



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 14 (2001)

Article 17

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### Citation Information

Roach, Kent. "The Myths of Judicial Activism." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 14. (2001).

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# THE MYTHS OF JUDICIAL ACTIVISM

Kent Roach<sup>\*</sup>

## I. INTRODUCTION

Since the enactment of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> Canadians have played out an American-style debate about judicial activism at an accelerated pace. Throughout the 1980s, a number of commentators on the left expressed concerns that the Court was interpreting the Charter in a manner that would thwart legislative attempts to assist the disadvantaged and strike down progressive social legislation as occurred in the United States in the *Lochner* era.<sup>2</sup> During the next decade, commentators on the right duplicated American criticisms of the Warren Court by arguing that the Supreme Court was exercising too much power by inventing rights not found in the Constitution, and by enforcing the rights of minorities and criminals against the wishes of the majority and their elected representatives.<sup>3</sup> These later concerns

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<sup>1</sup> Being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

<sup>2</sup> See, for example, Petter, "The Politics of the Charter" (1986), 8 S.C.L.R. 473; Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised ed. (Toronto: Thompson Educational Publishing, 1994); Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995). The *Lochner* era refers to a period between 1898 and 1937 in which the United States Supreme Court struck down many regulations as an interference with freedom of contract. It is symbolized by *Lochner v. New York*, 198 U.S. 45 (1905), in which the United States Supreme Court struck down a maximum 60-hour work week as an interference with freedom of contract.

<sup>3</sup> Morton and Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990), 1 S.C.L.R. (2d) 533; Morton and Knopff,

have been embraced by Her Majesty's Loyal Opposition, first the Reform Party and then the Canadian Alliance, as well as the conservative media.<sup>4</sup> Despite their different politics, these critics of judicial activism share much. They all believe that judges can read their personal preferences into the Charter; they are all sceptical about the rights asserted in Charter litigation; and they all have faith in majoritarian forms of democracy and legislative supremacy.

In this essay, I will argue that the term judicial activism is ultimately not a helpful way to structure debate about judicial review under the Charter or other modern bills of rights that allow rights as interpreted by the Court to be limited and overridden by ordinary legislation.<sup>5</sup> The label judicial activism obscures more than it illuminates and allows commentators to criticize the Court and the Charter without really explaining their reasons for doing so. It hints at, if not judicial impropriety, at least judicial overreaching, while hiding often controversial assumptions made by the critics of judicial activism about judging, rights and democracy. Such assumptions need to be revealed and unpacked for all the world to see.

It is much easier to see judicial activism as a pressing problem if one believes that judges can only legitimately discover clear answers in the text agreed to by the framers of the Constitution or the intent of those framers, or that judges are free to impose their political preferences in the guise of constitutional adjudication; that they should only decide what is necessary to resolve a dispute between the two parties to a dispute; that rights have a tendency to be absolute trumps and that democracy depends on legislative supremacy. Conversely, judicial activism is much less of a problem if one believes that all judging involves a constrained form of creativity; that the

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*Charter Politics* (Toronto: Nelson, 1992); Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993); Morton and Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

<sup>4</sup> See, for example, then Leader of the Opposition Preston Manning's criticism of "political and social activism by the courts," Hansard, October 13, 1999, at 1600-05. For a recent criticism by the Canadian Alliance Justice critic that the Supreme Court has "engaged in a frenzy of constitutional experimentation that [has] resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives of the people," see Hansard, March 1, 2001, at 1400. For examples of criticisms of judicial activism in the conservative media see Leischman, "Robed Dictators" *The Next City* (October 1998) 40; Seeman, "Who Runs Canada?" *National Post* (24 July 1999) A1. On the media's embrace of the judicial activism issue and an anti-institutional approach to reporting on the Supreme Court see Delacourt, "The Media and the Supreme Court of Canada" in Mellon and Westmacott, eds., *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Scarborough, Ont.: Nelson Thomson Learning, 2000), at 35.

<sup>5</sup> This would include bills of rights enacted in the 1990s in New Zealand, Israel, South Africa and the United Kingdom. See Hirshl, "Looking Sideways: Judicial Review vs. Democracy in Comparative Perspective" (2000), 34 *U. Richmond L. Rev.* 415.

Supreme Court should decide legal issues of national importance; that rights need not be absolute and that the Court's decisions need not be the last word. Although it is a popular means for judging the role of the courts, it may be better to replace the loaded, short-handed phrase judicial activism with more direct and complex discussions about the role of judges, courts and legislatures in a democracy.

I do not maintain that discarding the term judicial activism will result in agreement about what constitutes proper judging, respect for rights or respect for democracy. These are enduringly controversial issues of jurisprudence and politics. However, sweeping such difficult issues under the rug by throwing around labels about judicial activism does not help matters. Those who criticize or defend judicial activism must try to escape the tyranny of labels and explain more clearly the reasons for their conclusions. It is to this end that this essay will identify and criticize six assumptions commonly made by critics of judicial activism. My purpose is not so much to dispel concerns about judicial activism that have been directed at the Supreme Court,<sup>6</sup> but to relate them to a broader understanding of adjudication, rights and democracy, and to criticize the often implicit assumptions made by many critics of judicial activism on these topics.

## II. THE MYTH THAT JUDGES CAN AVOID DECIDING CHARTER ISSUES

A common criticism is that courts engage in judicial activism when they decide constitutional issues that are not absolutely necessary to settle a live dispute. In the United States, there is a long tradition of courts remaining passive to avoid constitutional decisions and engaging in constitutional minimalism so that when constitutional issues must be decided, they are decided narrowly on the facts of the cases.<sup>7</sup> The idea that courts should whenever possible avoid or limit constitutional judgment has influenced conservative critics of judicial activism. These critics argue that the Supreme Court has abandoned its traditional adjudicative function of settling disputes and has become an "oracle" that tries "to solve social problems by issuing broad declarations of constitutional policy." They also argue that the Court regularly displays "judicial hubris" by unnecessarily making constitutional

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<sup>6</sup> But see my forthcoming book, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law), for arguments that progressive and conservative critics have overstated their criticisms of the Court.

<sup>7</sup> Bickel, *The Least Dangerous Branch*, 2nd ed. (New Haven: Yale University Press, 1986); Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

pronouncements.<sup>8</sup> The American example has also influenced Patrick Monahan and Peter Hogg to suggest that the Court could decide issues more narrowly.<sup>9</sup> Canadian champions of constitutional minimalism,<sup>10</sup> however, should confront whether they really want judges to duck constitutional issues and should explain why the very act of ducking is not itself often an implicit rejection of the merits of the claim being avoided.

The idea that the Court should avoid or minimize constitutional judgment has its origins in attempts to limit the dangers of judicial supremacy under the American Bill of Rights. It was precisely because the constitutional judgments of the United States Supreme Court were so final and could not be subject to effective replies by ordinary legislation, that commentators urged that Court to practice the passive virtues of avoiding constitutional judgments, and the constitutional minimalism of deciding one case at a time based on the narrowest grounds possible. Given the ability of Canadian governments to reply

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<sup>8</sup> Morton and Knopff, *The Charter Revolution and the Court Party*, *supra*, note 3, at 53 and 58; Morton and Knopff, *Charter Politics*, *supra*, note 3, Chapter 7. See also Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001), at 134-35 and 179; Manfredi and Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999), 37 Osgoode Hall L.J. 513, at 522-26. The Court is unfairly criticized for some decisions because the laws in those cases were still very much live disputes even though they had already been changed by Parliament and legislative changes to the law did not apply retroactively to the cases. For example, in *R. v. Sieben*, [1987] 1 S.C.R. 295, the Court had to determine the admissibility of evidence seized under the writs of assistance; in *R. v. Heywood*, [1994] 3 S.C.R. 761, it had to determine whether the accused could be convicted under the old vagrancy law.

<sup>9</sup> Monahan, "The Supreme Court of Canada in the 21st Century" (2001), 80 Can. Bar Rev. 374, at 392ff; Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis" (2001), 80 Can. Bar Rev. 171, at 173-74. Dean Hogg suggests that my contribution to that symposium "urges the Court to adopt the passive virtues," *id.*, at 173, n. 7. That is not my position. Although avoiding constitutional issues can promote dialogue between the Court and the legislature given the judicial supremacy produced by the lack of limitation and override provisions in the American Bill of Rights, sections 1 and 33 of the Charter serve these dialogic purposes under the Charter and suggest "that there is less need for the use of the passive virtues to avoid or minimize constitutional interpretation if Charter judgments are not, even in theory, final" (Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001), 80 Can. Bar Rev. 481, at 497). On how dialogue is promoted by these structural features of the Charter see Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)" (1991), 105 Harv. L. Rev. 80, at 124-25; Perry, "The Constitution, the Courts and the Question of Minimalism" (1993), 88 N.W.U.L.R. 84, at 153-60; Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997), 37 O.H.L.J. 513.

