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STRIKING BACK: FIGHTING WORDS, SOCIAL PROTEST AND POLITICAL PARTICIPATION IN FREE AND DEMOCRATIC SOCIETIES

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In this article the authors analyse the "labour law trilogy" of cases in which the Supreme Court of Canada held, in each case by a plurality of 4 to 2, that workers' rights to strike and bargain collectively are not protected by section 2(d) of the Charter of Rights and Freedoms. Through their analysis of the judgments in those cases, they endeavour to draw insights about the larger debate between those who are supportive of the entrenchment of a Charter in the Constitution and those who are more sceptical and critical about the process of judicial review. It is argued that even though the cases can easily be shown to be wrongly decided, they ought not to be seen as evidence which supports the scepticism of those who are, by nature, critical of judicial review. The authors endeavour to show how these cases, corrected of a rather simple error, actually offer hope that the Charter can be used in socially progressive ways and for the general advantage of those who are among the less privileged in the community.

Les auteurs de cet article analysent les trois causes sur le droit du travail dans lesquelles la Cour suprême a décidé, chaque fois par une majorité de 4 à 2, que le droit de grève et celui de négociations pour conventions collectives que revendiquent les travailleurs ne sont pas garantis par l'article 2(d) de la Charte des droits et libertés. À la lumière de cette analyse, ils essaient d'expliquer la différence entre la position de ceux qui sont en faveur de l'inclusion de la Charte dans la constitution et de ceux qui restent sceptiques et critiquent l'usage de la revue judiciaire. Ils soutiennent que, quand bien même il est facile de

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prouver que les causes ont été mal jugées, il ne faut pas en conclure que c'est une preuve à l'appui du scepticisme de ceux qui sont, de par nature, contre la revue judiciaire. Les auteurs essaient de prouver que ces causes, après la correction d'une erreur plutôt simple, font espérer que la Charte pourra servir de diverses façons au progrès de la société et à l'avantage général des plus défavorisés.

I. Introduction: Scepticism and the Charter

This is yet another attempt, in a growing body of literature, to address a question which has occupied centre stage in the Canadian political forum ever since the Charter of Rights and Freedoms¹ was entrenched in our Constitution on April 17, 1982. Numerous politicians, lawyers, social activists, business and trade union leaders have engaged in lively debate over what role, if any, is proper for the judicial branch of government to play in the processes by which social policy is translated into law. For many, the idea that courts, staffed by a group of unelected persons who are, by and large, drawn from the more affluent and powerful groups in society, should stipulate limits on the law making authority of the people and their representatives is problematic in the extreme. To these people, judicial review of the decisions made in our legislative assemblies will seem doubly flawed. Allowing our third branch of government to exercise such authority over the other two seems utterly inconsistent with our democratic heritage and seems certain to undermine the generally positive role our legislators and their executives have played in distributing opportunities and resources more equitably to those in our country whose circumstances are more constrained and meagre than most. Empowering judges to act in this way seems inconsistent with our political tradition of democratic and generally socially progressive processes of government.

To allay the doubts of those who are instinctively suspicious of judicial review, there are several ways one might proceed. One approach, which was adopted in *Putting the Charter to Work*,² is to portray constitutional review in its best possible light. Judicial review can be described and defended as providing an opportunity for those who have not had much influence on, and (accordingly) who have not always been fairly treated by, the political process to claim a measure of social justice which the other two branches of government have, on occasion, been reluctant to recognize. Critics are encouraged to contemplate an idealized picture of courts working in harmony with the other branches and agents of government. The strategy is to try to show how certain principles of constitutional interpretation can be used by individuals and groups who are generally less well off than others in our country to restrain

¹ Constitution Act, 1982, Part I; hereinafter referred to as the Charter.

² D. Beatty, *Putting the Charter to Work* (1987).

some, (though by no means all), of the more egregious "acts" of injustice some branch or agent of government is about to commit or has already committed against them.³ Focusing on specific rules and laws which are incorporated in our labour codes, Putting the Charter to Work offers concrete examples of how the legalization (*viz* constitutionalization) of politics could generally encourage, and on occasion even require, more socially progressive policies to be infused with the authority of law.

In this article we propose to respond to the scepticism of the critics in a more direct way. Our ambition is to address what we take to be the most important and most forcefully put claims of those who are hostile to the idea of integrating a process of constitutional review in our system of government. If Putting the Charter to Work was an attempt to overwhelm the opposition by constructing the most compelling description of judicial review, in this article we want to examine the constitutional role of the courts under its most critical and darkest light.

In the course of the article three broad challenges mounted by the critics will be described and evaluated. The most fundamental attack on the integrity of judicial review comes from those who doubt the very possibility of the enterprise and claim that any pretence law has to objectivity and to providing right answers is illusory. This is a challenge which questions the very legitimacy of judicial review. These critics say that law is just as indeterminate and subjective as politics and that, accordingly, any exercise of coercive authority by an unelected elite violates the most fundamental tenets of our democratic traditions of government.

Two reasons are given for this belief. First, constitutional adjudication is said to be like politics because in defining the meaning of the rights and freedoms the Charter protects, judges are able to make decisions about fundamental values in our society. For example, in discussing the tension between the freedom of expression or conscience of one individual and the equality rights of another, Andrew Petter points to "[t]he political nature of the process of interpreting and reconciling val-

³ There is no reason why such "constitutional conversations" must be postponed until after a policy has been enacted into law. To the contrary, the constitutional dimensions of a proposed rule or policy can and should be debated well before it is declared to be law. Constitutional adjudication will only occur where the earlier conversation failed to persuade. Constitutional adjudication is a sequel to and not, as some envisage it, a substitute for rigorous review of the constitutionality of a proposed rule or policy before it is enacted into law. *Cf.*, P. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983), 61 *Can. Bar Rev.* 30. The courts have already alluded to the primary responsibility legislators have in ensuring the constitutionality of the policies they propose to enact into law. See, for example, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, (1984), 11 D.L.R. (4th) 641, at p. 659; *Reference Re Education Act of Ontario and Minority Language Rights* (1984), 10 D.L.R. (4th) 491, at p. 547 (Ont. C.A.).

ues such as these".⁴ In the same vein, Patrick Monahan argues that "[t]he very process of defining the content of the rights protected by the *Charter* seems inherently political".⁵ Completing the connection with the indeterminacy critique, Monahan goes on to characterize rights, notably those of equality and liberty, as "blank slates on which the judiciary can scrawl the imagery of their choice".⁶

Secondly, proponents of the "law is politics" thesis claim that constitutional adjudication unavoidably involves the judges in the "quintessentially legislative task" of balancing interests.⁷ Patrick Monahan puts the argument in the following way:⁸

Having given content to these open-ended rights, the judiciary must then balance these rights against considerations of the general welfare under s. 1. This process of interest balancing seems just another way of asking the fundamental legislative question: "is this worth what it costs?" The process of balancing individual against collective interests is a calculation which would have already been made by the legislature when it passed the statute under review. . . . Section 1 of the *Charter* appears to invite the Court to assess and second-guess the wisdom of the balance struck by the legislature.

In Monahan's view, *Charter* litigation is inherently political because it allows the courts to second guess the balance of interests that the legislature has struck and to substitute a different resolution if and as they see fit.

In a sense, the whole of this article is concerned with responding to those who question the very possibility of judicial review. The indeterminacy critique provides the focus and the organization for everything that follows. This article is an attempt to show that determinate solutions—right answers—do exist in both the interpretative and justificatory phases of constitutional review. But our purpose is broader than that. In addition to responding to the radical sceptics who argue that constitutional review is indeterminate, our ambition is to have provided an answer, by the end of the article, to a second group of critics who argue that even if constitutional adjudication does entail the application of discrete and definable rules and standards, the criteria that the courts in all probability will employ will be highly formalistic, generally regressive and, in most cases, likely to produce socially inequitable results.

This second line of attack is unlike the first in that it accepts the theoretical possibility of judicial review.⁹ Rather than portraying an image

⁴ A. Petter, *The Politics of the Charter* (1986), 8 Sup. Ct. L. Rev. 473, at p. 477.

⁵ P. Monahan, *Judicial Review and Democracy: A Theory of Judicial Review* (1987), 21 U.B.C. L. Rev. 87, at p. 96.

⁶ *Ibid.*, at p. 97.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ The inconsistency in the position of those who claim that the *Charter* is both indeterminate and socially regressive is powerfully demonstrated in B. Langille's paper,

of the Charter as an empty vessel, capable of being filled up with any rights and freedoms the courts care to recognize, here the critics argue that the principles of constitutional interpretation that have been and will continue to be applied by the courts are highly prejudicial to those who are most in need of the protection of the State. These critics doubt the Charter's potential to contribute to social justice in Canada because of their belief that it actually embodies a set of values, associated with classical liberalism, which are either insensitive or actually inimical to the interests of those without economic or political resources. Allan Hutchinson and Andrew Petter, for instance, state that:¹⁰

The framework and tenor of the Charter reflects traditional liberal values; it arms individuals with a negative set of formal rights to repel attempts at government interference.

This is the core of what they term "the discredited vision of social life and political justice" which "is part of the institutional architecture of Charter jurisprudence".¹¹ Echoing similar themes, Andrew Petter has expressed his concern that the Charter will be and in fact already has been interpreted as an instrument of purely negative liberty. His thesis is that "[f]ar from advancing the interests of disadvantaged Canadians, the Charter is much more likely to work to the detriment of those interests".¹² He characterizes judicial review as "a conception which views government solely as an inhibitor of freedom and which discounts the interests of individuals who depend upon the state to guarantee their freedom".¹³ Petter argues that "the true function of a charter in a liberal democracy" is to give rights to citizens only by contracting the sphere of government activity.¹⁴ He concludes:¹⁵

Governments, however, do not act in vain. Through redistribution of economic resources and regulation of private conduct, governments seek to pursue political purposes that benefit particular social interests. . .

The irony, of course, is that the very groups who supported the Charter in the name of disadvantaged Canadians are those who advocate greater intervention by government as means of achieving social justice. By bringing about the enactment of the Charter, they have inhibited the ability of government to engage in the very activities that they espouse.

Revolution Without Foundation: Scepticism and the Grammar of Law, also presented at the conference organized by Queen's University Industrial Relations Centre and Faculty of Law on "Labour Law Under The Charter", September 24-26, 1987.

¹⁰ A. Hutchinson and A. Petter, *Private Rights/Public Wrongs: The Liberal Lie of the Charter* (1988), 38 U.T.L.J. 279, at p. 283.

¹¹ *Ibid.*, at p. 280.

¹² Petter, *loc. cit.*, footnote 4, at p. 474; and see also at p. 494.

¹³ *Ibid.*, at p. 494.

¹⁴ *Ibid.*, at pp. 475-476.

¹⁵ *Ibid.* See also P. Monahan, *A Critic's Guide to the Charter*, in R. Sharpe (ed.), *Charter Litigation* (1987), pp. 400 ff.

In the course of the article we will not endeavour to respond to this line of criticism in the same way that we will evaluate the more basic indeterminacy thesis of the radical sceptics. Rather our strategy will be to show, through the determinate answers to which our analysis leads, that the characterization of judicial review as a socially regressive process of government cannot possibly be right. Our expectation is that, in the end, the solutions we will have worked through in responding to the indeterminacy challenge will provide very powerful counter-examples to the regressivity thesis these critics espouse.

Finally, in the course of this article we will address a third theory which, although it accepts the possibility of judicial review and even recognizes ways in which our courts might enhance both the democratic and progressive traditions of our system of government, argues that the legitimate authority of the courts stops short of promoting principles and policies of social justice in the ways many of the *Charter's* supporters advocate. Known as the "representation reinforcing" theory of judicial review, it holds that "the *Charter* is mostly concerned with the proper functioning of democratic policies as opposed to the substantive outcomes of that process".¹⁶ In Patrick Monahan's terms:¹⁷

... judicial review performed in the name of democracy seeks to enhance the integrity of the political process rather than bypass the process in the name of right answers. It places a premium on the democratic community struggling and searching for its collective identity. Most importantly, it is an analysis which reflects not only the structure of the *Charter* itself but also the larger Canadian political tradition.

Following closely in Ely's footsteps, Monahan's position is that "Canadian judges should interpret the *Charter* to reinforce and protect values associated with democracy".¹⁸ Recognizing "democracy" as a contested concept, he takes time to elaborate what he terms a "hybrid theory" which draws on both the "elitist" and "participatory" strands of contemporary democratic political theory.¹⁹ From this theoretical premise two principles of constitutional review can be derived. Again Patrick Monahan:²⁰

The first principle is a right of equal access and participation in the political system. . . . The court must protect the basic infrastructure of liberal democracy—rights of assembly, debate, free elections; no citizen may be excluded from participation in the process of collective debate and argument except on compelling grounds. . . .

The second principle is one of equality. The concern is not with the substantive equality of the outcomes of the policy process but with the manner in which the decisions or outcomes were produced.

¹⁶ Monahan, *loc. cit.*, footnote 5, at pp. 90-91.

¹⁷ *Ibid.*, at p. 92.

¹⁸ *Ibid.*, at p. 137.

¹⁹ *Ibid.*, at pp. 141-145.

²⁰ *Ibid.*, at p. 146.

On this theory then, the Charter's ultimate purpose is limited to ensuring the proper functioning of the mechanisms of democratic government. Substantive rulings of the kind supporters of judicial review think should be made fall well beyond that limit and, therefore, beyond the authority of the courts to effect. As with the second line of criticism, our response to this theory of the Charter will be incidental to our general analysis of the indeterminacy critique. In developing and defending a determinate interpretation of section 2(d) of the Charter, part of our argument will demonstrate that the narrow "representation reinforcing" theory of constitutional adjudication cannot be squared with important elements of the Charter.

