty was therefore preserved because the elected representatives of the nation retained final say, notwithstanding the difficulty involved in securing a constitutional amendment.¹⁰⁶

¹⁰⁴ Louis Favoreu, “Le Conseil constitutionnel et la cohabitation” as cited in Marie-Claire Ponthoreau, University of Bordeaux (France, unpublished paper) at 3-4.

¹⁰⁵ Georges Vidal, “Schengen et Maastricht” as cited in Ponthoreau, *ibid* at 3-4.

¹⁰⁶ *Ibid.*

It is notable that the justifications provided by both Favoreau and Vedel disoblige the Constitutional Council from reviewing the substance of the legislation in question. Again, consistent with deductive modes of legal reasoning, between the polarities of facts and principles, French jurists find themselves oriented to principles. Again, this is not to say that they are inattentive to facts, but rather to acknowledge that civilian legal reasoning has a different relationship to the facts than does the common law. What is ultimately being attempted is to preserve this distinction while yielding identical benefits through the use of proportionality principles. Whether or not such a system can be reconciled with a deeply-entrenched principle of national sovereignty remains contentious.

vi) Approaches to Proportionality in Both Legal Systems are Converging

The proportionality standard has been called “the most successful legal transplant of the twentieth century.”¹⁰⁷ Indeed, as this chapter has suggested, the incorporation of proportionality into Canada and the Fifth French Republic has affected a remarkably fast and far-reaching synchronization of the machinery of rights adjudication in both countries, despite legacies of sharply different conceptions of the judicial function and modes of legal reasoning. Both jurisdictions now provide for judicial review of enacted legislation where its effects may infringe a constitutionally-protected right. Again, proportionality involves elements of inductive, fact-sensitive reasoning and deduction from general principles. The practical effect of the adoption of that hybrid standard in common law Canada and civilian France has been the application of a standard that is more factually-driven in the former and more principle-oriented in the latter. In both cases, however, the same methodological pressures are exerted, affecting a narrowing of the legislature’s discretion in limiting constitutional rights.

It cannot be definitively said whether one approach to review of legislation is necessarily more rigorous or searching than the other. What can be said is that if there is

¹⁰⁷ Mattias Kumm, “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice” (2003) 2 *International Journal of Constitutional Law* 574, 595 as cited in Michel Rosenfeld and András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2013) at 1315.

a difference between the degree of deference afforded to the legislature between the two applications of proportionality that is related to their relative fact-sensitivity, that difference is gradual diminishing. Both countries seem to be increasingly attentive to foreign methodological practices when applying proportionality.¹⁰⁸ Indeed, there is evidence that the Supreme Court of Canada is moving toward a more principle-focused formulation of the test. It is also clear that in its constitutional interpretation, the Constitutional Council has elevated the influence of jurisprudence in French constitutional law. Reference to case law, and by necessary implication a tendency to give greater scrutiny to facts, is pushing French constitutional review in a more inductive direction. These developments may well suggest continued synchronization in the methodology of proportionality in both countries.

It is the Supreme Court of Canada's 2009 decision in *Hutterian Brethren* that gives reason to believe that the application of proportionality in Canada is becoming more principle-oriented. In that case, a majority of the court called for analytical clarity in the application of each step of the proportionality inquiry, referring to Israeli and European Union practice. Specifically, the majority instructed that reviewing courts should not engage in evaluating the government's legislative objective at the stage of minimal impairment. Advising that minimal impairment was a strictly empirical concept, they held that any value-laden concerns about the government's objective should be concluded at the final stage of proportionate effects of proportionality *stricto sensu*.¹⁰⁹ For their part, the dissenting judges urged against treating the steps of proportionality as "water tight compartments" and called for an "holistic" application of the test.¹¹⁰ The effect of reinforcing the structured-nature of the test by the majority was, arguably, to reduce judicial discretion and refocus attention on the distinct requirements of proportionality as constitutional principles. This would make the application of proportionality less inductive.

While it may be early to assess what the full implications of *Hutterian Brethren* may be, it is clear that the application of proportionality has advanced the inductive use

¹⁰⁸ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

¹⁰⁹ *Ibid* at para 51.

¹¹⁰ *Ibid* at para 195.

of case law in French constitutional review. To be sure, in French civil law, jurisprudence developed by courts (“*la jurisprudence*”) has traditionally been regarded as an influence but not legally binding.¹¹¹ In early constitutional review as well, judicial decisions were not treated as a source of law since, strictly speaking, they never created legal rules. Again, consistent with the tradition of a passive judiciary, the role of the judge was always understood to be restricted to applying pre-existing statutes or customs. But as René David has documented, since 1971 the Constitutional Council has developed an extensive body of case law for interpreting the Fifth Republic’s newly operative constitutional rights instruments and for determining which principles belong in the *bloc de constitutionalité*.¹¹² However, given the need for guidance in determining what does and does not meet the requirements of proportionality, judicial review has given new significance to case law.

Again, while it is clear that case law has become an increasingly important reference point for the development of the constitutional instruments of the French Fifth Republic, it is still too early to predict whether the increasing importance of jurisprudence in constitutional law will result in a formal change in its status. As David has acknowledged, the increasing influence ascribed to constitutional case law still does not make it a formal source of law. But reference to past decisions does by necessity import reasoning by analogy and distinguishing, both of which are highly fact-sensitive exercises. Accordingly, in some measure, the Constitutional Council is moving toward reasoning processes which may be more inductive than is typical in other areas of French law. Arguably, these signs of convergence suggest that differences in application are becoming less relevant.

vii) Conclusion

This chapter has established that legislative supremacy in Canada and the French Republic emerged out of two very different histories. In Canada, the exclusive right of the federal and provincial legislatures to make law within the constitutionally-prescribed

¹¹¹ Bell, *supra* note 83 at 25-27.

¹¹² René David, *French Law* (Baton Rouge: Louisiana State University Press, 1972) at 194 as cited in Bell *supra* note 83 at 27.

jurisdictional limits reflected norms of parliamentary sovereignty as developed in British constitutionalism. The legislature was deemed to be sovereign in its own right, strictly in terms of institutional independence. But the legislature's sovereignty was arrived at gradually, through a slow and unsystematic historical development. In other words, its rights were postulated from an essentially inductive assessment of its competence in relation to other institutions. The role of the legislature in France, however, is established by the revolutionary assertion of sovereignty as a principle from which all other constitutional realities are deduced. That principle is a particular concept of republican sovereignty giving the legislature the exclusive right to express the will of the nation as trustees of their volition. It may fairly be said, therefore, that in France, legislative supremacy was a premise of the constitutional framework, whereas in Canada it was a postulate.

While the incorporation of judicial review into prevailing modes of legal reasoning was easier in Canada than in the French Republic, both jurisdictions now provide review for suspected violations of freedom of religion on what is substantively a three-step proportionality standard. The analysis undertaken in this chapter has had two objectives. It has sought to shed light on how proportionality as a "hybrid" analysis involving reference to both facts and principles is able to be incorporated with relative ease into both common law and civilian legal jurisdictions. Mainly, however, it has tried to account for stylistic differences in the application of proportionality in the case law that will be referenced in this thesis. Those differences have to do with the relative fact-sensitivity of each application of the proportionality test and are due to the historical development of judicial review against different conceptions of legislative supremacy in Canada and France. As the final section of this chapter has indicated, convergence may be still on-going and these differences diminishing.

Chapter 3: A Comparative Analysis of the Application of Proportionality to Legislative Limitations on Religious Expression in Canada and the French Republic

i) Introduction

This chapter takes the form of a comparative analysis of constitutional rights adjudication in Canada and the French Republic. It examines the methods by which the constitutionality of legislative limitations on freedom of religion are determined in each jurisdiction, using France’s Law no. 2010-1192 of 11 October 2010 as a paradigmatic example. That statute introduced a criminal prohibition on the concealment of the face in public. The government of the French Republic held that such a legislation was necessary to deter the wearing of Islamic veils or *niqābs*, urging that such face-coverings had a deleterious effect on gender equality, public security, and democratic life. On 7 October 2010, the French Constitutional Council determined that the ban introduced by Law no. 2010-1192 was a justifiable limitation on freedom of religion,¹ as did the European Court of Human Rights (the “ECHR”) in its 1 July 2014 decision in *SAS v France*.² While a statute like Law no. 2010-1192, has never been judicially reviewed in Canada, the country’s freedom of religion jurisprudence is sufficiently thorough-going to speculate as to how a reviewing court would respond to a similar constitutional challenge.

While this analysis does explain how an infringement of freedom of religion is established in each jurisdiction, it is primarily concerned with the application of proportionality as an adjudicative tool. As explained in the previous chapter, review on a proportionality standard is as a sort of “hybrid” exercise, combining inductive, fact-sensitive reasoning with deduction from general principles. It is for this reason that the migration of proportionality is widely perceived as affecting a degree of constitutional norm convergence across common law and civilian jurisdictions.³ This chapter is intended to explore points of convergence in the way in which proportionality is applied

¹ Cons const, 7 October 2010, *Loi interdisant la dissimulation du visage dans l’espace public*, (2010) JO 18345, 2010-613 DC.

² *SAS v France* [GC], no 43835/11, ECHR 2014.

³ See for example Eric Engel, “The History of the General Principle of Proportionality” (2012) 10 *Dartmouth LJ* 1 and Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) at 150-152.

in jurisdictions with divergent modes of judicial reasoning. Indeed, while review of enacted legislation on a proportionality standard is now available in Canada and the French Republic, in each country it is applied in such a way as to comport with domestic modes of judicial reasoning. Thus, this analysis seeks to probe the extent of harmonization in adjudicative methods while shedding light on the broader viability of statutes like Law no. 2010-1192.

This chapter proceeds in six sections. In the first and second sections, the means by which proportionality was incorporated from the law of the European Union into Canadian and French law are reviewed. The third and fourth sections assess whether legislative bans of the kind imposed by Law no. 2010-1192 violate the scope or content of freedom of religion as it is entrenched in Canadian and French constitutional rights instruments. Sections five and six examine the use of proportionality in determining whether such an infringement would be constitutionally justifiable, with reference to the Constitutional Council's decision respecting Law no. 2010-1192 and to relevant Canadian case law. At all times, this analysis is undertaken with a view to both the methods by which proportionality is applied in each jurisdiction and its likely substantive outcomes.

It is concluded that while a statutory ban on concealment of the face in public may be a proportionate infringement of freedom of religion in the French Republic, it would almost certainly be held to be unconstitutional in Canada. Substantive differences yielded by divergent modes of judicial reasoning in each jurisdiction are negligible. The constitutionality of such legislation would turn on the inquiry into whether it has proportionate effect. It is the evaluative nature of the final step of the proportionality standard, and the extent to which it requires consideration of the normative dimension of rights that makes it decisive. Whether a deleterious effect on a right is thought to be tolerable in a free and democratic society turns on often unarticulated notions of what it means to be free and democratic. This is often made starkly clear in freedom of religion jurisprudence.

- ii) The Textual Basis for a Proportionality Standard in Canada.

The *Canadian Charter of Rights and Freedoms* (“the Charter”) was entrenched as Canada’s principal constitutional rights text on 17 April 1982. It established a two-stage procedure of judicial review for potential rights violations. At the first stage, the claimant must satisfy the reviewing court that a guaranteed right or freedom has been infringed. This involves the court in a purposive inquiry into the “scope” or “content” of the right. If an infringement of the right is established, it falls to the state to show on a balance of probabilities that the infringement is constitutionally justifiable. The justificatory standard which the state must meet is prescribed by s. 1, the *Charter*’s general limitations clause:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁴

In other words, provided that an infringement of a constitutional right or freedom is “prescribed by law” (generally a statute or a regulation),⁵ it is subject to s. 1 justification.⁶

In its 1986 decision in *R. v. Oakes*, the Supreme Court of Canada construed s. 1 of the *Charter* as imposing “a form of proportionality test.”⁷ Writing for the court, Dickson J. (as he then was) held that if a *Charter* right is found to be infringed, the reviewing court must then ascertain whether there are constitutional justifications for limiting the

⁴ *Canadian Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁵ The constitutionality of administrative decisions or other state actions is no longer determined by s. 1 justification. The words “prescribed by law” indicate that s. 1 justification is available only to legal norms that are “authorized by statute, ...binding rules of general application [that are] sufficiently accessible and precise.” See *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 53; *Doré v Barreau du Québec*, 2012 SCC 12 at para 37.

⁶ Section 35 of the *Constitution Act, 1982*, which affirms Aboriginal and treaty rights, is technically not part of the *Charter* and therefore not subject to s 1. Still, *per R. v. Sparrow*, the Supreme Court of Canada developed a test for determining permissible limitations on s. 35 rights comparable to a proportionality standard. See *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 and *R v Sparrow* [1990] 1 SCR 10 75.

⁷ Justice Dickson first made reference to s. 1 requiring a “form of proportionality test” in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para 139.

exercise of the right by the sub-constitutional law.⁸ The state must first show that the impugned law was adopted for a proper purpose. If that threshold is met, it must then satisfy a three-part proportionality test. It must show that the measures it adopted are “rationally connected” to its legislative objective (that is, the law’s proper purpose), that those measures impair the right “as little as possible,” and that there is a proportionate relation between the deleterious effects on the right and benefits accrued.⁹ With few modifications, the “*Oakes* test” remains the standard for determining the legitimacy of sub-constitutional limits on constitutional rights in Canada.¹⁰

In developing the *Oakes* test, Dickson J. seems to have drawn from the ECHR’s case law interpreting limitations clauses in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the “*Convention*”).¹¹ As noted in the previous chapter, from its origins in nineteenth century Prussian administrative law, proportionality as a legal construct migrated to German Basic Law, and from there to the law of the European Union. By the late-1970s, the formal three-step structure now associated with proportionality was more or less fully developed by the ECHR. Indeed, in its 1979 decision in *Sunday Times*, that court articulated a test that was quite similar to *Oakes*. It held that “interference” with the right to freedom of expression under Art. 10 of the *Convention* must be “prescribed by law,” have “legitimate aims,” be “necessary” to

⁸ Although government action is generally dependent upon statutory authority, it may rely on the common law as in the case of a prerogative. The *Charter* applies to the common law where the common law is the basis for some governmental action which is alleged to have infringed a guaranteed right or freedom. See *RWDSU v Dolphin Delivery* [1986] 2 SCR 573 at para 34.

⁹ In *Oakes*, the Court held that to be minimally impairing, the legislation means must infringe the constitutional right “as little as possible” to achieve its objective. In *R v Edwards Books*, while superficially applying *Oakes*, the Court broadened the legislature’s margin of appreciation by stating that the legislative means must infringe the right “as little as reasonably possible.” See *R v Oakes*, [1986] 1 SCR 103 at paras 69-71 and *R v Edwards Books*, [1986] 2 SCR 713 at para 131.

¹⁰ It should be noted that while the formal structure of the *Oakes* test is to be applied for all potential rights violations, Canadian courts have advised that it be applied in a manner that is “realistic” and sensitive to context. See *Edwards Books*, *ibid*, at para 176.

¹¹ The *European Convention for the Protection of Human Rights and Fundamental Freedoms* has number of specific limitations clauses. That is, a right carries with it in the form of a sub-section its own limitations clause.

achieve those aims, and be commensurate with the values of a democratic society.¹²

Thus, when it wrote *Oakes*, the Supreme Court of Canada seems to have drawn directly from case law on constitutional limitations clauses in the EU.

iii) The Textual Bases for a Proportionality Standard in France

It must be recalled that review of legislation for conformity with constitutional rights instruments first became available in the French Republic with the Constitutional Council's 1971 decision in *Dec. No 71-33 DC ("Liberté d'association")*.¹³ In that decision, the council effected an establishment of a form of *a priori* judicial review for the constitutionality of legislation prior to its promulgation. In doing so, it rendered legally operative ("*en vigueur*") two constitutional rights texts.¹⁴ The so-called constitutional bloc ("*le bloc de constitutionnalité*") established in *Liberté d'association* included the *Declaration of the Rights of Man and Citizen* of 1789 ("the *DDHC*") and the preamble of the *Constitution of 13 October 1946*. That document, among other things, makes reference to "the fundamental principles recognized by the laws of the Republic" (the "*PFRLR*"). The council relied on the 1946 preamble to justify a broad and open-ended authority to identify principles of constitutional value not transcribed in either constitutional text. In 2004, the *Charter of the Environment* was added as the third operative rights document of the French Fifth Republic.

The Constitutional Council's decision in *Liberté d'association* was an important step on the way to full *a posteriori* review, which was finally made available with the constitutional reform law of 2008.¹⁵ As explained in the first chapter, the Constitutional Council had been established by Title VII of the Constitution of 4 October 1958 as a

¹² *The Sunday Times v The United Kingdom*, no 6538/74, § 46, 54, 58, ECHR 1979-I.

¹³ Cons const, 16 July 1971, *Liberté d'association*, (1971) JO 7114, 71-44 DC.

¹⁴ The authority to identify certain laws as recognizing "fundamental" values was necessary in order for the Constitutional Council to be able to elevate certain statutes enacted in the French Third Republic (1870-1940) to constitutional status. Certain enduring constitutional principles were developed during the Third Republic (such as freedom of association) even though that regime lacked a formal constitution. See Cons const, 20 July 1988, *Loi portant amnistie*, (1988), JO 9448, 88-244 DC.

¹⁵ *Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^e République*, JO, 23 July 2008, 11890.

weak and deferential institution, tasked with a range of rather technical responsibilities, most notably, arbitrating the division between the competence of the legislature (over statute law) and the executive (over regulations).¹⁶ The drafters of the constitution of the Fifth Republic did not contemplate judicial review of legislation. To the contrary, as the *Travaux préparatoires* of that document reveal, they recognized French constitutional culture as “extraordinarily hostile to judicial review.”¹⁷ Thus, when the Constitutional Council was instituted, the supremacy of the legislature to the judiciary was still well-entrenched. Its 1971 decision in *Liberté d’association* marked a departure from that order, initiating the gradual incorporation of review of promulgated statutes.

The introduction of *a priori* review in 1971 both perpetuated the traditional French conception of the organic unity of legislation and law, and exacerbated its attendant confusion of legislative and constituent authority. While the council’s new role did not upset legislative supremacy in a technical sense, it did effect the legislative process to the extent that Parliament began to act with a view to the council’s institutional competence. For instance, the mere prospect of a petition for constitutional review (generally brought by opposition parties) and possible censure deeply influenced policy-making.¹⁸ This phenomenon, which accelerated throughout the 1980s, has been referred to as the “juridicization” of French legislative institutions.¹⁹ During that time, the council’s willingness to obstruct the legislative process increased and its case law gained increasing pedagogical authority. Part of this process involved the incorporation of ever-more searching standards of review, to bring France into alignment with rights norms and practices of other EU member states.

Not long after the Constitutional Council assumed the power to review legislation prior to its promulgation, it provided reassurance that its role was in no way legislative, but strictly limited to assessing acts of the legislature for conformity with constitutional

¹⁶ John Bell et al, *Principles of French Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 156.

¹⁷ Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press, 1992) at 5. See also *Travaux préparatoires de la Constitution du 4 octobre 1958, Avis et débats du Comité consultatif constitutionnel* (Paris: La Documentation française, 1960) at 75-79.

¹⁸ Stone, *ibid* at 4.

¹⁹ *Ibid* at 8-9.

texts and principles. In *Decision 74-54 DC* of 15 January 1975 (also known as the “*Abortion P*” decision)²⁰ the council held: “[T]he Constitution does not confer on the Constitutional Council a general or particular discretion (*un pouvoir général d’appréciation ou de décision*) identical to that of Parliament, but simply, empowers it to rule on the constitutionality of statutes referred to it.”²¹ In other words, the Constitutional Council established that it did not have the competence to “second guess” Parliament on questions of policy.²² Accordingly, it developed a single standard of review for constitutional review which it termed “manifest error” (*erreur manifeste*).²³ On that standard, absent an error so egregious that it could not “escape a man of good sense,”²⁴ the council could not interfere.

