

Christopher Forrest
McGill University
Student #: 119628617
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Bringing Section 33 Back Into the Constitutional Fold With Honour and Enthusiasm

4338 Papineau, Apt.1
Montreal, Quebec
H2H 1T4
christopher.forrest@mail.mcgill.ca
(514) 504-3042

Introduction

In 1997, Peter Hogg and Allison Bushell wrote “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such A Bad Thing After All)”¹ which offered a response to the counter-majoritarian objection to the entrenchment of the *Canadian Charter of Rights and Freedoms*. The article prompted a wide-ranging debate that eventually reached the courts.² However, scholars and judges are divided over the issue of whether the metaphor provides a satisfactory rejoinder to the counter-majoritarian objection, and both have expressed different views on the degree of activism required of courts in their dealings with the executive and legislative branches. For instance, in *R. v Hall*,³ Justice Iacobucci was strongly critical of the majority opinion delivered by the Chief Justice which he argued was unduly deferential toward parliament. He wrote: “in my respectful view, by upholding the impugned provision, at least in part, my colleague has transformed dialogue into abdication.”⁴ The Chief Justice responded in *Sauvé v. Canada (Chief Electoral Officer)* that “Parliament must ensure that every law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislatures and the courts should not be debased to a rule of ‘if at first you don’t succeed, try, try again.’”⁵ The latter decision

¹ Peter W. Hogg, Allison A. Bushell, “The *Charter* Dialogue Between Court and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such A Bad Thing After All,” *Osgoode Hall Law Journal* 35 (1997): 75-124 [hereinafter *Charter Dialogue*].

² See generally Richard Haig & Michael Sobkin, “Does the Observer Have an Effect? An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts,” *Osgoode Hall Law Journal* 45 (2007): 67-90.

³ [2002] 3 S.C.R. 309 [hereinafter *Hall*].

⁴ *Ibid.*, 127.

⁵ [2002] 3 S.C.R. 519, 17. For a complete discussion of the intra-institutional debate between justices of the Supreme Court regarding dialogue, see Christopher P. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003,” *Supreme Court Law Review* 23 (2004): 105-131 [hereinafter *The Life of a Metaphor*].

prompted one observer to inquire whether the dialogue metaphor retained any significance in the contemporary context.⁶

I contend that dialogue is neither as vibrant as Hogg and Bushell⁷ suggest, nor as respectful of the roles of the participants as it might be. The first criticism is substantiated empirically while the second is a normative claim. Hogg and Bushell suggest dialogue between courts and legislatures occurs “where a judicial decision is open to legislative reversal, modification, or avoidance (...).”⁸ Elsewhere, Professor Manfredi has argued that legislative modification of judicial decisions often results in “compliance”, while legislative avoidance through inaction frequently leads to “implementation” of the judicially created status quo.⁹ This essay examines the third option for dialogue: legislative reversals of Supreme Court decisions. With two exception, the study concludes there are only three examples of legislatures reversing the Court *without* the notwithstanding clause, and that this avenue for dialogue is, practically speaking at least, illusory.¹⁰ Despite the paucity of reversals, however, I maintain that the

⁶ Christopher P. Manfredi, “The Day the Dialogue Died: A Comment on *Sauvé v. Canada*,” *Osgoode Hall Law Journal* 45 (2007): 105-123 [hereinafter *The Day Dialogue Died*].

⁷ And subsequently Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, “Charter Dialogue Revisited – Or “Much Ado About Metaphors,” *Osgoode Hall Law Journal* 45 (2007): 1-65 [hereinafter *Charter Dialogue Revisited*].

⁸ Hogg and Bushell, *Charter Dialogue*, 79. For a critique of this definition, see Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” *Osgoode Hall Law Journal* 37 (1997): 513-527 [hereinafter *Six Degrees of Dialogue*]. For a response to this critique, see Peter W. Hogg & Allison A. Thornton, “Reply to Six Degrees of Dialogue,” *Osgoode Hall Law Journal* 37 (1999): 529-536 [hereinafter *Reply to Six Degrees*]. In a recent update of their initial article, Hogg, Bushell Thornton and Wright prefer a definition of dialogue whereby “a judicial decision striking down a piece of legislation for inconsistency with a *Charter* right or freedom is followed by some action by the competent legislative body.” Hogg, Bushell Thornton & Wright, *Charter Dialogue Revisited*, 27.

⁹ Manfredi, *The Life of a Metaphor*, 125-129.