II. *The Issue Defined: When Is Forced Labour Constitutional?*

It is not our intention to analyze, in abstract terms, each of these theories espoused by the critics of the Charter. Rather, to keep this project within manageable bounds, we propose to focus our analysis by considering whether certain laws which, to varying degrees, restrict workers' freedom to strike and bargain collectively, violate the Charter. Proceeding in this way parallels the methodology used in *Putting the Charter to Work*.²¹ Case studies, as others have observed,²² are a useful way of exploring the contours of legal concepts and both critics and defenders of judicial review ought to adduce those cases they think most powerfully support their arguments.

The critics will undoubtedly welcome the choice. They will, almost certainly, think that limiting a debate about the integrity and efficacy of judicial review to the question of the constitutional standing of workers' freedom to bargain collectively and strike will guarantee the success of their position. As some critics have been quick to point out,²³ the hard evidence which already bears on this question is that judicial review is at best indifferent, and perhaps even hostile to the interests of those who are relatively less well off in our country. The bitter reality, they will say, is that the Supreme Court has already handed down three judgments addressing this question²⁴ and in all three the court concluded that none

²¹ *Op. cit.*, footnote 1.

²² P. Gall, *Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword*, in J. Weiler and R. Elliot (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), p. 221.

²³ See Hutchinson and Petter, *loc. cit.*, footnote 10; A. Hutchinson—Comment, *Globe and Mail*, 16 April 1987, p. 7; A. Hutchinson—Review, *Globe and Mail*, April 1987, p. C-18.

²⁴ *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, (1987), 38 D.L.R. (4th) 161 (referred to as *Alberta Reference*); *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424, (1987), 38 D.L.R. (4th) 249 (referred to as *Public Service Alliance*); *Retail Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460, (1987), 38 D.L.R. (4th) 277 (referred to as *Saskatchewan Dairy Workers*).

of the traditional methods workers relied on to advance their interests—not strikes, not collective bargaining,²⁵ not even picketing²⁶—is entitled to any of the protection the Constitution and the Charter provide.

In each one of these cases, groups of workers had questioned the constitutionality of different pieces of labour legislation which, to varying degrees, limited their freedom to strike and bargain collectively. In the first case, the *Alberta Reference*,²⁷ the court was asked to examine several pieces of public sector collective bargaining legislation²⁸ enacted by a Conservative Government of Alberta. Of the legislation considered in the three cases, these laws were the most restrictive. Not only did they prohibit strikes on a permanent basis, but the alternative systems of dispute resolution which they put in their place were partial and incomplete. In the *Public Service Alliance*²⁹ case the court was asked to determine the constitutionality of the Federal Government's Public Sector Compensation Restraint Act³⁰ which initiated the (Liberal) Government's "six and five" inflation restraint programme in 1982. Although the compensation restraint legislation was not as permanent as the legislation involved in the *Alberta Reference*, the legislation in this case was quite similar to the extent that it prohibited a large group of workers from engaging in strikes and it contained real limits on their ability to refer disputes with their employer to compulsory arbitration. Finally, in the *Saskatchewan Dairy Workers*³¹ case the court was asked to review a piece of legislation which was somewhat less invasive of the workers' freedom to strike and bargain collectively. Unlike the legislation involved in the other two cases, the Dairy Workers (Maintenance of Operations) Act³² was a piece of *ad hoc* legislation involving a one-time prohibition

²⁵ It is perhaps worth noting that the court was only reviewing those sections of the legislation dealing with strikes and related aspects of collective bargaining like compulsory arbitration. The court was not asked to review all aspects of collective bargaining, thus leaving open the possibility, as McIntyre J. recognized, that other features of our systems of collective bargaining may enjoy some of the protection the Charter provides. See *Public Service Alliance of Canada*, *ibid.*, at pp. 453 (S.C.R.), 269 (D.L.R.).

²⁶ The question of what protection labour's freedom to picket enjoys under the Charter was considered by the court in a decision it handed down six months earlier than the strike and collective bargaining cases in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174. Altogether then, the court has written four judgments in which it has refused to extend any of the protection the Charter provides to those freedoms workers cherish the most.

²⁷ *Supra*, footnote 24.

²⁸ Public Service Employee Relations Act, R.S.A. 1980, c. P-33; Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1; Police Officers Collective Bargaining Act, S.A. 1983, c. P-12.05.

²⁹ *Supra*, footnote 24.

³⁰ S.C. 1980-81-82-83, c. 122.

³¹ *Supra*, footnote 24.

³² S.S. 1983-1984, c. D-1.1.

of the freedom to strike and it guaranteed the dairy workers involved the right to refer all aspects of their dispute with their employer to binding, third party, adjudication.

In each of these cases, the court held, by a 4:2 majority, that there was no merit to the workers' claim that these pieces of legislation limited their freedom of association in a way which could not be justified in a free and democratic society. Over the dissenting opinions of the Chief Justice and Wilson J., McIntyre, LeDain, Beetz and La Forest JJ. all said that, properly interpreted, the Charter's guarantee of "freedom of association" in section 2(d) was not in any way related to the freedom of workers to strike and bargain collectively.

Many critics will say that these judgments clearly illustrate how the third branch of our government operates in practice. They will say these cases uniformly contradict the idealized view that judicial review can play a role of protecting the interests of those who are relatively disadvantaged in liberal democratic systems of government. They will claim that these decisions uniformly support their position that judicial review can only be expected to support those who are already powerful and well-off.

In addition, many critics will be able to see in these cases empirical proof for their respective theories. For some, the court's decisions could easily be explained as the natural corollary of an unrestrained and highly indeterminate process which allows judges, in the end, to fashion their decisions on their own personal, philosophical, political and other preferences.³³ Given the socio-economic background of those who are most commonly appointed to the bench, these critics would explain, it is to be expected that the courts would not be sympathetic to the claims of the working class. For others, these cases could be condemned as the logical derivative of a Charter which is especially susceptible of being construed according to highly formalistic and/or much narrower principles of constitutional review.³⁴ Regardless of which theory is espoused, most critics will likely see in these cases very strong proof that their understanding and characterization of judicial review is exactly on track. Certainly on the weight of decided authority, it seems the critics can claim their position is more credible than the idealized one supporters advance. For these reasons, it seems safe to assume that the critics will welcome the idea that their theories and scepticism of judicial review be tested by considering what constitutional protection has been provided by the Charter against law makers who attempt to impose restrictions on the most effective ways workers have to engage in social protest and to participate in formulating the rules which regulate the most basic aspects of their lives.

³³ Monahan, *loc. cit.*, footnote 5; Petter, *loc. cit.*, footnote 4.

³⁴ Monahan, *ibid.*; Petter, *ibid.*

Although it might initially strike some as paradoxical, supporters of judicial review should be equally enthusiastic with this choice of terrain. In spite of the court's performance, these cases also offer supporters of judicial review a unique opportunity to expose fundamental weaknesses in the critics' arguments. If those who believe in the integrity and effectiveness of judicial review can show that the reasoning the majority used to support its decision is egregiously and irreparably flawed, they can deal the indeterminacy and regressivity critics a very powerful, if not fatal blow.

To begin with, if it can be said that the majority came to a set of conclusions which everyone now recognizes to be wrong, as a matter of settled constitutional law, the theories the critics rely on to explain their occurrence cannot possibly be right. This is so because demonstrating that the court's legal analysis is utterly indefensible, even on its own terms, necessarily implies there are objective principles and standards of evaluation which organize and constrain the court's powers of review in ways which will generally enure to the advantage of those who are relatively less well off in our country. If the reasoning the majority relied upon to support its conclusions is faulty it can only be because, contrary to the theories of the sceptics, the process is neither radically indeterminate nor distributively perverse. To prove that the decisions of the majority were wrong means that they cannot even be defended as the product of the judges' own subjective views about the nature and character of the freedoms being claimed. If the majority did make a mistake it can only be because it failed to recognize or properly apply the criteria which are generally recognized by the courts and commentators as being at the core of constitutional review.

In addition, showing that the majority was mistaken undermines the evidential value of these cases for the critics. Supporters of judicial review have the opportunity to argue that had these cases been properly decided, according to the court's own principles of constitutional interpretation, they would stand as among the more important examples of how the process of constitutional adjudication can protect even very large numbers of persons when some branch or agent of government does not treat them with the measure of concern and respect which the Constitution requires. If the guarantee of freedom of association in the Charter does embrace workers' freedom to strike and bargain collectively, as Dickson C.J. and Wilson J. found, these cases could be cited along with those examples identified in *Putting the Charter to Work*³⁵ as illustrating how constitutional review can enhance the quality of social justice that we can expect from the operation of government.

Within the framework of these decisions, we have organized the rest of the article into four major parts. In the next Part (III), we will

³⁵ *Op. cit.*, footnote 1.

respond to the claim of the critics that the language of the Charter (in this case section 2(d)) is so vague and general that it allows for any interpretation; that the rights and freedoms the Charter guarantees are "empty vessels" or "clean slates" which the courts can fill up as they please. In this initial phase of the constitutional conversation we will focus on a definition of freedom of association that was not opposed by anyone on the court and show how, contrary to the opinion of three of the judges who embraced the interpretation, it does offer constitutional protection to workers' freedom to bargain and protest collectively.

Then, in Part IV we will consider the counter positions of those who might be inclined to question both the objectivity of the definition identified in Part III and its applicability to the circumstances under review. First we will evaluate the argument that section 2(d) cannot be interpreted in a way which protects workers' freedom to strike and bargain collectively because that was not the *intention* of those who formulated and drafted the Charter. Next, we will examine the force of the argument that section 2(d) cannot be interpreted in this way because the Charter is aimed at protecting *political* rights rather than the *economic* entitlements that were being claimed in the instant cases. (Analyzing the nature and character of collective bargaining and the rights and freedoms the Charter protects allows us to respond to the thesis of those, like Monahan,³⁶ who claim that the Charter is only concerned with the political process and the institutions of our government). Finally, we will consider the argument of those who say that such an interpretation is inconsistent with the general character and nature of the Charter because it will constitutionalize *group rights* and give to associations more constitutional entitlements than any of their individual members could enjoy.

After responding to these interpretative concerns we turn our attention, in the first half of Part V, to those who would be inclined to reject the proposed definition of freedom of association because of the institutional and/or policy implications which they think it entails. In this part we will examine whether an interpretation of section 2(d) which offers the protection of the Charter to workers' freedom to bargain and protest collectively will lead to the court usurping the functions of the legislative and executive branches of government and ultimately inhibiting their ability to adapt and amend this body of law to respond to the constantly changing social conditions which they face. In this part we will discover, after close analysis of the dissenting judgments, that contrary to the claims of the critics, there is almost no unconstrained balancing or second guessing by the courts of judgments the elected representatives of the people have made.

In the second half of Part V we will focus on the freedom of workers to picket and communicate their views to the communities in which

³⁶ *Loc. cit.*, footnote 5.

they work in order to assess the role of the courts in those cases where an unconstrained balancing of interests seems unavoidable. Even here we will discover that although the circumstances may be relatively rare, there will be cases when an apparently unprincipled form of cost/benefit analysis can generate determinate and socially progressive solutions on which all reasonable persons can agree.³⁷

III. *The Interpretative Task: Defining the Constitutional Entitlement*

To meet the challenge posed by the critics, supporters of judicial review must first show that the court was mistaken in its conclusion that workers' freedom to bargain and protest collectively did not fall within the umbrella of protection that the Charter provides. Following the two stage analysis that everyone recognizes is characteristic of judicial review, supporters must first show that, on principles of interpretation and definitions *which everyone could accept*, the Charter's guarantee of freedom of association does protect workers' opportunity to engage in these types of activity through which they are able to gain a measure of control over the decisions which govern their working lives. In addition advocates of constitutional review must show that objective standards are available to permit a court to distinguish between permissible and unconstitutional restrictions on those (properly defined) freedoms and rights. If supporters of judicial review can show that there are right answers in both phases of the debate, then neither the interpretive exercise of value identification nor the balancing of competing freedoms is the radically indeterminate and/or conservative enterprise the critics claim them to be.

A. *Freedom of Association Defined*

As noted, whether a constitutional right or freedom was infringed by the laws under review, is an interpretive question. The issue is whether, as the critics contend, the rights and freedoms the Charter guarantees, like freedom of association, are "blank slates on which the judiciary can scrawl the imagery of their choice"³⁸ or whether, as the proponents argue, there are objective principles of interpretation which constrain this definitional exercise. To prevail in this first phase of the debate advocates of judicial review must establish that there are definitions of freedom of association to which everyone can subscribe which are broad enough to embrace the freedom of workers to bargain and protest collectively.

At first blush the position of those who argue in favour of the integrity and progressivity of constitutional review does not look auspicious. After reading each of the three sets of judgments written by Le

³⁷ This ethical standard of validation is proposed by T. Scanlon, *Contractualism and Utilitarianism*, in A. Sen and B. Williams (eds.), *Utilitarianism and Beyond* (1982), p. 116.

³⁸ Monahan, *loc. cit.*, footnote 5, at p. 97.

Dain J. (for himself and for Beetz and La Forest JJ.), McIntyre J. and by the Chief Justice (for himself and Wilson J.), it is apparent that no single interpretation of section 2(d) could be found which simultaneously enjoyed the explicit approval of every member of the court and was broad enough to reach the freedom to strike and bargain collectively. In all, four different definitions of section 2(d) were suggested by one or more members of the court but each of them either failed to enjoy the explicit support of everyone who sat on the bench, or was thought to be too narrow to embrace the workers' freedom to strike and bargain collectively.

Only two entitlements were identified by every member of the court as being protected by section 2(d) and neither of them reached far enough to protect the freedom of workers to strike and bargain collectively. First, all six judges were agreed that freedom of association must include the formal right to enter consensual arrangements with others to promote a set of common objectives. Freedom of association, on everyone's definition, included the constitutive right to bring a group or an association formally into legal existence. In addition, none of the judges doubted that section 2(d) must also guarantee the freedom of people to engage collectively in those activities which are recognized as the constitutional entitlement of the individual. If, for example, the Constitution guaranteed a worker the right to express herself as an individual, section 2(d) of the Charter would ensure she could communicate the same message with others who were associated with her in some group.

