

The Most Frail Branch: A Critique of the Justifications for Judicial Hegemony
in the Interpretation of Canada's *Charter of Rights and Freedoms*.

by

Michael Stephen Roger Down
B.A., Memorial University of Newfoundland, 1999
LL.B., University of Victoria, 2004

A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of

Master of Laws

in the Faculty of Law

© Michael Stephen Roger Down, 2009
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by photocopy
or other means, without the permission of the author.

The Most Frail Branch: A Critique of the Justifications for Judicial Hegemony
in the Interpretation of Canada's *Charter of Rights and Freedoms*.

by

Michael Stephen Roger Down
B.A., Memorial University of Newfoundland, 1999
LL.B., University of Victoria, 2004

Supervisory Committee

Professor Jeremy Webber
Faculty of Law

Dr. Colin Macleod
Department of Philosophy

Supervisory Committee

Professor Jeremy Webber
Faculty of Law

Dr. Colin Macleod
Department of Philosophy

Abstract

The legitimacy of judicial review based upon Canada's *Charter of Rights and Freedoms* remains a topic of intense public debate. This thesis considers whether the typical justificatory arguments in favour of judicial review can withstand critical scrutiny.

Chapter one canvasses the arguments of many of Canada's *Charter* sceptics as well as select international commentators. Chapter two examines Peter Hogg's claim that it is appropriate to consider the process of judicial review as a form of institutional dialogue between courts and legislative assemblies. It is argued that judicial supremacy is a more accurate description of current institutional arrangements. Chapter three scrutinizes the claim that judicial review has some special capacity to provide appropriate protection for minority rights. Finally, chapter four examines whether section 33 of the *Charter* can be rehabilitated in order to recalibrate current institutional arrangements. I conclude that it may be possible to limit judicial supremacy.

Table of Contents

Supervisory Committee.....	ii
Abstract.....	iii
Table of Contents.....	iv
Acknowledgements.....	v
Introduction.....	1
Chapter 1: Do You Believe in Magic – An Overview of the Critical Perspectives on Charter Based Judicial Review.....	6
Chapter 2: We Can Work it Out – An Evaluation of the Dialogic Potential of Judicial Review.....	29
Chapter 3: Of Platonic Guardians and Powerless Minorities – Does Judicial Review Serve an Essential Role in the Protection of Minority Rights from Majority Tyranny?..	61
Chapter 4: Waiting on the World to Change – An Examination of the Transformational Potential of the Notwithstanding Clause.....	88
Conclusion.....	108
Bibliography.....	113

Acknowledgements

First and foremost I offer my sincerest thanks to my supervisors, Professor Jeremy Webber and Dr. Colin Macleod, who have supported me throughout my thesis with their patience and knowledge. I attribute the level of my Masters degree to their effort and without their assistance this thesis would not have been written. One simply could not wish for more conscientious supervisors.

I would also like to thank my parents for encouraging me throughout all my university studies. During that time my father has assisted by proofreading countless papers and in the process has surely learned more than he ever expected (or desired) about law and philosophy.

Finally, I would like to thank my wife Marsha, who has supported me whole-heartedly throughout our years together, most of which I have spent as a university student. I could not have completed this without your love and encouragement.

Introduction

“There is now hardly any moral or political controversy in the world of new constitutionalism that does not sooner or later become a judicial one.”¹

After a quarter-century of constitutional adjudication based upon the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), the list of normative and political controversies the Supreme Court of Canada (the “S.C.C.”) has adjudicated continues to grow. The S.C.C. has made pronouncements on the constitutional validity of a variety of laws, concerning issues such as physician assisted suicide,² abortion,³ and the privacy of victims of sexual assault.⁴ More recently, it has made important rulings with respect to capital punishment,⁵ health care,⁶ and the definition of marriage.⁷ Given the currently limited options available for governments and citizens to respond to judicial interpretations of rights, it has been suggested that Canada’s system of governance is being transformed from a system of Parliamentary supremacy to a state of judicial supremacy. While many commentators continue to be largely supportive of this judicialization of politics, others have presented vigorous arguments against this trend. This thesis will consider what has traditionally been termed as the counter-majoritarian difficulty with judicial review of abstract constitutional provisions. Operating within a

¹ Ran Hirschl paraphrases Alexis De Tocqueville in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004) at 1 [Hirschl].

² *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [Rodriguez].

³ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁴ *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

⁵ *United States v. Burns*, [2001] 1 S.C.R. 283 [United States v. Burns].

⁶ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [Chaoulli].

⁷ *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 [Reference Re Same-Sex Marriage].

framework that takes normative disagreement seriously, it will examine several of the traditional justifications for this practice and evaluate whether they can withstand scrutiny.

In chapter one I will focus on the observations of some of the pre-eminent critics of judicial supremacy. I will provide a review of the critical literature in Canada. This will be accomplished through a summary of main arguments provided by scholars such as Joel Bakan, Michael Mandel, Andrew Petter, Jeremy Webber, F.L. Morton and Rainer Knopff. In addition, the discussion will include the positions on the legitimacy of bill of rights based judicial review of two of the more prominent non-Canadian scholars, critic Jeremy Waldron and proponent Ronald Dworkin. This is obviously a selective canvassing of the voluminous body of scholarship on the merits of judicial review both in Canada and internationally (particularly in the United States). I have selected these commentators when summarizing the principal positions because collectively they provide a representative overview on the concerns raised, especially in the Canadian context. Additionally, their work is particularly relevant to the principal theme of this thesis: the possibility of reconciling strong judicial review with democratic decision-making in conditions of deep and intractable normative disagreement that characterize contemporary western democracies such as Canada.

The literature reveals that most commentators adopt either a “proceduralist” or “consequentialist” perspective when evaluating the appropriateness of judicial review based upon the *Charter*. The proceduralist approach focuses on the impact of the *Charter* on democratic procedures and evaluates whether this is desirable without primarily focusing on the substantive results each process might produce in the case of specific

normative controversies. Contrastingly, the consequentialist approach measures the desirability of institutional arrangements such as Parliamentary supremacy and those which involve robust systems of judicial review by the differences (actual and expected) in substantive results on important normative controversies. I adopt the proceduralist critique of judicial review and accept many of the arguments provided by the critics of judicial review. I reject Dworkin's arguments that belief in "right" answers is an effective answer to critics of judicial review and argue that acceptance of the consequentialist approach can provide, at best, a fair-weather endorsement for the practice of strong judicial review. I also accept the argument that this form of institutional arrangement carries a steep cost found in its corrosive effect on existing representative institutions.

In chapter two I examine the current degree of finality of court decisions on normative controversies that fall within the scope of judicial rights interpretations in order to consider whether current Canadian institutional arrangements may be appropriately said to represent strong judicial review. Some commentators have argued that judicial review may be best understood as promoting institutional dialogue between courts and legislative assemblies. Peter Hogg and Allison Bushell articulated the most widely examined version of this thesis. It suggests that specific features of the *Charter* foster institutional dialogue by providing legislative assemblies with opportunities to assert their own interpretations on the reasonableness of their legislative proposals or to develop alternate strategies for pursuing important policy goals.

After examining the practical limitations inherent in each putative dialogic feature related to the *Charter*, I conclude that in a vast majority of cases Parliament and the

provincial legislatures are left with little practical alternative to implementing the court prescribed policy. Since, as Hogg and Bushell acknowledge, the notwithstanding clause is not politically viable – with the potential exception being within the province of Quebec – there is a high degree of finality to court decisions based upon the *Charter*. I conclude that Canada has moved from a set of institutional arrangements based largely upon the tradition of Parliamentary supremacy to a system that may be appropriately described as judicial supremacy.

In chapter three I examine the argument that judicial review is essential to the protection of the rights of minorities or vulnerable groups. In particular, I examine the theoretical underpinning of the common refrain that judicial review is necessary to prevent a “tyrannical” majority from trampling “minority rights.” First, I consider some of the theoretical assumptions behind the common usage of this term. While the term “tyranny of the majority” is used with great frequency, there appears to be a dearth of reasons to assume that the judicial review will necessarily prevent tyranny.

Subsequently, using the example of the ongoing controversy relating to the practice of polygamy in Canada, I examine the assumptions that this argument makes about the nature of normative disputes involving claims of minority rights. I argue that the typical characterization of these controversies as involving a discrete “minority” that is victimized by a callous “majority” does not adequately capture the social or theoretical complexity of many of these disputes. Rather, in many of the most prominent *Charter* cases, majoritarian institutions play the role of attempting to balance the competing rights claims and interests of multiple vulnerable groups and minority constituencies. I conclude

that rather than addressing this important concern, the practice of judicial review tends to obscure much of the complexity involved in these disputes.

In the concluding section I consider whether s. 33 of the *Charter* could be used to mitigate the legitimacy deficit posed by judicial supremacy. After briefly canvassing some of the public positions of Canada's political elites on the clause, I conclude that there is little chance that it will be used in the immediate future by Canada's federal Parliament. Subsequently, I consider some of the proposals made by scholars about how the practice of using the notwithstanding clause could be made more palatable to its critics. These suggestions include requiring a legislative supermajority in order to pass legislation containing the clause or making usage of referenda in order to solicit direct input from citizens about the interpretation of *Charter* rights. I argue that while these suggestions are well intended, they are impractical in a political context where judicial oracularism is widely accepted by the mass news media and political elites. I conclude that the refutation of this myth ought to be central to any project to rehabilitate the notwithstanding clause.

Chapter 1

Do You Believe in Magic – An Overview of the Critical Perspectives on Charter Based Judicial Review

While many legal academics have embraced the *Charter* and the additional power it has conferred upon the judiciary, lawyers and legal scholars, this support for this judicial check on the power of elected officials has not been unanimous. Rather, several of Canada's most prominent legal scholars have mounted a serious challenge to the claims to legitimacy typically proffered in defence of this practice. This chapter will canvass the arguments of several of the leading critics of *Charter*-based judicial review. Subsequently, the arguments of one of judicial review's most celebrated proponents, Ronald Dworkin, will be considered. It will be argued that the consequentialist analysis he ultimately endorses ought to be rejected in favour of a proceduralist approach that takes citizens' perspectives on issues of political morality, such as the meaning of rights, seriously.

In *Charter of Rights and the Legalization of Politics in Canada*, Osgoode Hall professor Michael Mandel develops a searing critique of the judicialization of politics in the Canadian context. Mandel appears equally concerned by what he considers to be the *Charter*'s lack of democratic credentials as by the judiciary's predilection to support the status quo and legitimate existing inequalities found in Canadian society. With impressive attention to detail, he recounts the history of advocacy groups that attempted to establish Bills of Rights in Canada. In particular, he provides intriguing and controversial arguments about the federal government's motivation behind the patriation

of the *Charter* that allude to the *Charter's* undemocratic pedigree. Mandel asserts that, then Prime Minister, Pierre Trudeau saw the constitutional entrenchment of his bilingualism policies as a powerful strategy for combating the Quebec separatist movement.⁸ The author alleges that for Trudeau, including these language rights with the more conventional, and less contentious, Bill of Rights provisions found in the *Charter* was a calculated move intended to justify and expedite the amendment of the constitution.⁹ As partial proof of this claim he notes that while several sections of the *Charter* are subject to the s. 33 legislative override clause, the language rights provisions are not. While some will take issue with Mandel's interpretation of Trudeau's motivation for championing the *Charter*, it is difficult to reject Mandel's critique of the methods used to sell the *Charter*.

In what is perhaps one of the strongest points in this critique, Mandel shreds the federal government's argument that the adoption of the *Charter* would bring "power to the people." Noting that the vague language in the document does little to restrain or guide judicial decisions, he compares the *Charter* to a blank cheque for judges.¹⁰ He concludes that "once [one admits] the controversial nature of constitutional rights and the great differences in "interpretation" that can result from differing ideological points of view of judges, and between judges and [other citizens], the idea that judicial review is democratic, in the usual sense of enhancing popular power, evaporates into thin air."¹¹

In addition to concerns about the *Charter's* lack of democratic legitimacy, Mandel is rather sceptical of claims that such institutional arrangements could nonetheless be

⁸ Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1994) at 20 [Mandel].

⁹ *Ibid.* at 21.

¹⁰ *Ibid.* at 68.

¹¹ *Ibid.* at 42.

amenable to progressive causes.¹² Rather, he argues that the *Charter* is more likely to legitimate existing political and social inequalities by shrouding political decisions in the language of legal principle.¹³ Providing examples of *Charter* decisions from cases involving criminal procedure, labour law and equality dimensions, Mandel finds that, on balance, progressive court decisions are far outweighed by those enforcing the status quo.¹⁴ In fact, he views the *Charter* as having undermined popular movements¹⁵ as negative court rulings have in many cases dissipated political urgency. Not one to mince words, he reserves his harshest criticism for those he believes most responsible for perpetuating this “hoax.” His scathing verdict is that “Canadian lawyers and judges have, for the most part, gleefully and greedily undertaken a job – deciding the most important political questions of the day – for which they lack all competence. And they have been more than willing to adopt the necessary pretexts to disguise these political, and politically conscious interventions as *apolitical* interpretations of a document so vague as to be meaningless.”¹⁶

University of British Columbia constitutional scholar Joel Bakan has made similar arguments in *Just Words: Constitutional Rights and Social Wrongs*. Bakan’s analysis largely eschews abstract theory in order to evaluate the social context in which the *Charter* operates. For him, “the emancipatory and egalitarian potential of the *Charter* depends on the social and historical circumstances surrounding its use.”¹⁷ While he rejects Mandel’s claim that *Charter*-based policy contributions are necessarily less

¹² *Ibid.* at 64.

¹³ *Ibid.* at 72.

¹⁴ *Ibid.* at 455.

¹⁵ *Ibid.* at 4.

¹⁶ *Ibid.* at 455.

¹⁷ Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 9 [Bakan].

democratic than representative institutions, he estimates that litigation based upon the *Charter* is ultimately unlikely to produce social progress. In fact, he argues that in general, *Charter* litigation will be more likely to thwart social progress. Like Mandel, Bakan asserts that *Charter*-based judicial review tends to impede the important goal of increasing public participation in democracy.¹⁸ He views this as problematic because judges – by his account – are unlikely to utilise their freedom from political accountability to advance the cause of social justice. For him, the *Charter* has privileged the outlooks of “an elite group of predominantly white, upper-middle-class, male lawyers”¹⁹ He insists that their views will be replicated in *Charter* decisions due to the generally indeterminate nature of law and the particularly ambiguous nature of *Charter* provisions.

Additionally, Bakan notes that since the *Charter* only applies to relationships between the individual and the state, it is not suited to addressing “most day to day coercion, need, want and discrimination in people's lives.”²⁰ Further, he argues that it poses a further danger since unsympathetic “individuals, groups and corporations can use the *Charter* to avoid legislative restrictions designed to prevent them from harming and exploiting others.”²¹ Like Mandel, Bakan cites a number of *Charter* decisions that have been unpopular with the “left” as evidence of why *Charter* judicial review is a lamentable development in Canadian politics. While his concerns are largely similar to Mandel’s, Bakan’s analysis has a more pronounced consequentialist focus. For Bakan, *Charter* judicial review is an illegitimate exercise of power largely because it is in the hands of

¹⁸ *Ibid.* at 10.

¹⁹ *Ibid.* at 31.

²⁰ *Ibid.* at 48.

²¹ *Ibid.* at 87.

the “wrong” people and consequently produces the “wrong” results. He concludes that “the *Charter*, however cannot protect and advance a progressive conception of social justice, despite its just words, it cannot compensate for the systematic undermining of ideals of social justice by the routine operation of society’s structures and institutions.”²²

Another commentator often associated with the Canadian Critical Legal Studies movement is University of Victoria’s Andrew Petter. He has focused much of his critique of the *Charter* on what he perceives to be the classical liberal interpretive bias²³ of the S.C.C. Petter notes that the “rights set out in the *Charter* are founded upon the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state.”²⁴ Consequently, “*Charter* rights are predominantly negative in nature, aimed at protecting individuals from state interference or control with respect to this matter or that.”²⁵ He joins John Hart Ely in arguing that this view of rights privileges the perspective of upper-middle class professionals who view government regulation and resource redistribution as the most concerning threats to their social and economic position. Similarly, Petter notes that this outlook has led the courts to utilize a narrow conception of “government” such that the “distribution of wealth and power are products of private initiative as opposed to state action.”²⁶ Accordingly, he contends that these ideological commitments justify the court’s decisions not to disturb pre-existing socioeconomic inequalities, which he views as the direst threat to the rights of many Canadians. He also notes that most of the historical gains achieved by workers, women

²² *Ibid.* at 11.

²³ See Andrew Petter & Allan C. Hutchinson, “Private Rights/Public Wrongs: The Liberal Lie of the *Charter*” (1988) 38:3 U.T. Fac. L. Rev. 278 [Petter & Hutchinson, “The Liberal Lie of the *Charter*”].

²⁴ Andrew Petter, “Canada’s *Charter* Flight: Soaring Backwards into the Future” (1989) 16:2 J.L. & Soc’y 151 at 152 [Petter, “Canada’s *Charter* Flight”].

²⁵ *Ibid.*

²⁶ *Ibid.* at 153.

and racial minorities have come via engagement with the legislative process.²⁷ Thus, he shares the scepticism expressed by Mandel and Bakan about the progressive potential of *Charter* litigation.

However, Petter's opposition to the *Charter* is also based upon democratic and practical procedural concerns. Nearly twenty years ago, he noted that the cost of bringing a non-criminal *Charter* case was prohibitively expensive for all but the wealthy.²⁸ He argues that the cost of *Charter* litigation will contribute to business-friendly interpretations of the overly general *Charter* rights.²⁹ Similarly, Petter appears equally perturbed by the persistent and inventive justificatory efforts of legal scholars sympathetic to the S.C.C.'s *Charter* interventions into Canadian politics.³⁰ He rejects the fiction that courts have the capacity to generate non-ideological social prescriptions³¹ and argues that this realization ought to contribute to the revitalization of more genuinely participatory democratic institutions. He suggests that "democracy is not about servitude to academic scribblers or imperial judges; it is about personal participation and social solidarity...democracy is about ourselves, not some of us, but all of us."³²

From the opposite end of the political spectrum, political scientists F.L. Morton and Rainer Knopff have developed a detailed critique of *Charter* politics. In *The Charter Revolution and the Court Party*, they argue that the adoption of the *Charter* has provided the means for certain groups to revolutionize Canadian politics by replacing

²⁷ *Ibid.* at 153-154.

²⁸ *Ibid.* at 155.

²⁹ *Ibid.* at 156.

³⁰ See Andrew Petter & Allan C. Hutchinson, "Daydream Believing: Visionary Formalism and the Constitution" (1990) 22: 2 Ottawa L. Rev. 365; Andrew Petter, "Twenty Years of *Charter* Justification: From Liberal Legalism to Dubious Dialogue" (2003) 52 U.N.B.L.J. 187 [Petter, "Twenty Years"].

³¹ Petter, "Canada's *Charter* Flight", *supra* note 24.

³² Andrew Petter & Allan C. Hutchinson, "Rights in Conflict: the Dilemma of *Charter* Legitimacy" (1989) 23 U.B.C. L. Rev. 531 at 548 [Petter & Hutchinson, "Rights in Conflict: the Dilemma of *Charter* Legitimacy"].

Parliamentary supremacy “by a regime of constitutional supremacy verging on judicial supremacy.”³³ They contend that the “Court Party” is composed of a coalition of national unity proponents, civil libertarians, equality seekers,³⁴ social engineers and postmaterialists.³⁵ While this coalition is not constant and its constituent groups sometimes have opposing interests, the Court Party pursues litigation frequently and opportunistically which helps to ensure that:

judicial intervention in the policymaking process is no longer *ad hoc* and sporadic [but rather] systematic and continuous... The nine Supreme Court justices are now positioned to have more influence on how Canada is governed than are all of the Parliamentarians who sit outside of cabinet.³⁶

The authors also claim that the judiciary and the state support the judicialization of Canadian politics. Like Mandel, Morton and Knopff suggest that many members of the judiciary have been eager participants in this process. Moreover, they echo Mandel’s observation that many of the document’s vaguely worded provisions provide insufficient guidance to provide clear answers to disputes. Likewise, they allude to intellectual dishonesty on the part of those who attempt to portray *Charter* decisions as apolitical. The metamorphosis of the S.C.C. from arbiter of discrete disputes to “authoritative oracle of the constitution, whose main job is to develop constitutional standards for society as a whole...”³⁷ has been assisted by the state, which has provided significant funding to members of the court party through the Court Challenges Program and the Secretary of

³³ F. L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000) at 13 [Morton & Knopff, *Court Party*].

³⁴ *Ibid.* at 68. According to the authors, equality seekers “include the ‘*Charter*’ members of the s. 15 club: women, visible and religious minorities, the mentally and physically disabled, the elderly” and lesbian, gay, bisexual and transsexual groups. Also included in this conception are official language minorities, multicultural communities and aboriginals.

³⁵ *Ibid.* at 78. Having attained a significant level of education and material affluence, “post-materialist” groups focus primarily on non-economic issues such as environmentalism, substantive equality, improved public education and greater democratization.

³⁶ *Ibid.* at 58.

³⁷ *Ibid.* at 54.

State. The authors note that such funding has historically aided federalist causes while in recent years it has primarily benefited “Court Party” advocacy groups while refusing to fund citizen groups with opposing ideologies.³⁸

For Morton and Knopff, the *Charter* Revolution is “deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy.”³⁹ They argue that the increased judicialization of politics “undermines perhaps the fundamental prerequisite of decent liberal politics: the willingness to engage those with whom one disagrees in the ongoing attempt to combine diverse interests in temporarily viable governing majorities.”⁴⁰ They conclude that:

[transferring] the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise policies with the intensely held policy preferences of minorities. Rights-based judicial policymaking also grants the policy preferences of courtroom victors an aura of coercive force and permanence that they do not deserve. Issues that should be subject to the ongoing flux of government by discussion are presented as beyond legitimate debate, with the partisans claiming the right to permanent victory. As the morality of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion. The result is to embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens – that is, as members of a sovereign people.⁴¹

From a position somewhat closer to the centre of the political spectrum, Jeremy Waldron has developed a rights-based argument against the judicialization of politics.⁴² The main targets of Waldron’s critique are systems that permit *strong judicial review*. In cases of strong judicial review, courts have the power to decide, as a matter of law, not to

³⁸ *Ibid.* at 97.

³⁹ *Ibid.* at 149.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 166.

⁴² See Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (1993) 13:1 *Oxford J. Legal Stud.* 18 [Waldron, “A Right-Based Critique of Constitutional Rights”]; Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999) c. 11 [Waldron, *Law and Disagreement*].

apply legislation that they conclude violates protected rights or otherwise to modify the offending provision(s) in order to render it compliant with the majority judicial opinion of rights.⁴³ Even with the presence of s. 33 in the *Charter*, Waldron considers the Canadian system to be an example of strong judicial review.⁴⁴

Waldron's view differs from that of most other critics as his position does not appear to be significantly motivated by his opinion regarding the results of rights-based judicial review in America or some other jurisdiction. From his position, instrumentalist evaluations of judicial review are question begging.⁴⁵ While Waldron does respond to the American commentators who favour judicial review on consequentialist grounds,⁴⁶ his primary quarrel with the institution appears grounded in its undemocratic nature:

By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.⁴⁷

He argues that meaningful citizen participation in the determinations of disputes about rights is the *right of rights*. For Waldron "it is impossible...to think of a person as a right-bearer and not to think of him as someone who has the sort of capacity that is required to figure out what rights he has."⁴⁸ Moreover, Waldron's argument that all citizens' sincere views on rights ought to be taken seriously is linked to his conviction that normative disagreement cannot merely be swept aside. He writes:

⁴³ Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346 at 1354 [Waldron, "The Core of the Case"].

