A Conversation Among Equals: Courts, Legislatures and the Notwithstanding Clause

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Abstract

Dialogue between courts and legislatures can occur where legislatures reverse, modify or avoid judicial decisions. With two exceptions, however, legislatures have only reversed the Supreme Court on three occasions. Defiant legislative responses enacted *without* the notwithstanding clause undermine the *Charter* and the courts, and are an inappropriate means of expressing institutional disagreement. However, based on a model of coordinate constitutionalism, recourse to the override constitutes a legitimate means for legislatures to advance alternate interpretations of *Charter* rights. Furthermore, section 33's value lies in the opportunity it creates for public deliberation regarding issues of national importance. Its relative disuse can be attributed to a combination of factors including its legislative history, the influence of American constitutionalism and an executive-dominated parliamentary process. Recognizing the legitimacy of section 33 would contribute to a greater respect for the roles and responsibilities of all three branches of government under a system of *constitutional* supremacy.

Résumé

Le dialogue entre les tribunaux et les assemblées peut survenir lorsque ces dernières renversent, modifient ou bien évitent des décisions judiciaires. Toutefois, à deux exceptions près, les assemblées n'ont renversé la Cour Suprême qu'à trois reprises. Les répliques législatives provocantes qui sont décrétées sans la clause nonobstant sapent les fondements de la Charte et des tribunaux et constituent une façon inappropriée d'exprimer un désaccord institutionnel. Toutefois, basé sur un modèle de constitutionnalisme coordonné, le recours à la clause nonobstant constitue, pour le législateur, un moyen légitime de faire valoir une interprétation alternative d'un droit protégé par la Charte. De plus, la valeur de l'article 33 repose sur l'opportunité que cet article crée pour une délibération publique concernant des sujets d'importance nationale. Sa désuétude peut être attribuée à une combinaison de facteurs incluant son histoire législative, l'influence du constitutionnalisme américain et l'existence d'un processus parlementaire dominé par l'exécutif. Le fait de reconnaître la légitimité de l'article 33 contribuerait à un respect accru pour les rôles ainsi que les responsabilités des trois paliers de gouvernement sous un système de suprématie constitutionnelle.

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There should be no doubt that it is appropriate for the government to disagree with the Court's interpretation of the Charter, and to act accordingly. The executive and the legislature are duty bound to act in accordance with the constitution, and the constitution is not simply whatever the Court says it is.[1]

- Chapter 1 -

I Introduction

In 1997, Peter Hogg and Allison Bushell wrote "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)"[2] which offered a response to the counter-majoritarian objection to the entrenchment of the *Canadian Charter of Rights and Freedoms*. The article prompted a wide-ranging debate that eventually reached the courts.[3] In *Vriend* v. *Alberta*,[4] Justice Iacobucci justified the Court's decision to read sexual orientation into Alberta's *Individual Rights Protection Act* as a prohibited ground of discrimination by pointing out that "dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it."[5] In *R.* v. *Mills*,[6] Justices Iacobucci and McLachlin (as she then was) wrote that "just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy."[7]

However, scholars and judges are divided over the issue of whether the metaphor provides a satisfactory rejoinder to the counter-majoritarian objection, and both have expressed different views on the degree of activism required of courts in their dealings with the executive and legislative branches. For instance, in *R.* v *Hall*,[8] Justice Iacobucci was strongly critical of the majority opinion delivered by the Chief Justice which he argued was unduly deferential toward parliament. He wrote: "in my respectful view, by upholding the impugned provision, at least in part, my colleague has transformed dialogue into abdication."[9] The Chief Justice responded in *Sauvé* v. *Canada (Chief Electoral Officer*) that "Parliament must ensure that every law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislatures and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again.'"[10] The latter decision prompted one observer to inquire whether the dialogue metaphor retained any significance in the contemporary context.[11]

