

Democracy's Unelected Lawmakers:

Liberal Constitutionalism and Judicial Review in Theory and in Practice

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Introduction

Notwithstanding particular institutional considerations, the fundamental tone of modern liberal democracy is characterized by the investment of a limited authority, derived from the constituency will, in a structure and system of government. Dating back to the birthing moments of social contract theory, legitimate governance has been conceived as a delegation of sovereignty and power upon those whose position it is to govern, by the sovereign people themselves¹. This emphasis on the right to self-determination grew as developing nations threw off the antiquated remnants of monarchical reign. Once adoption of this first principle began setting the norm, modern democracy developed under the influence of Mill's democratic liberalism, yet further limiting and narrowing government's formerly broad legislative purview. This liberalism served as the basis for an emerging conception and system of legal structure, known as liberal constitutionalism – a hierarchical arrangement of legal provisions and precepts which seeks the maximization of liberty in accordance with, and respective of, the minimization of harm. Thus, liberal constitutionalism, whose projects include the Canadian Charter of Rights and Freedoms, arose from “two competing constitutional principles: energetic self-government and individual liberty²”, where the former promotes majority rule and utilitarian pursuit of the common good, and the latter advances individual liberty free *from* majority rule and the tyranny of common interest.

¹ Rousseau, Jean-Jacques, The Social Contract, Cranston, Maurice (Trans.), (Penguin Books, 2004), p. 26.

² Manfredi, Christopher, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, (McClelland & Stewart, 1993), p. 11.

This dichotomous difficulty led Manfredi to confirm that “[t]he paradox is that judicial enforcement of rights in the name of liberal constitutionalism may destroy the most important right that citizens in liberal democracies possess, i.e., the right of self-government.³” This, indeed, is a profound paradox – profound because it challenges those who value their freedom to organize themselves in a manner conducive to achieving desired ends without sacrificing fundamental liberties and freedoms.

John Madison suggested that these competing principles could be best accommodated through a constitutional structure that “limited the powers of the national government, that relied on representative (rather than direct) democracy, and that separated the legislative, executive, and judicial powers of government⁴”. Known as the “separation of powers”, this general formula has been thought to serve the divergent interests addressed in the paradox of liberal constitutionalism – the legislature and executive branches respond to the majority and constituency will, while the judicial branch defends inalienable rights of the individual when violated or challenged. In Parliamentary systems, the legislative and executive branches are not so clearly distinguished (as the executive is comprised of select members of the legislature), whereas the judiciary, according to popular notions of the separation of powers, stands in stark and deliberate contrast to these other branches of government, supposedly representing an independent and politically-indifferent protector of individual liberty. However, in countries with constitutional bills or charters of rights, such as Canada and the United States, the high law and court of the land stands to review and evaluate the legality of political policy and statute – therefore, “the legitimacy question”, according to

³ Ibid. p. 37.

⁴ Ibid. p. 11.

Knopff and Morton, “takes the form of a debate about how activist or restrained judges should be in reviewing the decisions of the other branches of government”⁵. The question, in this light, asks whether the justices of the Supreme Court of Canada are democracy’s unelected lawmakers, playing a direct and controversial role in shaping and forming public policy. This paper will suggest that the answer to this important question is in the affirmative, and will delve into the theoretical as well as practical components of judicial policy-making. With special emphasis on law at the constitutional level, this theoretical and practical analysis will extend to examination of leading models of adjudication, proposed by legal thinkers such as H.L.A. Hart and Ronald Dworkin, as well as to conceptions of judicial review and activism, both generally and within Canadian courts. Ultimately it will be shown that, on all levels of analysis, judges play a determined and important role in shaping, and at times forming, public policy, and that this practice has been strengthened in Canada through the entrenchment of the Charter. It is through our analysis, and in this context, that we will reconcile the paradoxical demands of liberal constitutionalism, and reaffirm the legal and political principles which lie as the foundation for Canadian jurisprudence.

