

LAW'S EXPRESSION: THE PROMISE AND PERILS OF JUDICIAL OPINION WRITING IN CANADIAN CONSTITUTIONAL LAW[©]

BY PAUL HORWITZ*

This article argues that there is a link between one's theory of constitutional law, and one's judgments about style in judicial opinion writing. It identifies several special functions of the constitutional opinion, including the democratic function of responding to the counter-majoritarian difficulty through an act of public justification, and the inter-generational function of provoking a temporally extended dialogue about constitutional values. Drawing on these functions, it argues for an opinion writing style dubbed "open-textured minimalism," that seeks to resolve cases narrowly, articulate fundamental values and principles, and spark long-term debates about the underlying constitutional values supporting each decision. The author argues that the Supreme Court of Canada's rulings on section 2(b) and section 1 of the *Charter* suffer from their length and technicality. The Court's opinion in the *Secession Reference* on the other hand, is held out as an excellent example of the open-textured minimalist style favoured by the author.

Cet article propose qu'il existe un lien entre la conceptualisation des notions constitutionnelles que fait une personne, et leur opinion face au style utilisé lors de l'élaboration d'une opinion judiciaire. L'article identifie plusieurs fonctions spéciales attribuées à l'opinion constitutionnelle, y compris la fonction démocratique d'écarter les obstacles contre-majoritaires à l'aide d'un acte public de justification, ainsi que la fonction d'enchaînement successif que provoque un dialogue en matière de valeurs constitutionnelles qui s'étend temporellement. En se basant sur ces fonctions, l'auteur encourage un style de rédaction dit "open-textured minimalism," c'est-à-dire un style qui cherche à résoudre des cas de façon étroite, tout en encourageant des débats à long terme quant aux valeurs constitutionnelles sous-jacentes sur lesquelles chaque décision repose. L'auteur maintient que les jugements de la Cour suprême du Canada portant sur l'article premier et l'alinéa 2(b) de la *Charte* sont longs et techniques. Toutefois, les conclusions de la Cour dans le *Renvoi sur la sécession* constituent un excellent exemple du "open-textured minimalism" préconisé par l'auteur.

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* LL.B., University of Toronto 1995, LL.M., Columbia University, 1997. Law Clerk to the Honorable Ed Carnes, United States Court of Appeals for the Eleventh Circuit, 1998-1999. I thank Kelly Gallagher MacKay, Kent Greenawalt, Paul Michell, Kirsten Nussbaumer, and Lorne Sossin for comments on earlier drafts of this article; Ian Kerr for his views at an earlier stage of this project, and Tammara Giardino for excellent editing assistance. I also thank the University of Western Ontario Law School for the opportunity to present this article there. An earlier version of this article was produced with the aid of a grant from the Student Initiatives Programme of the Canadian Bar Association-Ontario, whose assistance I acknowledge.

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Of course, the eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials ...

– Justice Oliver Wendell Holmes¹

I. INTRODUCTION: INTEGRATING THEORY AND
PRACTICE

¹ Letter from Oliver Wendell Holmes to Felix Frankfurter (19 December 1915), in R.M. Mennel & C.L. Compston eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover, N.H.: University Press of New England [for] University of New Hampshire, 1996) at 40 [hereinafter *Holmes and Frankfurter*].

The division of legal scholarship into different fields or practices sometimes leaves interesting gaps to be filled. Consider the unresolved questions that lie at one intersection of scholarly legal interests. Legal scholarship in recent years has seen the development of a field known broadly as the “law and literature” movement.² That field consists of a number of sub-categories. Students of “law *in* literature” examine the treatment of legal themes in fiction. “Law *as* literature” scholars in turn fall into two categories: those who use literary theory to confront general problems of interpretation in the law,³ and those who study the literary or rhetorical elements of legal writing.⁴

One gap created by this division lies between the two sub-categories of law as literature. One group of scholars uses literary theory to illuminate theoretical problems in legal interpretation. They argue that something useful can be said about the nature of law and legal interpretation if we employ literary tools such as hermeneutics.⁵ Their concerns with law as literature are theoretical, not stylistic. Other scholars concentrate on the formal qualities of legal writing, while acknowledging that their formal criticisms may ultimately depend on the resolution of underlying

² See, for example, L. Ledwon ed., *Law and Literature: Text and Theory* (New York: Garland Publishing, 1996). Important works by individual authors include R.A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988) [hereinafter *Law and Literature*]; J.B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) [hereinafter *Justice as Translation*]; J.B. White, *Heracles' Bow: Essays on the Rhetorics and Poetics of the Law* (Madison: University of Wisconsin Press, 1985) [hereinafter *Heracles' Bow*]; and R. Weisberg, *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992).

³ See, for example, S. Levinson & S. Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, IL: Northwestern University Press, 1988).

⁴ For examples of scholars adopting this or similar taxonomies of law and literature, see, for example, *Law and Literature*, *supra* note 2 at 5-6; R.A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 472 [hereinafter *Overcoming Law*]; and P. Gewirtz, “Narrative and Rhetoric in the Law” in P. Brooks & P. Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, Ct.: Yale University Press, 1996) 2 at 3-4.

⁵ See “Preface” to Levinson & Mailloux, *supra* note 3 at ix. See also M. de S.-O.-l'E. Lasser, “‘Lit. Theory’ Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse” (1998) 111 Harv. L. Rev. 689.

theoretical issues.⁶ Thus, the question of the relationship between legal *style* and legal *theory* may be a neglected one.

Another gap is created by the way we discuss constitutional theory. Constitutional scholars commonly concern themselves with the abstractions of constitutional theory, or with the substantive results or procedural norms that should apply in constitutional law. They have much to say about the results that ought to be reached in a constitutional dispute, or the method that should be applied, but they are less concerned with the formal features of the judicial opinion that results from this exercise. In short, they regard questions of style as foreign to the concerns of constitutional theory.⁷

At the intersection of these scholarly interests, then, lies a neglected question: should there be a deeper relation between one's theory of constitutional law and one's judgments about style in judicial opinion writing? This article is grounded on the proposition that certain conclusions about the appropriate *style* of a constitutional opinion flow from the theory of constitutional interpretation one adopts.

Two arguments, in particular, suggest this conclusion. First, much of constitutional theory is concerned with whether courts may legitimately issue judgments that thwart the will of the democratic majority, in the name of the constitutional text. This is the classic "counter-majoritarian difficulty."⁸ For theorists who wish to preserve the democratic legitimacy of judicial review, *how* the courts speak to the democratic polity should be a natural concern.

Second, law relies on language as much as it relies on theory. To be sure, constitutional theorists can derive principles from judicial opinions without focusing on the specific language of

⁶ See, for example, D.R. Klinck, *The Word of the Law* (Ottawa: Carleton University Press, 1992) at 400 [hereinafter *Word of Law*].

⁷ This is not always so, as some of the sources discussed below indicate. See also K. Thomas, "The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*" (1993) 79 Va. L. Rev. 1805 at 1811-12. Moreover, many constitutional theorists sometimes mention the stylistic aspects of a given opinion, but those remarks are rarely linked back to the writer's larger theoretical concerns.

⁸ See especially A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven, Ct.: Yale University Press, 1986).

an opinion. In fact, constitutional theory routinely ignores the language of both judicial opinions and the constitutional text, and seeks its own descriptions of the underlying concepts of constitutional law.⁹ Ultimately, however, all that we do in law must be communicated through language.¹⁰ Though abstract concepts may be drawn from the body of constitutional law, they are inevitably incorporated in language. In an important sense, the language of the law *is* the law.¹¹ Constitutional theorists' ideas are shaped and bounded by words. They may hope their ideas will find expression in the words written by judges, and ought to be concerned with how ideas are expressed by courts. Style matters.¹²

The concern of this article is the style of judicial opinion writing in Canadian constitutional law—specifically, opinions interpreting the *Canadian Charter of Rights and Freedoms*.¹³ One of the most famous apothegms in the American constitutional literature is Chief Justice John Marshall's reminder that "we must never forget that it is *a constitution* we are expounding."¹⁴ So, too, we might say of the *Charter*: we must never forget that it is a *new* constitution we are expounding. The *Charter*, after all, has existed for less than two decades.¹⁵ That fact suggests much for the craft of judicial opinion writing in *Charter* cases.

⁹ See, for example, R.A. Posner, "Judges' Writing Styles (And do they Matter?)" (1995) 62 U. Chi. L. Rev. 1421 at 1422-23 [hereinafter "Judges' Writing Styles"]. But see J.B. White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life" in Ledwon, *supra* note 2 at 12: "It is not the restatable message that is the most important meaning of the poem or the judicial opinion, but the reader's experience of the life of the text itself."

¹⁰ See also J.G. Wetter, *The Styles of Appellate Judicial Opinions: A Case Study in Comparative Law* (Leyden: A.W. Sythoff, 1960) at 13: "Law's men act: words are media for their actions. Yet the two—words and actions—form a whole, a fluid, expanding and contracting process."

¹¹ See P.R. Hugg, "Judicial Style: An Exemplar" (1987) 33 Loy. L. Rev. 865 at 871.

¹² But see T. Grey, "Holmes's Language of Judging—Some Philistine Remarks" (1996) 70 St. John's L. Rev. 5.

¹³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁴ *McCulloch v. State of Maryland et al.*, 17 U.S. 316 (1819) at 407 [emphasis in original, hereinafter *McCulloch*].

¹⁵ By contrast, when *McCulloch*, *ibid.*, was written, the United States Constitution was 30 years old.

I will argue that just as constitutions must be written so as to allow them to survive and flourish over time, so too must judicial opinions leave some room for the creative development of constitutional doctrine over time. However, to some extent, the courts (particularly the Supreme Court of Canada) have been intent on developing detailed rules to govern future cases. Moreover, I will argue that, given the important role the courts play in expressing the fundamental values enshrined in the *Charter*, they are also obliged to seek a level of eloquence and persuasiveness that might be less essential in other areas of the law, but that they have fallen short of this goal.

I will advocate an approach to judicial opinion writing that we might call “open-textured minimalism.” Essentially, this approach urges courts to answer constitutional questions narrowly, while opening avenues for future discussion of the values implicated in a given case. It aspires to more brevity and persuasiveness than is typically found in the Canadian courts’ existing constitutional jurisprudence. This approach sacrifices some of the appellate courts’ guidance function, but offers greater room for a meaningful, time-extended dialogue about *Charter* values.

Parts II and III lay some groundwork for this project by considering the function of, and audience for, judicial opinions, and discussing some common stylistic tools in judicial opinion writing. Part IV outlines the concept of open-textured minimalism. It also compares it with recent arguments made by both Cass Sunstein, who has advocated a kind of minimalism in American constitutional law,¹⁶ and Peter Hogg and Allison Bushell, who have discussed the dialogic nature of *Charter* review. Part V examines the virtues and flaws of current judicial writing on the *Charter* by considering the Supreme Court’s decisions interpreting sections 1 and 2(b) of the *Charter*. Part VI offers

¹⁶ See C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) [hereinafter *One Case*]; C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) [hereinafter *Legal Reasoning*]; and C.R. Sunstein, “The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided” (1996) 110 Harv. L. Rev. 4 [hereinafter “Leaving Things Undecided”].

some cautionary remarks about the use of open-textured minimalism in judicial opinion writing.

II. MATTERS OF OPINION

A. *Functions of the Judicial Opinion*

An analysis of judicial opinion writing cannot properly begin without a more careful look at the function of the judicial opinion. Despite the increasing importance of other sources of law, the “study of law in Canada remains, to a large degree, the study of judicial opinions.”¹⁷ Yet we often examine judicial opinions—reading and analyzing them—without probing their function and structure. The style of judicial opinions is to the law as oxygen is to life: essential, but generally unremarked upon.