¹⁰ The legislative responses to the Supreme Court’s decisions in *R. v. Daviault* [1994] 3 S.C.R. 63 and *R. v. O’Connor* [1995] 4 S.C.R. 411 were both “reversals” as defined below, however, they were appropriately enacted without the notwithstanding clause since they dealt with common law rather than statutory rules. See Janet L. Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002), 59.

override mechanism offers a legitimate tool for governments to advance competing interpretations of the *Charter*, and as such is vital for genuine dialogue between the elected branches and the judiciary. Above all, use of the override affords legislatures and the public the opportunity to participate in the policy-making process regarding issues of national importance.

Purpose and Methodology

For the purposes of this study, legislative “reversal” is defined as a legislative rejection of a decision’s fundamental constitutional holding. The analysis is limited to legislative responses to decisions of the Supreme Court as the final arbiter in constitutional matters.¹¹ Parliamentary *and* provincial legislative enactments are considered since both levels of government are actively involved in interpreting the *Charter*. Finally, the study is limited to an analysis of Supreme Court decisions and legislative replies rendered and enacted on or after 1988, using the Supreme Court’s first *Morgentaler*¹² decision as the dividing line.

Abortion: *R. v. Morgentaler*

In a decision dealing with the constitutionality of Canada’s abortion legislation, the Supreme Court ruled that section 251 of the *Criminal Code* violated the principles of fundamental justice and could not be saved by the reasonable limitations provision of the

¹¹ For reasons in support of the exclusion of lower court decisions, see Manfredi & Kelly, *Six Degrees of Dialogue*, 517. Hogg and Bushell have dismissed this criticism on the basis that dialogue is dialogue, even where it occurs at the lower levels: see Hogg & Bushell, *Reply to Six Degrees*, 531. While this may be true, the focus here is on the *outcome* of dialogue, and since the Supreme Court is Canada’s final Court of Appeal, the analysis is limited to a consideration of its decisions.

¹² *R. v. Morgentaler* [1998] 1 S.C.R. 30.

Charter. Four of the five judge majority ruled the provision was deficient on procedural grounds, arguing that “the structure – the system regulating access to therapeutic abortions – is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence (...)”¹³ Justice Wilson dismissed the majority’s approach which in her view obscured the central issue on appeal.¹⁴ Preferring to address the substantive aspect of the section 7 guarantee, she concluded that the right to life, liberty and security of the person conferred on women the right to lawfully terminate an unwanted pregnancy.¹⁵

The fundamental constitutional principle at issue was whether principles of fundamental justice prohibited women from obtaining an abortion in accordance with section 251 of the *Code*. Although the Court was divided on the substantive versus procedural approach to the question, a majority of the justices found the criminal prohibition to be inconsistent with the *Charter*. Five years later, and in response to Dr. Morgentaler’s intention to open an abortion clinic in Nova Scotia, the provincial legislature enacted legislation to prohibit the procurement of abortions in non-accredited facilities. Just as section 251 at issue in *Morgentaler I* restricted the procurement of abortions to practitioners operating in an accredited hospital, section 4 of the *Medical Services Act* stipulated that “no person shall perform or assist in the performance of a designated medical service [including an

¹³ *Ibid.*, p.72 per Dickson C.J. and Lamer J. Justices Beetz and Estey also focused on procedure in their resolution of the appeal. *Ibid.*, p.81-82.

¹⁴ *Ibid.*, 161-162: “If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless.”

¹⁵ *Ibid.*, 171.

abortion¹⁶] other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.”¹⁷ Through the enactment of the *Medical Services Act* and concomitant regulations, the Nova Scotia legislature attempted to criminalize the procurement of abortions in private clinics in the province. The most convincing evidence that the legislature rejected the ruling in *Morgentaler I* can be found in the companion *Morgentaler II* decision.

At issue in *Morgentaler II* was whether the *Medical Services Act* and corresponding regulations were *ultra vires* the Nova Scotia legislature. Answering that question in the affirmative, a unanimous Court held that the pith and substance of the legislation in question was appropriately characterized as criminal law and therefore within the exclusive jurisdiction of the federal government.¹⁸ Of particular interest was the Court’s characterization of the “primary objective of the legislation [which] was to prohibit abortions outside hospitals *as socially undesirable conduct*, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession *was merely ancillary*.”¹⁹ In enacting the *Medical Services Act*, the Nova Scotia legislature sought to reverse the Supreme Court’s decriminalization of abortion in Canada. The proper procedure for expressing its disagreement over this contentious issue was the notwithstanding clause.

¹⁶ *Medical Services Designation Regulation*, N.S. Reg. 152/89, Schedule A, para.(d).

¹⁷ *An Act to Restrict the Privatization of Medical Services*, R.S.N.S. 1989, c. 281, s.4.

¹⁸ *Ibid.*, 30.