General Approaches to Adjudicative Public Policy

As a matter of theory, the judicial role in asserting social and public policy has divided jurists and judges along rather polarized ideological lines. Most remarkably, the tradition of formalism – encouraging an automatic and mechanical process of judicial decision-making – sits opposite the camp of legal realism, which suggests, at times rather

⁵ Knopff, Rainer, and Morton, F.L., Charter Politics, (Nelson Canada, 1992), p. 138.

forcefully, that the law is less a system of practicable rules and more an arena of absolute judicial discretion. Somewhere in the middle, a number of prominent legal theorists attempted to answer the question of the judiciary's role in deciding questions of policy, and have extracted their theses from complex notions of what "law" is and ought to be. The following is meant to construct a theoretical framework in which to understand this question, and to gradually provide a foundation for an investigation of the nature of judicial decision-making as it pertains to the judiciary's role in forming, influencing, and shaping Canadian public policy.

Hart's Penumbra and Judicial Discretion

H.L.A Hart, renowned jurist and author, railed against what he took to be the formalistic misconception of the nature of law as it is, misconstrued as a "logically complete and intellectually coherent body of law", and spoke of "the false premises of any excessively formalistic legal theorizing⁶". Specifically, formalism erred in its supposition that the law as it is, or as it could be, presents a model coherent enough to provide specific remedies to specific circumstances, whereas Hart (and a number of his ideological contemporaries) concedes the significance of what he calls the "penumbral" region of law – cases or elements of cases which fall outside the core of decided law or written statute. He raises, as an exemplary note, the challenge of vague or undetermined wording in law to the formalistic tradition – who, Hart wonders, assigns definition, and by what process? The crux of Hart's conception of law is a system of rules, "and since rules are framed or statable in general language, it follows that quite apart from other

⁶ MacCormick, Neil, H.L.A. Hart, (Stanford University Press, 1981), p. 121.

grounds of uncertainty in rules there is a limit to the degree of determinacy in the guidance they can ever give⁷”. That is not to deny, says Hart, the core of central meaning which rules of law possess; rather, it is to deny *preoccupation* with the legal “core”, and to recognize the role of the legal “penumbra” in determining the nature of judicial adjudication⁸. His position comes across most emphatically, and perhaps most pointedly, in his exclamation that “[t]he point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of ‘law’⁹”. That is, Hart’s conception of law, unlike the formalistic one, reaches beyond the mechanisms and strictures of the core, and extends to social and political considerations which allow judges to properly and sufficiently decide penumbral questions.

In this view, the matter of the judicial role in public policy is both granted and necessary. According to Hart, a judicial reading of law void of political and social considerations would be both empty and disadvantageous. This will be an important view to be reminded of in the later analysis of judicial roles in Canadian courts.

⁷ Ibid. p. 125.

⁸ H.L.A. Hart, *Positivism and the Separation of Law and Morals* in Law and Morality: Readings in Legal Philosophy (Second Edition), (University of Toronto Press, 2001), p. 57.

⁹ Ibid. p. 54.

Dworkin's Theory of Interpretation

The title of a lecture delivered by Ronald Dworkin, professor and jurist, in 1984, hearkens loyally to the aspect of Hart's jurisprudence outlined above. "Law's Ambitions for Itself" suggests that Dworkin, too, finds an immanent nature and complexity of law that extends beyond the mechanistic formalism so derided by Hart. However, Dworkin was not satisfied at the point where Hart left the question, and so delved more deeply into the nature of judicial discretion in the decision-making process.

