S.32

McKinney v BoG of University of Guelph: Factors: (1) created by statute? ≠ auto. subject to Charter(2) independent power to negotiate Ks/agreements with employees? (3) own governing bodies? (4) Free to spend $ as they wish? (5) own institutional norms and routes? or are its actions simply instruments/emanations of gov. policy? (6) extensively regulation + assistance ≠ auto. subject to charter, public purpose test doesn't work (trains/airlines etc all regulated/assisted by aren't subject); (7) funded by gov?(8) what sort of power do they use? if inherently G, subject to Charter, tho Charter isn't limited to bodies performing inherently G fxns. (9) What's the traditional position of the organization in society?
→ Wilson J dissenting noted that Canadian society doesn't perceive government as enemy (either in classical liberal or more American view) but as an ally/friend that aims to promote social equality, advance people's positions, etc, and therefore coercion is not the decisive test of what is part of government, and s.33 shouldn't define government as only the coercive arm of the state and should include universities/hospitals.
- Charter not only restrains coercive governments but creating positive Os that the government apparatus should be used to advance.
- consider how different views of the state/gov. influence the application of s.32 and the Charter
-classical liberal view of G wouldn't apply Charter to university- it's not a coercive arm of G which this view of G sees as needing to be limited/controlled by Charter rights (LaForest's minimal state of majority)

Douglas/Kwantlen Faculty Association v Douglas College: Colleges: gov's have far more direct control over regular operations (directly appointing BoG); court ruled college was actually *part of the apparatus of government*, while universities, though funded and created by gov, are essentially autonomous in operation
→ Universities considered as more independent academic bodies, whereas colleges are intended to fulfill aspects of governmental/provincial policies- partially a function of the historic function of universities.
→ Consider gov. degree of control over regular operations of organization- is it autonomous? Or subject to direct, routine control of its regular operations such that it essentially acts an apparatus of gov.

Stoffman v Vancouver General Hospital: Charter doesn't apply to hospital, despite majority of the board governmental appointees, and run according to gov. set standards
→ Hospital operates autonomously, according to its own assessment of its own needs, and given that routine control of the hospital was in the hands of the board of trustees rather than governmental bodies.
- even if formal means of control are highly linked to government, if the routine, factual operation of the entity is independent of government then it may still be outside gov control
- provision of public service ≠ gov function

Godbout v Longueuil: (1) If entity is 'governmental in nature' (degree of gov. control over them) or performs gov. functions (Yes- *Douglas*, *Lavigne*, No- *McKinney, Stoffman*) it's subject to the Charter as per section 32
→ (2) If entity performs "truly governmental functions," it likely falls w/i authority of enacting legislative body; if entity acts in a truly governmental capacity (not just public) likely subject to Charter
→ Created by statute, highly regulated by government, perform public service, primarily funded by government ≠ *prima facie* governmental organization: Must act in a governmental capacity
→ Municipalities= G entities: democratically elected councils and accountable like legislatures; have power to tax, to make, administer, and enforce laws w/i territory; power/existence derived from prov. G who would have to do the same things; b/c Charter applies to prov. leg + G, must apply to entities it gives powers to.

Greater Vancouver Transportation Authority v Canadian Federation of Student: Does Charter apply to GVTA/BC Transit and thus Charter violated by it's refusal to place political adverts on bus; 'Translink' basically an agent of gov under direct and substantial control of provincial government/municipal government, including its routine activities; Gov. can't avoid Charter just by transferring powers onto different

entity.

Defining Government Action

Lavigne v Ontario Public Service Employees Union: Charter applies to Regent's Council as basically an emanation of government power (subject to routine/regular control by Minister of Education); therefore the collective agreement w/ clause on dues was subject to Charter
→ If entity defined as subject to the Charter, all of its operations are also subject to the Charter.
→ Court's cautious of government's ability to restructure how they deliver services or operate government so that formally speaking, they seem to fall outside Charter control.

Governmental Acts of Non-Governmental Bodies

***Eldridge v BC*:** G can't give another entity/person power to infringe Charter tho in cases give authority to entity not subject to Charter (eg. private corporations) as they become autonomous once created.
→ Quasi-G bodies often given power by G and implement G policy, if claimed they violated Charter must be assessed whether they are part of G according to s.32 when they perform that action
→ In some circumstances Charter will apply to private entities when they perform inherently gov. fxns
→ Even if an entity is not gov. if a particular activity it performs is gov. in nature, may be subject to Charter
→ In this case the *Hospital Insurance Act* outlines content of service and who can receive it through the hospitals- thus in fulfilling this the hospitals (otherwise private entities) are carrying out a specific G objective.
→ Clear, precise link b/w G policy and the hospital's actions that violate the Charter- the violation is closely linked to G policy thru legislation; and the types/manner of services are "an expression of G policy"
→ Tho autonomous in day-to-day operations, given the link between the Act and services the hospitals provide, in providing these services they act as instruments of G policy= subject to the Charter wrt to these services
→ Delegating G authority and giving other entities G-like powers will not permit G. to avoid Charter's operation; these entities will also be subject to Charter insofar as they perform **inherently G functions.**

Slaight Communications Inc v Davidson: If non-G. entity exercises coercive statutory powers, likely subject to Charter- Adjudicator's powers created and used according to the *Labour Code*= "statutory creature insofar as he acts this way= when using delegated powers, adjudicator infringe Charter rights.
→ If legislation is ambiguous in the amount of discretion it allots to a non-gov. actor, interpret it as not permitting the infringement of Charter rights, otherwise it will need to be struck down.
→ Adjudicative bodies are bound by Charter (if exercising statutory powers)

Governmental Inaction: If Charter requires positive obligation, may apply to force gov. action.

Vriend v Alberta: Clear from legislative history that Alberta had intentionally failed to include sexual orientation as one of the prohibited grounds for discrimination in the *Individual's RIghts Protection Act*.
→ s.32 doesn't imply that a positive encroachment of rights on the part of legislature is needed- just that Charter applies to whatever falls w/i legislative/governmental **authority.**
→ Underinclusive legislation that infringes Charter rights by omission will bring scrutiny of the Charter- it's not the form of legislation but its substance that determines whether a law can be challenged.

→ If government chooses to implement policy/program it must do so non-discriminatorily
→ However less likely that s.15 creates positive obligations on gov. to correct inequalities...

→ *Normal Charter case: Legislation passed by government, but it violates Charter- then go to s.1 analysis as to whether it's reasonably justified in a free and democratic society;*

RWDSU v Dolphin Delivery: court issues injunction stopping RWDSU from picketing, based on tort of inducing breach of K; RWDSU claims breach of freedom of expression. Does the Charter apply?

