Overbreadth's Overbreadth — The Case for Overturning Overbreadth as a Principle of Fundamental Justice

Sterling Mancuso*

I. Introduction

Over the past decade, the principle of fundamental justice against overbroad laws has experienced something of a renaissance at the Supreme Court of Canada ("Supreme Court" or "SCC"). Starting in 2013 with *Canada v. Bedford*, the SCC has struck down laws respecting prostitution,[1] euthanasia,[2] irregular migration,[3] sentencing credit for pre-trial detention,[4] and mandatory, lifetime sex offender registration[5] for violating the overbreadth principle. Lower courts have also declared the definition of "cyber bullying",[6] involuntary committal orders[7] and highway speed regulations[8] to be overbroad. The British Columbia Court of Appeal has even suggested that the criminalization of child pornography may be unconstitutional in its overbreadth.[9] These varied and significant examples demonstrate that "overbreadth" has achieved a prominent role in Canadian constitutional law and is now routinely invoked to challenge laws with significant impacts on Canadian society.

Laws violate the overbreadth principle whenever they affect an individual's life, liberty, or security of the person more than necessary to achieve that law's purpose.[10] Remarkably, and despite overbreadth's growing importance, the Supreme Court has never justified *why* this doctrine constitutes a principle of fundamental

---

* Graduate of the University of Toronto Faculty of Law in spring 2023. Winner of the 2023 Runnymede Society Fellowship contest, for which this article is being published.

1 *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

2 *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.).

3 *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59 (S.C.C.).

4 *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14 (S.C.C.).

5 *R. v. Ndhlovu*, [2022] S.C.J. No. 38, 2022 SCC 38 (S.C.C.).

6 *Crouch v. Snell*, [2015] N.S.J. No. 536, 2015 NSSC 340 (N.S.S.C.).

7 *H. (J.) v. Alberta (Minister of Justice and Solicitor General)*, [2020] A.J. No. 948, 2020 ABCA 317 (Alta. C.A.).

8 *R. v. Michaud*, [2015] O.J. No. 4540, 2015 ONCA 585 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 450 (S.C.C.).

9 *R. v. B. (M.)*, [2016] B.C.J. No. 2511, 2016 BCCA 476 at paras. 72-74 (B.C.C.A.).

10 *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 112-113 (S.C.C.).

justice. Indeed, the SCC has never subjected overbreadth to the governing test for identifying the principles of fundamental justice.[11] The first SCC decision ever to identify overbreadth as a doctrine within section 7 of the *Canadian Charter of Rights and Freedoms*[12] — *R. v. Heywood* — rested this conclusion on a handful of prior precedents.[13] However, a closer examination of these precedents reveals that none support overbreadth as a principle of fundamental justice, and that one expressly denies the existence of a Canadian doctrine of overbreadth. Accordingly, overbreadth rests on a jurisprudential house of cards, and is ripe for re-examination from first principles.

In this article, I proceed as follows: first, I summarize overbreadth's origins and meaning; second, I demonstrate that the Supreme Court has never adequately justified why this rule constitutes a principle of fundamental justice; third, I argue that overbreadth fails all the leading approaches to identifying the principles of fundamental justice (*i.e.*, historical, empirical and normative); and lastly, I posit that *stare decisis* does not require continued adherence to the precedents on overbreadth. I conclude that the Supreme Court should overturn *Heywood* and its progeny, and remove overbreadth as a principle of fundamental justice.

II. THE ORIGINS AND MEANING OF OVERBREADTH

Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In *Reference re B.C. Motor Vehicle Act*, the Supreme Court outlined a two-step analysis for whether a law violates section 7: first, a claimant must prove that the law infringes upon an individual's life, liberty, or security of the person; and second, the claimant must demonstrate that the law violates a principle of fundamental justice. These principles are both procedural and substantive, and are "to be found in the basic tenets of our legal system".[14] Once a claimant proves that a law violates section 7, a declaration of invalidity almost invariably follows — to this day, the SCC has never found a violation of section 7

---

[11] See generally *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 at para. 113 (S.C.C.); *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 128 (S.C.C.).

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

[13] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

[14] *Reference re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at 511-513 (S.C.C.). The Supreme Court has since held that a mere risk of infringing upon life, liberty, and security of the person suffices to engage s. 7, and that the impugned law need not be the sole, or even the dominant cause of the infringement or risk thereof to attract scrutiny for compliance with the principles of fundamental justice: see generally *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 17, 2023 SCC 17 at para. 56 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 74-78 (S.C.C.). This adds to the sweeping scope of s. 7 and thus the impact of the principles of fundamental justice.

to be justified under section 1 of the Charter.[15]

A broad variety of laws engage section 7 of the Charter, since a large proportion of state action interferes with life, liberty, or security of the person. As the Supreme Court put it in *Carter*, the state interferes with these interests "all the time".[16] For starters, every criminal offence which contemplates imprisonment engages liberty, and so must comply with the principles of fundamental justice.[17] Further, courts have found that diverse policies, ranging from a single-payer health care system to the removal of children from parental custody, engage security of the person.[18] Given this wide range of laws that engage section 7, and given that all such laws must comply with the principles of fundamental justice, the content of those principles can significantly constrain the state's power to legislate.

The Supreme Court first invoked overbreadth as a principle of fundamental justice in 1994 with *Heywood*. At the time, the *Criminal Code*[19] criminalized convicted sex offenders from "loitering" near certain public places. Justice Cory, writing for a majority, held that this offence violated a principle of fundamental justice against overbroad laws, which requires that laws not use "means which are broader than necessary to accomplish [that law's] objective".[20] Therefore, any law that engages life, liberty, or security of the person must have a tight fit between its purpose, and the means used to achieve that purpose. Consequently, Cory J. held the loitering offence to be impermissibly overbroad, for requiring more people than necessary to stay away from more places than necessary for a longer time than necessary to achieve its purpose of safeguarding children.

Importantly, Cory J. invalidated the loitering offence not for overbreadth with respect to Mr. Heywood, but rather because it was overbroad with respect to other

---

[15] See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2019) at 4-5; but see *R. v. Michaud*, [2015] O.J. No. 4540, 2015 ONCA 585 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 450 (S.C.C.) and *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2022] B.C.J. No. 1294, 2022 BCCA 245 at paras. 393-422 (B.C.C.A.), *per* Fenlon J.A. concurring, leave to appeal refused [2022] S.C.C.A. No. 354 (S.C.C.).