To begin with, "[i]t seems unfair", Dworkin supposed, "for judges to change the law in the course of litigation."¹⁰ As was evident in confronting the paradox of liberal constitutionalism, the separation of powers model is meant to take away the legislative prerogative of the judiciary, not to strengthen it with the power of finality. Dworkin allays this concern by suggesting that judges do not, as some believe, make law, but rather that they discover the law that is latent in decided cases. This relies on Dworkin's concept of the "full law" – that is, law which includes both the written and decided law, as well as the "set of principles of political morality that taken together provide the best interpretation of the positive law"¹¹. Dworkin suggests what he calls an interpretive model of adjudication, in order to realize the full law as a matter of judicial decision-making, and sets out a process by which judges correctly employ a process of interpretation, considering the "best fit" of a legal principle according to social and moral considerations. "We must ask", Dworkin writes, "which of our...putative interpretations provides a better justification of the decisions from the point of view of political

¹⁰ Dworkin, Ronald, "Law's Ambitions for Itself" in Law and Morality: Readings in Legal Philosophy (Second Edition), Dyzenhaus and Ripstein (Eds.), (University of Toronto Press, 2001), p. 106.

¹¹ *Ibid.* p. 109.

morality¹²”. This process places a great responsibility upon judicial figures who, according to both Dworkin and Hart, must work within political and social considerations to develop the law – “volumes of philosophy speak in the fall of every judge’s gavel¹³”. And while Dworkin’s theorizing supposes that what is often feared to be judicial legislation is really nothing more than the necessary realization of the full law, his reliance on political morality as the basis for such realization restores the emphasis on the politicization of the judiciary. After all, whether relevant political principles are considered to be internal or external to the law itself, the matter of import is whether judges must employ discretion in determining and applying them. It seems that they do.

It is now possible to see a theoretical background for the role of the judiciary as shapers and sculptors of public policy, emerging from the conceptual tradition of what might be most aptly and concisely termed “interpretivism”.

Judicial Activism and Restraint

The extent and nature of judicial legislation is often discussed and measured in terms of judiciary activism. This concept of “activism” describes generally a judge or court’s tendency to decide cases in consideration of principles that are not part of the relevant statutory, case, or constitutional framework, in order to advance a decision of law that is innovative and new. In contrast is an orientation toward judicial “restraint”, where a judge or court is hesitant to upset the status quo, and therefore adheres more closely to the strictures of preceding law. Traditionally, judicial activism has been associated with a more liberal approach toward judicial decision-making, allowing for the

¹² Ibid. p. 112.

¹³ Ibid. p. 118.

status quo to develop and evolve along-side social and political norms. Judicial restraint, on the other hand, has been traditionally a practice of conservative judges who believe there must be compelling justification for straying from the path which the law has formed in the process of its own construction. Why, we might do well to ask, is this discussion meaningful in the context of our analysis of judicial law-making? The answer, while complex and layered, hinges on the claim that judicial activism – a hallmark of modern liberal democracy - is euphemistic for a sort of judicial legislation, and that Canadian constitutional law allows for the extensive practice of activist law-making. To paraphrase, the policy impact of the Charter and of the Canadian Constitution depends on the degree of activism exhibited and employed by Canadian judicial bodies, and especially by the highest court of the land, the Supreme Court of Canada¹⁴.

When the Charter was initially presented to the Canadian people in the form in which it was to be entrenched in the Constitution, the Canadian government presented an image of an independent and straightforward supreme law. This image reflects also the popular conception of Canadian constitutional law as it exists today. There was, Canadians were told, a judicial duty to “uphold the Constitution” (*Re Manitoba Language Rights*, 1985: 25, 26), implying a fixed set of constitutional provisions to be upheld as they are fixed – “[t]he judiciary would not be a protagonist except on behalf of the Constitution itself¹⁵”. There existed, and to a great extent still exists, a view that the Charter ensured and provided a more automatic system of rights protection, and that from such an automatic document flows a basic and rather singular judicial policy. From the Charter, commented Professor Peter Russell, it was thought that a better assurance of

¹⁴ Knopff, Rainer, and Morton, F.L., *Charter Politics*, (Nelson Canada, 1992), p. 98.