→ Charter applies to CL given s.52 ("any law inconsistent w/ Constitution is of no force and effect")
→ Charter does not apply to private litigation- s.32 specifies who Charter applies to- legislative, executive, and administrative branches- no matter whether their action is result of private or public litigation
→ Actions that use statutory authority that infringe Charter right/freedom will be unconst; Also unconst. if it relies on CL rule that infringes Charter right/freedom- but applies to CL only when it's a basis for gov. action that infringes right/freedom.
→ in this CL (subject to Charter) is used as basis for tort that injunction then created to stop
→ (1)Court orders are not governmental action for purposes of applying Charter- if you deem court orders as governmental action and subject to Charter, almost all private litigation becomes subject to Charter;
→ (2) If among 2 private parties, A sues B using CL, no government act supports action, don't apply Charter,
→ (3) Courts should interpret and develop CL in line w/ Const. values and principles

Hill v Church of Scientology: Crown sues the 'Church'- How do you reconcile CL tort of libel w/ Charter?
→ court orders not subject to Charter (in litigation b/w private parties- *Dolphin*); so *Hill* attacks CL tort of defamation using Charter- S.52 requires *all* laws accord with Charter- including CL.
→ CL needs to develop in line w/ changing societal values- and Charter represents a significant change
→ No const. duties owed b/w private parties, w/o duty no correlative right thus no CoA based on Charter right= they don't exist w/o state action of some s.32 grounded entity;
→ In litigation involving only private parties, Charter "applies" (because technically doesn't apply per s.32) to CL only insofar as CL is inconsistent w/ Charter values
→ Party claiming inconsistency has burden of proof to prove that CL is inconsistent w/ charter, and balancing them, CL needs modification but Court notes that deference must be given to CL.
→ Basically avoids problem of reconciling s.52 requirement that CL is subject to Charter, with s.32 requirement (per *Dolphin Delivery*) that judiciary + private parties *aren't* subject to Charter
→ *Oakes* test is not applied for private-private litigation involving CL violation of Charter; instead balance the values of relevant Charter right with the relevant values underlying impugned element of common law
→ Also onus of proof is reversed from *Oakes* (where gov. must justify infringement of R/F)- the complainant alleging CL inconsistency w/ Charter right must prove why it should be modified.

RWDSU v Pepsi Cola: SC changed CL rules on 2ry picketing; injunction passed against 2ry picketing; CL in Ontario had a per se prohibition on 2ry picketing;
→ Again, in light of *Hill*, rather than attacking the court order stopping the picketing, RWDSU attacks it based on the earlier stage- the CL rule that perse prohibits 2ry picketing
→ court recognizes need to adjust the CL in line with the values/principles of the Charter; decided 2ry picketing lawful provided that it avoided conduct amounting to a tort or crime; thus picketing management homes not permitted (torts=private nuisance + intimidation); freedom of expression of 2ry picketing outweighs CL- but instead of removing common law rule entirely, remove "per se" element of prohibition- Charter requires evidence of tortious/criminal conduct before 2ry picketing can be restricted thru common law prohibition.
→ Last-ditch effort as a means of avoiding CL.

Section 1: Charter interpretation- should be done purposively- due to abstract/broad nature of Charter rights, consider the purpose of the right or freedom in *today's society*- not what framers of the Constitution intended.

→ not intended to be a narrow, technical analysis of what a Charter right/freedom might mean.

R v Oakes: Principles of free & democratic society to guide Charter interpretation: "respect for inherent dignity of individual, commitment to social justice and equality, accomodation of a wide variety of beliefs, respect for cultural and group identity, and faith in sociopolitical institutions that enhance participation in society."
→ However Charter rights/freedoms aren't absolute- they can be infringed if it's "reasonable and demonstrably justified in a free and democratic society," to do so. Party seeking limitation must prove this.
→ Civil Standard of proof, "proof by a preponderance of probability."
→ Test: (1) Pressing and substantial purpose- can't infringe Charter right for trivial ends; (2) Rational connection between legislative means and objectives- "not arbitrary, unfair, or based on irrational considerations"- if a law doesn't rationally advance the purpose, it unnecessarily restricts right or freedom ; (3) Law should only minimal impair the relevant right/freedom- if it restricts right/freedom more than is necessary it may be ineffective or irrational- most common spot for law to fail ; (4) Proportionality of effects b/w the impairing measures and the identified purpose- if the impairing measures have severe deleterious effects, the objective must be of correlatively greater importance to survive- weigh laws actual benefit with actual loss, and whether it's still justified

→ "Pressing and substantial purpose"- law rarely fails at this part, almost any purpose fits this- provided it's a legitimate legislative purpose. (though failed at this stage in *Big M*, generally passes- *Irwin Toy, RJR MacDonald, JTI MacDonald, Keegstra*)

- gov. can't rely on another purpose except that which was stated in law- no 'shifting of purpose.'(*Big M*)

→ **Balancing:** If the rationality/effectiveness of a law is somewhat relative, then court might consider the importance of law's objective vs the value of the restricted activity.

Dagenais v CBC: refined 3rd part of proportionality - when assessing proportionality b/w effects of limiting measure and the stated objective, consider not just objective of impugned law (perhaps it has an important objective but has little actual benefits- its "salutary effects')
→ Proportionality test *also* requires prop~ b/w deleterious and salutary effects of measures that impair Rs/Fs
→ Amended test: the purpose isn't enough- too easy for gov, you should actually have to balance the beneficial effects of the law with its negative effects on people.

Freedom of Expression Section 2(b): Compare social-democratic view on balancing freedom of expression and equality vs more liberal-democratic views.

Basic Principles:

Irwin Toy v Quebec: P challenges *Consumer Protection Act* that limits commercial advertising directed at kids under 13- Exemptions permitted for ads in kids magazine and announcements of shows. P apparently violated the prohibition and seeks declaration claiming that the law is inconsistent w/ s.2
Protected by s.2(b)? if it has any meaning or attempts to convey meaning, *prima facie* expressive=protected. Tho most human activity arguably conveys/attempts to convey meaning, purely physical human activity generally doesn't convey/attempt to convey meaning (eg. parking car)- P has to prove act meant to convey meaning for acts like this.
→ the form may also matter but means of conveying content are very wide (doesn't include violent acts)
Was purpose/effect of gov. action the restriction of freedom of expression? Distinguish b/w laws aimed at restricting freedom of expression and laws that only have the effect of doing so...
→ Effect: if G purpose ***wasn't*** controlling/restricting conveying meaning (=auto-violation), P must prove that the ***effect*** was to restrict P's freedom of expression- look to values/principles behind freedom of expression- inherent good in finding/seeking truth, participation in society/politics, diversity in individual self-fulfillment should be encouraged and tolerated- P must show that their expression promotes/meant to convey meaning that reflects one of these principles.
Is the limit on s.2 right justified by s1?
→ Pressing and substantial objective: Point to some objective and prove on BoP (*vulnerable groups*)
→ Minimal imp.? If legislature has to balance competing claims of different groups and has to mark where 1 set of claims begins and conflicting claim fade aways- if this line reasonably drawn by the legislature, court shouldn't 2nd guess- *particularly* if leg. weighed conflicting scientific evidence and then allocated resources on this basis, as no reason to think that court will do any better.
⇒ When balancing claims of competing groups, legislature have made a decision about how to balance them so courts should defer to legislature's representative functions.
⇒ Tho when it's not a matter of balancing groups, its generally gov set against individual who has had right infringed (eg. s.7-14 violations)- in these cases courts can usually assess if least impairing means used Alternative means to fulfill ends of the pressing/substantial objective that less impairs the impugned freedom?