[16] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 71 (S.C.C.); see also *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 17, 2023 SCC 17 at para. 64 (S.C.C.) ("legislation often implicates interests that s. 7 protects").

[17] *Reference re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at 515 (S.C.C.).

[18] *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2022] B.C.J. No. 1294, 2022 BCCA 245 (B.C.C.A.), leave to appeal refused [2022] S.C.C.A. No. 354 (S.C.C.); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[19] R.S.C. 1985, c. C-46.

[20] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 at 792-793 (S.C.C.).

hypothetical offenders.[21] Indeed, Mr. Heywood — a serial sex offender, caught photographing children in playgrounds — was likely the exact type of person intended to be caught by the offence. Instead, Cory J. objected to the fact that the offence could catch a 65-year-old, convicted of alcohol-fuelled sexual assault when they were 18. As I elaborate below, this use of hypotheticals is part of what makes overbreadth such a powerful doctrine.

In the first two decades post-*Heywood*, the Supreme Court applied overbreadth sparingly, only striking down one law as overbroad.[22] At times, the SCC appeared to backtrack from *Heywood*, articulating a less exacting standard for overbreadth.[23] This approach changed with *Bedford*. In *Bedford*, the Supreme Court clarified overbreadth in several respects. First, the SCC adopted Professor Hamish Stewart's suggestion to label overbreadth a "failure of instrumental rationality".[24] This phrase reflects that overbreadth does not scrutinize the constitutionality of a law's purpose or effects in isolation, but solely assesses the fit between the two.[25] An unstated corollary is that a law's purpose and effects may both be Charter-compliant, and yet still violate section 7, due to the mismatch between them.

Bedford further clarified the strictness of the overbreadth test. Specifically, the SCC held that a law is overbroad if it affects even a single person more than necessary to achieve its purpose. Moreover, a law's effects are overbroad not only when they undercut the purpose, but also when they merely fail to advance the purpose.[26] Taken together, *Bedford* stands for the proposition that fundamental justice requires a perfect fit between a law's intent and effects.

The empirical impact of *Bedford*'s demand for perfect fit is plain. As Stewart has noted, pre-*Bedford*, successful overbreadth challenges were rare; post-*Beford*, far

---

[21] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 at 794-800 (S.C.C.).

[22] *R. v. Demers*, [2004] S.C.J. No. 43, 2004 SCC 46 (S.C.C.).

[23] In *R. v. Clay*, [2003] S.C.J. No. 80, 2003 SCC 75 at paras 34-40 (S.C.C.), the SCC suggested that laws are only overbroad when their means are "grossly disproportionate to the state interest". Chief Justice McLachlin later severed overbreadth and gross disproportionality in *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 114-117 (S.C.C.).

[24] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 107 (S.C.C.), quoting Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 1st ed. (Toronto: Irwin Law, 2012).

[25] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 107 (S.C.C.), quoting Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 1st ed. (Toronto: Irwin Law, 2012) at 151 and Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 S.C.L.R. (2d) 195 at 209.

[26] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 113-119 (S.C.C.).

more challenges have succeeded, as "courts are seemingly more receptive to overbreadth claims".[27]

III. OVERBREADTH AS AN UNJUSTIFIED DOCTRINE OF LAW

Over time, the Supreme Court has refined its methodology for identifying principles of fundamental justice. While the SCC was initially content to define the principles through reference to "the basic tenets of our justice system", later cases settled on a three-element test for analyzing whether any given doctrine is a principle of fundamental justice. The Supreme Court outlined these elements in *Malmo-Levine*: a principle of fundamental justice must be: (1) a legal principle; with (2) a "significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate"; and (3) defined precisely enough to yield a manageable standard.[28] The SCC reiterated these criteria as authoritative most recently in 2021.[29] Nevertheless, the Supreme Court has never considered whether overbreadth passes the test.

If overbreadth has never been subject to the *Malmo-Levine* test, then where exactly did it come from? The answer, quite surprisingly, is from a precedent denying the existence of a doctrine of overbreadth. In *R. v. Nova Scotia Pharmaceutical Society* ("*NS Pharmaceutical*"), the SCC considered whether a law was unconstitutionally vague.[30] Through its analysis, the SCC extensively compared vagueness with overbreadth, given their association in American constitutional law. Justice Gonthier concluded that overbreadth manifests itself in Canada as a tool for analyzing compliance with other Charter tests, such as gross disproportionality under section 12, or minimal impairment under section 1.[31] However, Gonthier J. repeatedly and explicitly held that overbreadth is not a freestanding doctrine, far less a principle of fundamental justice. A few quotes reveal that the SCC was not ambiguous on this point: "overbreadth is subsumed under the 'minimal impairment branch' of the *Oakes* test", "there is no such thing as overbreadth in the abstract", and, most tellingly, "overbreadth has no independent existence. *References to a 'doctrine of overbreadth' are superfluous*."[32]

Heywood relied heavily upon *NS Pharmaceutical* for the existence of overbreadth

---

[27] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2019) at 167.

[28] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 at paras. 112-113 (S.C.C.).

[29] *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 at para. 128 (S.C.C.).

[30] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.).

[31] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 at 629-630 (S.C.C.).

[32] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 at 629-632 (S.C.C.) (emphasis added).

as a principal of fundamental justice. Indeed, it is the only precedent Cory J. quoted in the section of *Heywood* identifying and defining overbreadth. This quote, used to justify overbreadth, included the phrase "overbreadth has no autonomous value under the Charter."[33] If this sounds strange, that is because it is. It would be as if the SCC today considered the doctrine of actual malice, quoted the portion of *Hill v. Church of Scientology* that held that actual malice is not a doctrine in Canadian defamation law,[34] and then rejected a defamation claim for failing to prove actual malice. This example is contrived, and yet analogous to the analysis in *Heywood*. Notably, Gonthier J. dissented in *Heywood*, due to adopting a narrower interpretation of loitering offence. As such, he expressed "no opinion" on whether overbreadth constitutes a principle of fundamental justice.[35] This expression of neutrality from the author of *NS Pharmaceutical* is hardly a ringing endorsement that *Heywood*'s majority faithfully incorporated its position on overbreadth.