¹⁹ *Ibid.*, 40. Referencing the legislative history of the *Act*, the Court noted that: “the prohibition of Dr. Morgentaler’s clinic was the central concern of the members of the legislature who spoke, and [...] there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated.” *Ibid.*, 40.

Same-sex common law relationships: *M. v. H.*

Other Supreme Court decisions have elicited similarly defiant legislative responses from provincial governments. At issue in *M. v. H.*²⁰ was the constitutionality of section 29 of the *Family Law Act*²¹ which limited spousal support to married and unmarried opposite-sex couples. A majority of the Supreme Court found section 29 to be a clear violation of the respondents' right to equality which could not be justified in a free and democratic society.²² In a dissenting opinion, Justice Gonthier attributed a different purpose to the legislation. In his opinion section 29 did not infringe the respondents' right to equality since "individuals in same-sex relationships do not carry the same burden of fulfilling the social role that those in opposite-sex relationships do. They do not exhibit the same degree of systemic dependence. They do not experience a structural wage differential between the individuals in the relationship."²³

The immediate legislative response to *M. v. H.*, despite its confrontational nature, cannot properly be considered a legislative reversal since the legislature did not *reject* the Supreme Court's interpretation of the underlying constitutional principle at issue.²⁴ However, later the same year Alberta amended its *Insurance Act*²⁵ in a manner which completely contradicted the majority ruling of the Supreme Court in *M. v. H.* There can be little doubt that the changes implemented as a result of the *Insurance Statutes Amendment Act*²⁶ reversed the Court's interpretation of the underlying principle at issue

²⁰ [1999] 2 S.C.R. 3 [hereinafter *M. v. H.*].

²¹ R.S.O. 1990 c. F.3.

²² *M. v. H.*, 43, 46, 49, 51.

²³ *Ibid.*, 84.

²⁴ *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, R.S.O. 1990 c. F.3., s.25(2).

²⁵ R.S.A. 1980, c. I-5.

²⁶ S.A. 1999, c. 31.

in that case. In a piece of legislation adopted less than six months after the ruling, the Alberta legislature opted to define a “common law relationship” as one “between 2 people of the *opposite sex*”.²⁷ According to one observer, this constituted a “direct *contradiction* [of] the principles articulated in *M. v. H.*”²⁸ In defence of the government’s position, the minister argued the *Insurance Statutes Amendment Act* was “not intended to redefine family law.”²⁹ However, all provincial and federal legislative enactments are subject to the *Charter*, regardless of the subject matter they purport to address. Moreover, although *M. v. H.* did not deal with the constitutionality of restricting the definition of “spouse” to marital opposite-sex relationships, Alberta has since amended its own definition in this regard,³⁰ while other provincial legislatures have also modified their definitions of “spouse” in light of the ruling in that case.³¹ Although not enacted in direct response to the Court’s ruling in *M. v. H.*, *Bill 44* nonetheless constitutes a clear legislative reversal of the underlying constitutional principle at issue in that case.

Bail: *R. v. Morales*

Parliament’s response to *R. v. Morales*,³² which involved the constitutionality of Canada’s bail provisions, is another example of a legislative reversal without the notwithstanding clause. At issue in appeal was the constitutionality of section 515(10)(b)

²⁷ *Ibid.*, s.1(2) [emphasis added].

²⁸ Jason Murphy, “Dialogic Responses to *M. v. H.*: From Compliance to Defiance,” *University of Toronto Faculty of Law Review* 59 (2001): 306 [emphasis added].

²⁹ Alberta, Legislative Assembly, *Debates*, 22 November 1999, 1936 (Ms. Graham).

³⁰ *Insurance Act*, R.S.A. 2000 c. I-3.

³¹ See for example *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14; *Definition of Spouse Amendment Act, 2000* S.B.C. 2000, c. 24; *Spousal Relationship Statute Law Amendment Act, 2005*, S.O. 2005, c. 5.

³² [1992] 3 S.C.R. 711 [hereinafter *Morales*].

of the *Criminal Code*³³ dealing with bail which allow for preventive detention in the public interest or for the protection of the public. A majority of the Court upheld the “public safety” component but struck down the “public interest” component on the basis of general vagueness and imprecision. An overly vague provision is deemed to violate the principles of fundamental justice protection by section 7 of the *Charter*.³⁴ That was the case here since the expression “public interest” “gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention.”³⁵

The legislative response to *Morales* enacted five years later made a number of changes to the *Code*’s bail provisions. First, the hierarchy which characterized the initial provision and the reference to ‘public interest’ were both removed. Second, Parliament added the following subparagraph:

515(10): For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
 (c) on any just cause being shown and, without limiting the generality of the foregoing, where detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.³⁶

This enactment constituted a reversal of the Supreme Court’s decision in *Morales* for the reasons set out below.