However, while everyone on the court recognized that these two particular freedoms must fall within the protection that section 2(d) of the Charter guarantees, no one was under any illusion that either of these entitlements would be of any assistance in the cases before them. None of the laws under review imposed any constraint on the workers' freedom to bring their unions into existence and no one thought that the freedom to strike and bargain collectively was like freedom of expression or religion which the Constitution explicitly guaranteed for each individual. In the result, while these two iterations of freedom of association do show that objective, determinate interpretations of very broad language can attract widespread support, they do nothing to justify the description of the Charter and judicial review as generating socially progressive results. To the contrary, the very narrow freedoms these definitions protect seem to add further support to the critics' position that the entrenchment of the Charter represents a highly individualistic and socially regressive turn in our theory and practice of government.

A third interpretation proposed by three members of the court (Dickson C.J.C., McIntyre and Wilson JJ.), initially seems even less promising than the other two. Unlike the first two entitlements, this definition of freedom of association, which would extend constitutional protection to

individuals acting collectively in ways it would be lawful for them to behave as individuals, did not attract the explicit support of every member of the court. Moreover, even those members of the court who embraced this interpretation did not view it as being broad enough to offer any protection to the freedom to strike and bargain collectively.

On closer examination however, this iteration of freedom of association turns out to be more promising than it first appears. It is true that this definition of freedom of association did not attract the explicit approval of Le Dain, Beetz and La Forest JJ. The whole thrust of their shockingly brief 600 word judgment is a response to and a rejection of a fourth possible interpretation of freedom of association advanced by Dickson C.J.C. and Wilson J. which would guarantee individuals the right to engage in all activities which were essential to give an association meaningful existence.³⁹ Le Dain J. and his colleagues argued that this fourth definition of section 2(d) was not necessary to give meaning to this section of the Charter and would ultimately entangle the court in an exercise of review on which it had no particular expertise and which is properly for the legislative branch of government to perform.

All three of these judges could hardly have been clearer in their rejection of the fourth definition of freedom of association that Dickson C.J.C. and Wilson J. endorsed. However, there is nothing to suggest that had Le Dain J. and his two colleagues considered the question they would have rejected this third definition as well; in fact there are strong reasons to think that had they focused their attention on this interpretation of section 2(d), they would have embraced it. As both McIntyre J. and Dickson C.J.C. explicitly recognized, this particular definition of freedom of association follows logically from the larger purposes which the Charter is understood to serve. Freedom of association, as McIntyre J. observed, rests on the simple idea that "attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others".⁴⁰ Citing the familiar words of Alexis de Tocqueville,⁴¹ both McIntyre J. and the two dissenting members of

³⁹ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 390-392 (S.C.R.), 239-240 (D.L.R.). This is a definition of freedom of association which has received some recognition in international law. See Dickson C.J.C., at pp. 352-359 (S.C.R.), 186-192 (D.L.R.).

⁴⁰ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 395 (S.C.R.), 218 (D.L.R.).

⁴¹ Alexis de Tocqueville, *Democracy in America* (P. Bradley (ed.), 1945), vol. 1, p. 196, cited in *Reference Re Alberta Public Service Employee Relations Act*, *ibid.*:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

the court saw that protecting the freedom of individuals to do in association that which they could lawfully do as individuals followed from this fundamental social dimension of the human condition.⁴² As the Chief Justice put it: "The purpose of the constitutional guarantee of freedom of association is. . . to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends."⁴³ Once it is accepted, as these judges did, that the attainment of individual goals is generally impossible without the aid and cooperation of others, it follows that freedom of association will guarantee individuals the opportunity to act collectively in ways they are permitted to act alone. If, as McIntyre J. held, freedom of association "serves the interest of the individual, strengthens the general social order and supports the healthy functioning of democratic government",⁴⁴ it is natural to interpret section 2(d) in this way. Not to define this constitutional entitlement to embrace these freedoms would be inconsistent with the very purposes the court has said the Charter was meant to serve.⁴⁵

B. *The Definition Applied*

So, on closer examination, there seems to be some basis for supporters to be optimistic that a definition of section 2(d) which protects the freedom of individuals to do collectively that which the law permits them to do as individuals would achieve widespread support, at least among the members of the Supreme Court who heard these cases. Moreover, it turns out that, notwithstanding the opinions of all three judges who accepted this interpretation, when one examines the reach of this particular definition of section 2(d) carefully, it does offer substantial protection to workers' freedom to strike and bargain collectively. None of the arguments raised by any of these judges supports their opinion that this definition of freedom of association is of no help to the workers in the instant cases.

In the view of the two dissenting members of the court, the Chief Justice and Wilson J., this interpretation of section 2(d) was not applicable because these workers were claiming the freedom to engage in activities, like striking and bargaining collectively, which no individual could do on his or her own. In their view, because this definition only pro-

⁴² P. Cavalluzzo, *Freedom of Association and the Right to Bargain Collectively*, in Weiler and Elliot, *op. cit.*, footnote 22, pp. 199-200, 209.

⁴³ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 365 (S.C.R.), 196-197 (D.L.R.).

⁴⁴ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 397 (S.C.R.), 219 (D.L.R.).

⁴⁵ See *The Queen v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200; see generally, Beatty, *op. cit.*, footnote 2, Part II.

tected those activities of an association which an individual could lawfully do on his own, no constitutional entitlement could be claimed. In the words of Dickson C.J.C., this was a case in which:⁴⁶

... no analogy involving individuals can be found for associational activity. . . This is precisely the situation in this case. There is no individual equivalent to a strike.

The reasons that McIntyre J. gave for rejecting the applicability of this third definition of freedom of association were quite different. He seemed to recognize that at least in a *behavioural* sense, a parallel can be drawn between workers who withdraw their labour collectively and those who do so individually. However, in his view, the analogy between a cessation of work by an individual employee and a strike by a number of workers was flawed in two other ways.⁴⁷ First, he said that the two activities were very different in the *purposes* they pursued. He said that while an individual employee who leaves his work has no intention to return, employees on strike always contemplate returning to work, and it is hoped on better terms. Secondly, McIntyre J. took the position that this third stipulated definition of freedom of association would have no application because it was not *lawful* for an individual, acting alone, to leave his or her employment. In his view, because an employee would have to pay damages if he or she breached his or her contract of employment, such behaviour could not be characterized as lawful and, accordingly, the stipulated definition could not apply. Workers could not claim that the laws they challenged prevented them from doing collectively what they lawfully could do on their own because, as the law of damages made plain, individuals cannot lawfully withdraw their services if and when they might please.

Following the dialogue along in this way makes the outcome of this initial, definitional stage of the debate hinge on the plausibility of the three reasons given by the different members of the court for their conclusion that, on the agreed definition, freedom of association had no application in the instant case. Are collective and individual refusals to work analogous as forms of behaviour or purposive activities and if they are is it correct to say that when an individual leaves work on her own it is unlawful? For supporters of judicial review to carry off this phase of the debate, it is necessary to show that none of these concerns is well founded either in fact or in law. It is necessary to show that there is, for the purpose of evaluating the laws under review, a relevant connection that can be drawn between workers who strike and workers who cease to work on their own which warrants and has received recognition in law.

⁴⁶ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 367 (S.C.R.), 198 (D.L.R.).

⁴⁷ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 410 (S.C.R.), 229-230 (D.L.R.).

What is most obviously problematic with the proposition that no analogy can be drawn between workers who withdraw their services collectively and those who leave work on their own is that it is factually wrong. As a matter of pure physical activity, the analogy cannot be denied. As a description of human behaviour, Dickson C.J.C. and Wilson J. cannot possibly sustain their assertion that there is no individual equivalent to the right to strike. In the hard reality of withholding personal services the physical act of the individual is the same whether it is done alone or in association with others. Regardless of the legal consequences we may attach to them,⁴⁸ as a matter of human behaviour, strikes are only quantitatively, not qualitatively different from the walk any individual may take on his own.

Behaviourally, the parallel is there and on that level the analogy certainly does hold. Furthermore the analogy cannot be resisted by claiming, as McIntyre J. does, that the *objectives* of each of these activities are radically different. It is both factually and conceptually wrong to say employees who withdraw their services on their own do not contemplate a return to work while employees who leave in association with others do. Historically the freedom of a person to quit his employment has long been recognized as a means for individual workers to resist "oppressive hours, pay, working conditions or treatment".⁴⁹ In Albert Hirschman's terms, "exit" (*viz* quitting) was, historically, the *only* means individual workers had to express their "voice".⁵⁰ Even today "holding out for a new contract" is an effective way for those in very strong bargaining positions, like those who excel in professional athletics or entertainment, to improve the conditions under which they will work. In the face of that kind of experience, the view that individuals who withhold their labour have no intention of returning to their jobs cannot be sustained.

Moreover, even if it were not contrary to the facts, the distinction McIntyre J. drew, between the purposes underlying individual and collective refusals to work, does not support his decision that strikes do not fall within this definition of section 2(d). On the interpretation of section 2(d) we are now considering, purpose is simply not relevant to the inquiry.⁵¹

⁴⁸ The fact that our law may attribute different consequences to these two ways workers can withdraw their services and calls them by different names (strikes and quits), does not alter the more fundamental behavioural parallel that can be drawn between them. Moreover, on close analysis, these legal differences can often be seen to be exaggerated as, for example, when an employer replaces the strikers and/or when a strike is lost.

⁴⁹ J. Pope, *Labour and the Constitution: From Abolition to De-Industrialization* (1987), 65 Texas L. Rev. 1071, at p. 1105; *Pollack v. Williams*, 322 U.S. 4, at p. 17 (1944).

⁵⁰ A. Hirschman, *Exit, Voice and Loyalty* (1970).

⁵¹ It might be noted that in many jurisdictions strikes are defined in a way that makes the purpose of the concerted activity irrelevant as well. See, for example, *Domglas*

Its focus is exclusively behavioural. On the stipulated definition, all that matters is whether an individual is being prevented from doing collectively that which the law allows her to do on her own. What is determinate is whether a worker, acting on her own, can lawfully withdraw her services and not the motivation behind the behaviour. By its express terms, this third definition of freedom of association is agnostic about a worker's objectives. Certainly there is nothing in the common law rule governing the freedom of workers to withhold their services which would make purposes or objectives relevant to the inquiry. The common law rule is clear. It will never order a person to perform specifically a contract of personal services.⁵² The common law rule respects a worker's right to leave work on her own whether she does so in order to pressure her employer to improve her wages and working conditions or in order to accept a better offer for her services. The common law rule is only concerned with the physical, not the mental dimension of this human behaviour. The motivational character of the worker's behaviour is simply not relevant to the purpose of the rule. The ultimate objective of the common law rule against enforced labour, like the third definition of freedom of association, is to protect a freedom of the individual to choose for herself rather than to favour one set of objectives over others.

So the first two reasons that the members of the court who considered the question gave to support their contention that this third definition of freedom of association does not reach the freedoms being claimed by the workers in these cases cannot be defended in either logic or fact. Nor, it turns out, is the third reason grounded any more firmly. First, it is simply wrong as a matter of law to say that the accepted definition does not apply because an individual cannot "lawfully" refuse to work in circumstances in which this legislation prohibits a strike. Certainly there can be no doubt that when a contract of employment comes to an end, individual employees are perfectly entitled to withhold their labour. When their contracts expire, workers are free to leave their employment whenever they please without incurring liability of any kind. By contrast, workers covered by the challenged laws could not strike and withdraw their services collectively even when their collective agreements had expired. When, for example, the collective agreements of the Alberta Union of Public Employees come to an end, the Alberta legislation would prevent their members from doing collectively and in association with others what as individuals they could lawfully do on their own. The truth of the matter is that laws of this kind do restrict workers' freedom to leave their work collectively when their agreements have expired even

Ltd., [1976] 2 Can. L.R.B.R. 394; *International Longshoremen's Association, Local 273 v. Maritime Employers Association*, [1979] 1 S.C.R. 120, (1979), 89 D.L.R. (3d) 289.

⁵² See, for example, I. Christie, *Employment Law in Canada* (1980), pp. 329 ff.

though if they acted individually it would be perfectly lawful for them to do so.

Moreover, even when an employee refuses to work during the term of her contract, it is an odd choice of words to say she is acting "unlawfully". Certainly the law does not *prohibit* an employee from withdrawing her services from a particular workplace as it once did.⁵³ As all of the standard textbooks and treatises on the common law of employment make clear, whatever the law might have proscribed at one time, the rule now is that every worker is perfectly entitled to leave her employment, even when it amounts to a "breach of contract", so long as she is prepared to guarantee the employer the means to hire someone else to perform the work she had agreed to do. Far from being forbidden by law, our legal rules of employment recognize the freedom of workers to stop working for anyone anytime they choose. Indeed, no matter how many times a worker withdraws her services the law will never require her to labour against her will. In the face of such toleration and permissiveness, leaving work certainly can not be considered unlawful in any strong—criminal or proscriptive—sense of the word.

Nor can it be successfully argued that the payment of damages reveals or establishes an element of wrongfulness in the behaviour of a person who leaves work during the term of her employment. From a utilitarian or communitarian perspective the payment of damages is certainly not evidence of any wrongdoing. To the contrary on these theories, as every first year law student is taught, damages are compensatory, not punitive, in nature. Contract damages are not intended to discourage or deter behaviour in the way the parallel rules of criminal law and tort are meant to do. In theory, contract damages are calculated, more or less, to allow for, indeed encourage, "efficient breach".⁵⁴ The standard economic analysis of breaches of contract, like withholding one's services in circumstances when one has promised to work, argues that the overall well-being in the community will be enhanced if individuals are allowed to terminate their contracts before the expiration of their terms and pay compensation for any losses for which they are responsible. The payment of damages, far from rendering such conduct unlawful, serves to ensure that individuals will only exercise this freedom when it is profitable for them to do so. Damages set the "exit price" for what our society recognizes to be both morally and rationally acceptable behaviour. When that condition obtains, on this now standard economic analy-

⁵³ Talking this way would have been more understandable prior to 1877 when a person could be imprisoned for up to a month for leaving his employment under the Master and Servant Act, S.C. 10 & 11 Vic., c.23.