Judicial opinions serve varied, sometimes conflicting, functions. First, of course, they decide an issue in dispute between parties. It has been suggested that the parties themselves might not care whether an opinion is issued, so long as their claims are decided,¹⁸ but that is not quite right. Litigants—especially the losing party—want to feel they have been treated fairly and justly.¹⁹ Thus, beginning with the parties themselves, the judicial opinion also seeks to justify the court's decision.²⁰

¹⁷ M.E. Gold, “The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada” (1985) 7 *Supreme Court L.R.* 455 at 455. See also F. Schauer, “Opinions as Rules” (1995) 62 *U. Chi. L. Rev.* 1455 at 1472 [hereinafter “Opinions as Rules”].

¹⁸ See J. Frank, *Law and the Modern Mind* rev. ed (Garden City, N.Y.: Doubleday, 1963) at 136.

¹⁹ See H. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale, IL: Southern Illinois University Press, 1992) at 28. But see K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960) at 289-90 (more important purpose is to inform winners which arguments succeeded). Moreover, the losing party needs some record of the decision to help determine whether to appeal. See Bosmajian, *ibid.* at 28.

²⁰ See also R. Martin, “Criticising the Judges” (1982) 28 *McGill L.J.* 1 at 5. One important category of case in which the dispute resolution function does not figure, technically speaking, is the reference opinion. While references are not formally adversarial, they do often attract opposing groups of intervenors, preserving some semblance of the need for dispute resolution. The reference more clearly fits the other

More generally, an opinion seeks to guarantee a measure of consistency, stability, and predictability in the legal system. It does so both to satisfy the litigants, and to ensure a measure of public confidence in the integrity of the legal system: whatever their personal values and motives, judges are required to provide a set of acceptable formal reasons.²¹

Another important function fulfilled by judicial opinions is persuasion. It has often been noted that one of the opinion's chief purposes is to convince readers that the result and the reasons used to get there are just and fair.²² This is so for a number of reasons, including the need to convince others to enforce the "violence" of a judgment,²³ and the need to buttress the confidence of the participants in the legal system that what they are doing is right.²⁴ No doubt, judges also strive for persuasive opinions to enhance their reputations at the bar and increase their influence on fellow judges.²⁵

Opinions offer another check of sorts on judges: the requirement that a judge reflect on a case long enough to write an opinion, and the knowledge that this work will be scrutinized by others, forces judges to think carefully about their judgment, even in relatively routine or clear cases.²⁶ The written opinion thus serves as a safeguard against "[s]nap judgments. . . . casualness and carelessness in decision."²⁷ Moreover, the requirement that a

functions of the judicial opinion discussed below.

²¹ See Bosmajian, *supra* note 19 at 27.

²² See, for example, Gold, *supra* note 17 at 455; W. Sadurski, "It All Comes Out in the End": Judicial Rhetoric and the Strategy of Reassurance" (1987) 7 Oxford J. Legal Studies 258 at 271.

²³ See M.D. Daneker, "Moral Reasoning and the Quest for Legitimacy" (1993) 43 Am. U.L. Rev. 49 at 50-51.

²⁴ See L.H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, Pa.: Pennsylvania State University Press, 1995) at 11.

²⁵ See also *Overcoming Law*, *supra* note 4, c. 3; and H.T. Edwards, "A Judge's View on Justice, Bureaucracy, and Legal Method" (1981) 80 Mich. L. Rev. 259 at 269.

²⁶ See R.A. Leflar, "Honest Judicial Opinions" (1979) 74 Nw. U.L. Rev. 721 at 737.

²⁷ R.A. Leflar, "Some Observations Concerning Judicial Opinions" (1961) 61 Colum. L. Rev. 810 at 810.

judge's intuitions and impressions be systematized into language by being written down filters out muddy thinking.²⁸

A function I have only touched on so far is the guidance function. Courts do not communicate solely with the litigants before them; they are also participants in a system of repeat players, including lawyers and lower courts. Through their opinions, courts—especially appellate courts²⁹—help inform and supervise the other players in this system. For high courts such as the Supreme Court, the guidance function may be primary, while the dispute-resolution function is secondary.³⁰ In this way, opinion writing is a “conscious process of rule making.”³¹

B. *The Democratic and Inter-Generational Functions*

To these regularly invoked functions of the judicial opinion, I would add two other functions, each related to the other. I call these the democratic and the inter-generational functions. These functions provide a link between ideas about constitutional theory and ideas about writing style in constitutional law opinions.

The democratic function of the judicial opinion stems from the judiciary's vexed position as an institution of government. On one hand, judges are charged with the duty to interpret and apply the *Charter*. Inevitably, judges will be required to make pronouncements describing, and ultimately shaping, the values that lie at the heart of our political and constitutional order. At the same time, they share this responsibility with a host of other institutions. Hence, the counter-majoritarian difficulty: the concern that courts, in applying the *Charter*, will block more

²⁸ See “Judges' Writing Styles,” *supra* note 9 at 1447. See also R.J. Traynor, “Some Open Questions on the Work of State Appellate Courts” (1957) 24 U. Chi. L. Rev. 211 at 218.

²⁹ See LaRue, *supra* note 24 at 10.

³⁰ See B. Wilson, “Decision-Making in the Supreme Court” (1986) 36 U.T.L.J. 227 at 234; and B. Laskin, “The Role and Function of Final Appellate Courts: The Supreme Court of Canada” (1975) 53 Can. Bar Rev. 469 at 475.

³¹ “Opinions as Rules,” *supra* note 17 at 1470.

directly democratic institutions that attempt to shape our constitutional values.

The democratic function responds to this concern by requiring judges to provide a public justification for their decisions.³² This ensures that courts retain some measure of democratic accountability: it permits the public to monitor the courts' work, and reminds judges that they must operate by more than mere judicial fiat. Thus, the democratic function demands that judges speak to the citizens whose rights are at stake, both to justify their actions and to attempt to persuade the people that their conclusions are right.³³

Scholars such as Sunstein have argued that the courts should sometimes fade into the background and allow greater deliberation and conversation within the "democratic arenas" of society.³⁴ Nevertheless, the courts cannot evade entirely their law-declaring function, and may have much of value to say about the fundamental rights they are charged with interpreting. Moreover, even in a deliberative democracy which values widespread societal dialogue, judges can encourage a dialogue between citizens about constitutional matters. Their position makes them particularly well-suited to contribute to any public dialogue on constitutional values. Although the case-by-case nature of adjudication restrains judges' perspective and renders their more general statements less reliable, their experience at interpreting the *Charter* and their relative isolation from political pressure makes them important participants in any discussion of *Charter* values. Thus, the democratic function of judicial opinions also recognizes the

³² See also A. Gutmann & D. Thompson, *Democracy and Disagreement* (London: Belknap Press of Harvard University, 1996) at 100: "[O]nly public justifications [by public officials] can secure the consent of citizens, whether it be tacit or explicit. Such justifications help sustain a sense of legitimacy that makes political cooperation possible in the face of continuing moral disagreement."

³³ For similar arguments in an American context based on the sovereignty of the people and the courts' concomitant obligation to explain themselves in a way the people can understand, see J. Goldstein, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand* (New York: Oxford University Press, 1992).

³⁴ See, for example, "Leaving Things Undecided," *supra* note 16 at 7, 19.

important role courts play as educators about our constitutional values.³⁵

The inter-generational function is similar. While the democratic function stems from the people's present-day consent to be bound by the *Charter*, and thus on the need for courts to address the people in their constitutional opinions, the inter-generational function stems from the long-term nature of constitutions. It recognizes that the breadth and vagueness of constitutions, the difficulty of enacting or amending them,³⁶ and the temporally extended nature of the affairs they govern makes it foolish to think of constitutions' legitimacy only in terms of the consent of the present generation to be bound by them. Instead, it recognizes that constitutions commit us to certain fundamental values over an extended period of time, while accepting that our understanding of a constitution and its underlying values may change over time.³⁷ Though documents such as the *Charter* precommit us to certain general governing values, such as ordered liberty and equality, they are not the end, but the beginning of a temporally extended effort to understand what these values mean and how they should govern us.

Given the youth of the *Charter*, we may not tend to focus much on this aspect of constitutionalism in Canada. The *Charter* developed from our pre-existing political values; it seems hard to envision that our political values may eventually develop from the

³⁵ See generally C. L'Heureux-Dubé, "The Length and Plurality of Supreme Court of Canada Decisions" (1990) 28 *Alta. L. Rev.* 581 at 582, 585; M. Tushnet, "Style and the Supreme Court's Educational Role in Government" (1994) 11 *Const. Comment.* 215; C.L. Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67 *N.Y.U. L. Rev.* 961; and E.V. Rostow, "The Democratic Character of Judicial Review" (1952) 66 *Harv. L. Rev.* 193 at 208: "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."

³⁶ Including, as has been evident in this country, the quick development of reluctance on the part of legislators to use the notwithstanding clause in s. 33 of the *Charter*.

³⁷ For recent discussions along these lines, see, for example, J. Rubenfeld, "The Moment and the Millennium" (1998) 66 *Geo. Wash. L. Rev.* 1085 [hereinafter "The Moment and the Millennium"]; M.C. Dorf, "A Nonoriginalist Perspective on the Lessons of History" (1996) 19 *Harv. J.L. & Pub. Pol'y* 351 at 353; J. Rubenfeld, "Reading the Constitution as Spoken" (1995) 104 *Yale L.J.* 1119; B. Ackerman, *We the People: Foundations* (Cambridge: Belknap Press, 1991). See also C. Fried, "Constitutional Doctrine" (1994) 107 *Harv. L. Rev.* 1140 at 1144: "[W]e are time-extended, not punctual, beings."

Charter. However, the American experience should teach us that, over time, constitutions and constitutional arguments truly constitute a people. They help to shape and define us as a people by providing the framework and terms of debate for our culture and our politics. Jed Rubenfeld puts the point well:

Constitutional law does not live in the moment—not in any moment, past, present, or hypothetical. It embodies a generation-spanning struggle—the historical struggle of a nation to be its own author, to write its own codes, to lay down and to live up to its own foundational commitments over time. Self-government takes time. A nation might take a century to realize its commitment to, say, the freedom of speech or the equal protection of the laws. It might take two centuries, or even more.³⁸

Judicial opinions dealing with questions of constitutional law must therefore, in a sense, speak across generations. They must attempt to speak meaningfully to future generations of readers who will be bound by the same constitutional text, while leaving some room for evolving interpretation of that text. This is not a terribly radical notion. Given our respect for precedent, in a sense all appellate decisions “speak from the present to the future,”³⁹ since they provide guidance for future conduct. Yet constitutional decisions differ from other kinds of decisions. The common law may change—indeed, it is meant to change. Though we occasionally refer to common law opinions dating from the distant past, the common law is always in flux and the best authority is always the most recent one. Similarly, statutes may be repealed, overruled, or simply fall into obsolescence. In either case, court decisions in these areas may only be of service in the short or medium term. By contrast, the *Charter* remains a binding document and is meant to have far greater permanence than other legal texts.⁴⁰ It is thus particularly important that judges writing opinions on the *Charter* recognize that they are participating in a

³⁸ “The Moment and the Millennium,” *supra* note 37 at 1111.

³⁹ See G.E. White, *Patterns of American Legal Thought* (Indianapolis, Ind.: Bobbs-Merrill, 1978) at 79 (quoting Henry M. Hart and John McNaughton).