Other than *NS Pharmaceutical*, the SCC in *Heywood* cited a handful of precedents for the proposition that it had previously approved "balancing the [s]tate interest against that of the individual" under section 7. While these precedents at least stand for the proposition for which they were cited, said proposition is a weak foundation for overbreadth. For example, Cory J. cited *R. v. Beare*.[36] *Beare* held that fingerprinting arrestees does not violate section 7, largely since the practice is allowed at common law. *Beare* considered how fingerprinting balances individual privacy against law enforcement, but it never so much as contemplated a doctrine of strict overbreadth. Justice Cory also cited to *Rodriguez v. British Columbia*.[37] This was a curious choice, since the majority in *Rodriguez* emphasized the need to subject proposed principles of fundamental justice to exacting scrutiny.[38] Like *Beare*, *Rodriguez* balanced state and individual interests within a section 7 analysis; and, like *Beare*, *Rodriguez* articulated nothing approaching *Heywood*'s rule against overbreadth.

All the other precedents cited in *Heywood* represent similar instances of balancing under section 7. But the fact that all principles of fundamental justice balance state and individual interests does not imply that all doctrines based on balancing are

---

[33] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 at 630 (S.C.C.), cited in *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 at 791 (S.C.C.).

[34] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at paras. 122-142 (S.C.C.).

[35] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 at 821-822 (S.C.C.).

[36] *R. v. Beare; R. v. Higgins*, [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387 (S.C.C.).

[37] *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

[38] *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 at 590-591 (S.C.C.).

principles of fundamental justice. To suggest otherwise is to confuse a necessary condition with a sufficient condition. This is a classic logical error, which casts further doubt upon the soundness of the doctrine of overbreadth.

Lastly, Cory J. briefly justified overbreadth on the basis that an "individual's rights [should not be] limited for no reason".[39] This premise, while clearly defensible, does not support overbreadth as a principle of fundamental justice. Whenever a statute limits an individual's rights, it does so because Parliament chose to pass a law to that effect. This is itself a reason for the limit. That reason may not be pressing, substantial, righteous, or well-balanced, but it is existent. And as the SCC acknowledged in *Bedford* (albeit in a section 1 justificatory analysis), the legislature may choose to cast a wide net, for administrative simplicity.[40] As such, Cory J.'s concern for reasonless limits on life, liberty, or security of the person does not, on its own, justify a constitutional requirement for a perfect fit between a law's purpose and effects.[41]

Since *Heywood*, the Supreme Court has never re-assessed whether overbreadth is worthy of being a principle of fundamental justice. *Bedford* offhandedly ventured that overbroad laws are "fundamentally flawed", and "inherently bad", but these conclusory statements do not overcome how *NS Pharmaceuticals* was twisted to mean the opposite of what it said.[42] Straight through to the most recent case of *Canadian Council for Refugees*, overbreadth has developed through citations to *Bedford*, which cites to *Heywood*, which cites to *NS Pharmaceutical*, which said that overbreadth is not a doctrine in Canadian law. This unusual evolution strongly suggests that the SCC ought to re-examine overbreadth from first principles.

IV. OVERBREADTH AND THE SOCIETAL CONSENSUS REQUIREMENT FOR FUNDAMENTAL JUSTICE

Given the increasing use of overbreadth to strike down laws by all levels of court,

---

[39] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 at 792-793 (S.C.C.).

[40] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at para. 113 (S.C.C.).

[41] Chief Justice McLachlin addressed a similar argument in *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59 at para. 36 (S.C.C.). In considering the breadth of the impugned law, she noted that "it may be argued that since Parliament used these words, that is what it intended", but that overbreadth "requires courts to go further than the text alone, and ask whether other considerations suggest Parliament's purpose was narrower." However, McLachlin C.J.C. later found that Parliament did understand the full breadth of the relevant text at para. 72. Nonetheless, the SCC still struck the provision for overbreadth.

[42] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 at paras. 105, 116 (S.C.C.). Notably, Stratas J.A. for the Federal Court of Appeal recently (if somewhat offhandedly) lampooned *Bedford*'s "extremely expansive overbreadth doctrine" for illustrating a "looser approach" to constitutional interpretation, focused not on the text of the Charter but on its "much broader underlying feel, spirit, or vibe": *Canada v. Boloh 1(a)*, [2023] F.C.J. No. 713, 2023 FCA 120 at para. 20 (F.C.A.).

it is imperative to consider whether overbreadth passes the three-part *Malmo-Levine* test. Overbreadth easily passes the first element; a requirement that laws match effects and purpose is clearly a legal rule. The manageable standard requirement is more complex. As I note below, one of overbreadth's chief drawbacks is its unpredictability. This militates against a manageable standard. Nonetheless, perhaps in theory, courts could faithfully apply a requirement for a perfect fit between legislative purpose and effect. I therefore accept for argument's sake that overbreadth passes this element. Overbreadth's true kryptonite, however, is its failure to pass the heart of the *Malmo-Levine* test: societal consensus.

"Societal consensus" remains a contested concept. Peter Hogg stated that this requirement "is not intended to be taken seriously".[43] Nader Hasan calls it a "legal fiction",[44] and Rowe J. has suggested that it is "unsettled", and "idiosyncratic".[45] Despite these unflattering commentaries, it remains that principles of fundamental justice must achieve societal consensus as to their fundamentality. The commentaries and jurisprudence demonstrate that the SCC has variously applied three forms of analysis to assessing societal consensus: historical, empirical, and normative. Instead of advocating for one approach as superior, I shall advocate that overbreadth fails all three.

1. Historical

In the early years of the Charter, the Supreme Court tended to follow a historical methodology to identifying principles of fundamental justice. Specifically, the Supreme Court looked to legal practices and customs with deep roots in Canadian legal history, such as the common law and presumptions of statutory interpretation. Under this approach, section 7 entrenched rights which were always considered to be basic tenets of our justice system, but which Parliament could theoretically have extinguished before the Charter.[46]

Beare is a good example of historical analysis. There, the SCC held that the common law is "one of the major repositories of the basic tenets of our legal system".[47] *Malmo-Levine* itself is another example. In that case, the majority held that the so-called "harm principle" lacked societal consensus, largely because many

---

[43] Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 S.C.L.R. (2d) 195 at 201.

[44] Nader R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63 S.C.L.R. (2d) 339 at 367.

[45] *R. v. J. (J.)*, [2022] S.C.J. No. 28, 2022 SCC 28 at paras. 368-369 (S.C.C.); see also *R. v. Aim*, [2023] O.J. No. 4759, 2023 ONSC 5305 at para. 48 (Ont. S.C.J.) ("[T]he principles of fundamental justice (PFJs) are works in progress.")