⁵⁴ See A. Mitchell Polinsky, *An Introduction to Law and Economics* (1983), Chapter 5. See also A. Kronman, *Paternalism and the Law of Contracts* (1983), 92 Yale L.J. 763; R.A. Posner, *Economic Analysis of the Law* (2nd ed., 1977), pp. 88-92.

sis, the law should and largely does encourage individuals to bring the contractual relationship to an end so that their services can be put to uses that are valued more highly by the community. From the community's perspective therefore, to say that it is unlawful for individuals to refuse to work for a particular employer reflects a serious misunderstanding of both the purpose and effect of this body of law.

Even from the employer's perspective, when an employee "pays damages" for leaving work before the termination of the contract, nothing unlawful or wrongful has been done. No entitlement of the employer has been violated or infringed. Precisely because the law refuses to order the specific performance of an employment contract, the employer's only lawful entitlement is to be compensated with such sums as will allow it to secure a substitute set of services whenever an employee leaves work before the term of his contract expires. When an employee "pays damages" for leaving work during the term of the contract, he or she is just invoking one of the accepted options for providing the promised services under the terms of the agreement. In a legal regime which refuses to order specific performance of a promise to labour, paying "damages" is one of the permitted ways an employee can fulfill the obligations he or she has undertaken to discharge.

In the result, none of the reasons offered by any members of the court justify the conclusion that the freedom of workers to withhold their labour collectively does not fall within the core definition of freedom of association which we have been considering. In every sense of the term workers in our community can leave work lawfully whenever they wish when they do so on their own. The law unambiguously allows each of us to refrain from working for those who are not prepared to meet such terms and conditions as we may demand. The law never insists that a person must labour for another person against her will.

But the situation is very different when individuals, like the workers in the instant cases, make the same decision to withhold their labour in association with others. Frequently, and certainly in the circumstances which are governed by the rules under review, the law does make it "unlawful" for workers to stay off the job. Workers who withhold their services in association with others in circumstances which were covered by the laws under review could be compelled by law to work against their will. The law is clear that workers who withdraw their services collectively, when some agreement or statute says they will not or cannot, can be compelled to work in circumstances in which, as individuals acting alone, they could not.⁵⁵ Had the members of the Public Service

⁵⁵ See for example *Winnipeg Builders Exchange v. I.B.E.W.*, [1967] S.C.R. 628, (1967), 65 D.L.R. (2nd) 242; *International Longshoremen's Association, Local 273 v. Maritime Employer's Association*, *supra*, footnote 51; *Tomko v. Nova Scotia Labour Relations Board*, [1977] 1 S.C.R. 112, (1977), 69 D.L.R. (3rd) 250.

Alliance, for example, attempted to strike to secure wages or benefits beyond those that the legislation allowed, their employer could have enlisted the aid of the courts to order them back to work.

So the court, it turns out, got it backwards. As the first Harlan J. recognized almost one hundred years ago,⁵⁶ laws of this kind mean that when workers walk off the job collectively, and in association with their mates, they can be ordered to return and resume work in a way the law never has and never would require if one of them had left work on his own. Legislation which restricts the right to strike limits people's ability to withdraw their labour when they act collectively, in association and for purposes related to their work. The *freedom to leave work is*, because of laws of this kind, *more limited when a person acts in association with others than when she acts alone*. It is not that the workers in these cases were attempting to secure the freedom to do collectively what the law rendered unlawful if they tried to act in this way on their own. Just the opposite. They wanted the laws under review, which rendered their collective decision to withhold their services unlawful, to match the (common) law which permitted them to refuse work when they acted on their own.

IV. *The Sceptics Reply:* *Alternate Theories and Principles of Interpretation*

Now at this point of the debate many supporters of constitutional review might be tempted to claim success in having established that the constitutional rights of the workers covered by the laws under review had been compromised. Having shown that the reasons which were given for the conclusion that none of the laws in question constrained workers from doing collectively that which they were permitted to do as individuals have no foundation in law or in fact, many supporters would be eager to claim victory in this first stage of the debate. We have identified a definition of freedom of association to which no one on the court demurred and which, even if it is not exhaustive or absolute, turns out to be sufficiently broad and definite to provide some protection to workers' freedom to strike and bargain collectively. The language of this part of the Charter, at least, turns out not to be an empty vessel from which any interpretation can be drawn. If one embraces this interpretation, one can claim that there are fixed moorings which do ensure that the protection of the Charter reaches activities like strikes and collective bargaining which are so critical to ensuring that workers are able to participate meaningfully in the formulation of the rules according to which so much of their lives will be lived. With the definitional enterprise completed in this way, many supporters of judicial review can be expected to urge that the debate move on to the second stage and consider whether it is

⁵⁶ *Arthur v. Oakes*, 63 F. 310 (7th cr., 1894).

possible to say why some restrictions that are imposed on workers' freedom to associate can be justified in societies which profess to be free and democratic while other limitations and regulations cannot. Supporters will want to show the specific ways in which, and the extent to which, judicial review can insist on a measure of social justice in and from our institutions of government that has not always been respected in the past.

Even though the supporters of judicial review have been able to mount a powerful case in this first phase of constitutional review, it is still too early for them to say they have "silenced" the critics on this point.⁵⁷ While our analysis of the laws under review seems to confirm that constitutional interpretation is not as radically indeterminate as the sceptics would like to maintain, some critics may reply that the interpretation we are considering is seriously flawed in other ways. For example, some might concede that if one accepts that section 2(d) protects people doing collectively that which the law permits them to do on their own, it must logically include the workers' freedom to strike and bargain collectively, but still argue that the interpretation itself was fundamentally wrong. Critics of judicial review can still argue that even if LeDain J. did not expressly dissent from this interpretation of freedom of association, there are powerful reasons, two of which he actually referred to, which would support the conclusion that extending constitutional protection to workers' freedom to strike and bargain collectively is inconsistent with and derogates from the Charter in critical ways.

Two sorts of reasons can be, and have been, formulated to support the proposition that workers' right to strike and bargain collectively cannot possibly claim the protection of the Charter. For some, including LeDain J. there are serious interpretive problems. In this section we will address these concerns. In Part V, we will consider a different set of arguments of those who, again like Le Dain J., say a decision by the court that workers' freedom to bargain and protest collectively is protected by section 2(d) would generate institutional confusion, if not chaos, between the different branches of government. For either reason, or for both, it is to be expected that many critics as well as the majority in the court will resist the conclusion that a violation of the Charter has been made out.

From a review of the literature and the judgment of the court, the interpretative difficulties that might cause some to reject the view that the Charter offers any protection to workers' freedom to strike and bargain collectively are likely to be of three general kinds. For some, holding that workers' freedom to strike and bargain collectively are protected

⁵⁷ On the meaning of silence in liberal discourse, see B. Ackerman, *Social Justice in a Liberal State* (1980).

by section 2(d) of the Charter flies in the face of the intention of those who drafted the document who, it is said, deliberately chose not to make any reference to these activities in delineating the freedom which section 2(d) was expected to cover.⁵⁸ Others have said that it would be inconsistent with the general character of the Charter to extend it to what are essentially matters of economic well-being.⁵⁹ On this view, because the orientation of the Charter is thought to protect our traditional political and civil liberties and more broadly the democratic processes at large, it would stretch the Charter beyond its natural limits to interpret it so as to protect economic rights of the kind that were involved in this case. The third anomaly that is thought to afflict the interpretation which supporters of judicial review embrace is that groups would end up possessing greater constitutional rights and freedoms than any of their individual members might enjoy.⁶⁰ If all of the essential activities and objectives of an association warrant constitutional protection it is said, legislatures would be powerless to stop associations from engaging in activities which no individual was allowed to perform. It will be necessary for the supporters of judicial review to respond to each of these difficulties that are said to afflict the interpretation they propose.

A. *The Framers' Intent*

To those who say the decision not to make any specific reference to collective bargaining in this section of the Charter proves that it was never expected that the Charter would protect economic freedoms of this kind, supporters should have little difficulty constructing an effective response. Basing arguments on the collective intention of a body of lawmakers, like the drafters of a constitution, is generally recognized to be a notoriously problematic exercise at the best of time. Of dubious legitimacy as a source of principles for judicial review, using the intention of the drafters of the Charter as a reference for constitutional interpretation also suffers from the practical difficulty of being almost impossible to formulate.⁶¹

The instant case provides a powerful example of the practical difficulties one can face in making this type of argument. The claim that the drafters of the Charter did not intend to extend constitutional protection

⁵⁸ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 412-413 (S.C.R.), 231-232 (D.L.R.), per McIntyre J.

⁵⁹ Gall, in Weiler and Elliot, *op. cit.*, footnote 22; J. Weiler, *The Regulation of Strikes and Picketing under the Charter*, in Weiler and Elliot, *ibid.*; *Reference Re Public Service Employee Regulations Act*, *supra*, footnote 24, at pp. 413 (S.C.R.), 232 (D.L.R.), per McIntyre J.

⁶⁰ Gall, *ibid.*; *Reference Re Public Service Employees Relations Act*, *supra*, footnote 24, at pp. 404-405 (S.C.R.), 225 (D.L.R.), per McIntyre J.

⁶¹ R. Dworkin, *Law's Empire* (1986), Chapter 9. See also Monahan, *loc. cit.*, footnote 5, at p. 115 *ff.*

to the freedom of workers to engage in collective bargaining is flawed at every step of the way. The fact that they chose not to make specific references to workers' freedom to engage in collective bargaining simply does not support the conclusion that they intended that these activities would enjoy no protection at all. It is equally possible, in the absence of evidence to the contrary, to infer that the intention of the drafters was exactly the opposite. No reference was made to collective bargaining because the drafters assumed that it would already be covered by the broader, generic guarantee of freedom of association that section 2(d) provided. Indeed what evidence we have on this question strongly suggests that it was in fact what the drafters intended.

From the proceedings leading up to the entrenchment of freedom of association in the Charter, it appears that the reason for not making specific reference to workers' freedom to bargain collectively was the fear that its specific recognition might be interpreted by the courts to diminish the associational rights of non-labour groups.⁶² On the belief that freedom of association was already broad enough to cover workers' freedom to bargain collectively, there was nothing to be gained by taking that risk.

Moreover the absence of any specific reference to collective bargaining was in keeping with the generality of language which is employed throughout the Charter. All of the rights and freedoms that were entrenched in sections 2, 7 and 15 are written in very broad terms. The particular freedoms and entitlements that these guarantees protected were to be worked out by the courts on a case by case basis. In the same way it was left to the courts to decide whether picketing, burlesque dancing, or commercial advertising fall within the Charter's guarantee of freedom of expression, so it would be expected that the drafters would leave the parallel refinement of the concept of freedom of association to the courts as well. This structure is fundamental to the operation of the Charter as a constitutional document designed to maintain its vitality over time. The Charter's failure to enumerate specific activities reflects the fact that as social, political and economic conditions evolve, the degree to which particular activities further Charter values will change and, consequently, so will their claim to constitutional protection.

In addition to the empirical evidence then, the whole structure and method of constitutional review strongly refutes the suggestion that the decision not to make any specific reference to collective bargaining in the Charter manifested an intention on the part of the drafters to deny it the protection the Charter provides. Moreover, even if intention is a legitimate source of criteria against which the Charter should be inter-

⁶² See the remarks of R. Kaplan, Acting Minister of Justice, in Minutes of Proceedings and Evidence of the Special Committee of the Senate and House of Commons on the Constitution of Canada, Issue #43, pp. 68-79, Jan. 22, 1981.

preted, both the statements of the drafters and the whole structure of the Charter strongly suggest that workers' freedom to bargain collectively (and therefore to strike as well⁶³) was protected by the guarantee which section 2(d) provides.

B. *Strikes and Collective Bargaining are Economic Rights*

The second difficulty that different members of the court and various commentators have identified with an interpretation which would extend the protection of the constitution to workers' freedom to strike and bargain collectively relates to the general structure and overall character of the Charter. The argument is that the Charter is concerned with fundamental rights and freedoms which are quite different from those being claimed by the workers in the cases under review. The Charter, it is said, is concerned with our traditional, long standing, political and civil liberties and more generally with the institutions and processes of democracy. By contrast the freedoms claimed in these cases are said to be concerned merely with matters of economic well-being.⁶⁴ The freedoms to bargain and protest collectively are described as entitlements which are of very recent origin, creations of the legislature and therefore always the subject of detailed regulation by the lawmakers who created them.⁶⁵

Like the argument based on the intent of the framers, this second challenge to the interpretation advanced by supporters of judicial review is seriously flawed. It relies on a description of collective bargaining

⁶³ The fact that in the discussions about whether specific mention should be made of collective bargaining in s. 2(d) everyone seemed to agree that no reference should be made to the right to strike cannot support the inference that the latter freedom was intended to fall outside the protection of the Charter, as McIntyre J. concludes in his judgment. See *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 412-413 (S.C.R.), 231-232 (D.L.R.). It is widely accepted that strikes are an integral feature of the Canadian system of collective bargaining and the two issues must be considered as one. Indeed, the protection of collective bargaining is the logically prior issue. See J. Weiler, *The Regulation of Strikes and Picketing under the Charter*, in Weiler and Elliot, *op. cit.*, footnote 22, p. 221. Once it is acknowledged that the system of collective bargaining in place throughout Canada is predicated, by and large, on the ability of workers to counter the bargaining strength of employers through the threat and use of economic sanctions in the form of strike action, the two issues reduce to one. Canadian Industrial Relations, *The Report of the Task Force on Labour Relations* (H.D. Woods, Chairman) (1968), pp. 129, 175-176. Since strike action is integral to effective collective bargaining, any constitutional protection afforded to the latter must necessarily be cast broadly enough to encompass the former.

⁶⁴ Gall, in Weiler and Elliot, *op. cit.*, footnote 22; Weiler, in Weiler and Elliot, *ibid.*; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 413 (S.C.R.), 232 (D.L.R.), per McIntyre J.