After about 1982, the standard of manifest error gradually evolved into a more rigorous means-end rational review. While certain rights retained the highly deferential standard of manifest error, others became subject to review for rational connection and necessity of the means adopted by the legislature in light of its objectives. In *Decision 2002-461*, for instance, (also referred to as “*Juvenile Justice*”), the council declared certain “educative sanctions” imposed on young offenders to be constitutional by acknowledging the importance of education to prevent breaches of the public order and noting that the sanctions “naturally take into account the familial and educational obligations of the interested parties.”²⁵ Described as a “proportionality” standard by French jurists and academics, this standard of review was far less evaluative than its three-part counterpart in European law, evincing an on-going unease in questioning legislative policy choices, which the Constitutional Council saw as falling within the legislatures “domaine de non-contrôle.”

²⁰ Cons const, 15 January 1975, *Loi relative à l’interruption volontaire de la grossesse*, (1975) Rec 19, 74-54 DC.

²¹ *Ibid* at para 1.

²² *Ibid*.

²³ For the first explicit reference to the manifest error standard see Cons const, 16 January 1982, *Loi de nationalisation*, (1982) Rec 18, 81-132 DC at para 20.

²⁴ Stone, *supra* note 15 at 160.

²⁵ Cons const, 29 August 2002, *Loi d’orientation et de programmation pour la justice*, (2002) JO 14953, 2002-461 DC at 32.

It was not until 2007, not long before the constitutional revision which established a procedure for *a posteriori* review, that the Constitutional Council supplemented its “proportionality” standard with consideration of the legislation’s “possible consequences (*conséquences possibles*). In *Dec. 2007-255 (“Loi en faveur du travail”)*, for instance, the council upheld certain targeted tax benefits aimed at rewarding work and stimulating the acquisition of a principal residence by the taxpayer. In deciding that the impugned legislation did not, *inter alia*, violate the principle of equality before public burdens in Art. 3 of the *DDHC*, the council engaged in a brief discussion of the merits of the legislation and its potential harms to constitutional rights.²⁶ This was substantially an inquiry into proportionate effect or proportionality *stricto sensu*. It should be remembered, however, that review for proportional effect remains the exception. The standard applied by the council is more or less deferential depending on the text of the rights provisions engaged. The following sections will explore this rather abstract notion in more concrete terms.

iv) Establishing an Infringement of Freedom of Religion in Canada

It must be recalled that the Canadian *Charter*’s general limitations clause, s 1, contemplates a two-stage procedure of judicial review for a potential rights violation. At the first stage, the reviewing court has to determine whether the challenged law has the effect of limiting a guaranteed right. Ascertaining the scope of the right, in terms of its content and outer contours, involves a purposive interpretation of its text.²⁷ The *Charter*’s guarantee of freedom of religion is prescribed in s. 2(a):

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion²⁸

²⁶ Cons const, 16 August 2007, *Loi en faveur du travail, de l’emploi et du pouvoir d’achat*, (2007) Rec 310, 2007-555 DC.

²⁷ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 116.

²⁸ *Canadian Charter of Rights and Freedoms*, s 2(a), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

The Supreme Court of Canada has formulated a test for determining when the right to freedom of religion has been abridged, which the claimant must satisfy on a civil standard. In the case of a legislative ban on concealment of the face in public, it is the first hurdle which anyone making a freedom of religion claim under s. 2(a) would have to surmount.

In terms of the methods of judicial reasoning to be applied, it is fair to say that constitutional review in Canada is comparatively inductive and fact-sensitive. Reflecting the culture of a common law jurisdiction, reviewing courts arrive at legal probabilities based on the facts with reference to binding precedent. In the constitutional context, the relative rigour with which a reviewing court can probe the facts at hand has been reinforced by the fact that constitutional review for rights violations has only ever been available *ex post*; that is, through the application of constitutional law to a specific case. In other words, review does not take place in the abstract but with regard to actual legal cases that raise constitutional questions in the context of litigation. Determining whether the scope of freedom of religion under s. 2(a) is infringed would therefore involve a comparatively probing and thorough-going inquiry into the facts being litigated at a very low level of abstraction.

In its 2004 decision in *Syndicat Northcrest v Amselem*,²⁹ the Supreme Court defined the scope of “freedom of religion” with reference to three criteria distilled from its s. 2(a) jurisprudence. The Court held, and has since repeatedly affirmed, that freedom of religion consists of the right to “undertake practices or harbour beliefs having a nexus with religion,” which an individual “sincerely believes or is sincerely undertaking in order to connect with the divine or as function of his or her spiritual faith.” It is not necessary, the court added, for such practices or beliefs to be objectively required by a recognized religion.³⁰ Accordingly, the court in *Amselem* had to develop a definition of “religion” that was sufficiently capacious to account for what it called a “personal or subjective” conception of the right, but that was still serviceable given the text of the right and the requirement that the expression at issue have a “nexus with religion.” In

²⁹ *Syndicat Northcrest v Amselem*, 2004 SCC 47.

³⁰ See for example *Amselem*, *ibid* at para 43; *SL v Commission Scholaire des Chênes*, 2012 SCC 7 at para 24, *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 35, *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 156.

other words, it had to give “some outer definition” to a concept that it conceded could not be defined with precision.³¹

Justice Iacobucci, writing for the majority in *Amselem*, gave “religion” a broad and “purposive” definition, consistent with the canons of *Charter* interpretation.³² He held that, “[d]efined broadly, religion typically involves a particular and comprehensive system of faith and worship,” and “tends to involve belief in a divine, supernatural, or controlling power.”³³ More importantly, however, he held that the “essence” of religion for the purpose of s. 2(a), had to do with “freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith.” That is, religion as it is used in Canadian constitutional (and indeed quasi-constitutional)³⁴ texts is not coextensive with recognized religious institutions or doctrines, but denotes beliefs “intrinsically linked to one’s self-definition and spiritual fulfillment” and practices which “allow individuals to foster a connection with the divine or with the subject or object of [their] spiritual faith.”³⁵ Thus, to establish an infringement of “religious” expression under s. 2(a), a reviewing court will focus on the factual indicia of the inward nature of the belief and the depth of feeling with which it is held.

In arriving at this definition of “religion” for the purpose of s. 2(a), the court in *Amselem* expounded upon its earlier case law, including its first s. 2(a) decision in the 1986 case of *R. v. Big M Drug Mart Ltd.*³⁶ In that seminal decision, Dickson J. did not define “religion” *per se*, but construed the text of s. 2(a) in such a way as to give primacy to “personal choice” and “individual autonomy.”³⁷ Reflecting at some length on the history of the Protestant Reformation in England, he reasoned that freedom of religion in

³¹ *Amselem*, *supra* note 27 at para 39.

³² See *Quebec v Boisbriand* 2000 SCC 27.

³³ *Amselem*, *supra* note 27 at 39.

³⁴ It should be noted that, while the Supreme Court’s reasons in *Amselem* were held to be applicable to s. 2(a) of the Canadian *Charter*, the case at bar had to do with the right to freedom of religion under s. 3 of the Quebec *Charter of Human Rights and Freedoms*, RSQ, c C-12. Provincial human rights legislation have been said to be of a “quasi-constitutional” nature.” See *Cadillac Fairview Corp v Saskatchewan (Human Rights Commission)*, [1999] SJ No 217 at para 29.

³⁵ *Amselem*, *supra* note at 27 para 39.

³⁶ *R v Big M*, *supra* note 24.

³⁷ *Amselem*, *supra* note 27 at para 40.

Canada was rooted in an historical recognition by the state that “belief was not amenable to compulsion” and that there existed a “reality of individual conscience.”³⁸ Accordingly, he held, the rights to both freedom of religion and to freedom of conscience under s. 2(a) were in fact a “single integrated concept,” which was meant to confer protection on beliefs of a kind recognized as integral to individual autonomy and personhood.

The *Amselem* decision both clarified the scope of freedom of religion and reinforced the centrality of “personal choice” to a s. 2(a) claim. It did so in two key respects. First, in overturning the conclusions of the Quebec Court of Appeal, Iacobucci J. held that reviewing courts may not inquire into whether or not the belief or practice at issue is objectively required by a religion. It is not the “mandatory or perceived as mandatory nature” of the religious expression that attracts protection under s. 2(a), he reasoned, but its “religious or spiritual essence.”³⁹ Thus, to fall within the scope of s. 2(a), the claimant need only establish on the facts that she subjectively believes that her conduct is required by her religion. The belief or practice need not be legitimated by established doctrine in any objective sense. To require an objective basis for religious expression, Iacobucci J. held, would both improperly engage a reviewing court in the arbitration of religious doctrine⁴⁰ and undermine the importance of autonomy and individual choice to freedom of religion, as settled by earlier case law.

Secondly, while the majority precluded speculation as to a religious practice’s “validity” in light of recognized doctrine, custom, or ritual, it did give reviewing courts a measure of latitude to probe the sincerity with which the belief is held. It hastened to add, however, that inquiries to that end must be “as limited as possible,”⁴¹ so as not to offend the deeply personal nature of the right. Therefore, the Court advised, the need to establish the claimant’s “sincerity” or “honesty of belief”⁴² is a question of fact that goes no further than what is necessary to establish her “good faith,” and that her putative belief is “neither fictitious nor capricious, and that it is not an artifice.”⁴³ To meet this low

³⁸ *Ibid* at para 45.

³⁹ *Ibid* at para 47.

⁴⁰ *Ibid* at para 45.

⁴¹ *Ibid* at para 52.

⁴² *Ibid* at para 51.

⁴³ *Ibid* at para 52.

threshold, the claimant may adduce evidence to show that the practice at issue is consistent with her “other religious practices at the time of the alleged interference”⁴⁴ Again, Iacobucci J. stressed that this test must be alive to both the “intensely personal” nature of the right, and the need to avoid the “invidious interference” of the state.

It should be also be noted that, in its early s. 2(a) jurisprudence, the Supreme Court of Canada indicated that freedom of religion under s. 2(a) may be subject to “internal limits.” Quite apart from s. 1 of the *Charter*, which does not affect the “scope” of a right, “internal” limits are inferred from the text of the right itself and speak to its content or outer contours. For instance, some of the earliest s. 2(a) case law shows a willingness to deny protection to the religious expression of parents whose conduct poses a risk of harm to their child. It was in such a context that in the 1993 case of *P(D) v S(C)*, L’Heureux-Dubé J., writing for a majority, held that freedom of religion is “inherently limited by the rights and freedoms of others.”⁴⁵ Similarly, in *Young v Young*, McLachlin J. (as she then was) affirmed that where a parent’s religious expression jeopardizes the best interests of a child, “it is clear that the guarantee of religious freedom can offer no protection,” and recourse to a proportionality analysis under s. 1 is not appropriate.⁴⁶

While in recent years Canadian courts have shown a preference for denying such claims under s. 1 rather than under s. 2(a), they continue to recognize internal limits where the interference with the right would be “trivial or insubstantial.” That is, as Dickson J. put it in *R. v. Edwards Books and Art Ltd.*, religious beliefs and practices are protected by s. 2(a) to the extent that they might “reasonably or actually be threatened.” For a state-imposed burden to be proscribed, he added, it must be “capable of interfering with religious beliefs or practices.”⁴⁷ This somewhat abstractly formulated rule serves as a tool for dispensing with challenges to legislative or administrative action which on its face has come to be recognized as constitutionally permissible. In other words, an internal limit to the right exists where the application of a thorough-going proportionality

⁴⁴ *Ibid* at para 53.

⁴⁵ *P(D) v S(C)*, [1993] 4 SCR 141 at 107.

⁴⁶ *Young v Young*, [1993] 4 SCR 3 at 218.

⁴⁷ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 97.

analysis would be patently unnecessary. It is with “a view to the underlying context” of a rights claim, it has been held, that the ultimate standard of protection will be measured.⁴⁸

If a Canadian court were to review a legislative ban on the wearing of the full face-veil or *niqāb* in public places, it is all but certain that it would find a violation of s. 2(a). In its 2012 decision in *R. v NS*, the Supreme Court had to determine whether a Muslim woman was required to remove her *niqāb* when testifying in order to afford the accused the full measure of his s. 11(d) rights to make full answer and defence to the charges against him, given the centrality of face-to-face communication historically ascribed to that right. In spite of a three-way split in their reasoning, every member of the court agreed that to oblige a Muslim woman to remove her veil constituted an infringement of her right to freedom of religion under s. 2(a). The claimant NS professed that she wore the veil as an expression of her faith as a Muslim. Accordingly, that the practice of veiling had a “nexus” with religion as defined in *Amselem* was not contested.

Writing for the majority, McLachlin C.J. found that the lower court in *N.S.* had erred in finding that the claimant evinced a lack of sincerity. The preliminary inquiry judge had inferred a lack of sincere belief from the claimant’s inconsistent use of the veil. McLachlin C.J. held that in doing so, he had confused the strength of N.S.’s belief with the sincerity with which it was held. Inconsistent adherence to a religious practice, she held, “may suggest lack of sincere belief, but it does not necessarily do so”⁴⁹ given that religious belief may vacillate over time without being an “artifice,” or a claim made capriciously or in bad faith *per Amselem*. Thus, the threshold for establishing the sincerity of a religious belief is very low.⁵⁰ More generally, in light of the low bar for a s. 2(a) violation set by *Amselem*, it is incontrovertible that a law of general application requiring the removal of face-veils would be found to violate freedom of religion. Again, this would trigger s. 1 of the *Charter*, shifting the burden to the state to provide that such a law is justifiable.

⁴⁸ *Ibid* at para 76; *Commission Scholaire des Chênes*, *supra* note 28 at para 25.

⁴⁹ *R v NS*, 2012 SCC 72 at para 13.

⁵⁰ While it is very rare for a reviewing court to find a lack of sincerity, such was the case in *R v Kharaghani*. In that case, an Ontario court conducted a limited factual inquiry to that end and refused to accept possession of cannabis as the exercise of a “sincerely held religious belief.” See *R v Kharaghani*, 2011 ONSC 836.

v) Establishing an Infringement of Freedom of Religion in France

Modes of constitutional adjudication in the French Republic do not lend themselves to questions pertaining to the “scope” or “content” of freedom of religion. French legal reasoning proceeds deductively, largely by way of what is called judicial syllogism (*syllogisme judiciaire*), a deductive technique developed to preserve legislative supremacy and to give an air of judicial passivity. As this analysis will show, it is applied by taking two contending general principles, and subsuming the facts at hand under one or the other as a sort of “end point” in a chain of logical inferences from those principles. Thus, the facts take a secondary role to principles when contrasted with common law reasoning. To speculate as to the “scope” of a right is an inherently inductive exercise, more aligned with common law practice, aimed at preemptively clarifying when a given set of facts will trigger a legal principle. In other words, questions of “scope” by their nature direct the mind to facts, when French rights adjudication is far more oriented to the general legal principles engaged by a case.

Accordingly, this section aims not so much to delineate the content of freedom of religion *per se*, but to establish the principles that support a rights claim and to reflect on their interplay. It must be recalled that in the jurisprudence of the Constitutional Council, it is not so much the black letter of the right which is being litigated, but the principles which are recognized as transcribed by that text. In other words, textual provisions cited in constitutional texts are to be thought of less as discrete and more or less insular provisions, than as principles of “constitutional” or the highest value in a hierarchical system of norms. As was the case in the Constitutional Council’s 2010 decision respecting the prohibition on the veil, multiple constitutional principles are often implicated by a given set of facts, and in concert shape the deductive process by which a result is reached, as section four of this analysis will reveal.

It is critical to establish from the outset that the Constitutional Council’s decision on the veil was not the result of a specific constitutional challenge brought by a private individual or group with standing. Rather, Law 2010-1192 had been referred to council on 14 Sept. 2010 by the Presidents of the National Assembly and of the Senate, for *a priori* review as provided for in the second paragraph of Art 61 paragraph 2 of the

Constitution.⁵¹ Thus, the council did not have to decide whether a particular provision was engaged by the law in the strict sense.⁵² Review by the council was undertaken with a more general view to whether the legislation conformed with a range of principles of constitutional value (the so-called *bloc de constitutionalité*). The council's decision, released a month later on 7 October 2010, dealt with four constitutional provisions which it determined were potentially engaged by the referred legislation. It arrived at that determination by way of a reasoning process not indicated in the text of its decision, but which necessarily precedes any deductive analysis.

Indeed, as a rule, French judges and members of the Constitutional Council do not account for the process by which the general principles adjudicated are determined. Certainly, the established practice of the Conseil d'État and the Cour de Cassation is to focus on logical deductions from pre-determined premises. Neither court elaborates on how these premises are identified at the outset. But as Eva Steiner has put it, the essential task of the judge is in fact to find "correct premises," and that cannot be done by way of deduction alone. To the contrary, it involves reliance on induction, analogy, and judicial discretion.⁵³ It is for this reason that the text of judicial decisions tends not to acknowledge the search for appropriate premises. In the context of the Constitutional Council's review of Law 2010-1192, it is clear that the four constitutional provisions cited had to be arrived at by some process of judicial reasoning given that no provisions

⁵¹ Prior to 1973, Art 61 of the prevailing constitution of the Fifth Republic allowed only four officials to refer acts of Parliament to the Constitutional Council after their adoption but before their promulgation by the President of the Republic and their entry into force: the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate. In 1974, Art 61 was amended to allow 60 Deputies (members of the National Assembly) or 60 Senators to refer a legislative act to the council. The constitutional reform law of 23 July 2008 amended Art 61 to allow for the the Cour de Cassation or the Conseil d'État to refer a statute already in force to the council for consideration of its constitutionality during the course of a proceeding, subject to certain conditions.

⁵² It should be noted that while *ex post* review of enacted legislation is now available, modes of judicial reasoning remain essentially deductive, as they had developed under the practice of *a priori* review.

⁵³ Steiner, *supra* note 48 at 151

were specifically cited by the Presidents of the National Assembly or Senate upon referral of the legislation for *a priori* review.⁵⁴

In her study of French legal reasoning, Steiner asserts that French judges do not in actual practice *begin* by stating premises or applying general principles. Rather, she observes, they begin with “some complicated and confusing case” out of which premises gradually emerge from “analysis of the total situation.”⁵⁵ Again, the text of the judicial opinion does not account for this process, but merely states its results in formal and laconic language. Choosing the premise or general principle from which a result will be deduced is a necessary first step requiring a certain engagement with the facts. The judge must then make interpretive choices, as well as engage in the weighing of conflicting interests and policy considerations.⁵⁶ The necessary search for “correct” premises or applicable principles, in Steiner’s view, is thus one of the main “limits of syllogistic reasoning”⁵⁷ The search for appropriate principles is accordingly left un-articulated in the text of the decision so not to give the appearance of judicial discretion in the application of the law.

Thus, the Constitutional Council’s review of Law 2010-1192 was based not merely on the provisions cited in its decision, but on the entire constitutional bloc. That is, the draft legislation was referred to the council to be assessed for conformity with four documents and a larger body of constitutional principles developed in constitutional case law. It may be recalled that the *bloc de constitutionalité* includes the text of the Constitution of 1958, the individual rights set out in the *DDHC* of 1789, the “political, economic, and social principles” enumerated in the preamble to the *Constitution of 4 October 1946*, the *Charter of the Environment* of 2004, and a body of non-textual *PFRLR*. The four provisions cited by the Constitutional Council in its reasons as general principles governing the case are the only principles within that potentially vast body of law which the council determined to be implicated by the legislation under review As

⁵⁴ The first paragraph of the council’s decision says of the referee legislators: “They have not raised any particular contention regarding this statute.” See *Loi interdisant la dissimulation du visage*, *supra* note 1 at para 1.