⁴⁰ See *Law Society of Upper Canada v. Skapinker* [1984], 1 S.C.R. 357 at 366, per Estey J.: “The *Charter* is designed and adopted to guide the Canadian community for a long time.” [hereinafter *Skapinker*].

conversation⁴¹ about our fundamental freedoms with readers over an extended length of time, each of whom is caught within his or her own era, but bound by the same “timeless” yet changing document.⁴²

This discussion raises the question whether citizens at large really form a part of the audience for judicial opinions.⁴³ This question is vital to our consideration of style because, if the judicial opinion is in large measure an attempt to persuade, it is necessary to know who is to be persuaded. Arguments will obviously be framed differently according to the target audience.⁴⁴

In many non-constitutional cases, the primary audience may be no larger than the litigants and their lawyers. Given the appellate courts' law-declaring function, we can also assume that the community of lower court judges, as well as other lawyers, government officials, and academics, will often form part of the audience for an opinion.⁴⁵ As a general rule, however, citizens outside of the legal community will rarely form part of the “interpretive community” for judicial opinions.⁴⁶ Even momentous cases, such as those arising under the *Charter*, are likely to be encountered in media accounts rather than actually being read by masses of citizens.⁴⁷ The actual audience will still

⁴¹ See *Justice as Translation*, *supra* note 2 at 101: “[W]e can say that the legal text, like every text, is a stage in a conversation and ask of it: Is this conversation one in which ‘democracy begins?’”

⁴² See *Heracles' Bow*, *supra* note 2 at 88; Ackerman, *supra* note 37 at 23: “The challenge ... is to locate ourselves in a conversation between generations.”

⁴³ See A.J. Mikva, “For Whom Judges Write” (1988) 61 S. Cal. L. Rev. 1357; R.A. Leflar, *Appellate Judicial Opinions* (St. Paul, Minn.: West Publishing, 1974) at 159.

⁴⁴ See Bosmajian, *supra* note 19 at 31.

⁴⁵ See, for example, Grey, *supra* note 12 at 6. Robert Nagel suggests that the United States Supreme Court's desire to achieve control and cohesion within the “official hierarch[y]” of the legal system has much to do with its adoption of the “bureaucratic style” which he criticizes. See R.F. Nagel, “The Formulaic Constitution” (1985) 84 Mich. L. Rev. 165 at 177-78.

⁴⁶ Daneker, *supra* note 23 at 51.

⁴⁷ See Tushnet, *supra* note 35 at 219.

mostly be confined to the legal and government community, along with a few reporters, opinion-makers, and non-legal academics.⁴⁸

As a normative matter, however, if opinions also fulfil important democratic and inter-generational functions, then they should attempt to include the public as part of the intended audience, despite the low actual readership in the larger community. Even if the actual readership of *Charter* cases remains small, the legitimacy of the courts' power of judicial review ultimately derives from the sovereignty of the people, and from their consent to a system of judicial review that allows counter-majoritarian rulings in the name of the *Charter*. The judicial system ultimately exists "only for ... and because of" the people.⁴⁹ Although the people's consent to judicial review in our constitutional democracy can generally be assumed, the fact of their ultimate ability to alter the constitutional structure and curtail judicial review suggests that courts should exercise their power of constitutional decisionmaking with at least some regard for this ultimate source of judicial authority. This is not to suggest that all constitutional opinions must be perfectly intelligible to all potential readers, but courts ought to at least remember that the public is an important potential audience for their opinions.⁵⁰

Thus, when appellate courts draft opinions interpreting the *Charter*, they ought to remember their duty to speak to the people, in this and future generations. Recognition of the duty to speak to this broader audience will have a considerable influence on the style of opinion we should expect from the courts.⁵¹ First, however, it would be useful to subject the concept of "style" to a more searching analysis.

III. STYLE MATTERS

⁴⁸ See also P.M. Wald, "A Reply to Judge Posner" (1995) 62 U. Chi. L. Rev. 1451 at 1453.

⁴⁹ L'Heureux-Dubé, *supra* note 35 at 582.

⁵⁰ See also L.H. Bloom, Jr., "Barnette and Johnson: A Tale of Two Opinions" (1990) 75 Iowa L. Rev. 417 at 428.

⁵¹ See also Goldstein, *supra* note 33 at 128.

Despite occasional loose references to style as mere dressing or ornamentation, there can be little real doubt that style is an essential element of any successful judicial opinion, if for no other reason than we cannot think or act without it. "Our language determines to a large extent how we see reality, and tropes especially affect our perceptions and how we see the 'truth.'"⁵² Constitutional law, especially, is grounded in abstract concepts and values, and thus inevitably requires the use of metaphors, tropes, and other literary figures. Hence, we speak of equality "before" or "under" the law, "chilling effects" on speech, or the "marketplace of ideas." To a significant degree, we think in and through style.

This article does not attempt a detailed taxonomy of the range of possible styles observed in judicial opinion writing, but it may be helpful to provide context through some general observations of the prevailing styles of opinion writing.

Judge Richard Posner offers a useful classification of approaches to judicial opinion writing, categorizing judicial styles as "pure or "impure."⁵³ Opinions in the pure style "have a lofty, formal, imperious ... "refined," ostentatiously "correct ... even hieratic tone" ⁵⁴ They are jargon-ridden and speak with certitude. They "tend to be long for what they have to say, solemn, highly polished and artifactual ... predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion."⁵⁵

Impure style will "tend to be more direct, forthright ... colloquial, informal, frank, even racy, even demotic."⁵⁶ It will tend toward brevity and lack of ornamentation, and will avoid headings and subheadings, shunning "the 'professionalizing' devices of the purist writer—the jargon, the solemnity ... the unembarrassed repetition of obvious propositions, the long quotations from

⁵² Bosmajian, *supra* note 19 at 17.

⁵³ "Judges' Writing Styles," *supra* note 9 at 1421.

⁵⁴ *Ibid.* at 1426.

⁵⁵ *Ibid.* at 1429.

⁵⁶ *Ibid.* at 1426.

previous cases to demonstrate fidelity to precedent”⁵⁷ It will show a fondness for wit and a general conversational tone, in keeping with a view that it is intended for an audience beyond the community of sophisticated legal readers.

Wigmore offers a less thoughtful, but still useful, description of common opinion styles.⁵⁸ These include the “opinion by reference,”⁵⁹ which relies on citations of earlier cases without much discussion of reasons; the “factual opinion,”⁶⁰ which concentrates on the facts to the neglect of any useful statement of law; the “rambling opinion,”⁶¹ whose lengthy and digressive nature offers little real guidance; and the “cautious opinion,”⁶² which resolves the matter on fine points without settling the main issues raised.

Critics of the recently prevalent⁶³ American style, offer a picture of a style resembling that which is criticized with respect to the Supreme Court of Canada below.⁶⁴ This style “emphasizes formalized doctrine expressed in elaborately layered sets of ‘tests’ or ‘prongs’ or ‘requirements’ or ‘standards’ or ‘hurdles.’⁶⁵ They decry the U.S. Supreme Court’s jurisprudence as a “thick undergrowth of technicality ... with an almost medieval earnestness about classification and categorization; with a theological attachment to the determinate power of various ‘levels of scrutiny’; [and] amazingly fine distinctions that produce multiple opinions designated in parts, sub-parts, and sub-sub-

⁵⁷ *Ibid.* at 1430.

⁵⁸ See J.H. Wigmore, *Evidence in Trials at Common Law*, rev. ed. by P. Tillers, vol. 1 (Boston: Little, Brown, 1983) at 614-18, 624-25.

⁵⁹ *Ibid.* at 624.

⁶⁰ *Ibid.* at 625.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Though that style may be changing. See, for example, *One Case*, *supra* note 16.

⁶⁴ For other criticisms of the Supreme Court of Canada’s writing style, see Martin, *supra* note 20; and D.R. Klinck, “‘Criticising the Judges’: Some Preliminary Reflections on Style” (1986) 31 McGill L.J. 655 (discussing Martin, *ibid.*).

⁶⁵ Nagel, *supra* note 45 at 165.

parts.”⁶⁶ These tests—along with their close relative, the balancing test—risk giving us the worst of both worlds. On the one hand, they suggest we can reach decisions through the mechanical weighing of “factors”;⁶⁷ on the other, they constrain the actual act of balancing that must occur, and obscure the judge’s actual responsibility for the way the balance is ultimately struck.⁶⁸

Frederick Schauer offers an interesting qualified defense of this oft-criticized style of opinion, one which advances the view that decisions with multi-part tests and similar features constitute a useful attempt to provide definitive guidance to lawyers and judges in future cases.⁶⁹ Schauer acknowledges that many modern opinions of the United States Supreme Court employ “quasi-statutory language,”⁷⁰ but he asks whether this is really such a bad thing. Formal elements are welcomed when they appear in statutes. If judicial opinions are not so different in purpose from statutes as legal academics commonly assume, then this difference in treatment is unwarranted.⁷¹ Schauer suggests that we dispense with our fixation with style and accessibility, since few people actually read entire judicial opinions; even lawyers tend to consult them only for useful sections and bits of language.⁷² Instead, we should think of the judicial opinion as a “conscious process of rule making” that is meant to fulfil a guidance function of “setting

⁶⁶ M.H. Horwitz, “The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism” (1993) 107 Harv. L. Rev. 30 at 98; see also B. Marshall, “Foreword” in Goldstein, *supra* note 33 at xi-xii; and D.A. Farber, “Missing the ‘Play of Intelligence’” (1994) 36 Wm. & Mary L. Rev. 147.

⁶⁷ See, for example, C.E. Baker, “Turner Broadcasting: Content-Based Regulation of Persons and Presses” [1994] Sup. Ct. Rev. 57 at 115.

⁶⁸ See, for example, A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993) at 148-49; F.N. Coffin, “Judicial Balancing: The Protean Scales of Justice” (1988) 63 N.Y.U. L. Rev. 16 at 22.

⁶⁹ See “Opinions as Rules,” *supra* note 17 at 1472; F. Schauer, “Justice Stevens and the Size of Constitutional Decisions” (1996) 27 Rutgers L.J. 543; F. Schauer, “Codifying the First Amendment: *New York v. Ferber*” [1982] Sup. Ct. Rev. 285. See also F. Easterbrook, “Ways of Criticizing the Court” (1982) 95 Harv. L. Rev. 802 at 808; R.F. Fallon, Jr., “The Supreme Court 1996 Term—Foreword: Implementing the Constitution” (1997) 111 Harv. L. Rev. 54 at 57, 61.

⁷⁰ “Opinions As Rules,” *supra* note 17 at 1457; see also *ibid.* at 1459.

⁷¹ *Ibid.* at 1460-63.

⁷² *Ibid.* at 1463-65, 1471-72.

forth ... standards to help those who are expected to follow the law.”⁷³

Schauer’s arguments reconfirm this article’s thesis that one’s view of the importance of style is connected to one’s theories about law, particularly concerning the function of a judicial opinion. His arguments are persuasive if one accepts that judicial opinions, like statutes, primarily exist to provide guidance for lawyers and litigants, who want certainty and not poetry. However, judicial opinions, particularly those concerning constitutional law, serve functions other than the provision of guidance. Judicial opinions that attempt to give definitive interpretations of the meaning of a constitutional provision by laying down rigid quasi-statutory tests ignore the more far-reaching aspects of constitutional adjudication. This is particularly true of the *Charter*, since courts are still in the provisional stages of interpreting that document and may lack the experience to lay down a workable set of quasi-statutory tests and doctrines.

Schauer also gives short shrift to the persuasion function of judicial opinions. Again, this is particularly important with respect to constitutional adjudication. Unless the constitution is amended, or the section 33 override is invoked to overcome judicial interpretations of sections 2 or 7-15 of the *Charter*, or the courts revise their views in light of a legislative sequel to their decision,⁷⁴ the final power to give legislation the imprimatur of constitutionality remains in the Supreme Court’s hands.⁷⁵ It may overrule itself, replacing one set of quasi-statutory rules with another, but only at the cost of respect for the Court’s authority and legitimacy. Laying down statute-like tests in this manner may thus provide clear guidance, but exacerbate the counter-majoritarian difficulty.