[46] Nader R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63 S.C.L.R. (2d) 339 at 343-344.

[47] *R. v. Beare; R. v. Higgins*, [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387 at 406 (S.C.C.), citing *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 at 155-156 (S.C.C.).

activities which cause no harm to others have always been criminalized in Canada.[48] Finally, in the *Motor Vehicle Reference*, the SCC inferred a principle of fundamental justice from longstanding presumptions of statutory interpretation.[49]

The historical approach to fundamental justice has suffered criticism for its association with originalism, and for its perceived inconsistency with a "large and liberal" approach to Charter interpretation.[50] Still, the SCC has recently affirmed the importance of history in interpreting the Constitution.[51] To search for a historical basis for overbreadth is therefore a meaningful exercise.

As a starting point, it militates against overbreadth that several laws struck down as overbroad long pre-date the Charter.[52] The Charter can obviously invalidate laws enacted prior to 1982; however, the historical methodology from *Malmo-Levine* strongly suggest that longstanding laws comply with fundamental justice. This bodes ill for overbreadth's justifiability via history.

The historic principles of statutory interpretation are, frankly, muddled on whether overbroad laws should be avoided. Approximate examples, thrusts and parries, can be found in either direction. For example, prior to 1982, ambiguous statutes tended to be construed restrictively, thus limiting their breadth. This resulted from presumptions such as strict penal construction,[53] and the rule against absurdities.[54] However, courts did not object to wide statutory breadth in and of itself, nor did they presume that a law's effects must tightly fit its purpose.

Through to the 1960s, *Maxwell* advocated for literal statutory interpretation,

---

[48] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 at paras. 115-126 (S.C.C.).

[49] *Reference re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at 513-515 (S.C.C.).

[50] Nader R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63 S.C.L.R. (2d) 339 at 347-348; *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 at 591-592 (S.C.C.).

[51] See generally *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 at para. 41 (S.C.C.); *R. v. Poulin*, [2019] S.C.J. No. 47, 2019 SCC 47 at paras. 77-80 (S.C.C.); see also *Canada v. Boloh 1(a)*, [2023] F.C.J. No. 713, 2023 FCA 120 at para. 23 (F.C.A.).

[52] For example, the offences ruled overbroad in *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) and *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.) formed part of the *Criminal Code* since at least 1927: *Criminal Code*, R.S.C. 1927, c. 146, ss. 216(l), 269.

[53] See *Marcotte v. Canada (Deputy Attorney General)*, [1974] S.C.J. No. 142, [1976] 1 S.C.R. 108 at 115 (S.C.C.).

[54] For examples of the rule against absurdities being used to narrow a statute's meaning, see *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294 (S.C.C.); *Goodman v. Manitoba (Criminal Injuries Compensation Board)*, [1980] M.J. No. 187, 120 D.L.R. (3d) 235 (Man. C.A.). Note, however, that this canon can also broaden a statute's meaning: *R. v. Scott*, [2001] S.C.J. No. 71, 2001 SCC 73 (S.C.C.). Thrusts and parries indeed.

seemingly no matter how broad. While later editions found a role for purpose in resolving ambiguities, this role was generally to expand a statute's breadth, rather than to restrict it.[55] Similarly, Elmer Driedger, no champion of literalism, observed that courts more often use purpose to broaden, rather than narrow, the meaning of a statute.[56] Certainly, neither *Driedger* nor *Maxwell* nor any other treatise I am aware of advocated any canon resembling the rule against overbroad laws.

Lastly, as noted in *NS Pharmaceutical*, the United States has long recognized a doctrine of overbreadth. However, this version of overbreadth is quite different from its Canadian cousin. In the United States, overbreadth only applies to restrictions on free speech under the First Amendment.[57] And unlike the *Heywood*/*Bedford* standard, the American version of overbreadth does not compare a law's purpose with its effects. Instead, American overbreadth examines whether a law which restricts some constitutionally unprotected conduct also captures a substantial amount of constitutionally protected expression.[58] American overbreadth is thus more analogous to a Canadian minimal impairment analysis on a violation of section 2(b) of the Charter. Accordingly, American overbreadth does not provide a historical basis for the Canadian principle of fundamental justice.

In sum, historical analysis might establish a societal consensus that ambiguous laws be construed narrowly, to avoid unnecessarily curtailing liberty. With a certain generosity of spirit, we could even call this "a rule against overbreadth". But there is scant evidence of any deeply rooted tradition in Canadian law akin to *Heywood* and *Bedford*'s strict overbreadth. This is fatal to overbreadth's claim to societal consensus via historical analysis.

2. Empirical

The empirical approach to identifying societal consensus asks whether, as demonstrable fact, society agrees that the relevant principle is fundamental to our concept of justice. The upside of empirical analysis is that it identifies actual societal consensus. But downsides include the difficulty in polling the public on legal doctrine, and the fact that defining rights through majority opinion potentially undercuts their minority-protective purpose.[59]

---

[55] P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 28-29, 45-47.

[56] Elmer A. Driedger, *The Construction of Statutes*, 1st ed. (Toronto: Butterworths, 1974) at 59-60.

[57] Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 4th ed. (St. Paul, MN: West Group, 2008) at §20.8.

[58] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 at 628-632 (S.C.C.).

[59] See generally *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at 337 (S.C.C.); *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 at para. 256 (S.C.C.), *per* Rowe J., concurring.

Justice Rothstein (dissenting) explicitly applied empirical analysis in *R. v. B. (D.)*, citing public opinion evidence to argue against societal consensus for a presumption of youth sentences for young offenders.[60] Similarly, in *Chaoulli v. Quebec*, Binnie and LeBel JJ. held that "health care to a reasonable standard within a reasonable time" did not qualify as a principle of fundamental justice, since the evidence showed no empirical consensus within medical literature.[61] Tara Mrjen has argued that *Kazemi Estate v. Iran* is another example of empirical analysis.[62] There, LeBel J. considered whether fundamental justice requires that victims of torture abroad should have access to a domestic remedy. In so doing, he assessed whether this proposed principle constituted a norm in international law, meaning it was "accepted and recognized by the international community of states".[63] Since several other countries' courts had rejected the proposed norm, LeBel J. concluded it was not a principle of fundamental justice.[64]

In each of these three cases, the relevant judges assessed societal consensus in its literal sense, seeking evidence of broad agreement to the proposed principle of justice. Thus *B. (D.)*, *Chaoulli* and *Kazemi Estate* each exemplify empirical analysis, asking whether a societal consensus exists in fact among general public, relevant experts, or the international community, respectively.