⁵⁵ Steiner, *supra* note 48 at 150-1.

⁵⁶ *Ibid* at 151.

⁵⁷ *Ibid* at 150.

Steiner put it, those provisions were identified as the “correct premises” of the decision by a preliminary analysis of the facts referred for *a priori* review.

The council held that four constitutional provisions were engaged by the government’s proposed legislative ban on concealment of the face in public, three of which are contained in the *DDHC* of 1789 (Arts. 4, 5, 10), while the fourth is in the preamble of the Constitution of 1946 (Art 3). The relevant provisions are:

Art. 4. La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi.⁵⁸

Art. 5. La Loi n'a le droit de défendre que les actions nuisibles à la Société. Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas.⁵⁹

Art 10. Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi.⁶⁰

Art 3. La loi garantit à la femme, dans tous les domaines, des droits égaux à ceux de l'homme.⁶¹

It is may be noted that the council’s reasons in Dec. 2010-613 rely only on textually-prescribed principles and not on PFRLR or other non-textual principles. While both enjoy equal weight as principles of constitutional value, for comparative purposes, this analysis deals only with textual provisions in both jurisdictions.

⁵⁸ Art 4. Liberty consists of the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure other members of the society the enjoyment of the same rights. These limits can only be determined by law.

⁵⁹ Art. 5. The law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one be forced to do anything not provided for by law

⁶⁰ Art. 10. No one shall be disturbed on account of his opinions, including his religious views, provided their manifestation does not disturb the public order as determined by law

⁶¹ Art. 3 The law guarantees women equal rights to men in all spheres.

Finally, before proceeding to discuss the application of proportionality to the ban on the veil as a sub-constitutional limit on a constitutional right to freedom of religion, it is critical to note that the four provisions cited in Dec. 2010-613 were not litigated individually or in their own right. Rather, the provisions are to be read somewhat in aggregate, and thought of as a more or less singular articulation of freedom of religion for the purpose of the law being reviewed. From the perspective of a common law tradition in which the discrete provisions of a constitutional text have controlling force, the French approach is quite different. But it must be recalled that in common and civil law traditions, there are often different ways of conceptualizing problems and of articulating solutions. The French Cartesian tradition places a particular emphasis on abstract thinking and evinces a corresponding lack of interest in empirical detail. Accordingly, it is not appropriate to strictly adhere to the black letter of each textual provision during the adjudicative process, but to think abstractly, with a view to the general principles at play.

vi) The Application of the Proportionality Test in Canada

a) Proper purpose

Under the Canadian *Charter*, the first step of s. 1 justification requires the state to establish that it enacted the impugned legislation for a “proper purpose.” That is, it must have legislated with a view to a sufficiently important objective. The determination of whether a legislative objective is “sufficiently important” involves three rather value-laden considerations. As Dickson J. held in *Oakes*, a legislative objective will be accepted as sufficiently important where it is “pressing and substantial” as opposed to merely trivial, and directed to the “realization of collective goals of fundamental importance.” Further, from a normative standpoint, the legislative objective must not be discordant with the values of a “free and democratic society.”⁶² As legal concept, these requirements are remarkably under-developed given that they have been held to be met in all but a few cases to have reached the Supreme Court of Canada. Indeed, the Court has only struck down a law for having an improper purpose once, in *R. v. Big M Drug Mart*.

⁶² *Oakes*, *supra* note 8.

Accordingly, *Big M* remains the Court's most authoritative pronouncement on improper or inadmissible objectives under the first stage of a s. 1 analysis. In that case, it invalidated federal Sunday-closing legislation for having been enacted with a religious purpose. Specifically, the Court determined that the objective of the impugned legislation was to coerce observance of the Christian Sabbath and not, as the government had argued, to provide a non-sectarian "common day of rest."⁶³ According to the majority, not only did the legislative history indicate a religious purpose, but the legislation could not have been enacted by the federal government as valid criminal law without one.⁶⁴ In contrast, in *Edwards Books*, the Court was able to ascribe to provincial Sunday-closing legislation an objective of providing a common day of rest.⁶⁵ While both laws had the effect of privileging observance of the Sunday Sabbath, only the legislation at issue in *Big M* was determined to be intolerable in a free and democratic society.

In distinguishing the facts of *Edwards Books* from those of *Big M*, the Court reflected at some length on what constitutes an inadmissible legislative objective under the first stage of *Oakes*. Again, the effect of the legislation was similar in both cases. The purpose for which the Sunday-closing law in *Big M* was enacted, however, was determined to be a "purely religious" one, evincing an intention to "bind all to a sectarian Christian Ideal" through positive law. As such, the Court held, the law represented "a form of coercion inimical to the spirit of the *Charter*," given that document's multi-cultural ethos and its broad guarantee of freedom of conscience and religion.⁶⁶ In contrast, the element of coercion in constitutionally-protected matters was not present in *Edwards Books*, where the legislative purpose was found to be the provision of a common day of rest for retail workers, and not a "surreptitious attempt to encourage

⁶³ *Ibid* at 135.

⁶⁴ Criminal law is a matter of federal jurisdiction under s 91(27) of the *Constitution Act*, 1982. Appropriate subjects for the criminal law have been held to be "public peace, order, security, health, morality" *per Reference re Dairy Industry Act*, s 5(a), [1941] SCR 1. A legislative purpose that can not be construed along these lines cannot be pursued under s 91(27).

⁶⁵ *Edwards Books*, *supra* note 8 at para 62.

⁶⁶ *Big M*, *supra* note 24 at para 97.

religious worship.”⁶⁷ Accordingly, the purpose was held to not to offend *Charter* values as envisioned by the text of s. 1.

The Court’s reasons in *Big M* and *Edwards Books* suggest that a law will not satisfy the “proper purpose” inquiry where its objective is intended to discourage the exercise or enjoyment of constitutional rights. This is not to say that a statute or common law rule cannot in their effect limit a s. 2(a) right; to the contrary, they routinely do.⁶⁸ The first stage of s. 1 justification does not consider the means chosen by the legislature to realize its objective, or their potential deleterious effect on constitutional rights. Rather, the proper purpose inquiry reflects an evaluative and valued-laden component of s. 1 justification that is focused narrowly on the propriety of a given legislative objective in light of the standard implied by the words “free and democratic society.” The extent to which the legislator’s concerns are “pressing” or of “fundamental importance” has come to be definitively tied-up with this normative inquiry and have rarely brought about the invalidation of a law in their own right.

Determining whether a legislative ban on the concealment of the face in public would pass the first stage of s. 1 justification is difficult in the absence of actual legislation or a legislative record. It is from such sources that Canadian courts ascertain the legislative objective, and that task is often wrought with practical and theoretical difficulties. In other constitutional courts, judicial review of legislative restrictions on face-coverings have acknowledged the existence of three legislative objectives, namely, public safety, gender equality, and maintaining the minimum requirements for democratic life.⁶⁹ While prevailing modes of legal reasoning in those jurisdictions may be able to

⁶⁷ *Edwards Books*, *supra* note 8 at para 62.

⁶⁸ It is well established that no *Charter* right is absolute and that “the ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent context arises.” See *Amselem*, *supra* note 27 at para 62.

⁶⁹ These were the three legislative objectives accepted by the French Constitutional Council in Déc n°. 2010-613, *supra* note 1 at para 4. The same three objectives were accepted by the Belgian Constitutional Court when reviewing that country’s legislative ban on concealment of the face in public in Cour Constitutionnelle, Arrêt n° 145/2012 du 6 décembre 2012, B 20 40.

deal with multiple legislative objectives,⁷⁰ the tendency of Canadian courts is to ascertain a singular objective, given the relative intensity with which they focus on the factual matrix at hand. Where a single legislative objective is illusory, they strive to narrow their focus to “the characterization that most directly relates to the reason for violation the constitutional right.”⁷¹

In practice, this may be avoided given the tendency of Canadian legislatures to draft laws with a relatively searching form of judicial review in mind. Indeed, like all s. 1 requirements, the need for a legislative objective to be “pressing and substantial” presupposes a fairly inductive form of judicial review. Accordingly, courts have interpreted it as imposing an evidentiary burden which must be met. It is for this reason that a ban on concealment of the face would likely be framed in narrower, and more negative terms. For instance, rather than draft the law with a view to advancing gender equality, a Canadian legislature would be more likely to be found to be acting to address the “harm” to gender inequality associated with the practice of veiling. Likewise, a ban legislated in the name of security or democratic life, would be enacted and justified with an emphasis on the harms perceived to be associated with concealment of the face in public. To be sure, the evidentiary threshold is low, and the government need only proffer evidence to support “a reasoned apprehension of harm”⁷² to discharge its burden.

While there is every indication that public security and gender equality are appropriate bases for limiting s. 2 rights,⁷³ it is far from clear that the objective of maintaining the necessary standards for democratic life would be admissible at the first

⁷⁰ Belgium adopted the *Code civil des Français* (the Napoleonic Code) under French occupation (1794-1814). It retained the French model and has developed a civil law system that is very similar to that of France. Like French constitutional law Belgian constitutional law continues to be modified to conform with norms mandated by the European Union.

⁷¹ Peter W Hogg, *Constitutional Law of Canada*, 2011 Student ed (Toronto: Thomas Reuters Canada Ltd, 2011) at 38.9(a).

⁷² *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 58. See also *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

⁷³ Providing for public security was recognized as a pressing and substantial objective in *Devito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 57 at para 72, while ensuring gender equality was accepted as a such in *Reference re Section 293*, *ibid.*

stage of s. 1. The Supreme Court's decision in *Sauvé v Canada* is instructive on this point. In that case, the Court struck down a legislative provision that denied to persons imprisoned for two years or more their right to vote as guaranteed by s. 3 of the *Charter*. In so, doing the Court split five to four on the admissibility of "philosophically-based or symbolic" legislative objectives. Writing for a majority, McLachlin C.J. held that "vague and symbolic objectives make the justification analysis more difficult" because they do not speak to the necessity of the limit on the right "in concrete terms." For this reason, she held, "demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy."⁷⁴ Further, she held, "broad, symbolic objectives" such as "enhancing civic responsibility" and "good citizenship" have been held to be "problematic."⁷⁵ Accordingly, it is clear that on whatever basis the government sought to justify its legislation, it would have to do so with reference to a reasoned apprehension of concrete harm.

b) Rational Connection

If the reviewing court is satisfied that the impugned legislation has been enacted for a proper purpose, it then falls to the government to prove that the means it has adopted are rationally connected to that purpose. In other words, at the second stage of *Oakes* (and the first stage of proportionality), the government must establish "a causal connection between the infringement and the benefit sought on the basis of reason and logic."⁷⁶ The Supreme Court has explained the role of the rational connection inquiry as ensuring that limitations on rights should not be "arbitrary, unfair, or based on irrational considerations." While this conception, first articulated in *Oakes*, has not been formally re-visited by the Court, there is some evidence that it is moving away from the language of "fairness" at the rational connection stage. Indeed, as Aharon Barak has noted, that

⁷⁴ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 16, 22.

⁷⁵ *Ibid* at para 23.

⁷⁶ *RJR MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 153.

language is problematic to the extent that it suggests an evaluative role for the Court in what is essentially an empirical inquiry.⁷⁷

Indeed, in its decision in *Alberta v. Hutterian Brethren of Wilson Colony*, the Court urged against conflating the search for a rational connection with more value-laden considerations better left to the final “balancing” step of proportionality. It stressed that “[t]he issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government’s goal.”⁷⁸ Beyond the search for such a link, the reviewing court should refrain from questioning the wisdom of means chosen by the legislature. It is well-established, for instance, that the state is not required to prove that the measures it has adopted will optimally realize its legislative objective. It need only show that it is reasonable to suppose that the limit may further its objective. Furthermore, the measures may advance the legislative purpose partially or inefficiently and still pass the rational connection test. Simply put, the rational connection inquiry is a second threshold test, which will be met where the legislature can point to the “reason” or “logic” of the measures it has adopted.⁷⁹

A legislative prohibition on the concealment of the face in public might well pass the rational connection branch of s. 1 justification. To be sure, a more definitive conclusion in this regard would require actual legislation with an identifiable purpose and means. It is unclear whether it could be established that the three legislative objectives already considered (security, gender equality, and maintaining the minimum standards of democratic life) are in fact compromised by public veiling. If it can be so established, the evidentiary record for each potential harm will likely be different. For example, while there may be significant evidence that the veil undermines gender equality,⁸⁰ evidence

⁷⁷ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), at 320.

⁷⁸ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 51.

⁷⁹ *Ibid* at para 45.

⁸⁰ In *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 the British Columbia Court of Appeal upheld sections of the Criminal Code of Canada proscribing polygamy. In doing so, it accepted, “patriarchal hierarchy and authoritarian control,” as harms of sufficient importance to merit the exercise of the legislature’s power over criminal law. This was held to be so in spite of the protestations of women in polygamous marriages that they were exercising their free will. In debates surrounding

suggesting its harm to public security or democratic participation may be scant. It must be recalled, however, that to establish a rational connection all that is required is enough evidence to disoblige the court of any notion that the means adopted by the legislature are arbitrary or illogical.

Indeed, the requirement of a rational connection is widely recognized in both Canadian case law and legal scholarship as being a burden which may be easily discharged. Again, evidentiary support for harm or the potential for harm can be slight. The Supreme Court has established that in most cases the evidentiary basis for means adopted by the legislature may be “admittedly inconclusive,”⁸¹ and has indicated that the inquiry is really about finding a “common sense connection.”⁸² Again, this suggests that the evidence needed to show the logic of the legislative scheme may be minimal. With respect to the three legislative objectives already discussed, if the state had adduced evidence at the first stage of *Oakes* to show that a ban on the veil was meant to respond to harm associated with veiling, the same evidence may be serviceable to show a rational connection between the prohibition on concealment of the face and the prevention of that harm.

c) Minimal Impairment

As the preceding two sections have noted, very few laws reviewed under s. 1 have been struck down during the preliminary “proper purpose” inquiry or at the so-called “rational connection” stage. Furthermore, the requirement of proportionate effect at the fourth and final step of *Oakes* has also played a marginal role in constitutional rights adjudication.⁸³ The vast majority of laws that have failed s. 1 review, have done so at the “minimal impairment” or “least drastic means” branch of *Oakes*. In fact, the second stage of *Oakes* has been so consequential that one constitutional law scholar has called it “the heart and soul of s. 1 justification.”⁸⁴ However, in *Hutterian Brethren*, the Supreme

the ban on face coverings in France, the *niqāb* was routinely associated with patriarchy. See *SAS*, *supra* note 1 at para 25.

⁸¹ *RJR MacDonald*, *supra* note 72 at para 158.

⁸² *Ibid* at para 86.

⁸³ Hogg, *supra* note 68 at 38.11(a).

⁸⁴ *Ibid*.

Court signaled a more structured and formal approach to minimal impairment which may give new importance to the final branch of *Oakes*. The final two steps of s. 1 justification are analysed here with the Court's reasons in *Hutterian Brethren* firmly in mind.

The second stage of *Oakes* requires the state to establish that the legislation under review impairs the constitutional right or freedom it engages "no more than is *reasonably* necessary" to achieve the law's objective. The word "reasonable" is important because it indicates that while the legislature is obliged to use the least restrictive means available to it to realize its objective, it enjoys a degree of deference or "room to maneuver" in determining what those means are. This so-called "margin of appreciation" doctrine recognizes that that legislature is better-suited to making policy, particularly where complex social and economic issues are involved. Accordingly, the Court has held that review for minimal impairment does not require that the limitation on a right be "perfectly calibrated," only that it is "reasonably and demonstrably justified."⁸⁵ Thus, a law will be "minimally impairing" of a constitutional right where it falls within a range of reasonable alternatives available to the legislature.

The effect of the court's decision in *Hutterian Brethren* was to re-fortify the legislature's margin of appreciation in determining the most effective means of achieving its objective. In that case, a small, insular religious community called the Hutterites challenged a regulation introduced by the Alberta government requiring all driver's licenses in the province to include a photograph of the license-holder. Their objective based upon their religious belief that the Second Commandment prohibited them from willingly being photographed, and insisted on an exemption to the photo requirement. In rejecting the Hutterites' claim, the majority held that an exemption would defeat the government's objective, which was to reduce identity fraud associated with the licensing system by ensuring one-to-one correspondence between each license and a photo of the license-holder in a digital "photo bank." For her part, Abella J., writing in dissent, resisted the notion that the absolute integrity of the photo-bank was necessary to substantially satisfy the government's objective.

⁸⁵ *Hutterian Brethren*, *supra* note 74 at para 37.

The majority in *Hutterian Brethren* held that a reviewing court is not competent to re-configure or modify the policy determination made by the legislature as the most effective means of realizing its objective. As McLachlin C.J. put it, in the case of the photo bank, the demand for an exemption, “instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it.”⁸⁶ If the legislature determines that a one-to-one correspondence was necessary for the system to be effective, the court must not engage in speculation as to “how effective” the system needs to be. The rational connection and minimal impairment tests are not evaluative but empirical, in the sense that they are “essentially determined against the background of the proper objective, and are derived from the need to realize it.” In this way the legislative goal, which has been found to be pressing and substantial, “grounds the minimal impairment analysis.”⁸⁷

Provided that the reviewing court does not readjust the legislative objective at minimal impairment, a statutory ban on concealment of the face in public might well be accepted. Again, this has a great deal to do with the relative breadth with which the legislature defines its purpose. If allowing for exemptions to the prohibition on veiling would substantially defeat the government’s purpose then the court may well accept a full ban as minimally impairing. As McLachlin C.J. noted in *Hutterian Brethren*, freedom of religion cases often involve this sort of “all or nothing dilemma.”⁸⁸ Where providing a religiously-based exemption, for example, would defeat the purpose of the ban, as it would seem to here, then the ban may well be found to be minimally impairing.

d) Proportionate Effect

The final step of s. 1 justification engages the court in a balancing exercise to determine whether the legislation being reviewed is proportionate in effect or proportionate *stricto sensu*. Citing the work of former Israeli Supreme Court President

⁸⁶ *Ibid* at para 60.

⁸⁷ *Ibid* at para 54.

⁸⁸ *Ibid* at para 61.

Aharon Barak,⁸⁹ the majority in *Hutterian Brethren*, held this step involves a court “placing colliding values side by side and balancing them according to their weight.” Canadian courts have typically referred to this exercise as balancing the salutary effects of the legislation with its deleterious effects on the constitutional right. President Barak has written elsewhere that, on his methodology the inquiry into proportionate effect is in fact “the most important of proportionality’s tests.”⁹⁰ While it has historically played a quite marginal role in the application of *Oakes*, there is good reason to believe that the more empirical and less evaluative approach to minimal impairment developed by President Barak has gained influence in Canadian constitutional law, and may make the final step of *Oakes* more consequential.

Indeed, in *Hutterian Brethren*, McLachlin C.J. stressed the importance of differentiating the rational connection and minimal impairment analyses from the inquiry into proportionate effect. In her view, while the latter invites the court to engage in value judgments, the first two steps of proportionality are far more empirical, and do not invite the court to “read down the government’s objective.”⁹¹ This distinction, she held, drawn by President Barak, is “a salutary one,” although one “not always strictly followed by Canadian courts.”⁹² The government’s objective, and the means adopted by the legislature to realize it, are not to be altered, but determined to be constitutional or unconstitutional as they are at the final step of *Oakes*. This approach re-affirms the legislature’s constitutionally authority to make policy-decisions, while at the same time vesting in the reviewing court a highly discretionary authority to strike down laws which are perceived to be insufficiently beneficial to justify the infringement of constitutional rights.