⁶⁵ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 412-415 (S.C.R.), 231-234 (D.L.R.), per McIntyre J., pp. 391-392 (S.C.R.), 239-240 (D.L.R.), per Le Dain J.

and an interpretation of the Charter which are far too narrow and shallow to capture the essential meaning of either. Collective bargaining is not just a recent creation of the legislative branch concerned primarily with mundane matters of material well-being. Historically, as Paul Cavalluzzo has pointed out, the freedoms claimed by workers in these cases are amongst the oldest liberties in our tradition of liberal democratic social relations.⁶⁶ The common law rule rendering unlawful *any* attempt to force people to work against their will is one of the oldest and most basic freedoms in our legal tradition. More importantly these freedoms are, today, as basic to the liberty of the worker as any of the other enumerated freedoms such as religion or thought or speech. As advocates of collective bargaining repeatedly stress, this process of setting the rules and conditions under which each person will work is really our method of industrial democracy; of workers' self government.⁶⁷ Collective bargaining is not just about haggling in the (labour) market.⁶⁸ As its most committed supporters repeatedly remind us, it is a process of making law in the workplace in which workers are expected to have a meaningful opportunity to participate in the formulation of the rules and conditions under which they will subsequently work.⁶⁹ To describe the freedom to bargain collectively as concerned exclusively with matters of economic well-being is, as any reading of a standard collective agreement will show, factually wrong. Much more fundamental is the opportunity it provides, like every other right and freedom the Charter protects, for individuals to be able to participate and be involved as much as possible in making those decisions which control very fundamentally the ways in which they will lead their lives.

Nor is the fundamental nature of the freedom to bargain collectively weakened by the fact that, in modern times at least, it has been subject to extensive social control.⁷⁰ As the Chief Justice was at pains to explain, it misunderstands the whole purpose of judicial review to define a constitutional guarantee in the very terms the legislature has used. Constitutional review is meant to evaluate, not assume, the validity of the lines the legislature has drawn.⁷¹

⁶⁶ Cavalluzzo, in Weiler and Elliot, *op. cit.*, footnote 22, p. 207.

⁶⁷ Canadian Industrial Relations, *op. cit.*, footnote 63, p. 96; P. Weiler, *Reconciliable Differences: New Directions in Canadian Labour Law* (1980), pp. 31-33.

⁶⁸ *Cf.*, *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 412 (S.C.R.), 231 (D.L.R.), per McIntyre J.

⁶⁹ Dickson C.J.C. refers to this literature in *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 367-370 (S.C.R.), 198-201 (D.L.R.).

⁷⁰ *Cf.*, *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 414-416 (S.C.R.), 232-234 (D.L.R.), per McIntyre J.

⁷¹ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 360-361 (S.C.R.), 193 (D.L.R.), per Dickson C.J.C.

Understood as providing a means by which workers can maximize the control they are able to maintain over their lives, the freedom to engage in collective bargaining is analogous to and just as fundamental as the other freedoms such as thought and speech which the Charter guarantees. Enhancing the autonomy of workers as a class, collective bargaining is precisely the kind of freedom which the Charter protects. Like all of the other freedoms section 2 contains, collective bargaining furthers the deepest values of individual autonomy on which the Charter rests. Even for those who believe that the ultimate purpose of the Charter is reinforcing the representativeness, *viz* the democratic quality, of our political processes, the freedom to bargain collectively should fit comfortably with the other entitlements the Constitution protects. The civilizing and participatory experiences that collective bargaining has given to workers are benefits of this model of industrial self government which have long been acclaimed.⁷² Laws, like those under review, which limit the opportunity of workers to participate in the rule making processes at the workplace ultimately weaken the representativeness and fairness of the larger political process which governs the wider communities in which we live.

We can imagine that for some critics the connection between the freedom to engage in collective bargaining and the democratic quality of our political process is much too tenuous to count. Some may be tempted to argue that the Charter is only concerned with the proper functioning of the processes and institutions of democratic politics rather than with each individual's personal inclination or capacity to participate in the system as such. Such a process based theory of judicial review has been widely condemned in the United States where it has recently been revived⁷³ and it seems even more out of place in the context of our Charter of Rights and Freedoms. The argument that the structure and purpose of our Charter is limited to protecting our democratic institutions and processes of government is logically flawed and inconsistent with the specific language of the text. Democratic systems of government are not ends in themselves. Rather they are, like collective bargaining, means by which each individual can maximize the amount of control he or she is able to maintain over the development of his or her life, consistent with recognizing an equal entitlement for everyone else. Equality of liberty, of personal self government, not just democratic structures of state, is the deep value on which the Charter and our whole system of constitutional government is based.⁷⁴

⁷² Weiler, *op. cit.*, footnote 67; C. Pateman, *Participation and Democratic Theory* (1970).

⁷³ See, for example, P. Brest, *The Fundamental Rights Controversy* (1981), 90 Yale L.J. 1063; L. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories* (1980), 89 Yale L.J. 1063.

⁷⁴ Beatty, *op. cit.*, footnote 2, Part II. T. Nagel has made the same point more

Interpreting the Charter as being limited to protecting the processes and institutions of our political system also fails to account for important rights and freedoms the Charter guarantees. The protection that the Charter extends to denominational schools, language rights, legal rights, mobility rights and the freedom of each person to follow his or her religion of choice makes it plain that reading the Charter to protect only the representativeness of our formal processes of democratic politics is an interpretation that its language cannot reasonably bear.⁷⁵ Moreover, in addition to failing to account for these fundamental rights and freedoms, such an interpretation would result in other entitlements being defined in a very arid and contrived way. Freedom of expression, for example, could not reach economic or commercial speech, a proposition which the Supreme Court of Canada has already rejected in its earlier ruling that workers' freedom to picket and boycott was a protected form of expression within the meaning of section 2(b).⁷⁶ Similarly the guarantee that is set out in section 15 that lawmakers will respect each person's equal entitlement to the protection and benefit of law would be constrained to secure equal participation in the processes of politics, an interpretation which, given the enumerated grounds of discrimination, seems totally implausible.

C. Strikes and Collective Bargaining are Group Rights

The third interpretative difficulty that some think is fatal to the claim that strikes and collective bargaining are protected by section 2(d) is that it seems to imply that groups could claim the protection of rights which no individual could enjoy.⁷⁷ The argument is that if strikes and collective bargaining were entitled to whatever protection the Charter provides, so would *any* activity which could be said to be essential to the lawful goals that *any* association is formed to promote. The hypothetical horrible which is raised to support this proposition is the prospect of a legislature being unable to pass a law prohibiting the private ownership of guns, because ownership of guns is essential to the objectives which gun clubs are formed to pursue. The example is meant to establish that the logical result of interpreting the Charter to protect strikes and collective bargaining is that associations will have more constitutional entitlements than any individual can enjoy—a result which the

broadly. He writes: "The moral equality of equal liberty is just as fundamental as the moral equality of equal representation"; The Supreme Court and Political Philosophy (1981), 56 N.Y.U. L. Rev. 519, at p. 521.

⁷⁵ This is a point made by Dickson C.J.C. in *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 364-365 (S.C.R.), 196 (D.L.R.).

⁷⁶ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, *supra*, footnote 26.

⁷⁷ Gall, in Weiler and Elliot, *op. cit.*, footnote 22; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 404-405 (S.C.R.), 225 (D.L.R.), per McIntyre J.

critics contend is conceptually absurd and quite at odds with the whole focus and character of the Charter which gives the individual, not the group, primacy of place. On this analysis, extending constitutional protection to collective bargaining would seriously constrain the law-making powers of the legislature because of the all-encompassing protection that every group will be able to claim under section 2(d). Like the second difficulty which we just considered, the argument here is that interpreting section 2(d) to cover strikes and collective bargaining would lead to results which are inconsistent with the whole nature and character of the Charter and indeed with the normal operation of our system of government.

In formulating a response to this line of analysis, supporters of judicial review have three possible strategies they can follow. First, it can be argued that this objection is really only aimed at the fourth interpretation of section 2(d), noted briefly in Part III above, which reads freedom of association as guaranteeing individuals the right to engage in activities necessary to give meaningful existence to groups. As noted, virtually everything in Le Dain's J.'s judgment was directed at refuting this interpretation and it is clearly not the definition of section 2(d) which we are defending. On the third interpretation we are considering, which protects the right of individuals to do collectively what they can do lawfully individually, the gun club scenario actually has no bite. Legal restrictions can always be imposed on the right of individuals to own guns and no special constitutional status will be gained by virtue of association in the form of gun clubs. The reasons for dismissing the gun club analogy, however, extend beyond this definitional exercise.

As a second response, some supporters of judicial review will want flatly to reject the analogy between laws which restrict the ownership of guns and those which limit workers' freedom to strike and bargain collectively. They will say the laws considered in the cases under review clearly impose limits on the kinds of freedoms that the Charter generally protects in a way gun control laws do not. As we have just seen, collective bargaining, understood as an "intrinsically valuable experience in self-government",⁷⁸ is an activity which promotes values which lie at the core of the Charter. In every society which would be considered democratic and free, systems of collective labour relations have become among the most important ways workers can be involved in the formulation of a whole set of rules which regulate some of the most important and some of the most minute details of their lives. For its supporters and adherents collective bargaining, like speech or thought or assembly, is an activity which is integral to the deeper moral value of autonomy and personal self government which underlies our whole theory and tradition of liberal democratic government.⁷⁹

⁷⁸ Weiler, *op. cit.*, footnote 67, p. 33.

⁷⁹ Weiler, *ibid.*; Cavalluzzo, in Weiler and Elliot, *op. cit.*, footnote 22, p. 199 ff.

Against this deeper understanding of what purposes the Charter is meant to serve, the example which is thought by some to counter this interpretation turns out to be no counter example at all. Laws which restrict the private ownership of guns are fundamentally different from the laws under review in one very important respect. Even if laws of this kind would limit the freedom of those who would be inclined to join gun clubs if ownership of weapons were allowed, it is difficult to see how a violation of a freedom protected by the constitution could be established. Ownership of guns is not, like collective bargaining, concerned with the kind of freedom which the Charter protects. Ownership of guns does not serve any of the purposes or values the Charter is taken to serve in the way collective bargaining does. In a society which claims to have replaced the rule of force with the rule of law, ownership of guns can no longer, if it ever could, be held out as legitimate means by which individuals can maintain control over their lives. Bargaining, not brawling, is the kind of authority the Charter endeavours to protect.⁸⁰

Finally, even if one rejected this distinction, it does not follow that extending constitutional protection to strikes and collective bargaining will actually restrict a legislature's authority to pass gun control laws. On the contrary, on the principles of constitutional review the Supreme Court has consistently applied, it seems certain the Charter does not recognize an absolute right to bear arms either as an individual or in association with others. Even if ownership of guns could be characterized, like collective bargaining, as an important instrument to promote personal autonomy and human dignity, there can be no doubt that the legislature would be able to *justify* a gun control law under the principles of review that are applied under section 1. Gun control laws are entirely consistent with, if not a precondition for, a society which is committed constitutionally to being both democratic and free. Whatever protection the Constitution may provide, workers' freedom to bargain and protest collectively is entirely independent of and unrelated to the restrictions a legislature may place on the ownership of guns.

So the gun club example actually shows that the protection of the Charter is neither absolute nor unlimited. The example demonstrates, as Peter Gall says, that the principal activities of each association are not *necessarily* protected under section 2(d) of the Charter.⁸¹ For the reasons

⁸⁰ For supporters who would endorse this analysis of the Charter, it would follow that the interpretation of s. 2(d) which we have been following is too broad. Adopting such a purposive interpretation of s. 2(d) would only protect individuals doing collectively those lawful activities which were closely related to the dignity and autonomy of the person, and not every activity an individual might lawfully perform on his or her own. Dickson C.J.C. seems to favour such an analysis in his judgment in *Reference Re Public Service Employee Relations Act, supra*, footnote 24, at pp. 367 (S.C.R.), 198 (D.L.R.).

⁸¹ Gall, in Weiler and Elliot, *op. cit.*, footnote 22, p. 247.

just described, the gun club example shows one important case where that is so. It is, however, a glaring *non sequitur* to conclude from this example, as the majority of the court does, that *no* activities which are essential to the objects of all associations are *ever* entitled to the protection the Charter provides. To the contrary when, as in the instant case, the activities are fundamental to the autonomy of large numbers of persons in our society, they are entitled to constitutional protection whether performed by an individual alone or in association with others.⁸²

V. Institutional Concerns: Relationships Between The Three Branches of Government

A. The Core Principles of Judicial Review

In the end then, none of the interpretative difficulties identified by the members of the court and other commentators threatens the definition of section 2(d) that we have been considering. Reading section 2(d) to embrace workers' rights to bargain and protest collectively is consistent with and indeed moves our country much closer to the structure of social relations that the Constitution now requires our lawmakers to respect. With all of the interpretative difficulties resolved, we can turn our attention to the institutional anomalies which are said to infect the supporters' case.

As we shift our focus to the institutional concerns which the critics have expressed over extending constitutional protection to workers' freedom to strike and bargain collectively, our analysis moves from the first to the second stage in what is recognized as the generally accepted methodology of constitutional adjudication. Once the definitional or interpretive issue is settled and a violation of the Charter found, the question confronting a court is whether the limitations which the challenged laws impose on a person's rights and freedoms "can be demonstrably justified in a free and democratic society".⁸³ As we noted at the outset of Part III, the success of the supporters' enterprise depends as much on meeting the critics' arguments and demonstrating that determinate answers can be found in this justificatory phase of Charter dialogue as it does on establishing discrete and generally accepted interpretations of the text.

⁸² On this analysis, the degree of protection that the Charter provides by guaranteeing a person's freedom of association would, like the guarantee of freedom of expression, vary with the nature of the activity involved. In the same way that some judges have suggested that political speech is deserving of more protection than burlesque dancing or commercial advertising, so it is to be expected that the associational activities of workers, designed to allow them to participate in the rule making processes at their workplaces, will warrant more protection than activities which are less essential to the autonomy of the person, like the ownership of guns.