While the empirical approach to societal consensus is easy to explain, it is difficult to apply to overbreadth. After some effort, I have found no opinion polls ever conducted on whether the Canadian public agrees with the doctrine of overbreadth. Nor have I found any authorities for an international norm against overbroad legislation. Finally, it is unclear who the relevant experts would even be with regards to the existence of overbreadth. In the absence of evidence, the onus of proof must prevail — since no evidence shows that overbreadth holds a societal consensus, it cannot be assumed to have such a consensus, and so it fails the empirical form of analysis.

3. Normative

Unlike empirical analysis, the normative approach to societal consensus asks what principles society *should* support, rather than what society *does* support. While the Supreme Court has never explicitly endorsed such normative reasoning, many

---

[60] *R. v. B. (D.)*, [2008] S.C.J. No. 25, 2008 SCC 25 at para. 131 (S.C.C.).

[61] *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 at paras. 209, 212-213 (S.C.C.).

[62] Tara Mrjen, *The Principles of Fundamental Justice and the "Societal Consensus" Requirement* (LL.M. Thesis, University of Toronto, 2016) [unpublished] at 8-15.

[63] *Kazemi Estate v. Islamic Republic of Iran*, [2014] S.C.J. No. 62, 2014 SCC 62 at para. 151 (S.C.C.).

[64] *Kazemi Estate v. Islamic Republic of Iran*, [2014] S.C.J. No. 62, 2014 SCC 62 at paras. 152-157 (S.C.C.).

scholars interpret certain judgments in this fashion.[65] Normative analysis allows for a rich and open consideration of which values merit constitutional entrenchment. And unlike a purely historical perspective, normative analysis allows the principles of fundamental justice to evolve over time, better reflecting contemporary realities.[66] However, normative analysis may suffer for lack of legitimacy – unelected judges striking down democratically enacted laws based on values they believe to be fundamental raises well-trodden concerns of illegitimacy. And as Professor Colten Fehr has recently argued, these legitimacy concerns are greatest in the context of the principles of fundamental justice, given their distinctively unenumerated nature.[67]

Overbreadth is normatively undesirable for at least five interrelated reasons: it vests the judiciary with extraordinary discretion, it is unpredictable in its application, it is incompatible with bright-line rules, it involves the judiciary in contentious questions of social policy, and it invalidates laws which pursue constitutional purposes using constitutional means. Collectively, these flaws outweigh overbreadth's benefits, meaning that it should not pass the societal consensus hurdle from a normative perspective.

(a) ***Vast Judicial Discretion***

The first and foremost normative argument against overbreadth is that it vests the judiciary with enormous discretion to strike down laws. Overbreadth assesses the fit between purpose and effects, and courts have the power to define both. As the Supreme Court has acknowledged, a law's purpose is rarely self-evident. Therefore, in articulating purpose, courts may refer to the panoply of statutory text, context, scheme, preambles, legislative history and extrinsic evidence.[68] From this veritable jambalaya, courts must articulate a "precise and succinct" statement of purpose. Post-*Bedford*, the SCC has acknowledged that given the strict nature of overbreadth, this articulation of purpose is typically determinative of a law's constitutionality.[69] For example, a law with a broad, highly abstract purpose is less likely to be overbroad, since all its effects can more easily be said to advance that purpose. But a law with a narrowly construed purpose will likely be overbroad, since the effects

---

[65] Nader R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63 S.C.L.R. (2d) 339 at 361-374; Tara Mrjen, *The Principles of Fundamental Justice and the "Societal Consensus" Requirement* (LL.M. Thesis, University of Toronto, 2016) [unpublished] at 15-20; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2019) at 125-127; Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 S.C.L.R. (2d) 195 at 201.

[66] See generally *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 at 155-156 (S.C.C.).

[67] Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: University of British Columbia Press, 2022) at 173-175.

[68] *R. v. Moriarity*, [2015] S.C.J. No. 55, 2015 SCC 55 at para. 31 (S.C.C.).

[69] *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at para. 87 (S.C.C.).

on at least one person will likely fall outside the scope of that narrow purpose.

Overbreadth's focus on statutory purpose presents another problem. The SCC almost always articulates a single statement of purpose in overbreadth analyses and has cautioned against recognizing "multifactorial statements of purpose".[70] However, in another context, the Supreme Court has recognized that most statutes are complex codes, with *multiple* competing purposes underlying their structure. As Cory and Iacobucci JJ. stated in *M. v. H.*, "often legislation does not simply further one goal but rather strikes a balance among *several* goals, some of which may be in tension."[71] A "precise and succinct" purpose statement is thus an artificial construct, effectively guaranteed to oversimplify the purposes underlining all but the most mundane statutes.

Once a court articulates a law's purpose, it then has the power to determine its effects. In constitutional cases, Canadian courts are not limited to considering how a law impacts the litigants before them. Instead, courts may consider how a law could impact other hypothetical claimants.[72] This happened in *Heywood*, where the SCC struck down the loitering offence given its impact on hypothetical offenders, even though the effects on Mr. Heywood fell squarely within the child-protection purpose.[73] More recently, in *Ndhlovu*, the SCC did not assess whether the sex offender registration laws at issue were overbroad as applied to Mr. Ndhlovu, but rather concluded they were overbroad as applied to other sex offenders.[74] The Supreme Court justifies the use of hypotheticals on the basis that nobody should be

---

[70] *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at para. 91 (S.C.C.). The recent judgment in *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 17, 2023 SCC 17 at para. 139 (S.C.C.), is a notable exception. In that case, Kasirer J. found for a unanimous panel that the impugned statutory provision had a "primary goal . . . subject to two limits". The Court did not aver to the guidance against multi-factorial purpose statements from *Sharma*. As such, the Court found a much more nuanced purpose than in many of its other overbreadth analyses. Unsurprisingly, the Court found that the effects of the law were not overbroad to this nuanced purpose. This further demonstrates the highly discretionary and powerful nature of the purpose-articulating exercise within an overbreadth analysis. Had the Court articulated a narrower purpose, it is more probable that it would have found the provision overbroad.