This sort of balancing or weighing of values engages the normative dimension of constitutional rights. To assess whether an infringement on a right is tolerable in a “free and democratic society” requires the reviewing judge to have some notion of what is implied by the words “free” and “democratic.” At this step in s. 1 justification, the court

⁸⁹ Barak, Aharon, “Proportionate Effect: The Israeli Experience” (2007) 57 UTLJ 369 as cited in *Hutterian Brethren*, *supra* note 74 at para 54.

⁹⁰ Barak, *supra* note 73 at 340.

⁹¹ *Hutterian Brethren*, *supra* 74 note at para 198.

⁹² *Ibid* at para 76.

imports, whether consciously or unconsciously, historical and cultural pre-notions of what makes for a good society. As far back as *Big M*, the Supreme Court has articulated a strongly individualistic theory of religious freedom under s. 2(a) as part of a more general s. 2 ethos which regards rights as essentially negative, to be exercised *against* the state. While the Court has tended to articulate this particular rights paradigm as though it were axiomatically the only meaning that could be ascribed to the words “free and democratic,” it does reflect an ideological orientation derived from Canada’s intellectual and cultural history.

Consistent with this individualistic rights ethos, legislation tends to be struck down at the final step of s. 1 justification where its salutary effects on society are perceived to be too abstract or speculative. In *Trinity Western*, for example, the court found that a risk was overly speculative, citing insufficient evidence that potentially discriminatory beliefs were actually result in discriminatory conduct. What was required, the court held, was “concrete evidence” of the harm apprehended.⁹³ Similarly in *Amselem*, “security” concerns posed by the construction of Succot on balconies in an apartment complex were also held to be “speculative” in the absence of evidence of a “tangible impact.”⁹⁴ It should also be recalled that in *Sauvé* the Court refused to reconcile a highly abstract legislative objective as being sufficiently important to over-ride a *Charter* right. Under this model, then, the state has relatively little room for passing laws of general application with predominantly abstract or symbolic dimensions.

Furthermore, deleterious effects on rights, including freedom of religion, are considered by a reviewing court in light of broader *Charter* values, specifically, “liberty, human dignity, equality, autonomy, and the enhancement of democracy.” As the majority held in *Hutterian Brethren*, “liberty” is the “most fundamental” of such values, and in the case of s. 2(a), the “right of choice in matters of religion.”⁹⁵ This emphasis on individual choice and the right to be left undisturbed by the state can be traced back to Dickson CJ’s seminal s. 2(a) decision in *Big M*. Subsequent case law has held that a negation of

⁹³ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 32.

⁹⁴ *Hutterian Brethren*, *supra* note 74 at para 88.

⁹⁵ *Ibid.*

individual choice in matters protected under s. 2 is highly deleterious, and the more the right is negated, the more intolerable the harm is considered to be. This was surely the case in *NS*, where veiling was held to be an expression of individual choice and the degree of interference with that choice was total.⁹⁶

Thus, while a legislative ban on concealment of the face in public may well pass the first three steps of a s. 1 analysis, it is all but certain that it would fail on the final inquiry into proportionate effect. Again, this has to do mainly with the speculative and somewhat abstract nature of such legislation's salutary effects on gender equality, public security or democratic participation. Balanced against this is a very concrete and far-reaching deleterious effect on a s. 2(a) right. It is important to understand that this particular weighing of the different values engaged reflects a particular individualistic approach to constitutional rights. While this normative dimension of rights adjudication has often found expression at the minimal impairment branch of s.1 justification, post-*Hutterian Brethren*, it will likely be considered at the stage of proportionality *stricto sensu*. That stage of s. 1 justification is poised to take on new significance, for as the next chapter of this thesis will suggest, the historical and cultural dimension of rights remains critical, in spite of increased synchronization in the methodology of rights adjudication across legal systems.

vii) The Application of the Proportionality Test in France

a) Proportionality is Applied Syllogistically

⁹⁶ It should be noted, however, that *R v NS* did not involve a s. 1 analysis. Rather, the case involved the court in achieving a balance between two constitutional rights: the right of NS to freedom of religion under s. 2(s) and the right of the accused to a fair trial, which included his right to make full answer and defence under s. 11(d). The accused's right to see the face of his accuser at trial was a common law right long interpreted to be part of a fair trial. To reconcile the s. 2(a) right with a common law right, the Sup Ct applied a framework developed in *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76. In applying that test, the court noted, "As *Dagenais* makes clear, this is a proportionality inquiry akin to the final part of the test in *R. v Oakes*." See *NS*, *supra* note 47 at para 35.

In reaching its result in *Dec. 2010-61*, the Constitutional Council subsumed the facts relating to Law 2010-1192 under one of two contending principles after a process of strict deduction, during which it justified its deductive inferences with reference to the requirements of proportionality. Again, *Dec. 2010-61* takes the form of a laconic six-paragraph statement of the law, admitting of no references to precedent and no reliance on analogy or other inductive techniques which typify the common law. Its language is therefore “existential and descriptive,” rather than “formative and prescriptive.”⁹⁷ It is a short decision, even by the standards of the Constitutional Council. Before delving into the council’s reasons with respect to Law 2010-1192, it is critical to recall why French rights adjudication is so distinctively terse. While the first chapter of this thesis examined French legal reasoning from an historical perspective, in this section it is worth briefly considering how French deduction takes place from a doctrinal standpoint.

As Constitutional Council member Jacqueline de Guillenschmidt has stated, the Constitutional Council strives to apply the law in a non-discretionary manner, with “With the common sense that since Descartes has been equally shared among all men.”⁹⁸ For his part, Descartes opined that by way of “quite simple and easy” reasoning, not unlike “analytical or co-ordinate geometry,” even the “most distant” truth may be arrived at.⁹⁹ The starting point, he reasoned, must be a broad and general principle ascertained by the “indubitable conception of a clear and attentive mind which proceeds solely based on the light of reason.”¹⁰⁰ From a basic principle, he advised, which is often the “simplest object and [therefore] easiest to know,” other less apparent truths might be discerned through strict

⁹⁷ Michael Wells, “French and American Judicial Opinions” (1994) 19 *Yale J Int’l* 81 at 96.

⁹⁸ “*Avec du bon sens dont on sait depuis Descartes, qu’il est également partagé entre tous les hommes.*” Authors Translation. Jacqueline de Guillenschmidt, “Le Contrôle du principe de la proportionnalité dans la jurisprudence constitutionnelle” Speech delivered at 5^{ème} Conférence des Chefs d’institution de l’Association des Cours constitutionnelles ayant en partage l’usage du français, Libreville, 8-13 juillet 2008. Online: at <<http://www.accpuf.org>>

⁹⁹ René Descartes, *Discourse on Method* (1637), F.E. Sutcliffe, trans (1968), as cited in Martin A Rogoff, *French Constitutional Law: Cases and Materials* (Durham, North Carolina: Carolina Academic Press, 2011) at 11-13.

¹⁰⁰ *Ibid.*

deduction.¹⁰¹ In other words, from a principle known with certainty, other correct propositions can be inferred as following necessarily. Descartes' deductive methodology deeply imbued French legal theory, legislative drafting and juristic form. As suggested earlier, the Cartesian premise that truth is logically antecedent to experience powerfully reinforces a posture of judicial restraint.

The French Cartesian tradition, in stark contrast to the common law, places a premium on abstract thinking and gives a corresponding lack of attention to empirical detail. The Constitutional Council thus presents the results of constitutional litigation as logical deductions from more fundamental principles. Deductive inferences are justified by the fact that constitutional rights are conceived of as norms from which sub-ordinate norms derive their force of law. As Hans Kelsen put it, a norm, whatever its formal legal status, is only binding if the entity commanding it is "authorized" or "empowered." to issue that command. This presumes a normative order in which all law is situated.¹⁰² Drawing deductive inferences involves identifying more specific norms as following logically from general norms, in light of the need for the higher norm to "empower" it. Through the deductive technique of *sylogisme judiciaire*, the facts of a case are subsumed under a more specific norm as the "end point" in chain of stringently logical inferences.

Accordingly, the role of the judge is represented as "applying" the law somewhat mechanically, as though the law being discussed "has already judged."¹⁰³ However, as a standard of judicial review, proportionality invariably involves the reviewing court in some degree of evaluation and "balancing," which would seem antithetical to traditional Cartesian methods. While French jurists commonly state that proportionality has always been the essence of deduction, it is undeniable that French adjudicative techniques have evolved to adapt to the incorporation of a standard of review that is necessarily somewhat inductive. It is clear that considerations of proportionality now inform how the Constitutional Council thinks about how legal norms are to be reconciled. This is evident from its use of the language of proportionality to justify its deductive inferences As this

¹⁰¹ *Ibid.*

¹⁰² Hans Kelsen, *General Theory of Law and State* (Anders Wedberg, trans. 1961) as cited in Rogoff, *supra* note 88 at 14-15.

¹⁰³ *Ibid* at 17.

section will show, in the case of Dec. 2010-61, this equated to a terse and syllogistic reasoning process which incorporates consideration of proper purpose, rational connection, and minimal impairment to establish a proportionate infringement of a rights norm.

It serves to recall that none of the constitutional texts of the Fifth French Republic contain a general limitations clause from which a requirement of proportionality for rights limitation can be inferred. Still, Jacqueline de Guillenschmidt has referred to proportionality as “*la pierre angulaire du contrôle de constitutionnalité*.”¹⁰⁴ In her view, while the requirement of that legislative abridgments of constitutional rights be proportionate does not emanate from the black letter of a single, discrete textual provision, it is an adjudicative norm which has long pervaded the republic’s constitutional rights instruments. Accordingly, in French constitutional interpretation, proportionality has traditionally been treated as “*un principe mouvant, impossible à définir dans l’absolu et nécessairement contingent*.”¹⁰⁵ This approach has had the effect of forestalling the development of the sort of structured, formal approach to judicial review for proportionality which has taken hold in other jurisdictions, and of ensuring that proportionality requirements would be inferred from the text of the rights being adjudicated.

Nevertheless, the term “proportionality” does have a meaning in a norm sense, even if the stringency of its application as a legal standard varies depending on the language of the rights norms at issue. For any sub-constitutional limit on a constitutional right to be “proportionate,” it must, in general terms, be “*équilibré, mesuré, [et] raisonnable*.”¹⁰⁶ While this triadic standard always “underwrites” interpretation of rights and their limits in France, as de Guillenschmidt has noted, it is rarely clearly expressed in the jurisprudence of the Constitutional Council.¹⁰⁷ Those three normative criteria are used by the council to measure the adequacy of the statutory standard to the legislative

¹⁰⁴ “The cornerstone of judicial review for constitutionality.” Authors translation. De Guillenschmidt, “Controlé du principe de proportionnalité,” *supra* note 98 at 27.

¹⁰⁵ *Ibid* at 27.

¹⁰⁶ “Balanced, measured, and reasonable.” Authors Translation. *Ibid*.

¹⁰⁷ “Il est sous-jacent, sans être clairement exprimé, dans la plupart des décisions du Conseil constitutionnel.” *Ibid*.

objective and to ensure a balance between the infringement of a right and the public interest.¹⁰⁸ Depending on the rights norms at issue, this may mean a standard of manifest error, a “soft” form of proportionality focussed on necessity or minimal impairment, or a rigorous three-step test that includes a weighing of the law’s “possible consequences.”

For instance, the Constitutional Council has generally used a far less exacting standard of review for environmental or social rights (“*droits de créance*”) than for legislation affecting liberty rights.¹⁰⁹ While the former often retain a standard of manifest error, most of the latter now demand application of a full three-step proportionality test, or what French jurists refer to as the “*triptych allemand*.”¹¹⁰ The three-part means-end rational review with scrutiny for minimal impairment and proportionality *stricto sensu* has been applied, for example, to ensure that a deprivation of the right to liberty is “strictly and obviously necessary” *per* Art. 9 of the 1789 *DDHC*. In contrast, Art. 5 of the 2004 *Charter of the Environment*, which ensures the imposition of precautionary measures by public authorities to prevent environmental damage, has been found to attract a standard of review akin to manifest error.¹¹¹ Again, this variability has to do with the relative breadth of legislative maneuverability conferred by the right as suggested by its text.

It must be recalled, however, that what is being reviewed is the competence of the legislature to make law given the constitutional principles engaged. In French constitutional rights adjudication, those principles are conceived of less as discrete textual provisions than as norms of the apex of a hierarchical order which both limit and empower all sub-constitutional laws. In other words, constitutional principles or norms dictate at the highest level of abstraction how all legislation and subordinate legislation is to be interpreted or applied. In most cases dealt with by the Constitutional Council, including *Dec. 2010-61* respecting concealment of the face in public, a number of textual

¹⁰⁸ *Ibid.*

¹⁰⁹ Rogoff, *supra* note 93 at 224-225.

¹¹⁰ “The German triptych,” is a reference to the German origins of the three-part proportionality analysis. Jacqueline de Guillenschmidt, “Questionnaire: La proportionnalité dans la jurisprudence constitutionnelle.” 5^{ème} Conférence des Chefs d’institution de l’Association des Cours constitutionnelles ayant en partage l’usage du français, Libreville, 8-13 juillet 2008. Available at <http://www.conseil-constitutionnel.fr>

¹¹¹ Cons const, 13 June 2013, *Liberté d’association*, (2013) JO 9976, 13-672 DC.

provisions in several constitutional texts are implicated. The constitutional principles implicated by those provisions are read as informing and complimenting one another. Thus, the council is not adjudicating the black letter of individual textual provisions in relation to the facts, but setting out the constitutional norms engaged by a particular set of facts in the most abstract of terms.

Accordingly, the rights provisions engaged in Dec. 2010-61, (that is, Articles 4, 5 and 10 of the *DDHC* and Article 3 of the Preamble of the Constitution of 1946), must be read as *a priori* truths which inform each other. Article 4 of the *DDHC* is a general liberty right, prescribing that the exercise of an individual's "natural rights" may only be limited to ensure the enjoyment of these same rights by others. It further prescribes that such limits "shall be determined solely by the law." Article 5 circumscribes the legislature's authority to set such limits by stating that it may only limit rights where their exercise is harmful to society. Article 10 suggested that freedom of religion is a natural right within the meaning of Article 4, and may only be limited in the interest of "public order," which to be consistent with Article 4 must involve the prevention of some harm. Finally, Article 3 of the 1946 preamble, obliges the legislature to legislate with a view to ensuring gender equality.

From these provisions, the Constitutional Council postulated two general contending principles: the broad liberty right of the individual to freedom of religion and the right of the legislature to limit that right to prevent societal harm, including harm of a gendered nature. With the single deductive inference that places of public worship (*lieux de culte ouvertes au public*) were not part of the "public order" for which the legislature could make law, the council proceeded to subsume Law no. 2010-1192 under the principle of legislative authority to make law for the public order. Again, this is an very short decision, and generally broad constitutional principles such as those involved in this case yield a chain of inferences to get to propositions sufficiently narrow to take in the facts at hand. Still, in arriving at its decision, the Constitutional Council made full use of the requirement of proportionality to justify its inferences. The proportionality criteria which the council felt were engaged by the principles it cited were proper purpose, rational connection, and minimal impairment or necessity.

a) Deductive Inferences are Justified With Reference to Proportionality's Requirements

First, the Constitutional Council acknowledged that Law no. 2010-1192 prohibiting the concealment of the face in public had a proper purpose. Again, it should be recalled that the proportionality standard in France grew out of the stand of manifest error, and the council retains the ability to invalidate legislation with “arbitrary or abusive” purposes, the error of which “could not escape a man of good sense.” In general terms, the standard of manifest error equates to the proper purpose inquiry in Canadian or EU law. On this point the council reviewed the legislation and held that Law no. 2010-1192 was “intended to respond to practices which until recently were of an exceptional nature, consisting of concealment the face in public.” It proceeds to note that the legislature had felt that such practices were at odds with public safety, gender equality and the minimum requirements of life in society, and more general the constitutional principles of liberty and equality.¹¹² Implicit in these reflections on the legislative purpose, is an subtle acknowledgement that there is nothing manifestly inappropriate about it.

Secondly, the Constitutional Council acknowledged (again, in rather existential and descriptive terms) the proportionality of the means adopted by the legislature in Law no. 2010-1192. Immediately preceding its discussion of legislative purpose, the council noted that “when enacting the provisions referred for review, Parliament has completed and generalized rules which previously were reserved for *ad hoc* situations for the purpose of providing public order.”¹¹³ This statement of legislative means suggest their innate rationality, as a logical extension of measures already existing to meet the needs of a developing situation. Given that a rational connection is generally considered to be a non-arbitrary or non-capricious one, a “completion and generalization” of existing rules cannot fail to meet that standard. Further, the reference to “public order” has a particular constitutional meaning. The legislature is empowered to make law for the “public order,” a term which draws its normative dimensions from other constitutional provisions setting

¹¹² *Loi interdisant la dissimulation du visage, supra* note 1 at para 4.

¹¹³ *Ibid.*

out the democratic character of French institutions. The implication is that if the provision developed for *ad hoc* situations were “rational,” then their adaptation to a more general phenomenon will be as well.

In the fifth paragraph of its six-paragraph decision, the council held that Law no. 2010-1192 minimally impaired on the right to freedom of religion. Again, the legislative objective is not a shifting standard but must ground the minimal impairment analysis. Accordingly, the council noted that “in view of the purpose which it sought to achieve,” the legislature had achieved a conciliation which was not disproportionate (*une conciliation qui n’est pas manifestement disproportionné*) between safeguarding the public order and guaranteeing constitutionally protected rights.¹¹⁴ It proceeded to note, however, that the legislation could not apply to places of worship frequented by the public without constituting an excessive burden on the exercise of freedom of religion.¹¹⁵ Thus, for the council it followed logically there was no less intrusive way to realize the legislative objective of preventing the harm associated with the *niqāb* than by prohibiting it in public places that do not have a specific religious purpose. In other words, veiling could be permitted in places of worship without undermining the legislature’s goals with respect to public order.

Importantly, the Constitutional Council did not conduct a balancing of the legislation’s salutary and deleterious effects. Again, this would have required the reviewing court to weigh contending values against the framework of what is required by a democratic society consecrated to the realization of “liberty” and “natural rights.” The fact that this inquiry was not conducted in Dec. 2010-61 suggests that it was not inferred by the council as required by the text of the rights provision they were applying. More accurately, it may be said that the rights paradigm the council felt was implied in determining proportionate effect was sufficiently well expressed by a more limited inquiry into whether the legislature had acted in manifest error, had used irrational means, and unduly impaired the rights of the individual. In a normative sense, the balance that French constitutionalism seeks to achieve between the rights of the individual and the needs of the whole of which he is a part is sufficiently accounted for in the softer

¹¹⁴ *Ibid* at para 5.

¹¹⁵ *Ibid.*

form of proportionality used in Dec. 2010-61, without recourse to consideration of possible consequences.

a) Conclusion

This chapter has analysed the application of proportionality in Canada and the French Republic to legislative limits on the constitutional right to freedom of religion. It has used France's recent legislative ban on the wearing of full face veils in public as an example which has implications for other freedom of religion cases in each jurisdiction. To be sure, each country undertakes the proportionality analysis using starkly different forms of legal reasoning. While Canadian rights adjudication is imbued with the empiricism and fact-sensitivity of the common law, French jurists place a premium on abstract and conceptual thinking. For the French Constitutional Council, proportional limitations on rights are knowable by the virtues of logic, and not as a by-product of litigation. Nevertheless, in recent decades both jurisdictions have incorporated the principles of proportionality into their approach to constitutional review, affecting an impressive synchronization in methods of rights adjudication.