The constitutionality of Parliament’s legislative amendments to the *Code* as a result of the *Morales* decision was reviewed by the Supreme Court in *R. v. Hall*. With respect to

³³ R.S.C., 1985, c. C-46 [hereinafter the *Code*].

³⁴ *Morales*, 15.

³⁵ *Ibid.*, 19.

³⁶ *An Act to amend the Criminal Code and certain other Acts*, S.C. 1997, c. 18, s.59(2).

the words “any just cause being shown”, a *unanimous*³⁷ Court held such a broad and vaguely worded grant of judicial discretion could not withstand constitutional scrutiny. According to the Chief Justice, “Parliament cannot confer a broad discretion on judges to deny bail, but must lay out narrow and precise circumstances in which bail can be denied.”³⁸ On behalf of the four dissenting judges, Justice Iacobucci noted more tersely that “the vague moniker of “any other just cause” represents a Parliamentary regression to a situation similar to that which existed prior to the enactment of the *Bail Reform Act* in 1972, when bail was a matter of fairly unrestricted judicial discretion.”³⁹

The majority of the Court led by the Chief Justice held that the remainder of section 515(10)(c), which legitimated the denial of bail in the interest of maintaining confidence in the administration of justice, was constitutional and characterized Parliament’s response as “an excellent example of [...] dialogue.”⁴⁰ However, Justice Iacobucci argued forcefully that this reenactment was nothing more than a revival of the condemned ‘public interest’ ground which could not survive constitutional analysis.⁴¹ According to him, parliament’s response departs markedly from what might be expected of a supposedly dialogic relationship between courts and legislatures. Commenting on the respective responsibilities of both participants in this process, Justice Iacobucci cited *Mills* with approval, noting that “it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory

³⁷ The four dissenting judges focused their disagreement on the constitutionality of the part of s.515(10)(c) referring to the importance of maintaining confidence in the administration of justice.

³⁸ *Hall*, 11.

³⁹ *Ibid.*, 22.

⁴⁰ *Ibid.*, 16.

⁴¹ *Ibid.*, 31.

scheme, that Parliament's law is unconstitutional. Parliament may *build* on the Court's decisions, *and develop a different scheme* as long as it remains constitutional."⁴² In other words, the minority took for granted the fact that Parliament was at liberty not only to respond, but to "build on" and construct a "different scheme" from the Court's interpretation of a particular constitutional principle. The fact that it found parliament's response in this case *not* to fall within that sphere of legitimate legislative activity supports the argument that this is a clear example of legislative reversal.

In the decisions discussed above, parliament and provincial legislatures have responded by rejecting the Supreme Court's interpretation of the fundamental constitutional principle at issue *without* invoking the notwithstanding clause. As I explain in the next section, legislatures have a legitimate role to play in interpreting the *Constitution* and are not confined to a judicial interpretation of rights. However, in expressing disagreement with the Court, legislatures have a responsibility to protect the rights and freedoms entrenched in the *Charter*, to maintain respect for the Court as an institution and, most important, to encourage public discourse on issues that are of national import. When legislatures opt to reject the Court's ruling on a *Charter* issue affecting the rights protected by sections 2 and 7-15, they must do so publicly by using the appropriate procedural vehicle to express their fundamental disagreement. The debate generated by this kind of legislative candour will strengthen parliament and provincial legislatures as institutions at the heart of the democratic process.

⁴² *R. v. Mills*, cited in *Hall, ibid.*, 36 [emphasis added].

Coordinate Constitutionalism

This section analyzes coordinate constitutionalism as an approach to judicial review which harnesses the strengths offered by a number of contending theories while avoiding many of the difficulties associated with each of them. Coordinate constitutionalism has been further developed by Canadian scholars writing in the post-patriation context.⁴³ Discussing the democratic legitimacy of the override, Professor Manfredi contends that section 33 finds its strongest justification not in the preservation of parliamentary supremacy but in its contribution to constitutional supremacy.⁴⁴ Drawing on *Edwards v. Canada (Attorney General)*,⁴⁵ he concludes that:

(...) legislatures *do* have coordinate authority to interpret the constitution and that this authority is explicitly recognized in the notwithstanding clause of section 33. (...) What we need to encourage is real dialogue about what rights mean, rather than automatic deference to the meaning offered by a single political institution.⁴⁶

Professor Hiebert rejects a judicial-centric approach to *Charter* scrutiny which neglects the important role played by parliament in drafting legislation, either to advance novel policy objectives or in response to the judicial invalidation of existing legislation. Indeed, the danger associated with inflated rights rhetoric is its tendency to undermine the relevance of alternative policy options – some of which may conflict with judicial pronouncements – advanced by the legislative branch. Building on Slattery’s work, Hiebert develops a “relational approach” to *Charter* adjudication that rejects the strong judicial bias in the dialogue literature in favour of an institutional reciprocity combining the expertise of courts and legislatures. Accordingly, the government’s role is to adopt

⁴³ See B. Slattery, “A Theory of the Charter,” *Osgoode Hall Law Journal* 25 (1987): 701-747.