⁸³ Charter, *supra*, footnote 1, s.1.

For many critics, as well as the majority of the court, it is institutionally unwise to ask the courts to specify what constitutes reasonable regulation of workers' freedom to bargain and protest collectively within a free and democratic society. Two defects are identified most often. First, the concern is expressed that if the Constitution is interpreted to provide some protection to workers' freedom to strike and bargain collectively, the courts will be dragged into an area of law and social policy which in modern times has been the domain of the legislative and executive branches of government and on which the courts have no comparative expertise.⁸⁴ Second, it is suggested that the effect of such a judgment would be the "constitutionalizing" of the existing models of collective bargaining in a way which would make future adaptation and amendment, which is so characteristic of and essential for this body of law, very difficult to achieve. The fear is that by a misallocation of our institutional resources of government the substantive integrity of our labour law could be threatened.⁸⁵

Both of the institutional arguments which challenge the validity of the supporters' interpretation reflect what only can be described as an appalling ignorance about the nature of constitutional review. In theory, and certainly in the practice of the Supreme Court to date, judicial review involves a very constrained and focused inquiry.⁸⁶ The function of the courts in evaluating which social policies can constitutionally be infused with the authority of law is actually very limited and it neither invades the law-making prerogatives of our legislators and their executives, nor crystallizes one model of collective labour relations in our labour codes for all time.

In the leading case of *The Queen v. Oakes*,⁸⁷ the court identified the general principles and framework of analysis it would follow in reviewing the validity (*viz* reasonableness) of laws which had been found to be constitutionally suspect in some respect. As summarized in the *Alberta Reference* case "the constitutive elements" of the court's review were of two kinds:⁸⁸

First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitution-

⁸⁴ Weiler, in Weiler and Elliot, *op. cit.*, footnote 22; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 416-419 (S.C.R.), 234-237 (D.L.R.), per McIntyre J., 391-392 (S.C.R.), 239-240 (D.L.R.), per Le Dain J.

⁸⁵ Gall, in Weiler and Elliot, *op. cit.*, footnote 22; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 414-415 (S.C.R.), 232-234 (D.L.R.), per McIntyre J.

⁸⁶ Beatty, *op. cit.*, footnote 1.

⁸⁷ *The Queen v. Oakes*, *supra*, footnote 45.

⁸⁸ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 373-374 (S.C.R.), 203 (D.L.R.).

ally guaranteed right: it must be related to social "concerns which are pressing and substantial in a free and democratic society". Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there must be a rational connection between the measures and the objectives they are to serve; b) the measures should impair as little as possible the right or freedom in question; and c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve. See *Oakes*, and authorities cited therein.

When the court restricts its evaluation to those four matters in the manner described, there can be no question of the third branch of government usurping the functions of the other two. There will be no immutable fixing of the rules of our labour law for all time. The reality is that judicial review measures the proportionality between the means the legislature has chosen to express its policies into law and the objectives which it hopes to achieve. In fact, as the cases under review attest, it is really the second principle of proportionality, that is the test of least drastic means, that is at the heart of judicial review. Under this test, the task of the court is not to second guess the judgment of the legislative or executive branch of governments. To the contrary, it is limited to asking whether there is an alternative rule or policy which could accomplish the objectives of the Government just as well as the one enacted into law but in a way which would compromise the rights and freedoms protected by the Charter less. If there is, if such an alternative policy is available, this principle of judicial review requires that it be chosen. If there is not, the law will have cleared the major hurdle of judicial review.

This description of the core function of judicial review is substantially borne out by the dissenting judgments written by the Chief Justice and Wilson J. Both of these judges, it will be recalled, found that, to slightly different degrees, the laws under review did limit the workers' freedom of association. Certainly on the standard applied by the Chief Justice, there is no basis for the claim that the courts' review of the constitutionality of various laws will entail a massive interference with the traditional policy-making role of the legislature. His inquiry was, with one small exception, focused exclusively on the means, the details, of the policies chosen by the legislatures. On the tests he applied, there was no second guessing of the objectives that the legislatures were pursuing or of their judgment that the social benefits promoted by these laws justified whatever constitutional infringements they entailed. In each of the cases under review, Dickson C.J.C. found that the concerns which had prompted the legislatures to "act" were sufficiently pressing and substantial to meet the first principle of review. In the *Alberta Reference*, he held the object of ensuring the uninterrupted provision of essential services was a perfectly constitutional objective for the government to have pursued.⁸⁹ Pro-

⁸⁹ *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 374-375 (S.C.R.), 204 (D.L.R.).

viding moral leadership to the community on income restraint⁹⁰ and the avoidance of economic harm to a particular sector of the community which was immediate and intensely focused⁹¹ were also recognized as valid purposes for a legislature to pursue in the other two cases under review. The only objective that the Chief Justice found did not meet this test was the Alberta legislature's professed ambition to immunize itself from the political pressure which public sector strikes might generate.⁹² And on this point the Chief Justice's concern was not that such an objective could never meet the "pressing and substantial" test, but rather that no evidence had been adduced that strikes by public servants would generate undue or adverse political pressure. The clear implication from the Chief Justice's reasoning is that if some activity could be shown to be detrimental to the integrity of our democratic processes, it would be perfectly proper for our legislators to immunize themselves from it. At least as the Chief Justice applied it, the test the court uses to identify which objectives a legislature can constitutionally pursue is highly deferential and not at all threatening to the traditional authority of legislatures to formulate law in this area of social relations.

Adopting such an attitude of judicial restraint when reviewing the purposes for which a legislature or its executive can legitimately infuse a piece of social policy with the authority of law is, for all of the reasons that the critics have highlighted, surely the correct posture for every court to take. As the critics properly point out, there is something quite undemocratic about an unelected group of officials, drawn from the wealthiest and most powerful segments of society, telling the elected representatives of the people that a problem which the latter perceive needs redressing is not sufficiently pressing or substantial to justify *any* exercise of their supreme prerogative of making law. In this respect, the dissenting judgment of Wilson J. in the *Saskatchewan Dairy and Produce Workers* case may be fairly criticized.⁹³ Her judgment, that avoiding the damage that could be done to the dairy industry was not so essential as to qualify under the test the Chief Justice articulated in the

⁹⁰ *Public Service Alliance of Canada v. Canada*, *supra*, footnote 24.

⁹¹ *Retail, Wholesale and Department Store Union v. Saskatchewan*, *supra*, footnote 24.

⁹² *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 378-380 (S.C.R.), 206-208 (D.L.R.).

⁹³ *Retail, Wholesale and Department Store Union v. Saskatchewan*, *supra*, footnote 24, at pp. 485-496 (S.C.R.), 294-302 (D.L.R.). Although Wilson J. does assert that preventing harm to a particular sector of the community is not an "objective of sufficient importance" to meet the standard set in earlier cases, it is possible to read her remarks as being limited to circumstances where, as in the case before her, there was not sufficient evidence to meet that test. On this reading, this portion of Wilson J.'s judgment would parallel the Chief Justice's questioning of the Alberta government's objectives in the Alberta reference and could not be regarded as a challenge to the sovereignty of Parliament.

Alberta Reference case, does directly challenge the validity of a judgment the legislature in Saskatchewan made. Her judgment does engage in the kind of second guessing the critics rightly decry. In the end, this part of her judgment is grounded in nothing more than her subjective opinion and belief that the interests of dairy farmers were not sufficiently pressing and substantial to justify the legislature enacting a law to protect them from the losses they were certain to suffer.

Apart from this one passage in Wilson J.'s judgment in the *Dairy Workers* case however, there is nothing in the theory or practice of constitutional review which gives any support to the claim that courts will interfere with or usurp the prerogatives of the legislature "to act". In defining objectives at least, courts seem quite willing to give the legislature a free hand. Indeed, in each of the cases under review every violation of the Charter that was identified by the two dissenting members of the court was, with one exception, grounded in the second proportionality principle of least drastic means. In the *Alberta Reference* case, Dickson C.J.C. and Wilson J. found the Public Service Employment Relations Act⁹⁴ violated this principle in two different ways. First the legislation was found to be defective because it was not drawn as narrowly as it could in defining the persons whose employment it regulated. Although Wilson J. and Dickson C.J.C. conceded that many of the employees who were covered by the legislation did supply services essential to the life and health of members of the community, they also found that the legislation applied to many other employees whom the government had failed to establish to be essential in that way. In the words of the court, denying all the employees who were covered by the legislation the freedom to strike was "too drastic a measure for achieving the object of protecting essential services".⁹⁵ Wilson J. and Dickson C.J.C. also held that the least drastic way the legislature could have achieved its declared purpose of ensuring the ongoing provision of essential services would have been to guarantee workers in these sectors access to an alternative system of compulsory arbitration which would cover all of the normal subjects usually contained in collective agreements applying to employees performing this kind of work.⁹⁶ The alternative was preferable because it would accomplish the legislature's objectives in a way which interfered much less with workers' freedom to associate. Compared to legislation which coupled the prohibition on the right to strike with a guarantee of a comprehensive system of compulsory arbitration, the Public Service Employee Relations Act⁹⁷ involved a substantial and

⁹⁴ *Supra*, footnote 28.

⁹⁵ *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 376 (S.C.R.), 205 (D.L.R.), per Dickson C.J.C.

⁹⁶ *Ibid.*, at pp. 380-385 (S.C.R.), 208-212 (D.L.R.).

⁹⁷ *Supra*, footnote 28.

unnecessary compromise of the constitutional rights of the workers involved. If the guarantee of essential services was the purpose that the strike prohibition was meant to serve, the least damaging way of accomplishing that objective was to guarantee an alternate opportunity of compulsory arbitration of the kind the Chief Justice and Wilson J. described.

In the *Public Service Alliance* decision, the constitutional defect the Chief Justice identified in the Public Sector Compensation Restraint Act⁹⁸ was also grounded in the second principle of proportionality where the court's focus is exclusively on the means the law maker has adopted to accomplish its objectives. In this case he found the legislation was overly broad, and not the least invasive policy available, because it limited the rights of workers to bargain collectively on non-compensatory matters as well as those which dealt directly with income and related monetary benefits. As the Chief Justice explained, limiting the workers' freedom to bargain collectively on such important non-compensatory matters as employee safety, management rights, grievance procedures, seniority and employee rights to engage in political activity, could not further the professed objects of the Act.⁹⁹ The reach of the prohibition was unnecessarily broad and therefore it was not the least drastic means Parliament might have adopted to provide the leadership role on income restraint that motivated its enactment of the Public Sector Compensation Restraint Act.

Finally, in the *Saskatchewan Dairy Workers'* case, the only constitutional defect that any member of the court was able to identify was once again predicated on the principle of least drastic means. In Wilson J.'s opinion, even if the legislation in that case could have been said to have been enacted for a purpose which was sufficiently substantial and pressing to warrant some initiative by the legislature, it was incumbent on the government to draft that restriction on the workers' freedom of association as narrowly as it could.¹⁰⁰ In her view, especially in light of the workers' apparent willingness, from the outset, to engage in only a limited and/or rotating strike, the government had failed to establish that a partial restriction rather than a complete prohibition was the least drastic way of minimizing the economic losses which the strike might cause.¹⁰¹ Designating, for example, a certain number of employees in an essential industry who must provide service at all times, which is the model in

⁹⁸ *Supra*, footnote 30.

⁹⁹ *Public Service Alliance of Canada v. Canada*, *supra*, footnote 24, at pp. 448 (S.C.R.), 265-266 (D.L.R.), per Dickson C.J.C.

¹⁰⁰ *Retail, Wholesale and Department Store Union v. Saskatchewan*, *supra*, footnote 24, at pp. 494-495 (S.C.R.), 301-302 (D.L.R.).

¹⁰¹ For a description of how this alternative was applied by the British Columbia Labour Relations Board in a strike of the Vancouver General Hospital in 1976, see Weiler, *op. cit.*, footnote 67, Chapter 7.

the federal public service, is quantitatively a less drastic restriction on the rights of workers than one which, as in the instant case, suspended the freedom of all workers in the industry.¹⁰²

In each of these examples then, the only constraint which Dickson C.J.C. and Wilson J. would have imposed on any of the legislatures was that they go about pursuing their purposes in a way which would minimize the limitation of the constitutional freedoms of those governed by the laws under review. Such judgments can hardly be described as substantial or serious invasions or usurpations of legislative sovereignty. They offer no support for the critics' claim that judicial review entails an inversion of constitutional roles. Applying a principle of review which is highly deferential to the purposes a legislature might validly pursue, they only required these legislatures to pursue their objectives in ways which would maximize the constitutional rights and freedoms of the people whose activities were regulated by the laws under review. Apart from Wilson J.'s questioning of how pressing and substantial the circumstances were which faced the Saskatchewan legislature, in only one other instance could it be said that a member of the court found a constitutional defect in any of the legislation under review by engaging in the kind of second guessing and institutional confusion that the critics rightly decry. In the *Public Service Alliance* case, Wilson J. held that the limitations on the workers' freedom to strike and bargain collectively were unconstitutional and could not be justified because they were not "carefully designed to achieve the objectives they were meant to accomplish".¹⁰³ In her view, because of the limited reach of the legislation, it could not reasonably be expected to have any direct effect on inflation at all. The means were not "proportional" to the ends the legislation was meant to accomplish because they were radically underinclusive.

¹⁰² It might be noted that a finding by the court that designating certain employees rather than prohibiting everyone from striking is a less drastic, and therefore constitutionally preferred policy the legislature could have adopted to accomplish its objectives, does *not* mean that this was the only policy which the constitution would permit. The principle of least drastic means does not, as too many assume, constitutionalize one labour policy for all purposes and for all time (see text *infra*, p.). If, for example, the Saskatchewan legislature had decided to provide essential services with military or police personnel there is nothing in the principle of least drastic means which would say they could not. Such a policy, like designating specific individuals, who must continue to provide the desired services, respects workers' freedom to withdraw their labour in a way the enacted law did not and so would also be constitutionally preferred. Because different purposes may be served by providing emergency services through designated employees rather than through the state's own security forces, the principle of least drastic means is not likely to have any application in a comparison between these two alternate policies. On the comparative advantages of these competing alternatives it is the legislatures, not the courts, which will have the most to say.