As this analysis has shown, both systems are able to bring the same principles to bear through their respective methods of judicial reasoning (ie. whether fact-oriented or principle-oriented). Differences in substantive outcomes resulting from differences in reasoning methods appear to be negligible. In other words, neither Canadian nor French legal reasoning necessitates a more rigorous application of the proportionality standard. Both constitutional authorities are likely to assess for a proper purpose (or the absence of a manifest error), a rational connection, and minimal impairment and arrive at more or less the same result, irrespective of the method of judicial reasoning used. Both forms of judicial reasoning strive to reconcile the right with its potential to be limited, and in doing so arrive at a window within which it must decide whether or not to defer to the legislature.

In the case of a prohibition on the veil, the matter turns on the final step of the analysis; that is, the inquiry into proportionate effect. The Canadian approach invites a reviewing court to assess the harm occasioned by the ban against a normative backdrop that sees liberty as a negative right of the individual to be left unmolested by the state.

The individual and the state are conceived of as existing in fairly rigid dichotomy, with the interests of the collective being represented by the legislature and the interests of the individual being represented by the courts. For its part, the French Constitutional Council did not conduct a proportionate effects inquiry, which in effect allowed it to assess the limitation against a backdrop which does not perceive of the state and the individual existing in as rigid a binary. Indeed, as the next chapter will explain, even where the Constitutional Council conducts a proportionate effects inquiry it is done in such a way as to comport with this more legislature-centric normative backdrop.

The normative dimension of rights, understood as the extent to which they are historically and culturally contingent, remains critical to determining justifiable limitations on rights. As with other constitutional rights, the normativity of “freedom of religion” is most evident when the reviewing authority considers whether the effects of a legislative limitation on that right is proportionate in the strict sense. Accordingly, the next chapter takes the form of a deeper and more concentrated analysis of the proportionate effects or balancing stage of proportionality. By analysing the way in which balancing takes place from the perspective of each jurisdiction’s intellectual and cultural development, the normative dimensions of democratic life and religious liberty in Canada and the French Republic can be better understood.

Chapter 4: How the Proportionate Effects Test Acts as the Main Vector for the Expression of Constitutional Culture

i) Introduction

This chapter attempts to shed light on the role of constitutional culture in the application of the proportionality test as tool of rights adjudication. It suggests that the “proportionate effects” or “balancing” stage of that test is the main vector for the expression of the cultural dimension of rights because it engages a reviewing court in appraisals of what is good or acceptable in a given jurisdiction. In the first two chapters of this thesis, it was suggested that courts in Canada and the French Republic have adapted proportionality to comport with their domestic modes of legal reasoning. This chapter explores how rules for applying the proportionate effects test have been judicially-developed so that balancing reflects prevailing rights norms in each country. It concludes that while the migration of proportionality has brought about a degree of harmonization in the methodology of rights adjudication, the constitutionality of limitations on rights such as freedom of religion still turns largely on both articulated and unarticulated normative considerations distinctive to different jurisdictions.

The legal rules developed by courts for application of the proportionate effects test are used to anchor a discussion about the cultural nature of constitutional balancing. That discussion is based upon the observation that while the proportionate effects test is part of a legal standard developed at a supra-national level, fundamental value-considerations of order and purpose are ascribed to it in the jurisdiction applying it. In other words, an instrumental “steering function” is expected of the proportionate effects test when it is applied in a particular legal system.¹ This chapter suggests that the nature of those value-considerations are best understood with reference to the constitutional culture in which the standard is being applied. The term “constitutional culture” is used to suggest basic, historically-developed “shared meanings” and interpretive perspectives in

¹ Hans Vorländer, “What is a ‘Constitutional Culture?’” in Silke Hensel et al, eds, *Constitutional Cultures: On the Concept and Representation of Constitutions in the Atlantic World* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012) at 28

a jurisdiction's constitutional law.² This chapter aims to move beyond a narrow or positivistic comparative analysis by exploring how the legal rules of balancing in each jurisdiction reflect their respective constitutional cultures.³

An historicist approach is used as the most effective means of exploring the "shared meanings" that inform balancing in each jurisdiction. This chapter does not seek to ascribe historical causes to contemporary legal issues. Nor does its use of history reflect an attempt to give a comprehensive review of the development of legal norms or institutions in Canada or France. The aim of this chapter is in fact far less ambitious. An historicist methodology is used to isolate a narrow distinction in legal reasoning in each legal system in the context of the balancing stage of proportionality. By relating that distinction to historical patterns, this chapter suggests a far greater degree of organicism in the law relating to constitutional rights than is generally acknowledged in legal scholarship. The recognition or non-recognition of particular substantive rights, it is suggested, is related to but not co-extensive with these underlying patterns in thinking about rights.

Accordingly, differences respecting the constitutionality of legislative restrictions on religious expression, such as prohibitions on concealment of the face in public, can be explained by a divergence in the way rights are conceptualized. That divergence finds its expression mainly in the proportionate effects stage of proportionality. It is argued that the Canadian approach to balancing reflects the empiricism of the common law, while the French approach is distinctly rationalistic. While the common law tradition tends to see liberty in a negative sense, as an individual right to be left unmolested by the state, the latter sees the state as having an important role in advancing liberty through a formative project of fraternal and egalitarian citizenship. The legal rules of balancing have been

² *Ibid* at 25.

³ Legal positivism suggests, in the words of Hans Kelsen, that "the content of the law can be anything whatsoever." The only basis upon which to judge the legitimacy of a law whether it is issued authoritatively and has social efficacy. No moral elements are included in the analysis. The tradition tends to restrict its focus to the black letter of the law and its functional operation as the principle means of assessing its validity. See Hans Kelsen, *Pure Theory of Law*, 2nd ed, trans by Erine Rechtslehre (1960) by Marx Knight (Berkeley: University of California Press, 1967) at 198 and Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Oxford University Press, 2002).

developed to reflect these ends. Thus, it is the legal rules of balancing, and not specific doctrines of secularism *per se*, which are responsible for the constitutionality or unconstitutionality of restrictions on religious expression in the public sphere.

ii) The Proportionate Effects Inquiry: General Observations

In most jurisdictions, constitutional review on a proportionality standard requires a preliminary inquiry into whether the law under review has a “sufficiently important objective,” followed by a three-part “proportionality test.” That test involves assessing the impugned legislation for: a “rational connection” between its objective and the means adopted to realize it, minimal impairment of the constitutional right, and a proportionate relation between the salutary effects of the law and its deleterious effects on the right. It is critical to appreciate that the final step of proportionate effects (known in the law of the EU as “proportionality *stricto sensu*”) is conceptually distinct from those that precede it. Taken together, the first three requirements represent a “means-end analysis,” focused narrowly on the relation between the legislative objective and the legislative means. In contrast, the test for proportionate effects assesses the relation between the legislative objective and the constitutional right. While the first three inquiries are primarily empirical, the fourth is evaluative in the sense that it involves a rather more subjective “balancing” of values.⁴

To be sure, the preliminary question of whether the law has a sufficiently important objective can be described as evaluative to the extent that it involves a court in determining whether a legislative objective is “good” or “acceptable” in a constitutional democracy. That inquiry, however, is focused narrowly on the admissibility of the law’s purpose, and the bases upon which a purpose can be rejected as improper are generally few and well-defined. Improper purposes are particularly clear and accessible to reviewing courts because they tend to be articulated in the constitutional text itself or in relevant case law,⁵ and do not involve the same level of speculation as questions dealing

⁴ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 344.

⁵ Under the *European Convention on Human Rights*, statutory purposes which are considered acceptable from the standpoint of limitations on rights are set out in the text of

with the potential effects of a law. In other words, the legislative intent involved tends to be either patently unacceptable or not. Thus, the proper purpose inquiry is conceptually like the rational connection and minimal impairment tests both in the sense that it is focuses on the relation between the law's limiting purpose and the means selected to achieve it, and because of the primarily empirical nature of its application.

The requirements of a rational connection and minimal impairment are not evaluative and do not engage the court in value judgements. The test for a rational connection between the means used by the legislation and the purpose it was designed to fulfill is empirical. It involves verifying as a matter of fact some sort of connection, however slight, between legislative means and ends. Again, such means may advance the legislative objective badly or inefficiently and still be rational.⁶ Similarly, the minimal impairment or necessity test does not invite a reviewing court to evaluate the legislative purpose or the need to realize it.⁷ The legislative objective remains fixed and grounds the inquiry. The aim of minimal impairment is to filter out cases in which the same level of realization of a legitimate legislative objective can be achieved at less cost to constitutional rights.⁸ While some level of judicial discretion is invariably applied,⁹ at minimal impairment the court is charged only with ruling out gratuitous limitations on rights.

The final step of the three-part proportionality test is different. It departs from consideration of the legislative ends and means, and focuses on the *effects* of the law. The

the specific limitations clauses themselves. See for example Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 at Art. 9(2).

⁶ Barak, *supra* note 4 at 305.

⁷ *Ibid* at 321.

⁸ Julian Rivers, "Proportionality and Variable Intensity of Review," (2006) 65 Cambridge LJ 174 at 200.

⁹ When applying the minimal impairment of necessity stage of proportionality, for example, the European Court of Human Rights developed the notion of a "margin of appreciation." According to that doctrine, a court will grant to a legislature a measure of "latitude... in evaluating factual situations and in applying the provisions enumerated in international human rights treaties." The margin of appreciation is now a well-recognized part of the proportionality test in every jurisdiction where that standard of review is used. See Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Hart Publishing, 2002) at 2.

court evaluates those effects through a balancing of its potential benefits and the harm it might cause to the rights of affected individuals or groups. It involves the reviewing court in determining, not whether a given level of rights-enjoyment combined with the realization of other interests meets a particular legal test, but whether it is good or acceptable in a given context.¹⁰ While scholars have advanced a range of methodological proposals to lend greater structure and formalism to the exercise and to prevent it from becoming “a playground of subjectivity”¹¹ the balancing process remains “methodologically obscure” in most jurisdictions. It is generally recognized that the balancing stage of proportionality involves an “insurmountable” element of subjectivity¹² given the extent to which it engages value judgments.

The inherent subjectivity or “crudeness”¹³ of the proportionate effects test stems from the fact that, in order to measure whether there is in fact an adequate congruence between the benefits gained by a law and the harm it may cause to constitutional rights, the reviewing court must be able to “quantify” the net gain and loss of a particular legislative initiative. That is, the values in conflict must, at their precise point of conflict, be infused with a certain weight, a weight which ultimately derives from context. The interaction of the value with particular factual circumstances inevitably engages judicial discretion and subjectivity. The proportionate effects test, therefore, cannot avoid a high level of subjectivity. The most that can be done is for judges to develop legal rules to guide balancing. The legal rules of balancing signal certain principles to which courts must refer when applying that stage of the proportionality standard.

As this chapter will show, when developing such rules courts are working from the text of the limitations clause of the constitutional document. Starting from the language used to justify limitations on rights, they bring to bear, both consciously and unconsciously, a particular way of thinking about rights that is organic to the legal system of which they are a part. They both read in particular political and philosophical

¹⁰ Rivers, *supra* note 8 at 200.

¹¹ Bernard Schlink, “Proportionality” in Michael Rosenfeld and András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) at 724.

¹² *Ibid* at 725.

¹³ Rivers, *supra* note 8 at 201.

ideologies, historical and cultural realities, including general notions of the structure of the political system,¹⁴ and import particular modes of reasoning which affect rights balancing in less explicit ways. In a sense, during balancing, judges are at once conscious articulators of certain aspects of the constitutional culture, and unconscious transmitters of other aspects. It is for both of these reasons that the final step of the proportionality analysis gives expression to the extent to which constitutional rights are historically and culturally contingent.

iii) Canadian Constitutional Culture Reflects a Common Law Heritage

The most important aspect of Canadian constitutional culture for the purpose of this analysis are those which engage very basic questions about traditional forms of legal reasoning. Those reasoning practices pre-existed the incorporation of the Canadian *Charter of Rights and Freedoms* (“the *Charter*”), and were subsequently leveraged in its interpretation. From a comparative perspective, the most distinctive feature of Canadian constitutional reasoning is its empiricism and non-speculative character. As this section will suggest, this fact-dependence and aversion to abstract reasoning is an inheritance of common law practices which developed in Britain in the eighteenth-century. Indeed, it is a key contention of this thesis that, even after the incorporation of a constitutional rights instrument and a robust system of judicial review, Canada may still be justifiably referred to as a common law constitutional culture. This is in large measure due to the extent to which the country’s common law heritage continues to make itself felt in constitutional review.

In the first chapter of this thesis, it was suggested that the late-Georgian period, extending roughly from the years 1760 to 1830, exerted an enduring influence on the development of “ancient” or “common law constitutionalism.” It was argued that common law constitutionalism is not so much a discrete theory of legislative competence, as it is a theoretical orientation, situated opposite of the principle of strict parliamentary supremacy. Simply put, common law constitutionalism suggests that authoritative legal texts – whatever their formal status – are to be interpreted as elements of a larger,

¹⁴ Barak, *supra* note 4 at 349.

historically-contingent constitutional design, admitting of both written and unwritten sources.¹⁵ A consequence of that sort of arrangement is that courts are obliged to interpret general or ambiguous texts with reference to custom and precedent, rather than original understanding.¹⁶ Such an interpretation is based on a recognition that a legislative text is embedded in a particular constitutional context, from which it derives both its meaning and its legitimacy as a source of law.

To be sure, the distinction between the two ways of conceiving of parliament's role tended to be more theoretical than practical. Throughout the nineteenth century, Parliament exercised its authority within a context established by custom and past practice, but was effectively unfettered by other institutions. The importance of studying the discourses relating to parliament's role lies in the extent to which they shed light on the organic development of British constitutional culture. The historical period during which common law constitutionalism last crested is important to that task because it reinforced certain aspects of that culture, as influential actors endeavoured to define what they regarded as a cumulative and coherent tradition from the influence of the French Revolution. Jurists and legal scholars of the period represented British constitutional culture as inherently ill-suited to the sort of abstract rights discourses taking place in revolutionary France. The constitutional culture of Britain, it was argued, was essentially empirical and unspeculative, having developed incrementally in a relationship of co-dependence with the common law.

Indeed, among the most important influences on late-eighteenth century jurists was British "empiricism," a philosophical tradition exemplified by the writings of such figures as John Locke, George Berkeley, and David Hume. In the most general terms, that tradition could be distinguished from the "rationalism" of continental Europe based upon the question of whether the human mind is possessed of any "innate" ideas.¹⁷ While

¹⁵ TRS Allan, "Text, Context, and Constitution: The Common Law as Public Reason" in Douglas E Edlin, ed, *Common Law Theory* (Cambridge: Cambridge University Press, 2007) at 185.

¹⁶ Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason" (2007) 107 *Colum L Rev* 1482 at 1482.

¹⁷ Anthony Kenny, *A New History of Western Philosophy In Four Parts* (Oxford: Clarendon Press, 2010) at 599.

the answers given in both traditions are variegated and deeply nuanced, it may be said that for the eighteenth century British empiricists, human knowledge derived only or primarily from sensory experience and not, as continental rationalists would have it, from abstract or *a priori* reasoning. Thus, for empiricists, knowledge could not be gained absent some level of engagement with concrete facts. To speculate or develop theories that did not engage such facts was an error at best, and not likely to yield any real knowledge for any practical use.

Neither philosophy nor the common law was a “self-contained science” in the eighteenth century; each influenced the development of the other.¹⁸ It is for this reason that traditional forms of common law reasoning, which leveraged judicial precedent as a tool for argument by analogy, reflected the empirical values of eighteenth-century Britain. For example, while for continental rationalists knowledge was something to be acquired through the mind’s recognition of certain pre-existing truths, the British empiricists urged that knowledge of a given object was only a “perception” of the mind, based upon the accordance or discordance of that object with other perceptions acquired by past experience.¹⁹ As the writer John Locke put it, for empiricists, the “capacity for distinguishing one thing from another is the source of the obvious and certain truth of the proposition.” It was the “mind’s ability to discern or distinguish” and to “to perceive two ideas to be the same or different” that lead to human understanding.²⁰

The culture of empiricism which had developed in Britain throughout the eighteenth century, helped to elevate the importance of precedent in judicial decision-making in the early 1800s. Prior to that, the common law was defined mostly by its “sanctity and unchangeability,” as a “fixed body of doctrine based on natural law and inflexible rules.”²¹ Reference to precedent was an important but not exclusive nor

¹⁸ Michael Lobban, *The Common Law and English Jurisprudence* (Oxford: Clarendon Press, 1991) at 80.

¹⁹ Kenny, *supra* note 17 at 600.

²⁰ John Locke, *An Essay Concerning Human Understanding II*, ed by Jonathan Bennett, Online: Some Texts from Early Modern Philosophy <<http://www.earlymoderntexts.com>>

²¹ Achieving fairness was not generally thought to be the function of the common law. Where application of the common law was thought to be unjust, relief was to be found in equity. See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) as cited in Lobban, *supra* note 19 at 1.

obligatory tool used by judges in reaching just solutions. In other words, judges might be guided by precedent but they were not bound by it, as no official doctrine of *stare decisis* existed.²² By the late eighteenth-century, however, the application of the common law became increasingly empirical and the ability to apply or distinguish past precedent based upon the facts of a given case became central to the judicial function. Informed by empiricism, the common law increasingly accepted the importance of cautious, fact-contingent reasoning and incremental change in the law.

By the end of the eighteenth century, reference to the inflexibility and immemorality of the common law were yielding to discussions of how the common law “grew.” Indeed, in his survey of the common law during the years 1760 to 1860, the legal historian Michael Lobban associated the legal culture of the period with the writings of Edmund Burke, who stressed the importance of slow, half-conscious change in the law. If the common law did indeed “grow” and develop, Lobban observed, “it was in a Burkean way, adding on to a sturdy and solid ancient structure” while avoiding the abstract and the speculative.²³ Indeed, the writings of Burke provide helpful insight into the culture of the eighteenth-century common law, with a particular focus on the ways in which it was different from that of the First French Republic (1792-1804). As such, they are a convenient point of reference for an analysis of common law constitutional culture in a comparative perspective.

Indeed, in recent years, a number of Canadian legal scholars have identified the writings of Burke with the formative years of a Canadian constitutional culture in the nineteenth century. For instance, David Schneiderman and Peter H. Russell have urged that the “moral foundations” of Canadian constitutionalism are imbued with a distinctly Burkean hue.²⁴ For his part, the historian G. Blaine Baker has suggested that the influential actors in mid-nineteenth century Upper Canada subscribed to an exaggerated

²² An official doctrine of *stare decisis* did not develop until the early nineteenth century. See Lobban, *supra* note 18 at 87.

²³ *Ibid.* at 1-2.

²⁴ David Schneiderman, “Edmund Burke, John Whyte, and Themes in Canadian Constitutional Culture” (2005) 31 *Queen’s LJ* 578 at 578 and Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004) at 10.

form of Burke's ideology. "By-passed by the American, French, and Industrial Revolutions," he wrote, the "legal-administrative elite" of Upper Canada became "radical in its romantic and stubbornly Georgian posture" and self-concept.²⁵ While it is not within the limited scope of this analysis to delve further into such claims, it is sufficient to note that the writings of the Whig parliamentarian are increasingly used by Canadian scholars as a short hand reference for the early common law culture of the country.