<sup>10</sup> There are critics of constitutional minimalism even in the American context of judicial supremacy. See for example Gunther, "The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review" (1964), 64 Colum. L. Rev. 1; Peters, "Assessing the New Judicial Minimalism" (2000), 100 Colum. L. Rev. 1455.

to Charter judgments under sections 1 and 33, there may be less of a case for such a restrictive approach to constitutional decision-making under the Charter. The Court can enhance democracy not by avoiding or minimizing constitutional judgment, but by defining broad principles which can then be subject to debate and limitation by the legislature when required in particular contexts.<sup>11</sup> In any event, it is not clear if the Court can minimize constitutional judgment without minimizing constitutional rights.

In the early years of the Charter, the Supreme Court made some Charter decisions it could have avoided. Take the case of Edward Dewey Smith. Mr. Smith was a 27-year-old with prior convictions who returned from Bolivia with over \$100,000 in cocaine. Applying the seven year mandatory minimum sentence for importing narcotics to Mr. Smith would not have raised Charter concerns about grossly disproportionate punishment that would be cruel and unusual. Nevertheless, the Supreme Court used Smith's 1987 case to strike down the seven year mandatory minimum sentence for importing narcotics as cruel and unusual punishment on the basis that the mandatory minimum sentence would be grossly unfair if applied to a small time offender, such as a teenager bringing a joint of marijuana back from spring break.<sup>12</sup> The American courts would never have decided the case on a hypothetical example and they would have seen seven years as a light sentence for importing drugs. Can the Court's bold, broad and even brassy decision be defended? In my view, it can. Prosecutors might never have charged the teenager with importing, but they might have threatened to do so. Moreover, it was a virtual certainty that the mandatory minimum sentence would do injustice to some small time importer, and such offenders might not have the will or resources to take their cases all the way to the Supreme Court. Finally, the Court's bold decision did not necessarily constitute the final word. As Lamer J. indicated, Parliament could have replied to the Court's decision with a new mandatory sentence that would only apply to big time or second offenders. Even bold judgments need not be the last word under the Charter.

The Court has recently grown much more cautious about striking down mandatory minimum sentences on the basis of their effects on hypothetical offenders. It has upheld a mandatory minimum of four years' imprisonment for

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<sup>11</sup> Contrary to some criticisms of dialogue between the Court and the legislature, this dialogue is "one of active citizenship" because the elected legislature retains the power to limit or even to override the Court's decisions. Contrary to Jeremy Waldron's arguments that dialogue between the people and the United States Supreme Court is false and undemocratic: Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), at 291.

<sup>12</sup> *R. v. Smith*, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97. On the Court's lack of attraction to the passive virtues in this case see my article, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform" (1989), 11 S.C.L.R. 433.

negligent manslaughter with a firearm and has refused to look at actual reported cases in which the penalty would have been applied to battered women, Aboriginal offenders and police officers who negligently killed people with guns.<sup>13</sup> Similarly, in the *Robert Latimer* case,<sup>14</sup> that Court only examined whether life imprisonment without eligibility for parole for 10 years was cruel and unusual when applied to Mr. Latimer and did not examine even more sympathetic cases where the penalty could be applied when a competent victim asked for assistance in ending his or her own life. Although these decisions can be defended on the basis that the Court should only decide one case at a time, it is a mistake to believe that the Court's more cautious approach has not affected the substance of the law. Constitutional minimalism has gone hand in hand with a minimal approach to the right against cruel and unusual punishment as it relates to mandatory sentences. The judicial deference that accompanied the Court's new attraction to constitutional minimalism culminated in its suggestion in *Latimer* that it was up to the cabinet to grant Mr. Latimer mercy and "the choice is Parliament's on the use of minimum sentences."<sup>15</sup>

A few weeks after the *Latimer* decision, the Supreme Court reverted to the bolder and broader approach that characterized the *Smith* case<sup>16</sup> when it held that section 7 of the Charter was violated when any fugitive was extradited to face the death penalty. The Court could have decided the case more narrowly because the applicants, Glen Burns and Atif Rafay, were Canadian citizens who had mobility rights under section 6 of the Charter to stay and enter Canada. It could have decided the case even more narrowly on the basis that the applicants were not only Canadian, but 18 years old at the time of the alleged murder of Rafay's mother, father and sister. The one case at a time approach would, however, have begged many questions. No execution of most teenagers, but what about 19-year-olds? No execution of pregnant women, but what about after birth? No execution of those with severe mental disabilities, but what about the less severely disabled? This type of gruesome case by case approach is used by American courts in death penalty cases, but was eschewed by the Court on the more principled basis that extradition to face the death penalty was fundamentally unjust given the dangers of executing the innocent.<sup>17</sup> A one case

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<sup>13</sup> *R. v. Morrisey*, [2000] S.C.R. 90. On the role of constitutional minimalism and judicial restraint in these recent section 12 cases, see my article, "Searching for *Smith*: The Constitutionality of Mandatory Sentences," Osgoode Hall L.J. (forthcoming).

<sup>14</sup> *R. v. Latimer*, [2001] 1 S.C.R. 3.

<sup>15</sup> *Id.*, at para. 88. The reader should know that I acted for the Canadian Civil Liberties Association which argued that the mandatory penalty should be struck down in part on the basis of hypothetical examples.

<sup>16</sup> *Supra*, note 12.

<sup>17</sup> The Court left itself some wiggle room by noting that this principle might not apply in undefined exceptional circumstances: *United States of America v. Burns*, [2001] 1 S.C.R. 283.

at a time approach would have diluted the rights of fugitives and would have made the law less clear and less principled.

Constitutional minimalism also provides the particular danger of producing a minimal approach to Aboriginal rights. In its first Aboriginal fishing rights case, the Supreme Court articulated a broad test for what constitutes an Aboriginal right even though the case had to be sent back for a new trial. Chief Justice Dickson and LaForest J. recognized that Aboriginal rights should be interpreted to provide “a solid constitutional base upon which subsequent negotiations can take place.”<sup>18</sup> A similarly broad approach was taken in the *Delgamuukw*<sup>19</sup> land claims case with the Court again expressing a hope that the judgment would allow for negotiations to proceed. Professor Monahan has argued that “the abstract and generalized nature of the advice that was offered takes the Court into dangerous waters” that make it difficult to predict future cases and may require the Court “to revise or reformulate the principles.”<sup>20</sup> This may be true, but a broad decision at least gave governments and Aboriginal peoples a framework in which to discuss their claims. After years of expensive litigation, it would have been shocking if the Court had said little or nothing about Aboriginal rights in these cases.

The Court’s decision in *Marshall No. 2*<sup>21</sup> may suggest a new attraction to a minimalist approach that not only decides one case at a time, but minimizes the ambit of Aboriginal rights. After the Court’s decision to hold that Marshall had a treaty right to fish for a moderate livelihood, both Aboriginal and governmental leaders, including the Minister of Indian Affairs, speculated that the decision may have repercussions on other resources and in other parts of Canada. This type of speculation often follows the Court’s decisions, particularly in the area of Aboriginal rights where the objective of much litigation is to obtain legal resources to influence subsequent negotiations. Land claims and other treaties result from negotiating in the shadow of the law and uncertainty about the breadth of the Court’s decisions is often one of the biggest bargaining chips that Aboriginal people bring to the table. In its second judgment or postscript to *Marshall No. 1*<sup>22</sup> the Court wiped some chips off the table by indicating that its decision did not apply to logging, minerals or off-shore natural resources. The Court did not go so far as to say it applied only to eels and not to the lucrative lobster fishery, but the logic of constitutional minimalism could have taken the Court to such a limited ruling.

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<sup>18</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>19</sup> *R. v. Delgamuukw* [1997] 3 S.C.R. 1010.

<sup>20</sup> Monahan, “The Supreme Court of Canada in the 21st Century” (2001), 80 *Can. Bar Rev.* 374, at 392.

<sup>21</sup> *R. v. Marshall No. 2*, [1999] 3 S.C.R. 533.

<sup>22</sup> *R. v. Marshall No. 1*, [1999] 3 S.C.R. 456.



The Court in *Marshall No. 2* was not internally consistent in its constitutional minimalism. It went beyond what was necessary to deny the intervenor's request for a re-hearing and speculated that the Crown might be able to justify closed seasons and licensing requirements as a limitation on the treaty right. This broad ruling has supported the federal government in its determination to enforce such rules against Aboriginal fishers with the result being that Donald Marshall today would likely be prosecuted for doing exactly what the Supreme Court acquitted him of doing, namely exercising his treaty right by fishing without a licence and in a closed season.