¹⁵ Mandel, Michael, *The Charter of Rights and the Legalization of Politics in Canada*, (Thompson Educational Publishing, 1992), p. 36.

fundamental rights and freedoms proceeded from “a blind, and most anachronistic view of the judicial process [which denied] the policy-making role of the judiciary¹⁶”.

However, the practice of constitutional decision-making that has emerged from the Charter’s entrenchment has looked distinctly different, and has made discussion of judicial activism, both in theory and in practice, painfully relevant.

Judicial activism manifests in both negative and positive forms – both of which play a role in judicial policy-making. ‘Negative activism’ is in general terms the judicial invalidation of policy initiatives of legislative or executive branches of government. It is the role of the constitution to weigh individual and group rights against such policy initiatives, and the degree to which innovation and evolution characterize such weighing determines the extent to which negative activism participates in the decision-making process. On the other hand rests ‘positive activism’, where judges “tell other policy-makers not only what they may *not* do, but also what they *must* do¹⁷”. While activism in the negative form is significantly more popular and commonplace than in its positive form, the latter exhibits an explicit policy-making role of the judiciary, while the former exhibits a more indirect and subtle version. Both forms, however, speak to the prevalent role of the judiciary in forming, and at least influencing, the public-policy process.

A significant source of activism within the judiciary is the language native to the Constitution itself. Constitutional provisions are generally drafted in as open-ended language as is practicably reasonable, in order to accommodate the changing norms and needs of the society which it governs supremely. Many legal scholars have alluded to the role that the broad wording of rights protections in the Charter has played in expanding

¹⁶ Mandel, Michael, The Charter of Rights and the Legalization of Politics in Canada, (Thompson Educational Publishing, 1992), p. 36.

¹⁷ Knopff, Rainer, and Morton, F.L., Charter Politics, (Nelson Canada, 1992), p. 101.

the legislative role of judges. Tom Flanagan comments on this role, noting that with the entrenchment of the Charter in 1982, “[t]he courts received the power to nullify legislation not only on division-of-power grounds, which they already possessed, but also on the basis of a long list of *expansively worded rights* in the Canadian Charter of Rights and Freedoms¹⁸” (emphasis added). Michael Mandel writes about the Charter that most of “its provisions were vague ideals with no instructions whatsoever on how they were to be achieved in reality... These rights are what you make of them, and what you make of them depends upon your point of view.¹⁹” Mandel, in the same vein, observes that “the Charter is mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life.²⁰” In their book on judicial decision-making, Professors Greene and McCormick summarize these observations, claiming that “[t]he essence of law is definition... and the more vague and general the law, the more that judges ‘legislate’²¹”. It is abundantly clear, in this context that the Charter contains as part of its construction a certain structurally-induced invitation of judicial policy-making. The deliberately open language of the Charter has meant a substantial increase in such policy-making – a development that we will explore in more depth later on.

That judges influence and shape public-policy is now more clearly apparent on both a theoretical and practical level, and we have begun to shed light on this phenomenon in a Canadian context. However, before going further in this analysis, it is

¹⁸ Flanagan, Tom, *Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo*, in *The Myth of the Sacred*, James, Abelson, Lusztig, (Eds.), (McGill-Queen's University Press, 2002), p. 135.

¹⁹ Mandel, Michael, *The Charter of Rights and the Legalization of Politics in Canada*, (Thompson Educational Publishing, 1992), p. 37.

²⁰ *Ibid.* p. 39.

²¹ Greene, Ian, and McCormick, Peter, *Judges and Judging*, (James Lorimer, 1990), p. 228.

important that we address the fundamental question of philosophical and jurisprudential importance which inevitably arises from this discussion. In a democracy, founded upon the principles of equal liberty and opportunity, there is an elemental emphasis placed upon authority of government derived from the basic sovereignty of the people. Is it legitimate, let alone beneficial, to allow unelected judges to influence and form public-policy – an activity reserved (according to the separation of powers) for elected legislative representatives?