In his writings, Burke argued that the distinctive characteristic of the British constitution was that it was non-speculative. In his 1790 letter to the French *député* Charles Jean François Depont he urged that French rights discourses were abstract and insufficiently tethered to reality. Affirming his ardour for a "manly, moral, regulated liberty,"²⁶ he proceeded to rail against the reign of "naked reason" in France,²⁷ which he held to be "vulgar in the conception [and] perilous in the execution."²⁸ For him, the French view of liberty as an object of design by "geometrical distribution and arithmetical management"²⁹ denied the reality of human nature:

The nature of man is intricate; the objects of society are of the greatest possible complexity; and therefore no simple disposition or direction of power can be suitable either to man's nature or to the quality of his affairs. When I hear the simplicity of contrivance aimed at and boasted of in any new political constitutions, I am at no loss to decide that the artificers are grossly ignorant of their trade, or totally negligent of their duty.³⁰

In a similar vein, in his *Observations on the Present State of the Nation*, penned in 1769, he wrote that "politics ought to be adjusted, not to human reason, but to human nature of

²⁵ G Blaine Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law & Hist Rev* 259 at 259.

²⁶ Edmund Burke, *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event*, by Conor Cruise O'Brien (London: Penguin Books, 2004) at 89.

²⁷ *Ibid* at 183.

²⁸ *Ibid* at 267.

²⁹ *Ibid* at 144.

³⁰ *Ibid* at 153.

which reason is but a part and by no means greatest part.”³¹ To engage the state in a self-conscious ethical project was by necessity to invite the use of its arbitrary power, for the complex reality of both the person and his society was simply not amenable to a design arrived at through discursive reason, even if said design was emancipatory in its objective.

For Burke, the British constitution was based upon the principle of inherited right and empirical growth. It was for this reason that he tended to coningle the language of constitutional “rights” with proprietary “title.” In his letter to DePont, he observed that the British saw their liberty not as an object of design, but as a “patrimony derived from their forefathers.”³² It was for “reasons of practical wisdom which superseded their theoretical science,” he advised, that they favoured a “positive, recorded, hereditary title” for all that which was worthy of being inherited, to a “vague, speculative right.”³³ He proceeded to reference a series of initiatives from the Magna Carta to the Petition Of Right (1628), as support for the proposition that it had been the “uniform policy” of the British constitution to conceptualize liberty as an “entitled inheritance” and an “estate” belonging to the British people, “without an reference whatever to any other more general or prior right,” of the kind on which French rights discourses were being conducted.

It is important to observe that the rights to which the British lay claim were essentially negative rights to be exercised by the individual against the state. Certainly, the obligation to act affirmatively to facilitate the enjoyment of certain “positive” rights was not in contemplation in pre-industrial Britain. But what is more important for the purposes of this analysis, is that conception of rights articulated by Burke did not involve the state in any kind of formative project aimed at emancipation or the self-conscious generation of a particular type of society. The state was presumed to be liberty’s natural antagonist. To look for liberty in the state was to look for it where it could never be found. The state, Burke argued, is not “made in virtue of natural rights,” for such rights

³¹ Edmund Burke, “Observations on a Late Publication Entitled The Present State of the Nation” in Isaac Kramnick, ed, *The Portable Edmund Burke* (New York: Penguin Books, 1999) at 154.

³² Burke, *Reflections* at 119.

³³ *Ibid* at 118.

existed outside of it.³⁴ The continental philosophy he criticized was be definition “abstract” because it was oriented to a reality that did not yet exist. The authority of the state would be a needed to bring about that reality, much to Burke’s consternation.

Finally, it is important to note the essentially empirical way in which Burke construed constitutional development in Britain. He equated the culture of the British constitution with the common law, and suggested the importance of adhering to particular sets of facts in making decisions concerning the rights of the individuals. Echoing the writings of the empiricists on epistemology, he suggested that it was “circumstances that “[gave] in reality to every political principle its distinguishing colour and discriminating effect.”³⁵ It was therefore inadvisable to speculate about rights and their limitations beyond a concrete set of facts in which a particular decision had to be made. By taking an essentially empirical approach to the constitution then, it may be said that the constitution did not “change” *per se*, but was “meliorated and adapted” to circumstances arising over time.³⁶ In this way, as the legal historian David Lieberman has suggested, the late-Georgian British constitution may be best thought of as a “living organism of complex structure and historical continuity,”³⁷ that had in many ways grown up in contradistinction to the rationalism of the continent.

iv) At Common Law, Freedom of Religion Developed as a Negative Right

The development of freedom of religion in Britain was related to other cultural developments in that country, including trends in law and philosophy. The free exercise of religion in Britain came about by way of a slow process of religious de-regulation in the centuries after the Reformation. That process involved a series of legislative initiatives (often called “relief acts”) which repealed laws burdening particular religious factions. As this section will suggest, the effect of extending relief to particular religious sects legitimated their long-standing resistance to a majority with which they refused to

³⁴ *Ibid* at 150.

³⁵ *Ibid* at 90.

³⁶ *Ibid* at 123.

³⁷ David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989) at 5.

conform. Emancipation of so-called “non-conforming” Protestants and later Roman Catholics took the form of a negative right against the state to be unburdened in the public sphere because of private confessional differences. In this way, freedom of religion is prototypical of other rights in British constitutional culture. Thus, rights in Canada can only be adequately understood with reference to the heterodox nature of religious practice in post-Reformation England.

The Protestant heritage of Britain affected the way in which rights were conceptualized in two important ways. First, the rise of Protestantism was a critical influence in the emergence of the “individual” as the principal currency for most discussions on the human condition in the modern era. As H. Richard Niebuhr has put it, between the polarities of “order and movement [and] of structure and process,” the Protestant is arguably oriented to the more dynamic end relative to the Roman Catholic.³⁸ His experience is – again, in the most general of terms – less about being part of an enduring order and more about internal process.³⁹ The free decision of the individual will was central. It is in this sense that Marx observed that the effect of the Reformation was to displace “bondage out of devotion by replacing it with bondage out of conviction.”⁴⁰ While the distinction is subtle, it is real, and exerted a powerful and still discernable influence on the development of British constitutional culture.

The second way in which the Reformation affected the development of rights discourse in Britain was by impressing a distrust of the state on British culture. The essentially negative nature of “liberty” in the common law tradition can only be understood in light of the Reformation. Quite apart from the anti-statism of Protestant “non-conformists,” the Anglican majority were long gripped by fear of the re-emergence of a Roman Catholic state. Indeed, railings against “arbitrary government” and “popery,” ran like a *leitmotif* throughout most aspects of British culture for over two centuries. While it may be said that the result was an essentially “negative” conception of liberty as

³⁸ H. Richard Niebuhr, “The Protestant Movement and Democracy in the United States” in James Ward Smith and A Leland Jamison, eds, *The Shaping of American Religion* (Princeton, NJ: Princeton University Press, 1961) at 22.

³⁹ *Ibid.* 22-23.

⁴⁰ Karl Marx, *Contribution to Critique of Hegel’s Philosophy of Right* (Cambridge: Cambridge University Press, 1970).

the right to be free from the state's coercive power, there existed a positive aspect to the constitution as well. That is, in the Anglo-Protestant mind, the freedom of the individual included his or her right to move toward a goal of action dictated by his or her conscience.

Until the early nineteenth century, restrictions on matters of conscience were justified as necessary to protect the inherited rights of Britons, who were axiomatically assumed to be Protestant. As the Prince Regent put it in 1819, "devine favour and protection," had secured in Britain "the principle of religion under a just submission to lawful authority."⁴¹ For centuries after the Reformation, prejudice against Roman Catholics in Britain was endemic. Adherents of that faith were distrusted as inherently "un-English" and "fundamentally alien," associated with continental tyranny.⁴² It was in this way that restrictions on religious practice were reconciled with notions of "ancient" and "inherited" rights. In a manner not atypical of the eighteenth century, "universal" rights claims were made by and in the interest of a particular and restricted male demographic. The means by which the British constitution adapted to protect those rights, and the means by which enjoyment of those rights was extended are worth studying as indicative of constitutional culture.

- v) The Legal Rules Developed for the Application of the Proportionate Effects Inquiry Reflect a Common Law Constitutional Culture.

It may be recalled that the Supreme Court of Canada has interpreted s. 1 of the *Charter* as contemplating a proportionality test as the justificatory standard for all limitations on constitutional rights. The standard of review that it articulated in its decision in *R. v. Oakes* in 1986 closely followed the approach taken by the ECHR in interpreting the specific limitations clauses of the *European Convention on Human Rights* (the "*Convention*"). Under the so-called "*Oakes* test," the Court held, the state has

⁴¹ Mark Canuel, *Religion, Toleration and British Writing* (Cambridge: Cambridge University Press, 2002) at 15.

⁴² Colin Haydon, "I love my King and my Country, but a Roman Catholic I hate": Anti-Catholicism, Xenophobia, and National Identity in Eighteenth Century England" in Tony Claydon and Ian McBride, eds, *Protestantism and National Identity: Britain and Ireland, c. 1650 – c. 1850* (Cambridge: Cambridge University Press, 1998) at 34.

to establish on a balance of probabilities that the legislation under review has been enacted for a proper purpose and that it meets the three requirements of proportionality: rational connection, minimal impairment, and proportionality in its effects. With respect to the final step of the test, it signaled that “the values of a free and democratic society” would be brought to bear to determine whether the balance between the salutary effects of the impugned legislation and its deleterious effects on the right is constitutionally permissible.⁴³

The Supreme Court stated in *Oakes* that the values of a “free and democratic society” are both the basis for the rights and freedoms entrenched in the *Charter* and “the ultimate standard against which a limitation on a right or freedom must be shown to be reasonable and demonstrably justifiable.”⁴⁴ In other words, the Court held that the test for whether a limit on a right is proportionate and justifiable must be informed by both the s. 1 reference to a “free and democratic society,” and the normative structure of the *Charter* as a whole. While a thorough-going review of the Court’s reflections on that normative structure is not feasible here, for comparative purposes, two general observations may be made. First, the court has interpreted s. 1 as being informed by a “negative rights” ethos guaranteeing non-interference by the state. Secondly, it has developed legal rules and modes of reasoning for the application of proportionality which reflect an essentially empirical approach to construing legal rights.

As a preliminary point, however, it should be noted that the Supreme Court has said that the negative rights ethos informing s. 1 pervades the *Charter* as a whole. It is therefore appropriate to refer to the interpretation of other *Charter* provisions when construing s. 1. As the Court held in *R. v. Lyons*, the “amplification of the content of each enunciated right or freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole, and in particular, the content of the other specific rights and freedoms it embodies.”⁴⁵ Thus, in the cases of *Godbout v Longueil* and *R.B. v Children’s Aid Society*, the Court began by citing *Lyons* as the correct approach to interpreting the content of “liberty” under s. 7. It then proceeded to

⁴³ *R v Oakes*, [1986] 1 SCR 103 at para 66.

⁴⁴ *Ibid* at para 64.

⁴⁵ *R v Lyons*, [1987] 2 SCR 309 at para 21.

refer specifically to its decisions in *Oakes* and *Big M Drug Mart*, dealing with the words “free” and “freedom” in ss. 1 and 2(a) respectively.⁴⁶ All three provisions, it reasoned, should be interpreted as being informed by the same negative rights ethos.

It may be said that the ethos informing the *Charter* is one of “negative liberty,” emphasizing individual or group autonomy and a general right to non-intervention by the state. It is a philosophical orientation well-explained by Dickson J. (as he then was) in *Big M*, in which he pronounced that “freedom can primarily be characterized by the absence of coercion or restraint,”⁴⁷ through forms of control that limit “volition” and autonomous choice.⁴⁸ He went on to suggest that a society is only “truly free” where it can “accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.”⁴⁹ He then characterized the *Charter* in classically liberal terms as a safeguard against a “tyranny of the majority.”⁵⁰ These remarks were subsequently affirmed in case law on a range of other provisions, including s. 7 where “liberty” was equated with a right “to make fundamentally personal choices, free from state interference”⁵¹ and s. 2(b), where freedom of expression was interpreted as advancing “self-fulfillment and autonomy.”⁵²

With respect to freedom of religion under s. 2(a), Dickson J. opined that religious beliefs were “historically prototypical” of other constitutional guarantees in their focus on the importance of individual choice and volition. The centrality of conscience and the free, inward decision of the individual will, Dickson J. suggested, was a cultural derivative of the English Reformation. During the English Civil Wars and Interregnum in particular, he suggested, the idea that “belief was not amenable to compulsion,” gained ascendancy. An essentially English fixation on the “reality of the individual conscience,” he concluded, further assisted the development of institutional norms of a “free and democratic society.” He concluded that rigorous protection of individual conscience was

⁴⁶ See *Godbout v Longueuil*, [1997] 2 SCR 844 at 63 and *B(R.) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 77.

⁴⁷ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 95.

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at para 94.

⁵⁰ *Ibid* at para 96.

⁵¹ *Blencoe v British Columbia*, 2000 SCC 44 at para 54.

⁵² *Ford v Quebec (AG)*, [1988] 2 SCR 712, 54 DLR (4th) 577 at para 59.

not only central to s. 2(a), but indicative of the broader “values that underlie [Canadian] political and philosophical tradition,” and as such, represented the *sine qua non* of constitutional rights protection under the *Charter*.⁵³

To be sure, in *Big M* Dickson J. noted that negative rights claims against the state, while essentially individual in nature, can have a collective or group dimension. As support for this proposition, he interpreted freedom of religion under s. 2(a) by citing s. 27., which prescribes that that document must be interpreted with a view to the “preservation and enhancement of the multicultural heritage of Canadians.”⁵⁴ Section 27 has been used as support for the proposition that s. 2(a) of the *Charter* protects both individual and group aspects of freedom of religion.⁵⁵ However, as McLachlin C.J. made clear in *Alberta v Hutterian Brethren of Wilson Colony*, the multiculturalism provision does not transform an individual right against the state into a collective one. Rather, its effect is often felt at the final stage of the proportionality test. A deleterious effect on the rights-holder may be considered more serious where it has a broader impact on a group or community of which he or she is a part.

vi) In Canada, Justifiable Limitations on Rights are to be Determined Empirically

In light of these normative commitments, it is perhaps unsurprising that the legitimacy of limitations on rights at the proportionate effects stage of s. 1 justification has come to focus on the extent to which such limits adversely affect autonomy and choice. Again, courts have developed legal rules to assist in “quantifying” the salutary and deleterious effects of the legislation under review from an evaluative standpoint. One such rule is that the degree of harm which the violation of a right will incur must be assessed with a view to the values of a free and democratic society; namely, “liberty, human dignity, equality, autonomy, and the enhancement of democracy”⁵⁶ The Supreme Court has stated that, in all cases, “liberty” is “the most fundamental of these values,” and

⁵³ *Big M*, *supra* note 47 at para 122.

⁵⁴ *Ibid* at para 99.

⁵⁵ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 96.

⁵⁶ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 88.

it has interpreted the other values in light of it.⁵⁷ Importantly, it has construed each of these terms as involving a rigid binary between the rights-holder on the one hand, and the legislature as representative of the collective interest on the other.

The Supreme Court has used an empiricist and non-speculative approach to determining whether a limit on a right is proportionate in its effect. A second judicially-developed legal rule is that the gravity of a deleterious effect on a right will depend on the extent to which it deprives the claimant of his or her freedom of choice. *Per Hutterian Brethren*, the question [at the proportionate effects stage] is whether the limit leaves the adherent with a meaningful choice to follow his or her religious belief or practice.”⁵⁸ An effect may range from being “trivial,” in which case it is more likely to be permissible, to total abrogation of autonomous choice, in which case it is less likely so. At all times gravity is measured in terms of what the individual is or is not able to do in a given case or what can clearly be inferred from concrete evidence. Thus, the seriousness of the harm greatly depends on the engagement of the particular claimant in a particular set of facts.

Conversely, the salutary effects of a limitation on a right will be deemed suspect where they are unduly speculative or symbolic. There must be some concrete benefit that is likely to materialize if the rights of an individual or group are to be abridged. Of course, the salutary effects of legislation are inherently connected to the legislative objective, and the Court has held that with respect to the proportionate effects inquiry “the highly symbolic or abstract nature of [an] objective detracts from its importance as a justification for the violation of a constitutionally protected right.”⁵⁹ Indeed, as Abella J. noted in *Hutterian Brethren*, the proportionate effects inquiry often turns on the question of whether the benefits gained from a rights-limitation would be “real” or “perceived.”⁶⁰ Thus, to justify a limitation on a right, the state’s burden is to prove a harm or a real risk of harm and to demonstrate that the benefits of the limitation are concrete and not speculative.

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at para 88.

⁵⁹ *Sauvé v Canada*, [2002] 3 SCR 519 at para 23.

⁶⁰ *Hutterian Brethren*, *supra* note 56 at para 82-83.

Thus, the legal rules developed for the proportionate effects inquiry are applied to the factual matrix at hand according to modes of reasoning reflecting a common law legal culture. The judicial reasoning process used is comparatively inductive and fact-dependent, leaving little room for the state to legislate in the pursuit of unempirical social or philosophical objectives. That culture is also one in which liberty tends to be understood negatively, in terms of the absence of state interference in the enjoyment of rights. The legal rules of balancing are a matter of judge-made law, and are derived from judicial interpretation of the constitution's general limitations clause, s. 1, and their understanding of the constitutional order as a whole. While they are represented as flowing naturally from the words "free and democratic," they in fact reflect local and particular pre-notions and prejudices of what constitutes a free and democratic society.

vii) French Constitutional Culture is Based in an Emancipatory Project which Favours Rationalism

If the culture of the common law is empirical, it may be said that French constitutional culture is rationalist. That is, it is premised on reasoning that accepts that there are objective truths pre-existing recognition by the human mind. One such truth is the natural liberty of the individual. It is a basic postulate of French republicanism that social institutions must be structured in such a way as to preserve liberty from the deleterious effects of inequitable social relations. French constitutional culture accordingly involves the state in a kind of emancipatory project aimed at legislating conditions deemed necessary for liberty. To a certain extent, French republicanism contemplates freedom *through* the state as opposed to freedom *from* the state.⁶¹ Liberty may exist in a state of nature, but it is not a natural or historic given; rather it must be secured by the republic.⁶² This requires the state to be able to legislate prescriptively, and to exert a rationalizing, emancipatory influence on a broadly-construed public sphere.

⁶¹ Christian Joppke, *Veil: Mirror of Identity* (Malden, MA: Polity Press, 2009), at 29-30.

⁶² Cécile Laborde, *Critical Republicanism* (Oxford: Oxford University Press, 2008) at 107.

A critical part of the state's role, then, is to impose its "social authority" in the interest of "promoting the autonomy of persons."⁶³ The revolutionary heritage of the French Republic is discernable in the presumption that the state should have a role in "culturing" society to modernity. As this section will reveal, perhaps the most important aspect of that acculturation is the republic's function in wrenching the individual out of his archaic, sectarian identities and engaging him in a shared project of being free. In comparative perspective, it may be noticed that French republicans are confident in the universality of their values, and in the corrosive effect of illiberal, sectarian traditions on democratic life.⁶⁴ As a result, the distinction between the liberty of the individual and the interests of the collective is not as clear as in other constitutional traditions. The remainder of this chapter will explain how the incorporation of judicial review has taken account of this difference.