⁴⁴ Manfredi, *Judicial Power*, 188.

⁴⁵ [1930] A.C. 124.

⁴⁶ Manfredi, *The Day Dialogue Died*, 123.

legislation implementing its policy agenda, a process which involves assessing competing rights claims. The judiciary, in turn, ensures that compromises made by government in furtherance of its legislative objectives comport with the *Charter*.⁴⁷ The novelty of the relational approach is its insistence on a positive role for parliament in the legislative process. Rather than being simply responsive to judicial interpretations of the *Charter*, parliament plays a proactive role by “assum[ing] an important responsibility to interpret rights conflicts, arising from an essential task of democratic governance – making political judgments about how to mediate among disparate opinions, assumptions, and expectations.”⁴⁸

Professor Kelly has also investigated judicial review from a parliament-centred perspective, focusing on the government’s response to the *Charter*. His work offers an *empirical* foundation for the coordinate approach that buttresses the normative claims made by its proponents. Kelly adopts a *cabinet*-centred approach that focuses on the government’s response to entrenchment. His is a guarded optimism which suggests that although judicial review has not resulted in the unchecked activism feared by critics, it has nonetheless evolved at the expense of parliamentary scrutiny which has been eclipsed by a executive-dominated cabinet.⁴⁹ The result is what Kelly refers to as the “intra-institutional paradox of legislative activism [which] has contained judicial power but has further weakened parliament as an institution at the hands of the cabinet.”⁵⁰ On this view, activist judicial review points to a failure at the legislative stage, rather than a

⁴⁷ Hiebert, *Charter Conflicts*, 53.

⁴⁸ *Ibid.*, 54.

⁴⁹ James B. Kelly, *Governing With the Charter* (Vancouver: UBC Press, 2005), 223.

⁵⁰ *Ibid.*

voluntary abuse of judicial discretion, and substantiates Roach's concern that "if courts ever "govern our lives," the primary cause will be the failure and default of other political institutions."⁵¹

Kelly confronts judicial critics by challenging the very foundation on which their criticism rests: namely, that the process of judicial review is fundamentally undemocratic since unaccountable judges have usurped the policy-making function of the elected branches of government. Such a parochial conception of the policy-making process discounts the extensive involvement of the bureaucracy under the direction of the cabinet and the prime minister in enacting legislation that advances governmental objectives. The extensive involvement of the elected branches of government in designing legislation – what Kelly refers to as "legislative activism"⁵² – confirms the existence of a coordinate approach to constitutional interpretation involving *both* parliament and the judiciary. The Supreme Court's section 1 jurisprudence provides additional evidence in support of the coordinate constitutionalism model.⁵³

Despite these advantages, scholars have criticized the coordinate construction model on a number of fronts. For instance, Roach argues that a coordinate approach to judicial review of a bill of rights is antithetical to the rule of law "which suggests that the

⁵¹ Kent Roach, "The Role of Litigation and the Charter in Interest Advocacy," in *Equity and Community: the Charter, Interest Advocacy and Representation*, ed. F.L. Seidle, 160 (Montreal: IRPP Governance, 1993) [citations omitted].

⁵² Kelly, *Governing With the Charter*, 4.

⁵³ See, for instance, *R. v. Oakes* [1986] 1 S.C.R. 103; *R. v. Edwards Books* [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 and *RJR-MacDonald v. A.-G. Canada* [1995] 3 S.C.R. 199.

legislature should respect the Court's interpretation of the Constitution."⁵⁴ He also points to the seeming paradox of having legislatures be the judge in their own majoritarian cause in assessing the constitutionality of their enactments.⁵⁵ With respect to the first argument, however, courts are also subject to the rule of law, a fact which is often conveniently overlooked by critics of coordinate constitutionalism. As Agresto explains, "although the proponents of judicial review have no hesitation in affirming the existence of a judicial check on the other branches, they seem to become uneasy at the thought of direct reciprocal checks on judicial acts, *especially in the area of constitutional interpretation.*"⁵⁶

There are several responses to the second argument. First, it should be remembered that prior to the entrenchment of a bill of rights, legislatures were always judges in their own majoritarian causes at common law. This did not mean courts were powerless to intervene in the name of human rights. As Roach himself explains, the common law presumption was a creation of the courts designed to protect vulnerable minorities by requiring that legislatures use clear language to abridge a fundamental right.⁵⁷ The rationale underlying this requirement is closely related to the importance of public debate and transparency in government.