→ Courts will usually defer to (1) leg. findings of fact; (2) leg. accommodation of competing values and interests; (3) broad freedom of speech right means the value of protected activity varies- so weaker/ significant competing interests may mean restricting less valuable forms of expression (hate speech, comm. speech)

Commercial Speech:

RJR MacDonald v Canada (AG): *Tobacco Products Control Act* restricts advertising of tobacco products.
McLachlin: Notes importance that state still has to prove its limitation of rights is reasonable + justified- regardless of the social/economic context behind the law. All parts of the justification must be on the BoP.
→ Context, deference, flexible/realistic standard of proof are important for s. analysis 1 but don't go so far as to relieve states of burden of demonstrating that infringement was reasonable and justified.
→ *Objective*: objective of infringing measure? Shouldn't be overbroad/exaggerated or analysis compromised
→ *Rational connection*: causal relationship b/w the infringement and benefit may not be measurable scientifically- court can accept causal connection on basis of reason/common sense/ logic, w/o direct proof
→ *Minimal impairment*: law must be tailored to not impair rights more than needed. (not perfection- and there needn't be NO other options- law is acceptable if " falls within a range of reasonable range of alternatives")
Justifying complete ban more difficult than a partial ban- and only permissible at min.impair if gov. proves that only full prohibition will accomplish objective, Gov. didn't prove this was needed- didn't compare effect of less invasive bans nor justify a total ban. Law prohibits types of advertising that are plausibly beneficial to consumer and gov. didn't introduce evidence about misleading effects of most tobacco advertising.

→ *Value of expression in question?* Gov. has onus of proving that restrictions needed- tobacco co's don't have to prove why the ads offer benefits.

⇒ Restrictions on comm. speech easier to justify but no recognized link b/w claimant's motives and degree of protection- profit motives shouldn't figure in whether gov. has justified infringement under s.1

Dissent: When restricted form of expression less related to the values/principles underlying 2b, less difficulty to justify it being restricted- harm of tobacco + profit motive behind its promotion aren't closely linked to these values therefore this expression has little s.1 protection; Vulnerable groups- b/c law is aimed at protecting consumers- vulnerable groups in his view- means greater deference

→ *Proportionality*- for matters of social science/legislative fact finding, defer to leg.- courts aren't meant to make policy- leg's best equipped inst. to compile/assess evidence to balance competing interests and protect the vulnerable

→ *Minimal impairment:* again owing to the purpose of the expression in question, satisfied- no right to sell harmful products- leg. could have just justifiably criminalized them thru crim law power so limits on advertising are fairly unintrusive means to control tobacco.

Canada (AG) v JTI MacDonald Corp: After *RJR MacDonald* defeat, *Tobacco Act* passed, w/ similar aims

→ In this case gov. brought sign~ social science evidence to back claims of why particular types of ads needed to be banned + narrowed scope of law in terms of types of ads banned.

→ Ban on 'false, misleading, deceptive' promotion intended to stop misleading false inferences about tobacco- meets (1) *pressing and substantial objective* (combat tobacco promotion ia false misleading ads); (2) *rational connection* b/w prohibition and Parliament's health/consumer protection purpose; (3) *minimal impairment*- tough to find narrower words that address obj. Ban falls within a range of reasonable alternatives., (4) *proportionality of effects*- objective is very important (stopping smoking) and evidence shows advertising thru false/deceptive/misleading statements encourages it, and type of expression is of little value (right to draw false conclusion about safety of tobacco products.Compare deleterious vs salutarious effects- the salutarious effects are fairly strong.

→ s.1 inquiry- sections meant to protect kids (restricts ad placement, ban on ads rnsbly thought to appeal to kids) clearly infringe s.2(b): (1) clear pressing and substantial objective of preventing kids smoking, and (2) rational connection b/w the restrictions on ads and this objective; (3) minimal impairment? doesn't totally ban tobacco ads- some types are permitted- and besides type of speech being prohibited is of fairly low value and not much will be lost; will serve to protect vulnerable groups (kids) that might not justify if it was aimed at protecting less vulnerable groups (adults); is it overbroad? (4) proportionality of effects- the speech being impaired is of relatively low value + ban may have important benefits to prevent people from smoking.

→ Lifestyle ads; low value expression- deceptive, manipulative ads designed to sell products that will hurt you; s.11 inquiry- (1) pressing/substantial objective easily met, (2) rational connection b/w limiting consumption/addiction and banning the lifestyle ads; (3) minimal impairment

→ Differences b/w this case and *RJR*? Different law (much better tailored) but also better evidence provided

R v Guignard: Considers the interests of 'viewers/listeners' as reason to protect freedom of expression.

→ D puts sign on property complaining about his insurer; municipal inspector orders its removal based on bylaw restricting the "erection of advertising signs outside an industrial area," G refuses and is charged

→ Just as comm. parties have right to promote/inform their business thru ads, consumers can "counter-advertise"- criticize products or how a service was supplied (provided not defamation).

→ This right isn't limited to private speech and counter-advertising is extremely important to protect consumers and their social + economic interests → Bylaw clearly infringes these rights and freedom of expression- particularly econ. disadvantaged, forces D to either use more expensive means of 'advertising' or be restricted to private/quasi private comm. (eg. leaflets) to counter- advertise; Relevant provisions are therefore invalid.

Equality Issues:

R v Keegstra: 319.2 already partly constrained- doesn't apply to private conversations- reasonably tailored

⇒ Additionally, no conviction if... what you're saying is true, Even if statements aren't true, but you believe them to be true and say them in discussion for public benefit; if said in good faith while arguing an opinion on a religious subject; or if pointed out in good faith for its removal

⇒ Requires 'wilful promotion of hatred'- not just saying hateful things- actus reus requires intent to promote hatred

→ Expression that wilfully promotes hatred clearly conveys meaning and therefore is protected by freedom of expression. S.319(2) does infringe freedom of expression- can it be justified?

⇒ Dickson notes that (1) hate speech ≠ form of violence that falls in unprotected expression (*Irwin Toy*)- it only applies when expression is directly comm. thru physical violence, and (2) freedom of expression should be defined broadly- and other value balancing done at s.1

Irwin Toy test to find if 2b infringed? (1) Expression meant to convey meaning (*Content Neutrality*: when considering infringement don't consider the content of the speech- D only has to prove infringement of some speech meant to convey meaning) + (2) prohibition aimed directly at comm. of expression= 2b infringed.

S.1 analysis: s.1 should be contextualized based on the "values and circumstances particular ot an appeal

⇒ *Contextual factors?* (1)(look to underlying values behind section 2b) (a) Search for truth- doesn't serve truth; (b) Value of speech- Dickson says basically certain speech has less value ; (c) self-fulfillment- free speech contributes to this generally, however the groups who are meant to be protected by s.319 will be limited in their capacities for self-fulfillment by the speech targeted- some people's self-expression will be stifled by other's if freedom of expression w/o limits; (d) democratic process- expression can also work to undermine democratic principles/processes by arguing for society where individuals denied respect/dignity based on ethnicity/religion

⇒ Link b/w contextual factors- owing to these factors it's less difficult to justify infringing it under s.1.

⇒ (2) Charter principles- G argument stronger if they can connect law to them (both in terms of the law and the groups protected by the law

⇒ (3) Is law criminal? b/c impugned law is part of criminal code flips presumptions- in this case highly coercive use of gov. power is targeted at a vulnerable group- but one that is using hate speech.