In order to account for the comparative inseparability of individual interests from public ones in French constitutional culture, it is necessary to examine certain precepts of French republicanism. This requires a degree of engagement with an extensive body of philosophical, literary, and aesthetic representations of the republican ideal as it has developed in France since the late-eighteenth century. Indeed, the French revolutionary period initiated both a tradition of ephemeral constitutional instruments and of republican expression in a range of intellectual and cultural mediums. It is for this reason that, as the French cultural historian Pierre Nora put it, "republicanism" in France has long been characterized by "a powerful political culture" and an "empty political form." In other words, Nora added, it has long had "strong emotional [but] weak institutional substance."⁶⁵ French republican thought, while itself a multiform and complex tradition, continued to be the real source of norms of constitutional value in France. The "legicentric" nature of French constitutional culture can only be explained with reference to certain peculiar features of that discursive tradition.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Christina Schröer, "Symbolic Politics and the Visualization of the Constitutional Order in the First French Republic, 1792-1799" in Silke Hensel et al, eds, *Constitutional Cultures*, *supra* note 1 at 163.

viii) The Writings of Rousseau Exerted a Formative Influence on French Republicanism

The inclination to conceive of individual rights as involving a strong collective dimension is derived from a distrust of “factional” interests which extends at least as far back as the mid-eighteenth century. While a distinct culture of republicanism would not emerge in France until at least as early as the First Republic (1792-1804), the deeply anti-sectarian nature of French republican discourse is traceable to the writings of Rousseau. He introduced to early French republicanism at once a Romantic preoccupation with “nature” and an attachment to the cultural norms of classical antiquity. He proposed that in an (allegorical) “state of nature,” man had been noble and free, but had been corrupted in society by his “*amour propre*,” or his impulse to covet the esteem of others.⁶⁶ Rousseau repined, “[d]ependence on men engenders all the vices, and by it, master and slave are mutually corrupted.”⁶⁷ If man were to retain his freedom in society, he wrote, he required a sort of healing education.

He prescribed a neo-classical conception of the “citizen” not merely as a bearer of legal privileges and immunities, but as an active participant in the sovereign authority. To remain free, the individual had to engage in public-decision making. Further, he had to engage in such a way as to produce laws which would not define his society by relations of inequity. He did so by subordinating his private or “particular interests,” and orienting himself to the “general will.”⁶⁸ Again, for Rousseau, the “general will” was not the additive total of a majority of private wills. Rather, it was the “highest common factor of agreement,”⁶⁹ or the “rational” interest in general terms of the society as an organic whole. In order to participate in self-government and in the shaping of the “general will,” he advised, the individual needed to be cultured in an ethic of “civic virtue,” as inspired

⁶⁶ Allan Bloom, *Emile, or On Education* by Jean-Jacques Rousseau (New York: Basic Books, 1979) at 3-14.

⁶⁷ Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford: Oxford University Press, 1997) at 84-85.

⁶⁸ *Ibid.* at 85.

⁶⁹ Brian Barry, “The Public Interest,” in Anthony Quinton, ed, *Political Philosophy* (Oxford: Oxford University Press, 1967) at 119.

by the stoic, austere and egalitarian habits he attributed to the city-state cultures of Greek and Roman antiquity.

To be sure, Rousseau recognized that by entering into this “civil state,” the individual relinquished some of the freedom he enjoyed in a “state of nature.” He could no longer pursue his private interests without regard for the general will. However, Rousseau proposed that passage into a civil state would produce a “remarkable change” in man. By “substituting justice for instinct in his conduct,” the actions of the citizen acquired a “moral” quality they had formerly lacked:

Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.

By entering the social contract, he concluded, man’s faculties would be “so stimulated and developed” and his feelings “so ennobled” that he would “bless continually the happy moment” that it delivered him from being “a stupid and unimaginative animal” and made of him “an intelligent being and a man.”⁷⁰

Rousseau’s prescription of a high-level of engagement in public decision-making complimented by an egalitarian culture of “civic virtue” deeply influenced French republican culture in its formative stages. A “literary cult of Rousseau” which had prevailed in intellectual circles during the final years of the Bourbon monarchy, gradually transformed during the First Republic into a “political cult of Rousseau.”⁷¹ Veneration of his writings not only reinforced the period’s neo-classical preoccupations in literature and the arts, but found powerful expression in revolutionary festivals, hymns, iconography, and even modes of dress. During the dictatorship of the Committee of Public Safety (1793-94) in particular,⁷² the extolling of “virtue and regeneration of morals” pervaded

⁷⁰ Jean Jacques Rousseau, *The Social Contract*, translated by Maurice Cranston (London: Penguin Books Ltd, 2004) at 20.

⁷¹ Gordon H McNeil, “The Cult of Rousseau and the French Revolution’ (1945) 6 *Journal of the History of Ideas* 197.

⁷² The Committee for Public Safety (*Comité de salut public*), created in March 1793 by the National Convention formed the de facto executive government of France during the Terror (1793-1794), a stage of the French Revolution. The power of the committee was at

most aspects of public life, as the revolution extended its ambitions to a reformation of human nature.⁷³ The revolutionary heritage of France was profoundly influenced by Rousseau's association of liberty with virtue, and it is from that heritage that French republican culture derived much of its emotional energies.

The origins of French secularism or *laïcité* can be traced to the First Republic and, in some measure, to the intellectual contributions of Rousseau.⁷⁴ Born in the Republic of Geneva, Rousseau was of Calvinist extraction, but identified in his writings as a deist who perceived divinity in nature.⁷⁵ He distinguished between “inward devotion to the supreme God,” and sectarian religion, or what he referred to as “the religion of the priest.”⁷⁶ The latter, he wrote, had produced in France “a kind of mixed and anti-social system of law,” by dividing society and inculcating intolerance. He urged that sectarian religion was antithetical to the social contract, for it “detached” men from civic life and the general welfare, “as from all earthy things.” It indulged man's impulse to *amour propre* by enticing him to turn inward, and to perceive his fellow citizens as “others” with interests antagonistic to his own. He accordingly equated “religion and civil intolerance.”⁷⁷

ix) Religious Sectarianism Contributed to the Development of Rousseau's Notion of the “General Will”

The importance of his writings can only be understood in light of the role of the Roman Catholic Church in mid-eighteenth century France. The late-Bourbon monarchy was a régime of an ineradicably Catholic character. The church legitimated the régime by inculcating belief in the divine right of kings and teaching the necessity of sacerdotal power and mediatory access to grace and Christian salvation. As the cultural historian Adam Zamoyski has put it, Roman Catholicism was no less than the “central organizing

its height between August 1793 and July 1794 under the leadership of Maximilien Robespierre.

⁷³ Michael L Kennedy, *The Jacobin Clubs in the French Revolution, 1793-1795* (New York: Berghahn Books, 2000) at 171.

⁷⁴ Laborde, *supra* note 62 at 7.

⁷⁵ Rousseau, *Social Contract*, *supra* note 70 at 160.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 161-162.

principle” of French politics, education, art and even language.⁷⁸ The church sanctified the French monarchy, and was in turn privileged by it. As the so-called “first estate” of the realm, its clergy were subject to a range of political privileges and immunities. The church coveted such advantages while resisting efforts to extend toleration to French Protestants and Jews. It also retained a right to petition the state to censor offensive or sacrilegious material, which it successfully exercised to induce publication bans on the *Social Contract* and *Émile*.⁷⁹

It was for these reasons that Rousseau’s anti-sectarianism and his emphasis on the general will was influential for a range of actors in the First Republic. To be sure, it is not possible here to comprehensively review state policies toward religion during the First Republic. The difficulties which inhere in such an undertaking is due to the fact that the First Republic remained an ill-defined concept. It was neither officially inaugurated nor abolished,⁸⁰ and never represented a coherent system of government. It was, rather, a process of historical development involving at least three distinct republican régimes: a parliamentary dictatorship under the National Convention (1792-95), a limited suffrage republic known as the Directory (1795-99), and the plebiscitary régime termed the Convention (1799-1804).⁸¹ During that period, treatment of religion in the public sphere was in a state of constant change, responsive to both the ideological aspirations of private decision-makers and the political realities to which they felt obliged to respond.

It is important to begin, however, by noting the role of the Roman Catholic Church in precipitating the emergence of republicanism as a viable system of government in the years leading up to 1791. As late as 1789, when most of its members presumed the

⁷⁸ Adam Zamoyski, *Holy Madness: Romantics, Patriots, and Revolutionaries, 1776-1871* (New York: Penguin Books, 1999) at 4.

⁷⁹ William Doyle, ed, *The Oxford Handbook of the Ancien Régime* (Oxford: Oxford University Press, 2012) at 305.

⁸⁰ The date on which France became a republic is disputed. When the National Convention met for the first time on September 21, 1792, it formally abolished monarchy but did not elaborate on the nature of the régime it was establishing. As Patrice Gueniffey has suggested, the First Republic “made its formal entrance quietly” a few days later when public laws began to be promulgated in the name of the “French Republic.” See Patrice Gueniffey, “The First Republic” in Edward Berenson et al, eds, *The French Republic: History, Values, Debates* (Ithica: Cornell University Press, 2011) at 19.

⁸¹ *Ibid* at 19-20.

continued viability of the Bourbon monarchy, the National Assembly initiated a far-reaching process of constitutional re-structuring. With respect to the church, it pursued a “dual policy” of extending legal rights to non-Catholics,⁸² while subordinating the Roman Catholic Church to the authority of the state through such measures as the abolition of ecclesiastical taxing power and the confiscation of church lands. Most importantly, however, in 1790 the French government adopted the Civil Constitution of the Clergy, which divested clerics of their legal privileges and required them to take an oath of fidelity to the new constitution. When both the French monarchy and the Papacy resisted the Civil Constitution, the collapse of the *ancien régime* was accelerated and anti-clerical sentiment was intensified.

The first two republican régimes to follow the abolition of the monarchy in 1792 contributed significantly to the French republican distrust of “factional interests,” particularly religious ones. The papacy’s repudiation of the Civil Constitution of the Clergy intensified republican hostility to the church, and initiated a divide between so-called “juring” priests who took the oath and “non-juring” or “refractory” priests who refused. Thereafter, the National Convention and Directory governments were engaged in sustained but unsuccessful efforts to stabilize the country, which found itself menaced by foreign armies from without, and by Catholic and royal reactionaries from within. The most sanguinary example of such reaction was the war in the Vendée region between the republic and an insurgency called the Catholic and Royal Army.⁸³ Taking at least one hundred and seventy thousand lives, the Vendée war epitomized what François Furet has termed “the depth of the conflict between religious tradition and the revolutionary foundations of democracy” in France.⁸⁴

Indeed, it was largely the religious instability of the First Republic which led to the conferral of dictatorial power to the so-called Committee for Public Safety under Robespierre in 1793. During that period, the Committee advanced ever more radical

⁸² Robert B. Holtman, *The Napoleonic Revolution* (Baton Rouge: Louisiana State University Press) at 121.

⁸³ Martin Lyons, *France Under the Directory* (Cambridge: Cambridge University Press, 1975) at 43-44.

⁸⁴ François Furet and Mona Ozouf, eds, *A Critical Dictionary of the French Revolution* (Cambridge: Harvard University Press, 1989) at 175.

policies aimed at “de-Christianisation” or the total extirpation of the Catholic religion from France. This involved both efforts to develop new forms of civil religion, and to discourage “superstitious and hypocritical faiths.”⁸⁵ The Committee introduced severe restrictions on public worship and on the public display of religious iconography, and enacted laws prohibiting ecclesiastics from wearing religious garb in public places.⁸⁶ Incited by the executive government of the country, Jacobin clubs took up the task of destroying “crucifixes, virgins, images of saints” and other “ridiculous” objects that could be construed as vestiges of “royalism, feudalism, and superstition.”⁸⁷ The period reinforced in France a cultural association between religious expression and a lack of concern for the general welfare.

Finally, it is important to note that the Committee supplemented restrictions on religious expression with affirmative measures aimed at the regeneration of French society in light of a pre-Christian ideal. This included the repeal of the Gregorian calendar for its historical association with the papacy, and the establishment of state-sanctioned forms of deistic worship, complete with rituals such as “civic baptism” and ceremonial garb reminiscent of the Roman Republic.⁸⁸ Robespierre in particular exerted himself in developing “a religion of the republic and a national morality,” deeply imbued with ideas derived from Rousseau. For instance, prayers of the period implored the “Supreme Being” to, among other things, “restore man to his primitive perfection.”⁸⁹ Atheism was discouraged and poorly subscribed. The real tension from which the First Republic was never able to deliver itself was rather between traditional modes of Roman Catholic belief and a contrived form of deism which was austere, anti-sectarian and oriented to the general welfare.

From its formative stages, French republican culture distrusted attachment to “factional interests” as inimical to the egalitarian ideal. Forged in resistance to feudal structures sustained by social privilege and private advantage, the “people” were exalted by republicans as a basically unitary, fraternal civic body in which minorities were not

⁸⁵ Kennedy, *Jacobin Clubs*, *supra* note 73 at 154.

⁸⁶ *Ibid* at 151.

⁸⁷ *Ibid* at 155.

⁸⁸ *Ibid* at 168.

⁸⁹ *Ibid* at 172.

recognized.⁹⁰ The interests of the First Republic did much to shape a view of the “people” as perpetually menaced by what Pierre Lévy has called the emergence of “other legitimacies.”⁹¹ The emancipation of French Jews in 1791 was a paradigmatic example of the way in which republican equality applied. In the words of the *député* Clermont-Tonnere, Jews were to be “refused everything *qua* nation, and granted everything *qua* individuals.” They would not be a “political body or order within the state” but would “acquire citizenship individually.”⁹² The only way to secure liberty was through an assertion of the equality of citizens by abolishing a litany of “mass anomalies” and entrenched privileges associated with feudal hierarchy.⁹³

A related aspect of this anti-sectarianism was the broad construal that the First Republic gave to the public sphere relative to the private. This is particularly evident in the emphasis that it placed on civic virtue and on engagement in civic institutions. As Marx observed, the political project initiated by the First Republic exalted the individual as a discrete being, but always into a sort of general but abstract communal existence.⁹⁴ This was in many ways due to the intellectual influence of Rousseau, who stressed the importance of civic commitment over self-interest. While the nature of public engagement and of in civic institutions has varied greatly, a comparatively rigid distinction between the private and public sphere has remained. In short, in French republicanism, the ideals of liberty and equality have never been thought of distinct of a fraternal “community of citizens,” bound together by an ethical project and a shared civic loyalty.

The religious tensions of the First Republic would only subside after Bonaparte’s accession to power and his implementation of a Concordat with the Vatican in 1801. But the period preceding the Concordat had given rise to a distinctive republican culture, that would continue to develop and mature throughout the nineteenth-century. Importantly, it remained ill-at-ease with factional identities and attached to the notion that strong civic

⁹⁰ Laborde, *supra* note 62 at 38

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid* at 39.

⁹⁴ Karl Marx, “The Jewish Question”, in David McLellan, *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977) at 51.

institutions might transcend private differences. Again, the French republic has always been predicated on the notion that the right to be left undisturbed by the state is not sufficient to secure liberty and self-government. Rather, it sees public life as involving an emancipatory project which obliges the citizen to be free in a particular way. This was the enduring legacy of the First Republic, when only a unitary, fraternal civic bond was thought to be sufficiently strong to break the hold of feudal inequity. That legacy was leveraged in the early years of the Third Republic (1870-1940) to form the basis of *laïcité* as coherent doctrine of secularism with a basis in law.

x) *Laïcité* Began to be Incorporated as an Official Doctrine of the French Republic in the Late-Nineteenth Century

The contemporary *état laïque* was introduced in France beginning the early 1870s in response to new incursions of the Roman Catholic Church in French public life. In 1864, the Vatican released a document called *The Syllabus of Errors*, which condemned substantially the entire panoply of Enlightenment political ideas, including liberty, separation of church and state, and the presumption of equality with other Christian faiths, or what it called “indifferentism.”⁹⁵ According to the historian Robert Gildea, the Syllabus was so far-reaching as to effectively preclude reconciliation between the church and liberal or democratic ideas in France.⁹⁶ The church also condemned the Paris Commune of 1871, which had revived persecution of clerics, as the culmination of an anti-religious revival that had beset France with instability since 1789.⁹⁷ Finally, they argued that the country’s defeat by a Protestant state in the Franco-Prussian War (1870-1871) had been God’s punishment for the sins of the Enlightenment and the French Revolution.⁹⁸

The church accordingly pursued a program of “Moral Order,” putatively aimed at expiation of the country’s sins. French church officials argued for the restoration of both the monarchy and the Pope’s temporal power, which had been ceded as a result of the

⁹⁵ Robert Gildea, *Children of the Revolution: The French, 1799-1914* (London: Penguin Books, 2008) at 139.

⁹⁶ *Ibid* at 339.

⁹⁷ *Ibid* at 337.

⁹⁸ *Ibid*.

Concordat. Its most successful initiative, however, was its effort to extend the church's grip on national education, as a means of inculcating Catholic thought and prejudice at both the primary and secondary school levels.⁹⁹ The church's control of girls' education by nuns reached its highest point in 1878, when the number of those in female congregations, which had been 66,000 in 1850, more than doubled to 135,000.¹⁰⁰ The church also successfully agitated for legislation allowing for Catholic universities for the first time since the revolution, ending a state monopoly on education at the secondary and post-secondary levels established by Bonaparte so that all future military and civil officers would have to pass through the same education system.

The French government responded by legislating for free education in 1881 and for compulsory secular or lay education the following year. It justified a prohibition on religious schools by insisting that the republican doctrine of *laïcité* required the state school to be a neutral space in which liberty of conscience prevailed. Delivering education through the filter of religious doctrine was deemed to be antithetical to that objective.¹⁰¹ In the place of Christian morality a civic or "independent" morality was to be taught, based on such secular notions as fraternity and solidarity.¹⁰² The new moral instruction was to be supplemented with civic education aimed at training the future citizen in democratic participation and self-government. The introduction of a secular education system was roundly justified with reference to republican principles and the Revolution of 1789.¹⁰³ As in the First Republic, the imposition of a neutral public sphere was an assertion of power; and an attempt to sustain an egalitarian and fraternal

⁹⁹ *Ibid* at 338-339.

¹⁰⁰ *Ibid* at 339.

¹⁰¹ While state schools were constituted to deliver a secular, civic education, a period of time was set aside one day each week for Catholic, Protestant, and Jewish students to receive religious instruction. See Gildea, *supra* note 94 at 343.

¹⁰² *Ibid* at 343.

¹⁰³ In 1871, Prime Minister Leon Gambetta stated that "The message of the Syllabus [of Errors] is the greatest threat to the society of 1789 of which we are the heirs and representatives. The main aim of the society of 1789 was to base the political and social system on reason instead of grace, to assert the superior status of the citizen over that of the slave... For eighty years, two world views have been present, dividing minds and fomenting conflict, a desperate war in the heart of our society." As cited in Gildea, *ibid* at 340.

democracy, in which every citizen felt a sense of obligation for the liberty of his fellow citizen.

The most important legislative initiative taken during the was the 1905 law on the *Separation of Church and State*. That law finally abolished the 1802 Concordat and remains the *de jure* basis of *laïcité* in France. Iterating Art. 10 of the 1789 *Declaration of the Rights of Man and Citizen* (the “DDHC”) Art. 1 of the 1905 law guaranteed the “free exercise of faiths under no other restrictions than those set out in the interests of public order.” In Article 2 it was declared that “the republic does not recognize, remunerate or subsidize any faith.” Art. 28 prohibits any display of religious symbols or iconography in any public place, excepting religious edifices, cemeteries, museums or exhibitions. The 1905 law has been supplemented by a number of ministerial “circulars” including a 1936 ban on the wearing of religious insignia, a 1937 ban on religious proselytising in schools, and an affirmation in 1944 of school neutrality.¹⁰⁴

In the Fifth Republic, the 1905 law of separation is recognized as a constitutional law by virtue of having been recognized by the Constitutional Council as reflecting principles which are fundamental to republican France. The council’s authority to so designate a law stems from the preamble of the 1946 constitution, which affirms the constitutionality of a range of unspecified “fundamental principles recognized by the laws of the Republic.”¹⁰⁵ Accordingly, the principle of *laïcité* is a norm with which all sub-constitutional laws must conform. French constitutional law guarantees at once a wide range of individual rights, and a constitutional structure that is *prima facie* ill-suited to recognizing religious distinctions in the public sphere.¹⁰⁶ The remainder of this thesis will explain how an equilibrium between the two is reached from the standpoint of legal doctrine. It will be argued that the degree of protection afforded to religious rights has less to do with the doctrine of *laïcité per se* than with France’s legicentric constitutional culture.