⁵⁴ Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures," *The Canadian Bar Review* 80 (2001): 493.

⁵⁵ *Ibid.*

⁵⁶ See J. Agresto, *The Supreme Court and Constitutional Democracy* (New York: Cornell University Press, 1984), 101 [emphasis added].

⁵⁷ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001), 254.

There is, however, a more serious flaw in the second argument which has to do with the assumption that legislatures routinely advance positions held by a majority of Canadians. With its second consecutive minority government at the federal level, and possibly on the brink of a third,⁵⁸ Canada's recent experience suggests that the notion of government by majority may be suffering a setback of late. To advance its policy agenda, a minority government must therefore make concessions to minority stakeholders whose support in the form of *ad hoc* coalitions is vital both to its success and longevity.⁵⁹ However, there is evidence that even majority governments are more often composed of ephemeral and shifting minorities depending on the issue under consideration. Since government is rarely unified, there are fewer occasions for a dominant majority to impose its views on a vulnerable minority.⁶⁰

Having argued that a coordinate approach constitutes the most effective means of protecting fundamental rights, there remains the related issue of whether the invocation of the notwithstanding clause as a means of expressing institutional disagreement over the interpretation of rights can be considered a legitimate exercise of legislative and executive authority. The view defended here, despite its infrequent use to date, is that recourse to the notwithstanding clause constitutes a justifiable exercise of governmental authority which can and ought to be used to advance a competing interpretations of

⁵⁸ Campbell Clark, "Vote would return minority, PM predicts: But critics say Harper's comments show he may be warm to the prospect of a fall election," *Globe and Mail on the Web*, (September 26, 2007), <http://www.theglobeandmail.com/servlet/story/RTGAM.20070926.wharperelection26/BNSStory/Front/> (accessed October 2, 2007).

⁵⁹ See "Jeffrey Simpson takes your questions," *The Globe and Mail on the Web*, (October 2, 2007) <http://www.theglobeandmail.com/servlet/story/RTGAM.20071001.wlivesimpson1002/BNSStory/specialComment/> (accessed: October 2, 2007).

⁶⁰ Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World", *University of Toronto Law Journal* 52 (2002): 97.

Charter rights. Furthermore, section 33 ought not to be limited to exceptional circumstances but rather should be considered a legitimate means of advancing alternate interpretations of rights and of eliciting the participation of all three branches of government, and of Canadians, in the policy-making process. As demonstrated in the first section, however, the override has fallen into relative disuse by provincial and federal legislatures. Possible reasons for this state of affairs are examined in the following section.

Section 33's Limited Use

The greatest impediment to section 33's use is the popular misperception that a decision to invoke the notwithstanding clause implicates the state in the abrogation of citizens' rights. This view is undoubtedly the result of a combination of apprehensions.⁶¹ However, the most compelling explanation for the override's continued disuse has to do with the government's reaction to the *Charter*. Drawing on Professor Kelly's research, I argue that an executive-dominated parliamentary process has undermined the effectiveness of parliament as a deliberative institution. Fewer opportunities for parliamentary involvement in the formation of public policy have decreased the likelihood of section 33 being used to generate discussion on questions which are fundamentally philosophical in nature.

Kelly rejects a judicial-centred approach to judicial review that neglects the input of parliamentary actors in the policy-making process. As a result of "pre-introduction"

⁶¹ These include the perception that the override is seen as the result of a tainted constitutional bargain and the influence of American constitutionalism with its emphasis on judicial supremacy.

scrutiny of legislation by the Department of Justice (bureaucratic activism) and “post-introduction” scrutiny by members of parliament (parliamentary activism), legislatures, at least theoretically, play an important role in shaping policy under the *Charter*.⁶² Consequently, rather than evincing the power of the courts, supposedly ‘activist’ decisions in many instances are indicative of an antecedent parliamentary process which has failed in its responsibility to ensure the constitutionality of its policy initiatives.