The Court's decision in *Marshall No. 2* has been praised as an example of a minimalist approach that is "fact-sensitive and context specific" and leaves "more room for dialogue with the legislature than would a court decision announcing a broad or sweeping new rule of law that went far beyond the facts of the case."<sup>23</sup> In my view, however, it is not necessary under the Charter to decide cases narrowly in order to facilitate dialogue between the court and the legislature. Given the ability to justify limits on Aboriginal rights,<sup>24</sup> dialogue can occur whether the Court makes sweeping or narrow decisions. Governments could justify limits on Aboriginal rights in a contextual fashion even if such rights were defined very broadly to apply to all natural resources or, as the Court termed it in *Marshall No. 2* "anything and everything physically capable of being gathered."<sup>25</sup> In many Aboriginal rights cases, dialogue will take the form of negotiation between Canadian governments and Aboriginal people. All that *Marshall No. 2* accomplished as a minimalist decision was to diminish the bargaining power of the Mi'kmaq by eliminating any doubt that *Marshall No. 1*<sup>26</sup> did not apply to logging and other resources. The logical extreme of a minimalist approach would be to require Aboriginal people to establish their rights on a species by species, acre by acre basis. This would not facilitate dialogue or indeed justice because a minimalist approach that only resolves Aboriginal rights one prosecution at a time does not clarify the law and runs the real danger of rendering such rights so difficult and costly to establish in court that they will be illusory.

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<sup>23</sup> *Supra*, note 20, at 391.

<sup>24</sup> Although section 1 of the Charter does not apply to Aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), the Court has invented a similar justification process which was again recognized in *Marshall No. 2*, *supra*, note 21. The Court's creativity in this respect belies the claim by conservative critics of judicial activism that the Court's creative approach to treaty interpretation has only benefited Aboriginal peoples. See Flanagan, *First Nations?: Second Thoughts* (Montreal: McGill-Queen's University Press, 2000), at 151-65.

<sup>25</sup> *R. v. Marshall No. 2*, *supra*, note 21, at para. 20.

<sup>26</sup> *R. v. Marshall No. 1*, *supra*, note 22.

A Court committed to minimalism would also be eager to avoid constitutional judgment in its entirety whenever possible. It would routinely decline to exercise its discretion to decide moot cases. The Court has been criticized for deciding the *M. v. H.* case<sup>27</sup> even though it was moot because the same-sex couple, one of whom had contested the exclusion of lesbian couples from support provisions, had reached a financial settlement before the Supreme Court heard the case.<sup>28</sup> Even before the Charter, it was quite typical for cases heard by the Supreme Court to be effectively resolved given the years it often takes for a case to get to the highest Court.<sup>29</sup> The Court often hears criminal cases after the accused has served the sentence and the case is technically moot. It is difficult to argue that with the *M. v. H.* case fully prepared for argument in an adversarial fashion and the underlying issues having been litigated for much of the 1990s, the Court should have ducked the issue. Such a course of action would only have delayed the inevitable and required another homosexual couple to go through years of expensive litigation to present the issue to the Court. The fact that the Ontario legislature had decided not to include same-sex partners in 1994 could not stop those partners from bringing Charter litigation. A couple by couple, statute by statute approach also would have risked producing a contest about who, between the disadvantaged group and the government, had the deepest pockets.

In any event, governments often expect the Court to provide guidance beyond a particular case and in *M. v. H.*,<sup>30</sup> the government did not argue that the case should not be decided because it was moot. Although less than enthusiastic about the result, the Ontario government had the good grace to reply to the Court's decision not only with an amendment to the particular law found by the Court to be unconstitutional, but to over 60 other laws involving spousal benefits as well. Governments as well as litigants recognize that the Court and the Charter must of necessity deal with issues of broad public importance and application.

There may be a case for avoiding or minimizing judgment when the Court genuinely needs more information and argument than presented in the case, but often there is also a need for broad principles that can be refined in further cases. Such principles will help governments and affected parties think through

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<sup>27</sup> [1999] 2 S.C.R. 3.

<sup>28</sup> Morton and Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000), at 55; Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001), at 135.

<sup>29</sup> Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding whether to Decide" in Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

<sup>30</sup> *Supra*, note 27.

questions of rights that might otherwise be ignored.<sup>31</sup> In these still early days of the Charter, judges often need to define broad rules rather than ducking issues and deciding one case at a time. Litigants, lower courts and governments legitimately look to the Court for guidance. The consequences of broad and even bold constitutional judgments are not as great in Canada or other countries with modern bills of rights as they are in the United States. The Charter, unlike the American Bill of Rights, allows the legislature to respond by enacting legislation to be defended in a particular context, perhaps not fully considered by the Court, as a reasonable limit on the right as articulated by the Court.

The myth that judges can avoid constitutional issues is perhaps best illustrated by the unhappy stories of two unlikely people whose lives intersected because the Court ducked the difficult issue of fetal rights. One was Joe Borowski, a pro-life crusader from the Prairies and the other was Chantal Daigle, a young Quebecois woman who was enjoined by the courts at the request of her ex-boyfriend, Jean Guy Tremblay, from obtaining an abortion.

Mr. Borowski<sup>32</sup> passionately believed that the fetus was protected by the Charter and was offended at the idea that Canadian law allowed abortions, even if they were approved by a hospital committee under the *Criminal Code*<sup>33</sup> as necessary to protect a woman's life or health. He wanted to challenge the constitutionality of any legal abortions, but encountered many roadblocks in persuading the courts to hear his case. He had no legal right to challenge the abortion law because it did not directly affect his own rights. Instead, he relied on a 1974 case that recognized a discretionary form of public interest standing in cases where a citizen raised a serious constitutional issue that could not be decided in litigation by those directly affected. In that case, the Supreme Court had allowed an opponent of bilingualism to argue that it exceeded the powers of the federal government. The Court had emphasized the public interest in ensuring that governments acted constitutionally and that Canadian courts, unlike American courts, were not constitutionally restricted to deciding only live cases and controversies.<sup>34</sup> The *Thorson* and *Borowski* cases also demonstrate that public interest standing (as well as intervention)<sup>35</sup> is open to

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<sup>31</sup> American critics of Sunstein's constitutional minimalism often make this point, but they often yearn for some way to minimize judicial supremacy by making the Court's articulation of broad principles provisional. See Peters, "Assessing the New Judicial Minimalism" (2000), 100 *Columbia L. Rev.* 1455 and Devins, "The Democracy Forcing Constitution" (1999), 97 *Mich. L. Rev.* 1971.

<sup>32</sup> *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575.

<sup>33</sup> R.S.C. 1970, c. C-34, s. 251, as it then was.

<sup>34</sup> *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138.

<sup>35</sup> Governments have guaranteed right of interventions in constitutional cases and conservative and other groups can intervene to oppose Charter claims in the Supreme Court. See generally Tables 2.7 and 2.9 in Chapter 2 of Brodie, *Friends of the Court*

all, not only the left-leaning groups associated with what Professors Morton and Knopff call the Court Party.<sup>36</sup>

In 1981, the Supreme Court granted Borowski public interest standing on the basis that he was raising serious constitutional issues that could not reasonably be raised in litigation by those directly affected by the law. Chief Justice Laskin dissented and argued that “mere distaste has never been a ground upon which to seek assistance of a court.”<sup>37</sup> The Chief Justice’s uncharacteristic opinion ignored that Borowski’s claim was couched not in terms of taste, but an allegation that the Constitution had been violated. If the Court had told Borowski to go away, it would have implicitly been rejecting his argument that legal abortions violated the Charter. It is much better to answer such legal questions directly in a manner that can be judged for all and not through the indirect means of denying standing or declaring the controversy moot.

Chief Justice Laskin was on more solid ground when he argued that it was possible for a person more directly affected, for example a man who fertilized a fetus, to bring a live claim that an abortion would violate the rights of a fetus.<sup>38</sup> The problem with this approach, one that the Court would eventually learn, was that such a live and concrete dispute would be extremely difficult to litigate. Those who are directly affected by a law may not be able to go to the expense, time or trauma of litigating the issue. Better decisions may emerge when highly motivated and competent public interest litigants are allowed to raise issues that directly affect others. The *Borowski* case<sup>39</sup> took eight years to return to the Court, but this leisurely pace ensured that the affected parties had the time to give the Court their best evidence and arguments.

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<<http://publish.uwo.ca/~irbrodie/fotc/fotc2-tab.doc>>; Monahan, “Constitutional Cases 2000: An Overview” in this volume of the *Supreme Court Law Review*, Tables 3 and 4 at pp. 10 and 13; Hein, “Interest Group Litigation and Canadian Democracy” in Howe and Russel, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001), Table 3 at 232.

<sup>36</sup> Morton and Knopff largely ignore the role of governments and groups opposed to Charter claims as intervenors. For example, they mention that there were 22 intervenors in the landmark *Sparrow* case, but fail to mention that 14 of these represented non-Aboriginal fishing interests and six represented other governments: Morton and Knopff, *The Charter Revolution and the Court Party*, *supra*, note 28, at 56.