→ *Pressing and substantial objective:* (a) hate speech harms dignity/self worth/sense of acceptance of the individual targeted; (b) may also subtly or actively encourage discord b/w different cultural groups; numerous international~ human rights principles also emphasize importance of limiting discrimination + promotion of hatred; clear that harm from hate propaganda is worth targeting.

- harm needn't actually be proven- seriousness of the potential harm and difficulty of proving clear link b/w expressive conduct and hatred is enough for lower standard of causation.

→ *Rational connection*: banning/prohibiting hate propaganda clearly reduce harm done to id. groups- and criminalizing certain forms of expression sends valuable message about values of society.

⇒ Dissent: McLachlin suggests no rational link- criminalizing hate-speech won't help to suppress it

→ *Minimal impairment:* overbroad? might punish expression that isn't hateful or limit merely unpopular expr~

⇒ impairment of right needn't be the least restrictive means given context of low value speech and protecting vulnerable groups- need only be 1 of a reasonable range of alternatives

⇒ law has high *mens rea* (subj. desire to promote hatred or foreseeable that it would be certain to result from the expression), and excludes statements made in private convos- it's reasonably tailored

⇒ Limiting racism is a fairly significant legislative goal/purpose- value of speech is quite low so few deleterious effects from the law.

→ Example of contrast of different views of how government power should be used to promote

Dissent: Consider how broadly or narrowly the law is defined? Is it overly vague? May lead to chilling effect on expression? "combination of overbreadth and criminalization" can lead to chilling effects- only express on non-controversial matters? Is it criminal (more severe consequences, unequal parties)? How has the law been used? Balance important of the right and the actual benefit conferred by the infringement?

R v Whatcott: 2 separate restrictions in HRC 1 on hate speech, other on speech that belittles/ridicules group
Contextual factors: HRC, not *CC* so it's more a matter of restricting between private entities (unlike criminal laws- state vs the individual); tho still restricted to public conversations.
→ (1)*Pressing + substantial objective:* Initially look at purpose section of the law- protect individuals, promote
→ (2) Proportionality- is law proportionate to its objective- perfection isn't required- the legislature's chosen means should be given deference: "effective answers to complex social problems … may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable". Legislature's choice must only be "one of a reasonable range of alternatives"
→ 2(a) *Rational connection*: The portion of the HRC stating that expression that "ridicules, belittles or otherwise affronts the dignity of" was not sufficiently offensive to rationally connect to aim of limiting hate speech.
→ 2(b) *Minimal impairment*: unlike in *Keegstra*, much easier to successfully prosecute- casts broader net- because it doesn't require intent to discriminate/promote hate speech, just the display; however legislature has to choose among "competing policy options" and needn't choose the least impairing option
- restricting expression to prevent offense ignores importance of free expression to "indvl self-fulfillment, search of truth, and unfettered political discourse." The law would capture too much
→ 2(c) Weighing of effects: benefits= restricting ahte speech + its harmful efefcts, negative effects? type of expression being restricted doesn't really promote 2b values:
→ Wording of law: how much does the law include? Can it be read down to less impair free expression?
→ Nature of expression: lower value expression that does little to promote (or undermines) the principles + values behind freedom of expression will be easier to justify restricting than speech closely connected w/ underlying 2b values- hate speech is particularly far from 2b; the closeness of the speech to 2b values also relates to the value of the speech "relative to other Charter rights" which may restrict freedom of expression
⇒Political discourse: "Political expression contributes to our democracy by encouraging the exchange of opposing views. Hate speech is antithetical to this objective in that it shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse."
Precautionary approach on social facts- when dealing w/ evidence on social science used to back legislation, don't expect an extremely high causal standard- a reasonable inference is sufficient to justify.
⇒ court can use "common sense + exp." to assume certain activities (inc. hate speech) inflict social harm
Government has to justify law as one of reasonable range alternatives to the legislative objectives
⇒ Though of course P can attack minimal impairment by showing other preferable alternatives.

R v Butler: s163 originally intended to restrict obscenity to promote moralism- but if you maintain this as the purpose, law won't even get back 1st step of Oakes test- legislating morals isn't considered appropriate
⇒ To avoid purpose shifting (*R v Big M*), court claims this specific purpose- restricting sexual morality represented broader purpose- protecting society from harm; now it protects society from harm of porn that degrades, victimizes by promoting sexual inequality. s163 thus limited to fairly narrow types of pornography-
→ Context: Speech isn't close to 2b values,, vulnerable groups and values are being protected by the law, speech may in fact causes harm, + economic motive (tho less influential)= court deferential to government.
Rational connection- owing to type of speech being limited the court doesn't need an absolute causal link- precautionary approach to scientific fact will be enough: "reasonable apprehension of harm" that law will limit
Minimal impairment: law needn't be the least impairing means;
→ Internal limitations- if law sets out specific defences and exceptions and has a high standard to restrict, much more likely the court will uphold the law

R v Labaye:Types of harm: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct
→ Private sex club doesn't expose anyone who doesn't want to enter;
→proof of causal link isn't at a scientific standard but should be based on convincing/persuasive arguments.

R v Sharpe: To establish rational connection b/w objective of law and reduction of harm, reasoned apprehension of harm is enough- look at social science evidence + experience and common sense.

Section 15: Use *Kapp* and *Withler*

Andrews: discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

Interpreting:

Andrews v LSBC s.15 promises equality before/under the law and its protection/benefit w/o discrimination.
→ Discrimination? distinction (intentional or not) based on the personal characteristics of individual/group which burdens them, disadvantages them, or imposes obligations that others don't, or limits/denies access to opportunities, benefits, advantaged available to other.
→ S. 15 prohibits discrimination based on prohibited enummerated or analogous grounds
→ s.15(1) suit must show (1) unequal treatment before/under law/differential impact + (2) leg. impact is discriminatory; once breach of s.15(1) shown, go to s.1;
→ (1) equality ≠ simply identical treatment under the law- facially neutral laws can also discriminate
→ (2) Focus on the actual effects of impugned law, not the intent/purpose of the legislature
→ (3) To establish s.15 breach, they must prove differential treatment that basically equals "discrimination on the basis of a personal characteristic" that is either enumerated in s.15 or analogous to them-
- McIntryre: discriminatory law= assumes individual has certain characteristics based on membership in a group; Wilson J- discrimination= basically the creation/emphasizing disadvantage of groups/individuals

R v Law:.After analysis of context, court rules it's not discriminatory b/c law was intended to benefit people over 35 who may not be as competitive in the labour markets
→ s.15(1) analysis should be done purposively and contextually "taking into account the full social, political and legal context of the claim" (also cite *M v H*)
→ Purpose of s.15: promote equality, "prevent the violation of essential human dignity and freedom"
- Laws which create different treatment for groups/individuals (among enummerated/analogous grounds) will violate this purpose if "the differential treatment reflects the stereotypical application of presumed...characteristics, or otherwise has the effect of perpetuating or promotingthe view that the individual is less capable, or less worthy of recognition or value as a human/member of Can. society."
- Human dignity= "realization of individual autonomy and self-determination," self respect and self worth
→ (1) does the law result in differential treatment? Whether through (a) formal distinction based on personal characteristics, or (b) by failing to account for the disadvantaged position of claimant- meaning differential treatment based on personal characteristics, even if law is facially neutral; (2) Is one of the enumerated/analogous grounds the reason for the differential treatment; (3) Is the differental treatment discriminatory- does it imposed burden/withhold benefit based on a "stereotypical application of presumed...characteristics," or which undermines that person as an individual "worthy of recognitiion as a human being/member of Canadian society"?
→ Contextual factors: subjective/objective- (1) pre existing disadvantage/stereotyping, prejudice, vulnerability- s.15(1) is meant to protect these groups though this isn't a decisive factor; (2) Does the law take into account the actual situation of the people claiming discrimination- or is there little connection- if it doesn't take them into account, more likely discrimination, if it does, harder to establish; (3) the purpose of the law- does it have "ameliorative purpose or effects" with respect to a disadvantaged group? (4) scope of the law- if severe consequences, differential treatment that causes them more likely to be found discrim. w/i s.15(1)