⁴⁴ *Ibid.* at 1356.

⁴⁵ Waldron, *Law and Disagreement*, *supra* note 42 at 252.

⁴⁶ *Ibid.* at 289.

⁴⁷ Waldron, "The Core of the Case", *supra* note 43 at 1353.

⁴⁸ Waldron, *Law and Disagreement*, *supra* note 42 at 252.

Although there may *be* an objective truth about justice, such truth never manifests itself to us in any self-certifying manner; it inevitably comes among us as one contestant opinion among others.⁴⁹

Consequently, “no one can believe that his view of justice is *right reason* [with the implied consequence that it should be imposed on others]...merely because he is convinced (even if rightly) that his view is really correct.”⁵⁰ For him, disagreement about rights – even intractable disagreement – is to be expected in a healthy democracy. Additionally, Waldron alleges that legal rights discourse tends to sidetrack the debate about rights through focusing discussion on the proper interpretation of a particular document and case precedent, rather than on substantive issues of justice.⁵¹

Another prominent commentator that has focused more directly on a proceduralist critique of judicial review of legislation is Jeremy Webber of the University of Victoria. Like several of the above-mentioned critics, he suggests that the judicialization of politics can have a significant and detrimental impact upon democracy. Akin to Waldron, Webber is more concerned with the constitutional entrenchment of bills of rights than other mechanisms that could involve judicial review of legislation.⁵² He observes that the language used in constitutionally entrenched bills of rights tends to cast disputes in terms of absolute right or wrong such that decisions that make use of political compromise become improbable.⁵³ Further, as interpretations of constitutionalized rights tend to be highly symbolic, they take on a heightened status in terms of defining national identity

⁴⁹ *Ibid.* at 199.

⁵⁰ *Ibid.* at 203.

⁵¹ Waldron, “The Core of the Case”, *supra* note 43 at 1353.

⁵² Jeremy Webber, “A Modest (but Robust) Defence of Statutory Bills of Rights” in Tom Campbell, Jeffrey D. Goldsworthy & Adrienne Stone eds., *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Aldershot, England; Burlington, VT: Ashgate, 2006) at 263 [Webber, “Modest Defence”].

⁵³ Jeremy Webber, “Constitutional Reticence” (2000) 25:2 *Australian Journal of Legal Philosophy* 125 at 128 [Webber, “Constitutional Reticence”].

such that those in disagreement with “the constitution” may feel estranged from the broader political community.

Webber also acknowledges the value of disagreement in a democracy⁵⁴ and expresses serious reservations about the notion that citizens should strive to formulate immutable definitions of rights:

The desire to write common values into a constitution is a mark of considerable hubris, presuming as it does that we have the moral capacity to decide questions of fundamental value once and for all, achieving in one moment what is properly the work of public reflection throughout time.⁵⁵

He notes that this process tends to remove important issues from meaningful public debate by “largely insulating [results] against further political challenge and refinement.”⁵⁶ While Webber does not favour unfettered Parliamentary supremacy in all contexts,⁵⁷ he argues that in established democracies “there is no substitute for well-balanced, on-going, participatory structures.”⁵⁸ For him, constitutionalized judicial review of legislation on its substantive merits tends to foreclose the participation of most of society thereby removing those citizens from the formulation of the public position and ought, typically,⁵⁹ to be avoided.⁶⁰

The criticisms these commentators have levelled at the Canadian system of constitutional judicial review are robust. That being said, some might be unconvinced

⁵⁴ *Ibid.* at 136.

⁵⁵ *Ibid.* at 135.

⁵⁶ *Ibid.* at 137.

⁵⁷ While Webber suggests that a constitutional bill of rights may help to prevent gross human rights violations in certain limited circumstances, he argues that such circumstances are the exception to the rule. See Jeremy Webber, “Democratic Decision Making as the First Principle of Contemporary Constitutionalism” in Richard W. Bauman & Tsvi Kahana eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge; New York: Cambridge University Press, 2006) at 411 [Webber, “Democratic Decision Making”].

⁵⁸ *Ibid.* at 414.

⁵⁹ Webber, “Constitutional Reticence”, *supra* note 53 at 152.

⁶⁰ Webber, “Democratic Decision Making”, *supra* note 57 at 124.

with the strong proceduralist emphasis in the arguments presented by Waldron and Webber. Influential proponents of the American style of judicial review such as Ronald Dworkin have advocated a consequentialist-based analysis of the practice's purported strengths and weaknesses.⁶¹

Dworkin is perhaps the best-known proponent of a strong form of rights-based judicial review. His support of the institution of judicial review is based upon his acceptance of what he terms “the constitutional conception of democracy.”⁶² He describes his view of the relationship between majoritarian decision-making processes as follows:

The constitutional conception of democracy...takes the following attitude to majoritarian government. Democracy means government subject to conditions – we might call these the “democratic” conditions⁶³ – of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better.⁶⁴

While Dworkin acknowledges that the exact nature of these democratic conditions and whether they are offended by a specific law will be controversial issues, he holds that according to his constitutional conception of democracy, it “would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes that the

⁶¹ Ronald M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996) at 34 [Dworkin, *Freedom's Law*].

⁶² *Ibid.* at 17.

⁶³ According to Dworkin, these conditions include such things as moral independence and equal concern for the interests of all members. However, both the constituent conditions of democracy and the appropriate understanding of these concepts are areas of contestation that cannot be resolved via tendentious theorizing. For a more detailed description of Dworkin's perspective on these conditions, see *Ibid.* at 25.

⁶⁴ *Ibid.* at 17.

laws in question respect the democratic conditions, and that is the very issue in controversy.”⁶⁵

However, this argument cannot be expected to satisfy anyone that has not already accepted Dworkin’s preferred conception of “democracy.” In fact, the claim that controversies about the nature of democracy cannot be resolved by definitional fiat actually leaves one to wonder why one should accept his vision of democracy. It is also unclear how members of a society should decide which of the plethora of competing theories about democracy should be adopted – presumably he would not be content to let the people make an authoritative decision about this. Moreover, one need not believe that one’s conception of democracy is *the* vision of democracy in order to articulate concerns with institutional arrangements that include a strong form of judicial review. Clearly, something more must be said about the value of this practice and whether it can overcome the objection that unaccountable judicial bodies are merely replacing the rights interpretations of elected representatives with their own rights interpretations.

One of Dworkin’s best known attempts at providing this additional justification for his more sceptical readers is the “right answer thesis.” Dworkin holds that there is one, and *only* one correct answer for most legal disputes. It is argued that the existence of “right” answers to disputes about rights would lend legitimacy to the process of Bill of Rights judicial review of governmental actions. However, one might also assume that such arguments in favour of the legitimacy of strong judicial review would be limited to circumstances where judges arrive at the “right” decision. It is difficult to imagine how the existence of “right” answers to legal disputes would legitimize the process of judicial review if the judiciary fail to discern and implement those outcomes. Nobody would

⁶⁵ *Ibid.* at 18.

seriously suggest that if, in fact, there are objective moral standards, that this provides license for individuals to act as they see fit. Curiously, Dworkin argues that reaching this “best” decision is not necessary in order to confer legitimacy on a particular decision.

Dworkin argues that in deciding “hard” cases – cases in which the legal materials do not provide a clear answer – the legitimacy of the decision is not ultimately tied to its correspondence with the theoretical “right” answer. The topic of “hard” cases is particularly salient to the issue Bill of Rights based judicial review because legal documents such as the *Charter* do not contain detailed explanations of the scope or content of the rights contained within. Further, such documents contain no guidance regarding how conflicts between entrenched rights ought to be resolved. In *Law’s Empire* Dworkin argues that in hard cases, “If the raw data do not discriminate between these competing interpretations, each interpreter’s choice must reflect his view of which interpretation proposes the most value for the practice – which one shows it in the better light, all things considered.”⁶⁶ While Dworkin acknowledges the obvious fact that judges will have differing visions of what is best from the standpoint of political morality⁶⁷ and will consequently not always agree upon the “best” answer, he does not view this as necessarily providing a challenge to the legitimacy of the *process*. For Dworkin, as long as judges *feel* bound to make these decisions on the basis of a “coherent set of principles about justice and fairness and procedural due process [that requires] them to enforce these in the fresh cases that come before them...”⁶⁸ while believing that there is a “best” answer to the dispute that is not necessarily equivalent with their personal normative

⁶⁶ R. M. Dworkin, *Law's Empire* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1986) at 52-3.

⁶⁷ *Ibid.* at 256.

⁶⁸ *Ibid.* at 243.

preference, the integrity of the decision-making process is maintained. Consequently, the integrity of a legal decision in a hard case is primarily based upon the court's good faith application of legal principles and is only incidentally related to the "rightness" of the decision.

However, in his later work⁶⁹ it is clearer that Dworkin perceives a connection between the cumulative effect of judicial decisions on a society and the legitimacy of the *institution* of judicial review. He asserts, "[t]he best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions."⁷⁰ Dworkin contends that judges, being free from the restraints of popular accountability, are better situated to make controversial decisions that enhance democratic practice. For him this does not give the judiciary free reign to strike down any law of which it disapproves. Rather, such authority ought to be limited to instances where "some rule or regulation or policy itself undercuts or weakens the democratic character of the community, and the constitutional arrangement assigns *that* question to the court."⁷¹

Dworkin's theory on adjudication has been criticized from many sides. In particular, numerous theorists who have been labelled as part of the Critical Legal Studies movement have raised several difficulties with his approach. While scholars typically associated with Critical Legal Studies adopt a variety of critical perspectives, they tend to share the general view that "law is politics" and seek to expose the ways in which

⁶⁹ Dworkin, *Freedom's Law*, *supra* note 61 at 34.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 32.

traditional legal discourse obscures the “politics of power.”⁷² One prominent strategy at exposing such power relations has focused on the existence of intractable contradictions in terms of legal principles. Through developing this *indeterminacy thesis* Critics hoped to lay bare “the political choices justified by the doctrine.”⁷³

Many Critical Legal Studies scholars would suggest that the liberal principles lauded by Dworkin as the bedrock of the integrity of the judicial decision-making process are a mere “smoke screen” to conceal judges’ political preferences – subconscious or otherwise. As one commentator has noted, “the existence of such a theory makes no practical difference because a judge will typically see her favoured ideology as constituting that theory. The soundest theory is not some brooding omnipresence in the sky, but rather a brooding irrelevance in the sky (assuming it is anywhere at all).”⁷⁴ The force of this latter argument when applied to the abstract provisions of the *Charter* will be evident to many who may not have sympathy for other arguments put forward by Critical Legal Studies scholars. Similarly, Dworkin’s suggestion that constitutional judicial review be limited to issues that relate to the “democratic character” of a political community and which are assigned to courts by the constitution cannot be viewed as constraining the decisions of judges on the equally contentious issue of the scope of constitutional judicial review.

Adherents of Dworkin’s position measure the desirability of an institutional arrangement, like judicial supremacy, by comparing its results in a particular context to those they assume would have been generated by an alternative procedure, such as

⁷² Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995) at 106.

⁷³ *Ibid.* at 111.

⁷⁴ Andrew Altman, “Legal Realism, Critical Legal Studies, and Dworkin” (1986) 15:3 *Philosophy and Public Affairs* 205 at 232.

legislative supremacy. Of course, in order to arrive at a decision, they must also compare this imagined difference in results to some vision of political morality. Invariably, such commentators' personal ethical commitments mould the standard by which the adequacy of institutional arrangements is measured. Since many people -- both professional academics and mere concerned citizens -- care deeply about rights issues, this approach continues to be appealing to some. However, there are profound difficulties with this type of analysis.

One of the primary difficulties with this type of consequentialist approach is that it is largely indeterminate. Even when one is only considering a select group of rights issues, determining whether the grass would currently be greener on the other side of the counterfactual fence is often not possible with an adequate degree of reliability. Further, such estimations typically become exponentially more complex when one attempts to look beyond the present to grasp the longitudinal implications of current institutional arrangements. Institutional design that seems better equipped to protect rights x, y, and z today may actually contribute to their marginalization in the future.

This reality is clearly illustrated by the current composition of the Supreme Court of the United States. One could labour for many years as an advocate (or critic), of such an institution only to be forced into an embarrassing about face should the next judicial appointee swing the balance of judicial power in the opposite direction -- alternatively, such advocates must blithely maintain that the new judicial majority has either "grasped" (or "perverted") the "true" meaning of the constitution. Additionally, it is worth noting that there is no consensus about the benefits of judicial supremacy amongst those who largely rely upon consequentialist analyses of judicial review. Indeed, some critics of the

judicialization of politics have presented detailed consequentialist arguments against judicial review of legislation.⁷⁵

However, as the example of the American Supreme Court has demonstrated, there is a more fundamentally troubling difficulty with such consequentialist analyses of democratic institutions. They reduce questions of democratic fairness to a mere calculation of which types of institutional arrangements are expected to come closest to producing that commentator's preferred set of rights outcomes. As Waldron has eloquently argued, this type of analysis is largely question begging. Consequently, it is little wonder that consequentialists' support (or opposition) of strong judicial review "is a sometime thing."⁷⁶ I prefer to measure the fairness of democratic institutions by asking the following question: "Even if the result I had hoped for was not realised, can I still respect the process that produced the result?" As Petter noted twenty years ago:

Suppose tomorrow it were announced that a Political Entitlements Tribunal would be established; that the tribunal would be given sweeping powers to curtail the activities of modern government in the name of protecting such vaguely defined entitlements as 'liberty', 'equality', and 'freedom of association'; that the tribunal would be composed⁷⁷ of nine white affluent lawyers, the majority of whom would be men, all of whom would be of or beyond middle age; that members of the tribunal would be able to remain in office until the age of seventy-five and would be accountable only to themselves; and that the cost of bringing a claim would amount to more than five times the average annual income of a Canadian family. What would one's reaction to such a proposal be?⁷⁸

⁷⁵ Hirschl, *supra* note 1 at 286.

⁷⁶ Waldron, "The Core of the Case", *supra* note 43 at 1351.

⁷⁷ While it is acknowledged that the court's current composition is slightly more representative of the broader Canadian population than twenty years ago it is rather absurd to think that a body of nine could ever be adequately representative of a diverse population of more than 32,000,000.

⁷⁸ Petter, "Canada's *Charter* Flight", *supra* note 24 at 161.

This observation is a strong answer to the criticisms of those who would argue in favour of the judicialization of politics on the basis of deficiencies that exist under current systems of popular representation.⁷⁹

Second, by dictating resolutions for disputes about rights to the general population, courts invite mass apathy towards democratic institutions while encouraging an inflationary rights discourse. As Rainer Knopff has noted,⁸⁰ while

rights may exist, and can even be the subject of a fundamental popular consensus, the issues covered by their rhetorical cloak in the courtroom are rarely of this fundamental ilk. The people may agree that theocratic establishments violate the fundamental right of freedom of religion, while reasonably disagreeing about the merits of Sunday closing laws. They may agree that equality is a fundamental right – one that prohibits, say, slavery-while disagreeing profoundly, but legitimately, about whether this right protects only equality of opportunity or also equality of result. If theocrats or slavers take power, the fundamental consensus will, by definition, no longer exist, and judges, wielding only their “parchment barriers,” will be able to do nothing about it. As long as the fundamental consensus persists, on the other hand, true violations of its terms will not occur, and the only issues that will go to court will be second-level issues about which reasonable people may reasonably disagree. The courtroom politics of rights, however, rhetorically gives these second-level disagreements the colour of truly fundamental ones. Courtroom partisans present themselves as the true defenders of fundamental rights, of the original consensus, and demonize their opponents as despoilers of all that is true and good. Again, what is merely a part is rhetorically disguised as the whole.

The increasing removal of rights disputes from public consideration is akin to gradual and progressive disenfranchisement of citizens. In a society where intractable normative disagreement about the subject matter of *Charter* litigation is rampant the gradual exclusion of various positions in contentious disputes from the sphere of legitimate public debate erodes the participatory opportunities that have traditionally been considered part

⁷⁹ Such defences of the judicialization of politics typically provide a litany of complaints about the prominence of elites in governments, inadequacies in the representative make-up of legislatures and the prohibitive expense attached to running a successful political campaign. Arguments of this sort are more fruitfully directed towards analyses of how to reinvigorate accountable, democratic institutions rather than abandoning them in favour of an institution that more acutely manifests many of the same flaws.

⁸⁰ Rainer Knopff, “Populism and the Politics of Rights: The Dual Attack on Representative Democracy” (1998) 31:4 *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 683 at 700.

of meaningful civic life. In practice this leaves those marginalized by the rights decisions of judicial majorities with the option of abandoning their normative commitments or embracing courses of action that fall outside the purview of what is considered democratic activity. Those who believe in the value of participatory institutions ought to find both of these options concerning.

Another potential argument in support of judicial review, with regard to common law jurisdictions, is that judges have always exercised a significant degree of law making power in addition to their statutorily mandated discretion. It is suggested that since the exercise of judicial discretion in important cases is inevitable and the mere continuation of an institutional tradition, one should not be concerned about the impact of the *Charter* on determinations of rights disputes. This statement does contain a kernel of truth. At times during the long history of the common law, judicial innovation has made profound and influential contributions to the development of certain areas of law (i.e.: the development of negligence as a cause of action in tort law). Furthermore, it is obvious to many observers⁸¹ that judges exercise quite significant discretion, and power, in the more mundane acts of interpreting legislation, deciding matters of guilt or liability and considering matters of sentencing or damages.

While such observations contain a kernel of truth, they tend to minimize the extent of the increase of judicial power that has occurred under the *Charter*. It is clear that under the *Charter*, Canadian courts have chosen to exercise a significantly higher degree of power at the expense of Canadians and their elected representatives.

⁸¹ It is commonplace for members of my local bar to take a keen interest in the dispositions of local judges and weigh this significantly in their case strategy. Even the controversial practice of judge shopping is not uncommon amongst certain practitioners.

Whereas the pre-*Charter* S.C.C. primarily focused on the resolution of disputes involving supposed errors in interpretation of law and fact, it has now become a regular forum for the substantive review of legislation.

Further, as will be discussed more fully in a later chapter, there are often important differences in the effect of judicial decisions based upon judicial discretion in the interpretation of legislation and those based upon interpretations of the *Charter*. In many cases, *Charter* decisions bring a strong degree of closure to political disputes by placing both theoretical and practical limitations on whether, or how, the appropriate level of government can respond. *Charter* decisions also play a strong role in shaping the contours of future political debate and legislative action since, for a variety of reasons, governments wish to avoid having their legislation invalidated by the courts. As noted by Webber, constitutionally based decisions tend to entail a level of emotive and rhetorical appeal not associated with other court decisions.⁸² Additionally, as some commentators⁸³ have argued, rights decisions based upon constitutionalized Bills of Rights have also stunted the development of rights assertions by numerous advocacy groups. Consequently, appeal to the fact that judges have always exercised some degree of power does little by itself to undermine a critique of the significant increase of the judicialization of politics that has occurred since the adoption of the *Charter*.

A final critique of a position held by some of the above-mentioned authors relates to their endorsement of certain forms of what Waldron would refer to as *weak*

⁸² Webber, “Constitutional Reticence”, *supra* note 53 at 128.

⁸³ See Hirschl, *supra* note 1 at 286; Mandel, *supra* note 8 at 542; K. D. Ewing, “The Unbalanced Constitution” in Adam Tomkins, K. D. Ewing, & Tom Campbell eds., *Sceptical Essays on Human Rights* (Oxford UK; New York: Oxford University Press, 2001) at 103.

judicial review. Professor Webber provides “a modest, but robust” endorsement of statutory Bills of Rights⁸⁴ and Waldron seems, at times, equivocal about the issue.⁸⁵ Since this thesis will focus specifically on the Canadian system of judicial review, the issue of statutory Bills of Rights will not be addressed in the level of detail that the issue deserves. That being said, I do not share these esteemed professors optimism, (in the case of Professor Webber), or dare I say, indecisiveness (in the case of Professor Waldron), regarding such mechanisms. In practice, many of the same arguments that Professor Waldron has wielded against strong judicial review could be marshalled against the implementation of statutory Bills of Rights.

Like their constitutionally entrenched cousins, statutory Bills of Rights confer unwarranted legitimacy on the increased involvement of an unelected, unrepresentative and unaccountable legal elite in the determination of political issues traditionally left for the people to decide through various voting mechanisms. Additionally, going through the court system, even under a statutory scheme, is still prohibitively expensive for all but the wealthiest or systemically privileged citizens. While issues related to access are a concern, even the provision of adequate funding to each and every group or individual who wished to challenge legislative provisions would not address a more serious deficiency. Like other citizens, judges are socially and historically located, and are therefore incapable of rendering apolitical or ahistorical decisions. This reality is all the more problematic because judges, unlike politicians, are in no way accountable to the people that are subject to their decisions.

⁸⁴ Webber, “Modest Defence”, *supra* note 52.

⁸⁵ See James Allan & Andrew Geddis, “Waldron and Opposing Judicial Review - Except, Sort of, in New Zealand” (2006) 2 *N.Z.L.J.* 94.

Additionally, even when statutory Bills of Rights are designed to place stringent limitations upon the powers of judges, those entrusted with interpretation can find ways of increasing the scope of their authority.⁸⁶ However, it is worth noting that this challenge does not itself undermine the logic of these professors' criticisms of constitutionalized Bills of Rights but rather goes to their estimation of the degree of difficulty posed by these "weaker" institutional arrangements.

From my perspective much of the critique of the judicialization of politics (or in some cases, the hyper judicialization) has fared rather well against the criticisms frequently offered by those who support such institutional arrangements. Having largely adopted the proceduralist critique of the *Charter*, I will examine arguments pertaining to whether the current Canadian context, with the continued presence of a notwithstanding clause, can fairly be considered an example of strong judicial review as Professor Waldron has argued.

⁸⁶ James Allan, "Take Heed Australia - a Statutory Bill of Rights and its Inflationary Effect" (2001) 6 Deakin Law Review 322.

Chapter 2

We Can Work it Out – An Evaluation of the Dialogic Potential of Judicial Review

While most commentators accept that the S.C.C.'s application of the *Charter* has increased the judiciary's role in the Canada political system, some theorists argue that the *Charter's* impact upon Canadian democracy has been greatly exaggerated by the likes of Waldron, Petter and Bakan. Perhaps the most influential of such critiques is that of dialogue theory as initially formulated in the Canadian context by, then Osgoode Hall professor, Peter Hogg and then Osgoode Hall law student, Allison Bushell. They purport to rebut the argument that *Charter*-based judicial review is democratically illegitimate. While some have questioned whether their efforts achieve their stated aim,⁸⁷ their conception of dialogue has been much discussed within legal academic circles and even referenced by the Supreme Court of Canada.⁸⁸ Further, the arguments they utilize represent a reasonable summary of those commonly cited by individuals who argue that the *Charter* has had limited practical impact on Canadian democracy. In order to consider how strong judicial review actually is in the Canadian context this discussion will focus primarily on their assertions about the actual impact of the *Charter* on the democratic process. According to Hogg and Bushell, it is appropriate to view the *Charter*-centred

⁸⁷ See Andrew Petter, "Taking Dialogue Theory Much Too Seriously (or Perhaps *Charter* Dialogue isn't Such a Good Thing After All)" (2007) 45:1 Osgoode Hall L.J. 147 [Petter, "Taking Dialogue Theory"]; F. L. Morton, "Dialogue or Monologue?" *Policy Options* (April 1999) 23 [Morton, "Dialogue or Monologue"]; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall L.J. 513 [Manfredi & Kelly, "Six Degrees"]; Jeremy Webber, "Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)" (2003) 9:1 Austl. J. H. R. at 135 [Webber, "Institutional Dialogue"].