<sup>37</sup> *Canada (Minister of Justice) v. Borowski*, *supra*, note 32, at 578.

<sup>38</sup> In recent years, courts have been more inclined to deny public interest standing on the basis that someone more directly affected could bring a claim. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. See my book, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 1994 (2000 as updated)), at 5.200-5.260.

<sup>39</sup> *Supra*, note 32.

Borowski's case on the merits finally came back to the Supreme Court in 1989.<sup>40</sup> The Court declined to decide the case on the basis that it had become moot after the Court in 1988 had struck down the abortion law in *Morgentaler*.<sup>41</sup> Even though the new status quo violated the rights that Borowski claimed for the fetus even more than the old law and even though there had been full adversarial argument on the issues, the Court feared that a decision might "pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court."<sup>42</sup> It is difficult to see how deciding the issues raised by Borowski — issues that the Court admitted could have been remitted to them by the government on a reference — would have dictated the form of legislation to Parliament or departed from the Court's role. The issue was whether the fetus had rights under the Charter. The Court's eventual decision that the fetus did not have such rights would not have dictated legislation to Parliament because, as recognized in *Morgentaler*, Parliament could still act to protect a fetus that did not have constitutional rights. Even a decision recognizing fetal rights would have left Parliament an important role in striking the balance between fetal rights and the rights of women denied access to abortions. A decision on the merits in *Borowski* would have contributed to the dialogue between the Court, the legislature and society on abortion, but it would hardly have been the final word.

A ruling on the merits in *Borowski*<sup>43</sup> might have clarified some of the legal questions that were being debated in Parliament while not dictating the form that legislation should take. It would also have given Borowski a meaningful day in court after he had spent over a decade litigating the issue. In any event, the Court's decision to declare Borowski's appeal moot only delayed the inevitable. Less than a year later, the Court was summoned back from its summer recess to sit in an emergency session to decide whether Jean Guy Tremblay had the legal right to prohibit his former girlfriend Chantal Daigle from obtaining an abortion in the 22nd week of her pregnancy. After argument in *Tremblay v. Daigle*<sup>44</sup> was commenced, the Court was informed that Daigle had obtained an abortion in the United States. This meant that the case was moot. Following *Borowski*, the Court should have declined to answer a constitutional question that was no longer necessary to decide a live dispute. The Court now recognized, however, that the controversial issue of fetal rights could not be avoided. It issued its decision that the rights of the fetus and the

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<sup>40</sup> *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

<sup>41</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

<sup>42</sup> *Supra*, note 40, at 365.

<sup>43</sup> *Supra*, note 40.

<sup>44</sup> [1989] 2 S.C.R. 530.

father were not protected under the Quebec Charter<sup>45</sup> “[i]n order to try to ensure that another woman is not put through an ordeal such as that experienced by Ms. Daigle.”<sup>46</sup> This has been criticized as favouritism to the pro-choice position,<sup>47</sup> but it extended the pro-life forces represented by intervenors in the appeal the courtesy of deciding their claims on the merits.

These cases are good illustrations of what Chief Justice McLachlin has called the “myth that courts can decline to decide Charter issues”<sup>48</sup> that are presented to them. The Court simply must decide constitutional issues, however difficult or divisive. Ducking the issue will only delay the inevitable and often will constitute an implicit and unjustified dismissal of the merits of the claim. Techniques of judicial avoidance and minimalism were designed in the American context in an effort to minimize the effects of judges having the final word when they define constitutional rights. A decision on the merits in *Borowski*,<sup>49</sup> unlike the American decision in *Roe v. Wade*,<sup>50</sup> would still have left Parliament much room to devise its own abortion policy. Ducking constitutional issues under the Charter is not necessary to create space for democratic decision-making or to minimize the consequences of a decision that society decides is mistaken. As in other areas of the Charter, elected legislatures retain robust powers under sections 1 and 33 of the Charter to respond to even bold and broad constitutional judgments that the Court could have avoided.

### III. THE MYTH THAT JUDGES EXERCISE OPEN-ENDED DISCRETION WHEN MAKING LAW

Critics of judicial activism on both the left and the right have reached, through very different routes, the conclusion that judges have a strong discretion when interpreting the vague phrases of the Charter and that they can read their unrepresentative views into the Charter. The left concludes that adjudication is inherently indeterminate and political while the right holds up the often disappointed hope that judges could decide cases in a formalist manner based on the plain words and intent of the Charter. The former predicts

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<sup>45</sup> Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, preamble, ss. 1 (as am.) and 2.

<sup>46</sup> *Supra*, note 44, at 550.

<sup>47</sup> Morton, *Morgentaler vs. Borowski* (Toronto: McClelland & Stewart, 1992), at 285.

<sup>48</sup> McLachlin C.J., “Charter Myths” (1999), 33 U.B.C.L. Rev. 23, at 31.

<sup>49</sup> *Supra*, note 40.

<sup>50</sup> 410 U.S. 113 (1973).

that judges will use their discretion under the Charter to favour the advantaged while the latter predicts that judges will favour the disadvantaged.<sup>51</sup>

Anyone who regularly reads the decisions of the Supreme Court can see the effects of different approaches and personalities on the Court. Justice Bastarache has indicated that on criminal justice matters he is more conservative than the majority of the Court and particularly more so than former Chief Justice Lamer.<sup>52</sup> Not many would disagree. Judges do exercise creativity when interpreting the law and at the margins their experiences influence the way they make law. The common law would not have been made and it would not have evolved had judges not been creative. My concern in this essay, however, is only with the strong claim that judges are free to make the law in their own image. This may seem like a straw man because few people would argue that there are absolutely no constraints on judges deciding cases. The problem is that those who make claims about judicial activism often have made something very close to such extreme claims. They are forced to argue that judges enjoy a strong discretion under the Charter to make their case that judicial law-making is undemocratic and allows an almost monarchical elite to impose its personal views on the populace. What is especially ironic is that the critics of judicial activism diverge widely on the predictions of what the personal preferences of the judges will be. The left is convinced that judges will favour corporations and the wealthy because the judges are, after all, wealthy lawyers. The right is convinced that judges will favour minorities who are favoured by the intellectual elite that have access to the judges through the law schools, judicial education and the law clerks.

A number of critics predicted that once the Court abandoned the proposition that the principles of fundamental justice protected under section 7 of the Charter were restricted to matters of procedural fairness, the only alternative was something akin to the substantive due process that produced both *Lochner*<sup>53</sup> and *Roe v. Wade*.<sup>54</sup> But this has proven not to be the case. The Court's decision in *Morgentaler*<sup>55</sup> can be distinguished from *Roe v. Wade* in the sense that it left the legislature more room to respond and did not attempt to

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<sup>51</sup> See, for example, Petter and Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989), 23 U.B.C.L. Rev. 531 and Morton and Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990), 1 S.C.L.R. (2d) 533.

<sup>52</sup> Schmitz, "Supreme Court Goes 'Too Far': Judge" *National Post* (13 January 2001) A1. On the role that myths about judicial activism have played in the often unfair criticisms made against the former Chief Justice, see my article "Chief Justice Lamer and Some Myths About Judicial Activism" (2000), 5 Can. Crim. L.R. 21.

<sup>53</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>54</sup> *Supra*, note 50. See for example Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993), Chapter 2.

<sup>55</sup> *Supra*, note 41.

detail a trimester by trimester abortion policy. Reply legislation was introduced and almost enacted that would, contrary to *Roe v. Wade*, have regulated abortion at all stages of pregnancy. Although the Court has held that the fetus is not protected under the Charter, it has also indicated that Parliament could act to protect the fetus. Canadian judges have not written their own views about abortion, whether they be pro-life or pro-choice, into the Charter.

What about the Court's more recent decision to hold that the principles of fundamental justice require Canadian governments to seek assurances that the death penalty will not be applied before it sends fugitives back to face trials in foreign lands?<sup>56</sup> The Court made this decision even though a decade earlier it had allowed mass murderer Charles Ng and escaped murderer Robert Kindler to be sent to the United States to face the death penalty,<sup>57</sup> and even though attempts to amend extradition legislation to ensure that the Minister of Justice always seeks assurances that the death penalty not be applied had been defeated.<sup>58</sup> Professor Ted Morton has criticized the decision as an affront to both democracy and the rule of law. He fears that the decision will prevent governments from allowing the issue of capital punishment "to be democratically decided through an election or a referendum." The Court's change of heart on this matter underlines in his view that the Court stands "in judgment of the policy wisdom of Parliament's decisions — not based on what the Charter means, but on the personal beliefs of a majority of these nine unelected judges."<sup>59</sup>

The problem with Professor Morton's argument is that the judges on the Court did not assert their personal beliefs in a roll call voice vote. Rather they agreed to a lengthy judgment that attempted to justify their decision in relation to the text of the Charter and its prior decisions. The Court also drew a distinction between justice issues that were within its expertise — matters such as the risk of wrongful convictions and the execution of the innocent — as opposed to more general issues about the morality and wisdom of the death penalty. The Court's reasons may not convince everyone; reasonable people may disagree and a majority of Canadians may favour the death penalty. But as the Court noted, if public opinion were decisive there would be no need for the Charter or the independent judiciary to provide protections for "the worst and weakest among us." The Court reminded us of our higher aspirations when we were most likely to forget them. The decision to send Burns and Rafay back to face possible execution was not made by Parliament or the people in the light

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<sup>56</sup> *United States of America v. Burns*, [2001] 1 S.C.R. 283.