R v Kapp: if overriding purpose of program is ameliorative- go to s.15(2) first.
→ non-AB fishermen treated differently- AB given exclusive access to a particular fishery for period of time- meant as part of an ameliorative program to recognize historic inequalities and AB ownership of the fisheries
→ Don't take the contextual factors from *Law* as a test- rather as ways of focussing on limiting the discrim~ of "perpetuating disadvantage and stereotyping"
→ court acknowledges law proscribes differential treatment but it meets s.15(2) test of an (1) amerliorative purpose meant, to (2) address socio-economic disadvantages of group ID'd by ennumerated/analogous
⇒ means of the law must be rationally related to the ameliorative purpose- and the disadvantage targetted
→ Court will look at the disadvantaged group targeted by the ameliorative program and do this using a broader context including historical stuff but they won't be overly strict about it
→ If the Court wasn't saved by s.15(2), they might have to turn to a s.15(1) test in the alternative; if not saved by 15(1) argued in the alternative it's saved by s.1
→ court recognizes that historical and social inequalities of ABs justifies a program that attempts to ameliorate this, and does so in a policy that does not treat men and women in the same ways

R v Withler: S.15 is aimed at substantive- not formal- equality; In line with law, court rejects a "formalistic omparison between particular groups" and instead focuses on the contextual factors of the law and the group
(1) Does law create a distinction based on ennumerated or analogous grounds? (a) does it create a distinction? Does it treat two groups differently- whether through (i) formal distinction- law specifically says to treat groups differently, or (ii) does the law in its effect create a distinction b/w 2 groups? Even if it is facially neutral- it treats all groups the game, court will look consider adverse impacts. s.15 analysis can be triggered by non-formal laws with adverse impacts and (b) Is the distinction on one of ennumerated grounds under s.15? (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability)
(2) Has substantive equality been violated by the distinction in that it creates a disadvantage by perpetuating a historic inequality? (basically discrimination) Consider the following factors (*Law*) but aren't exactly a test:
→ Factors: (A) is the group targeted a vulnerable group, (B) Arbitrariness/actual situation- law should take into account the actual conditions of the group- if it doesn't, more likely an infringement of s.15(1) (doesn't need to be perfect correspondence and consider resources allocation and particular policy goals that the legislature may have been attempting- you may need to consider broader purpose of scheme); (C) Ameliorative purpose- if law has this purpose, unlikely it will violate the dignity of more advantaged groups, b/c their exclusion equates to greater needs of disadvantaged group; (D) Scope and nature of the interest affected by the impugned law? The more severe and specific the effect of the law on affected group, more likely treatment is discriminatory w/i the scope of s.15(1)
→ How to show substantive inequality/discrimination? (1) if law "perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics" by treating them in a way (for example) that perpetuates historical disadvantages, (2) if the law imposes a disadvantage "based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group" (usually results in perpetuating "prejudice and disadvantage"
→For step 2, consider the "circumstances of members of the group and the negative impact of the law on them"- thus historic positions of the group may be useful to this analysis
→ If the purpose of law is of an affirmative action type (meant to ameliorate inequality) perhaps turn to s.15(2)
⇒ amelioration is still a factor for part of the s.15(1) analysis
→ No need to invoke adverse impact approach because law clearly gives less benefit to certain ages
→ Analogous/ennumerated grounds? Yes- ennumerated ground of age.
⇒ Other analagous grounds: sexual orientation, marital status, and citizenship

→ Is distinction drawn discriminatory?
→ Distinction does in fact take account for the circumstances of the people it affects.
⇒ no negative/invidious stereotyping evident in the law's treatments of differently aged peopel.
⇒ law's affects doesn't stereotype, prejudice, assume things that characterizes the elderly

Examples of adverse impacts:

Eldridge: facially neutral policy/law where s.15 claim succeeded through a consideration of adverse impacts
→ Sufficient link b/w the impact of a law and a disadvantage that was created- law treats everyone the same, however this adversely impacts deaf people

Symes: *Income Tax Act* sets cap on deductions for child-care expenses for businesses; tho facially neutral, it affects women disproportionately b/c they tend to raise kids more- neutral act has adverse impacts
(1) Court will consider the effect of adverse impacts; (2) agrees women disproportionately bear costs of raising kids, but says insufficient evidence that they disprop. bear *economic* costs of raising kids.
→ High evidentiary threshold required for establishing link b/w alleged disadvantage and the impact of the law- the court isn't willing to see direct connection b/w social costs (established) and the economic costs- and isn't willing to infer a link.

Vriend: facially neutral law ignores social context of discrimination based on sexuality- means they get less protection under the law.

Ennumerated/Analagous grounds:

Corbiere v Canada: Test for analagous grounds: s.15 targets the denial of equal treatment based on immutable or constructively immutable grounds (things the gov. can't reasonably expect you to change- may be vital to one's identity/personhood, perhaps consider the history of group

Discrimination:

M v H: s.29 of Ontario's *Family Law Act* extends recognition to common-law hetero couple but doesn't include gay couples; lesbians can't claim spousal support from each other after breakup
⇒ Doesn't raise ameliorative purpose issue- gives a benefit to group w/ relative advantages
→ s.29 challenged through s.15(1) analysis-
⇒ Vulnerable groups: draws distinction b/w gay and hetero couples by denying benefit to former, contributing to their pre-existing disadvantages
⇒ Arbitrariness(use court's language "actual situations"): in reality/actul circumstances of claimants, gay couples need the benefits of legislation just as much as hetero couples- court can't see any other reason to deny this benefit so that suggests that there's some discrimintory/prejudicial/stereotyped reason behind it.
- in law not recognizing the circumstances of gays by giving them equal benefits as heteros it perpetuates the bias against them.
⇒ Actual benefits:
→ Once court has completed s.15(1) analysis it's fairly difficult for the government to justify it under s.1 so no need to do a s.1 analysis for s.15 (but yes for s.2(b))
⇒ Unlike s.2(b) where it's easy to establish violation and most of the work is done at s.1

Critiques for Analyzing the Charter

- (1) Outcomes-based- What sort of political or social outcomes will the Charter produce- and do we want them?
    - Assessable from various points (eg. left,right)
        - Left- Charter as an instrument used to entrench and limit progressive social measures owing to the particular viewpoints of those who created, enacted, and now administer the Charter through the judicial system
- (2) Legitimacy- Indeterminacy of Charter gives judges a great deal of discretion to decide- and constrain- the ways in which democratic institutions make decisions
        - Issue of unrepresentative makeup of the judiciary
        - problem of democratic legitimiacy- unelected body limiting + guiding the decisions of elected legislatures
    - Legitimacy issue of undemocratically elected judges making such important decisions
        - Also goes to views of democracy- does it strictly mean majority rule? What limits are there on majority rule- if any?
            - Ultimately majority rule leads away from democracy as majority rule can choose to repress or derogate what makes it a democracy
            - Thus other source of power needed to restrict majority rule- Charter courts
- (3) Accessibility- how accessible is the Charter via the courts for minorities or the very poor?