While the emergence of the DOJ as a central agency under the direct control of the prime minister has an immediate impact on the *development* of legislation under the *Charter*, there is evidence to suggest that executive dominance also has a negative effect on parliamentary *responses* to the judicial invalidation of statutes and regulations. The consolidation of power at the centre has occurred at the expense of the legislative branch whose supervisory functions have been eclipsed by an increasingly powerful executive. This is so whether the legislature is debating legislation addressing a new policy *or* legislation enacted in *response* to a judicial ruling striking down an already existing statute or regulation. In either scenario, legal service units embedded in each of the line departments and coordinated by the DOJ provide the executive branch with multiple contact points throughout the legislative process, allowing it to exert a considerable degree of influence and control at the expense of other parliamentary participants:

This aspect of Charter politics, whereby the cabinet co-opts parliamentary institutions to overcome judicial invalidation of legislation, is no less executive-dominated than the certification process by the minister of justice during the normal legislative process that precedes judicial review. In truth, during the post invalidation period, (...) parliament has a

⁶² J.B. Kelly, “Parliament and the Charter of Rights: An Unfinished Constitutional Revolution,” *Policy Options* (February 2007), 103.

constructive – yet orchestrated – role when the cabinet attempts to re-establish the constitutionality of an invalidated statute.⁶³

Executive dominance in the process of legislative *responses* to the judicial invalidation of statutes therefore also marginalizes legislatures. Fewer access points in the legislative process means fewer opportunities for MPs and Senators not in cabinet to consider the notwithstanding clause as a means of generating public discussion.⁶⁴

Reflecting on the dominance of the executive, Franks observes that “executive-centred policy-making does not lead to the mobilization of consent while policies are being developed. Parliament is unimportant. It ratifies and authorizes decisions worked out elsewhere.”⁶⁵ Donald Savoie, who expressed a similar view in relation to the concentration of power in the hands of central agencies and the prime minister, reports that caucus, once a forum for consultation and debate, has become a place where Ministers seek to gain MP support for policy decisions *ex post facto*: “cabinet used to meet the day after caucus – now it meets the day before.”⁶⁶ These and other changes operate to the detriment of parliament as a deliberative institution by limiting opportunities for the kind of discussion section 33 is meant to generate. A number of proposals have been advanced to address these problems, including reducing the number of confidence votes, relaxing party discipline, introducing fixed elections, strengthening the committee system, senate reform, and the introduction of some form of proportional

⁶³ Kelly, *Governing with the Charter*, 248.

⁶⁴ The government might also favour invoking the notwithstanding clause in response to a judicial decision, in which case executive dominance would be an advantage. However, where public opinion on the merits of invoking the notwithstanding clause differs from the executive’s, executive dominance (in combination with party discipline) operates to the detriment of the legislative branch.

⁶⁵ C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), 215.

⁶⁶ Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics*, (Toronto: University of Toronto Press, 1999), 93.

representation.⁶⁷ My research underlines the need to reform the existing committee system by creating a parliamentary standing committee for the scrutiny of legislation from a rights perspective which would increase the likelihood of section 33 being considered as a viable legislative alternative to judicial interpretations of *Charter* rights.

Standing, legislative, joint and special committees perform a critical role in the legislative process, acting in an oversight capacity and engaging in policy-making.⁶⁸ Furthermore, they provide an important contact point for backbench MPs and members of the public to actively engage in a policy exercise. Yet a number of observers have spoken to the relative weakness of the existing committee system in serving as an effective accountability mechanism in the legislative process. Part of the problem stems from the fact that committee composition mirrors the distribution of seats in the legislature and party discipline applies to its members, making it difficult for opposition and backbench MPs and MLAs to advance interests that conflict with the government's policy agenda. There is also a tendency for committee reports to be effectively disregarded by legislatures, contributing to the members' sense of removal from the policy process.⁶⁹ A dearth of financial and personnel resources has further limited the ability of committee members and chairs to adequately carry out their functions.⁷⁰ A number of reforms has

⁶⁷ Jennifer Smith, "Debating the Reform of Canada's Parliament," in F.L. Seidle and D.C. Docherty, eds. *Reforming Parliamentary Democracy* (Montreal: McGill-Queen's University Press, 2003): 150-168.

⁶⁸ The Parliamentary Centre, *Forum on parliamentary reform*, http://www.parlcent.ca/publications/pdf/reform_e.pdf (accessed November 13, 2007), 16 [hereinafter *Forum on parliamentary reform*].

⁶⁹ David C. Docherty, "Parliament and Government Accountability," in M.W. Westmacott and H.P. Mellon, eds. *Public Administration and Policy: Governing in Challenging Times* (Scarborough, Ont: Prentice Hall and Bacon Canada, 1998), 49.