This is where the democratic function of the judicial opinion enters in. Constitutional judicial opinions must have some

⁷³ *Ibid.* at 1470, 1467.

⁷⁴ Canadian courts may defer substantially to legislation that reflects a careful balancing of competing interests, even if the legislative policy is at odds with an earlier judicial ruling. See *R. v. Mills*, [1999] 3 S.C.R. 668 at 711: “Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups.”

⁷⁵ But see generally Hogg and Bushell, *infra* note 140.

broadly persuasive quality in order to retain any lasting authority. Though Schauer argues that other branches of government make decisions without public explanation,⁷⁶ the other branches of government must subject their actions to deliberation in the legislature, and to public debate during election campaigns. Judicial opinions must persuade, and not just dictate, in large measure because of their isolation from this sort of accountability. Schauer is right to note that not every member of the public actually reads judicial opinions on the constitution or any other subject, but neither does every citizen follow legislative proceedings or political debate. Ultimately, judicial opinions must persuade not because of the size of their readership, but because their legitimacy is always at issue. So opinions must offer more than mere guidance. Thus, whatever the merits of Schauer's arguments, other considerations counsel against the proliferation of quasi-statutory language in judicial opinions, and in favour of more open-textured language.⁷⁷

Beyond observations about general categories of judicial style, the discussion below may be aided by listing some particular tools of legal writing. I discuss only two tools, albeit broadly conceived ones, here. Both tools have a role to play among the general principles of style that I propose for the writing of constitutional law opinions.⁷⁸

One rhetorical tool commonly employed in fine judicial writing is the trope—the figurative use of speech through metaphor, metonymy, personification, and other figures. Metaphor, in particular, plays an important role in the judicial opinion.⁷⁹ Though Justice Reed urged that a “rule of law should not be drawn from a figure of speech,”⁸⁰ metaphors are

⁷⁶ See “Opinions as Rules,” *supra* note 17 at 1466.

⁷⁷ Schauer acknowledges, however, that different approaches may be required at different times: *ibid.* at 1470.

⁷⁸ For a fuller discussions of this topic see, for example, Bosmajian, *supra* note 19; and Leflar, *supra* note 27.

⁷⁹ See, for example, Bosmajian, *supra*; M. Boudin, “Antitrust Doctrine and the Sway of Metaphor” (1986) 75 *Geo. L.J.* 395; D. Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition” (1986) 95 *Yale L.J.* 857.

⁸⁰ *McCullum v. Board of Education*, 68 S. Ct. 468 (1948) (per Reed J. dissenting).

inescapable in law.⁸¹ As prosaic an area as antitrust doctrine, for instance, renders abstract business activities more concrete through the use of terms such as “bottleneck” or price “squeeze.”⁸² In constitutional law, David Cole has noted a “creative misreading” of First Amendment metaphors by judges over time, in order to infuse old tropes with new meanings, while still retaining the appearance of respect for the authority of the past.⁸³

This example suggests the strengths and dangers of tropes such as the metaphor. On the one hand, they help make difficult and abstract concepts easier to comprehend and work with. They can be powerful persuasive tools, and revive old legal concepts through a fresh and startling turn of phrase.⁸⁴ Their allusive, evocative character helps us to begin to shape a verbal response to new ideas that are not yet capable of more precise understanding. Yet these qualities also arguably make them dangerous. Metaphors “tend to run away with us. Then we find that our thinking is directed not by the force of argument at hand, but at the interest of the image in our mind.”⁸⁵ A metaphor such as the “marketplace of ideas” image may obscure the degree to which reality differs from the imagined image; we may forget to ask if there is a marketplace of ideas, and if so why it ought to be left unregulated.⁸⁶ Also, the meaning of a metaphor may be reinterpreted over time in troubling ways.⁸⁷ Perhaps if we stripped

⁸¹ See, for example, J.T. Noonan, Jr., “The Relation of Words to Power” (1996) 70 *St. John’s L. Rev.* 13 at 13: “Metaphor is unavoidable. The law is honeycombed with metaphor and we could not live without it.” See also G. Lakoff & M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), for the broader argument that metaphor is inescapable and pervasive—not just in language, but in all human conduct.

⁸² See Boudin, *supra* note 79 at 395.

⁸³ See Cole, *supra* note 79 at 892.

⁸⁴ See D.S. Gordon, “‘Jug Jug’ to Dirty Ears”: *Maryland v. Craig* Through a Literary Lens” (1991) 66 *N.Y.U. L. Rev.* 1404 at 1420.

⁸⁵ Bosmajian, *supra* note 19 at 38, quoting Monroe Beardsley.

⁸⁶ See, for example, J.A. Barron, “Access to the Press—A New First Amendment Right” (1967) 80 *Harv. L. Rev.* 1641.

⁸⁷ See Boudin, *supra* note 79 at 414.

the creative imagery from a legal concept, we could examine it more clearly.⁸⁸

However, these dangers may be reconceived as potential benefits. I have described an inter-generational function in constitutional law that requires courts to attempt to guide future generations while leaving them the space to reinterpret or reinvent constitutional concepts and values over time. In that sense, the possibility that a metaphor will be “misread” over time—that new meanings will be poured into a capacious figure of speech—may be a benefit, not a risk. Rather than view colourful phrases in a judicial opinion through the lens of a fear of unintended consequences,⁸⁹ we might view them as sources of possibility and hope. Figures of speech demand that readers fill them with meaning, and so offer an “almost magical capacity to unleash creative thought,”⁹⁰ while providing the flexibility that future lawyers need to respond to changing situations.⁹¹ Tropes should be watched carefully, but used creatively.

Another useful stylistic tool is the aphorism or epigram. Holmes is the acknowledged master of the epigrammatic moment, the captivating phrase or sentence that convinces by sheer force of wit.⁹² Epigrams or aphorisms can easily be derided as containing more wit than reason: Judge Pierre Leval is probably right to ask, “[D]oes anyone who has studied law doubt that for every case in which impressive rhetoric strengthens the opinion we can find a

⁸⁸ Bosmajian, *supra* note 19 at 72, quoting Wendell Wilkie: “[A] good catchword ... can obscure analytical thinking for fifty years.”

⁸⁹ See, for example, J.S. Kaye, “Judges as Wordsmiths” (1997) 69 N.Y. St. B.J. 10 at 10: “A careless comma, a stray phrase, a fanciful footnote can come back to haunt in the cases and years ahead.”

⁹⁰ Boudin, *supra* note 79 at 414.

⁹¹ See Kaye, *supra* note 89 at 10 (noting that “a touch of ambiguity ... leaves room for the unforeseen and unforeseeable.”). For an interesting argument that “imprecision and uncertainty” are valued commodities in the legal system, see P.A. Ritter, “The Packaging of Legal Information in an Adversary System of Legal Decision-Making” (1980) 38 U.T. Fac. L. Rev. 143 at 149.

⁹² See, for example, B. Kaplan, “Encounters With O.W. Holmes, Jr.” (1983) 96 Harv. L. Rev. 1828 at 1835. Holmes wrote, perhaps disingenuously, “I deny that I search for epigrams. I write too rapidly to stop for phrases—and I certainly do not consciously skip over a difficulty.”: *Holmes and Frankfurter*, *supra* note 1 at 171.

thousand where a self-conscious literary device conceals shallow reasoning—where epigram substitutes for analysis?”⁹³

Nevertheless, like metaphors, epigrams serve important functions. Even dangerous epigrams—epigrams that capture our attention too closely, that may be misinterpreted, or that may conceal weaknesses in reasoning⁹⁴—are full of potential. A vivid and memorable statement encourages creative responses. It “rivets attention, crystallizes relevant concerns and considerations, provokes thought.”⁹⁵ Consider the decades of argument spawned by Holmes’s championing of “the free trade in ideas,”⁹⁶ or the lasting influence of Lord Sankey’s reference to the Constitution as a “living tree.”⁹⁷ Moreover, as Mark Tushnet has observed, memorable phrases offer “eruptions of individual idiosyncrasy in the otherwise bureaucratic operations of the Supreme Court,” providing judicial sound-bites that may cut through the Court’s typical verbiage and possibly even reach an otherwise uninterested public, as well as offering insights into the character of individual judges.⁹⁸

Style is thus an essential element of judicial opinions. It distinguishes short-lived opinions from those with a lasting influence, both because a well-written opinion is more likely to be remembered and quoted,⁹⁹ and because open-ended or pregnant

⁹³ P. Leval, “Judicial Opinions as Literature” in Brooks & Gewirtz, *supra* note 4 at 209.

⁹⁴ See Kaplan, *supra* note 92 at 1835-36 (relating Morris Cohen’s remark that “the trouble with aphorisms and vatic pronouncements . . . is that they lend themselves to being picked out by different people to serve diverse unintended purposes”).

⁹⁵ See R.A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990) at 136 [hereinafter *Cardozo*].

⁹⁶ *Abrams v. United States*, 250 U.S. 616 at 630 (1919), per Holmes J., dissenting. For a recent use of the metaphor in Canadian jurisprudence, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 256 [hereinafter *Secession Reference*]: “No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top.”

⁹⁷ *Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136, per Lord Sankey L.C.

⁹⁸ Tushnet, *supra* note 35 at 218, 222. But see R.A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge: Harvard University Press, 1996) at 145 [hereinafter *The Federal Courts*].

⁹⁹ See, for example, Boudin, *supra* note 79 at 404; *Cardozo*, *supra* note 95 at 136.

phrases, capable of creative reinterpretation, allow subsequent courts to inject their own sensibilities into the law while still giving a nod to precedent.

IV. OPEN-TEXTURED MINIMALISM

A. *Toward a Standard of Opinion Writing Style in Constitutional Law*

Having noted the disparate strands of literary and legal theory and practice, it is now possible to weave them together. A judicial opinion should, before all else, seek a satisfactory resolution of the dispute between the litigants. It must therefore offer a sufficiently clear and definite account of the court's reasoning and the relevant legal principles involved to reassure the parties that they have been dealt with justly.¹⁰⁰

At the same time, the opinion must also provide general guidance for the other participants in the legal system, including lower courts. On issues concerning the *Charter*, appellate courts should also address themselves to their ultimate source of authority and legitimacy—the community of citizens.¹⁰¹

The democratic function of judicial opinions also reminds us that judges play an important part in an ongoing national dialogue about fundamental constitutional values. The inter-generational function reminds us that judicial opinions about the *Charter* must speak across an unknowable number of years. Accordingly, the courts' style of speaking about constitutional issues should attempt to reach citizens now and in the future. At the same time, judicial opinions must leave room for future courts to assert their own understanding of the *Charter* without having to hack their way out of a thick tangle of precedents.

These arguments are underscored by one more factor: the *Charter* is a relatively new document. Posner has noted that Chief

¹⁰⁰ For the traditional view that that is all an opinion should do, see, for example, J.J. Parker, "Improving Appellate Methods" 25 N.Y.U. L. Rev. 12 (1950); and H.B. Gregory, "Shorter Judicial Opinions" (1948) 34 Va. L. Rev. 362 at 364.

¹⁰¹ See Goldstein, *supra* note 33 at 7.

Justice John Marshall, whose early opinions interpreting the United States Constitution still shape American constitutional law, cited few cases and avoided jargon, freeing himself to write boldly and clearly. He could do so because the Constitution was “still fresh,” and he was unencumbered by a “minefield of authoritative precedents.”¹⁰² Though the Supreme Court of Canada has already written a great deal about the *Charter*, its jurisprudence is relatively new and the years stretch ahead of it. There ought to be no undue haste to spill ink on a clean page. The stewards of this youthful *Charter* act in trust for future interpreters of the document, and would be wise to offer doctrine sparingly.