Essay: How has Charter interpretation varied based on different views of government?

- An early critique of Charter was based on the sort of rights the Charter identified and focussed on
    - Bogart, petter
        - now fear that Charter rights acts as an undemocratic mechanism by which narrow interests can force government to take action to advance their own position, against the will of the majority/
- Different conceptions of the role of government have played a decisive role in Charter jurisprudence, both in terms of the application of the Charter and the interpretation of its rights. Though the application of the Charter seems to have focussed primarily on a classic liberal view of government, going forward the Charter may increasingly accommodate a social democratic view of government, even to the point of having obligations imposed on government to address and ameliorate social and economic inequalities.
- **Application:** In terms of analyzing the scope of the Charter the court has generally considered the nature of an entity's functions and the degree to which it is controlled by government, basically in line with a classic liberal view of how the Charter should be used to constrain government action. Notwithstanding certain powerful dissents, apart from the regular governmental bodies (leg/exec/etc) if an entity was closely controlled by the government whether in its entirety or when performing certain actions, or exercised authority delegated from government, (Douglas, GVTA, Lavigne, Slaight, Eldridge) or exercised inherently governmental functions (Godbout) the court ruled the Charter would apply. In these circumstances any connection with the coercive authority of government required that the Charter would apply to protect individual freedoms. If a However in terms of the interpretation of the Charter, to some extent Charter jurisprudence has recognized and absorbed the concerns of the leftist critique of the Charter, and in some circumstances it has become a positive tool to force governmental action in the service of progressive social reform. (see below, 'interpretation')
    - Thus in *McKinney*, Laforest noted "Historically, bills of rights..have been direct at government..the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual"
    - LaForest noted that other entitities and persons can violate individual rights- particularly through economic inequality- but this can be regulated by government, and subjecting "all private and public action to judicial review" would bring society to a standstill.
    - Wilson, dissenting in *McKinney,* argued against LaForest's minimalist view of the proper role of the state, in which the more "the state interferes with this private ordering, the more likely it is that the freedom of the people will be curtailed. Thus, the minimal state is an unqualified good." Wilson suggested that this classically liberal view of the government resulted in LaForest creating too narrow a test of 'government' action that was therefore subject to the Charter
        - Wilson J suggested that the classic liberal view of a government that should be constrained and limited to promote/protect individual freedom, was inappropriately applied from the American constitutional jurisprudence, failing to take into account the unique historical and constitutional development of Canada, which has been characterized by frequent interventionist policies.
            - Wilson considered the historical role of the state in fomenting progressive social reforms, as well as the modern Canadian state, and suggested that "The Canadian government has thus not been regarded as a monolith of oppression but rather as having a beneficent and protective role to play". Accordingly she argued that at least in the Canadian experience, "freedom has often required the intervention and protection of government against private action" and thus s.32 should be narrowly so as to apply to only traditionally governmetn actions

involving the coercive use of force.

- *Godbout:* In terms of both municipalities and arbitrators exercising delegated powers, "the ultimate source of authority is government per se and, consequently, the entity under scrutiny will be kept in check through the application of the Charter, just as government itself would be were it performing the functions conferred."
- Thus much of the focus in terms of applying the Charter and s.32 focusses on either the degree of an entity's connection to the coercive power of government, or whether it exercises "quintessentially" governmental powers (like municipalities) (*McKinney*). This classic liberal view of the role of government remains a significant influence on Charter jurisprudence, notwithstanding the incongruities of this position with the historical role of the Canadian government.

- Thus while the court has made clear that the Charter only regulates the relations between the government and private individuals (see *Dolphin Delivery*), courts have remained fairly deferential to the government's interests in promoting social reforms or limiting harm (consider *Keegstra, JTI*, , and thus the Charter has been less dangerous as a check on this than some feared.
- And while the Charter's rights are generally framed negatively, with the presumption that the individual needs protections from a potentially coercive and overpowerful government (and a great deal of Charter litigation has dealt with this- whether through challenges to police rights to search and seizure, right to counsel) the Charter has (1) helped in some respects to advance social reforms, and has been (2) less of a barrier to governmental action.
  - Although it's likely the case that most social inequalities are created by private action- and thus the Charter isn't a particularly useful tool for addressing it, the frequency of government intervention in most aspects of Canadian society (whether through taxation, regulation, provision of medical services, administrations, pensions, public services, etc) means that at least obliquely, reformers and those seeking greater social equality have been able use the Charter to address inequalities or discrimination at least in terms of governmental action. S.15 jurisprudence in particular seems to draw from a more socially democratic view of government, that sees the state as an ally in seeking social equality and the Charter as a means of ensuring that the state acts as such.
    - Thus in *Vriend* the Charter was applied to underinclusive legislation to ensure the law did not have discriminatory effects.
    - The court's treatment of s.15 has been more in line with a social-democratic view of government- first, by emphasizing that the s.15analysis should be done purposively and contextually "taking into account the full social, political and legal context of the claim" (*Law*) they have required that government be aware of these issues and particularly the historical disadvantages of groups that might be harmed by a particular law. Second, the court has repeatedly emphasized that the goal of s.15 is substantive equality under/before the law (Withler, Kapp, Law)- at least in terms of government action, the Charter will act to ensure that the law does not treat people differently based on grounds "relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society." Thus the court will consid adverse impacts of even facially neutral laws, (see *Andrews*, *Symes*) acknowledging that, because the proper role of government is to ensure substantive equality, it will need to take into account the historic situations of particular groups lest otherwise identical laws produce real negative effects based on the particular situation of particular groups.

- Though this does not go so far as to impose positive obligations on government, it at least means that the government, as an entity constantly interacting with individuals, must ensure citizens are treated equally in these interactions- and euquality of treatment does not mean identical treatment given extant consequences of historical social and economic inequalities. (Andrews) The Charter is a tool to ensure these principles are followed- acting both to protect groups and individuals from the government and to ensure the are treated equally by a government occupying the uneasy position of menace and benefactor.