[71] *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 at para. 100 (S.C.C.) (emphasis added). This statement has largely been forgotten — a search shows it has only been quoted in one trial level decision. Fortunately, it was "rediscovered" by Hart Schwartz in "Circularity, Tautology and Gamesmanship: 'Purpose' Based Proportionality-Correspondence Analysis in Section 15 and 7 of the *Charter*" (2016) 35:2 N.J.C.L. 105.

[72] *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 at paras. 50-51 (S.C.C.).

[73] Peter W. Hogg & Wade Wright, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2022) at §47:24.

[74] *R. v. Ndhlovu*, [2022] S.C.J. No. 38, 2022 SCC 38 at paras. 101, 114 (S.C.C.).

subject to an unconstitutional law.[75] But in an overbreadth analysis, hypotheticals allow a judge to define a law's purpose narrowly, and then conjure up a hypothetical just outside that purpose. That law then violates section 7 of the Charter. This is an extraordinary judicial power indeed.

Overbreadth's vast judicial discretion is normatively undesirable because it grants unelected courts supremacy over elected legislators in a very wide field of social policy not covered by enumerated constitutional rights. As the late Peter Hogg observed, "a judge who disapproves of a law will always be able to find that it is overbroad."[76] This is not a desirable situation. Such unbounded discretion effectively amounts to an unenumerated, unbounded judicial trump card, undermining the principles of democracy and the separation of powers.

(b) ***Unpredictability***

Beyond being undesirable for its own sake, overbreadth's highly discretionary nature feeds into its second chief drawback: unpredictability. The amorphous purpose inquiry, coupled with the vast range of hypothetical effects, makes predicting the outcome of an overbreadth challenge extremely challenging. If a sufficiently motivated judge can find any law to be overbroad or not, then it becomes very difficult to predict *ex ante* the constitutionality of a law.

Consider the overbreadth analysis in *Ndholvu*, which found that prior criminality is not a reliable proxy for risk of reoffending, in part because one sex offender ended up paraplegic.[77] Then compare with *Sharma*, released one week later, which held that the length of a sentence is in *every case* a reliable proxy for the seriousness of the offence.[78] Each of these cases were decided on a 5-4 majority, illustrating how a single justice's creativity with purposes and hypotheticals can uphold or condemn a law. It may be possible, with effort, to reconcile *Ndholvu* and *Sharma*'s holdings *post facto*. But one can hardly blame a legislator for incorrectly predicting the outcome of the two overbreadth analyses *ex ante*.

One senior lawyer for the Attorney General of Ontario has complained that overbreadth lacks "both coherence and predictability", making it near impossible to predict the constitutionality of statutes for his client.[79] This level of unpredictability impedes legislatures from enacting laws relating to life, liberty, or security of the person, given the perennial risk of an overbreadth challenge, whose outcome defies

---

[75] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 at paras. 68-75 (S.C.C.).

[76] Peter W. Hogg & Wade Wright, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2022) at §47:24.

[77] *R. v. Ndhlovu*, [2022] S.C.J. No. 38, 2022 SCC 38 at paras. 85-90 (S.C.C.).

[78] *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at paras. 104-109 (S.C.C.).

[79] Hart Schwartz in "Circularity, Tautology and Gamesmanship: 'Purpose' Based Proportionality-Correspondence Analysis in Section 15 and 7 of the *Charter*" (2016) 35:2 N.J.C.L. 105 at 107.

prediction. Governments ought to be able to address public policy within a reasonably clear field of constitutional activity. Overbreadth's unpredictability inhibits this desirable outcome.

(c) ***Incompatibility with Bright Lines***

Overbreadth's next drawback is its incompatibility with bright-line rules. A bright line will almost always be overbroad since creative litigants — or judges — can almost always hypothesize an individual who falls just over the line, and who is therefore affected without advancing the law's purpose. This is exactly what happened in *Michaud*, where Lauwers J.A. reluctantly held a 105 km/h speed limit for trucks to be overbroad, since conceivably truckers could slightly exceed this limit without undercutting the law's safety purpose. Justice Lauwers openly questioned the wisdom of strict overbreadth, as it "trivializes" the concept of fundamental justice to invalidate basic safety regulations.[80] Beyond safety regulations, Stewart and Fehr have argued that overbreadth is also incompatible with a bright-line age of consent — a judge might well conclude that an 18-year-old could have sex with someone one day under the age of consent, without undercutting the purpose of protecting young people from abuse.[81]

Bright-line rules are critical tools for establishing predictable standards of legal behaviour; accordingly, overbreadth's incompatibility with bright lines is another example of its normative undesirability. One might counter that most overbroad bright lines can be justified under section 1, but it seems a strange outcome that a principle of fundamental justice would be routinely and justifiably infringed upon.[82]

(d) ***Involving the Judiciary in Contentious Social Policy***

Given that many laws interfere with life, liberty, or the security of the person, and given that almost any law can be challenged as overbroad, overbreadth inevitably requires courts to address contentious matters of social and economic policy. And yet, as the SCC has repeatedly recognized, the judiciary is ill-equipped to adjudicate such general policy matters.[83] Furthermore, requiring courts to weigh in on contentious public debates undermines the constitutional principle of democracy,

---

[80] *R. v. Michaud*, [2015] O.J. No. 4540, 2015 ONCA 585 at paras. 146-154 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 450 (S.C.C.).

[81] Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: University of British Columbia Press, 2022) at 75; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2019) at 160-162, critiquing *R. v. B. (A.)*, [2015] O.J. No. 6088, 2015 ONCA 803 (Ont. C.A.).

[82] Some time after writing this section, I discovered that Colton Fehr had advanced a similar argument in "Vaccine Passports and the Charter: Do they Actually Infringe Rights?" (2022) 43:1 N.J.C.L. 95 at 109-113.

[83] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62 at para. 120 (S.C.C.); *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 17, 2023 SCC 17 at para. 4 (S.C.C.).

potentially lowering public confidence in the administration of justice.

Canada is a democracy, and in a democracy, people are encouraged to debate contentious social and economic issues and then settle matters through voting.[84] Yet overbreadth requires courts to weigh in on those same matters, subjugating democratically enacted laws to policy judgments which courts are poorly equipped to make.