Democracy Checked

The influence of judicial review and “legislation” serves as a substantial check on institutionalized democracy. That unelected officials function as policy-makers, subject to rare bouts of accountability, challenges the fundamentally democratic tone of modern Western nationhood. Commenting on what he terms “The undemocratic elitism of judicial review²²”, Knopff reminds us of Tocqueville’s position in support of strong judicial activity, as he conceived of the legalization of democratic politics as the strongest barrier against the shortcomings of democracy²³. Indeed, for those who find profound insufficiency in the pure practice of democratic politics, judicial review is a powerful instrument in restricting, as John Stuart Mill sought fit to name it, “the tyranny of the majority²⁴”. However, there are those, and indeed they are many, who maintain a faith (however qualified) in the operation of democracy as the most viable and legitimate political system due to its expression and recognition of the sovereign people, seeking to

²² Knopff, Rainer, and Morton, F.L., *Charter Politics*, (Nelson Canada, 1992), p. 242.

²³ *Ibid.* p. 239.

²⁴ Mill, John Stuart, *On Liberty* in *Law and Morality: Readings in Legal Philosophy (Second Edition)*, Dyzenhaus and Ripstein (Eds.), (University of Toronto Press, 2001), p. 263.

ensure the principles of equal liberty and opportunity which are at the heart of democratic theory. For these individuals, judicial review stands to threaten the sovereignty and authority of the people, both in concept and in practice.

The Charter, which we have to this point shown to be a vague document open to a near-maximum of judicial activism, is curious in this context, since it powerfully enshrines democratic rights, and weighs *all* rights included and protected in the Charter on a scale of justifiability in a free and democratic society (Section 1, Charter of Rights and Freedoms). It seems, to risk redundancy, curious that a document so committed to the protection of democratic process and practice would allow, in the same breath, for exceedingly wide judicial interpretivism and activism. This marks a return to the paradox of liberal constitutionalism, where a balance is sought between the pressing demands of self-government and individual liberty. In answering this paradox we have already examined the separation of powers model; however, in light of the conflation of responsibilities under each branch, due to the legislative tendencies of the judiciary by means of judicial activism, it is clear that a more extensive and satisfactory answer is required.

In fact, the answer may very well present itself within the Charter, preempting any need to turn to external models of political organization or legal arrangement. How might this be, we should be inclined to ask, in light of the apparently conflicted priorities included in the constitutional document? It is first necessary to pose a preliminary question: What, broadly speaking, is the inherent aspiration within the democratic concept? Indeed, democracy aims, as we have suggested, toward a maximum of equality of liberty and opportunity through the expression of the people's ultimate sovereignty.

Democracy, then, is not value-neutral in its ideal realization as in Mill's concept of the tyrannical majority. That is, those who find fault with democracy, as did Tocqueville, due to its misplaced and misappropriated trust in its subjects, really find fault in democracy's abuse, and have, in the process of theorizing, glossed over the principled aims of democratic organization. If, then, true democracy intends to temper self-governance with principles and protections of individual liberty, then it finds itself aptly reflected in the practice of liberal constitutionalism. Perhaps, and I think it is true, this offers a satisfactory reason as to why egalitarian democrats favour that undemocratic elitism of judicial review²⁵, and why "judicial power has been on the increase almost everywhere in the democratic world²⁶". In this view, liberal constitutionalism, and its inevitable component of judicial review and activity, are not so much checks on democracy as they are expressions and realizations of democratic authority.

Adjudicative Public Policy in Canada

The Charter of Rights as a Function of Public Policy

The disentangling of concepts and influences at the heart of liberal constitutionalism and the legitimacy of judicial review serves usefully as a theoretical basis for an investigation and evaluation of these notions as they appear in the practice of Canadian law. Both are manifest, in their most extensive forms within Canada, in the entrenchment and employment of the Charter of Rights and Freedoms, entrenched in the Constitution Act of 1982. We have, to this point, characterized the Charter as a document

²⁵ Knopff, Rainer, and Morton, F.L., *Charter Politics*, (Nelson Canada, 1992), p. 242.