⁸⁸ The authors state that the S.C.C. has referenced the dialogue metaphor in ten of its decisions. Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited - or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall L. J. 1 at 5 [Hogg *et al.* "*Charter* Dialogue Revisited"].

exchanges between Parliament and the provincial legislatures and the courts as institutional dialogue because elected officials often have the legal authority and capacity to respond to court decisions that invalidate portions of legislation. This claim will be evaluated by examining each of the characteristics of judicial review in the Canadian context that the authors suggest provide opportunities for dialogue. I conclude that, at the moment, there is virtually no circumstance in which Canadian legislative bodies can alter the substance of a *Charter* decision and that it is, therefore, appropriate to suggest that the current institutional arrangements constitute judicial supremacy.

According to the authors, “where a judicial decision is open to legislative reversal, modification or avoidance, ...it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.”⁸⁹ The authors subsequently state that “there is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out...”⁹⁰ They infer that these “dialogical” opportunities are pervasive such that in practice the Canadian system of government is most accurately conceived of as Parliamentary supremacy or at least *near* Parliamentary supremacy. This claim also forms the basis of the authors’ argument in support of the legitimacy of the practice. They argue that since the consequences of S.C.C. decisions can typically be avoided or minimised, the practice of judicial review is not undemocratic.⁹¹

In theory a dialogical relationship between the legislative and judicial branches of government could provide a meaningful opportunity for Parliament or a legislative

⁸⁹ Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35: 1 Osgood Hall L.J. 75 at 79 [Hogg & Bushell, “*Charter* Dialogue”].

⁹⁰ *Ibid.* at 80.

⁹¹ As Petter has noted, the alleged reversibility of a decision provides dubious justification for the practice of judicial review. See Petter, “Twenty Years”, *supra* note 30 at 195.

assembly to consider rights issues from a different perspective. In certain cases, this could potentially benefit the government by bringing cases involving actual legislative errors or policies with unforeseen consequences to the attention of governmental officials. Such cases might provide the government with the opportunity to reconsider how the provisions in question balanced competing rights concerns and other interests. In rare cases, judicial decisions which strike down governmental policies have likely not been entirely unwelcome as governments occasionally lack the political will to make controversial changes in policy. However, it is fair to say that the vast majority of *Charter* cases do not involve legislative errors or undesirable (from the perspective of the government) policies but rather a measured policy preference supported by the government.

Rather than focussing on a largely sterile semantic debate about which institutional interactions are constitutive of “dialogue”, the more pressing issue of which institution, in practice, has the ultimate policy making authority will be the primary focus of this chapter. That being said, the authors’ curious conception of dialogue merits mention. They argue that the sheer number of cases where Parliament or a provincial legislature has responded after a judicial decision nullifying legislation is sufficient proof that Canada’s legislative bodies are generally not significantly constrained by judicial interpretations of the *Charter*. However, the authors lump all forms of government response, including cases where the legislative body merely repealed the impugned provisions and implemented the court’s requirements, as dialogue. As Morton has noted, this operationalization of “dialogue” is not entirely convincing:

This lax operationalization of the concept of dialogue also obscures important differences between types of legislative response. When Parliament added

a new search warrant requirement to the *Anti-Combines Act* after *Hunter v. Southam* it simply did what the Court told it to do. After *Daviault*, by contrast, Parliament created a new offence that explicitly rejected the Court's ruling that self-induced intoxication can be used as a *mens rea* defence against assault charges. Similarly, Quebec's 1988 use of section 33 to avoid compliance with the Court's ruling in the "French-only" public signs case is clearly not on a par with the same government's decision in 1993 to comply with the Court's ruling. Yet, in the 1997 study, these very different responses are all counted equally as "dialogue."⁹²

Of course, such a broad operationalization renders the concept of "dialogue" near meaningless. The real issue is which institution, practically speaking, has the final say about how to balance rights in these types of disputes. If this authority rests with Parliament then Canada cannot be said to possess a strong form of judicial review. However, if in practice, this power rests with the courts then it is appropriate to say that the Canadian judicial branch is supreme.

The current balance of power between these institutions may be evaluated by considering the purported dialogical sites discussed by Hogg and Bushell. According to the authors, there are four elements related to *Charter* adjudication that provide opportunities for institutional dialogue. Their list consists of: *Charter* section 33, the notwithstanding clause; *Charter* section 1, which allows the courts to limit the scope of constitutionally protected rights; the fact that the *Charter* rights in sections 7, 8, 9 and 12 are qualified; and the fact that *Charter* section 15 rights may be achieved through any of a number of possible means. Their arguments with relation to each of these purportedly dialogue fostering features will now be examined.

⁹² Morton, "Dialogue or Monologue?", *supra* note 87 at 23.

***Charter* Section 33 – The Notwithstanding Clause**

Section 33 of the *Charter* allows a government to remove legislation – in all or part – from judicial scrutiny on the basis of sections 2 (fundamental freedoms), and 7-15 (legal and equality rights) of the *Charter*. However, the invocation of the clause expires automatically after a term of five years and must be renewed by the legislature at such time in order to remain in effect. In theory the clause could be invoked in response to a *Charter* decision based upon the aforementioned sections, although, as the authors note, this has actually only occurred once.⁹³ A further limitation on section 33 is that it does not apply to other sections of the *Charter*. Consequently, where a court bases its decision on sections 3-6, (which include democratic and mobility rights) sections 16-23 (which relate primarily to language rights) or section 28 (gender equality), section 33 may not be used to override the judicial majorities' rights interpretation. While the authors acknowledge these express limitations and also state that the future usage of section 33 appears unlikely outside Quebec,⁹⁴ they fail to adequately examine why the clause is not being used and the ramifications of this for their theory.

There is currently a strong consensus amongst commentators that usage of the notwithstanding clause would constitute an immense expenditure of political capital. Commentators such as Waldron,⁹⁵ Petter⁹⁶, Morton⁹⁷ and Janet Hiebert⁹⁸ have recently

⁹³ Hogg & Bushell, "*Charter* Dialogue", *supra* note 89 at 83, n. 26.

⁹⁴ For a detailed account of the past usages of the s. 33 of the *Charter* see Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of Section 33 of the *Charter*" (2001) 44:3 Canadian Public Administration/Administration Publique du Canada 255; Webber, "Institutional Dialogue", *supra* note 87.

⁹⁵ Waldron, "The Core of the Case", *supra* note 43 at 1357.

⁹⁶ Petter, "Taking Dialogue Theory", *supra* note 87 at 161.

⁹⁷ F. L. Morton, "Can Judicial Supremacy Be Stopped?" *Policy Options* (October 2003) 25 at 28 [Morton, "Judicial Supremacy"].

argued that the political cost currently associated with the notwithstanding clause makes it unusable. Part of the explanation for this relates to the impoverished state of rights discourse, at the theoretical level, found in the mainstream news media. While, as discussed, there are no objective logical criteria to suggest that the construction of *Charter* rights produced by judicial majorities is *the* correct interpretation, there is still a certain mystique associated with judicial rights interpretations. Many citizens conflate the *process* of judicial review with the *existence* of individual rights. This leads to the inaccurate view that usage of the notwithstanding clause necessarily constitutes the abrogation of individual rights. Some have argued that media coverage, which typically depicts the clause as “overriding” individual rights, has contributed significantly to this view.⁹⁹ However, as will be discussed in greater detail in the next chapter, in many cases the reactive use of s. 33 merely constitutes a different view of how different *Charter* rights and other important interests ought to be balanced. Further, it is fair to suggest that many Canadian citizens at this point do not realize that judges are not providing ideologically neutral interpretations of *Charter* provisions.

One of the reasons this mystique surrounding judicial interpretations of *Charter* rights persists relates to the generally deferential attitude toward the judiciary fostered by Canadian legal and political culture. Members of several of the professions that might be expected to possess genuine insight into the practical reality of constitutional litigation are strongly discouraged from making negative public comment on the process.

⁹⁸ See generally Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) and more directly Janet L. Hiebert, “Is it too Late to Rehabilitate Canada's Notwithstanding Clause?” (2004) 23 Sup. Ct. L. Rev. 169 [Hiebert, “Is it Too Late to Rehabilitate?”].

⁹⁹ Emmet Macfarlane, “Rights Talk” and Reality in Canada: Does News Media Coverage Impoverish Political Discourse Regarding the *Charter* of Rights?” (Paper presented to the Canadian Political Science Association, University of Saskatchewan Saskatoon, Saskatchewan 30 May 2007) [unpublished].

Throughout the legal academic and professional training of aspiring lawyers, deference to the judiciary is modelled. Practicing lawyers rarely criticize *Charter* decisions publicly. According to the norms of legal culture it would be considered unseemly for Crown lawyers to openly criticise a *Charter* decision. Likewise, private practitioners who specialize in constitutional litigation would stand to gain little by criticizing the decisions of the high court or scrutinizing the process. Similarly, legal academics with elevated aspirations correctly recognize the emperor to be less than receptive to unflattering comments about his wardrobe. Politicians that have criticized the *Charter*-based judicial disposition of social controversies have been accused of interfering with judicial independence – as if such commentary somehow encumbered judicial capacity to formulate value neutral resolutions to intractable controversies.¹⁰⁰

Indeed, these views have also been perpetuated at times by members of the judiciary who have claimed in their written reasons that they have in fact been providing neutral interpretations of the document.¹⁰¹ For instance, in *RJR-Macdonald Inc. v.*

Canada (Attorney General) Justice McLachlin wrote:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.¹⁰²

Striking a similar note, Justice Iacobucci wrote for the majority in *Vriend v. Alberta*:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper

¹⁰⁰ Lorne Sossin “Don't Treat Judges Like Politicians” *National Post* (11 June 2004) A20.

¹⁰¹ See Bakan, *supra* note 17 at 23; Jessie J. Horner, *Canadian Law and the Canadian Legal System* (Toronto: Pearson Allyn & Bacon, 2007) 234-235; Michael Harris “Chief Justice Denies Court is Too ‘Activist’: Supreme Court ‘Cannot be Ruled by Public Opinion’” *The Ottawa Citizen* (18 November 2000) A3.

¹⁰² *RJR-Macdonald v. Canada*, [1995] 3 S.C.R. 199 at para. 136.

policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself.¹⁰³

More broadly, Charterphiles and politicians frequently accuse those critical of the process of lacking respect for the rights enshrined in the *Charter*.

While in some cases these claims may represent a sincere but naïve view of the operation of the *Charter*, in many cases such accusations appear politically motivated. However, such tactics have a certain force because the attribution of *Charter* rights with constitutional status provides them with an enhanced rhetorical standing not associated with rights grounded in ordinary legislation.¹⁰⁴ This rhetorical approach has been appropriated by politicians and pundits alike who have undoubtedly observed the powerful persuasive force of constitutional bill of rights rhetoric in the American context. Additionally, the inadequacies of media coverage reinforce the impression that the determinations of judicial majorities constitute authoritative statements of individual rights. A particularly pointed instance of this occurred during the 2006 federal election when Prime Minister Paul Martin announced that, if re-elected, his party would remove the federal Parliament's power to use the notwithstanding clause. While there was substantial doubt cast on the possibility of achieving this without constitutional amendment,¹⁰⁵ the situation is illustrative of the current state of *Charter* rights discourse.

This strategy was orchestrated in order to portray Canada's other major political party, the federal Conservative Party, as the "enemy" of citizens' rights. Martin characterized the notwithstanding clause as "a hammer that can only be used to pound

¹⁰³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 136.

¹⁰⁴ For a discussion of this latter point see Webber, "Constitutional Reticence", *supra* note 53 at 132.

¹⁰⁵ Janice Tibbetts, "Martin's Surprise Proposal Opens Legal Quagmire" *Nanaimo Daily News* (11 January 2006) A5.

away at the *Charter* and claw back any one of a number of individual rights”¹⁰⁶ As will be discussed in more detail in the next chapter, most *Charter* decisions involve the balancing of rights claims between various groups of individuals and not the mere “clawing back” of citizens’ rights. However, there are reasons, beyond the realm of political rhetoric, why this surface view of *Charter* rights discourse persists.

As Jeremy Waldron has noted, the procedural structure involved in the usage of the notwithstanding clause may contribute to such misrepresentations. He states:

I believe that the real problem is that section 33 requires the legislature to misrepresent its position on rights. To legislate notwithstanding the *Charter* is a way of saying that you do not think *Charter* rights have the importance that the *Charter* says they have. But the characteristic standoff between courts and legislatures does not involve one group of people (judges) who think *Charter* rights are important and another group of people (legislators) who do not. What it usually involves is groups of people (legislative majorities and minorities, and judicial majorities and minorities) all of whom think *Charter* rights are important, though they disagree about how the relevant rights are to be understood.¹⁰⁷

Furthermore, as Morton has noted:

Politically speaking it is easier for a government to refuse to give a group a “new right” than to take away an “existing right.” In the first instance, the government is simply ignoring a claim for special treatment. In the latter case, they can be portrayed as attacking the group.¹⁰⁸

Thus, until a more honest and sophisticated discourse about the nature of rights and *Charter* interpretation develops, any government that makes use of its “constitutional right” to exercise the notwithstanding clause to reconfigure competing rights claims is likely to face media sensationalism that gives disproportionate voice to irate advocacy

¹⁰⁶ Thomas Axworthy, “Sword of Damocles or Paper Tiger: Canada’s Continuing Debate over the Notwithstanding Clause” Festschrift Conference “Recreating Canada” in honour of Professor Paul Weiler, Harvard University, November 3-4, 2006) [unpublished] at 1 [Axworthy].

¹⁰⁷ Waldron, “The Core of the Case”, *supra* note 43 at 1357, n. 34.

¹⁰⁸ Morton, “Judicial Supremacy”, *supra* note 97 at 28.

groups and opportunistic opposition party attempts to cast that government as an “enemy of rights.”¹⁰⁹

In fact, an examination of the current state of Canadian federal politics provides ample support for this observation. Currently, there are only two parties that have the capacity to lead a federal government. As previously noted, the federal Liberal party has exhibited significant antipathy to the use of the notwithstanding clause – even going so far as to include unilateral amendment of the constitution as a campaign promise during the 2006 federal election. Subsequent to its electoral defeat the party has not changed this official stance.¹¹⁰ Consequently, should the current Conservative government even publicly raise the possibility of utilizing this clause, it would be rather surprising if this did not become ammunition for a further round of scare campaigning resurrecting the “Conservative Party hidden agenda” mantra of Chrétien and Martin era campaigns. Consequently, current federal party dynamics speak quite strongly against the application of the clause.

Greatly compounding this enormous political obstacle is a further procedural barrier which problematizes the usage of the notwithstanding clause. Section 33(3) of the *Charter* states that “A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.” The practical ramifications of this limitation are profound. Even if a government is able to withstand the barrage of media sensationalism and partisan criticism likely to be associated with having used the notwithstanding clause and is re-

¹⁰⁹ For a more detailed analysis of how the *Charter* process operates to generate political inertia see Morton & Knopff, *Court Party*, *supra* note 33 c. 7.

¹¹⁰ L. Ian Macdonald, “If Liberals are the Party of the *Charter*, Tories are Party of BNA Act” *The Gazette* (11 December 2006) A31.

elected, it is assured of facing some level of the very same political controversy within the course of its next regular term.

Should the government not renew the application of the clause the subject matter of the legislation will almost certainly be challenged, bringing further political controversy before the discretion of the courts. That is to say, the cost of political capital currently associated with using the clause would rarely seem justified given the legislative decision would remain under a shadow of constitutional suspicion punctuated by questions of whether the clause will be renewed every five years or with every change in government. As Janet Hiebert has incisively noted, this provision ensures that “[the] ability to disagree with a judicial ruling is simply a delaying tactic. Short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation.”¹¹¹

***Charter* Section 1 – The Reasonable Limitations Clause**

Having acknowledged that the political cost associated with section 33 of the *Charter* is prohibitive, section 1 of the *Charter* enjoys a prominent role in Hogg and Bushell’s argument. However, before the authors’ claims about the dialogue creating potential of the *reasonable limitations clause* may be considered it is important to examine the practical operation of section 1 in *Charter* cases.

In *Charter* cases where a majority of S.C.C. judges have found that governmental action has violated one or more *Charter* rights, the judges who have decided that rights have been violated must then decide whether the violation “can be demonstrably justified

¹¹¹ Janet L. Hiebert, “Parliamentary Bills of Rights: An Alternative Model” (2006) 69 *Modern Law Review* 7 at 5.

in a free and democratic society”¹¹² per *Charter* section 1. In order to determine the “reasonableness” of legislation judges utilize the “*Oakes* test” (the title references the case in which the S.C.C. created this standard for s. 1 review).¹¹³ The *Oakes* test, which provides judicial majorities the opportunity to uphold governmental action that transgresses their interpretation of *Charter* rights, is commonly referred to as a two-part test. The first part of the inquiry requires the court to consider whether the objective of the legislation is of “sufficient importance” and related to concerns that are “pressing and substantial” such that there is warrant to limit a *Charter* right. If a judge answers this question in the affirmative, he or she must consider the second part of the inquiry, which is commonly referred to as the “proportionality test.”

This part of the test contains three components. First, the judge is required to determine whether the law is “rationally connected” to its objective. The second component of the proportionality test queries whether the legislative scheme has adopted the “least restrictive means” of achieving the goal. In theory this component requires judges to consider whether there are other means that could be used to carry out the court determined policy objective that would be less restricting on the judges’ interpretation of the relevant *Charter* right(s). Last, the judge is required to determine whether the good done by the legislation is “proportionate” to the harm wrought through the violation of rights. If a judge answers either of these questions in the negative he or she will have decided that the legislation was not saved by section 1 of the *Charter*. If a majority of sitting judges vote against upholding the governmental action, in whole or in part, the

¹¹² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1.

¹¹³ *R. v. Oakes*, [1986] 1 S.C.R. 103.

court will typically require the competent governmental branch to cease the impugned action.

Where the substance of the successfully challenged governmental action is embodied in legislation the court will typically¹¹⁴ decide to nullify the offending legislative provision(s). While the *Oakes* test may appear to some to provide a principled manner of evaluating legislation that relates to what are often intractable moral and political issues, a closer examination of the process dispenses with this myth, as we will see. Additionally, this procedure clearly vests final authority of the interpretation of the scope and justifiable limits of *Charter* rights in hands of judicial majorities.

Given the centrality of the *Oakes* test to the process of *Charter*-based judicial review, the intellectual integrity of these processes is inescapably intertwined. Unfortunately, an examination of the practical operation of this test strips bare the thin veneer of principle. Upon a cursory examination, it is obvious that the process can be readily used to justify either upholding or striking down legislation in nearly any case that is likely to come before the courts. This is perhaps most obvious with respect to the first component of the test where the court must decide whether the objective of the legislation is “pressing and substantial” and of “sufficient importance” to justify limiting a *Charter* right.

First, as will be obvious to many, this form of inquiry is susceptible to vigorous good faith contestation. For almost any given legislative action there will be some intelligent citizens who genuinely believe the policy attempts to address a pressing and

¹¹⁴ Under section 52 of *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” This is the section of primary importance for this discussion. It is noted that section 24(1) of the *Charter* allows courts greater discretion in choice of remedy (successful litigants are entitled to “such remedy as the court considers appropriate and just in the circumstances”).

substantial concern. Likewise, there will typically be other equally intelligent citizens that sincerely disagree. Matters are further complicated by the fact that people will also disagree about the objective(s) of the legislation. However, in practice, all that counts is the interpretation of a select group of judges whose views on the legislative objective and its importance are portrayed as authoritative through the process of constitutional adjudication. As Bakan has observed, there are no reasons to believe that the results produced by judicial majorities are authoritative in any normative or rational sense. He incisively observes that “the way the Court characterizes the purpose of a legislative provision will tilt the argument...”¹¹⁵ about the suitability of the legislative provisions in one direction or the other. While this observation is applicable to all components of the *Oakes* test, an example demonstrating the way this can occur during the first part of the test will be illustrative.

In *Rodriguez v. British Columbia (Attorney General)*¹¹⁶ the *Criminal Code* provision which prohibits “aid[ing] or abet[ting] a person to commit suicide”¹¹⁷ was challenged by Sue Rodriguez on the basis of sections 7, 12 and 15(1) of the *Charter*. The appellant was afflicted by amyotrophic lateral sclerosis and had a life expectancy of 2 to 14 months. In a split decision, the S.C.C. decided by a vote of 5-4 to uphold the *Criminal Code* provision. A majority comprised of five judges rejected the appellant’s claims under sections 7 and 12 of the *Charter* but assumed, without undertaking an actual s.15 analysis, that the legislation violated said section of the *Charter*. Consequently, they provided a section 1 analysis of the provision. The majority determined that the purpose of the legislation was to protect “the young, the innocent, the mentally incompetent, the

¹¹⁵ Bakan, *supra* note 17 at 29.

¹¹⁶ *Rodriguez*, *supra* note 2.

¹¹⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 241 (b) [*Criminal Code*].

depressed, and all those other individuals in our society who at a particular moment in time decide the termination of their life is a course that they should follow for whatever reason.”¹¹⁸ This characterization of the provision’s purpose framed the debate about the section in a manner highly favourable to their final position. Consequently, they had little difficulty concluding that the prohibition was demonstrably justified in a free and democratic society.

Contrastingly, the dissenting opinion of Justices McLachlin and L’Heureux-Dube provided a very different interpretation of the provision’s purpose. They state, “the objective of the prohibition is not to prohibit what it purports to prohibit, namely assistance in suicide, but to prohibit another crime, murder or other forms of culpable homicide.”¹¹⁹ They also identified a second “concern” which they held the legislation was designed to assuage: “The second concern is that even where consent to death is given, the consent may not in fact be voluntary.”¹²⁰

Consequently, they decided that the concerns underlying the legislation were not compelling.¹²¹ They noted that other sections of the *Criminal Code* currently addressed the issue of homicide. Accordingly, they held that the fear of vulnerable individuals being coerced or manipulated into committing suicide was not a substantial purpose for limiting the appellant’s section 7 right because the possibility of manipulation was part of the reality of suicide. Clearly, these arguments appear more reasonable when the objective of the provision is merely to “assuage concerns” rather than “save the lives of vulnerable people.”

Unsurprisingly, these dissenting judges found that the legislative provision did not serve

¹¹⁸ *Rodriguez, supra* note 2 at para.72.

¹¹⁹ *Ibid.* at para. 215.

¹²⁰ *Ibid.* at para. 217.

¹²¹ *Ibid.* at paras. 218-221.

any compelling objective and would not have upheld the prohibition under *Charter* section 1.

Even if those sympathetic to Hogg and Bushell's account of dialogue agree with this observation regarding the characterization of legislative intent under section 1 analyses, they would likely respond that this reality has been factored into the authors' theory. They would likely note that the great majority of cases involving the nullification of legislative provisions are decided on the basis of the proportionality test and more specifically, the "least restrictive means" test. As Hogg has stated elsewhere, a majority of judges have relied upon the "rational connection test" in only a handful of cases¹²² while the third component of the proportionality test has never¹²³ been the sole component relied upon by a majority in a nullification decision.¹²⁴ And, it is very rare that a legislative purpose has been held not to be "pressing and substantial."¹²⁵

Consequently, the authors' most robust section 1 argument in favour of their thesis for "near" Parliamentary supremacy, as opposed to judicial supremacy, rests with the least restrictive means test. The nullification of legislation via this component of the *Oakes* test implies that the legislative ends can still be legitimately pursued by changing the means. Indeed, the authors argue that their data demonstrate that claims of judicial supremacy are greatly exaggerated because "most" disputes are merely about "means" instead of "ends." While this argument may appear sound if one accepts this theoretical distinction propounded by the courts and embraced by the authors, an examination of the

¹²² Peter W. Hogg, *Constitutional Law of Canada*, 2006 student ed. (Scarborough, Ont.: Thomson Carswell, 2006) at 857 [Hogg, *Constitutional Law of Canada*].