B. *Open-Textured Minimalism*

With these requirements laid out, and keeping in mind the discussion of style offered above, the Supreme Court might aspire to an approach to opinion writing in constitutional law that I will call “open-textured minimalism.”¹⁰³ It should be emphasized that open-textured minimalism is only a style. To be sure, it is also an expression of legal theory, not merely a set of purely aesthetic suggestions. It cannot be followed as if it were a rulebook; still, some general traits that would characterize an open-textured minimalist opinion can be identified.

First and most obviously, an open-textured minimalist respects the primary function of the judicial process: to decide cases. The judge applies or develops as much doctrine as necessary to offer a resolution of the dispute at issue. At the same time, the minimalist style demands that judges self-consciously

¹⁰² *Law and Literature*, *supra* note 2 at 274; see also C.L. Eisgruber, “John Marshall’s Judicial Rhetoric” [1996] *Sup. Ct. Rev.* 439. But see C.F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, Kan.: University Press of Kansas, 1996) at 181-91 (calling Marshall’s indifference to precedent a “myth,” but noting that he placed principle before precedent, and describing his methods of avoiding troublesome precedents).

¹⁰³ I share the use of the phrase “open-textured” with H.L.A. Hart, who discusses the “open texture” of legal rules. See H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) at 123, 127-28. Although the phrase connotes indeterminate language in both contexts, I use the phrase for my own ends here.

avoid deciding more issues than necessary.¹⁰⁴ *Open-textured* minimalist judges are also aware of their own limitations, of the presence of substantial and reasonable disagreement regarding the values underpinning the *Charter*, and of the potential costs of errors if they seek to resolve a complicated issue definitively.¹⁰⁵ They therefore seek to guard against too swift a development of constitutional doctrine. These judges also remember the youthful status of the *Charter*, and their own modest position in the context of an inter-generational conversation about *Charter* values. They are reluctant to lay down too many rules or settle too many questions at once.¹⁰⁶

Accordingly, an open-textured minimalist court would, to the extent possible, avoid the statute-like, multi-prong or multi-factor tests that have characterized recent American constitutional opinions and that, as we will see below, have also been prominent in *Charter* jurisprudence. Though multi-prong tests leave later courts with substantial discretion as to the results of particular cases, they pose several difficulties. They can be difficult and laborious to apply. They demand that future courts mechanically follow particular patterns of analysis, and discourage courts from developing original approaches to the law as their understanding of the *Charter*, or of relevant factual circumstances, changes.¹⁰⁷ Courts that wish to create new and possibly better lines of doctrine must either abandon their old precedents, thus

¹⁰⁴ This position has regularly been voiced by the Supreme Court of Canada. See, for example, *Skapinker*, *supra* note 40 at 181: "The development of the *Charter* as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken."; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; and *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at 173-175, per LaForest J., dissenting in part [hereinafter *Provincial Judges' Reference*].

¹⁰⁵ See, for example, *One Case*, *supra* note 16 at ix, 4-5, 46-60 (describing minimalism as a response to the presence of disagreement in a heterogeneous democratic society, and as a safeguard against erroneous decisions on issues that are either politically controversial or factually underdeveloped).

¹⁰⁶ See E.E. Cheatham, "Conflict of Laws: Some Developments and Some Questions" (1971) 25 Ark. L. Rev. 9 at 19: "Do not be too rigid. Leave room for wise choice and for new and unforeseen kinds of cases."

¹⁰⁷ See R.B. Ginsburg, "Speaking in a Judicial Voice" (1992) 67 N.Y.U. L. Rev. 1185 at 1198 ("Doctrinal limbs too swiftly shaped ... may prove unstable").

showing disrespect for *stare decisis*, or pretend they are still following the old precedents—a fiction which is quickly exposed and leads to even greater disrespect for precedent. Furthermore, they encourage “tedious, meandering opinions”¹⁰⁸ that fail to capture the attention of the public. Minimalist judges therefore avoid the promulgation and proliferation of tests, rules and standards.¹⁰⁹

Instead, judges should self-consciously and actively participate in a conversation about *Charter* values, offering persuasively argued statements about the values relevant to a particular case, inviting a full and open conversation among both the public and future courts. They must not close off the possibility that our understanding of the *Charter* and its values may change.

This may be accomplished in several ways. Judges should discuss fundamental principles and values, but avoid enshrining these principles in broad and binding rules of conduct. Instead, they should use *dicta* to float ideas about the legal principles involved, inviting debate over these ideas without attempting to resolve all of their implications.¹¹⁰ In addition, judges should seek to employ memorable but open-textured language in discussing constitutional principles, offering phrases whose meaning may be filled in, debated, and revised over time. The great value of rich figures of speech such as “clear and present danger” is not that they settled difficult issues (they did not), but that they offered their contemporary audiences a reasonable explanation for the court’s judgment, while leaving future readers the opportunity for productive debate about the values implicated by these pregnant

¹⁰⁸ “Judges’ Writing Styles,” *supra* note 9 at 1439.

¹⁰⁹ Beyond the avoidance of expansive rules or standards, a minimalist judge may employ a vast arsenal of avoidance techniques to avoid settling constitutional questions too hastily. Thus, the “minimalist” aspect of open-textured minimalism is, in some respects, the offspring of a tradition of constitutional law advocating the use of courts’ discretionary powers to avoid resolving difficult constitutional questions until they are truly ripe for decision. See generally Bickel, *supra* note 8; *One Case*, *supra* note 16 at 4-6, n. 5., c. 1.

¹¹⁰ See also N.K. Katyal, “Judges as Advicegivers” (1998) 50 *Stan. L. Rev.* 1709 (building on Bickel and Sunstein, and arguing that judges should employ “advicegiving” *dicta* to recommend certain courses of action without requiring it). This approach, Katyal notes (in tune with my own concerns), “mediate[s] the tensions in a system of law based on *stare decisis*”: *ibid.* at 1714.

phrases. Open-textured phrases are useful place-holders for larger debates about constitutional values. They are classically “Delphic” words, “profound and obscure,” which invite the larger interpretive community to fill them with meaning.¹¹¹ There is some risk that a court consciously seeking such rich, open-textured language would fall into heavy-handedness or pretension,¹¹² but the benefit of seeing an increase in the amount of eloquent and debate-provoking language is worth the risk of some leaden prose.

Open-textured minimalism, as defined here, is not a synonym for judicial conservatism, nor an antonym for judicial activism. Minimalism alone risks lapsing into judicial passivity or quiet support of the *status quo* because it encourages judges to leave difficult issues unresolved. However, these fears should be allayed when minimalism is paired with the provocative, debate-encouraging language that is part of the open-textured minimalist style. An open-textured minimalist may write an epigrammatic opinion whose implications, though perhaps not spelled out in a broad rule, ultimately prove far-reaching. Open-textured minimalism does not require that a judicial opinion do nothing at all. Rather, it is an approach that attempts to decide questions narrowly, without laying down too much doctrine, while still providing suggestive and evocative prose that will be the starting point for ongoing conversations about *Charter* values. In a landscape of moral and political heterogeneity and factual uncertainty, open-textured minimalism can become an effective and appropriate method of balancing the risks of judicial activism against the risks of judicial quietism.

Some other general traits also characterize the opinion of an open-textured minimalist.¹¹³ Conscious of their duty to reach the larger public audience for constitutional law opinions, open-textured minimalists strive for brevity in their opinions. They

¹¹¹ See LaRue, *supra* note 24 at 84.

¹¹² See S. Petch, “Borderline Judgments: Law or Literature?” (1991) 7 *Austr. J.L. & Soc’y* 3 at 9. See also Kaye, *supra* note 89 at 11.

¹¹³ The principles in this paragraph derive in part from Goldstein, *supra* note 33 at 112-16; R. Forrester, “Truth in Judging: Supreme Court Opinions As Legislative Drafting” (1985) 38 *Vand. L. Rev.* 463 at 469-72; and Hugg, *supra* note 11 at 868-69.

avoid “long-winded developments of the obvious”¹¹⁴—the lengthy discussions of irrelevant facts and pointless recounting of cases that have long fallen into desuetude, typical of what Wigmore called the “rambling opinion.”¹¹⁵ To encourage contemporary and inter-generational dialogue, they offer an honest account of the arguments against their position. For the sake of the educative and democratic functions, they also seek the memorable aphorism, the striking or pregnant phrase that often becomes the sound-bite of an opinion and captures the attention of a wider audience.¹¹⁶

This is simply a general sketch of the approach of the open-textured minimalist. Rough as it is, it offers itself up to the criticism that the judge it describes is something of a coward or laggard, who refuses to provide guidance to lower courts and instead dashes off a series of obscure judicial poems or *koans*.¹¹⁷ I do not mean to advocate a kind of judicial mysticism, or a focus on judicial aesthetics to the exclusion of sound reasoning. To take Holmes or Denning as exemplars, it should be clear that it is possible to write with clarity and perceptiveness about difficult legal issues while still maintaining a succinct and evocative style and leaving room for future doctrinal development. The open-textured minimalist recognizes that there is some wisdom in not laying down too much law at once,¹¹⁸ and an equal measure of wisdom in encouraging future conversations about constitutional and *Charter* values. The open-textured minimalist takes courage from these words describing Judge Learned Hand:

[I]t is not surprising that on occasion we find in Learned Hand, as in Holmes, a certain vagueness of formulation and a penumbral scope to decisions. This is a manifestation of clarity of thought. It is the kind of clarity which, in Professor Whitehead’s phrase, “leaves the darkness unobscured.” Analysis of a difficult problem may still be incomplete or its solution as yet unattained. The search for

¹¹⁴ See *Holmes and Frankfurter*, *supra* note 1 at 186.

¹¹⁵ See Farber, *supra* note 66 at 154.

¹¹⁶ See Tushnet, *supra* note 35.

¹¹⁷ See *Cardozo*, *supra* note 95 at 134.

¹¹⁸ See Fallon, *supra* note 69 at 113-14: “The task of crafting a new rule or test—or even a serious proposal for one—is hard work, requiring resources that may not always lie at hand. And a failed effort can be costly. Sometimes in constitutional law, as in medicine, the governing principle should be: ‘First, do no harm.’”

truth at a given time may require even of a judge avowed agnosticism or inexplicitness of statement. ... Learned Hand knows what he does not know; and he knows the importance of not obstructing deeper analysis tomorrow by the illusory certainty of obsolete or premature generalization.¹¹⁹

C. Sunstein's Minimalism

At this point, I want to contrast the vision of open-textured minimalism offered above with another set of arguments for a kind of judicial minimalism that have been proposed in recent works by Cass Sunstein. Sunstein's theory of minimalism shares a number of basic traits with the vision of open-textured minimalism offered in this article, but the ways in which our visions of minimalism differ reinforce this article's suggestion that one's theory of constitutional law and one's beliefs about style are ultimately interconnected.

Sunstein sets out both a general theory and a specific application of his theory to constitutional adjudication. He argues that the enterprise of law is possible in our divided and heterogeneous society because judges rely on "incompletely theorized agreements"—agreements to settle those aspects of a case or legal issue on which there is consensus, while leaving other questions undecided or unreasoned.¹²⁰ The courts' use of incompletely theorized agreements will be helped along by "constructive uses of silence"; that is, courts will avoid addressing issues that may prove "false, obtuse, or excessively contentious."¹²¹

Sunstein's ultimate aim is to provide a defense of a minimalist approach to judicial reasoning, favouring case-by-case judgments over the development of broadly binding rules.¹²² This approach does more than make legal agreement possible in a system rife with disagreement about social values, it also serves Sunstein's broader interest in deliberative democracy—his belief that citizens in a democratic republic should enter into meaningful

¹¹⁹ F. Frankfurter, "Judge Learned Hand," (1947) 60 Harv. L. Rev. 325 at 326-27.

¹²⁰ See *Legal Reasoning*, *supra* note 16 at 35-38.

¹²¹ *Ibid.* at 38-39.