²⁶ Flanagan, Tom, *Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo*, in *The Myth of the Sacred*, James, Abelson, Lusztig, (Eds.), (McGill-Queen's University Press, 2002), p. 134.

under the general category of liberal constitutionalism, and have recognized the extent to which, and reasons by which, the Charter has expanded the role of the judiciary in legislative-type endeavors. From this point we would do well to substantiate, emphasize, and qualify these claims.

There has been alleged and traced a genuine transformation of the nature and extent of judicial policy-making in Canada, marked at its center by the entrenchment of the Charter. That document is said to have, if only in effect, given rise and fuel to a “judicial ‘super-legislature’ beyond the reach of Parliament, the provincial legislatures and the electorate²⁷”. From this view has proceeded the characterization of the Charter “not as a defender of traditional rights, but as an instrument for the creation of new rights²⁸”. Insofar as such dynamic authority was not available to the court before the entrenchment of the Charter, that event indicated a movement toward significantly wider judicial discretion. Flanagan recognizes this movement, concluding that “[t]he 1982 amendments elevated judicial power to a status far higher than anything seen in Canada²⁹”. In their writing, McCormick and Greene summarize these assertions, saying of the Charter entrenchment that “this is the most revolutionary change to affect the Canadian judiciary, with the Supreme Court of Canada carrying the ultimate responsibility...the broad scope of the entrenched rights involves the courts in a much wider set of public policies and controversies.³⁰” A number of scholars have made note of this trend in analysis of cases that have come before the court. Christopher Manfredi at

²⁷ Knopff, Rainer, and Morton, F.L., *Charter Politics*, (Nelson Canada, 1992), p. 139.

²⁸ *Ibid.* p. 240.

²⁹ Flanagan, Tom, *Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo*, in *The Myth of the Sacred*, James, Abelson, Lusztig, (Eds.), (McGill-Queen's University Press, 2002), p. 135.

³⁰ Greene, Ian, and McCormick, Peter, *Judges and Judging*, (James Lorimer, 1990), p. 196.

McGill University suggests that, counting from the first decided Charter case in 1984 and concluding in 1989, the Supreme Court, relying on the Charter, nullified federal and provincial statutes in whole or in part on 16 separate occasions (compared with the overturning of only a single federal statute in the United States during the first thirty-four years that it claimed to exercise judicial review)³¹. James Kelly extends the period of analysis as he estimates that, of the 366 Charter cases decided by the Court between 1984 and 1999, 110, or roughly 30 per cent of these, involved cases of judicial activism³². However, while it is certain that the Charter has expanded the role of judicial review *generally*, it is also true that the text of the Charter has done so specifically, with certain Charter provisions ensuring and expanding that role.

In the first and less prominent instance, the introductory section of the Charter appears to serve this end. There is certainly weight to the argument that “[i]n the majority of Charter cases, the Court performs its most important task not in defining the substantive meaning of rights and freedoms, nor in measuring government action against those definitions, but in applying the section 1 test of reasonable limits.³³” Section 1 of the Charter, which allows for the infringement of all protections included in the document to the extent that those infringements are deemed, by the Court, justifiable in a free and democratic society, is practiced as a matter of law according to the “reasonable limits” test outlined in *Oakes*. That test, in part, requires that the government’s encroachment on the protected rights of its constituents take the least restrictive form of achieving its

³¹ Manfredi, Christopher, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, (McClelland & Stewart, 1993), p. 38.

³² Kelly, James B., *The Supreme Court of Canada and the Complexity of Judicial Activism*, in The Myth of the Sacred, James, Abelson, Lusztig, (Eds.), (McGill-Queen’s University Press, 2002), p. 99.

³³ Manfredi, Christopher, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, (McClelland & Stewart, 1993), p. 157.

policy objectives. The question immanently presented in this test can only be resolved by taking into account important policy considerations³⁴.