¹²³ Additionally, Hogg states that the third part of the "proportionality test" appears logically redundant since it is difficult to imagine legislation passing the first three components of the test without doing more good than harm. See *Ibid.* at 867.

¹²⁴ In addition to being highly subjective, it is worth noting that both of these components of the "proportionality" test are also coloured by the judicial interpretation of the legislative objective.

¹²⁵ See Hogg, *Constitutional Law of Canada*, *supra* note 122 c. 35.9.

practical significance of these differences of opinion about “means” reveals serious deficiencies with this position.

Hogg and Bushell argue that dialogue is possible where “the legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objective that the judicial decision has impeded.”¹²⁶ They present statistics¹²⁷ that suggest that these dialogical opportunities are genuine and ubiquitous.¹²⁸ However, there are several reasons to doubt that the frequency of the S.C.C.’s reliance on the least restrictive means test to nullify legislation is evidence of the capacity of elected officials to avoid the consequences of judicial rights interpretations.

First, the mere fact that the judicial majority has not told the competent legislature outright that it cannot pursue the (court interpreted) policy objective does not suggest that a dialogue between equals can occur. As has been noted, any action taken by the competent legislative body must still appease a majority of judges sitting in any particular case. This fact illustrates the stark asymmetry of the institutional relationship. Judges are free to select which procedural elements “offend” the requirements of the least restrictive means test leaving the government with the option of acquiescing to the judicial majority’s procedural requirements or attempting to pursue the policy objective via a markedly different legislative approach.

¹²⁶ Hogg & Bushell, “*Charter Dialogue*”, *supra* note 89 at 80.

¹²⁷ The authors note that in 44 of 66 cases of legislative nullification they canvassed the competent legislative body took some form of legislative action in response to the nullification. See *Ibid.*

¹²⁸ The authors count all types of legislative response including the mere repeal of nullified legislative provisions and instances where the legislature codifies the judicial majority’s remedial prescriptions as instances of “dialogue.” For a more detailed critique of the authors’ operationalization of dialogue see Andrew Petter, “Taking Dialogue Theory”, *supra* note 87 at 152.

Further, in many of the cases in which legislation has been nullified via the least restrictive means test, any legislative revision that would be acceptable to the judicial majority is attenuated to such a degree that the actualization of the policy objective(s) is significantly diminished. The influence of *Charter* decisions on a wide variety of cases has necessitated significant limitations in government policy in agricultural labour relations,¹²⁹ the trafficking of illegal narcotics¹³⁰ and the prosecution of those living off the avails of prostitution.¹³¹ Additionally, in many cases it is arguable that while the majority opinion does not explicitly state that the government objective is invalid, by striking down the current legislative regime under the least restrictive means test, the judicial majority has merely concealed its disapproval with the challenged policy initiative. In a number of cases, this strategy appears to have been used by the courts in order to conceal the fact that the objection to the challenged governmental policy more accurately lies in the realm of ends than means.

One instructive example cited by Ted Morton is the dispute between Parliament and the S.C.C. regarding prisoner voting rights cases.¹³² In *Sauvé* (1993), the S.C.C. held that section 51(e) of the *Canada Elections Act*¹³³ violated section 3 of the *Charter* which provides that “Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” Section 51(e) had prohibited “every person undergoing punishment as an inmate in any penal institution for the commission of any offence” from voting in

¹²⁹ *Dunmore v. Ontario (Attorney General)*, [2001] 3 (S.C.R.) 1016.

¹³⁰ *R. v. Smith*, [1987] 1 S.C.R. 1045.

¹³¹ *R. v. Downey*, [1992] 2 S.C.R. 10.

¹³² See *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 [*Sauvé* (1993)] and *Sauvé v. Canada (Attorney General)*, [2002] 3 S.C.R. 519 [*Sauvé* (2002)].

¹³³ R.S.C.1985, c. E-2.

federal elections. In upholding the decision authored by Justice Arbour of the Ontario Court of Appeal, the brief reasons provided by Justice Iacobucci state that that challenged section was too broad and failed to satisfy the least restrictive means test.

Subsequently, Parliament amended this portion of the act to prohibit persons serving a sentence of two years or more. Inevitably, the amended provision was challenged. When the matter came before the S.C.C. in late 2001 Justice Arbour was now a member of the high court and opted to vote with the majority of five to nullify the amended provision. Writing for the majority in *Sauvé* (2002), Justice McLachlin scolded Parliament for adopting the “if at first you don’t succeed, try, try again approach,”¹³⁴ stating:

Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override.¹³⁵

While the majority opinion goes through the motions of applying the proportionality test, the majority judges indicate¹³⁶ that in their opinion, the federal government has failed in its attempts to justify any voting prohibition. Consequently, the fact that legislation is nullified via the least restrictive means test, as was the case in *Sauvé* (1993), is not necessarily indicative of a genuine opportunity for the competent legislature to pursue the policy objective by similar means, if at all.

The result in *Sauvé* (2002) stands in sharp contrast to a small series of preceding instances where Parliament responded to high court rulings with legislation that contradicted the construction of the *Charter* rights provided by the court. In *R. v.*

¹³⁴ *Sauvé* (2002), *supra* note 132 at para. 17.

¹³⁵ *Ibid.* at para. 14.

¹³⁶ *Ibid.* at para. 26.

*Daviault*¹³⁷ a majority of the S.C.C. held that the common law rule which prevented the defence of extreme drunkenness akin to insanity from applying to negate the *mens rea* requirement for “general intent” crimes such as sexual assault was unconstitutional. Parliament responded by generally following the reasoning of the three dissenting judges and amending the *Criminal Code* to reinstate the common law rule.¹³⁸ As this provision has yet to be challenged, it remains unclear how the S.C.C. will view this legislative response. However, given the changes in court composition that have occurred since 1994, it may be difficult to determine what any future court ruling about the constitutionality of these provisions suggests about the nature of the institutional relationship between the S.C.C. and legislative assemblies.

A clearer example of a potential case of dialogue is found in *R. v. Mills*.¹³⁹ In this instance, Parliament adopted the reasoning of the dissent from *R. v. O'Connor*¹⁴⁰ in order to greatly limit the circumstances under which those accused of sexual assault and other crimes would be granted access to the alleged victim’s confidential clinical and counselling records.¹⁴¹ These provisions were subsequently challenged in *Mills* where the majority, including several members of the *O'Connor* majority, found the *Criminal Code* amendments to be constitutional. As Hogg has noted, the *Mills* decision unexpectedly relied upon the concept of institutional dialogue rather than a section 1 analysis in order to justify this somewhat surprising about face.¹⁴²

¹³⁷ *R. v. Daviault*, [1994] 3 S.C.R. 63 [*Daviault*].

¹³⁸ See *Criminal Code*, *supra* note 117 s. 33.1.

¹³⁹ *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*].

¹⁴⁰ *R. v. O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*].

¹⁴¹ See *Criminal Code*, *supra* note 117 s.s 278.1-278.91.

¹⁴² Hogg *et al.* “*Charter Dialogue Revisited*”, *supra* note 88 at 21.

Kent Roach of the University of Toronto refers to the legislative reactions produced by Parliament in response to the court decisions in *Daviault* and *O'Connor* as “in-your-face” replies.¹⁴³ While these types of responses do not constitute dialogue for Roach – who argues they represent a form of coordinate interpretation whereby Parliament merely reasserts its interpretation of the *Charter* – other commentators have considered these cases to be prime examples of institutional dialogue. Manfredi and Kelly, while critical of Hogg’s vision of dialogue theory, speak favourably of the dialogical credentials of the governmental response to the *Daviault* decision.¹⁴⁴ Additionally, Knopff and Baker¹⁴⁵ have suggested that Roach’s dismissal of Parliament’s response to the *O'Connor* decision as “non-dialogical” makes little sense given the minority rationale embraced by Parliament had garnered four votes to the majority’s five. They suggest the establishment of a norm for “close” cases (those decided by one vote) in which the S.C.C. ought to be deferential to legislative responses that accord with the minority’s reasoning.¹⁴⁶ While it may be tempting to view the legislative responses to the *O'Connor* and *Daviault* decisions as evidence that section 1 of the *Charter* permits a broader scope of disagreement than has been suggested here, a closer examination of this small group of cases suggests that their existence is not highly problematic to the claim that Canada possesses a strong version of judicial review.

As previously mentioned, the obvious difficulty with relying upon the legislative sequel to *Daviault* is that it has yet to have faced a constitutional challenge at the high

¹⁴³ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 273-81 [Roach].

¹⁴⁴ Manfredi & Kelly, “Six Degrees”, *supra* note 87 at 520.

¹⁴⁵ Dennis Baker & Rainer Knopff, “Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases” (2002) 21 Windsor Y.B. Access Just. 347.

¹⁴⁶ The perspective of one judge has meant the difference between upholding or nullifying governmental policies in several additional important cases. See for instance, *Rodriguez*, *supra* note 2; *Chaoulli*, *supra* note 6; *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 [*Reference Re Ng Extradition*].

court. This fact alone limits the conclusions that one may draw from this example. While the *Mills* decision provides a clear example of a judicial majority accepting a governmental response that partially contradicts a past high court ruling on the matter, it is difficult to build the empirical argument for dialogue on the basis of such a limited set of results. Even when Manfredi and Kelly applied their operationalization of “dialogue” – which for them occurs when a legislative body acted to replace or amend impugned provisions (as opposed to repealing provisions or replacing entire acts) – they discovered that only one third of the cases involving judicial nullification cited by Hogg and Bushell actually satisfied these modest criteria.¹⁴⁷

Additionally, as Grant Huscroft has noted, the reality often overlooked by those eager to portray Canada as having a weak form of judicial review is not what occasionally happens, but rather the context in which judicial review occurs.¹⁴⁸ As discussed, under a section 1 analysis courts have the opportunity to preclude any legislative response by characterizing the intended goal of the challenged policy as trivial or by structuring the section 1 analysis to mold the content of any “constitutional” legislative response. Additionally, as Huscroft suggests, when a court does not suspend the declaration of invalidity, this creates a new policy status quo which becomes the legal standard that the government will be viewed as acting to displace.¹⁴⁹ Consequently, the mere fact that legislative bodies occasionally enact legislative responses that partially contradict the position of the judicial majority and certain of the judges change their position does not alter the core reality that such discretion rests entirely with the courts.

¹⁴⁷ Manfredi & Kelly, “Six Degrees”, *supra* note 87 at 521.

¹⁴⁸ Grant Huscroft, “Constitutionalism from the Top Down, (2007) 45:1 Osgoode Hall Law Journal 91 at 97-98.

¹⁴⁹ *Ibid.* at 98.

Lastly, as Manfredi has noted in his discussion of the aforementioned *Sauvé* decisions, the authoritarian tone with which the judicial majority rejected Parliament's legislative response in *Sauvé* (2002) casts serious doubt on the possibility of genuine institutional dialogue when a majority of the S.C.C. is firmly entrenched in its position.¹⁵⁰

Thus, section 1 of the *Charter* does not usually allow Parliament or the provincial legislatures to have the final say about important matters of policy. So long as there is a determined litigant, the final word on the propriety of governmental policies is vested with the courts. If anything, it is probable that the greatest impact of the logically indeterminate *Oakes* test is to conceal the fact that section 1 analyses produce results largely contingent on the current constitution of the high court.

***Charter* Sections 7, 8, 9 and 12 – Qualified Rights**

As previously noted, Hogg and Bushell argue that opportunities for institutional dialogue between Canadian courts and legislative assemblies exist where Parliament or provincial legislatures have the opportunity to provide legislative responses to judicial interpretations. They identify the presence of “qualified rights” as creating such an opportunity. They state that:

Section 7 guarantees the right to life, liberty and the security of the person, but only if a deprivation violates “the principles of fundamental justice.” Section 8 guarantees the right to be secure against “unreasonable” search or seizure. Section 9 guarantees the right not to be “arbitrarily” detained or imprisoned. Section 12 guarantees against “cruel and unusual” punishment.¹⁵¹

Consequently, they argue that these purported limitations create opportunities for institutional dialogue – which they have previously defined as situations where the

¹⁵⁰ Christopher Manfredi, “The Day the Dialogue Died: A Comment on *Sauvé v. Canada*” (2007) 45:1 *Osgoode Hall L.J.* 105 at 117.

¹⁵¹ Hogg & Bushell, “*Charter* Dialogue”, *supra* note 89 at 88.

competent legislative body can override, modify or avoid a judicial rights interpretation. However, there are several difficulties with this claim.

One of the main problems with the authors' argument about the dialogue creating potential of the "qualified" rights is that the qualification of rights does not, by itself, allow Parliament or a provincial legislature to avoid a judicial majority's rights interpretation. If a majority of judges decide that a type of wire-tap search carried out by police is "unreasonable" and prevents the governmental authorities from being able to obtain admissible evidence via that method, the fact that not *all* types of search are illegal does nothing to create institutional dialogue. In fact, even if this right were not qualified, the same type of interaction that the authors classify as dialogue would still occur. Consequently, the fact that the government has the opportunity to defend the "reasonableness" of police searches in court does not provide it with an opportunity to avoid the decision of a judicial majority. This point is well illustrated by examining an important decision that focused on section 7 of the *Charter*.

In *United States v. Burns*¹⁵² the S.C.C. voted unanimously to refuse the extradition of two murder suspects to Washington State unless the Canadian government could secure agreement that the suspects, if convicted of capital offences, would not face the death penalty. The respondents, Mr. Burns and Mr. Raffay, were to stand trial for murder of Mr. Raffay's mother, father and sister who had been bludgeoned to death. The federal Minister of Justice, Allan Rock, agreed to an unconditional extradition of the accuseds under the assumption that Washington State prosecutors would seek the application of the death penalty.¹⁵³ The respondents

¹⁵² *United States v. Burns*, *supra* note 5.

¹⁵³ *Ibid.* at para. 15.

appealed this decision and were successful in the British Columbia Court of Appeal where a majority attempted to avoid the precedent established in *Kindler v. Canada (Minister of Justice)* by deciding that the extradition of Canadian citizens in such circumstances violated their section 6(1) mobility rights. However, the S.C.C. rejected this reasoning and held that the case turned on the issue of whether extraditing individuals accused of or convicted of committing crimes to jurisdictions where they could face capital punishment violated their *Charter* section 7 right to “security of the person.” Consequently, the court was unanimous in deciding that extradition in such circumstances would not accord with the “principles of fundamental justice” and that the government action was not justified under section 1 of the *Charter*.¹⁵⁴

The commitment of the high court to maintain an illusion of right answers was well illustrated by this decision. In a pair of companion cases¹⁵⁵ decided in 1991, the S.C.C. held by a majority of four to three that extradition of accused or convicted persons who could face the death penalty in the United States did not violate those individuals’ section 7 right to security of the person. However, a mere ten years later when faced with essentially the same issue the court arrived at a very different decision. In the unanimous decision (endorsed by three of the judges who had previously upheld the government’s right to extradite in such circumstances), the ministerial decision to extradite was set aside. In the reasons for the decision the court held that the principles of fundamental justice had not changed.¹⁵⁶ Nonetheless, the

¹⁵⁴ Hogg himself has expressed significant doubts about the probability of a governmental action that have been found by a court to contravene the “principles of fundamental justice” being upheld under a section 1 analysis. Elsewhere he notes that this has only occurred rarely and in dissenting opinions. See Hogg, *Constitutional Law of Canada*, *supra* note 122 at 870.

¹⁵⁵ See *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Reference Re Ng Extradition*, *supra* note 136.

¹⁵⁶ *United States v. Burns*, *supra* note 5 at para. 141.

court decided, “that in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.”¹⁵⁷ The court justified this drastic change in policy by selective reference to purported changes in domestic and international attitudes toward the death penalty citing Canada’s role as a leader in the abolition movement. This narrow definition of “Canada” excluded the 52.9% of adult Canadians who favoured the reinstatement of the death penalty in 2001,¹⁵⁸ and the Canadian federal government that had authorised the unconditional extradition of the respondents.

After the *Burns* decision the Canadian federal government was left with only one practical option – to obtain assurances from the State of Washington that the death penalty would not be applied to the respondents, should they be convicted of the murders. Further, the *Burns* decision has also cast significant doubt about Parliament’s practical authority to consider reintroducing the death penalty. It would be quite surprising given the court’s current position on this issue if capital punishment were not found to violate section 7 of the *Charter*.

Thus, the fact that section 7 is a “qualified” right has not provided any opportunity for serious dialogue, at least not between Parliament and the courts, on the issue of capital punishment. The court is the ultimate arbiter of the permissibility of this sanction and Parliament’s only genuine opportunity to override the will of the judicial majority rests with the notwithstanding clause, which for reasons already examined is not at this time a politically viable option. While Hogg and Bushell have mentioned a number of “qualified rights” in their analysis including some cases in

¹⁵⁷ *Ibid.* at para. 65.

¹⁵⁸ “Canadians Back Death Penalty: Poll” *Nanaimo Daily News* (17 September 2001) A7.

which the relevant legislative body has provided a legislative response to a judicial decision (other than merely repealing the provision(s) or following the court's explicit instructions), the common denominator between these cases is that the courts retain the ultimate and readily exercisable capacity to override the governmental action. Thus, the fact that the S.C.C. does not nullify *all* governmental responses to judicial rights interpretations is not evidence of *bona fide* legislative autonomy or genuine dialogue since the responses are conventionally tailored to avoid judicial rejection.

***Charter* Section 15 – Equality Rights**

Last, the authors have suggested that the manner in which the judiciary has interpreted section 15 of the *Charter* provides a locus for dialogue and governmental response. Applying the authors' own criteria for dialogue, it is likely that they would acknowledge that judicial interpretations of *Charter* section 15 cannot be overridden outright due to the current problems associated with the notwithstanding clause. Further, the government cannot be said to have the option of avoiding the decision. Neither extension nor rescission of the benefit can accurately be described as "avoidance" of the judicial decision. The authors aver that the final option of modification is open in most of these cases.

The authors state "typically, where a law is declared to be unconstitutional for a violation of section 15(1), the problem is that the law is underinclusive, such that persons in the applicant's position who have a constitutional right to be included, suffer the disadvantage of being excluded."¹⁵⁹ The authors observe that the courts typically do not require the competent legislative body to extend the restricted benefit

¹⁵⁹ Hogg & Bushell, "*Charter* Dialogue", *supra* note 89 at 90.

to the excluded group.¹⁶⁰ Rather, the government could choose to wholly rescind the benefit or offer the benefit in a reduced manner to both the legislative and judicially entitled recipients. While, in theory, the courts' typical approach allows the competent government three options, in practice the option of rescinding the benefit altogether would often carry dire political consequences. Similarly, while the authors note that Parliament has, in one high profile incident, chosen to reduce benefit levels and extend them to judicially entitled recipients, the question remains as to whether these options are sufficient to provide the government with policy making autonomy.

Hogg and Bushell point to the example of *Schachter v. Canada*¹⁶¹ (“*Schachter*”) a case in which the federal government chose to extend certain unemployment insurance benefits formerly available exclusively to adoptive parents to natural parents while reducing the level of the benefits offered.¹⁶² While this case illustrates a more moderate approach than the all or nothing dichotomy of complete extension or complete rescission, this “modification” is hardly evidence of a significant governmental autonomy. As Petter has noted, the court decision significantly increased the level of funding needed for this part of the unemployment insurance program. This necessitated the shifting of funding from other priorities. The most obvious group to lose out were adoptive parents, who had their benefit period cut from fifteen weeks to ten weeks.¹⁶³ To cite this example as evidence of Parliamentary sovereignty is a stretch. Parliament had clearly undertaken a policy decision to make these benefits more accessible to adoptive parents than natural parents. Thus, being

¹⁶⁰ *Ibid.*

¹⁶¹ *Schachter v. Canada*, [1992] 2 S.C.R. 679.

¹⁶² Hogg & Bushell, “*Charter Dialogue*”, *supra* note 89 at 91.

¹⁶³ Andrew Petter, “Taking Dialogue Theory”, *supra* note 87 at 153.

forced by the courts to decide between benefit extension, rescission or the hybrid approach that it ultimately selected, denied Parliament its preferred policy option. The fact that the court-sanctioned options provided some flexibility is not even evidence that Parliament could “modify” the judicial rights decision. If a parent provides a child with three options and the child selects one of these options no one would suggest that this proves the child is in the position of authority vis-à-vis the parent.

While the type of “dialogue” represented by the governmental response in *Schachter* may not instil great confidence in the possibility of institutional dialogue, there are many other section 15 cases where opportunities for “dialogue” are more limited. In many cases, there may be no practical middle ground between the extension or rescission of the rights. Indeed, in certain important cases, the government is left with one practical option. During the political controversy surrounding same-sex marriage, the decisions from several provincial Courts of Appeal left the federal government with no practical solution but to implement the courts’ definition of marriage. Rescinding the marriage regime outright was obviously not a live option. Similarly, transforming the marriage regime into a civil union regime was not an option. Despite the game of political brinksmanship¹⁶⁴ that occurred

¹⁶⁴ The S.C.C.’s refusal to provide an explicit response to the fourth question in the same-sex marriage reference *Reference Re Same-Sex Marriage*, *supra* note 7, was viewed by many commentators, including Hogg, as a strategy to deflect attention from the courts’ role in developing the change in policy. As Hogg notes, the refusal to answer the question about the constitutionality of the opposite-sex requirement found in the traditional legal definition of marriage was unusual as none of the conventional reasons for refusing to answer the question applied. Further, the reasons given by the high court – that since legislation that would legalize same-sex marriage was expected to be tabled, there was no relevant legal issue, and that ruling that the opposite-sex requirement was constitutional would overturn the rulings of lower courts – rang quite hollow. Firstly, it was far from certain that the new legislation would survive the promised free vote in Parliament. Indeed, the survival of the minority government that supported the enactment was frequently in jeopardy during the spring of 2005, requiring the defection of several opposition party members and the support of independent Chuck Cadman in order to survive the May 19th confidence vote. Additionally, the fact that lower courts had ruled against the constitutionality of the opposite-sex requirement spoke to the relevance and timeliness of the legal question. The main purpose of having a high

between the federal government and the S.C.C. surrounding the same-sex marriage reference question, it was clear that the only recourse left to Parliament was to implement same-sex marriage.

Similarly, in a number of other normative controversies ranging from physician assisted suicide¹⁶⁵ to corporal punishment¹⁶⁶ there is likely to be no option of a policy middle ground. If the S.C.C. had created a right to physician-assisted suicide or rescinded parents' rights to use corporal punishment and a majority of Parliament did not support these changes to rights relationships, it could not create a compromise response as in *Schachter*. While, it could attempt to place certain limits on physician assisted suicide – which would ultimately be subject to the rights interpretations of the judicial majority – the mere existence of the right would be an affront to the rights preferences of Parliament. In the case of corporal punishment, Parliament would have even fewer options, as the rescission of the right would in all probability have been absolute.

Consequently, the authors' argument that the judicial interpretation of section 15 rights allows institutional dialogue is greatly exaggerated. While the courts have mandated three potential responses to judicial finding of underinclusiveness the options of benefit rescission and extending diminished benefits are generally politically unpalatable and, therefore, not live options. Further, in certain cases there is not even the logical possibility of these options. Thus, judicial interpretations of *Charter* section 15 typically compel Parliament and Provincial legislatures to adopt

court is to settle issues of importance that have been litigated in lower courts. See Hogg, *Constitutional Law of Canada*, *supra* note 122 at 253.

¹⁶⁵ *Rodriguez*, *supra* note 2.

¹⁶⁶ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

judicial rights interpretations under the pretext of a principled dialogue.