¹²² *Ibid.* at 101.

dialogues about their fundamental values. Though he recognizes that courts on occasion provide important statements of principle, he largely rejects the view that a court should be seen as a “forum of principle.”¹²³ Instead, courts should have a “limited place ... in a democratic society, where fundamental principles are best discussed and announced in democratic arenas.”¹²⁴

More recently, Sunstein has focused on the practice of constitutional law. His minimalist judges—who, he suggests, include a majority of the current United States Supreme Court—“decide no more than they have to decide. They leave things open. They make deliberative decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome.”¹²⁵ These judges, utilizing incompletely theorized agreements and relying on the constructive uses of silence, are “decisional minimalists.” They avoid “broad rules and abstract theories,” preferring to limit their role to deciding cases, rather than attempting to resolve broader social controversies. They rely on analogy and fact-specific reasoning instead of grand theories.¹²⁶

Sunstein argues that “[o]ne of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.”¹²⁷ He acknowledges that a strong judicial hand may sometimes be necessary to strengthen deliberative democracy, as when it defends prerequisites to public deliberation such as the First Amendment,¹²⁸ but on the whole, his approach favours deciding constitutional cases narrowly and giving the democratic process greater breathing room.

¹²³ *Ibid.* at xiii-ix.

¹²⁴ *Ibid.* at 6.

¹²⁵ “Leaving Things Undecided,” *supra* note 16 at 6.

¹²⁶ *Ibid.* at 7, 14, 20.

¹²⁷ *Ibid.* at 19.

¹²⁸ See, for example, *ibid.* at 29, 37; *One Case*, *supra* note 16 at 64.

The common point of departure between Sunstein's vision of minimalism and mine is the role we envision for courts in the system of democratic deliberation. Sunstein shies away from the important role courts must play in enunciating fundamental constitutional values—even controversial ones—because his interest is in pushing discussion of issues of public controversy to democratic arenas.¹²⁹ He places much emphasis on the courts' use of silence. However, judges are, after all, charged with the function of declaring and clarifying those values every time they engage in judicial review. That institutional role makes them uniquely qualified to catalyze debate about constitutional values, and provide important contributions to that debate, even if the debate is ultimately resolved by democratic deliberation and not by judicial fiat.¹³⁰ Open-textured minimalism urges judges to at least open a dialogue about constitutional questions, and advocates a different approach to incompletely theorized agreement: decide cases on the basis of facts and low-level principles, while deliberately seeking to spark dialogue among courts and citizens about the nature of the high-level principles involved.

Put in Sunstein's terms, open-textured minimalism seeks decisions that are "deeply reasoned but also narrow."¹³¹ Deep but narrow decisions do not lay down new, overarching tests or standards, but "venture ... ambitious remarks" about the general constitutional principles implicated by the case.¹³² To be sure,

¹²⁹ "In American government and in all well-functioning democracies, the real forum of high principle is politics, not the judiciary...": *Legal Reasoning*, *supra* note 16 at 7.

¹³⁰ See B. Friedman, "Dialogue and Judicial Review" (1993) 91 Mich. L. Rev. 577 at 583, 669: "[C]ourts interpret the Constitution, but they also facilitate and mold a society wide constitutional dialogue."; "[C]ourt decisions may act as a catalyst, causing society to debate issues that might not otherwise have stood at the top of the agenda." Judges acting in this fashion may, in fact, influence democratic deliberation, without foreclosing it, by serving as what Sunstein elsewhere calls "norm entrepreneurs," whose support for new ideas may reveal weak support for existing legal or social norms and make it less costly for individuals to support new ideas. See, for example, C.R. Sunstein, "Social Norms and Social Roles" (1996) 96 Colum. L. Rev. 903 at 929.

¹³¹ See "Leaving Things Undecided," *supra* note 16 at 24.

¹³² *Ibid.* at 25.

Sunstein supports deep but narrow decisions in some instances,¹³³ but his general aim is to limit the “width *and* depth of judicial judgments.”¹³⁴ There we disagree.

Thus, our differences with respect to the role of judges lead us to different visions of minimalism, and hence to different conclusions about the desirable style of judicial opinion writing in constitutional cases. We may share the view that the Supreme Court’s opinion in *Romer v. Evans*¹³⁵ was “an extraordinary and salutary moment in American law,”¹³⁶ but the open-textured minimalist is as interested in the potential for future development left open by the richly evocative and suggestive language of Justice Kennedy’s opinion as he is in the fact that *Romer* elided controversy by leaving “many issues open.”¹³⁷

In short, Sunstein’s model of minimalism urges upon the courts a constructive silence, whereas the open-textured minimalist is less interested in the use of silence than in using judicial language to open up avenues for meaningful discussion and deliberation about our constitutional values. Those avenues may sometimes be opened by silence, as when a refusal to finally resolve by constitutional means the issue of assisted suicide sparks debate on the issue in the media and in legislatures.¹³⁸ Often, however, the minimalist judge will provoke dialogue through the pregnant phrase, the artful argument that initiates and provokes a

¹³³ *Ibid.* at 74-77.

¹³⁴ *Ibid.* at 99 [emphasis added].

¹³⁵ 116 S.Ct. 1620 (1996) [hereinafter *Romer*], holding that a state constitutional amendment forbidding the enactment or enforcement of anti-discrimination laws involving gays, lesbians, or bisexuals violated the Equal Protection Clause of the Fourteenth Amendment.

¹³⁶ “Leaving Things Undecided,” *supra* note 16 at 9.

¹³⁷ *Ibid.*

¹³⁸ See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (holding that laws prohibiting physician-assisted suicide did not violate constitutional guarantees of due process or equal protection, and permitting debate on the issue “to continue, as it should in a democratic society”: *ibid.* at 2275); and *Rodriquez v. British Columbia*, [1993] 3 S.C.R. 519 (holding that the prohibition of physician-assisted suicide did not offend principles of fundamental justice, and noting both the lack of clear social consensus on the issue and the value of deferring to the legislature for the development of gradually evolved procedural controls).

valuable and wide-ranging conversation about rights and their limits.¹³⁹

D. *Hogg & Bushell's Dialogue*

A recent article by Peter Hogg and Allison Bushell also deserves a brief discussion, despite its somewhat different focus.¹⁴⁰ Their project is to defend the courts against the counter-majoritarian difficulty that arises when judges invoke the *Charter* to strike down the laws of duly elected legislatures. They do so by proposing that we treat judicial review as “part of a ‘dialogue’ between the judges and the legislatures.”¹⁴¹ Though the Supreme Court might seem to have the final say on the interpretation of the *Charter*, “[w]here a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished.”¹⁴² As their survey suggests, the legislatures have regularly responded to court decisions by amending a law or crafting alternative legislation to get around the courts’ rulings. The Supreme Court often aids in this process, by suggesting legislative approaches that would pass constitutional muster.¹⁴³

¹³⁹ See M.C. Dorf, “The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation” (1998) 112 Harv. L. Rev. 4 at 79: “Especially in an age when the judiciary is painfully aware of its own limitations, the articulation of fundamental (albeit corrigible) values may be its central task.”

¹⁴⁰ See P.W. Hogg & A.A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75.

¹⁴¹ *Ibid.* at 79. For more detailed discussions of the dialogic nature of judicial review, and the courts’ relationship with legislatures and the public, see, for example, B. Slattery, “A Theory of the *Charter*” (1987) 25 Osgoode Hall L.J. 701; J. Jai, “Policy, Politics and Law: Changing Relationships in Light of the Charter” (1997) 9 N.J.C.L. 1; N. Devins, *Shaping Constitutional Values: Elected Government, The Supreme Court, and the Abortion Debate* (Baltimore: Johns Hopkins Press, 1996); W.N. Eskridge, Jr. and P.P. Frickey, “The Supreme Court, 1993 Term—Foreword: Law as Equilibrium” (1994) 108 Harv. L. Rev. 26; and Friedman, *supra* note 130.

¹⁴² Hogg & Bushell, *supra* note 140 at 80.

¹⁴³ For recent Canadian Supreme Court of Canada decisions offering detailed or specific suggestions to bring legislation in line with the Constitution see, for example, *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 [hereinafter *Libman*]; and

This view of the interplay between courts and legislatures has proven attractive to the Supreme Court in its rulings on politically sensitive or controversial issues.¹⁴⁴

The dialogue metaphor highlights this article's argument that legal theory and legal style are intimately connected. Judges who are confident their understanding of the *Charter* is absolute, correct and final, and that judicial review exists to correct legislative mistakes and not to engage in dialogue, may write in a style that reflects this view: peremptory, blunt, self-assured, possibly dogmatic or pompous. Judges with a more tentative view of the role of judicial review and a more respectful view of the legislature may write in another style: conciliatory, careful, hesitant, ringed round with caveats and non-binding suggestions. Judges who view themselves as part of an intertemporal dialogue with future generations of citizens and courts, as well as a contemporary dialogue with the legislature, may write in their own distinct style as they attempt to persuade and inspire a broad range of unknowable readers.

This leads to a question left open by Hogg and Bushell's vision of dialogue: what should the scope and nature of that dialogue be? If the courts are truly to escape the spectre of counter-majoritarianism, must they not also participate in a broader societal dialogue? Hogg and Bushell argue that further evidence of the dialogue between courts and legislatures can be found in the increasing "*Charter-speak*" of legislatures—that is, their increasing tendency to respond to judicial decisions with legislation that specifically addresses itself to the dictates of the *Charter*, with references to pressing and substantial purposes or reasonable limits.¹⁴⁵ Their point could be expanded to encourage a more meaningful form of *Charter-speak*, in which citizens and their legislators, sparked by the open-textured and provocative language of the courts, debate the meaning of the *Charter*, not just its technical requirements.

Provincial Judges' Reference, *supra* note 104.

¹⁴⁴ The Hogg and Bushell thesis is relied upon in the majority judgements in *Vriend v. Alberta* [1998] 1 S.C.R. 493 at 564-66, 578; *M. v. H.* [1999] 2 S.C.R. 3. at 59-60; and *Mills*, *supra* note 74 at 711.

¹⁴⁵ See Hogg & Bushell, *supra* note 140 at 101-04; see also Jai, *supra* note 141 at 11.

More generally, if the courts and legislatures are in fact engaged in a kind of dialogue on the *Charter*, what are the acceptable terms of this dialogue? This question applies to both courts and legislatures. For example, in the course of rendering its judgments, the Court often suggests an alternative legislation provision that might pass muster. In *Libman*, for example, the Supreme Court struck down a nearly complete ban on independent spending in referendum campaigns, while suggesting a \$1,000 limit might be acceptable. To what degree can the Court's suggested alternative be taken as mere *dicta*?¹⁴⁶ If the court holds that a law that infringes the *Charter* has been given inadequate justification, is it appropriate for a legislature simply to pass a more or less identical law that makes reference to legislative findings, combined with preambular phrases such as "pressing and substantial"? Or must it actively and independently reconsider whether the earlier law was justifiable in light of the *Charter* values propounded by the court?

Clearly, a number of factors might determine the answers to these questions. We would have to consider, among other things, the institutional competence of the courts to suggest alternative legislative schemes, and whether their sometimes detailed suggestions can legitimately be said to be required by the bare language of the *Charter*.¹⁴⁷ We would also have to consider whether the *Charter* requires legislatures to engage in a more searching deliberation about the values inherent in the *Charter* before passing laws that may infringe it, or whether they can simply insert *Charter*-speak mechanically into legislative language as a substitute for deeper reflection on the proper limits of the law. Finally, as my discussion of the democratic and inter-

¹⁴⁶ See *Libman*, *supra* note 143 at 616-620. See also Eskridge & Frickey, *supra* note 141 at 39-42 (discussing the courts' use of *dicta* as a signalling device to other institutional actors, including lower courts and legislatures).