⁷⁰ "A Challenge Facing the Canadian Public Service," *Occasional Papers on Parliamentary Government* 21 (September, 2005), 14, <http://www.parlcent.ca/publications/pdf/Pg%2021%20Final%20ENG.pdf> (accessed December 21, 2007).

been proposed to address these deficiencies.⁷¹ However, failure to successfully their recommendations has not only hamstrung the ability of committee members to actively participate in policy exercises but has also increased the power of the executive.⁷²

The creation of a special standing committee charged with reviewing all legislative initiatives from a rights perspective would also help restore the balance between legislative and executive responsibilities in interpreting the *Charter*. Hiebert has advocated the creation of such a committee to examine legislation from a rights perspective before it is enacted, affording parliamentarians the opportunity to participate in *Charter* scrutiny as well as reducing the likelihood of subsequent judicial invalidations.⁷³ Moreover, such a committee would provide an important point of contact for the public to become actively involved in policy exercises. I agree with Peter Lougheed who has argued “the purpose of the override is to provide an opportunity for the responsible and accountable public discussion of rights issues, and this might be undermined if legislators are free to use the override *without open discussion and deliberation of the specifics of its use.*”⁷⁴ The creation of a special joint committee would increase the participation of parliamentarians and the public in the policy-making process by generating discussions on how best to protect rights. In such an environment, use of

⁷¹ These include monitoring committee composition to ensure that membership reflects Canadian interests, that members have appropriate policy expertise, that committee reports are actually debated in the House and that committees are endowed with sufficient resources to fulfil their mandates. *Forum on parliamentary reform*, 16-22.

⁷² “(...) because of the dominance of party discipline, majority governments, extreme partisanship in the House of Commons, and the undervalued role of the Senate, the parliamentary committee system in Canada is prevented from acting as an adequate check on the legislative agenda of the political executive.” Kelly, *Governing With the Charter*, 246.

⁷³ Janet L. Hiebert, “Wrestling With Rights: Judges, Parliament and the Making of Social Policy,” *Choices* 5 (1999): 27-28.

⁷⁴ Peter Lougheed, “Why A Notwithstanding Clause?” *Points of View* 6 (1998): 16 [emphasis added].

section 33 is more likely to be frankly considered in open deliberations regarding critical policy issues. It is this kind of *intra*-institutional dialogue which, in conjunction with judicial review, offers the best safeguard for constitutionally protected rights.

Conclusion

The recent Charter @ 25 Conference was devoted in part to debating the continued relevance of the dialogue metaphor and the notwithstanding clause in a system of constitutional supremacy.⁷⁵ Both issues are controversial. Just as one observer recently sounded the death knell for dialogue,⁷⁶ another (as noted earlier) has called for “a comprehensive qualitative analysis of the cases – one that evaluates the substance of the court rulings, their impact upon the legislatures’ policy objectives, and the extent to which legislative responses were successful in overcoming, as opposed to accommodating, these impacts.”⁷⁷ This study has been guided by a guarded optimism insofar as its central contention is that dialogue in theory serves an intrinsically valuable purpose in a liberal democracy, however, dialogue in practice is not as pervasive as a number of commentators have suggested. Specifically, the paucity of legislative reversals of Supreme Court decisions using the override undermines the opportunity for an inter-institutional conversation harnessing the strengths of the judiciary and legislatures in framing the parameters of a public discussion on the meaning of fundamental rights and freedoms.

⁷⁵ See *The Charter @ 25*, homepage, (2006), <http://misc-iecm.mcgill.ca/conf2007/welcome.html> (accessed December 20, 2007).

⁷⁶ Manfredi, *The Day the Dialogue Died*, 105-123.

⁷⁷ Andrew Petter, “Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn’t Such a Good Thing After All),” *Osgoode Hall Law Journal* 45 (2007): 153.

Unfortunately, the scholarship in this area is polarized and tends to be supportive of judicial *or* legislative finality in constitutional interpretation. I contend that coordinate constitutionalism, a theory supported by the Supreme Court's section 1 jurisprudence, provides the most accurate account of the institutional reciprocity that characterizes the relationship between legislatures and the courts. Furthermore, it recognizes the legitimacy of invoking the notwithstanding clause as a means of expressing institutional disagreement over the interpretation of rights as a valid exercise of legislative and executive authority.

I attribute the override's desuetude primarily to an executive-dominated parliamentary process which has evolved at the expense of legislatures as *bone fide* deliberative bodies. However, I maintain that the creation of a special standing committee charged with scrutinizing legislation from a rights perspective, both justify recourse to the override, not as a means of trumping rights claims but to promote a rights discourse in connection with policy issues of national importance. As further evidence in support of my thesis, I point to a number of Supreme Court decisions where section 33 ought to have been invoked to engage the public in resolving the kinds of rights claims that arise in relation to philosophical questions at the core of politics.

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