Consider *Carter*, where the Supreme Court invalidated Canada's ban on euthanasia. Euthanasia is a complex issue, attracting strong opinions on all sides.[85] The Supreme Court held that the purpose of the ban was to "protect vulnerable persons from being induced to commit suicide in a moment of weakness".[86] Reasonable minds could disagree on how to achieve this objective. And yet overbreadth obligated the SCC to judge whether Parliament had selected a perfectly well-fitted means to achieve its goal. Similarly, in *Cambie Surgeries*, the British Columbia courts adjudicated whether a public health care model is overbroad to the province's health care objectives.[87] Voters routinely debate and determine their own health care policy. Nonetheless, overbreadth required courts to insert themselves into that debate, and pass judgment. The SCC ultimately denied leave to appeal, perhaps wary of the optics of standing in judgment on such a fundamental question of public policy.

Euthanasia and public health care are just two examples of contentious policy issues, frequently subject to public debate, which are vulnerable to overbreadth challenges. The more that courts enter the arena of debate, the less room there is for the public to make their own choices through elected representatives. The Charter undeniably took certain policy choices out of the toolbox of elected representatives: yet euthanasia, health care, and other such matters are not mentioned in the text of the Charter.[88] For courts to strike down laws in these fields thus risks lowering public confidence in the administration of justice, potentially leading to a popular backlash against judicial review.[89] This is normatively undesirable.

---

[84] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at paras. 61-69 (S.C.C.).

[85] Ray Pennings, "Canadians' Views on Assisted Dying Are Complex", *Policy Options* (December 4, 2020), online: https://policyoptions.irpp.org/magazines/december-2020/canadians-views-on-assisted-dying-are-complex/.

[86] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 at para. 86 (S.C.C.).

[87] *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2022] B.C.J. No. 1294, 2022 BCCA 245 at paras. 393-422 (B.C.C.A.).

[88] Text being of "primordial significance" in Charter interpretation: *Quebec (Attorney General) v. 9147-0732 Quebec inc*, [2020] S.C.J. No. 32, 2020 SCC 32 at para. 11 (S.C.C.).

[89] A similar phenomenon has been noted in the United States: Jeannie Suk Gersen, "The Conservative Who Wants to Bring Down the Supreme Court", *The New Yorker* (January 5,

(e) ***Invalidating Laws with Independently Constitutional Means and Ends***

Lastly, overbreadth is undesirable because it ensnares laws which pursue constitutional goals using constitutional means. Unlike other rights and freedoms, overbreadth does not safeguard a field of ascertainable individual conduct from state intrusion. Instead, overbreadth solely considers the fit between a law's purpose and effects. Accordingly, a law's purpose and effects may both be perfectly Charter-compliant, and yet that law could still violate the Charter. At its best, this is a peculiar situation. More corrosively, there is potential for real harm to our constitutional structure.

To demonstrate, consider the hypothetical Supreme Court decision *R. v. Mancuso*, which strikes down the *Broad Act* for overbreadth. Consider further that the *Broad Act*'s purpose and effects are independently Charter-compliant.[90] Suppose that after *Mancuso*, Parliament passes the *Intentionally Broad Act*. This law is identical to the *Broad Act*, except that it includes an expansive statement of purpose, which explicitly encompasses all the effects which the SCC contemplated in *Mancuso*. How might the SCC respond? It appears there are only two options. First, the Supreme Court might uphold the new law, even though it has exactly the same effects on Canadians as the first law. Alternatively, the Supreme Court could reject the new purpose as pretextual, articulate what it believes to be Parliament's true intention, and again strike down the law as overbroad.

Both outcomes are normatively undesirable. In the first scenario, the Supreme Court will have invalidated one law and approved another, despite the actual impact on Canadians being identical. One could question whether the expenditure of time and resources was worth it. The second scenario, however, is potentially more harmful. There, the Supreme Court would be rejecting Parliament's explicitly stated purpose, in effect piercing the legislative veil to impose its own statement of purpose. In so doing, the SCC would necessarily be accusing Parliament of being dishonest as to its objective. This move would place the legislature and the judiciary into an antagonistic posture, harming comity between the branches of state. And all over a law whose purpose and effects *are entirely constitutional*.

(f) ***Normative Balancing***

On the other side of the normative balancing scales, overbreadth can be defended

---

2023), online: https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court.

[90] I construct a hypothetical here, because the Supreme Court has never found a law to be overbroad, while affirmatively rejecting all other challenges against the law. This is because the SCC's usual practice when it allows an overbreadth claim is to decline to consider other Charter claims against the law. However, it is easy to imagine that such a hypothetical could exist, especially in the context of a regulatory bright line such as in *R. v. Michaud*, [2015] O.J. No. 4540, 2015 ONCA 585 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 450 (S.C.C.).

for ensuring that Canadians are not lightly deprived of life, liberty, or security of the person. When the legislature decides to deprive Canadians of these fundamental interests, it should be most careful. As Iacobucci J. once eloquently noted, "liberty lost is never regained and can never be fully compensated for."[91] Doubtless this principle applies with equal vigour to life and security of the person.

I accept that the preservation of life, liberty and security of the person is a noble goal. Unfortunately, overbreadth goes too far. No law affecting these interests is ever safe from review as to whether hypothetical effects perfectly match malleable purpose. This constant uncertainty constrains Parliament from trying to advance the goals of section 7, such as by safeguarding the liberty interests of vulnerable children, or the security interests of highway drivers.[92] Enumerated Charter rights already provide significant protections for Canadians, as do those substantive principles of fundamental justice which are deeply rooted in our legal history. Thus, at the end of my normative weighing exercise, I conclude that overbreadth should not be a principle of fundamental justice.

V. OVERBREADTH AND *STARE DECISIS*

The doctrine of *stare decisis* compels courts to follow their precedents on previously decided questions of law.[93] Nevertheless, *stare decisis* is not absolute, and virtually everyone agrees that courts may sometimes depart from precedents which they now believe to be wrong. The SCC has held that in considering whether to overrule a precedent, courts must "ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error".[94] If the status of overbreadth as a principle of fundamental justice is indeed erroneous, then this question becomes a live consideration.

The Supreme Court has never articulated a comprehensive framework for deciding whether to overturn its own precedents, but it came closest most recently in *R. v. Kirkpatrick*.[95] In *Kirkpatrick*, a concurring judgment of four justices outlined three situations when the SCC may overrule itself.[96] I submit that each of these three categories apply to overbreadth.

---

[91] *R. v. Hall*, [2002] S.C.J. No. 65, 2002 SCC 64 at para. 47 (S.C.C.).