¹⁴⁷ Thus, in *Mills*, *supra* note 74, the Supreme Court held that Bill C-46 (dealing with the disclosure of private, psychiatric records of sexual assault complainants) was constitutional despite its failure to track exactly the common law disclosure procedure set out by the Court in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The Court noted that "[w]hile it is the role of the courts to specify [constitutional] standards," Parliament could choose from "a range of permissible regimes that can meet those standards." *Mills*, *ibid.* at 712. Thus, "the mere fact that Bill C-46 does not mirror *O'Connor* [did] not render it unconstitutional." *Ibid.* at 745.

generational functions of the judicial opinion suggests, we would have to consider whether a broader dialogue should not be encouraged by the language of the courts.

These speculations suggest a good deal remains to be said about how the dialogue should be conducted, and with whom. Open-textured minimalism offers one model for this dialogue.

V. STYLE IN CANADIAN CONSTITUTIONAL OPINION WRITING: A CASE STUDY

In this section, I will examine a number of cases decided by the Supreme Court of Canada over the past decade that deal with the guarantee of freedom of expression under section 2(b) of the *Charter*. By examining the opinions on a particular subject rather than a mix of constitutional cases, we can see how the Court's approach to opinion writing has changed over time. Moreover, section 2(b)'s status as a broadly worded fundamental right makes it a provision that lends itself to eloquence and expansiveness in judicial writing. If open-textured minimalism is to be found anywhere in the Court's constitutional jurisprudence, it ought to be found here.

There are two halves to the tale of the Court's style in its section 2(b) jurisprudence. First, consider the question of minimalism. Within a few years of the *Charter*'s inception, the Court issued multi-part and structured, if open-ended, tests to be applied in considering a law's constitutionality. The most prominent example is surely the "*Oakes* test," which sets out the factors to be considered in evaluating whether an infringement of the *Charter* is justified under section 1.¹⁴⁸ Though the language of section 1 may have suggested the need for some kind of justification test, the *Oakes* approach closely tracks the formalist approach taken by the United States Supreme Court. It contains parts and sub-parts, each of which allows for a good deal of judicial discretion, but whose overall effect is to constrain future courts' approach to the issue of justification under section 1, rather than to encourage creative or innovative interpretations of

¹⁴⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

it.¹⁴⁹ Such an approach, to be sure, does provide a measure of guidance to litigants and courts. However, the balancing of the guidance role with the other functions of judicial reasons may ultimately require a broader debate over the meaning of the justification clause.¹⁵⁰ *Oakes* largely forecloses that debate.

Formalism and the creation of multi-factor tests is also apparent in the Court's early section 2(b) cases. For example, in *Irwin Toy v. Quebec (Attorney General)*,¹⁵¹ the Court set out a number of tests to determine whether government action violated section 2(b).¹⁵² For activity to be considered expression, it must "convey or attempt to convey a meaning." If the government aims to restrict a form of expression, such as leafleting, its purpose will be considered to be the infringement of section 2(b), but efforts to control only the "physical consequences of certain human activity," such as littering, will not be treated as having the purpose of infringing section 2(b). Nonetheless, government action may still be found to infringe section 2(b) if its effect is to restrict expression—provided that the plaintiff show the expression in question sought to "convey a meaning reflective of the principles underlying freedom of expression," as the Court had earlier set out in *Ford v. Quebec (Attorney General)*.¹⁵³

For some time, the Court continued to employ the section 1 and section 2(b) architecture set out in *Oakes* and *Irwin Toy* respectively, at least through such cases as *R. v. Keegstra*, *R. v. Butler* and *R. v. Zundel*.¹⁵⁴ However, the Court more recently has

¹⁴⁹ See E.P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) at 3-1 (discussing the Court's turn to formal tests in interpreting s. 1, and its eventual partial turn away from that approach).

¹⁵⁰ See also L.E. Trakman, W. C. Hamilton, & S. Gatién, "R. v. *Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 *Osgoode Hall L.J.* 83 at 86. (The Supreme Court's approach to section 1 following *Oakes* eschewed normative analysis and focused on applying a test that was "methodological in design and technical in application").

¹⁵¹ [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

¹⁵² *Ibid.* at 969-76.

¹⁵³ [1988] 2 S.C.R. 712 at 764, 765 [hereinafter *Ford*].

¹⁵⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; *R. v. Butler* [1992] 1 S.C.R. 452 [hereinafter *Butler*]; and *R. v. Zundel* [1992] 2 S.C.R. 731 [hereinafter *Zundel*].

shown some desire to soften the formalistic approach to *Charter* interpretation that was evident in the earlier cases. Thus, in *Dagenais v. Canadian Broadcasting Corp.*¹⁵⁵ the Court was able to use the common law context of the case to avoid the straitjacket of its earlier tests. It concluded that common law rules conferring discretion with respect to publication bans must operate in a manner consistent with *Charter* values. It engaged in a broad-based discussion of these values, without following precisely the road map laid down in the earlier cases. Moreover, despite the fact that the Court did not directly apply the *Oakes* test in *Dagenais*, it nevertheless took the opportunity to tinker with it, modifying the third part of the proportionality test to allow more judicial discretion to balance the deleterious and salutary effects of a government measure that restricts expression.¹⁵⁶

Similarly, in *RJR-MacDonald v. Canada (Attorney General)*,¹⁵⁷ though Justice McLachlin's plurality opinion supported and applied the section 1 jurisprudence founded on the *Oakes* test, she agreed that "an overtechnical approach to section 1 is to be eschewed" ¹⁵⁸ Similarly, in *Ross v. New Brunswick School District No. 15*¹⁵⁹ and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,¹⁶⁰ the Court, unanimously in both cases, repeated that "an approach involving a 'formalistic test' uniformly applicably in all circumstances must be eschewed."¹⁶¹

Thus, the Court has begun to exhibit a tendency to pull back from laying down a rigid set of formal rules to constrain the Court's approach to *Charter* adjudication. It has begun to favour instead a more contextual, less rule-bound approach to section 1; similarly, its approach to section 2(b) has also shown a decreased desire to fit its later decisions into an analysis as structured and

¹⁵⁵ [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

¹⁵⁶ *Ibid.* at 889.

¹⁵⁷ [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

¹⁵⁸ *Ibid.* at 328 (per McLachlin J.); see also *ibid.* at 269-72 (per La Forest J., L'Heureux-Dubé and Gonthier JJ. dissenting).

¹⁵⁹ [1996] 1 S.C.R. 825 [hereinafter *Ross*].

¹⁶⁰ [1996] 3 S.C.R. 480 [hereinafter *CBC*].

¹⁶¹ *Ross*, *supra* note 159 at 872.

formalistic as that suggested by the *Irwin Toy* test. In this limited sense, it might be said that the Court has shifted away from the quasi-statutory or “multi-part test” approach to constitutional opinion writing in these areas. Instead, it has adopted a more minimalist approach. At the same time, the Court is stuck with a thicket of section 1 jurisprudence, and cannot simply abandon it without evincing disrespect for its own precedents. Accordingly, the Court’s recent statements about section 1 in the freedom of expression cases suggest a simultaneous awkward commitment to and shrinking away from the *Oakes* test and its progeny.¹⁶²

This situation aptly demonstrates the dilemma that is raised by a non-minimalist court, interpreting a relatively new bill of rights, that lays down broadly applicable rules too quickly. If the Court is serious about preferring a more contextual approach to section 1, it faces four choices: it could explicitly abandon the *Oakes* test and its line of subsequent cases, which would show little respect for precedent and make the Court look unprincipled. It could simply ignore *Oakes* and its progeny, which would show equally little respect for precedent, and again make the Court vulnerable to charges that it is unprincipled. It could purport to follow the test, while quietly eviscerating it, which raises similar problems and would call for a good deal of obviously contorted reasoning. Or it could remain loyal to the *Oakes* test, knowing it has shortcomings, which would leave the Court trapped in the black-letter box into which it has placed itself.¹⁶³

Of course, the truth is more subtle than this analysis suggests. The Court is not ready to abandon the *Oakes* test, which in any event is not so far from the language of section 1 itself, and which allows the Court a fair amount of discretion. Yet the Court’s recent judgments nevertheless suggest at least some of its members regret that such a broad test was laid down so early. The Court may continue to rework *Oakes*, while still pledging allegiance to it. That situation may eventually become untenable. In short, the cases in this area offer an example of the potential

¹⁶² See Lasser, *supra* note 5, for an interesting analysis of this phenomenon in American and French jurisprudence.

¹⁶³ For other discussions of the problems of precedent see, for example, M.C. Dorf, “Dicta and Article III” (1994) 142 U. Pa. L. Rev. 1997; F.H. Easterbrook, “Stability and Reliability in Judicial Decisions” (1988) 73 Cornell L. Rev. 422.

perils of non-minimalism, and the corresponding virtue of avoiding the swift promulgation of rules and tests.¹⁶⁴ Sometimes laying down a vague standard rather than a clear rule can be “the better part of valor; the premature adoption of a rule may prevent the courts from obtaining the information they need to make a *sound* rule.”¹⁶⁵

The Court has thus in some respects come closer to a sort of minimalism in its approach to constitutional decision-making, but it cannot yet be said that its jurisprudence truly fits the model of open-textured minimalism I have proposed above. As I have suggested, other qualities characterize open-textured minimalism besides the simple reluctance to promulgate doctrine too quickly. Qualities such as brevity, persuasiveness, an awareness of the audience beyond legal professionals, a consciousness of the inter-generational aspect of the Court’s work, a desire to spark constitutional dialogue, and the use of richly epigrammatic language are also part of the style of open-textured minimalism. In the area of freedom of expression, these qualities epitomize opinions such as Holmes’s dissent in *Abrams v. United States*¹⁶⁶ or Brandeis’s concurrence in *Whitney v. California*,¹⁶⁷ but with few exceptions, the Canadian Supreme Court’s writing on section 2(b) cannot match those decisions for concision, persuasive style, or the ability to provoke deep thought or dialogue.

Certainly some strong language may be found within the Court’s opinions. Thus, *Irwin Toy* reminds us that freedom of

¹⁶⁴ See Fallon, *supra* note 69 at 113-14. Fried, *supra* note 37 at 1152, remarks: “The Court should be like a careful, sober, and reliable trustee of someone else’s assets. Imagine how such a person goes about some project. She is unlikely to conceive every detail and ramification at the first moment of action. Our important undertakings have a life-cycle. And so, too, there are the rhythms and sequences by which doctrine ... is brought into being, elaborated, modified, and perhaps eventually abandoned.”

¹⁶⁵ *The Federal Courts*, *supra* note 98 at 245 [emphasis added]. Posner includes in the former category, however, “a multifactored test with equal weighting of each factor”: *ibid*. It is difficult to slot the *Oakes* test into either category. As a multi-factor test in which each sub-test is itself a vague rule, but all prongs of the test must be met rather than simply being weighed in the balance, it is neither fish nor fowl. In any event, the experience with *Oakes* suggests that even this degree of definitiveness in a rule may become problematic for future courts.

¹⁶⁶ 40 S. Ct. 17 (1919).

¹⁶⁷ 47 S. Ct. 641 (1927) [hereinafter *Whitney*].

expression is fundamental “because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.”¹⁶⁸ Justice La Forest’s language in *Ross* emphasizing the “importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom”¹⁶⁹ is an equally strongly worded reminder of the potential merit of arguments favouring the restriction of some expression. Justice Cory’s discussion of freedom of expression in *Edmonton Journal* still resonates with its readers, and continues to influence the course taken by the Court:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. ... It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.¹⁷⁰

Other examples of strong writing may be found within the Court’s freedom of expression jurisprudence. Nevertheless, I think it fair to say they are more the exception than the rule. The length of the Court’s opinions in the early to mid-1990s is evident in this area. For example, the main opinions in each of *Keegstra*, *Zundel*, and *RJR-MacDonald* take up more than 100 bilingual pages of the Supreme Court Reports.¹⁷¹

Much of the length of these opinions is taken up by the kind of material criticized by Wigmore—lengthy recitations of the facts, including many inessential matters; extensive string citations

¹⁶⁸ *Supra* note 151 at 968.