A closer examination of Hogg and Bushell's dialogue theory has shown it to be an apologetic for judicial supremacy. As Petter has noted, Hogg and Bushell's dialogue theory grossly underestimates the impact of court decisions on the development of subsequent public policies. He states:

In the age of the *Charter*, constitutional rights, and judicially conditioned assumptions about their interpretation, permeate every aspect of political life, from deciding how best to regulate the use of tobacco, to debating election finance reform, to determining the standards for legal liability in environmental offences.¹⁶⁷

The authors' failure to address the pervasive impact of *Charter* decisions on the formation of legislative policies in their analysis diminishes the persuasiveness of their theory. This omission is all the more problematic given that the operation of *Charter* s. 1 is arguably the most compelling part of the authors' argument. Consequently, the mere fact that Parliament or provincial legislatures have the capacity to prepare a legislative response is not compelling evidence of the continuation of Parliamentary supremacy.

Rather than illuminate the context of institutional interactions between judges and elected legislative bodies, dialogue theory has attempted (unsuccessfully) to conceal the degree of judicial power and its influence in Canadian governance. As Petter has noted:

By portraying judicial review as a contribution to deliberative engagement, the dialogue metaphor recasts judges as advocates within a democratic process rather than as arbiters within an authoritarian regime. Similarly, by representing judicial decisions under the *Charter* as transitory and reversible by legislatures, the dialogue metaphor purports to relieve judges of responsibility for the consequences of their *Charter* rulings without constraining their *Charter* powers.¹⁶⁸

¹⁶⁷ Petter, "Twenty Years", *supra* note 30 at 197.

¹⁶⁸ *Ibid.* at 198-199.

At this time the preponderance of the evidence supports the proposition that it is not Canadian citizens, but the S.C.C., that is *the* final arbiter of governmental policy in Canada. However, amongst those who acknowledge the current balance of power are those who argue that judicial supremacy is necessary in order to ensure the protection of minority rights from the tyranny of the majority. This claim and its underlying assumptions will be considered at length in the next chapter.

Chapter 3

Of Platonic Guardians and Powerless Minorities – Does Judicial Review Serve an Essential Role in the Protection of Minority Rights from Majority Tyranny?

The claim that the *Charter* operates to safeguard the rights of minorities and vulnerable groups from the “tyranny of the majority” is generally accepted as a truism.¹⁶⁹ In fact, this view of the *Charter’s* role in protecting minority rights predates the patriation of the constitution. For instance, during the public consultations regarding the composition of the *Charter*, the Council of National Ethnocultural Organizations of Canada opposed the inclusion of section 1 because it argued one of the main purposes the *Charter* was to protect minorities from the purportedly unreasonable and discriminatory actions of an “emotional majority.”¹⁷⁰ However, this general perspective is based upon several questionable assumptions about the nature of tyranny and the particular claim that courts have some specialized institutional capacity to identify and mitigate tyrannical states of affairs. Additionally, this position is premised upon a simplistic understanding about the nature of rights disputes. It presumes that most *Charter* disputes involving “minority rights” consist of a binary conflict between the rights of a *minority* group and the policy preferences of the *majority* as represented by Parliament or a provincial legislative assembly. In this chapter the ongoing rights-based controversy surrounding

¹⁶⁹ See Dale Gibson, “Protection of Minority Rights Under the Canadian *Charter* of Rights and Freedoms: Can Politicians and Judges Sing Harmony?” (1985) 8:2 *Hamline L. Rev.* 343; Anne F. Bayefsky, “Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian *Charter* of Rights and Freedoms” (1983) 31:2 *Political Studies* 239; Roach, *supra* note 143; Lorraine Eisenstat Weinrib, “Canada’s Constitutional Revolution: From Legislative to Constitutional State” (1999) 33 *Isr. L.R.* 13 [Weinrib, “Canada’s Constitutional Revolution”].

¹⁷⁰ Yasmeen Abu-Laban & Tim Nieguth, “Reconsidering the Constitution, Minorities and Politics in Canada” (2000) 33:3 *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 465 at 182.

polygamy and the institution of marriage will be utilized to demonstrate the inadequacy of this binary conception of rights disputes. Since the language of “majority tyranny” does not adequately capture the social reality of many of these controversies, claims that judicial dispositions of such disputes have some mysterious capacity to avoid “trampling” on some vulnerable constituency’s view of its rights is without merit.

While the phrase “tyranny of the majority” is frequently used in Western political discourse, the concept often lacks rigorous theoretical development. As Waldron has noted, “so easily does the phrase “tyranny of the majority” roll off our tongues, that the need for judicially patrolled constraints on legislative decisions has become more or less axiomatic.”¹⁷¹ However, the assumptions that support this commitment to judicial review bear deeper examination. The capacity for judicial review to protect minorities and other vulnerable groups from the “tyranny of the majority” is largely linked to how this concept is defined. Only by considering popular conceptions of “tyranny of the majority” can one hope to conduct a useful examination of this claim.

John Stuart Mill was one of the earliest theorists to make use of the term “tyranny of the majority.”¹⁷² Mill was primarily concerned with social tyranny and the possibility that arbitrary and repressive social norms could constrain the flourishing of minority identities. He states:

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than

¹⁷¹ Waldron, “The Core of the Case”, *supra* note 43 at 1395.

¹⁷² It is widely believed that Mill borrowed the term from Tocqueville.

civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.¹⁷³

For Mill, repressive social conventions may be identified via application of the harm principle. For him:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.¹⁷⁴

While contemporary definitions of “harm” remain hotly contested in many contexts, the general sense of Mill’s perspective on tyranny has continued to shape the contours of the debate about which social policies constitute tyrannical interventions into the lives of citizens.

Allegations of the “tyranny of the majority” tend to occur when a legislative body makes a decision that alters the rights of some segment of the population who lack the ability to overturn the decision via electoral processes. Typically, some of the members of this group and certain others not directly impacted by the policy will claim that the policy is arbitrary in that it denies them a right to act in manner that would not harm others. In the particular case of *Charter* litigation, the issue of “harm” is paramount to the section 1 analysis where the court will ultimately decide whether the harm it has determined the policy was intended to prevent is sufficiently important, and whether any harm caused by the policy is proportionate to the harm prevented by the policy. However,

¹⁷³ *J.S. Mill On Liberty in Focus* ed. by John Gray & G. W. Smith (New York: Routledge., 1991) at 26.

¹⁷⁴ *Ibid.* at 30.

the fact that a minority of individuals claim that a particular policy causes them disproportionate harm while majoritarian institutions take the opposite position says nothing in itself about which side is in the right about this dispute. For almost every governmental policy, there is some group of citizens who sincerely believe that the policy violates their rights or the rights of others and that it is disproportionately harmful to those directly impacted. Hence, what is typically denoted by the usage of the phrase “tyranny of the majority” is strong disapproval on the part of a particular constituency for a governmental policy.

Waldron notes that in any dispute about rights “the side that claims to recognize a right that...the other denies will think that the opposite side’s position is potentially tyrannical.”¹⁷⁵ However, he concludes that while “some of these claims about tyranny are no doubt correct...they do not become correct simply because they are asserted.”¹⁷⁶ Waldron admits that his definition leads to the conclusion that there will be tyrannical decisions under any decision-making institution. That being said, he suggests that a tyrannical decision made by a majoritarian institution is actually less problematic than when a court makes a similar decision since the majoritarian process allowed individuals the opportunity to participate as equals per the universal franchise.

Waldron takes issue with the typical usage of the terms “majority” and “minority” that occurs in rights discourse. He distinguishes between *topical* and *decisional* majorities and minorities. The topical minority is comprised of the individuals whose rights are at stake in a particular decision whereas the decisional minority is the group of individuals whose favoured position was unsuccessful in the political process. This latter group may

¹⁷⁵ Waldron, “The Core of the Case”, *supra* note 43 at 1395-96.

¹⁷⁶ *Ibid.* at 1396.

include individuals whose rights were not the issue of the vote. It also need not include all of the individuals whose rights were at stake. For instance, certain individuals may support a policy that diminishes certain of their legal rights – such as a policy that would require them to pay higher taxes. Accordingly, in order for an individual to demonstrate they are the victim of majority tyranny, they must be a member of the topical minority and be able to prove that the diminishment of their rights was indeed tyrannical. Thus, Waldron holds that individuals are often mistaken about which rights they really have and that individuals should not use this terminology in an inflationary sense. He concludes that the “[t]he most fruitful way of characterizing tyranny of the majority is to say that it happens when topical minorities are aligned with decisional minorities.”¹⁷⁷

Another conception of majority tyranny is that provided by Tom Christiano in his discussion of *persistent* minorities.¹⁷⁸ According to Christiano “[t]here is a persistent minority in a democratic society when that minority always loses in the voting. ...[i]f the society is divided into two or more highly unified voting blocks in which the members of each group votes in the same ways as all the other members of that group, then the group in the minority will find itself always on the losing end of the votes.”¹⁷⁹ For him the manner in which indigenous peoples have been treated in many societies constitutes an example of this form of tyranny. However, he notes that the plight of persistent minorities does not necessarily arise from the intentional mistreatment of such groups by the majority factions “because it may be the case that the majority attempts to treat the

¹⁷⁷ *Ibid.* at 1398.

¹⁷⁸ Christiano suggests that persistent minorities constitute a particular subset of majority tyranny.

¹⁷⁹ Tom Christiano, “Democracy”, *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), online: The Stanford Encyclopedia of Philosophy
<<http://plato.stanford.edu/archives/fall2008/entries/democracy/>> at 5.3.2.

minority well, in accordance with its conception of good treatment. It is just that the minority never agrees with the majority on what constitutes proper treatment.”¹⁸⁰

While Waldron and Christiano provide thoughtful conceptions of majority tyranny, their attempts fail to overcome the type of difficulties faced by less nuanced approaches. These theories imply that while there may be false allegations of tyranny there is ultimately some way of separating the wheat from the chaff. Indeed, a major difficulty associated with the assumption that judicial review prevents “tyranny” is that normative issues are sites of significant contestation in modern democratic societies. As previously noted, this uncertainty has contributed to the widespread rejection amongst legal academics of the position that the process of judicial review is legitimate because the judiciary has the capacity to derive the “right” answers to intractable moral controversies. Reasonable individuals on opposing sides of debates about euthanasia, capital punishment, and abortion often display the genuine belief that the positions of those on the other end of the continuum constitute tyranny. Clearly, one need not embrace a moral relativist stance in order to acknowledge that the practice of judicial review has no special claim to provide authoritative answers to vexing moral dilemmas.

The actual practice of judicial review demonstrates that judicial determinations of “tyranny” are largely contingent on the composition of the bench. Those generally acquainted with American institutional arrangements will be well aware that the most significant variable in determining the result of many rights-based controversies is the current ideological make up of the nation’s high court. On many issues, the results produced by a court dominated by conservative judges will differ substantially from those produced by a court with a majority of liberal judges. As the American example

¹⁸⁰ *Ibid.*

demonstrates, the argument that donning robes endows judges with an elevated sense of normative insight or some mystical capacity to channel the view from nowhere is simply not plausible. Rather, when analysing high court judgements, one finds many of the same moral perspectives that exist in a representative social aggregation. However, the scope of normative argument considered by courts in such cases is typically less than representative of the positions found within the society. This fact is highly problematic for those who assume that judicial review generally acts to protect minority rights since the views that are often excluded are those held by members of socially marginalized groups. While the naïve view that suggests “rights are as courts say” may serve a useful rhetorical function in certain contexts, there is no good reason to assume the infallibility of courts.¹⁸¹

As has been noted by a number of commentators, the operation of the current judicial appointment process is not conducive to the flourishing of counter-hegemonic views of rights. In the Canadian context, judges are appointed exclusively by the Prime Minister. In general, those elevated to the Supreme Court of Canada will tend to hold many of the assumptions about how *Charter* rights ought to be interpreted as the nation’s political elite. As Petter has observed:

Decisions are made in the context of, and are the product of, a partial vision of social life and political justice. As Benjamin Cardozo put it over half a century ago, ‘the chief lawmakers... may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy.’

These ideological assumptions are by no means determinative in each and every case; they do not demand or sanction a particular set of detailed outcomes. However, they do energize and inform the interpretation of the *Charter* and push its

¹⁸¹ Dworkin himself argues that both courts and legislatures have the capacity to make erroneous decisions about rights. See Dworkin, *Freedom's Law*, *supra* note 61 at 32-33.

enforcement toward certain types of conclusions. As imagined normative bottom lines, these deep-seated premises allow the legal community to maintain institutional legitimacy by pretending to be exercising its considerable power in accordance with ostensibly neutral and formal directives.¹⁸²

Consequently, rather than acting as a check against elite sentiment, courts largely function to reify certain widely held rights interpretations, whether those perspectives are “tyrannical” or not.

Additionally, one of the least examined features of discussions about the legitimacy of judicial review is how the majoritarian political process that shaped the *Charter* continues to influence judicial decisions about minority rights. While it is clear that the *Charter*, like any other piece of legislation, is a product of majoritarian legislative processes, it is often assumed that the content of this document is sacrosanct and not subject to the types of criticism that are often levelled at the other endeavours of legislative assemblies. However, a closer examination of the content of the design of the *Charter* incorporates many of assumptions about rights found within classical liberal theory.¹⁸³ Rather than including social rights that explicitly guarantee such things as a reasonable standard of living or adequate health care, the primary focus of the *Charter* is on shielding the private lives of citizens from undue interference by the government. By enshrining these liberal assumptions in the constitution and appointing judges that have been largely hostile to redistributive rights interpretations,¹⁸⁴ *Charter*-based judicial review has protected the rights of the wealthy and powerful under the guise of judicial neutrality.

¹⁸² Petter & Hutchinson, “The Liberal Lie of the *Charter*” *supra* note 23 at 279.

¹⁸³ *Ibid.*

¹⁸⁴ See Judy Fudge, “The Canadian *Charter* of Rights: Recognition, Redistribution and the Imperialism of the Courts” in K. D. Ewing, Adam Tomkins & Tom Campbell eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001).

In addition to containing entitlements that do not threaten dominant groups, the *Charter* cannot be said to extend those rights to all groups in a neutral fashion. A cursory examination of its provisions illustrates that the contents of the *Charter* were largely shaped by political factors. Influential lobby groups were able to gain explicit recognition of the rights of their constituents in provisions such as s. 15 of the *Charter*, while other groups, such as gays, lesbians, and those practicing alternative marital unions, were left to rely upon the contingencies of the judicial appointment process to determine whether they would be entitled to bring a claim under section 15. Given the nature of the judicial appointment process, it is clear that the rights interpretations of dominant groups will continue to inform judicial understandings of “tyranny” and determine which minority or vulnerable groups are deserving of access to rights protection.

While many would acknowledge that the moral insights of judges are “not spectacularly special”,¹⁸⁵ and it is clear that judges’ ideological perspective plays a significant role in their promotion, one might hope that the independence of courts from the other branches of government might play a valuable role in protecting the rights of minorities and vulnerable groups. It could be argued that the judiciary’s lack of political accountability empowers courts to make the “right” decision about minority rights where such decisions would be unpopular with the broader population. However, there are several weaknesses with this assumption. First, where judicial rights interpretations do not enjoy popular support, one must assume either bad faith on behalf of the broader population or that judges have a privileged normative perspective. Since judicial appointees are drawn from the ranks of the legal and political elite, there is no good reason to believe that the outcomes produced by a judicial majority will be normatively

¹⁸⁵ Dworkin, *Freedom's Law*, *supra* note 61 at 74.

superior to those generated by a legislative majority. If anything, one of the most valuable lessons of human history is that the exercise of political power without robust accountability is less than desirable. Thus, rather than guaranteeing that acts of tyranny will not occur, the principle of judicial independence typically serves to entrench the “winner take all” judicial dispositions of the political controversies brought before courts.

In contrast, elected legislative assemblies, though imperfect democratic organs, mitigate many of the weaknesses inherent in the process of judicial review. Although legislative majorities - like judicial majorities - have no special claim to discerning “right” answers to such political controversies, they tend to produce resolutions steeped in compromise that face greater scrutiny from a diversity of constituencies. Since dominant political parties have a monopoly on judicial appointments, legislative assemblies invariably incorporate representatives from a broader array of constituencies. This ensures that these perspectives will be represented in the process of legislative review with a reasonable possibility of contributing to the compromise resolution.

Additionally, it is fair to say that Canadian politicians of all stripes possess a genuine concern about issues of fundamental rights. However, like judges, they disagree about the scope of rights and which policies represent a reasonable infringement of rights. As previously mentioned, politicians are unlikely to implement policies that transgress societal consensus about fundamental rights. Further, in extreme cases where state actors authorise activities that violate such social consensus – such as genocide or ethnic cleansing – the process of judicial review can do little to prevent such atrocities. Rather, a majority of the issues brought before the courts on the basis of the *Charter* do not address tyrannical violations of broadly held norms but instead the type of controversies about

which reasonable citizens – including judges – frequently disagree. Rather than providing a panacea for genuine concerns about the “tyranny of the majority”, judicial review primarily serves to substitute the rights interpretations of representative and accountable legislative bodies with those of a largely unrepresentative and unaccountable political elite.

The second difficulty with the conceptions of minority rights provided by Waldron, Christiano and others¹⁸⁶ relates to the manner in which rights disputes are viewed. Those that view support for the judicial supremacy as concomitant with support for minority rights assume that the typical case involving minority rights requires a court to choose between the *rights* of a minority and the *policy preference* of a legislative assembly. Accordingly, courts are viewed as often having the simple decision of protecting the legitimate rights expectations of minority group members from overzealous legislative action. However, the difficulty with this model for understanding rights disputes involving minorities is that it fails to adequately represent the diversity of rights claims involved in these cases. Far from merely reflecting this binary conflict between a singular minority group and the state, many of these controversies involve conflicting good faith rights claims on the part of multiple minority or vulnerable constituencies. Consequently, in deciding these controversies courts are privileging the rights assertions of particular minority constituencies while marginalizing the rights claims of others. This dynamic is well illustrated by the ongoing controversy relating to the constitutional status of polygamous familial relationships in Canada.

¹⁸⁶ Barbara Billingsley, “Section 33: The *Charter*'s Sleeping Giant” (2002) 21 Windsor Y.B. Access Just. 331.

Estimates suggest that more than a thousand Canadians are currently living in polygamous families.¹⁸⁷ While the term “polygamy” will be used throughout this discussion, the overwhelming majority of instances of polygamy present in North America involve one man with multiple wives (polygyny) as opposed to one woman with multiple husbands (polyandry). Consequently, the instances of polygamy referenced in this discussion will actually be cases of polygyny. In the Canadian context, a large majority of these polygamous family units are associated with the Fundamentalist Church of Jesus Christ of Latter Day Saints (the “FLDS”) and reside in the British Columbia community of Bountiful and nearby communities along the Alberta border. While the practice of polygamy in Canada is strongly associated with this particular sect it is important to realize that the practice exists amongst practitioners of other religions and non-religious individuals. There is evidence that a small minority of Canadian Muslims are currently practicing polygamy¹⁸⁸ while there are also reports of Christian, Jewish and non-denominational polygamous families existing in North America.¹⁸⁹ Consequently, any discussion of the constitutional rights claims surrounding this debate must take into consideration the positions of these groups. The constitutional rights claims asserted by polygamists involve the decriminalization of the practice and the expansion of the legal definition to marriage to include such relationships.

¹⁸⁷ Nicholas Bala, “An International Review of Polygamy: Legal and Policy Implications for Canada” in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005), at 3 [Bala].

¹⁸⁸ Noor Javed, “GTA's Secret World of Polygamy; As Toronto Mother Describes her Ordeal, Imam Admits he has 'Blessed' Over 30 Unions” *Toronto Star* (24 May 2008) A10 [Javed].

¹⁸⁹ Bala, *supra* note 187 at 7.

Current State of Canadian Law Regarding Polygamy

The *Criminal Code* prohibits both polygamy and bigamy. However, the scope of the prohibition on polygamy is much broader and actually encompasses the behaviour captured under the bigamy prohibition. Under the subheading “offences against conjugal rights” section 293(1) of the *Criminal Code*¹⁹⁰ states:

Every one who
 (a) practises or enters into or in any manner agrees or consents to practise or enter into
 (i) any form of polygamy, or
 (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or
 (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

The broad language of this provision might appear to capture many different types of non-monogamous situations. However, Canadian courts have held that the phrase “any kind of conjugal union with more than one person at the same time” does not prohibit adultery. Rather there must be “some form of union under the guise of marriage.”¹⁹¹ However, it is unclear how courts would interpret this decision in our contemporary context. The prohibition against bigamy is found under section 290 of the *Criminal Code*¹⁹² which states:

(1) Every one commits bigamy who
 (a) in Canada,
 (i) being married, goes through a form of marriage with another person,
 (ii) knowing that another person is married, goes through a form of marriage with that person, or
 (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

¹⁹⁰ *Supra* note 117.

¹⁹¹ Bala, *supra* note 187 at 33.

¹⁹² *Supra* note 117.

(b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

In comparing these two sections it appears that the scope of activities captured by section 290(1) is more clearly defined. This section prohibits one from partaking in a marriage ceremony while already married, or with someone who one knows to be married. However, the scope of section 293(1) is much broader. The language of this section clearly encompasses the behaviour prohibited by section 290(1) and applies to polygamous relationships involving participation in a marriage ceremony. Additionally, the language of this section is of sufficiently broad scope to encompass secularly based polygamous or polyamorous relationships (which can involve multiple partners of both sexes). However, in certain instances, the conceptual difference between such relationships and the conduct of married couples that engage in the type of group sex activities recently found to not be criminally indecent by the S.C.C.¹⁹³ would be blurred. Consequently, the judges' individual perspectives on what constitutes "marriage" and related legal concepts will largely shape the interpretation provided to this subsection.

A second piece of legislation that is likely to face *Charter* scrutiny is the *Civil Marriage Act*.¹⁹⁴ Section 2 of this act states: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." This provision limits the legal recognition of marriage to monogamous relationships between opposite sex or same-sex partners. Obtaining legal recognition for polygamous marriages under the *Charter* would be a substantial symbolic victory for polygamists and an important step in their pursuit of access to spousal benefits for multiple spouses. As members of unpopular minority

¹⁹³ *R. v. Labaye*, [2005] 3 S.C.R. 728.

¹⁹⁴ R.S.C. 2005, c. 33.

subcultures it is unlikely at this time that Canadian polygamists will initiate legal proceedings that include a constitutional challenge of these sections of the *Criminal Code* or the *Civil Marriage Act*. However, with Wally Opal, Attorney General of British Columbia, having pledged legal action, ostensibly in the form of a prosecution of one or more of the practicing male polygamists in Bountiful,¹⁹⁵ it is probable that the *Criminal Code* provisions and current definition of marriage will soon face judicial scrutiny in the form of a *Charter* challenge.

Conflicting Minority Rights Claims or Tyranny of the Majority: Conceptualizing the Rights Conflict

A common characterization of this type of controversy would invoke the binary conflict between “state interests” and the rights of a religious minority. It is easy, and to a certain extent accurate, to view this dispute as involving a conflict between the rights of the men and women to engage in the practice of polygamy and the interests of the state in avoiding some of the “negative” aspects of the practice. This view of the legal controversy, while incomplete, has a veneer of legitimacy because of how *Charter* challenges are typically processed by the courts.