More direct an influence, however, has the twenty-fourth Charter provision. This clause allows for, in light of a serious violation of charter rights, “a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances³⁵”. Such remedies, constructed and imposed by decision of the Court, also referred to as “structural injunctions”³⁶, are a tremendous exercise of positive judicial activism, and have a moderate yet important history in legal practice. In the case of *Badger v. A.-G. Canada*, Justice Hirschfield of the Manitoba Court of Queen’s Bench addressed the constitutionality of the law restricting (indeed, revoking) the voting rights of those incarcerated in Canadian prisons. Justice Hirschfield, in his decision, struck down the legislation in light of its undue and disproportionate violation of section 3 of the Charter, which protects every Canadian citizen’s right to vote in a Parliamentary election. However, his decision extended beyond this routine review of legislation, and required, as part of his official decision, positive steps to be taken “by the chief electoral officer to enable them to exercise their right – for example, by enumerating them and providing them with mail-in ballots or special in-prison polling stations³⁷”. It is clear that Justice Hirschfield did not believe the imposition of such positive steps to be constitutionally required in and of themselves, and it is abundantly evident that they, and therefore his decision, constituted a rather extreme and extensive practice of judicial policy-making.

³⁴ Ibid. p. 158.

³⁵ Constitution Act, 1982, Canadian Charter of Rights and Freedoms, in Law and Morality: Readings in Legal Philosophy (Second Edition), Dyzenhaus and Ripstein (Eds.), (University of Toronto Press, 2001), p. 1045.

³⁶ Knopff, Rainer, and Morton, F.L., Charter Politics, (Nelson Canada, 1992), p. 101.

³⁷ Ibid. p. 103.

Section 33: The Notwithstanding Clause

Section 33 of the Charter, recalled popularly as the “notwithstanding clause”, allows for legislative override of judicial decisions without any requirement of principled justification or independent review. In allowing for such majoritarian supremacy, the Charter appears to lend the weight and privilege of finality to ultimate self-governance (that aspect of liberal constitutionalism that is ideally to be balanced with the primacy of equal and individual liberty). In so enabling parliament, the Charter appears to undermine the supposed unaccountability of judicial decision-making and policy-formation. However, many legal scholars, politicians, and laymen alike have criticized the role of Section 33 in Charter jurisprudence and practice, claiming that the clause unduly hinders the proper functioning of the judiciary. Patrick Monahan was so forward as to maintain that the inclusion of the notwithstanding clause in the 1982 constitutional package was obviously a very serious mistake³⁸. Former Prime Minister Brian Mulroney, in a moment of uninhibited passion, called section 33 a major flaw of 1981’s constitutional construction – one which reduces and undermines individual rights, and renders the constitution itself rather worthless³⁹. The consequence of these sentiments has been a growth in the political unpopularity of the clause that “is at least temporarily in desuetude⁴⁰”. That is, as Manfredi supposes, “[t]he problem with the external check on judicial power contained in the legislative override provision of section 33 is that its

³⁸ Manfredi, Christopher P., *Strategic Behaviour and the Canadian Charter of Rights and Freedoms*, in The Myth of the Sacred, James, Abelson, Lusztig, (Eds.), (McGill-Queen’s University Press, 2002), p. 156.

³⁹ *Ibid.*

⁴⁰ Flanagan, Tom, *Canada’s Three Constitutions: Protecting, Overturning, and Reversing the Status Quo*, in The Myth of the Sacred, James, Abelson, Lusztig, (Eds.), (McGill-Queen’s University Press, 2002), p. 136.

political legitimacy has been seriously undermined, resulting in calls for its removal from the Charter⁴¹”.