<sup>57</sup> *Reference re Ng Extradition (Canada)*, [1991] 2 S.C.R. 858; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

<sup>58</sup> Morton, "What Chretien Once Believed" *National Post* (19 February 2001).

<sup>59</sup> *Id.*



of day, but by the Minister of Justice behind closed doors. To be sure, Parliament did not require the Minister to seek assurances, but it also did not take a firm stand in favour of the death penalty. The Court's decision in *Burns and Rafay*<sup>60</sup> forced Parliament and society to address important issues that it would otherwise be inclined to ignore or neglect.

The Court's courageous stand against the death penalty is not necessarily the final word. If, despite a growing international consensus against the death penalty and our increasing awareness of people who are wrongfully convicted of murder, Canadians really want the death penalty, they can have it. How? All Parliament need do is enact the death penalty notwithstanding section 7 of the Charter. Parliament would not have to change the Court or the Constitution, but simply alert the people that it was enacting legislation notwithstanding the Charter. The use of the override would make us think twice, and might *de facto* require a strong majority and strong legislative will for the death penalty, but that is appropriate when the stakes are so high. The override would also wisely require Canadians to revisit the issue in five years' time when the override expired but could be renewed. If a person sentenced to death or executed during those five years were found to have been wrongfully convicted or if Canada received enough international criticism, the people would have an opportunity to take a second look as the Court's important warnings in *Burns and Rafay*.<sup>61</sup>

Although judges do make a difference in cases like *Burns and Rafay*, the text of the Charter still matters. The courts have been reluctant to find various forms of economic rights in the Charter given the absence of property rights or explicit guarantees of adequate social services as found in some other constitutions and proposed in the ill-fated Charlottetown Accord.<sup>62</sup> Despite impassioned arguments from law professors that health care, housing and social assistance are within the purposes of the Charter in ensuring security of the person and the equal benefit of the law,<sup>63</sup> the courts have generally rejected such claims. In a case refusing to constitutionalize the right to strike as part of the freedom of association to form a union, the Court has indicated that, with the possible exception of specifically entrenched mobility rights, the Charter "does not concern itself with economic rights."<sup>64</sup> Chief Justice Dickson and Lamer and Wilson JJ. — all judges not noted for their restraint — concluded that the exclusion of property rights from section

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<sup>60</sup> *Supra*, note 56.

<sup>61</sup> *Id.*

<sup>62</sup> Bakan and Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

<sup>63</sup> Whyte, "Fundamental Justice: The Scope and Application of the Charter" (1983), 13 Man. L.J. 455; Jackman, "The Protection of Welfare Rights under the Charter" (1988), 20 Ottawa L. Rev. 257.

<sup>64</sup> *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 412.

7 of the Charter “leads to a general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee.”<sup>65</sup> They left the door open a crack by indicating that they did not declare “that no right with an economic component can fall within ‘security of the person.’...”<sup>66</sup> Justice Lamer, however, subsequently tried to close the door by indicating that section 7 of the Charter should not apply to issues of “pure public policy” and did not include the right to work as a prostitute.<sup>67</sup> The courts have not read either libertarian or communitarian economic views into section 7 of the Charter. They have been constrained by the omission of economic or property rights from the Charter and have not used the Charter to stand in the way of privatization and the shrinkage of the Canadian welfare state throughout the 1990s.<sup>68</sup> Judges have not read their economic views, whether they be free market or interventionist, into the Charter. The economic rights cases<sup>69</sup> suggest that the idea that courts have an open-ended discretion to read their own view of the world into the Charter is a myth.

Arguments by conservative critics of judicial activism that the Court has ignored the text of the Charter ring hollow when the critics are uncomfortable with what the text of the Charter actually says. A good example is prisoner voting rights. Section 3 of the Charter guarantees every Canadian citizen the right to vote in federal and provincial elections. It does not say every citizen who is not in prison. The Canadian Constitution differs from the American one which qualifies the right of citizens to vote to exclude those who participated in “rebellion or other crime” and has allowed massive and

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<sup>65</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 1003.

<sup>66</sup> *Id.*

<sup>67</sup> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

<sup>68</sup> See, for example, *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal to C.A. refused (1996), to Admin. L.R. (2d) 87n (C.A.), leave to appeal to S.C.C. refused (1996), 40 Admin. L.R. (2d) 87 (S.C.C.), upholding significant cuts in social assistance and the many cases listed in Laskin, *The Canadian Charter of Rights and Freedoms Annotated* (Aurora: Canada Law Book, 2000), at 7.900-7.1100; Jackman, “Poor Rights: Using the Charter to Support Social Welfare Claims” (1993), 19 Queen’s L.J. 65; Sharpe and Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998), at 148-50. The United Nations Committee on Economic, Social and Cultural Rights has made adverse comments about the treatment of social and economic rights under the Charter. See Schabas, “Freedom from Want” (2000), 11 N.J.C.L. 189, at 210.

<sup>69</sup> Even in its cases dealing with mobility rights which specifically provide that every person has the right to the gaining of a livelihood in any province, the Court has taken pains to stress that the right does not guarantee the right to work or even to free trade within Canada and only prohibits discriminatory treatment on the basis of province of residence. See *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

permanent disenfranchisement of felons.<sup>70</sup> Given the clear text, one would expect that conservative critics of judicial activism who urge courts to be faithful to text and the intent of the framers of the Constitution would applaud judicial decisions holding that legislation that denies prisoners the vote infringes this fundamental democratic right. Alas this is not the case. Knopff and Morton have argued that such decisions are examples of an activist “noninterpretivist” and “living tree” approach to Charter interpretation. They defend Justice Lyon’s interpretation of the right to vote as including the statutory restrictions on a prisoner voting at the time of the Charter’s enactment as an example of “a very traditional or interpretivist view of constitutional interpretation.”<sup>71</sup> This defence of Lyon J.A.’s perverse interpretation of the plain words of section 3 of the Charter suggests that their preferred approach to Charter adjudication is less about ensuring fidelity to the text and more about minimizing the impact of the Charter. If anyone does violence to the text of the Charter or engages in judicial discretion that reads his or her own personal values into the Charter, it is surely Lyon J.A. who denies that prisoners have been refused the right that they, like every citizen of Canada, plainly have under the Charter. Reasonable people can disagree about whether particular restrictions on a prisoner’s right to vote are reasonable. Substantive opposition to prisoner voting rights should not, however, be dressed up in arguments that judges who hold that prison disenfranchisement violates the clear right that prisoners as citizens have to vote are illegitimately reading their personal values into the Charter.

#### IV. THE MYTH THAT NO REAL RIGHTS ARE AT STAKE IN CHARTER LITIGATION

Some critics of judicial activism are sceptical about whether Charter litigation involves real rights. Those on the right express scepticism about rights inflation and group rights while those on the left express scepticism about individualistic and negative rights that protect people from the state. Professors Petter and Mandel worry about the effect of due process rights which, by protecting the accused from the state, may make it more difficult for the state to protect the victims of crime. These victims, like the accused, often

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<sup>70</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>71</sup> *Badger v. Canada (Attorney General)* (1986), 55 Man. R. (2d) 198, at 209-10 (C.A.) *per* Lyon J.A. Morton and Knopff, *Charter Politics* (Toronto: Nelson, 1992), at 298-99. Manfredi in *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001), at 240, n. 41, similarly suggests that “an interpretivist approach to s. 3 of the Charter would accept as ‘reasonable’ all limits that predated the Charter (i.e., that existed prior to 1982).”

come from disadvantaged groups, most notably women and children.<sup>72</sup> These concerns speak to the need to balance due process with victims' rights, but they cannot justify scepticism about due process rights. The state is still putting people in jail and it had better do so fairly.