The *Oakes* test casts *Charter*-based legal disputes as consisting of one or more “rights” that are violated by governmental conduct, and then allows the judiciary to decide which policy “objective” the governmental action attempted to achieve. Thus, the structure of the *Charter* analysis can obscure the fact that what is often at stake in *Charter*-based rights disputes could just as easily be described in terms of competing

¹⁹⁵ Robert Matas, “Polygamy Prosecutor Wants Bountiful Probe Reopened” *The Globe and Mail* (16 June 2008) A1.

rights. For instance, a recent report¹⁹⁶ authored by the Alberta Civil Liberties Research Centre considered the possibility of a *Charter* challenge to the governmental non-prosecution¹⁹⁷ of section 293 of the *Criminal Code* as an infringement of the section 15 equality rights of women and children. While such a challenge might stand little practical chance of succeeding given that the judiciary has been reticent to compel government agencies on issues of policy enforcement, the suggestion is none the less illustrative. Although this case would be dealing with the same social phenomena, it would be framed as conflict between the equality rights of women and children and the interest of the state (which could be characterized in any number of ways in this case). While both of these hypothetical cases would involve legal argument attempting to articulate positions in terms of rights protected under the *Charter*, the format of the section 1 analysis is not conducive to a balanced discussion of competing rights claims. A more complete evaluation of the legal issues surrounding the practice of polygamy in Canada would acknowledge that regulation has consequences for the rights of multiple minority groups.

At a general level, the rights claims of different parties directly implicated in the practice of polygamy may be divided into two main groups: those who support the institution of polygamy and those who are opposed to the institution. While neither group is demographically or ideologically homogenous, both sides marshal some reasonable rights-based arguments in favour of their position. Further, as those directly implicated by this practice constitute a miniscule segment of the national population, neither side will be able to achieve political success at a provincial or national level without obtaining the

¹⁹⁶ The Alberta Civil Liberties Research Centre, "Separate and Unequal: The Women and Children of Polygamy" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005), [Civil Liberties Research Centre].

¹⁹⁷ Bala notes, "there are only a couple of reported prosecutions for polygamy, however, and these occurred about a century ago, and involved Aboriginal peoples." See Bala, *supra* note 187 at 3.

support of a majority of those not directly implicated in this practice. The competing rights claims of both sides will now be briefly canvassed.

Charter-based Rights Claims in Favour of Polygamy

As previously mentioned, the overwhelming majority of practitioners of polygamy in Canada do so in conjunction with their observance of their religious beliefs. Many members of the FLDS believe that having multiple wives (as assigned by community leaders) and fathering many children are a requirement for men to reach the highest level of heaven. Similarly, it is believed that a woman's route to this highest level of heaven is "dependent on obedient participation in an assigned plural marriage and the bearing of as many children as possible."¹⁹⁸ Consequently, many of the FLDS practitioners view polygamy not in terms of a lifestyle choice but as a divine dictate that relates directly to their eternal destiny. These individuals would have a robust argument that the *Criminal Code* prohibition of polygamy violates their right to freedom of religion under section 2(a) of the *Charter*. They could also argue that this section violates their section 7 right to liberty and their section 15(1) right to equality.

Other "religious" practitioners would utilize similar *Charter* rights arguments – although some have suggested that the claims of Muslims based upon freedom of religion under section 2(a) of the *Charter* might not be as robust as those available to members of the FLDS. Nicholas Bala of Queens University Faculty of Law notes that Islamic groups that endorse polygamy consider the practice to be merely permissible.¹⁹⁹ While certain

¹⁹⁸ Bala, *supra* note 187 at 7.

¹⁹⁹ *Ibid.* at 39.

interpretations of the Koran permit Muslim men to marry up to four wives,²⁰⁰ participation in this form of familial arrangement is not a requirement. Similarly, Jewish, Christian and other religious groups that practice polygamy could have stronger or weaker section 2(a) claims depending on the place the practice occupies in their theological perspective. However, the section 7 and section 15 arguments presented by these groups would be largely similar to those marshalled on behalf of members of the FLDS. In contrast, non-religious practitioners of polygamy would not have access to section 2(a) argument to support their claim. Rather, their claim would rest upon arguments based upon section 7 and section 15(1). They would argue that the *Criminal Code* prohibition infringed their liberty in a manner that was not demonstrably justifiable in a free and democratic society, or that, once polygamy was recognized for some religious believers, it should be recognized for all Canadians.

Those practicing polygamy could also utilize the *Charter* to challenge the constitutionality of the *Civil Marriage Act*. While a constitutional challenge of section 293 of the *Criminal Code* would centre on the issue of an individual's right to participate in their chosen familial structure without state interference, a challenge of the *Civil Marriage Act* would focus on the question of whether its definition of marriage discriminated against polygamists by denying them access to a benefit, for example, legal recognition, that is available to individuals that have chosen monogamous relationships. The contours of the arguments presented by each pro-polygamy faction would largely depend upon the results of earlier litigation initiated by other groups. While it is theoretically possible that members of religious groups required to engage in the practice could enjoy greater success than religious groups which merely permit the practice, in

²⁰⁰ *Ibid.* at 2.

reality this distinction might be difficult for the S.C.C. to articulate. Members of religious groups denied the extension of a benefit would likely feel unjustly targeted by the court's decision. Similarly, non-religious polygamists would argue that they face discrimination on the basis of their beliefs if the benefit of legal recognition of such unions is only granted to religious practitioners. The reasoning of their argument could be compelling when compared to the debate about same-sex unions, where it was not argued that access to legal recognition of such marriages should be limited on the basis of religious association. For instance, a non-religious bi-sexual could argue that there was discrimination under section 15(1) on the basis that only being permitted to marry an individual of one sex discriminates against their particular sexual orientation. Consequently, it is probable any judicially sanctioned extension of legal recognition to polygamous unions would be universal.

Additionally, it is important to consider that there may be further individuals who might wish to participate in relationships not typically considered as marriages but that could fall within the scope of section 293 of the *Criminal Code*. The practices of “polyamory” and “polyfidelity” often involve multiple partners of both sexes. Unlike religious based polygamy, these relationships frequently include the practice of group sex and often include individuals with different sexual orientations.²⁰¹ While there is very limited data on these relationships (they seem to be extremely rare) and the likelihood of them facing criminal prosecution is slim, their existence does give rise to distinct *Charter* rights arguments. Such arguments would apply to both section 293 of the *Criminal Code* and section 2 of the *Civil Marriage Act* and could be successful regardless of the outcome of hypothetical cases relating to religious based practitioners. The social reality of such

²⁰¹ *Ibid.* at 31.

relationships could be sufficiently different, in terms of gender equality and the age of the participants, for a majority of judges to find this potential rights infringement unjustified under a section 1 analysis.

Charter-based Rights Claims Against Polygamy

In a similar manner, there are several *Charter*-based arguments that many believe count against the decriminalization and legal recognition of the practice. Those who oppose polygamy argue that the practice violates the rights of vulnerable members of these religious minorities. More specifically, they argue that polygamy infringes on the rights of women and children under section 15(1) and section 7, as well as the rights of females under section 28 of the *Charter*. In some cases, these individuals lack meaningful access to the decision-making processes in their relevant sub-cultural communities. Further, their meagre standing in the overall Canadian demographic means that they do not form a constituency that has been able to effect significant policy change at the ballot box. The *Charter*-based arguments of this minority will now be briefly discussed.

The primary *Charter*-based argument against polygamy relates to the impact that the practice of polygamy has upon gender equality. Since the practice nearly exclusively involves a male having multiple wives, many theorists argue that it poses a serious threat to women's equality.²⁰² Historically, concerns that section 27 of the *Charter*, which promises the *Charter* will be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", might limit women's rights led feminists to advocate for the inclusion of a gender equality provision. Section 28 states that "notwithstanding anything in this Charter, the rights and freedoms referred to

²⁰² Beverley Bains, "Equality's Nemesis?" (2006) 5 J.L. & Equality 57.

in it are guaranteed equally to male and female persons.” Consequently, if critics of polygamy were able to prove that the practice of polygamy is discriminatory they would have a strong argument that the gender imbalance it creates constitutes a breach of the *Charter*. On the international front, the United Nations Committee on the Elimination of Discrimination against Women has taken the position that the practice of polygamy constitutes sexual discrimination.²⁰³ Similarly, a recent report commissioned by Canada’s Department of Justice has concluded that Canada has shirked its international human rights obligations by allowing the practice to continue unimpeded.²⁰⁴ Additionally, a number of recent policy research reports commissioned by Status of Women Canada have provided insight into the social reality of the practice of polygamy in North America.²⁰⁵

Most of the legal scholarship to date on polygamy in the Canadian context relates to the manner in which it is practiced by members of the FLDS. Women and girls in these communities typically have little input into the choice of their spouse. Rather, they are “assigned” to men in good standing with the church leadership. There is the further possibility that wives could face consequences of marital assignment several times during their lives. When male members of the sect are excommunicated from their community or fall out of favour with church leadership, their wives and children can be “reassigned” to other males in the community.²⁰⁶ Reassignment will also often occur upon the death of

²⁰³ Civil Liberties Research Centre, *supra* note 196 at 7.

²⁰⁴ Department of Justice Canada, *Polygyny and Canada’s Obligations under International Human Rights Law* by Rebecca J. Cook & Lisa M. Kelly (Ottawa: Minister of Justice and Attorney General of Canada, 2006) online: <<http://www.justice.gc.ca/eng/dept-min/pub/poly/poly.pdf>>.

²⁰⁵ Civil Liberties Research Centre, *supra* note 196; Bala, *supra* note 187; Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005) [Campbell].

²⁰⁶ Bala, *supra* note 187 at 7; Civil Liberties Research Centre, *supra* note 196 at 23.

a husband which is a probable experience for many women given there is often a significant difference in age between the bride and groom at the time of the bride's first marriage. In fact, in FLDS communities it is not unusual for young, teenaged girls to be "assigned" to marry middle-aged men.²⁰⁷ It is clear from the testimonials of women who have left the community that at least some of the women involved in these marriages participate under duress or later come to view their arranged marriages as abusive.²⁰⁸

There is also evidence that the practice of polygamy by the FLDS can have disastrous consequences on women's economic status and general well being. The economic status of women in this community is frequently undermined by the fact that members are encouraged to deed their property to a trust controlled by church leaders based in American FLDS enclaves called the "United Effort Plan." Consequently, those wishing to leave a marriage and the group would not receive typical compensation associated with the division of assets at the breakdown of a marriage.²⁰⁹ Further, female members of the community often do not work and often receive limited financial assistance from their husbands.²¹⁰ Studies also indicate that the practice of polygamy has been linked to increased instances of sexual, physical and psychological abuse of women and children.²¹¹ It is plausible that the above mentioned economic constraints compound the difficulty women face when considering whether to leave what they might term as an unhealthy or abusive relationship. For many, the practice of polygamy in this context

²⁰⁷ Stephen A. Kent, "A Matter of Principle: Fundamentalist Mormon Polygamy, Children, and Human Rights Debates" (2006) 10:1 *Nova Religio* 7 at 13.

²⁰⁸ Daphne Bramham, "Book Gives Insight into the Life of a Teenage Bride" *Daily Bulletin* (30 May 2008), 7; Robert Matas, "Where 'the Handsome Ones go to the Leaders'" *The Globe and Mail* (24 May 2008) A12.

²⁰⁹ Campbell, *supra* note 205 at 16.

²¹⁰ *Ibid.*

²¹¹ Civil Liberties Research Centre, *supra* note 196 at 19.

would constitute a *prima facie* case of gender discrimination in violation of section 15 of the *Charter*.

Similar concerns about the impact of polygamy on the equality rights of women and children exist within other communities practising polygamy in Canada. While little research has been conducted about the practice involving Muslims, and the practice appears isolated, reports indicate that certain Canadian Islamic religious leaders are actively engaged in the promotion of the practice. One Toronto-area imam claims to have performed in the range of thirty polygamous marriages over a five-year period.²¹² While there is no evidence of “assigned” marriages or control of familial property by religious leaders, it appears that some of the same threats to women’s equality posed by the practice in the FLDS context are present in the Islamic context. Indeed, the negative psychological consequences experienced by women who discover that their husband has secretly taken further wives might well be more pronounced than in contexts where such behaviour is expected. However, what is clear is that some of the women who have been or continue to be involved in polygamous relationships believe that the practice has negatively impacted upon their family relationships and general well being.

Conclusions to be drawn from the Example of Polygamy

The issue of polygamy constitutes an intractable rights dispute between members of minority and vulnerable groups. The religious practitioners have a strong argument that the current prohibition violates their right to religious freedom. Similarly, all those who wish to engage in this form of marital union may claim that the prohibition infringes upon their right to liberty. There is also the argument that current Canadian marriage

²¹² Javed, *supra* note 188.

laws, which exclude polygamous unions, constitute discrimination under section 15(1) of the *Charter*. However, some of the women and children who have experienced the reality of polygamy argue that the practice is the embodiment of discrimination against vulnerable women and children. Those directly implicated in the practice can provide significant evidence about how the differential treatment they have received under the practice has impacted their lives in a manner they strongly perceive to be constitutive of gender discrimination. For them, the decriminalisation or legal recognition of the practice would constitute a violation of women's and children's equality rights. The constitutionalization of these competing rights claims does nothing in itself to protect the rights of minorities or vulnerable groups in this instance as both sides would feel that judicial intervention in favour of the other side would be tyrannical. While one would hope that this type of dynamic would be an isolated phenomenon, many of the disputes that have, or are likely to be litigated under the *Charter* pit the reasonable rights assertions of minorities and vulnerable groups against each other.

Additionally, the *Charter* has provided opportunities for powerful individuals and business corporations to attack governmental policies constructed to aid minorities and vulnerable groups. For instance, business corporations have successfully used the *Charter* to challenge state regulations such that most absolute, and strict liability offences are viewed as violations of corporate rights being subject to section 1 scrutiny.²¹³ This provides corporations with opportunity to challenge regulatory provision designed to protect workers, consumers and the environment. Courts have extended *Charter* protection to corporations under sections 2(b) (freedom of expression), 8 (unreasonable

²¹³ Bakan, *supra* note 17 at 90.

search and seizure), 11(b) (the right to a trial within a reasonable amount of time).²¹⁴

Individuals and organizations such as the National Citizens Coalition have also used the *Charter*, with mixed success, in order to attack election laws that would limit ‘third-party’ spending during election campaigns²¹⁵ and mandatory membership requirements for trade unions.²¹⁶ Thus, the judicial construction of the *Charter* has provided numerous opportunities for powerful individuals and organizations to undermine egalitarian governmental policies.²¹⁷

The controversy related to the practice of polygamy and the *Criminal Code* prohibition of the practice demonstrates that allegations of tyranny of the majority are highly subjective. Those who are sympathetic towards the rights of minority religious groups to practice their faiths and view the FLDS practices as causing harm that is not disproportionate to some instances of monogamy might argue that the prohibition of the practice constitutes a tyrannical violation of rights. However, those who are less sympathetic to the rights assertions of religious groups or who view the harm being caused by the FLDS practice as extreme might assert that the reticence of governmental officials to enforce the law or take alternative measures to protect women’s rights in Bountiful shirks Canada’s human rights obligations. To them such behaviour may be described as a tyrannical neglect on the part of majoritarian institutions that appear content to avoid prosecutorial action that would undoubtedly become a legal quagmire. The perspective of both groups could well be internally consistent with the worldviews of

²¹⁴ *Ibid.* at 90-1.

²¹⁵ See *National Citizens’ Coalition Inc. v. Attorney General of Canada (1984)*, 32 Alta. L.R. (2d) 249; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827.

²¹⁶ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

²¹⁷ For more detailed information on the *Charter*’s history of strengthening pre-existing power imbalances see Bakan, *supra* note 17 c. 6.

their members. Similarly, others who have adopted different moral worldviews would dispute the assertion that the current state of affairs is constitutive of tyranny.

Consequently, one is left with numerous competing views – each of which may be internally consistent – and no clearly impartial arbiter to provide an objective solution to this moral controversy.

Conflicts between the rights assertions of minority and vulnerable groups have been at the core of several prominent *Charter* cases. The *Rodriguez* case pitted the liberty and security rights of terminally ill persons who desire physician assisted suicide against the right to life of others, including disabled persons, who could be killed without having given consent. Similarly, the *Chaoulli* case implicated the competing rights to security of the person of those who could afford private health insurance and were suffering due to long wait-lists under the current healthcare regime with the rights of those who would not be able to afford private insurance. Likewise, many successful *Charter* challenges to legislative provisions related to those accused or convicted of crimes were met with outrage by victims rights groups who view such decisions as marginalizing the rights of victims of crime. In these cases, neither of the groups directly implicated is sufficiently large to impose their will upon the other via majoritarian voting processes.

Moreover the lack of a neutral adjudicator problematizes *all Charter* disputes involving the rights of minorities.²¹⁸ Interpretation of the scope of *Charter* rights and whether a governmental limit on the judicially constructed interpretation of a right is “reasonable” is similarly a highly subjective process. The fact that the state has curtailed

²¹⁸ Andrew Petter and Allan Hutchinson have persuasively argued that conflicting views of the scope and meaning of rights, conflicting perspectives about the relative importance of competing rights and conflicting views about which other policy considerations ought to trump putative rights violations demonstrate the S.C.C.’s lack of neutrality in deciding *any Charter* case. See Petter & Hutchinson, “Rights in Conflict: the Dilemma of *Charter* Legitimacy” *supra* note 32.

the rights of some segment of the population in a manner that it, and perhaps others, perceives to be repressive is not in itself evidence that the governmental policy is tyrannical. For instance, the fact that some civil libertarians disagree with the S.C.C.'s decision to largely uphold section 161.1 of the *Criminal Code*, which relates to the prohibition of the possession of child pornography,²¹⁹ says little in itself about whether the provision represents a tyrannical sort of majoritarian preference. Historically, the decision about how to balance these disputes would have rested with Parliament. While Parliament has no special claim to infallibility, one thing that may be stated in defence of a decision that it makes is that "it was not made in a way that tyrannically excluded certain people from participation as equals."²²⁰

Rather than providing a procedure that can legitimately claim to better protect minority rights or avoid conflicts between competing rights, the judicialization of politics has effectively removed these types of decisions from the purview of a somewhat representative, democratically accountable, majoritarian, voting body and placed them in the hands of an unrepresentative and unaccountable voting body. Those on the losing side of rights disputes effectively lose the right of equal participation in a democratic society. Given the dubious justifications for this disenfranchisement, the argument from minority rights provides little reason to accept judicial hegemony in *Charter* rights interpretation.

²¹⁹ *R. v. Sharpe*, 2001 S.C.C. 2.

²²⁰ Waldron, "The Core of the Case", *supra* note 43 at 1398.

Chapter 4

Waiting on the World to Change – An Examination of the Transformational Potential of the Notwithstanding Clause

Given the dubious justifications for judicial supremacy, it is not surprising that several of the individuals concerned about this development in Canadian democracy have turned their attention to the difficult question of what, if anything, may be done to recalibrate the balance of power in favour of representative institutions. Since *Charter*-based judicial review has become a permanent feature of Canada's constitutional landscape, the literature has tended to focus on strategies that can operate within the current constitutional framework. Broadly speaking, the responses to the concerns about the legitimacy of judicial review may be divided into two categories. One potential avenue for addressing the legitimacy deficit examines the possibility of reforming the judicial appointment process so that it more adequately reflects various democratic ideals. However, this approach fails to adequately address the most concerning elements of *Charter*-based judicial review. Reforming the judicial appointment process does nothing to remedy the deficit in accountability. Rather than "looking for democracy where it does not reside..."²²¹ this chapter will instead focus on the notwithstanding clause - an alternative with the potential to return the final decision-making power regarding state policy to more accountable public institutions. The analysis will begin by examining the public positions taken by political elites towards the clause and examining the current state of Federal politics regarding the clause. I will then consider some proposed

²²¹ Petter, "Twenty Years", *supra* note 30 at 198.

strategies for the rehabilitation and potential usage of the clause and argue that the most useful rehabilitative strategy is not changing the usage criteria, but rather changing the subtext of the discussion about the clause.

For many concerned with the legitimacy deficit posed by judicial supremacy, the rehabilitation of section 33 of the *Charter* has the potential to rebalance the relationship between the courts and the other branches of government. While many things can, and have been, written about section 33 of the *Charter*, one thing that appears clear is that the clause is one of the most misunderstood provisions in the *Charter*. As has been discussed, usage of section 33 does not necessarily constitute derogation of rights any more than a judicial interpretation of the *Charter* necessarily constitutes an infringement of rights. Nonetheless, the prevailing public position of a succession of Canadian Prime Ministers has been to adopt the rhetoric of judicial oracularism – “rights are as courts say” and *any* legislative²²² derogation from the majority interpretation of the S.C.C. constitutes an affront against human rights, an assault against *Charter* values, and a rejection of motherhood, apple pie and ice-hockey (although not necessarily in that order).

The Prime Ministerial assault on the notwithstanding clause began after the unfortunate series of events that followed the S.C.C.’s decision to strike down the commercial signs sections of Quebec’s Bill 101.²²³ The Bourassa government responded by enacting similar legislation that did not conform to the S.C.C.’s recommendations from *Ford*, protecting the legislation by invoking the notwithstanding clause. This decision angered many Anglophone Canadians and is widely considered to have been a

²²² However, according to prevailing sentiment it is perfectly *appropriate* for the S.C.C. to derogate from its prior interpretations of the *Charter* which it has done on several occasions including the cases on extradition of those accused of capital crimes in other jurisdictions.

²²³ See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [*Ford*].

contributing factor to the failure of the Meech Lake Accord. In an attempt to deflect the anger away from the Quebec government and save the accord, Mulroney attempted to refocus blame on the notwithstanding clause, calling it “that major fatal flaw of 1982, which reduces your individual rights and mine.”²²⁴ The Prime Minister also concluded that the provision so undermined the *Charter’s* capacity to “protect the inalienable and imprescriptible individual rights of individual Canadians that [it is] not worth the paper it is printed on.”²²⁵

Throughout much of its existence, the rhetorical disdain for section 33 has proven to be bi-partisan. After coming to power in the early 1990’s, the Chrétien Liberals continued the practice of demonizing the clause. During his time as Prime Minister, Mr. Chrétien became quite comfortable with using the threat of section 33 as a foil against which his party could be positioned as the defender of the integrity of the *Charter*. His *Charter* strategy was well illustrated during the Parliamentary debates about same-sex marriage that occurred in 2003. An opposition party motion called on Parliament to reaffirm the traditional definition of marriage and “take all necessary steps available to the Parliament of Canada to preserve this definition of marriage in Canada.”²²⁶ Rather than condemning the motion as a violation of the rights of gays and lesbians, Chrétien argued that the truly reprehensible feature of the motion was that the reference to “all necessary steps...” could be understood as authorizing usage of the dreaded notwithstanding clause. The Liberals then avoided a vote on the substance of the motion by defeating a proposed amendment that would have removed the reference to “all

²²⁴ Christopher P. Manfredi, “Same-Sex Marriage and the Notwithstanding Clause” *Policy Options* (October 2003) 21 at 23.

²²⁵ *Ibid.*

²²⁶ *Ibid.* at 21.

necessary steps...” from the motion. Manfredi suggests that this “successful transformation of a vote of a motion about the definition of marriage into a *de facto* referendum on the notwithstanding clause is indicative of a growing convention that it should never be invoked by any legislative body.”²²⁷ The argument for judicial supremacy, which underlies this critique of section 33, was taken a step further by Prime Minister Paul Martin who, as previously discussed, stated the intention of a future Liberal government to remove the usage of section 33 from the purview of Parliament.

The recent change in government has done little to resurrect the political viability of the clause. While some within the caucus of the former Reform and Canadian Alliance parties have at times eschewed this rhetorical dismissal of the clause, it appears unlikely that the governing Conservative Party of Canada will make use of the clause in the immediate future. During the final days of the 2004 federal election campaign Conservative MP Randy White stated in a documentary that a Conservative government could potentially use the notwithstanding clause in order to maintain the traditional definition of marriage and reinstate conservative policies on other social issues. This statement was widely reported as a serious gaffe by the media²²⁸ with party leader Stephen Harper distancing himself from the comments. On the 25th anniversary of the adoption of the *Charter*, federal Liberal leader Stephane Dion and deputy leader Michael Ignatieff used the occasion to chide now Prime Minister Harper for his lack of *Charter* enthusiasm and his government’s funding cuts to the Court Challenges program, in

²²⁷ *Ibid.*

²²⁸ See for instance, Sean Gordon “MP’s Controversial Remarks put Harper in the Hot Seat Again” *Edmonton Journal* (June 26, 2004) A5.