- Significant problems still remain:
  - Though the test for applying the Charter has become much more comprehensive and still seems grounded in a classic liberal view of government, the influence of s.15 jurisprudence in particular may shift the idea of the role of the government within Charter jurisprudence towards more of a progressive, if sometimes quiescent ally, that the Charter can be used to coax or cajole into action.
  - It seems possible that Charter jurisprudence has shifted towards more of a social democratic view of government as an entity that should be charged with correcting social and economic inequalities, rather than an oppresive force, for which the Charter is a tool; However unless the scope of the Charter is expanded- perhaps not to the point of regulating private actions (Laforest's concerns in *McKinney* are understandable)- its potential to act as a force for progressive social and economic reform may be stymied by the substantively illusory (in terms of protecting individual rights) division between the private and government spheres.
    - Additionally, the matter of access to justice as a barrier to the Charter being truly effective is a significant concern; the still unrepresentative makeup of the judiciary also remains a problem.
    -

- ***Keegstra-***
    - Market place of ideas- at the heart of s2(b) right is the search for "truth and the common good" in art, science, and politics- however owing to the difficult of identifying "truth and the ideal form of social and political organization with absolute certainty" freedom of expression should be impaired only with caution, lest the spread of information valuable to this end be prohibited.
        - however if this approach is taken too far, permitting any form or variety of expression, it could also harm the values underlying 2b- including the search for truth or social/political improvements. (eg. hate speech)
        - Free-expression also meant to allow the opportunity for self-fulfillment- tho restrictions on freedom of expression can limit this, certain forms of expression might harm other the ability of others to develop individually and as members of society (hate speech)
        - Thus by restricting expressive content such as hate propaganda, the state is serving the advancement and "protection of values central to freedom of expression."
        - Important as an effort to signal that community/state won't tolerate hateful expression.
    - Freedom of expression can conflict with the "values of individual dignity and social harmony"
        - Though even in the US First Amendment approach, freedom of speech is not treated as an absolute, however freedom of expression is particularly difficult to override (in comparison to international instruments. See McLachlin's dissent.
- ***Whatcott***
    - "marketplace of ideas"- suggested as an alternative to legislation prohibiting hate speech, for a free-flowing market place of ideas whereby if the government permitted everyone to voice their unrestricted opinions, and "appropriate balancing of competing rights and conflicting views" would be achieved. However in both *Keegstra* and *Whatcott* the court cautions against assuming that truth and rationality will automatically "overcome all falsehoods" given that people are not always rational and that hate speech fails to advance or may even undermine most of the very principles that underly the section 2b right. It may discourage the contributions of vulnerable groups and limit their ability to seek self-fulfillment/personal advancement through free-expression,
- ***Andrews***: court acknowledges that it's basically impossible for laws to be entirely neutral- simply due to differences amongst people and groups, law may always have a "more burdensome or less beneficial impact on one than another," however this is the 'ideal' to aim towards.
    - Some distinctions must always be drawn between different groups/individuals notwithstanding that s.15 is intended to "ensure equality in the formulation and application of the law."
        - s.15 isn't mean to merely remove distinctions- some such distinctions are important to toher Charter guarantees (AB rights and freedoms, multicultural heritage, etc)- nor is simply "identical treatment" enough for this can produce inequalities- this is dealt with by s.15(2)

Merits of Entrenchment and Legit~ of Judicial Review

R v Vriend: List of prohibited grounds for discrimination under Alberta human rights laws didn't include sexual orientation; held to be unjustifiable violation of s.15 (equality rights guarantee) s.51 says that the list of prohibited grounds isn't exhaustive- and sexual orientation is analogous to the existing grounds so it's included.

- Iacobucci notes and addresses criticisms that courts are usurping legislature's role- it's result of confusion over Charter- const~ supremacy meant that Canadians have certain rights and freedoms, which cannot be removed, though they aren't absolute and may be qualified or infringed under s.1- disputes over rights and justifying them must be resolved by judiciary
    - Indeterminacy of the often broad Charter rights and freedoms requires judicial interpretation for the Charter to be a tall workabel

(1) Choice of adopting Charter and the interpretative, "remedial role of the courts" was a choice by Canadians via their representatives about changing Canadian democracy

- Nowhere in Constitution is the right to give courts the rights to declare things unconstitutional, however they held it was implied by s.52

(2)Independence of the courts (from exec~ + leg~) means they usually intend and do make make fair, reasoned, and principled decisions, whereas politicians do serve particular interest/lobby groups

- Not their duty to make judgements on merits of policy decisions but to uphold the Const~

-This role requires respect between the branches of gov~ for each other's respective roles

(3) Concept of democracy should not be defined so narrowly as simply majority rule (eg. inherent dignity of individual, commitment to social justice/equality, accommodation of wide variety of beliefs, respect for cultural and group identity, faith in sociopolitical institutions), and it requires certain mechanisms that protect these values against majority rule.

- excessive majority power can undermine other fundamental concerns of democracy.

→ (4) Dialogue theory- Judicial dialogue and dialogue b/w branches makes each accountable to each other, enhancing demo~

- see Hogg and Bushell *Dialogue Theory*, below: 'notwithstanding clause' arguably permits such a dialogue- w/o it the Constitution would simply be supreme and any court judgements on it would give court absolute authority given its interpretive role; also makes the court more willing to declare laws unconstitutional because legislature's can overrule their judgements if necessary.

- *R v Mills*- SC endorsed dialogue concept of interbranch relations
- Legitimacy of judicial decision-making- in this case court (1) imposes positive duty to include sexual orientation under prohibited grounds for discrimination, and (2) reads in sexual orientation
- In *RJR-MacDonald v Canada*, the SCC struck down the federal *Tobacco Products Control Act*, which contained a broad prohibition on advertising of cigarettes and other tobacco products. In response to the decision, the federal government enacted new legislation banning advertising of tobacco products but with more limited exceptions for certain types of advertising. In the 2007 decision of *Canada v JTI-Macdonald Corp,* the SCC upheld the new legislation, describing the Act as "more restrained and nuanced than its predecessor", which "represented a genuine attempt by Parliament to craft controls on advertising and promoting that would meet its objectives as well as the concerns expressed by the majority of the SCC in *RJR*.

Hunter v Southam: the "purposive approach" to interpreting Charter rights- case involved s.8 guarantee of freedom from unreasonable search and seizure

- What does 'unreasonable' mean in S.8? American, historical/political/philo~ contexts aren't useful for assessing it, nor dictionary definitions, or statutory construction (Constitutions are differently assessed compared to statutes…)
    - Const~ aims at the future as an ongoing "framework" for assessing "the exercise of gov. power"

        - Thus must be able to grow and develop alongside new social/political realities
- Therefore to assess constitution~ you must assess its purposes and wider objects
    - Charter intended to guarantee and protect certain rights and freedoms and constrain gov. action- doesn't authorize or confer power governments
    - Assessment of const. of search and seizure (or of a statute on search & seizure) must focus on the the reasonable/unreasonable impact on the subject of S&S not its role in gov~ obj~
- Proper approach to interp~ Charter is a purposive one, therefore to assess the scope/value of a right, a Court must first specify the purpose behind the right, or the nature of interests, it's meant to protect~
- Enacting of Charter transformed Canadian polity from legislative to constitutional supremacy, with the SC main agent

Bogart- "*Courts and Country*"

- Bogart suggests that two different models of democracy are at issue- one see judges as a rational/principled arbitors who can restrain the potential excess of majoritarian democracies and protect the disadvantaged, while the second sees the judiciary as an "unaccoutnable, elitist, and…unrepresentative" power that will act as an undemocratic, reactionary check on the necessary aggressive social reform ;
- **Pro**: individuals (particularly minority) can use the Charter as a tool to bring attention to their interests
    - Charter will unite Canadians by creating other interests that cut across regionalism while protecting minority interests, s33 allows legislature to override most judicial decisions
- **Contra**- The Charter subverts true democracy- (1) elected reps and bodies have been most effective in improving people's lives- assisting poor and ordinary people generally has come about because of popular support and political will; (2) elected representatives create a vigorous, responsive democracy- relying on judicial review rather than reps denies citizenry best opportunities; (3) costs of accessing courts privilege certain groups and give them the best opportunities to use judicial review