Those on the right express a different type of scepticism about rights. Professors Morton and Knopff express concerns that "the courtroom politics promoted by the Court Party" is "authoritarian" and undermines the pluralistic politics of liberal democracies and the need for a sovereign people to accept the ability of a temporary majority "to set and conclude the rest"<sup>73</sup> while Professor Manfredi similarly argues that it is wrong to see the legislative process as a "zero sum game" in which some majorities and some minorities are permanent.<sup>74</sup> Behind this defence of pluralistic politics lurks deep scepticism. This scepticism is about whether Charter litigation involves a violation of real rights and concerns that the Court is blurring "the distinction between genuine mistreatment of discrete and insular minorities and the ordinary vicissitudes of democratic politics."<sup>75</sup> The suggestion is that many who are going to court should accept a "win some lose some" attitude that is necessary for a healthy democracy.

The defence of Charter litigation as a short circuit of pluralistic politics might work if the courts had inflated Charter rights so they could be claimed whenever any temporary minority was denied some benefit. This, however, has not been the case. The Charter has not been interpreted to protect people against every restraint on their freedom and every inequality in their treatment. Section 7 has generally been restricted to issues that involve the justice system, and equality rights have been narrowed to protect those who are vulnerable to discrimination and affronts to their human dignity. Once the Court placed these important restrictions on the potentially broadest rights in the Charter, then scepticism about rights seemed unwarranted.

The facts of the cases are probably the most eloquent reminder that Charter litigation involves real rights. It would be difficult to tell Burns and Rafray that their rights were not at stake when the Minister of Justice decided to extradite them without assurances that they would not be housed on death row awaiting lethal injection.<sup>76</sup> Delwin Vriend's rights were at stake when he could not even

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<sup>72</sup> Petter, "The Politics of the Charter" (1986), 8 S.C.L.R. 473; Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised ed. (Toronto: Thompson Educational Publishing, 1994).

<sup>73</sup> Morton and Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000), at 149-50.

<sup>74</sup> Manfredi, *Judicial Power and the Charter*, *supra*, note 71, at 198.

<sup>75</sup> *Id.*, at 135.

<sup>76</sup> *United States of America v. Burns*, [2001] 1 S.C.R. 283.

complain about discrimination after being fired from his teaching job when his employer learned he was gay.<sup>77</sup> Similarly, Ms. M.'s rights were at stake when she could not apply for support simply because her economically dominant common-law partner was also female.<sup>78</sup> The treatment received by the successful Charter applicants in these cases was not part of the "ordinary vicissitudes of democratic politics,"<sup>79</sup> but the denial of equal citizenship. These people's Charter complaints were not a product of moral over-sensitivity, but rather were claims to equal treatment as individuals with dignity. It is one thing to criticize the Court for how it balances rights with other rights and social interests, but it simply will not do to pretend that no rights are at stake in Charter litigation.

#### V. THE MYTH THAT JUDGES ENFORCE ABSOLUTE RIGHTS UNDER THE CHARTER

Many concerns about judicial activism are based on an image of the Court enforcing rights as absolute trumps over social interests and competing rights. The American experience provides plenty of examples of rights being enforced in this manner. This is especially so in the context of the First Amendment's absolute command that no law shall be made abridging freedom of expression, religion and association. The Canadian Court, however, has at every turn rejected the idea of rights as absolute trumps. In its recent decision upholding the offence of possession of child pornography, McLachlin C.J. rejected the idea that any right, even one related to one's private thoughts, would be beyond limitation under section 1 of the Charter.<sup>80</sup> Whereas the Canadian Supreme Court has affirmed Jim Keegstra's conviction for hate propaganda based on his teaching of hateful conspiracy theories about Jews to his students, the United States Supreme Court has struck down a law prohibiting cross burnings and swastika displays as impermissible regulation of the content of speech. Similarly, the Canadian Court upheld restrictions on degrading and dehumanizing pornography that were struck down in the United States as attempts to regulate the content of speech.<sup>81</sup> My purpose is not to join the

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<sup>77</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>78</sup> *M. v. H.*, [1999] 2 S.C.R. 3.

<sup>79</sup> *Supra*, note 74, at 135.

<sup>80</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para 80.

<sup>81</sup> Compare *R. v. Keegstra*, [1995] 2 S.C.R. 381, with *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992). On the willingness of the Canadian court to see the state not as the antagonist of freedom but the proponent of equality rights, see Moran, "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" [1994]

debate about the merits of these decisions, but simply to indicate the increased margin of deference that Canadian legislatures have over American legislatures when placing content-based restrictions on speech. The idea that courts will enforce absolute rights in Canada is simply a myth.

Some people may reasonably argue that the Court has erred in deciding that all expressive activity short of violence are protected forms of expression under the Charter. By allowing limits to be placed on rights, however, section 1 of the Charter allows legislatures to limit the damage caused by judicial overreaching in defining rights. Section 1 makes the protection of speech less of an all or nothing proposition than it is in the United States and it allows legislatures an opportunity to limit the damage caused by perhaps overly broad judicial interpretations of rights. Many believe that both American and Canadian courts have made serious mistakes in equating spending large amounts of money to influence elections with freedom of expression. In the United States, the Supreme Court has severely restricted the ability of legislatures to impose limits on campaign financing despite serious fears that this has produced inequalities and a money-driven electoral system.<sup>82</sup> Canadian courts under the Charter have made the same equation and the National Citizens Coalition has won several cases in Alberta striking down various restrictions on third party spending in an election.<sup>83</sup> The results of these cases were quite significant because they led to wide open third party spending in the 1988 and 1993 federal elections. These cases are some of the strongest examples of the dangers of judicial activism under the Charter.

Nevertheless, Parliament has not been powerless in crafting a response to judicial decisions striking down restrictions on spending during elections. After the first National Citizens Coalition case and the free spending 1988 federal election, the government appointed a Royal Commission to examine electoral financing. After several years and millions of dollars, the commission made strong recommendations about the need for restrictions on campaign spending and the dangers of the approach taken by the American and Canadian courts. A Royal Commission can be a potent instrument in the government's attempt to influence the Court because it can produce the social science that the courts will often defer to under section 1 of the Charter. In 1997, the Supreme Court indicated that it was entirely permissible under section 1 of the Charter for the government to limit the speech and spending of some in order to ensure fairness

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Wisconsin L. Rev. 1425. On pornography, compare *R. v. Butler*, [1992] 1 S.C.R. 452, with *American Booksellers v. Hudnut*, 777 F.2d 323 (7th Cir. 1985), aff'd 106 S.Ct. 1172 (1986).

<sup>82</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976); *F.E.C. v. National Conservative Political Action Commission*, 470 U.S. 480 (1985).

<sup>83</sup> *National Citizens Coalition v. Canada (Attorney General)* (1984), 11 D.L.R. (4th) 481 (Alta. Q.B.); *Somerville v. Canada (Attorney General)* (1996), 136 D.L.R. (4th) 205 (Alta. C.A.).

and to enhance the voice of those who could not spend millions in an attempt to influence an election. The Court quoted the Royal Commission report with approval and took notice of the inequities produced by unrestricted spending in the 1988 free trade election.<sup>84</sup> During the 2000 federal election, the Court overturned an injunction secured by the National Citizens Coalition against the enforcement of new restrictions on third party spending. The Court did not decide the merits of the challenges, but again re-affirmed the legitimacy of and public interest in allowing government to regulate spending during elections.<sup>85</sup>

The ability of governments to justify limitations on rights under section 1 of the Charter and the willingness of the Court to listen to the government's case for justification can mitigate perhaps overbroad judicial definitions of rights. Those who criticize the courts for engaging in judicial activism must account for the opportunity that section 1 of the Charter provides for government to justify limitations on rights. However tempting it may be, the American image of rights as absolute trumps is not an accurate description of the Charter and is not a helpful starting point for discussion of the Court's role under the Charter.

## VI. THE MYTH OF JUDICIAL SUPREMACY UNDER THE CHARTER

The critics of judicial activism will not likely be persuaded by the ability of governments to respond to judicial decision with legislation that can be defended under section 1 of the Charter. After all, courts still decide whether new limits placed on the right are reasonable. The critics dismiss the concept of dialogue between the court and the legislature. On the right, Professor Morton argues that mandatory court decisions are "a monologue, with judges doing most of the talking and legislatures most of the listening."<sup>86</sup> On the left, Allan Hutchinson argues that if there is any dialogue "it is between the different branches of government: citizen's complaints only provide an occasion for a

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<sup>84</sup> *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 56. The Court will still require the legislature to justify restrictions on campaign spending. In that case the Court struck down what amounted to a total ban on the ability of people to spend money in the Quebec referendum, except through the official yes and no campaigns. Professor Manfredi criticized the case for continuing "the trend toward unregulated election spending" and for engaging in "judicial micro-management of public policy" and held that a \$600 restriction on third party spending in a Quebec referendum campaign was unreasonable, but a proposed \$1,000 limit in a federal election was not: Manfredi, *Judicial Power and the Charter*, *supra*, note 71, at 150-51. The \$600 limit under Quebec law, however, was restricted to the costs of holding a meeting and prevented a third party not associated or affiliated with official yes and no committees from spending any money on ads or handbills.