Dion's words "the legacy of the Charter is too precious for us to remain indifferent to those who, through antagonism or neglect, would seek to undermine it."²²⁹

With the Conservatives failing to secure a majority in the House of Commons during the 2008 federal election it is probable that under Harper's leadership the party will continue to moderate its image and stake out the centre. For instance, the S.C.C.'s recent decision²³⁰ which held that reverse onus provisions in the *Youth Criminal Justice Act*²³¹ were unconstitutional, was a serious blow to the Conservative's criminal justice agenda. However, it appears that party leadership will continue to resist the calls of party members to utilize or even engage in general public discussion about the usage of section 33. The concern amongst party leadership appears to be that this could leave the Conservatives vulnerable to Liberal attacks about the party harbouring a "hidden agenda" or more generally lacking "respect for rights." Indeed, Harper will well remember that such charges seemed to resonate with some voters during both the 2000 and 2004 federal elections. However, the longer the Conservatives are able to form government the more difficult it will be for the Liberals to convince voters that the party has a hidden agenda. Nonetheless, given the public position of the Liberal party on the notwithstanding clause and the minority status of the current government, it appears highly unlikely that the clause will be applied by the federal government in the immediate future. At present it seems that only a perfect storm of persistent, overwhelming public outrage in response to some *Charter* decision that falls under the purview of section 33 could possibly lead to the application of the clause. The Conservatives would require the support of one or more

²²⁹ Susan Delacourt "Liberals, Tories Bicker Over Rights; Parties Spend Anniversary of *Charter* Squabbling Over Who Gets Credit for it, Who Best Defends it" *Toronto Star* (April 18, 2007) A13.

²³⁰ *R. v. D.B.*, 2008 S.C.C. 25.

²³¹ S.C. 2002, c. 1.

of the opposition parties in order to utilise the clause to reinstate the impugned legislation. Accordingly, one might be hard pressed to imagine a current governmental policy – save perhaps the current exclusion of polygamous relationships from the definition of marriage – that could likely be struck down by the courts that might satisfy these other criteria. While the short-term prospects for the usage of the clause appear quite limited, several theorists have proposed changes to the process through which the notwithstanding clause is applied that are designed to enhance its legitimacy.

It is worth noting that much of the scholarship pertaining to section 33 has been hostile to application of the clause rather than encouraging its legitimacy so that it can be made politically viable. For instance, John Whyte has suggested that there is no justification for its usage.²³² Lorraine Weinrib has stated that the usage of the clause necessarily constitutes an abrogation of rights²³³ and has argued that legislative provisions protected by section 33 ought to attract a high level of scrutiny in any analysis of whether they satisfy formal requirements.²³⁴ More recently, Thomas Axworthy has argued in support of Prime Minister Martin’s goal of abolishing the clause.²³⁵ In this chapter, I will draw on the relatively sparse literature that argues for revision of the practice surrounding the *non obstante* clause so that its usage may become more viable. However, as will be discussed, most of the suggestions provided by these supporters of the clause involve criteria which, in practice, would rarely be satisfied.

McGill political scientist, Chris Manfredi, has conducted one of the most thorough examinations of proposed strategies to rehabilitate the notwithstanding

²³² John D. Whyte, “On Not Standing for Notwithstanding” (1990) 28:2 Alta. L. Rev. 347.

²³³ Weinrib, “Canada’s Constitutional Revolution”, *supra* note 169.

²³⁴ Lorraine Eisenstat Weinrib, “Learning to Live with the Override” (1990) 35: 3 McGill L. J. 541 at 569.

²³⁵ Axworthy, *supra* note 106.

clause.²³⁶ Manfredi embraces a suggestion made by Peter Russell²³⁷ that legislation which includes section 33 should be subject to enactment both before and after an election of the relevant legislative body.²³⁸ He suggests that this could be accomplished by adding the additional stipulation that all instances of section 33 in force in a particular jurisdiction would expire after each election of the legislative body for that jurisdiction. As he notes, this would force the newly elected legislative cohort to consider the merits of extending the application of section 33 in each provision with which it is attached.²³⁹ Additionally, Manfredi favours removing the ability of government to use section 33 in a pre-emptive manner and suggests that increasing the bar for passing legislation that includes the clause from a simple majority to a two-thirds supermajority would help to increase the legitimacy of such legislation.²⁴⁰ Manfredi also suggests the text of the provision could be changed to reflect the reality that application of the notwithstanding clause does not necessarily constitute a derogation from *Charter* rights, but rather a difference of opinion with the decision of a judicial majority. If his suggested amendments were adopted, the text of section 33 would read as follows:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding *a final judicial decision that the legislation or a provision thereof abrogates or unreasonably limits* a provision included in section 2 or sections 7 to 15 of this Charter. *A declaration under this subsection becomes effective upon the agreement of three-fifths of the House of Commons and Senate or three-fifths of the provincial legislature, as the case may be.*

(3) A declaration made under subsection (1) shall cease to have effect *upon the dissolution of the Parliament or legislature making the declaration* or five years

²³⁶ See Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001) c. 7 [Manfredi, *Judicial Power and the Charter*].

²³⁷ Peter H. Russell, "Standing up for Notwithstanding" (1991) 29:2 Alta. L. Rev. 293 at 301-302.

²³⁸ Manfredi, *Judicial Power and the Charter*, *supra* note 236 at 192.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.* at 193.

after it comes into force or on such earlier date as may be specified in the declaration.²⁴¹

While some will find Manfredi's suggestions congenial, it is unclear that they would be sufficient to resuscitate the political viability of section 33. The attempt to emphasize that the rights interpretations of judicial majorities do not necessarily constitute correct interpretations of the *Charter* is an important step to dispelling the myth of judicial oracularism. However, it is improbable that the consensus needed to amend the language of the constitution will be obtained in the foreseeable future. Given Manfredi clearly understands that judicial dispositions of rights issues have no special claim to embody the dictates of "right reason", his other prescriptions appear somewhat incongruous with this proposal.

While Manfredi's other proposals are intended to secure broader acceptance for the application of section 33, one may wonder whether they go too far in attempting to appease those sceptical about the clause. The suggestion that legislative supermajorities be required to invoke the clause could easily be perceived as suggesting that a legislative majority is doing something inappropriate in disagreeing with a judicial majority. Similarly, the suggestion that all uses of the clause ought to expire after each election also serves to subject the process to an increased level of public scrutiny. These proposals would arguably feed into commonly held misconceptions about the clause. While these suggestions are clearly well intended, it is plausible that they could ultimately function to further diminish the political viability of the clause.

²⁴¹ *Ibid.* It is noted that the federal government and the governments of several provinces have established a set four-year election cycle, which have always been followed but could easily be accommodated without changing the substance of this proposal.

Like Manfredi, Janet Hiebert concludes, “there is no justification for granting a judicial monopoly for determining the meaning of rights.”²⁴² She endorses the amendments to section 33 proposed by Manfredi as they “convey the idea that use of the notwithstanding clause is to disagree with a judicial interpretation of what is a reasonable limit on a Charter right.”²⁴³ However, she suggests that further theoretical work is necessary as it is one thing for Parliament to invoke section 33 in a good faith manner in support of an arguable alternate rights interpretation, and another for a legislative body to use the override in support of “legislation that patently conflicts with Charter values according to any reasonable interpretation of these.” However, this distinction is not as straightforward as it might first appear. It is possible for “reasonable” people to vigorously disagree about what constitutes a “reasonable” interpretation or limitation on rights. Indeed this is the one of the core difficulties with legitimacy of a judicial monopoly on rights interpretation. Hiebert notes this elsewhere when likening belief in objective judicial rights interpretations to belief in Santa Claus.²⁴⁴ This begs the questions of who is qualified to determine when a legislative policy is so “unreasonable” as to be devoid of a good faith, right-based justification.

Hiebert concludes that proposed uses of the notwithstanding clause “should be evaluated in terms of the general normative framework of the Charter: that state actions should be consistent with a free and democratic society.”²⁴⁵ Additionally, she asserts that the constituent values of such a society are subject to contestation and are not limited to rights enumerated in the *Charter*. Hiebert acknowledges that this imprecise prescription

²⁴² Hiebert, “Is it Too Late to Rehabilitate”, *supra* note 98 at 180.

²⁴³ *Ibid.* at 186.

²⁴⁴ *Ibid.* at 181.

²⁴⁵ *Ibid.* at 188.

may be viewed as giving Parliament too much discretion and will therefore not satisfy all critics. However, she concludes “if one accepts the impossibility of deriving from the *Charter* objectively correct legal answers to conflicts involving claims of rights, or is sceptical that by giving judges the final determination for complex social problems they are more likely to produce better answers,” then one ought not to accept the hysteria that permeates discussion about the utilization of section 33.²⁴⁶

One final commentator who has attempted to provide a more precise set of circumstances for the invocation of section 33 is current Parliamentarian Scott Reid. Prior to running for office with the Canadian Alliance in 2000, Reid authored several books and articles in scholarly publications relating to Canadian constitutional law. In “Penumbras for the People: Placing Judicial Supremacy under Popular Control”²⁴⁷ he argues that supplementing the current Parliamentary process by means of direct democracy could enhance the legitimacy of the clause.

Reid suggests that the amendments suggested by Manfredi and others would be ineffective, given the general perception that courts “protect” rights while legislatures are merely capable of “trampling” rights, and impractical, due to the difficult nature of constitutional negotiations. Consequently, Reid proposes a model that he argues would avoid both of these “obstacles.”²⁴⁸ He suggests that one potential solution that could overcome these dual challenges would be to use regular legislation to authorize popular input on the advisability of using section 33 in response to a judicial rights decision.

²⁴⁶ *Ibid.*

²⁴⁷ Scott Reid, “Penumbras for the People: Placing Judicial Supremacy Under Popular Control” in Anthony A. Peacock ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills, Ont.: Oxford University Press, 1996) at 186 [Reid].

²⁴⁸ *Ibid.*

Reid proposes legislation which states that “if any law [within a given] jurisdiction were struck down by the courts as an infringement of rights guaranteed under the *Charter*, the offending provision would automatically be submitted to the electorate for their consideration at the time of the next general election.”²⁴⁹ He surmises that in the hypothetical case of a plebiscite result in favour of utilizing the clause, the incoming government would be obligated to legislate in accordance with the majority’s rights interpretation. Similarly, in cases where a majority of citizens preferred the rights interpretations of the judicial majority to those of the legislative majority that had voted in favour of the legislation, the new government would be hard pressed to use the notwithstanding clause to assert its preferred rights interpretation. While Reid is correct in suggesting that this proposal would avoid the potential quagmire of renegotiating constitutional arrangements, it is less clear that the use of direct democracy would overcome the perceived legitimacy difficulties associated with section 33. In order to better understand the efficacy of this proposal one must first consider the state of public opinion regarding section 33.

Despite the antipathy of many of Canada’s political elite towards the notwithstanding clause, the provision remains something of an unknown quantity amongst the general population. One of the interesting results of a recent national survey was how little many Canadians appear to know about the notwithstanding clause. One of the questions on the survey asked respondents:

“Are you aware or unaware that the provinces or federal government can opt out of an element of the Charter of Rights and Freedoms by using the notwithstanding clause?”

²⁴⁹ *Ibid.* at 204.

While the phrasing of the question is illustrative of the standard misconceptions about the operation of section 33, the response provided to this question was interesting. While the survey was conducted in early November 2006, less than a year after Prime Minister Martin's "notwithstanding" gambit only 49% of respondents answered this question in the affirmative.²⁵⁰ Consequently, in spite of the efforts of many political elites to demonize the clause, it appears that for many Canadians it remains an undefined – or at least an under defined – entity.

As previously mentioned, one difficulty with accurately gauging public opinion about the notwithstanding clause is the public's apparent lack of familiarity with the operation of the *Charter*. Indeed, it remains an open question whether the public would actually prefer to leave all rights interpretations with judicial majorities if the myth of judicial oracularism lost traction in Canada, as has happened in the United States. Recent surveys have proved inconclusive on the question of public opinion on judicial supremacy. In the previously mentioned November 2006 survey 54% of respondents indicated support for the courts when asked to choose whether the courts or Parliament should have the final decision on topics related to rights.²⁵¹ However, in a more recent survey 68% of respondents supported the proposition that the notwithstanding clause should remain intact.²⁵² When one considers the results of the survey question regarding general public awareness of section 33 in concert with the response to this question, the safest conclusion to be drawn from the survey data is that the general public lacks full confidence in both politicians and judges. Assuming this is the case, the use of direct

²⁵⁰ Nik Nanos, "Charter Values Don't Equal Canadian Values: Strong Support for Same-sex and Property Rights" *Policy Options* (February 2007) 50 at 51 [Nanos, "Charter Values Don't Equal Canadian Values"].

²⁵¹ *Ibid.* at 53.

²⁵² Janice Tibbetts "Charter Override Needed: Survey; Notwithstanding Clause;" *National Post* (11 April 2007) A6.

democracy could enhance the legitimacy of section 33 if a majority of Canadians believe that certain decisions should be made directly by the public as opposed to political and legal elites.

That being said, many academics appear to be suspicious about proposals that link direct democratic mechanisms with the notwithstanding clause. Hiebert simply states that she is “sceptical about the desirability of subjecting proposed uses of the notwithstanding clause to referenda.”²⁵³ While Manfredi shares Hiebert’s scepticism, he provides greater explanation for his concern. He suggests the primary problem with such proposals is that “direct democracy, including referenda, circumvents the representative institutions in which deliberation takes place.”²⁵⁴ However, it is unclear how pronounced this concern would be under the type of system proposed by Reid. According to his proposal, the policy would return to Parliament for another debate and vote. This would require Parliamentarians to consider many of the rights issues flagged in the court decision in addition to rights concerns and other interests that may have been given short shrift by the court. Most Parliamentarians are also deeply concerned about issues involving minority and vulnerable groups and the composition of Parliament would make it likely that the positions of a variety of vulnerable groups would find a genuinely sympathetic hearing with some of the individuals actually tasked with making the decision. This diversity of opinion could be aired in a vigorous manner within the governing party’s caucus, as well as in Parliament itself, allowing MP’s to more fully understand the perspectives of different minority constituencies.

²⁵³ Hiebert, “Is it Too Late to Rehabilitate”, *supra* note 98 at 189.

²⁵⁴ Manfredi, *Judicial Power and the Charter*, *supra* note 236 at 192.

Additionally, Parliament would not be bound to adopt every policy that received the support of a majority of voters. There will be instances where voters are evenly divided about the appropriateness of a policy such that no clear public consensus has crystallized. Other issues will relate to obscure or highly technical policies that may produce majority results that are somewhat spurious. In such cases the political cost of disagreeing with constituents would not necessarily be prohibitive. Additionally, in instances where many citizens were deeply concerned about the policy in question the Parliamentary process could allow both sides of the vote to feel that their perspectives were genuinely represented. Indeed, it is possible that such instances might foster an environment in which the tight reins of party discipline were loosed so that these rights disputes could be decided via free votes. Such debates would benefit from Parliament's capacity for competent policy analysis and its potential for representative deliberation.

Manfredi also notes that subjecting disputes about rights to referenda has the capacity to further undermine the legitimacy of the clause by breathing further life into concerns about the tyranny of the majority which in turn would further diminish the legitimacy of the provision.²⁵⁵ He also claims that the suggestion that such referenda ought to be automatic might lead legislative bodies to "shirk responsibility for making difficult and controversial decisions"²⁵⁶ and from having to justify the application of section 33. The former criticism is somewhat overdrawn. At present, section 33 is not politically viable. It is improbable that any party would implement legislative provisions that resemble those suggested by Reid without having carefully measured public opinion about the rebalancing of political institutions. Consequently, if such an amendment to

²⁵⁵ *Ibid.* at 191.

²⁵⁶ *Ibid.*

legislative practice were to be adopted, it would clearly not please everyone, but the mere adoption would mark a major enhancement of the credibility of the clause. Similarly, the concern about elected officials “shirking responsibility” must be weighed against the current context where this happens regularly when legislatures capitulate to the rights interpretations of judicial majorities.²⁵⁷ Additionally, as Reid notes,²⁵⁸ the usage of direct democracy as a check on legislative supremacy in Switzerland has actually lead to compromise and the formation of greater consensus by political parties about issues.

Consequently, while some academics harbour a deep distrust about the practice of direct democracy, which in some cases is based largely upon a rather jaundiced view of their fellow citizens’ capacity for moral reasoning, there is no *prima facie* reason why submitting the choice between the policy proposals of different institutions to the general population would be illegitimate. Rather, providing the occasion for citizens to participate in the decision making process would allow them the opportunity to reflect on the issues at hand, better understand the positions of others and evaluate their own perspectives about the meaning of fundamental rights issues. Indeed, this is the very opportunity that judicial review bestows upon judges, who, like citizens, regularly disagree about the scope of various rights, how to balance competing rights and whether a purported infringement of a protected right is “reasonable.” Perhaps the main, undisputable difference between the two mechanisms would be that one voting body would be largely²⁵⁹ representative while the other is woefully unrepresentative.

²⁵⁷ Manfredi acknowledges that latter point himself. See *Ibid.*

²⁵⁸ Reid, *supra* note 247 at 206-207.

²⁵⁹ It is important to remember that not all Canadians have the right to vote. By limiting the franchise to citizens who have reached the age of majority, our voting procedures exclude the perspectives of younger citizens. However, such age-based exclusion pales in comparison to that which exists on the Supreme Court of Canada.

According to Reid, this type of process would actually provide an alternative, and more legitimate, interpretation of which policies are “demonstrably justified in a free and democratic society” per section 1 of the *Charter*.²⁶⁰ For him, the perspective of a majority of millions of voters carries more legitimacy than the perspective of a simple majority of nine judges.

Reid also argues that his proposed plebiscite process would have the additional benefit of providing voters with a policy choice – presumably between the policy nullified by the court and a new policy proposal that implements any changes prescribed by the judicial majority. However, this assumption is not as sound as it first appears. First, policy evaluation is arguably not one of the institutional advantages of courts. Additionally, in some court decisions where a majority of judges decide to nullify legislation, there may be divergent reasoning provided by multiple concurring decisions. Similarly a unanimous decision may lack necessary detail to provide clear direction as to which features would be essential to the court’s acceptance of an alternative²⁶¹ policy. This could lead to unintended consequences such as the court becoming increasingly strategic in its decision-making process.

Additionally, Reid’s proposal could also have the consequence of undercutting the power of representative institutions. It is plausible that mandating referenda on *Charter* rights disputes could lead to the further erosion of judicial restraint – which is arguably a meaningful consideration for some high court judges. By submitting all applicable successful *Charter* challenges to popular review, it is possible that certain

²⁶⁰ Reid, *supra* note 247 at 205-206.

²⁶¹ I assume here that legislation has been nullified following the majority conclusion that it has failed to satisfy some element of the “proportionality test” as opposed to having been deemed as an illegitimate policy objective.

members of the judiciary would feel more comfortable with striking down governmental policies, particularly when it appears there would be significant public support for a policy change.²⁶²

While each of the prescriptions provided by these commentators has the potential to make the application of the notwithstanding clause more palatable to some of its critics, perhaps the most difficult challenge to the rehabilitation of section 33 as a viable option is the current state of the discourse surrounding the section. In sources of information easily accessible to the general public the notwithstanding clause is continually portrayed as a means of “overriding” rights as opposed to a means of animating alternative rights interpretations. As noted by Janet Hiebert, a press release by the federal Department of Justice described section 33 as an “escape clause” that allows governments to “make some laws as if the *Charter* doesn’t exist.”²⁶³ Similarly, the Library of the Parliament of Canada’s information page on the notwithstanding clause embraces the typical discourse about the purported tension between Parliamentary supremacy and rights. It lists the retention of Parliamentary sovereignty and the Charter’s potential to lead to the politicization of the judiciary as potential justifications for the presence of the clause. However, in providing the rationale against the inclusion of the clause it fails to rise above this false dichotomy. It states:

The basic argument is quite simply that, in the words of former Quebec cabinet minister Clifford Lincoln, who resigned in protest against the language law amendment, “rights are rights.” In this view, the rights and freedoms in the Charter are subject to judicial interpretation but must be protected against legislative transgression.²⁶⁴

²⁶² This could lead to an increase in the number of *Charter* related ballots per voting cycle so that it could become onerous for members of the general public to obtain sufficient information about ballot issues.

²⁶³ Hiebert, “Is it Too Late to Rehabilitate”, *supra* note 98 at 173.

²⁶⁴ David Johansen & Philip Rosen, “The Notwithstanding Clause of the Charter”, online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>>.

The view that “rights are as judges say” is also the dominant position that informs media reporting on this aspect of the *Charter*. The Canadian Broadcast Corporation’s background page on section 33 is illustrative of this phenomenon. It states:

The notwithstanding clause allows the federal government or a provincial legislature to enact legislation to override several sections of the Charter that deal with fundamental freedoms, legal rights and equality rights.

Simply put, this override power allows governments to create laws that will operate in spite of (or “notwithstanding”) some Charter rights that the laws appear to violate.²⁶⁵

As previously discussed, this perspective also dominates the news media’s reporting on the notwithstanding clause.²⁶⁶ While this factor is attributable to the language of the provision and the information provided by governmental and dominant media sources, it is also related to the history of political discourse related to the clause. As long as politicians continue to recite the same rhetoric about the clause only being used to “override” citizens’ rights, this view will dominate media headlines of stories related to section 33. Thus, the publicization of a more nuanced rights discourse could well be the most powerful aid to the rehabilitation of the clause.

In jurisdictions – such as the United States – where citizens understand that the interpretation of constitutional rights is largely related to the composition of the bench and the personal juridical philosophy of the individual judges, the myth of judicial oracularism has limited traction. When voters understand that *both* courts and legislative bodies act to extend the rights of certain individuals while curtailing the rights of others, it is very difficult to sustain the facile notion that courts necessarily “protect” rights while legislative assemblies merely “trample” rights. This is particularly obvious in cases where

²⁶⁵ “In Depth: Canadian Government – Notwithstanding Clause – FAQs”, online: CBC News <<http://www.cbc.ca/news/background/cdngovernment/notwithstanding.html>>.

²⁶⁶ See Macfarlane, *supra* note 99.

governmental policies meant to extend rights to certain citizens (for instance, affirmative action policies, or such social rights as universal health care) are struck down as unconstitutional or, as in *Chaoulli*, subjected to conditions that arguably tend to undermine them.

A final variable that could enhance the image of the notwithstanding clause would be an increase in dissatisfaction with judicial interpretation of *Charter* rights. While most citizens could not likely name five cases in which the *Charter* was used to invalidate government legislation, a string of decisions that angered a large portion of the population would likely lead to increased calls from the public for the usage of the clause. While the courts' role in legalization of same-sex marriage angered some Canadians, an increasing majority now accept this decision.²⁶⁷ However, it is unlikely that a court decision to further expand the definition of marriage to include polygamous relationships would be met with such enthusiasm. A recent poll found that 62% of Canadians believe that polygamists should be prosecuted under existing laws while only 19% of those polled oppose such prosecution.²⁶⁸ In general, the more out of step the *Charter* decisions of the S.C.C. are with the views of citizens on issues many consider to be of great import, the more public support there is likely to be for usage of the clause.