¹⁰³ *Public Service Alliance of Canada v. Canada*, *supra*, footnote 24, at pp. 458 (S.C.R.), 273 (D.L.R.), per Wilson J.

Underinclusiveness, however, is a very different characteristic than overinclusiveness, at least from the constitutional point of view. Whereas a judgment that a rule of law is drawn too broadly does not involve any questioning of the social objectives a legislature is pursuing,¹⁰⁴ underinclusiveness unavoidably does. Underinclusiveness, unless it is being used to question the *bona fides* of the legislature's will,¹⁰⁵ necessarily involves questioning the soundness of the policy that has been enacted into law. It involves second guessing the judgment of the legislature that the (marginal) benefits the legislation might possibly promote are sufficient to justify the limitations and restrictions on the constitutional freedoms of those they constrain. To pay attention to the critics' concern that there not be a confusion of roles between the different branches of government, the criteria of underinclusiveness should be used with the same caution which the evaluation of legislative purposes receives.

If, then, as the critics argue, we should look to our actual experience to evaluate the legitimacy of judicial review, the cases concerning the constitutional protection to which workers' freedom to strike and bargain collectively are entitled should allay their concern that the Charter will lead to a massive inversion of institutional roles. On the experience of these three cases nothing of the kind need occur. These cases show that, with the exception of the two slips that Wilson J. made, constitutional review involves a court applying principles which are, by and large, highly deferential to the law-making prerogatives of the legislature, and which focus almost exclusively on establishing whether alternate rules exist which can accomplish the declared objectives just as effectively as the one under review, but in a manner which compromises or invades constitutionally protected rights and freedoms less. From our analysis of these cases, co-operation, not confrontation, is the hallmark of proper, constitutional relations between the three branches of government. In the words of the Chief Justice: "The role of the judiciary. . . lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*."¹⁰⁶

B. *Second Guessing the Lawmaker: the Balancing Principle*

While the cases under review strongly support the thesis that the principle of least drastic means is at the core of judicial review, it would

¹⁰⁴ For a discussion of the counter arguments that weighing and balancing different costs associated with alternative policies is unavoidably entailed in arguments about overinclusiveness as well as underinclusiveness, see the text at pp., *infra*.

¹⁰⁵ *Public Service Alliance of Canada v. Canada*, *supra*, footnote 24, at pp. 446 (S.C.R.), 264 (D.L.R.), per Dickson C.J.C. See also J. Tussman and J. tenBroek, *The Equal Protection of the Laws* (1949), 37 Calif. L. Rev. 340.

¹⁰⁶ *Public Service Alliance of Canada v. Canada*, *ibid.*, at pp. 442 (S.C.R.), 261 (D.L.R.), per Dickson C.J.C.

be unwise and certainly premature to say that this principle exhausts the legitimate role that our third branch of government can play in the evaluation of whether some piece of social policy has been validly (*viz* constitutionally) transformed into law. The urge that tempted Wilson J. in the *Public Service Alliance* case to question the validity of a law which involved a very substantial denial of a very significant constitutional freedom for very large numbers of people, in order to secure a social benefit which seemed very tenuous and remote at best, cannot be denied. Nor should it necessarily always be resisted. In other fields the Supreme Court has identified circumstances in which the discrepancy between the violations of constitutional rights and freedoms and the social benefits some rule or policy is expected to achieve is too enormous to ignore.¹⁰⁷ There is no reason to think similar judgments are not equally possible in the field of workplace relations in the future. When the constitutional freedom which is being invaded is especially fundamental, (for example, the right to life or freedom from physical restraint) and substantially outweighs the social benefits which the legislation is expected to provide (for example, reducing administrative costs), it may well be appropriate for the court to pass its judgment on the moral integrity of the balance that the legislature has struck.¹⁰⁸

Certainly that would be true when the law under review was the creature of the judiciary itself. Assuming, contrary to the decision of the court, that the Charter does apply to law created by the courts,¹⁰⁹ in such a case balancing the social benefits against the constitutional costs does not raise the anti-democratic overtones or confusion of institutional roles which give the critics so much cause for concern. The institutional dilemma vanishes when the agency that is being "second guessed" is another court. In these circumstances reviewing the balance that a lower court has struck between the social benefits and constitutional defects a particular law entails is no different than any other appeal on a question of law.

¹⁰⁷ *Singh v. M.E.I.*, [1985] 1 S.C.R. 177, (1985), 17 D.L.R. (4th) 422; *Reference Re Section 94(2) Motor Vehicle Act*, [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

¹⁰⁸ Because s.33 of the Charter allows a legislature to override any of the rights and freedoms protected, *inter alia*, in s. 2, the court's role is ultimately a moral one, in which it acts as a social conscience or critic evaluating the constitutional integrity of each law that is challenged before it. The characterization of the court's role as social critic is borrowed from Michael Walzer, *Interpretation and Social Criticism* (1987). In Walzer's terms social criticism is an active and engaged rather than a detached exercise in which the critic elaborates on existing morality and turns it on the ruling class.

¹⁰⁹ Almost without exception the commentators have been critical of the court's decision that the Charter did not apply to law developed and applied exclusively by the courts. For a summary of these reviews, see Hutchinson and Petter, *loc. cit.*, footnote 10.

The law which was challenged in *Dolphin Delivery*,¹¹⁰ the other leading case dealing with workers' freedom to bargain and protest collectively, provides one illustration of how a court could go about measuring the proportionality between social benefits and constitutional costs. In this case the court was reviewing the (judge made) common law rule that prohibits one person from interfering with the contractual relations of another. Dolphin Delivery had sought an injunction to restrain the members of the Retail, Wholesale and Department Store Union from picketing its business. According to Dolphin Delivery the picketers' dispute was with their own employer, Purolator, and it (Dolphin Delivery) should be entitled to carry on its own business free from all interference of the picketers. The question that the court ultimately had to address was whether the social benefits such a common law was expected to achieve outweighed the infringement on the workers' constitutional freedom to express themselves in the manner they sought.

In this case had the court considered the question properly it could not rely on the principle of least drastic means to do all of the work. Only if the common law rule were defended on the ground that the purpose of the law was to limit conflict to the immediate parties to the dispute would the principle of least drastic means have some bite. If, as the court did, one says that limiting the scope of labour disputes was the objective this rule limiting picketing was meant to serve, then the principle of least drastic means would insist the common law could not limit the workers' freedom of expression in order to protect those businesses which had involved or "allied"¹¹¹ themselves with the employer with whom the workers had their dispute. If it is said that the purpose of the law is to confine labour disputes to the parties directly involved, a tort which prohibits all interference with contractual relations would be constitutionally flawed because it is overly broad. Such a law would limit the freedom of workers to protest against others in the community, like "allies" of their employer, who could not be said to be neutral to or unconcerned with the merits of the primary dispute.

The principle of least drastic means should not, however, have been determinative in this case because it can be said quite properly that the objectives that these common law rules are expected to promote go well beyond limiting labour disputes to those who are the immediate protagonists. Protecting the sanctity and stability of all contractual relations in the society at large are additional purposes which the common law rules regulating economic conflict can validly be said to promote. If, as any

¹¹⁰ *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, *supra*, footnote 26.

¹¹¹ Allies are generally considered to be those who aid the struck employer in resisting a strike. See S. Tacon, *Tort Liability in a Collective Bargaining Regime* (1980); D. Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388.

court might, it is said these are the real objectives that the economic torts are intended to secure, a rule which prohibits all communication which is directed to interfering with the sanctity of commercial relations would, by definition, be the least drastic rule available to realize those goals. In these circumstances, if a constitutional defect is to be found in a rule which prohibits all communication aimed at disrupting commercial and contractual relations, it must be found in the third proportionality principle, measuring the relation between the costs and benefits that such a rule entails. If this common law rule is constitutionally flawed it must be because the invasion of workers' constitutional freedoms is out of all proportion to the benefits it secures.

In any analysis under the third proportionality principle, as noted above, the court must balance the social benefits a law is expected to achieve against the compromises it tolerates of people's constitutional freedoms and rights. Reduced to its essentials, as the critics have been at pains to explain, the judgment exercised by a court when it reviews a law from the perspective of this principle of proportionality is one of balancing competing interests against one another. In the case under review, the freedom of Dolphin Delivery to do business with some other persons in the community (for example, Purolator or the customers of Purolator) free from the public comment and protest of workers who are involved in a labour dispute with that other person would have to be weighed against the freedom of the employees of Purolator to protest publicly the decision of Dolphin Delivery to continue to have commercial relations with their employer.

Although conceptually it may be said that the competing freedoms advanced by the workers (of Purolator) and the shareholders (of Dolphin Delivery) are indistinguishable and worthy of the equal respect of the law, in any given case the circumstances may be such that the balance tilts strongly one way or the other. In the same way that not all forms of expression are deserving of the same weight,¹¹² so picketing is a behaviour of infinite variations.

From the facts that appear in the reported judgments the exact nature of the relationship between Dolphin Delivery and Purolator, the company with whom the workers had their conflict, is not entirely clear. But it is easy to think of examples where clear imbalances will appear between the competing freedoms that are being addressed in cases like these. For example if, in the case under review, it could have been shown that Dolphin Delivery had not been engaged in any activity which could assist Purolator or its related companies, the claim of the workers to be free to express themselves in the form they proposed loses much of its

¹¹² See *supra*, footnote 83, and see generally F. Schauer, *Free Speech: A Philosophical Inquiry* (1982).

force and appeal. Say, to take an extreme example, that Dolphin Delivery had actually taken on the accounts which had traditionally used Purolator. Assume that Dolphin Delivery was doing business with many of the customers formerly serviced by the employees of Purolator. In these circumstances, the activities of Dolphin Delivery would actually strengthen the position of the workers in their dispute with Purolator. In the absence of any collusive agreement between the two companies, by servicing the customers of their employer, Dolphin Delivery's behaviour actually threatens Purolator with a permanent loss in its business. Acting in this way Dolphin Delivery actually put pressure on Purolator to settle the dispute with its workers.¹¹³ In these circumstances, if the employees of Purolator were allowed to picket Dolphin Delivery, constitutional protection would be extended to behaviour (picketing) which has as its objective the imposition of losses on another group of persons (sometimes, because of their legal relations, called shareholders) even though those others are doing nothing to harm them. There is an imbalance, an inconsistency, under a Charter of Rights committed to the ethical idea of equal liberty,¹¹⁴ in the claim of one group of persons for the constitutional freedom to inflict burdens on others who are doing no harm to them.

Of course the imbalance will not always be tilted that way. It is just as easy to think of circumstances in which the interests of the workers would weigh heavier in the balance. For example, if it had been the case that Dolphin Delivery had in fact "allied" itself with those with whom the workers had their dispute, a claim for injunctive relief would be as empty as the workers' petition, in the first example, to be allowed to inflict losses on persons who are completely neutral bystanders. Allies can not logically claim any greater protection from the law than those whose cause they have taken up. If, as it does, the law allows workers to picket those with whom they have a lawful conflict or dispute, it would be completely anomalous to deny them the same freedom to protest the behaviour of those who have allied themselves with their adversaries.¹¹⁵

In these two examples then, we can see how bright lines can be drawn even under the third proportionality principle which balances social benefits against constitutional freedoms. It is also worth noting that when one applies both the least drastic means and cost-benefit analysis the same distinction between allies and neutral third parties shows up.¹¹⁶ It

¹¹³ For a discussion of parallel cases, see *Re Hiram Walker and Sons* (1978), 2 Can. L.R.B.R. 334, at p. 339 (P.C. Weiler); Beatty, *loc. cit.*, footnote 111, at pp. 407-408.

¹¹⁴ Beatty, *op. cit.*, footnote 2.

¹¹⁵ Beatty, *loc. cit.*, footnote 111.

¹¹⁶ If the principles of constitutional review require law makers to distinguish the

is true that both of these are contrived examples and much more difficult balances may have to be judged. The circumstances giving rise to the lawsuit in Dolphin Delivery may actually have been an illustration of such a difficult case. At least from the reported facts it is not immediately clear whether Dolphin Delivery was (as the Supreme Court assumed) truly a neutral bystander in the dispute between Purolator and its workers, or whether it was acting in a way which facilitated the ability of Purolator to withstand the pressures the workers were trying to apply. However, just as we saw that the language of the Charter may be open to easier and more difficult interpretations, so the fact that some balances will be hard to gauge does not deny that there are others which can be made very easily.

VI. *Postscript*

In the end then, careful analysis of all of the judgments that have been written by the Supreme Court concerning the constitutional protection which workers' freedom to protest and bargain collectively enjoys should dispel any fear that judicial review will invade substantially the realm of politics and the sovereignty of the legislature. Constitutional adjudication does not set the courts adrift to fashion policy, in labour law or elsewhere, out of whole cloth.¹¹⁷ Only in very limited circumstances will the courts engage in the kind of cost/benefit balancing that distinguishes the political from the judicial processes. Properly conceived, law and politics represent a symbiotic relationship working towards a common vision of an ordered society.¹¹⁸

Our analysis of these cases should also dispel, once and for all, the parallel allegation that judicial review unavoidably involves a balancing function which is highly discretionary and indeterminate and which renders decision making by the courts no different from that of the legislatures. On our review of the legal rules which were being challenged in the strike and picketing cases, one has very clear evidence of the very sharp lines that principles like least drastic means and even cost/benefit are able to illuminate.

freedom claimed by those who are allied with one of the primary participants in a labour dispute from that claimed by those who are truly neutral third parties, enactments like s. 4.1 of the Industrial Relations Reform Act, S.B.C. 1987, c.24, amending the Labour Code of British Columbia, R.S.B.C. 1979, c.212, would also be equally vulnerable to a successful challenge in the courts.