<sup>85</sup> *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

<sup>86</sup> Morton, "Dialogue or Monologue?" (1999), 20(3) Policy Options 23, at 26.

discussion in which those citizens can only listen hopefully and can only speak episodically in the high-prized words of an arcane legal vocabulary. Democracy demands that citizens be more than eavesdroppers at the doors of power.”<sup>87</sup> The dialogue metaphor is not perfect and requires more careful elaboration.<sup>88</sup> But the baby should not be thrown out with the bath water. Criticisms of dialogue turn into error when they assume that the Charter is based on judicial supremacy and ignore the reply options open to governments.

Dialogue would be difficult and often illusory if the only effective way to respond to constitutional decisions was to change the Constitution or the Court. Both these drastic responses were eventually used to answer the decisions of the Judicial Committee of the Privy Council which stated that the federal government could not implement a New Deal including unemployment insurance to deal with the Great Depression. It may often be difficult for a government whose legislation is invalidated under the division of power to formulate new legislation to pursue the same policy objectives. This, however, is not the case under the Charter. The Charter contemplates a complex and multi-tiered dialogue between courts and legislatures over how rights and freedoms will be treated in a free and democratic society. Governments can talk back to the Court under section 1 as they explain their reasons for limiting a right and the alternatives that they considered and rejected. If this does not work, governments can shout at the Court by using the section 33 override. Shouting, however, comes with a political price both in terms of heightened public attention and a requirement that the legislature re-visit the matter after a five-year cooling off period when the override expires.

There are plenty of examples of legislative responses to court decisions. Parliament responded to the Court’s invalidation of a total ban on tobacco advertising with legislation prohibiting life style advertising.<sup>89</sup> This response has been criticized as a distortion of Parliament’s policy to get tough on a

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<sup>87</sup> Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), at 170. In response to the conservative critique of judicial activism, however, Professor Hutchinson has tempered some of his earlier opposition to the Charter. He now admits that courts “have a vital and complementary role to play in the ‘continuous process of discussion and reflection’ about what democracy means and demands”: Hutchinson “The Rule of Law Revisited: Democracy and Courts” in Dyzenhaus, ed., *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999), at 218.

<sup>88</sup> For an attempt to outline three models of dialogue as based on coordinate construction, accountability and institutional competence, see my article, “Common Law and Constitutional Dialogues Between the Supreme Court and Canadian Legislatures” (2001), 80 Can. Bar Rev. 481.

<sup>89</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *The Tobacco Act* S.C. 1996, c. 13, s. 4.



serious health risk.<sup>90</sup> All the blame, however, cannot be dumped on the Court or the Charter. The government could have done a better job in justifying the necessity of the total ban in the first place by demonstrating, if the government could, that the total ban was more effective than the less restrictive lifestyle advertising ban. The majority of the Court complained that it did not have access to studies comparing the effectiveness of the two restrictions on advertising. With or without the override, Parliament could have enacted an “in your face” reply that effectively reinstated the old law. Parliament has not been shy about reversing Charter decisions that recognize defence of extreme intoxication (that the Court made available for those accused of sexual assault) and access to complainant’s private records with “in your face” replies when those harmed by the legislation were people accused of sexual assault.<sup>91</sup> One reason that the government did not enact an in your face reply that essentially reversed the Court’s decision may be that the tobacco companies, which pump millions into the economy through corporate sponsorships, have more political power than those accused of sexual assault. This, however, cannot be blamed on the false idea that the Charter promotes judicial supremacy.

Finally, if the government had really wanted to prohibit all tobacco advertising, it need only have pulled the trigger on the section 33 override as apparently recommended by the Minister of Health to the Cabinet.<sup>92</sup> The public, which overwhelmingly supports restrictions on tobacco advertising, could have been persuaded of the need for the override. If governments in Saskatchewan, Quebec and Alberta can be re-elected after using the override against unions, non-French speakers and gays and lesbians respectively, it is a safe bet that the people of Canada would have accepted the use of the override against the tobacco companies that are contributing to the death of so many of us. Critics of judicial activism who profess to be concerned about democracy should accept, with good grace, decisions by their elected governments not to use the override.

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<sup>90</sup> Hiebert, “Wrestling with Rights: Judges, Parliament and the Making of Social Policy” in Howe and Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001), at 180-83; Manfredi, *Judicial Power and the Charter*, *supra*, note 71, at 178-79.

<sup>91</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, s. 33.1 (am. 1995, c. 32, s. 1), reversing *R. v. Daviault*, [1994] 3 S.C.R. 63, with respect to violent general intent offences and *Criminal Code* ss. 278.1-278.91 (am. 1997, c. 30), reversing *R. v. O’Connor*, [1995] 4 S.C.R. 411.

<sup>92</sup> Hiebert, “Wrestling with Rights,” *supra*, note 90, at 201, n. 39.

## VII. THE MYTH OF MAJORITARIAN DEMOCRACY AND UNDEMOCRATIC JUDICIAL REVIEW

The final assumption that should be revealed and the final myth that should be discarded in our debates about judicial activism is the idea that judicial review is inherently undemocratic and that Canadian democracy has traditionally been based on the wishes of the majority unfettered by judicial intervention. Many critics of judicial activism on all sides of the political spectrum argue, with passion, that judicial review is undemocratic. Their views cannot be lightly discarded because there is something odd about a Court of nine appointed and unrepresentative judges striking down legislation enacted by elected governments. It will not do to simply say that elected governments agreed to entrench the Charter. The governments that agreed to the Charter may not have foreseen the evolution of judicial review in Canada and, in any event, they are our old governments, not our current ones. A slightly different take is to argue that some rights are indispensable to a functioning democracy. Long before the Charter, the Supreme Court struck down restrictions on a free press on the basis that they were inconsistent with a functioning Parliament, which requires wide and free debate on matters of public controversy.<sup>93</sup> The idea that judicial review can be justified as enforcing the ground rules of democracy is attractive,<sup>94</sup> but it must be conceded that it is difficult to justify many Charter decisions, especially the majority made with respect to criminal justice, as absolutely or uncontroversially necessary to maintain democracy.

Why then is it a myth to maintain that judicial review is inherently undemocratic? A sense of history is important. The treaties between the First Nations and the Crown indicate that Aboriginal rights are not some recent invention, but have been recognized since the time Europeans came to Canada. Confederation was a creative compromise that tempered majority rule with federalism and minority rights that were subsequently enforced by courts. Canadian history cannot be rewritten so that Lord Durham's dreams of a legislative union where the majority could swamp the minority were actually realized.<sup>95</sup> Like Confederation, the making of the Charter was a creative compromise between the rights of majorities and those of minorities. Pierre Trudeau's insistence on rights for individuals and minorities that could be enforced by the Supreme Court was tempered by the insistence of the provinces

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<sup>93</sup> See, for example, *Reference re Alberta Statutes*, [1938] S.C.R. 100.

<sup>94</sup> See, for example, Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), and Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987).

<sup>95</sup> This is contrary to Morton and Knopff's arguments that we should reclaim the ideas of Lord Durham that "parliamentary sovereignty was the key to protecting rights" (*The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000), at 153).

that rights be subject to both explicit limitation and override by all the elected governments of Canada.

The Supreme Court understands better than many that Canada was never a simply majoritarian democracy. At significant junctures, it has reminded us of the complexity of the sometimes competing concerns that make up Canada's free and democratic society. In the implied Bill of Rights cases from Alberta in the 1930s and Quebec in the 1950s, it reminded us that democracy requires respect for fundamental freedoms.<sup>96</sup> In *R. v. Oakes*,<sup>97</sup> Dickson C.J. reminded us that a free and democratic society depends on respect for individual and group dignity and diversity, as well as democratic institutions that "enhance the participation of individuals and groups in society." More recently in the *Quebec Secession Reference*,<sup>98</sup> the Court reminded us that the core values of Canada include not only democracy, but federalism, minority rights and the rule of law. The starkly majoritarian vision of democracy that critics of judicial activism on both the left and the right have embraced is an incomplete vision that does not do justice to the complex and plural commitments of Canada. It has never existed. If the country is to survive it will never exist. It is an unrealistic and ultimately destructive myth. At the very least it is an inaccurate starting point to measure the effects of the Charter on Canada.