It appears that the primary obstacle to the utilization of the clause is the common misconception that courts protect rights while legislatures only have the capacity to violate rights. As has been noted, this misconception persists due to a combination of limited public understanding about the operation of the *Charter* and the misleading language of section 33. Additionally, the naïve acceptance of judicial oracularism by

²⁶⁷ Nanos, "Charter Values Don't Equal Canadian Values", *supra* note 250 at 50.

²⁶⁸ Chantal Eustace "Polygamists Should be Charged, Poll Says" *National Post* (April 26, 2008) A15.

some in the general public continues to be supported by lawyers, certain political elites and the acceptance of this conceptualization of the *Charter* process by many in the mass news media. While there may be dubious normative justification for the continuance of judicial supremacy, the current relationship between governmental institutions is unlikely to change until Canada develops a more honest and sophisticated *Charter* discourse.

Conclusion

Throughout the course of this argument I have attempted to demonstrate that the typical justifications in support of a judicial monopoly on rights interpretation are essentially question begging. As the *Charter* critics have demonstrated, the rights interpretations produced by judicial majorities have no better claim to fulfilling the dictates of “right reason” than those provided by legislative assemblies. As many of those who hold a largely favourable opinion of judicial review admit, there is no good reason to believe that courts are providing right answers to the complicated normative disputes they regularly adjudicate.

Rather, the limited membership of courts guarantees that, when compared to legislative assemblies, fewer perspectives on rights will be represented amongst the actual decision-makers. Judges are overwhelmingly drawn from a privileged social stratum marked by common educational and work experience. Further, the tenure enjoyed by Canadian judges ensures these decision makers are not accountable to those whose rights they are determining. Consequently, the cost judicial hegemony exacts from citizens’ participatory rights is steep and unwarranted.

However, as has been discussed, not all commentators agree that the S.C.C. truly has the final say about the interpretation of *Charter* rights. Some have suggested that it is more appropriate to view the institutional arrangement between courts and legislative assemblies as dialogical. Given the lack of non-question begging reasons for preferring the rights interpretations of judicial majorities to those of others, one must question why courts ought to occupy such a position of relational privilege while others are excluded.

The normative justification provided by Hogg is that judicial review is legitimate because legislative assemblies are generally not bound by judicial rights interpretations. I have argued that this curious defence of the legitimacy of judicial review does not hold up to empirical scrutiny.

Given that Hogg acknowledges that usage of the notwithstanding clause – with its self-contained limitations – is currently politically untenable, the courts are left with the final say about *Charter* rights. While Parliament or provincial legislative assemblies have sometimes developed legislative responses to some *Charter* decisions, the existence of these legislative sequels and the fact that courts sometimes endorse them does little to disturb judicial hegemony in rights interpretation. Neither do the presence of section 1, qualified rights or the purported policy flexibility associated with section 15 provide legislative assemblies with the final say about the interpretation of *Charter* rights. Consequently, at present, it is appropriate to say that judicial rights interpretations based upon the *Charter* have such a high degree of finality that a governmental system once based upon Parliamentary supremacy has metamorphosed into a form of government marked by judicial supremacy.

The final potential justification for judicial supremacy I have examined is the common refrain that judicial review plays a crucial role in protecting minorities and vulnerable individuals from the “tyranny of the majority.” However, this assumption is based upon an overly simplistic view of the rights and interests at stake in many disputes about *Charter* rights. Firstly, given that nearly any decision balancing rights and other interests is open to vigorous contestation, the involvement of rights assertions brought by minorities and vulnerable individuals does nothing to solve the issue of legal

indeterminacy in any given *Charter* case. The fact that members of such a constituency claim a particular right says nothing in itself about the legitimacy or lack thereof of the particular assertion of right.

A further difficulty with the argument that judicial supremacy is essential for the protection of minority rights is that many of the most controversial *Charter* cases contain conflicting rights claims from several minority or vulnerable groups. I have argued at length that the current debate about polygamy is illustrative of this phenomenon. This controversy is widely viewed as implicating the right to freedom of religion of members of an unpopular minority group. Further, the equality rights of a subset of this group – women and girls – are also at stake. In a similar manner many *Charter* cases, including those related to issues such as euthanasia, the provision of health care services, as well as many of the challenges to criminal and regulatory prohibitions, implicate conflicting rights and interests of topical minorities. Thus, approval of the courts' *Charter* record on “minority rights” demonstrates little more than sympathy for the rights of those minority constituencies that have benefited from the judicial construction of the *Charter*.

Given the dearth of non-question begging justifications for judicial supremacy, I have argued that strategies that might alter current institutional arrangements ought to be considered. Focusing specifically on the *Charter*'s notwithstanding clause I conclude that a unique set of factors has combined to pose a vexing challenge to the clause's political rehabilitation. First, the language of the clause suggests that it necessarily operates to deprive citizens of their rights. Additionally, the public position of a series of political elites has been that the clause is an anathema to the constitutional protection of rights.

This appraisal of the clause remains prominent in elite political discourse which broadly accepts the tenet that “rights are as judges say.”

Of the few rehabilitative prescriptions put forth by scholars concerned about judicial supremacy, the prospect of successful *Charter* challenges initiating a non-binding plebiscite at the time of the next jurisdictional general election appears most promising. While not without potential difficulties, this process would allow input from the broader public on issues of rights interpretation. Although court decisions may not always provide a clear policy alternative to the impugned policy, this process would still provide legislative assemblies with public comment about the legislation in question. Such participation would differ from that of instant opinion polls in that it would be obtained after citizens have been provided the opportunity to engage in public debate and personal moral reflection about the rights and interests implicated by the policy.

Additionally, the final determination of whether to apply the notwithstanding clause to resurrect the policy would rest with the legislative assembly. This would subject the policy to further scrutiny by a decision-making body that is likely to contain actual representation by many of the minority constituencies whose rights are implicated in a given debate. The process could also serve an important educative function about the operation of the *Charter* and the nature of rights interpretation. However, given the capacity of judicial decisions to stigmatize impugned policies and the fact that individual applications of the notwithstanding clause expire after five years, the notwithstanding clause might, at best, be considered as a means of limiting, rather than reversing, judicial supremacy. Further, at present the rehabilitation of the notwithstanding clause appears

unlikely to occur until the public discourse on the nature of rights and the operation of the *Charter* matures.

This is unfortunate because at base, the argument against judicial hegemony in rights interpretation is an argument for a vision of democracy based upon a sincere acknowledgement of *all* citizens' epistemic limitations on issues of political morality. If history is any indication, citizens of political communities will continue to disagree about rights and any other manner of phrasing normative debate. If we are to respect those who engage in this debate in a genuine manner we ought to respect processes that invite broader and more egalitarian public participation. While all decision-making processes have the capacity to violate some citizen's perceived rights, there are good reasons to believe that this flaw is intrinsic to the process of judicial supremacy. As Jeremy Waldron has eloquently noted:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some public-spirited citizen who wishes to launch a campaign or lobby her MP on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But – like her suffragette forebears – she wants a vote; she wants her voice and her activity to count on matters of high political importance.

In defending a Bill of Rights, we have to imagine ourselves saying to her: 'You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' view. When their votes differ from yours, theirs are the votes that will prevail.' It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.²⁶⁹

²⁶⁹ Waldron, "A Right-Based Critique of Constitutional Rights", *supra* note 42 at 50-51.

Bibliography

Legislation

Canada Elections Act, R.S.C.1985, c. E-2.

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

Civil Marriage Act, R.S.C. 2005, c. 33.

Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

Criminal Code, R.S.C. 1985, c. C-46.

Youth Criminal Justice Act, S.C. 2002, c. 1.

Case Law

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76.

Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791.

Charkaoui v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350.

Dunmore v. Ontario (Attorney General), [2001] 3 (S.C.R.) 1016.

Gosselin v. Quebec (Attorney General), [2002] 4 (S.C.R.) 429.

Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827.

Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211.

National Citizens' Coalition Inc. v. Attorney General of Canada (1984), 32 Alta. L.R. (2d) 249.

R. v. Daviault, [1994] 3 S.C.R. 63.

- R. v. Downey*, [1992] 2 S.C.R. 10.
- R. v. Grant*, [1993] 3 S.C.R. 223.
- R. v. Hess*, [1990] 2 S.C.R. 906.
- R. v. Mills*, [1999] 3 S.C.R. 668.
- R. v. Morgentaler*, [1988] 1 S.C.R. 30.
- R. v. O'Connor*, [1995] 4 S.C.R. 411.
- R. v. Smith*, [1987] 1 S.C.R. 1045.
- Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858.
- Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698.
- Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
- RJR-Macdonald v. Canada*, [1995] 3 S.C.R. 199.
- Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
- Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438.
- Sauvé v. Canada (Attorney General)*, [2002] 3 S.C.R. 519.
- Schachter v. Canada* [1992] 2 S.C.R. 679.
- Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.
- United States v. Burns*, [2001] 1 S.C.R. 283.
- Vriend v. Alberta*, [1998] 1 S.C.R. 493.

Books and Articles

- Abu-Laban, Yasmeen & Tim Nieguth, "Reconsidering the Constitution, Minorities and Politics in Canada" (2000) 33:3 Canadian Journal of Political Science/Revue Canadienne de Science Politique 465.

- Ajzenstat, Janet, "Reconciling Parliament and Rights: A. V. Dicey Reads the Canadian Charter of Rights and Freedoms" (1997) 30:4 *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 645.
- The Alberta Civil Liberties Research Centre, "Separate and Unequal: The Women and Children of Polygamy" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005).
- Allan, James, "Take Heed Australia - a Statutory Bill of Rights and its Inflationary Effect" (2001) 6 *Deakin Law Review* 322.
- , "Oh that I were made judge in the land. (New Zealand example demonstrates why Australia should not have a bill of rights)" (2002) 30 *Federal Law Review* 561.
- , "Thin Beats Fat Yet Again - Conceptions of Democracy" (2006) 25 *Law & Phil.* 533.
- Allan, James & Andrew Geddis, "Waldron and Opposing Judicial Review - Except, Sort of, in New Zealand" (2006) 2 *N.Z.L.J.* 94.
- Altman, Andrew, "Legal Realism, Critical Legal Studies, and Dworkin" (1986) 15:3 *Philosophy and Public Affairs* 205.
- Axworthy, Thomas, "Sword of Damocles or Paper Tiger: Canada's Continuing Debate over the Notwithstanding Clause" *Festschrift Konference "Recreating Canada" in honour of Professor Paul Weiler Harvard University, November 3-4, 2006* [unpublished].
- Baines, Beverley, "Equality's Nemesis?" (2006) 5 *J.L. & Equality* 57.
- Bakan, Joel, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).
- , "Some Hard Questions About the Hard Cases Question" (1992) 42:4 *U.T.L.J.* 505.
- Baker, Dennis & Rainer Knopff, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 21 *Windsor Y.B. Access Just.* 347.
- Bala, Nicholas, "An International Review of Polygamy: Legal and Policy Implications for Canada" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005).
- , "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29:1 *Queen's L.J.* 41.

- Bayefsky, Anne F., "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" (1983) 31:2 *Political Studies* 239.
- Beatty, David M., *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto, Ont.: Carswell, 1990).
- Billingsley, Barbara, "Section 33: The Charter's Sleeping Giant" (2002) 21 *Windsor Y.B. Access Just.* 331.
- Bork, Robert H., *The Tempting of America: The Political Seduction of the Law* (New York; London: Free Press; Collier Macmillan, 1990).
- Boyd, Neil, *Canadian Law: An Introduction*, 4th ed. (Toronto: Nelson Thomson Learning, 2007).
- Campbell, Angela, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, November 2005).
- Campbell, Tom, *The Legal Theory of Ethical Positivism* (Aldershot England: Dartmouth Pub. Co., 1996).
- , *Prescriptive Legal Positivism: Law, Rights and Democracy* (London: UCL Press, 2004).
- Campbell, Tom, Jeffrey Denys Goldsworthy & Adrienne Stone, *Protecting Human Rights: Instruments and Institutions* (Oxford UK; New York: Oxford University Press, 2003).
- Christiano, Tom, "Democracy", online: (2008).
- Department of Justice Canada, *Polygyny and Canada's Obligations under International Human Rights Law* by Rebecca J. Cook & Lisa M. Kelly (Ottawa: Minister of Justice and Attorney General of Canada, 2006) online: <<http://www.justice.gc.ca/eng/dept-min/pub/poly/poly.pdf>>.
- Deveaux, Monique, "Conflicting Equalities? Cultural Group Rights and Sex Equality" (2000) 48:3 *Political Studies* 522.
- Dworkin, Ronald M., *Law's Empire* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1986).
- , *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996).

- Dyzenhaus, David, "The New Positivists" (1989) 39:4 U.T.L.J. 361.
- Ely, John Hart, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).
- Embry, Jessie L., "Effects of Polygamy on Mormon Women" (1984) 7:3 *Frontiers: A Journal of Women Studies* 56.
- Estlund, David M. *et al.*, "Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited" (1989) 83:4 *The American Political Science Review* 1317.
- Ewing, K. D., "The Unbalanced Constitution" in Tom Campbell, K. D. Ewing & Adam Tomkins eds., *Sceptical Essays on Human Rights* (Oxford UK ; New York: Oxford University Press, 2001) 103.
- Fudge, Judy, "The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts" in Tom Campbell, K. D. Ewing & Adam Tomkins eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335.
- Gibson, Dale, "Protection of Minority Rights Under the Canadian Charter of Rights and Freedoms: Can Politicians and Judges Sing Harmony?" (1985) 8:2 *Hamline L. Rev.* 343.
- Goldman, Alvin I., *Knowledge in a Social World* (Oxford; New York: Clarendon Press; Oxford University Press, 1999).
- Goldsworthy, Jeffrey, "Legislation, Interpretation, and Judicial Review" (2001) 51:1 U.T.L.J. 75.
- , "Judicial Review, Legislative Override, and Democracy" (2003) 38:2 *Wake Forest L. Rev.* 451.
- Grofman, Bernard & Scott L. Feld, "Rousseau's General Will: A Condorcetian Perspective" (1988) 82:2 *The American Political Science Review* 567.
- Hiebert, Janet, "The Evolution of the Limitation Clause" (1990) 28:1 *Osgoode Hall L.J.* 103.
- , "Rights and Public Debate the Limitations of a "Rights Must be Paramount" Perspective" (1993) *International Journal of Canadian Studies* 117.
- , *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002).

- , "A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny" (1998) 26:1 *Federal Law Review* 115.
- , "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" (2004) 23 *Sup. Ct. L. Rev.* 169.
- , "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82:7 *Tex. L. Rev.* 1963.
- , "Rights-vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3:1 *The New Zealand Journal of Public and International Law* 63.
- , "Parliamentary Bills of Rights: An Alternative Model" (2006) 69 *Mod. L. Rev.* 7.
- Hirschl, Ran, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).
- Hogg, Peter W., *Constitutional Law of Canada*, 2006 student ed. (Scarborough, Ont.: Thomson Carswell, 2006).
- Hogg, Peter W. & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35:1 *Osgoode Hall L. J.* 75.
- Hogg, Peter W., Allison A. Bushell Thornton & Wade K. Wright, "Charter Dialogue Revisited - or "Much Ado About Metaphors" (2007) 45:1 *Osgoode Hall L. J.* 1.
- Horner, Jessie J., *Canadian Law and the Canadian Legal System* (Toronto: Pearson Allyn & Bacon, 2007).
- Huscroft, Grant "Constitutionalism from the Top Down, (2007) 45:1 *Osgoode Hall Law Journal* 91.
- Johansen, David & Rosen, Philip "The Notwithstanding Clause of the Charter", online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>>.
- Johnson, Heather, "There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future" (2005) 11:3 *William & Mary J. Women & L.* 563.
- Kahana, Tsvi, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44:3 *Canadian Public Administration/Administration Publique du Canada* 255.
- , "Understanding the Notwithstanding Mechanism" (2002) 52:2 *U.T.L.J.* 221.

- , "Legalism, Anxiety and Legislative Constitutionalism" (2006) 31:2 Queen's L.J. 536.
- Kelly, Lisa M., "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65:1 U.T. Fac. L. Rev. 1.
- Kennedy, Duncan, "The Critique of Rights in Critical Legal Studies" in Wendy Brown & Janet Halley ed., *Left Legalism/Left Critique*: Duke University Press, 2002).
- Kent, Stephen A., "A Matter of Principle: Fundamentalist Mormon Polygamy, Children, and Human Rights Debates" (2006) 10:1 Nova Religio 7.
- Knopff, Rainer, "Populism and the Politics of Rights: The Dual Attack on Representative Democracy" (1998) 31:4 Canadian Journal of Political Science / Revue Canadienne de Science Politique 683.
- , "How Democratic is the Charter? And Does it Matter?" (2003) 19 Sup. Ct. L. Rev. 199.
- Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Eng.: Clarendon Press, 1995).
- Lougheed, Peter, "Why a notwithstanding clause?" (1998) 9 Const. Forum Const. 1.
- Macfarlane, Emmet, "Rights Talk" and Reality in Canada: Does News Media Coverage Impoverish Political Discourse Regarding the Charter of Rights?" (Paper presented to the Canadian Political Science Association, University of Saskatchewan Saskatoon, Saskatchewan 30 May 2007) [unpublished].
- Mandel, Michael, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Pub., 1994).
- Manfredi, Christopher P., *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: M & S, 1993).
- , *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001).
- , "Same-Sex Marriage and the Notwithstanding Clause" *Policy Options* (October 2003) 21.
- , "The Day the Dialogue Died: A Comment on *Sauve v. Canada*" (2007) 45:1 Osgoode Hall L.J. 105.
- Manfredi, Christopher P. & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall L.J. 513.

- Martin, Robert, *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy* (Montreal ; Kingston: McGill-Queen's University Press, 2005).
- Minda, Gary, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995).
- Morton, F. L., "Dialogue or Monologue?" *Policy Options* (April 1999) 23.
- , "Can Judicial Supremacy Be Stopped?" *Policy Options* (October 2003) 25.
- Morton, F. L. & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).
- Nanos, Nik, "Charter Values Don't Equal Canadian Values: Strong Support for Same-sex and Property Rights" *Policy Options* (February 2007) 50.
- Petter, Andrew, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16:2 J.L. & Soc'y 151.
- , "Twenty Years of Charter Justification: from Liberal Legalism to Dubious Dialogue" (2003) 52 U.N.B.L.J. 187.
- , "Taking Dialogue Theory Much Too Seriously (or Perhaps Charter Dialogue isn't Such a Good Thing After All)" (2007) 45:1 Osgoode Hall L. J. 147.
- Petter, Andrew & Allan C. Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 U.T.L.J. 278.
- , "Rights in Conflict: the Dilemma of Charter Legitimacy" (1989) 23 U.B.C. L. Rev. 531.
- , "Daydream Believing: Visionary Formalism and the Constitution" (1990) 22:2 Ottawa L. Rev. 365.
- Reid, Scott, "Penumbra for the People: Placing Judicial Supremacy Under Popular Control" in Anthony A. Peacock ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills, Ont.: Oxford University Press, 1996) 186.
- Roach, Kent, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).
- Russell, Peter H., "Standing up for Notwithstanding" (1991) 29:2 Alta. L. Rev. 293.

- Russell, Peter H. & Kate Malleson, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006).
- Shah, Prakash A., "Attitudes to Polygamy in English Law" (2003) 52:2 I.C.L.Q. 369.
- Stephens, K. Michael, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms" (2002) 13:2 N.J.C.L. 183.
- Stone, Adrienne & Tom Campbell, *Law and Democracy* (Aldershot, Hants, England ; Burlington, VT: Ashgate/Dartmouth, 2003).
- Stone Sweet, Alec, *Governing with Judges: Constitutional Politics in Europe* (Oxford ; New York: Oxford University Press, 2000).
- Tushnet, Mark V., "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94:2 Michigan L. Rev. 245.
- , *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999).
- Waldron, Jeremy, "A Right-Based Critique of Constitutional Rights" (1993) 13:1 Oxford J. of Legal Stud. 18.
- , "Freeman's Defense of Judicial Review" (1994) 13:1 Law & Phil. 27.
- , *Law and Disagreement* (New York: Oxford University Press, 1999).
- , "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346.
- Webber, Jeremy, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5 Canterbury Law Review 207.
- , "Constitutional Reticence" (2000) 25:2 Australian Journal of Legal Philosophy 125.
- , "Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)" (2003) 9:1 Austl. J. H. R. at 135.
- , "Supreme Courts, Independence and Democratic Agency" (2004) 24 Legal Studies 55.

- , "Democratic Decision Making as the First Principle of Contemporary Constitutionalism" in Richard W. Bauman and Tsvi Kahana ed., *The Least Examined Branch: the Role of Legislatures in the Constitutional State* (Cambridge ; New York: Cambridge University Press, 2006) at 411.
- , "A Modest (but Robust) Defence of Statutory Bills of Rights" in Tom Campbell Jeffrey D. Goldsworthy & Adrienne Stone ed., *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Aldershot, England; Burlington, VT: Ashgate, 2006) at 263.
- Weinrib, Lorraine Eisenstat, "Learning to Live with the Override" (1990) 35:3 McGill L. J. 541.
- , "Canada's Constitutional Revolution: from Legislative to Constitutional State" (1999) 33 Isr. L.R. 13.
- Whyte, John D., "On Not Standing for Notwithstanding" (1990) 28:2 Alta. L. Rev. 347.

Newspaper Articles

- "Canadians Back Death Penalty: Poll" *Nanaimo Daily News* (17 September 2001) A7.
- "Democratic vandalism: Part 1: Judicial review committee doesn't work" *Calgary Herald* (26 August 2004) A16.
- "In Depth: Canadian Government – Notwithstanding Clause – FAQs", online: CBC News <<http://www.cbc.ca/news/background/cdngovernment/notwithstanding.html>>.
- Bramham, Daphne, "Book Gives Insight into the Life of a Teenage Bride" *Daily Bulletin* (30 May 2008) 7.
- , "Polygamy Fight" *Vancouver Sun* (August 2, 2007) B1.
- , "Bountiful Case has Wide Ramifications for Canadian law" *Vancouver Sun* (July 13, 2007) B1.
- Delacourt, Susan, "Liberals, Tories Bicker Over Rights; Parties Spend Anniversary of Charter Squabbling Over Who Gets Credit for it, Who Best Defends it;" *Toronto Star* (April 18, 2007) A13.
- Eustace, Chantal, "Polygamists Should be Charged, Poll Says" *National Post* (April 26, 2008) A15.

- Gordon, Sean, "MP's Controversial Remarks put Harper in the Hot Seat Again"
Edmonton Journal (June 26, 2004) A5.
- Harris, Michael, "Chief Justice Denies Court is Too 'Activist': Supreme Court 'Cannot be Ruled by Public Opinion'" *The Ottawa Citizen* (18 November 2000) A3.
- Janice Tibbetts, "Charter Override Needed: Survey; Notwithstanding Clause" *National Post* (11 April 2007) A6.
- Javed, Noor, "GTA's Secret World of Polygamy; As Toronto Mother Describes her Ordeal, Imam Admits he has 'Blessed' Over 30 Unions" *Toronto Star* (24 May 2008) A10.
- Macdonald, L. Ian, "If Liberals are the Party of the Charter, Tories are Party of BNA Act" *The Gazette* (11 December 2006) A31.
- Matas, Robert, "Polygamy Prosecutor Wants Bountiful Probe Reopened" *The Globe and Mail* (16 June 2008) A1.
- , "Where 'the Handsome Ones go to the Leaders'" *The Globe and Mail* (24 May 2008) A12.
- Slayton, Philip, "Put the Spotlight on Judicial Nominees" *The Globe and Mail* (14 April, 2008) A15.
- Sossin, Lorne, "Don't Treat Judges Like Politicians" *National Post* (11 June 2004) A20.
- Tibbetts, Janice, "Martin's Surprise Proposal Opens Legal Quagmire" *Nanaimo Daily News* (11 January 2006) A5.