¹¹⁷ This misconception is shared by critics and the members of the court alike. See Weiler, in Weiler and Elliot, *op. cit.*, footnote 22, p. 227; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 416-419 (S.C.R.), 234-237 (D.L.R.), per McIntyre J., 391-392 (S.C.R.), 239-240 (D.L.R.), per Le Dain J.

¹¹⁸ See, for example, B. Slattery, *A Theory of the Charter*, unpublished essay dated November 23, 1987 (Osgoode Hall Law School).

To the extent that these cases are representative of the courts' method of analysis we can see how, by focusing their attention on whether a challenged law pursues its objectives in a way which respects our constitutional commitments as much as one reasonably can, constitutional adjudication acquires an objectivity and determinacy that differentiates it from the processes of politics. The courts' record in these cases confirms earlier predictions¹¹⁹ that the judicial branch will show considerable deference to laws which pass the test of least drastic means. Only in isolated instances did anyone on the court show even the slightest inclination to engage in the cost/benefit analysis which is at the core of the legislative function.

In the final analysis, these cases also confirm our initial hypothesis as to the possibilities and plausibility of constitutional adjudication enhancing the quality of social justice in the lives of those who have not always been well treated by the lawmakers of our country. Contrary to the claims of those critics who conceive of "negative liberty" as a socially regressive idea,¹²⁰ these cases show that the Charter can protect people when those who are vested with legal authority treat them in an abusive and discriminatory way. Once one moves beyond the serious error of interpretation made by the majority of the court, the standard two-stage framework that everyone agrees distinguishes constitutional review once again generates socially progressive results. In the cases we have just reviewed we have seen that, properly executed, constitutional adjudication will identify very clear limits on the extent to which our lawmakers can interfere with workers' freedom to protest and bargain collectively. Contrary to the claims of the critics and the majority members on the court,¹²¹ even when it is balancing competing freedoms a court is capable of articulating definitive and objective answers which are socially progressive and supportive of those who are among the least advantaged among us.

At this point in the conversation, supporters of judicial review can be forgiven for wanting to claim victory in the debate. All of the doubts of the sceptics seem to have been addressed. Objective criteria and principles of interpretation are available in both the initial, interpretive and secondary, justificatory (balancing) stages of review which are capable of generating very determinate and socially progressive results. Two small matters remain to be addressed however before defenders of judicial review can claim to have silenced all of the sceptics' concerns. First, for some like Monahan, there will remain a nagging doubt that the objectiv-

¹¹⁹ Monahan, in Sharpe, *op. cit.*, footnote 15.

¹²⁰ Hutchinson and Petter, *loc. cit.*, footnote 10; Petter, *loc. cit.*, footnote 4; Monahan, *ibid.*

¹²¹ *Reference Re Public Service Employee Regulations Act*, *supra*, footnote 24, at pp. 414, 419 (S.C.R.), 232-233, 236-237 (D.L.R.), per McIntyre J.

ity which supporters claim for their analysis is "wholly illusory".¹²² Monahan's concern derives from an example, drawn from Ely, which he thinks illustrates the "political character" of judicial review even when it is limited to applying the principle of least drastic means.¹²³ The hypothetical situation posed by Monahan involves legislation which requires the installation of special brakes on all trucks except those carrying seafood. Monahan believes, following Ely, that supporters of judicial review will argue that the exception that is made for trucks carrying seafood would even fail a rational connection test because the purpose for which the trucks are used is manifestly irrelevant to considerations of safety, the apparent legislative concern. Against such a claim, Monahan then counters that such a finding in fact constitutes a misreading of legislative purpose and an implicit value judgment on the part of the courts regarding policy choice. In his view:¹²⁴

It is apparent that law had two purposes, rather than one. The first was to increase traffic safety by requiring most trucks to install new brakes. The second purpose was to ensure that these gains in traffic safety did not come at the expense of increasing the costs of truckers transporting seafood. . . . The claim of irrationality is really little more than a judgment that one of these purposes, the goal of preferring seafood truckers, is unacceptable. The court simply ignores the impugned purpose, and then concludes that the legislation does not further the goals which remain.

The argument is generalized as follows:¹²⁵

Laws are never passed without reasons. Those reasons may be complex and involve a trade-off between a number of competing goals, but the reasons always exist. The issue is never whether a law is rational or not but, rather, whether it has been passed for good reasons or for bad reasons. Accordingly, the conclusion that a law is irrational is not achieved by measuring the fit between a law and its real purpose; it is a product of evaluating the fit between the law and some contrived and restrictive set of judicial purposes.

In this discussion of the trucking example Monahan shows he does not fully appreciate that it is the principle of least drastic means rather than the principle of rationality which is central to the function of constitutional review. To see how this is so, let us change the example slightly to reflect the labour relations context in which we have been working. Think about a piece of collective bargaining legislation which stipulates that the protection and benefits it offers to workers at large are not to be made available to those who work in agriculture. Assume that exclusion is challenged and that the farmworkers can prevail in the first phase of constitutional review by showing that such an exclusion limits their freedom of association and/or violates their right to be treated equally as set out in section 15 of the Charter. The onus would then shift to the

¹²² Monahan, *loc. cit.*, footnote 5, at p. 108.

¹²³ Monahan, *ibid.*, at p. 112.

¹²⁴ Monahan, *ibid.*, at p. 113.

¹²⁵ Monahan, *ibid.*, at p. 114.

government to justify excluding agricultural workers from the benefits and protection of the Act. To discharge this burden government could, as it traditionally has, defend this enactment by claiming, just as in Monahan's example, that such a law has two distinct purposes. First, it would be said the legislation was enacted in order to promote collective bargaining and the well-being of the community as a whole and secondly, the specific exclusion was included in order to provide special assistance to the farm sector.¹²⁶

This example, which is drawn from our existing labour laws,¹²⁷ parallels the trucking example cited by Monahan in all relevant respects. With respect to such a law, Monahan could say, as he does in his trucking example, that the statutory exclusion of farmworkers from the benefits of the Act is rationally connected to the two purposes the legislature is trying to accomplish. There can be no doubt that denying farmworkers the right to bargain collectively would confer a clear financial benefit on employers in the agricultural sector¹²⁸ and if the government presented evidence to the court that this was one of the purposes underlying the legislation, on the analysis we have been following, it would not be proper for the court to ignore or reject it. In the same way that the dual purposes of safety and subsidies make the exemption of seafood trucks from the special brake law a perfectly rational policy for the legislature to pursue, so a decision to cut down the exclusion of agricultural workers from our collective bargaining laws on grounds of irrationality would simply be a mistake.

But as we have seen from our consideration of the dissenting judgments in the case under review, rationality is not the most important quality a law must possess to pass constitutional scrutiny. As the judgments of Dickson C.J.C. and Wilson J. make plain it is the second, not the first, proportionality principle enunciated in *Oakes*¹²⁹ which is at the core of judicial review. If the exclusion of farmworkers (or seafood carriers) is to be validated constitutionally the government would be obliged to show not just that this law was rationally connected to the objective of providing financial assistance to the farm sector but, more important, that the exclusion of farmworkers would accomplish this purpose in a way which would impinge on the constitutional rights and freedoms of

¹²⁶ Another reason sometimes given by legislators to justify their exclusion of farmworkers from their collective bargaining laws is a desire to protect the family farm. For a discussion of this rationale and what kind of laws it can justify, see Beatty, *op. cit.*, footnote 2, pp. 89-92.

¹²⁷ Beatty, *ibid.*

¹²⁸ Estimates of the extent to which unions have been able to raise the wages of their members (and costs of their employers) vary between eight and fifteen per cent. For a summary of these empirical studies, see M. Gunderson, *Labour Market Economics* (1980), p. 314 *ff.*

¹²⁹ *Supra*, footnote 45.

farmworkers as little as possible. It is this requirement, not rationality, which makes such a law so suspect constitutionally. Denying farmworkers the equal benefit and protection of our collective bargaining laws is constitutionally flawed precisely because there are obvious, alternative ways a legislature could have extended its support to this sector of the economy which would have shown more respect to the farmworkers' right to equal treatment and to their freedom to associate with one another. Direct financial subsidies are more reasonable policies to extend assistance to the farming community because they permit the government to realize its objectives in a way which does not compromise the constitutional freedoms of farmworkers to associate and bargain collectively. Indeed, on virtually every criterion of income assistance and social welfare policy, direct cash payments almost always dominate in-kind benefits. Direct financial subsidies are, in the jargon of the welfare economist, pareto superior to the indirect benefits which would be provided by denying farmworkers the protection of our collective bargaining laws.¹³⁰ Direct financial subsidies would allow government to realize its objectives of supporting the agricultural community more effectively than the existing law and it would do so in a way which shows more respect for the constitutional freedoms of workers to associate and bargain collectively.

In the result, in this example, which is on all fours with the hypothetical on which Monahan relies, we can see once again how determinate and progressive outcomes can be generated by a principled process of decision making which does not involve the court balancing or second guessing choices the legislature has made. Analyzed against the principle which measures the proportionality of the means to the objectives sought to be achieved, Monahan's example actually provides yet another illustration of our thesis that constitutional review can generate socially progressive results without having to usurp the method or function of the other two branches of government. In the circumstances Monahan hypothesizes, the courts could, by invoking the proportionality principle of least drastic means, identify alternate social policies which would accommodate all of the objectives a legislature may wish to realize in a way which maximizes our commitment to personal freedom and autonomy.

Having confirmed the objectivity of their analysis one further time, supporters of judicial review can finally turn their attention to the sceptics who worry about the policy implications of the constitutional analysis we have followed over the course of this article. For some, including those who formed the majority of the court in the freedom of association

¹³⁰ See M. Gunderson, *Economics of Poverty and Income Distribution* (1983), pp. 111-115; J. Tobin, *On Limiting the Domain of Inequality* (1970), 12 J.L.E. 263; L. Thurow, *Government Expenditures: Cash or In-Kind Aid*, in G. Dworkin, G. Bermant and P. Brown (eds.), *Markets and Morals* (1977).

cases, extending any constitutional protection to strikes and collective bargaining is not problematic so much as a matter of constitutional law as it is in the labour relations policies it entails. The concern is that even if supporters of judicial review are on firm ground as a matter of constitutional law, "constitutionalizing" our existing models of collective bargaining will make it very difficult for legislators to change and adapt this law to new circumstances as they arise.¹³¹

Properly understood, extending constitutional protection to picketing and collective bargaining in the manner we have suggested will not, of course, "constitutionalize" any one model for all time. Holding that the most traditional freedoms of the working classes are entitled to the protection of section 2(d) merely requires that governments justify limitations which they place on free collective bargaining; it does not, as the Chief Justice made clear, mandate the courts to impose one model across all of Canada.¹³² The principles of review which the court applies simply act as exclusionary principles, identifying laws which are unconstitutional but never insisting that there is only one model which can pass the test of constitutional review. If, as some worry,¹³³ in twenty years collective bargaining can no longer play a significant role in giving individual workers a measure of self-government in the context of the employment relationship, then it will lose much of its claim to constitutional protection. A recognition of its central role in Canadian society today in no way precludes the development of new institutional arrangements which, in providing alternative means of promoting this value, might not only displace collective bargaining as a practical institution but could also remove the basis of its claim to Charter protection—its essential contribution to furthering underlying Charter values.

So in the end, none of the arguments and fears of the critics withstand close analysis. It turns out that the critics should not take much encouragement from the judgments the Supreme Court authored in its review of various laws which limited workers' freedom to protest and bargain collectively. Properly analyzed, according to the principles which the court itself has said are the core of constitutional review, these fundamental and long standing ways by which workers have tried to maintain as much control as possible over their own destinies are entitled to all of the protection the Constitution provides. Rid of their mistakes, these cases support our thesis that the Charter and judicial review do offer an effective means of participation in the processes of government to those,

¹³¹ Gall, in Weiler and Elliot, *op. cit.*, footnote 22; Weiler, in Weiler and Elliot, *ibid.*; *Reference Re Public Service Employee Relations Act*, *supra*, footnote 24, at pp. 414-419 (S.C.R.), 232-237 (D.L.R.), per McIntyre J.

¹³² *Reference Re Public Service Employee Relations Act*, *ibid.*, at pp. 374 (S.C.R.), 203 (D.L.R.).

¹³³ Gall, in Weiler and Elliot, *op. cit.*, footnote 22.

like workers, who have traditionally not had much influence in either the back rooms or public fora of politics. In this the critics are quite wrong. Law is not politics, but neither is it something entirely separate and apart. Properly conceived, constitutional law has a civilizing effect on our political life. Entrenchment of the Charter and constitutional review marks a new era in the legislation, viz constitutionalization, of political behaviour.

We must not, however, be too hard on the critics. On first consideration, these cases do seem to offer strong support for their scepticism of constitutional adjudication. Certainly, if the court had adhered to its own principles of constitutional review the objective rules and determinative results would have been plain for everyone to see. In the end, some responsibility for the critics' failure to see how the Charter can promote social justice in the community lies with the court itself. Moreover, if the court continues to write judgments which cannot be grounded on the generally accepted principles of constitutional review, then critics could still prevail. Even if, in theory, the integrity of judicial review is secure, it is only the actual decision-making record of the court which can confirm its potential in practice. Certainly, in some of the most important judgments it has already delivered, it has shown itself capable of the task.¹³⁴ Even in the cases we have been considering, because only six members sat on the bench, the composition of the present court is such that if the judges have the courage to acknowledge the serious mistakes that they made, they could correct the critics' misconceptions about the integrity and regressivity of judicial review overnight.¹³⁵

¹³⁴ See, for example, *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321; *The Queen v. Oakes*, *supra*, footnote 45; *Reference Re Section 94(2) Motor Vehicle Act*, *supra*, footnote 107.

¹³⁵ The three members of the present court, who did not sit on the freedom of association cases, are Lamer, L'Heureux-Dubé and Sopinka JJ. If, as we have argued they should, these three judges embraced those parts of the analysis of Dickson C.J.C. and Wilson J., which we have highlighted in the text, these cases could be reversed immediately.