A better starting point is to see the Charter as a continuation of a common law tradition that enhances democracy by requiring legislatures to consider rights, but does not impose the Court's judgments about rights as the absolute final word.<sup>99</sup> It should not be forgotten that in many cases, Charter litigation restrains the discretionary decisions of police officers and other bureaucrats and not the more considered decisions of legislatures. Democracy and the rule of law alike are enhanced when Parliament responds to these decisions with new legislation that authorizes and regulates the police conduct in question. Because of Supreme Court decisions, we do not leave the seizure of DNA samples or the entry into homes to make arrests to the discretion of police officers. We now

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<sup>96</sup> *Reference re Alberta Statutes*, *supra*, note 93; *Saumur v. Quebec (City)*, [1953] S.C.R. 299; *Switzman v. Elbling*, [1957] S.C.R. 285.

<sup>97</sup> [1986] 1 S.C.R. 103.

<sup>98</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

<sup>99</sup> As Lord Irvine has argued, bills of rights such as the United Kingdom's *Human Rights Act, 1998* which allows ordinary legislation to limit or override rights, ensure that human rights are not "a matter of fudge" and that departures from rights "should be conscious and reasoned departures, and not the product of rashness, muddle or ignorance" and that they are made "openly and in the full glare of parliamentary and public opinion" (Lord Irvine, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights," [1998] P.L. 221, at 225-26). For a comparison of Charter rulings with robust common law decisions proclaiming rebuttable presumptions of fault in the criminal law and fairness in administrative law, see my article, "Common Law and Constitutional Dialogues," *supra*, note 88.

have statutory authorization for when and how DNA samples should be taken and when a warrant is and is not required to break down the door of even the “worse and weakest” among us. The Court has not had the last word on police powers, but its decisions have enhanced democracy by generating a legislative reply that promotes public discussion and accountability for the exercise of police powers.

Even on issues of contentious social policy, the Court’s interventions under the Charter can be defended as enhancing and enforcing democracy. Take the case of the Court’s decision in *Vriend v. Alberta*<sup>100</sup> to hold that the exclusion of protection from discrimination on the basis of sexual orientation in Alberta’s human rights code<sup>101</sup> was an unjustified form of discrimination. As suggested above, this decision can be defended as a just recognition of Delwin Vriend’s very real rights to complain that he was fired for discriminatory reasons. Irrespective of the justice of Vriend’s claim, however, the Court’s decision can also be defended as promoting democracy in Alberta. Christopher Manfredi has suggested that “*Vriend* represented the boldest step in a sequence of institutional interactions that promotes the transition from legislative to judicial supremacy in Canada.”<sup>102</sup> For him, the Court’s reference to the ability of Alberta to respond by invoking section 33 was “disingenuous” given “the political delegitimization of the notwithstanding clause.”<sup>103</sup> Alberta’s subsequent use of the override on homosexual marriage, however, implies that Professor Manfredi is wrong to suggest that section 33 is permanently out of bounds. The reason why Alberta did not use the override to overrule *Vriend* was not that section 33 was illegitimate, but because the people and the Premier thought the decision was right. A committed democrat should not complain if the elected government of the people is not prepared to use the override.<sup>104</sup>

Morton and Knopff take a different tack and argue that *Vriend*<sup>105</sup> took away the government’s “preferred choice” which “was not to act at all. ...Prior to the ruling, the Klein government could safely ignore this issue, upsetting only a small coalition of activists, few of whom were Tory supporters in any case.”<sup>106</sup> Refusing to address an issue may technically be a form of policy-making, but it is not a particularly admirable or courageous one. This is especially the case

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<sup>100</sup> [1998] 1 S.C.R. 493.

<sup>101</sup> *Individual’s Rights Protection Act*, R.S.A. 1980, c. I-2.

<sup>102</sup> Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001), at 5.

<sup>103</sup> *Id.*, at 134.

<sup>104</sup> Goldsworthy, “Legislation, Interpretation and Judicial Review” (2001), 51 U.T.L.J. 75, at 80-82.

<sup>105</sup> *Supra*, note 100.

<sup>106</sup> Morton and Knopff, *The Charter Revolution and the Court Party*, *supra*, note 95, at 165.

when the issue is discrimination and the reason for ignoring an issue is that citizens — or what Morton and Knopff dismiss as “a small coalition of activists”<sup>107</sup> — are not needed to support the governing party. The Court’s decision in *Vriend* enhanced democracy by addressing this defect in majoritarian politics while giving the legislature an opportunity to reassert the status quo, if it was willing to do so, in a clear manner. When the government could no longer rely on legislative inertia and avoidance of an issue concerning the rights of an unpopular minority, it was unwilling to defend a discriminatory position unsupported by its own electorate.

*Vriend*<sup>108</sup> enhanced democracy by requiring Alberta to confront how it treated a disadvantaged minority while in no way dictating that equal personhood must be extended to the gay and lesbian minority. Alberta’s acceptance of *Vriend* should help promote faith in democracy by suggesting that given the opportunity to use the notwithstanding clause to discriminate, both the government and the people of Alberta chose the high road, albeit with a little help from the Court. If they had chosen discrimination, at least the override would have preserved the Court’s point of principle and required the legislature to revisit the matter in five years time. Unfortunately, Alberta later chose to short circuit meaningful democratic debate on gay marriage by using the override to prohibit courts from even considering whether present restrictions on marriage are an unjustified form of discrimination against homosexuals. It would have been more democratic to allow the minority and the courts to speak their lines in the dialogue and then decide whether to use the override.

### VIII. CONCLUSION

Despite its common usage and attraction as a shorthand for more complex ideas, the term judicial activism is ultimately not a helpful way to structure debate about judicial review, at least under the Charter or other modern bills of rights that allow legislatures to limit and override rights as interpreted by the Court with ordinary legislation. The label judicial activism obscures more than it illuminates because it allows commentators to criticize the Court without explaining why they believe a particular decision is wrong. Moreover, it allows critics to claim the high moral ground and hint at judicial impropriety without explaining their often controversial views about judging, rights and democracy.

All critics of judicial activism should explain why, if judges are free to impose their world views under the Charter, they still bother to explain their conclusions, not on the basis of personal preferences, but in terms of their

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<sup>107</sup> *Id.*

<sup>108</sup> *Supra*, note 100.

interpretation of the relevant text, precedents and traditions which affect the question before them. It is perhaps inevitable that complex jurisprudential issues cannot always be fully explained, but it would improve the debate if critics of judicial activism made clear what they expect from judges. If this were to occur, many would perhaps dismiss both the framers' intent approach, favoured by some conservative critics of judicial activism, and the deep indeterminacy approach, favoured by some progressive critics of judicial activism, as extreme views about what judges actually do.

Another major limitation of the label judicial activism is that it often hides the user's views about rights. Rights are one of the most theoretically and politically charged issues of our times and reasonable people will disagree about them. At the same time, those criticizing the Court for engaging in judicial activism and those defending the Court from such charges should come clean about their views on rights. Critics on the right have been admirably candid about their views that Charter litigation does not generally involve real rights, but rather focuses on disputes about thwarted policy preferences that should, in most cases, be resolved in the legislature. Critics on the left have also been candid about their concern that the Charter only protects individuals from the state. Those in the media and in politics who raise concerns about judicial activism are often considerably less candid about their scepticism that Charter litigation involves real rights. In all cases, the scepticism about rights should be front and centre in debates about the role of the Court under the Charter. If this is done, the critics of judicial activism may face some tough questions. Do those on the right really believe that gays and lesbians do not have the right to complain about discrimination or to receive equal benefits? Do those on the left really believe that accused individuals do not have rights to evidence that may be helpful to their defence? The public has a right to know and they may be dismissive of politicians and pundits who are too dismissive of their rights.

Finally, the critics of judicial activism should make clear their views about democracy. In order to understand why judicial review is not undemocratic, it is helpful to understand something about Canadian history and our evolving common law tradition. Democracy in Canada has never been about unfettered majority rule. From Confederation on, our courts have been assigned the important task of enforcing the division of powers and minority rights. They have also been responsible for ensuring that governments respect the rule of law by making clear statements if they wish to depart from the fairness values found in the common law surrounding the public law, whether it be criminal or administrative, or Aboriginal rights law. Critics of judicial activism should not be allowed to use the vulnerability of the Court in a populist age to rewrite Canadian history and to recast Canadian democracy in a purely majoritarian light that fails to explain other fundamental aspects of our society, including

federalism, minority rights and the common law. The traditional understanding of Canadian democracy may well be shifting in a more populist and individualistic direction. This controversial understanding of democracy should be front and centre in debates about the role of the Court and the Charter and not obscured by the loaded language of judicial activism and its implicit assumption that judicial review is inherently novel and undemocratic.

My intention in identifying some false and unhelpful assumptions and myths relied upon by those who criticize the Court for engaging in judicial activism has not been to end the necessary and healthy debate about judicial review under the Charter, but only to lay the ground work for a clearer and more transparent debate. A better debate would more directly engage the complex and important issues of judging, rights and democracy that have too often been obscured under the slippery and loaded label of judicial activism.