[92] Overbreadth thus arguably violates itself, for invalidating more laws than necessary to safeguard the purposes of s. 7. One might fairly say that overbreadth is overbroad.

[93] I have argued elsewhere that *stare decisis* may be an illegitimate doctrine in Canadian constitutional adjudication. For the purposes of this article, I assume that I am wrong on this, and the conventional wisdom is correct: Sterling Mancuso, "Questioning Precedent: A Critique of Constitutional Stare Decisis at the Supreme Court of Canada" (April 14, 2023), online (blog): https://www.utflr.ca/blog/constitutional-precedent.

[94] *Canada v. Craig*, [2012] S.C.J. No. 43, 2012 SCC 43 at para. 27 (S.C.C.).

[95] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 (S.C.C.).

[96] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 219-241 (S.C.C.).

1. Significant Legal Change

The *Kirkpatrick* concurrence held that the Supreme Court may overturn precedents "where fundamental changes undermine the rationale of the precedent".[97] These changes can be social, economic, technological, or legal. The concurrence emphasized that this is a high bar — fundamental changes sufficient to overturn precedents "typically takes years, if not decades, to emerge".[98]

Subsequent legal changes have undermined *Heywood*'s breezy invocation of overbreadth as a principle of fundamental justice. As noted above, *Heywood* did not subject overbreadth to the three-part test identified in *Malmo-Levine*. Yet the SCC has repeatedly affirmed that this test is mandatory.[99] Since the test for defining the principles of fundamental justice is clearer, and more refined than when *Heywood* was decided, that judgment can be revisited for "[relying] on principles . . . inconsistent with those underlying the Court's subsequent decisions."[100]

2. Unworkability

A precedent is unworkable when it is difficult to apply, and so undermines certainty. This is an appropriate reason for overturning precedents, since unworkability undermines the chief rationale behind *stare decisis* — the promotion of legal predictability.[101]

As noted earlier, the enormous discretion judges have in applying overbreadth makes it very hard to predict whether a proposed law is overbroad. If Hogg was right that any judge can find any law to be overbroad, then no law is safe. Overbreadth thus promotes *uncertainty* in the law, undermining the rationale of *stare decisis*. On this basis alone, overbreadth should be overturned. However, the *Kirkpatrick* concurrence suggested that unworkability in this theoretical sense is insufficient to overturn a precedent; unworkability must be demonstrated, through examples in caselaw.[102]

I have argued elsewhere that since *Bedford*, the Supreme Court has inconsistently applied overbreadth.[103] Starting in *Safarzadeh-Markhali*, the SCC has begun a habit of defining overbreadth using the *Bedford* standard of perfect fit, but then applying a looser requirement that a law's effects be "reasonably necessary" to achieve its

---

[97] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at para. 219 (S.C.C.).

[98] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 219-221 (S.C.C.).

[99] See note 11.

[100] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at para. 235 (S.C.C.).

[101] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 207-215 (S.C.C.).

[102] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 217-218 (S.C.C.).

[103] Sterling Mancuso, "Doubling Down on Inconsistency: *R v JJ* and the Principle Against Overbroad Laws" (October 3, 2022), online (blog): https://www.utflr.ca/blog/rvjj.

object.[104] These two standards are inconsistent and can lead to inconsistent outcomes.

I am not alone in noting this inconsistent approach to overbreadth — Stewart and Fehr have made similar observations.[105] Troublingly, the SCC has continued to conflate the two standards, without acknowledging their inconsistency, even after Stewart critiqued this approach in his acclaimed treatise on section 7.[106] The Supreme Court's inconsistent fidelity to the *Heywood*/*Bedford* standard thus testifies to its unworkability in practical terms.

3. *Per Incuriam*

Lastly, overbreadth is vulnerable to a claim that *Heywood* was a judgment taken *per incuriam*. A decision is taken *per incuriam* when the court "failed to consider a binding authority . . . and this failure affected the judgment".[107] The *Kirkpatrick* concurrence emphasized that the SCC should overturn all decisions taken *per incuriam*.[108]

Per incuriam is undoubtedly a high bar. However, it appears to describe *Heywood*'s application of *NS Pharmaceutical*. While *Heywood* cited *NS Pharmaceutical* (and indeed quoted it at length), it did not apply its dictates on overbreadth. Justice Cory simply took a precedent which said, "overbreadth has no independent existence", and cited it as authority that overbreadth is an independent doctrine of law. And he did so without acknowledging the apparent inconsistency. Had the SCC taken *NS Pharmaceuticals* on its face, it seems unlikely it could still have concluded that overbreadth is a principle of fundamental justice.

Therefore, did the Supreme Court truly "consider" the relevant binding precedent in *Heywood*? I submit it did not. Otherwise, the SCC could disregard any precedent by boldly claiming it supported a proposition which it explicitly opposed. This would turn *stare decisis* on its head, making a mockery of the doctrine. Thus, for the very stability of *stare decisis*, the SCC should hold *Heywood* to be *per incuriam*, and restore *NS Pharmaceutical* as the original, governing precedent on overbreadth.

VI. CONCLUSION

The Supreme Court of Canada has used the doctrine of overbreadth to strike down many significant laws, and yet it has never justified why these laws violate the "basic

---

[104] *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14 at para. 50 (S.C.C.).

[105] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2019) at 163-164; Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: University of British Columbia Press, 2022) at 72.

[106] *R. v. J. (J.)*, [2022] S.C.J. No. 28, 2022 SCC 28 at paras. 136-139 (S.C.C.); *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at para. 162 (S.C.C.); *R. v. Ndhlovu*, [2022] S.C.J. No. 38, 2022 SCC 38 at para. 172 (S.C.C.).

[107] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at para. 205 (S.C.C.).

[108] *R. v. Kirkpatrick*, [2022] S.C.J. No. 33, 2022 SCC 33 at paras. 204-206 (S.C.C.).

tenets of our justice system". Indeed, applying the SCC's own test, overbreadth cannot qualify as a principal of fundamental justice. *Stare decisis* alone cannot compel repetition of a principle without historical basis, empirical support, or normative desirability. This is especially true when the jurisprudential origins of the doctrine are as unclear — even twisted — as overbreadth's. The doctrine of strict overbreadth has no place in section 7 of the Charter. As such, the Supreme Court should not hesitate to correct itself, and to remove overbreadth from the lexicon of fundamental justice.