¹⁶⁹ *Supra* note 159 at 874.

¹⁷⁰ *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 1326 at 1336 [hereinafter *Edmonton Journal*].

¹⁷¹ But see L’Heureux-Dubé, *supra* note 35 at 587: “[I]t will take time before we come to grips with our new constitutional document, and until we do, the preferable approach is to allow all views to be expressed, thereby hampering as little as possible our freedom to later expand or correct the courses we have chosen.” This view accords with my own argument that the *Charter*’s youthful status should influence the way in which the Court writes opinions involving the *Charter*. However, my arguments suggest that the style and methodology of judicial opinions can hamper future courts regardless of the plurality of those opinions.

of earlier cases; and extended discussions of and quotations from cases that have little bearing on the issues at stake in the instant case;¹⁷² and discussions of the central issues that exhibit a tendency to wander, rather than bearing down on the key arguments to be made.

Thus, even where there is strong writing to be found on freedom of expression within the Court's jurisprudence, it may be obscured, and its impact lessened, by the length and nature of the writing that surrounds it. Moreover, most of the writing in these opinions is not stylistically strong, whether according to general impressions of style or according to the more specific criteria identified as hallmarks of an open-textured minimalist style. More often, the Court's style is aptly captured by some of the critical language in Posner's description of the "pure" style of opinion writing: it tends to employ more legalistic language than is strictly necessary, it is often solemnly formal, it is long for what it has to say, its tone is artifactual and impersonal.¹⁷³ Its opinions seem to have been written solely for the community of regular readers of judicial opinions, with perhaps less effort made to be broadly persuasive than would be the case if the Court wrote in the belief that it should reach a larger audience.

Even the best writing of the Court on freedom of expression, such as that noted above, shows little of the epigrammatic, aphoristic, richly evocative character that is present in the work of a prose artist such as Holmes, or the best work of Cardozo. Even resonant words such as those of Justice Cory in *Edmonton Journal*, in my view the most eloquent language of the Supreme Court on section 2(b), are more hortatory than provocative, more of a Sunday-sermon declamation about our constitutional values than an effort to persuade us that his statement is true or important, and certainly not an invitation to

¹⁷² See L'Heureux-Dubé, *ibid.* at 585: "When a particular case presents the Court with an opportunity to give definite direction on a particular point of law, the natural inclination is to explore each facet of the particular legal problem, recount history and account for each theory or precedent." On a more critical note, see C.A. Beardsley, "An Unconventional After-Dinner Speech" (1941) 25 J. Am. Jud. Soc'y 40 at 41: "But the judges don't stop when they run out of their own words. They cause their typists to copy paragraph after paragraph, and sometimes page after page, of other judges' words ..."

¹⁷³ See "Judges' Writing Styles," *supra* note 9 at 1426-29.

disagree with or supplement the values he describes. His words undoubtedly command one's respect, but they are less successful at commanding one's attention or assent, especially when compared to a more open-textured, arresting but obscure phrase. "Men feared witches and burnt women," Brandeis wrote.¹⁷⁴ It is not as easily intelligible as Justice Cory's clear statement of the importance of expression in a free society—yet, at the same time, it is instantly intelligible, unmistakable in its force and implications. It has a swift and powerful impact on its reader, but it also has the capacity to provoke years of discussion about its full meaning. The *Whitney* concurrence still provokes productive and varied discussion about the meaning of free speech 70 years later;¹⁷⁵ years after more direct, but less captivating exhortations, like Justice Cory's statement in *Edmonton Journal*, will have likely lost most of their power to move the reader.

In short, despite the potential for eloquent, stirring or provocative discussion that is inherent in the subject of freedom of expression, the Supreme Court rarely attains the influence or eloquence of opinion such as the *Whitney* concurrence. Though it has shown a greater tendency of late to avoid promulgating as many rules and tests as it once did, the structure and style of its opinions suggest that it displays few of the traits that make up the style of open-textured minimalism. Such criticisms cannot be shrugged off by dismissing opinions such as the *Whitney* concurrence as mere rhetoric. Rhetorically effective opinions command attention and provoke thought and discussion. They move those they convince to do their utmost to defend the values extolled in the opinion, and stir those they cannot convince to craft the best possible arguments in response. They rise above more mundane language to affect readers, both in the legal community and beyond, long after other opinions have been forgotten, and they may serve as a wellspring for years of healthy democratic dialogue about the nature and extent of our

¹⁷⁴ *Whitney*, *supra* note 167 at 376 (Brandeis J. concurring).

¹⁷⁵ Compare V. Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*" (1988) 29 *Wm. & Mary L. Rev.* 653 (discussing the opinion approvingly), with C.A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993) at 104 (subjecting Brandeis's aphorism, quoted above, to searching criticism).

constitutional values. There is something to be said for the proposition that the Court, when writing about the *Charter*, should say less, but say it better.

Despite the critical note I have sounded in this article, I hasten to add that I do not mean to suggest that the Court has never used open-textured minimalism in its writings. The opinion of the Court in the *Secession Reference*¹⁷⁶ is an excellent example of the mixture of judicial prudentialism and stylistic care that characterizes the open-textured minimalist approach outlined in this article.

Several features of the Court's opinion are worth noting. First is its size. It is not short, to be sure; but, given the weight of the issues raised and the space that could have been expended, it is surprisingly brief. Thus, after a substantial discussion of the core constitutional principles that undergird the opinion, the Court dispenses with the question of the constitutionality of a unilateral declaration of independence in a mere 25 paragraphs.¹⁷⁷ Its discussion of the effect of the international law of secession takes only a little more discussion: 37 paragraphs.¹⁷⁸ This compression is achieved without any real loss of clarity, and is possible because of the Court's evident determination to bear down directly on the issues it chose to address.

Second, consider the use of language. In keeping with its awareness that the *Secession Reference* concerned issues of broad political significance, the Court avoided a narrowly legalistic tone and adopted plain language that often lent a highly practical air to the constitutional discussion. The opinion was clearly the product of an effort to speak in a lasting and memorable way to a broader audience. To that end, the opinion is heavily laced with precisely the sort of tropes identified above as classic tools of effective judicial rhetoric. Thus, the aphoristic ring of this sentence, which relies heavily on alliteration: "In our constitutional tradition, legality and legitimacy are linked."¹⁷⁹ Or the remark, capped by a blunt colloquialism, that "it would be naïve to expect that the

¹⁷⁶ *Secession Reference*, *supra* note 96.

¹⁷⁷ *Ibid.* at 263-75.

¹⁷⁸ *Ibid.* at 276-91.

¹⁷⁹ *Ibid.* at 240.

substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details.”¹⁸⁰ Metaphor, too, is highly evident in the opinion, as in the Court’s effort to emphasize the interwoven nature of Confederation: “Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission: “... The threads of a thousand acts of accommodation are the fabric of a nation. ...”¹⁸¹

A final element of this opinion that identifies it with the open-textured minimalist approach is what it does *not* decide. Despite the obviously broad scope of its discussion of the “vital unstated”¹⁸² constitutional principles of federalism, democracy, constitutionalism and the rule of law, and respect for minority rights, the Court’s actual application of these principles to the questions presented in the government’s reference was narrowly drawn and left much to be discussed by other parties, including voters, legislatures, government negotiators, and future courts. Thus, the Court declined to address what would happen if properly conducted separation negotiations reach an impasse,¹⁸³ and removed itself from any “supervisory role over the political aspects of constitutional negotiations,”¹⁸⁴ noting that the constitutional principles enunciated by the Court will sometimes fall to the political process, not the judicial process, for protection.¹⁸⁵

In short, despite its entry into the vexing political and legal issues surrounding secession, the Supreme Court’s relatively minimalist opinion lets these issues remain part of an ongoing democratic and inter-generational discussion among Canadians. At the same time, it articulated general constitutional principles

¹⁸⁰ *Ibid.* at 267.

¹⁸¹ *Ibid.* at 269-70.

¹⁸² *Ibid.* at 247.

¹⁸³ *Ibid.* at 270.

¹⁸⁴ *Ibid.* at 271.

¹⁸⁵ *Ibid.* at 271-72.

that will serve as organizing principles for ongoing discussions about secession and, more generally, as the starting point for broader discussion about Canadian constitutional values.

VI. CAVEATS AND FUTURE QUESTIONS

This article has advocated a particular approach to judicial opinion writing in Canadian constitutional law—open-textured minimalism—that would encourage judges to craft deep, but narrow, opinions that provoke democratic and inter-generational discussions about our constitutional values, while resisting the urge to lay down too much doctrine at once. This approach is respectful of the presence of widespread disagreement about the precise implications of our constitutional values—a state of affairs that is altogether appropriate in a heterogeneous, democratic culture with a youthful constitution. Open-textured minimalist courts respond to this condition by seeking to resolve only as much as necessary at a given time, while encouraging other individuals and institutions to continue their public dialogue about our constitutional values—and contributing to that debate themselves. This approach is particularly important in the early years of our *Charter* and of the *Constitution Act, 1982* as a whole, when we may be tempted to settle as many issues as possible for future generations of constitutional interpreters, despite our own relative lack of experience and wisdom on these issues.

Open-textured minimalism doubtless sacrifices some of the judicial opinion's ability to offer one of the essential functions of the judicial opinion: guidance. However, given the relative youth of the *Constitution Act, 1982*, the special legitimacy concerns that are raised by sweeping constitutional opinions, and the high costs of error in this area, the loss of guidance may be outweighed by other benefits: namely, the open-textured minimalist opinion's ability to enrich democratic deliberation about our constitutional values, while minimizing the effect of erroneous constitutional decisions by the courts.

Given the sweeping nature of this proposed approach to opinion-writing style, it may be appropriate to conclude with some cautionary remarks. First, like any style, open-textured

minimalism should be treated as a general approach and not a rigid rule. It would be ironic indeed if an article counselling against too eager a promulgation of binding rules should itself seek to become a rule of style binding on appellate judges in all constitutional cases. A good artist learns to work within the rules of his or her chosen medium. A great artist comes to understand when to break these rules. So it is with style in the writing of judicial opinions.¹⁸⁶ While open-textured minimalism is an approach well-suited to the role and function of constitutional opinions, even judges who whole-heartedly adopt such a style must sometimes abandon it. The factual or legal questions involved in some constitutional issue may become sufficiently clear over time that it becomes appropriate to settle the issue in a definitive way.¹⁸⁷ Alternatively, an issue may be a source of such ongoing controversy that it becomes desirable to come down on one side of the issue or the other through a clear legal rule, which may always be reversed if public consensus shifts decisively against it.¹⁸⁸ Similarly, the desire to be concise and persuasive should not be pursued at any cost; if an opinion is brilliantly stated but dishonest or elliptical, its style may come at too high a cost.¹⁸⁹ How a judge ought to balance these competing needs in a given case is, not surprisingly, a question of judgment.

Just the same, if style is rarely the dominant concern of a judge writing a constitutional law opinion, it ought always to be one of his or her foremost concerns. Style does matter. The *Charter* was written to last a long time, and its language was meant to resonate for generations. We should expect as much from the language of those charged with interpreting it.

¹⁸⁶ See Posner, *supra* note 2 at 297.

¹⁸⁷ See, for example, J.D. Wexler, "Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism" (1998) 66 *Geo. Wash. L. Rev.* 298 at 305.

¹⁸⁸ See also *One Case*, *supra* note 16 at c. 4.

¹⁸⁹ See, for example, *The Federal Courts*, *supra* note 98 at 351.