¹⁰⁴ Bronwyn Winter, *Hijab and the Republic: Uncovering the French Headscarf Debate* (Syracuse, NY: Syracuse University Press, 2008) at 54-55.

¹⁰⁵ *Constitution du 4 octobre 1958, Version consolidée au 21 juin 2015*, Pmbl. Online: Legifrance <<http://www.legifrance.gouv.fr>>

¹⁰⁶ Laborde, *supra* note 60 at 4.

xi) French “*Légiscentisme*” Presumes a Role for Civic Virtue and *Laïcité*

As a matter of constitutional law, the legality of the ban on the public wearing of full-face veils was based not on *laïcité per se* but on the level of deference afforded to the legislature by the Constitutional Council. The requirement of proportionate effects and the legal rules affecting their operation were determined with a view to legislative competence. But the doctrine of *laïcité* does inform how that competence is construed, and it is important to understand the way in which it does. For non-French observers trying to understand the role of *laïcité* in determining deference in French constitutional rights adjudication, it helps to begin by remembering that, historically, legislative supremacy was the norm in France and that the judge was accordingly assigned an essentially passive role. There is, however, an important third element which has long supplemented what would otherwise be a system of parliamentary majoritarianism. That third element is foreign to common law conceptions of constitutional rights protection but integral to those of the French Republic.

At a theoretical level, majority rule in France has always been tempered (or even directed) by an ethic of civic virtue, and *laïcité* is merely an example of that ethic transcribed into law. The link between *laïcité* and republicanism was well-stated by the historian Claude Nicolet, who observed that “[l]egal and territorial integrity also require unity of another kind: moral or spiritual: this is the function of *laïcité*.”¹⁰⁷ In terms of the legislative function, this strong civic culture lends itself to the notion that the legislature not only has a right but a duty to pursue objectives for the public interest. What makes this conception of legislative competence different from other parliamentary democracies is the relatively broad construal that is given to the public interest. The doctrine of *laïcité* provides a good example of how that public interest is circumscribed as the content of legislative competence. In France, the public and private interests are clearly distinguished.

In practice, the notion of civic virtue and *laïcité* gave rise to a comparatively rigid dichotomy between public and private spheres, and a far-reaching construal of the former

¹⁰⁷ Claude Nicolet, *L'idée républicaine en France (1789-1924): Essai d'histoire critique* (Paris: Gallimard, 1982) as cited in Jean Baubérot, “Laicity” in Berenson, ed, *supra* note 78 at 127.

relative to the latter.¹⁰⁸ In the private sphere, the individual incarnates. “natural and imprescriptible rights,” including to religious liberty.¹⁰⁹ In the public sphere, she is called to be a “*citoyenne*,” engaged in “public reasoning,”¹¹⁰ as part of a formative, emancipatory project of democratic and egalitarian citizenship. Historically, *laïcité* developed as a tool for ensuring a neutral and non-sectarian public sphere. That civic space was and is thought by French republicans to be necessary in order to shore-up the fraternal, associative bond at the “heart of the republican pact.”¹¹¹ With the incorporation of judicial review, French jurists have had to develop proportionality standards that in their application were able to account for this pub-priv. divide, so as not to unduly restrict the ability of the legislature to make law for the public sphere.

xii) In France, Balancing Reflects a Legicentric Legal Culture

It is important to recall that none of France’s four operative constitutional rights instruments contain a general limitations clause. The Constitutional Council infers the standard of review for limitations on constitutional rights from the text of the rights implicated in a given case. Accordingly, the standard is more or less rigorous depending on the constitutional principles engaged. While the way in which the standard is formulated varies from case to case, the objective of the Constitutional Council is always to ensure an “equilibrium” between conflicting values.¹¹² Depending on the rights engaged, that may involve review for a “manifest error of appreciation,” a standard not unlike review for an insufficiently important objective in other jurisdictions. The council may add to that review for a rational connection and minimal impairment. Finally, it may apply a full proportionality test by adding an evaluation of the “possible consequences”¹¹³

¹⁰⁸ *Ibid* at 41.

¹⁰⁹ *Ibid* at 69.

¹¹⁰ Joppke, *supra* note 61 at 29.

¹¹¹ Winter, *supra* note 104 at 59.

¹¹² Federico Fabbrini, “Reasonableness as a Test for Judicial Review of Legislation in the French Constitutional Council” (2009) 4 J Comp L 39.

¹¹³ Martin A Rogoff, *French Constitutional Law: Cases and Materials* (Durham, North Carolina: Carolina Academic Press, 2011) at 225.

of the legislation under review. Again, review for “possible consequences” is substantially similar to the proportionate effects test.

Freedom of religion is guaranteed in Art. 10 of the *DDHC* which states that “no one shall be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the public order, as determined by law.” Again, because French rights adjudication focuses on abstract principles rather than discrete textual provisions, where an infringement of Art. 10 is under review, it usually is in conjunction with other articles relating to Art 10, such as Arts. 4 and 5. Those broad “liberty” rights provide that the “natural rights of man [have] no boundaries other than those to ensure to other members of society the same rights,” and that limits on rights are permissible where their exercise “harms others” or is “injurious to society.”¹¹⁴ It should be noted that each article speaks both to the right and to its justifiable limits.

In the particular case of Loi n° 2010-1192 respecting concealment of the face in public, the standard of review was inferred by the council from the limiting language of Arts. 4, 5, and 10 of the *DDHC* and Art. 3 of the Preamble of the 1946 Constitution. According to the text of those provisions, the legislature has the right to limit individual freedoms in matters of religion where the exercise of those rights would be injurious to other rights-holders and to the public order. Art 3 of the 1946 preamble lends legitimacy to state initiatives aimed at advancing gender equality. These articles are substantively similar to what is found in rights instruments in other democratic jurisdictions. As this section will make clear, the formulation and application of a proportionality test to Loi n° 2010-1192 turned largely on unarticulated normative considerations, which speak to the legicentric nature of French constitutional culture rather than the doctrine of *laïcité per se*.

In Dec. 2007-555 DC respecting concealment of the face in public, no possible consequences test was applied. Again, taken together, the provisions cited in that case (Arts. 4, 5, and 10 of the *DDHC*), suggests a broad liberty right to autonomy and individual choice that can only be abridge by the legislature where its exercise is injurious to other rights-holders. By virtue of Art 3 of the preamble of the Constitution of

¹¹⁴ *Déclaration des Droits de l'Homme et du Citoyen de 1789*, at Arts 4, 5 and 10, online: Legifrance <<http://www.legifrance.gouv.fr>>

1946, it is clear that harm of a gendered-nature may justify such limitations. In Dec. 2007-555 DC, the Constitutional Council inferred from these articles a manifest error test plus a means-end review, suggesting a robust role for the legislature in determining the role of religion in the public sphere. As suggested in the previous section, in constitutional rights adjudication, the interest of the “public sphere” are usually expressed as social or collective interests, juxtaposed against individual interests during the balancing stage of proportionality.

It is critical to note, however, that where an inquiry into the “possible consequences” of a law is applied, it is done using legal rules that reflect the “legicentric” culture of French constitutionalism.¹¹⁵ As explained in the previous two chapters, proportionality was incorporated gradually into French law, and has been adapted to that end. This includes the judicially-developed legal rules of the test’s application, which in France have been formulated to reflect an historical commitment to the supremacy of statutory law. This does not mean that the interest of individual rights-holders are given sub-standard consideration. Rather, the concept of “légiscentrisme.” stands for the proposition that while individual rights are affirmed in the French constitution, it is in a context that recognizes a strong collective dimension to rights enjoyment. In France, the lack of a clear distinction between individual rights and the public interest is particularly evident at the proportionate effects stage of proportionality, because of the evaluative nature of that requirement.

In Dec. 2007-555 DC, for instance, the Constitutional Council upheld legislation granting a tax credit for the acquisition of a primary residence as a justifiable limit on the principle of equality before public burdens.¹¹⁶ It applied a possible consequences or proportionate effects test. In doing so, it used legal rules indicating not judicial deference as it is understood in common law systems, but a judicial recognition that individual rights and the public interest do not exist in a sharp dichotomy. It noted the possible effects of the legislation, and evaluated those effects with reference to the requirements of a means and ends review. Specifically, it noted that the effects of the law were acceptable

¹¹⁵ Fabbrini, *supra* note 112 at 48.

¹¹⁶ Cons const, 16 August 2007, *Loi en faveur du travail, de l’emploi et du pouvoir d’achat*, (2007) Rec 310, 2007-555 DC.

in that they advanced “a purpose of general interest,” and then noted that the effects reflected “objective and rational standards with respect to the goal sought by the legislature.” Finally, it held that the law was not “a manifestly disproportionate tax benefit in light of its objective.” Reference to deleterious effects on affected persons was implicit, but the balancing exercise was structured around the competence of the legislature.

The way in which the Constitutional Council relates balancing back to the objective and means chosen by the legislature is indicative of a culture of *légitimité*, as is its disinclination to engage in balancing at all in most cases. When the council declines to engage in the formulation of policy, or to exercise “a general power of appreciation” akin to that of the legislature, it is not showing judicial “deference” as that concept is understood in common law jurisdictions. In common law jurisdictions it is assumed that courts exist to protect individuals from other branches of government, implying limits on legislative authority where individual rights are implicated. This conception presupposes that rights and the public interest can be clearly distinguished. It also presumes a sort of binary relationship where courts represent the interests of individual rights-holders and legislatures represent societal interests. This conception has historically not pertained in France. As a consequence, if the presumption of a dichotomy between the rights-holder and the public interest is beginning to set in, it remains far less rigid than in other jurisdictions.

xiii) Conclusion

In this chapter, it was suggested that, from a comparative standpoint, the proportionate effects or balancing stage of proportionality is the most important. This is because the proportionate effects stage of proportionality is evaluative rather than empirical, and as such, is able to give expression to value-laden considerations which are related to the constitutional culture of a given jurisdiction. The proportionate effects test is shaped by constitutional culture both in the conscious efforts of judges to interpret the meaning of the text of a constitution’s limitations provision, and the modes of legal reasoning that they bring to bear, often un-consciously, in applying that test. This chapter has leveraged the intellectual and culture history of the comparator jurisdictions to

explain interpretive patterns that are relevant to a comparative analysis of the proportionate effects test. In so doing, this chapter identified significant but often subtle or facially imperceptible differences in the constitutional cultures of the comparator states.

The aspects of both constitutional cultures which were relevant to this chapter are those relating to the effect that the role of the legislature has on legal reasoning at its most basic level. In this narrow respect, it was suggested that Canada's constitutional culture reflects the empiricism of the common law while France's constitutional culture is imbued with the rationalism of the French Enlightenment. As a result, in the words of J.A. Talmon, the former is distinguished by a preference for "organic, slow, half-growth" while the latter embodies "doctrinaire deliberateness."¹¹⁷ These cultural differences are responsible for divergent conceptions of the relationship of the individual rights-holder to the interests of the society of which he or she is a part. While Canadian constitutional culture conceives of a rigid binary between the individual and the collective as represented by the state's legislative power, French constitutional culture is far more legicentric in the sense that the distinction between the freedom of the individual and the freedom of his society is less clear.

Thus, in the case of restrictions on religious expression in the public sphere, divergent outcomes are due mainly to different cultural assumptions about the legitimate role of the legislature and less about different doctrines of secularism *per se*. Canadian secularism and French *laïcité* are substantively different doctrines; one is a theory of negative liberty based on the free exercise of religion, the other prescribes a neutral public sphere to ensure the full participation of individuals as "citizens" of a self-governing republic. While in Canada secularism refers to a culture of negative liberty, in France it is a substantive doctrine that supports a legislature which was historically unfettered but for the influence of a culture of civic virtue intended to direct the behaviour of free people. Judicial review on a proportionality standard has been very recently grafted onto long-standing patterns in both countries. As this chapter has

¹¹⁷ J.L. Talmon, *The Origins of Totalitarian Democracy* (London: Praeger, 1952) at 67.

revealed, it has been modified out of necessity to comport with entrenched constitutional cultures.

Chater 5: Conclusion

This thesis sought to shed light on the limits of proportionality's potential as a vector for driving global convergence in rights norms. It was held that the migration of that legal standard across jurisdictions has yielded a high level of synchronization in the methodology of rights adjudication, but not a "universal" standard or an "ultimate rule of law."¹ It was argued that as a supra-national legal standard, proportionality is shaped in its operation by established modes of legal reasoning in the jurisdiction in which it is applied. To illustrate this point, the application of proportionality to particular legislative limitations on freedom of religion in Canada and the French Republic were analysed from a comparative standpoint. It was shown that divergences in the way in which that test operates are the result of different, historically-contingent interpretive perspectives. As a result, the culture of the constitution into which proportionality is incorporated is both discernable in the operation of that legal standard and determinative of its outcomes.

The focus of this comparative analysis was on particular statutory restrictions on freedom of religion. Specifically, Canadian and French case law was analysed in order to shed light on each jurisdiction's approach to constitutional review of statutory bans on public veiling. This analysis accordingly concentrated on the French Constitutional Council's decision upholding the constitutionality of that country's ban on concealment of the face in public and related decisions of the Supreme Court of Canada. Both jurisdictions conduct review of such rights-limitations with a standard of review based upon the requirements of proportionality as developed in the law of the European Court of Justice (the "ECJ") and the European Court of Human Rights (the "ECHR"). That standard is, however, modified by the constitutional culture in which it is applied.

In order to explain the ways in which constitutional culture affects the operation of proportionality, this thesis used a contextualist methodology based upon the precepts of legal historicism. Intellectual and cultural history was leveraged to account for differences in the way in which proportionality is applied. Specifically, historical discourses surrounding relevant aspects of legal reasoning in each of the comparator states were analysed to show how the way in which rights are balanced is influenced by

¹ David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 171.

interpretive perspectives and “shared meanings” that are very much organic in the sense that they are historically-developed and socially-transmitted.² Accordingly, the methodology of this thesis was not adopted to advance reform of the law, but with a view to enhancing understanding of the operation of superficially-similar legal standards across jurisdictions with a particular emphasis on the effect of constitutional culture.

The first chapter of this thesis set the groundwork for a comparative analysis of legal doctrine by explaining why the application of proportionality looks different in each jurisdiction. It was noted that proportionality is a sort of “hybrid” test which involves both fact-dependent inductive reasoning, and deduction from general principles. As such, it can be incorporated with relative ease into both common law and civil law systems. But each system tends to stress facts or principles in applying proportionality in order to better comport with established practices of legal reasoning. The result is a difference in the way in which the test is articulated rather than a difference in requirements which are brought to bear, given that in either case, both facts and principles are inevitably engaged. Thus, in Canada, proportionality was shown in its operation to be fact-sensitive and discursive, while in France it is terse and syllogistic. It was argued that the extent to which each legal system acknowledges engagement with the factual matrix of a case can be explained by the historical development of discourses surrounding the notion of legislative supremacy in each country.

In the second chapter, a full comparative analysis of the application of proportionality was undertaken, focusing on the French Constitutional Council’s decision respecting concealment of the face in public and related case law of the Supreme Court of Canada. It was shown that, in assessing such legislation for constitutionality, both legal systems make a preliminary inquiry into whether the law has a proper purpose, followed by a review for a rational connection between legislative means and ends, and for minimal impairment of the constitutional right. In Canada, constitutional review of alleged violations of freedom of religion, like reviews of other constitutionally protected rights, requires a balancing inquiry or requirement of “proportionate effects.” In France,

² Hands Vorländer, “What is ‘Constitutional Culture?’” in Silke Hensel et al, eds, *Constitutional Cultures: On the Concept and Representation of Constitutions in the Atlantic World* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012) at 28.

the nature of the balancing of “possible consequences” is heavily dependent upon the particular rights engaged. Generally, however, French balancing is more oriented to the legislature than Canadian balancing.

The second chapter also suggested that when accounting for different results in the application of proportionality in Canada and the French Republic, the balancing test tends to be decisive. While the proper purpose, rational connection, and minimal impairment requirements are essentially empirical questions, the proportionate effects test is evaluative. That is, it is concerned with value judgments about what is good or acceptable in a democratic society. Accordingly, it tends to be the main venue for the expression of the cultural dimension of rights in a given jurisdiction. While Canadian balancing tends to give expression to a cultural notion of rights as concentrated in the individual, French balancing reflects an historical preoccupation with being free in a collective capacity. If balancing is undertaken at all, it is done so as not to represent individual and collective interests as being strictly divided and opposed.

The third chapter of this thesis was a concentrated analysis of the proportionate effects or balancing stage as a site for the expression of constitutional culture. It was noted that courts develop legal rules for the balancing inquiry that reflect their understanding of the normative standard against which limitations on rights must be justified based on the language of the limitations provisions of the constitution. It was proposed that in Canada the rules of balancing reflect a presumption that individual rights and the collective interests exist in a relatively strict dichotomy. For instance, the state is restricted in its ability to pursue abstract or symbolic initiatives, and the gravity of a limitation on a right tends to be measured with reference to individual autonomy. In France, individual and collective rights do not exist in as rigid a dichotomy. During balancing, harmful effects on individual rights are related back to the state’s ends and means, and assessed in light of state’s right to legislate in the public interest.

It was also suggested that this way of conceptualizing rights derives from very basic tendencies in legal reasoning. In Canada, constitutional review tends to be conducted empirically, focusing narrowly and non-speculatively on the concrete interests of a claimant. This is not a universal practice, but reflects the integration of rights adjudication into a common law culture. In the French Republic, the legal rules of

balancing relate individual rights *back* to the legislature, and the proper balance between the rights of the individual and the public interest are arrived in a rather more abstract way. That high degree of abstraction is a direct result of the relative lack of a clear distinction between the individual and the public interest historically. The French republican tradition confers on the legislature the right to make law prescriptively, with a view to securing the societal conditions necessary for individual liberty. Accordingly, the outcome of judicial review of statutory restrictions on religious expression in the public sphere does not turn on notions of secularism *per se*, but on divergent conceptions of legislative competence which find expression in the proportionate effects stage of proportionality.

As detailed in the third chapter, the influence of religion in society should not be thought of so much as an insular subject of inquiry *within* the law, but as a critical determinant in the growth of the law, shaping both the empiricism of the common law and the rationalism of French civil law. In relative terms, the history of the Protestant Reformation in England yielded a more dichotomous view of the individual's relationship to the state, while France's more homogenous religious make-up gave rise to a self-concept with a far more defiant collective dimension. French republicanism cannot be understood without reference to that country's conflictual relationship to the Roman Catholic Church. By the late-eighteenth century, France's unique history had yielded a conviction among influential actors that only a unitary, fraternal civic bond could be sufficiently strong to break the hold of feudal and religious inequity. It is for this reason that it may be said that liberty is not regarded by French republicans as a natural or historic given, but as a state of being that must be secured by the republic in its legislative capacity.

By analysing law as embedded within a particular, organic historical context, a richer and more fulsome understanding of the law's role in regulating contemporary human conduct can be achieved. Legal standards such as proportionality, which are substantially similar as a matter of positive law, are modified in their application by their interaction with entrenched norms and modes of reasoning. Accordingly, the extent to which proportionality is adapted should not be overshadowed by the apparent success of its migration. It is important not to allow a preoccupation with what are increasingly

presumed to be universal standards in rights protection to distract from the continued relevance of local, culturally-contingent norms and practices. To do so would both inhibit effective discourse in law and impair the development of self-knowledge, both of which are arguably the most important ends of comparative constitutional scholarship. This thesis has sought to re-situate rights adjudication *within* culture and to affect an expansion of the terms in which it is evaluated, understood and critiqued.

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