For some, the notwithstanding clause is a perfect remedy to the problem of interpretive finality and judicial supremacy – it has served as what Peter Russell called “the legislative review of judicial review⁴²”. However, Russell ultimately disagreed with such a harsh and uncompromising view of the override clause. He saw section 33 as “the foundation of an interinstitutional dialogue, in which courts and legislatures issue reasoned responses to each other’s initiatives, thereby improving the quality of both public deliberation and its policy outcomes⁴³”. Herein lies the value of such a clause – it furthers the objective and aim of the principles of liberal constitutionalism that we have emphasized throughout this paper. Without it, the elemental fundament of self-government is outweighed by the heavy-handed authority of judicial review. With it, given the political challenges confronting its use, the profound import of individual liberty is more properly balanced with the modern Western orientation toward democratic sovereignty. Thus we continue to see the commitment of Canadian jurisprudence at the constitutional level to the paradoxical, yet fundamental, principles of liberal constitutionalism.

Conclusion

The importance of directing attention and address toward the issues, both theoretical and practical, surrounding the role and legitimacy of judicial activism and

⁴¹ Manfredi, Christopher, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism, (McClelland & Stewart, 1993), p. 38.

⁴² Knopff, Rainer, and Morton, F.L., Charter Politics, (Nelson Canada, 1992), p. 228.

⁴³ *Ibid.* p. 229.

review, may certainly present itself without extensive explanation. Suffice it to say that the role of the judiciary is central to the function of modern liberal democracy, and that the individual rights which it serves to protect are the foundation for social progress and development. Theorists such as Hart and Dworkin provide a framework in which to understand and assess the nature of judicial policy-making, and their theorizing points to the important role such policy-making plays in a coherent theory of modern statehood. Cohen, paraphrasing the esteemed professor himself, points out that Dworkin's resolutions and conclusions regarding the aptness of wide judicial discretion as a function of the law itself provide "a full political theory that justifies the constitution as a whole"⁴⁴

Proceeding from this brief yet pointed analytic background, a summary of the generally inconsonant tendencies of judicial activism and restraint explores the forms in which such policy-making is manifest, and expresses an ideological component of the complex notion of judicial review, adding a unique depth to the subject. A sufficient understanding of these judicial orientations, central to the judiciary's pivotal role in upholding the stipulated guarantees of the constitution, contextualizes and informs any measure of the politicking of the court. To extend the sentiment metaphorically, an appreciation of judicial interpretivism might do well in establishing to what extent "the tree's growth should be tended by judicial gardening"⁴⁵.

Ultimately, the question of legitimate judicial review is an attempt to delve boldly into the larger question of legitimate liberal constitutionalism, of which judicial review is inherently and inevitably a part. As we have demonstrated in appropriate length, the principles of liberal constitutionalism, which exist as a challenging paradox, are the

⁴⁴ Greenawalt, Kent, *Policy, Rights, and Judicial Decision*, in Ronald Dworkin and Contemporary Jurisprudence, Cohen, Marshall (Ed.), (Rowman & Allanheld, 1983), p. 106.

⁴⁵ Knopff, Rainer, and Morton, F.L., Charter Politics, (Nelson Canada, 1992), p. 108.

pressing policies of self-governance and individual liberty. Cognizant of the democratic ideal as the protection and realization of these principles simultaneously, the Canadian Charter of Rights and Freedoms presents itself as an apt institutional fulfillment of the democratic concept. Enhancing and completing such fulfillment are the specific clauses which comprise the theoretical components of the Charter and support its conceptual framework. On the one hand, section 24 allows extensive judicial activism and policy-formation – not only in its negative form but in its more potent and direct positive form. On the other, section 33 permits ultimate legislative override of judicial review, removing what some fear to be, while others laud as, the finality of the judiciary's will and word. Striking a balance, and resting at the heart of the liberal constitutional ideal, is Charter section 1, which compels measure of individual liberties against policy imperatives, and vice versa. This is perhaps the greatest and most appropriate expression and paraphrase of the state of Canadian constitutional jurisprudence and practice. Indeed, it is one we have great reason to be proud of.

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