Petter "*Immaculate Deception- "The Charter's Hidden Agenda*:- Charter is regressive and more likely to undermine than advance the disadvantaged

- Charter founded on a classical liberal view of government that sees the principal force against individual freedom and flourising as the the state- not entrenched disparities of wealth and private power.
    - By and large the Charter rights are negative- they aim to limit/restrict the ability of the state to interfere with individuals.
    - As the court notes in *Hunter v Southam*, the Charter "is intended to constrain governmntal action inconsistent with those rights and freedoms; it is not in itself an authorization for government action."
- Petter suggests that this is reflective of a systematic bias towards interests of upper-middle class and professionals, who make up most lawyers, judges, etc- for this broad class (who were highly influential in creating the Charter and now in interpreting) fundamental rights are needed shield them from the state's popwer to regulate and redistrubute.
    - Charter also presumes that existing wealth/power distributions are products of private action, rather than state action, and as such are outside the scope of the Charter.
    - Thus Charter can't address unequal income distributions- main source of inequalities- and will even limit power of state to address them thru democratic action.
- Petter notes, quite correctly that inequality property distribution has been a major source of inequltiy- and the Charter was not designed to address these issues. Most advances won on behalf of disadvantaged were by state power, rather than judiciary, and Charter will retard this process
- The Charter is designed to act as a check on potentially progressive legislative action out of "the same reverance for individual autonomy" that also grounded the common law- a useufl world-view, now constitutionally entrenched, for those with sufficient power and means to live autonomously and *need*

protection from the state.
- Consider how judiciary has used certain entrenched laws to overrule democratically created laws that
- Nature of judiciary encourages regressive impact of Charter through both the costs of access and the composition of the judiciary; it means the Charter favours those w/ economic resources due to the high costs of litigation and thus the nature of Charter litigation favours the interests of the wealthy- who will (and have) be able to disproportionately influence the course and development of Charter jurisprudence
    - Also tend to be drawn from relatively wealthy middle class professional class and they reflect the values of the legal system where they were schooled
- Property rights is basic political value underlying common law- an assumption that sees system of property rights as a natural part of the private sphere of individual autonomy, which the Charter keeps separate from the activities of the state- it might be noted how convenient it is for those with significant property interests, that property rights are almost seen as a natural right at the heart of our legal system and society.

Weinrib- "*Limitations on Rights in a Constitutional Democracy*"- Supremacy of rights model of understanding the Charter and role of courts
- Rights protection as supreme law to which other laws must conform- emphasizes the dignity, autonomy, and equality of each community member, meriting judicial protection
- In this model political comm~ is framework for individual to conduct their life- supreme law thus helps majority politics to advance this- but limits its ability to renege on comm's~ basic human premises
- Political forums are often unable (whether thru functional structure or otherwise) to sufficiently assess infringements of rights or protect individual interests- in supremacy of rights model, judiciary helps to ensure that policy formed by the chaotic and sometimes ineffective leg~ branch is just
    - Uses ind~/highly trained and educated judges to protect/advance deeper/long-term pol~ trends
- Courts must protect such rights while acknowledging them as representative of deeper values

Hogg and Bushell- "*Charter Dialogue b/w Courts and Legislatures*
- Dialogue- H and B suggest interpreting judicial review as a dialogue b/w judges and legislatures- when courts make a decision on an issue, it opens a public debate around Charter values.
- B/c judicial striking down of a law can be redressed by creating a new law, this should help to assuage concerns about around the democratic legitimacy of judicial review- though it creates some constraints, the final decision made will be a democratic one- if the legislature has sufficient will.
    - Generally when courts strike down a decision, they advise how to modify law to avoid const~ problems, and typically the constitutional issue can be remedied
- Features of the Charter that advance dialogue:
    - Section 33- legislative override permitting legislature to reenact impugned law w/o judicial interference by including an "express notwithstanding clause into a statute", freeing it from the Charter's influence. Even if s.33 this has rarely been used it and it generally results in serious controversy and public discussion,it acts as the ultimate democratic trump card.
    - Section 1- reasonable limits on guaranteed Charter rights- if law fails this as not using the least restrictive means, courts will explain what law would have satisfied that, and legislature can usually rework a law so that it responds to court and can be upheld against future challenges
    - Qualified rights of ss.7, 8, 9, 12
    - Guarantee of equality rights under s.15
- Though in some cases courts end the dialogue- such as if they decide very objective of the law is unconstitutional, or if the political context makes it impossible to create a new law in response to the Court's decision (lack of democratic consensus) and according to the courts advice, in most cases legislatures do respond to CHarter violations by passing a new law in reponse

- Generally Hogg and Busheel suggest that new laws created in response to successful challenges typically achieved same legislatives objectives but w/ greater protection for rights
- Judicial decisions can influence legislation even if court doesn't strike down law- lawmakers are aware of equalitiy/rights concerns around the Charter and will respond to concerns- even in non-compulsory cases, Charter dialogues can have an impact outside of the courts
- Hogg & Bushell don't see critique of democratic legit~ of Charter as sustainable- even when courts strike down laws, they almost always give leg~ a chance to respond- if there is demo~ will, leg~ objective can be achieved
    - Dialogue b/w courts and legislature is part of balancing the "individualist" Charter values with the broader goals of the community.

- Some commentators (Roach) suggests that American debates/theories on judicial activism have been wrongly introduced into Canada, ignoring the Charter's structure (specifically s.1, s.33) which ultiamtely gives leg~ ultimate ruling over social policy issues
    - It actually allows the Courts to be more aggressive in promoting/protecting rights & freedoms b/c they know legislature can override them it wishes, while helping to balance power of legislature, which can be excessive in a parliamentary system.
    - Excessive judicial deference (eg. in protecting minorities) allows government to act w/ fewer checks, particularly in ways that only harm certain groups w/ less political power
    - Criticisms of judicial activism may be problematic as they may lead to excessive jud~ deference- and an unchecked leg~ monologue that fails to protect or advance interests of those w/ little political power

Knopf and Morton critique- dislike dialogue theory, Charter gave SC broad power to make policy- interest groups have used Charter to use courts to advance their policy interest, making constitutional, policy that would be difficult to achieve thru the legislature

- When judicial policy creates a new status quo, it can be almost impossible to reverse if it cuts acros normal party lines and divides government in power (eg. abortion- see 754)
    - Hogg doesn't find this convincing- only shows that it's a struggle politically, to reverse SC decision on an equality issue- though possible given strong public sentiment
        - See *Vriend* as in fact an example of dialogue- Alberta government could have chosen to override the decision, but chose not to, presumably b/c they didn't think they had enough support.
        - Judicial decisions striking down laws are never necessarily and usually aren't in fact "the last word on an issue."

Criticisms of Charter have shifted from the left (feared that Charter woudl restrain "social desirable regulation and redistribution) to the right- out of fears that Courts would use Charter to constitutionalize unpopular rights of minorities, undemocratically against the wishes of unwilling majorities

- Petter's left critique to some extent was absorbed into jurisprudence
    - Should law impose more positive obligations on gov~ to advance rights?
- Lack of fixed definitions in the Charter leaves a great deal of discretion up to judges personal philosophies/ideas