I contend that dialogue is neither as vibrant as Hogg and Bushell[12] suggest, nor as respectful of the roles of the participants as it might be. The first criticism is substantiated empirically while the second is a normative claim. Hogg and Bushell suggest dialogue between courts and legislatures occurs "where a judicial decision is open to legislative reversal, modification, or avoidance…."[13] Elsewhere, Professor Manfredi has argued that legislative modification of judicial decisions often results in "compliance", while legislative avoidance through inaction frequently leads to "implementation" of the judicially created status quo.[14] This article examines the third option for dialogue: legislative reversals of Supreme Court decisions. With two exceptions, the study concludes there are only three examples of legislatures reversing the Court *without* the notwithstanding clause, and that this avenue for dialogue is, practically speaking at least, illusory. Despite the paucity of reversals, however, I maintain that the override mechanism offers a legitimate tool for governments to advance competing interpretations of the *Charter*, and as such is vital for genuine dialogue between the elected branches and the judiciary. Above all, use of the override affords legislatures and the public the opportunity to participate in the policy-making process regarding issues of national importance.

The first chapter is an analysis of a number of Supreme Court decisions and corresponding legislative reversals enacted without the notwithstanding clause. While parliament's responses to *R.* v. *Daviault* and *R.* v. *O'Connor* were properly enacted without the override,[15] subsequent legislative enactments in connection with *R.* v. *Morgentaler*, *M.* v. *H.* and *R.* v. *Morales* constituted clear reversals of the underlying constitutional principles at issue in those cases and therefore should have incorporated section 33.[16] Defiant responses to cases like *R.* v. *Feeney* and *R.* v. *Duarte* – though not outright reversals – would also have been strengthened through recourse to the override.[17] With the exception of these decisions, I contend that the dearth of legislative – whether or not they incorporate the notwithstanding clause – challenges the view that dialogue is as pervasive as observers have suggested.

The second chapter explores the legitimacy of *legislative* interpretation of *Charter* rights and reversals of Supreme Court decisions using the override. The focus here is on theoretical models of judicial review and different approaches to the notwithstanding clause that have attempted to reconcile it with a system of constitutional supremacy. Coordinate constitutionalism, which attributes equal responsibility to courts and legislatures in interpreting the *Charter*, provides the most appropriate justification for section 33's use in a system of constitutional supremacy.

The third chapter examines a number of possible explanations for the override's desuetude. I maintain the association of the notwithstanding clause with a denial of citizens' rights by the government is caused by a number of factors. These include the circumstances surrounding its enactment, the influence of American constitutionalism as well as the effects of executive dominance on the involvement of parliamentarians in the scrutiny of legislation from a rights perspective.[18] The creation of a special standing committee responsible for scrutinizing legislation from a rights perspective would afford parliamentarians the opportunity to seriously consider use of the override as a means of encouraging discussion in relation to important policy objectives.

As further evidence in support of my thesis, chapter four briefly examines a number of Supreme Court decisions to demonstrate the kinds of situations where section 33 might properly be invoked. My intent is neither to suggest these issues were not properly justiciable, nor that these cases were necessarily incorrectly decided. Instead, the discussion of these decisions is used to draw attention to the potential application of the notwithstanding clause in further clarifying the nature of guaranteed rights and freedoms. This section concludes that more frequent use of the override would be consistent with a model of coordinate constitutionalism and would strengthen legislatures as genuine consultative bodies.

II. Purpose and Methodology

In their 1997 article, Hogg and Bushell found that 80% of the decisions analyzed prompted a legislative response of some kind which they took to be evidence of dialogue between courts and legislatures.[19] However, Professors Manfredi and Kelly have argued

Charter Dialogue suffers from an important normative deficiency.[20] They contend that dialogue is often negative rather than positive, meaning that in the majority of cases identified by the authors, legislatures do what they are told rather than what they want.[21] In *Charter Dialogue Revisited,* Hogg, Bushell Thornton and Wright find continued support for their initial thesis. Furthermore, they maintain dialogue has influenced the remedies used by courts (reading down and suspended declarations of invalidity) and has led to judicial deference in 'second look' cases.[22]

Petter raises two criticisms in response to these claims. First, he takes issue with the use of a purely quantitative rather than a qualitative analysis which obscures the difference between the existence of a legislative response and a legislative response that endorses or repudiates the ruling in whole or in part.[23] To describe judicial review as weak or strong on the basis of a quantitative analysis only says little about the specific nature of the relationship between courts and legislatures and whether it is in fact dialogic. What is required instead is "a comprehensive qualitative analysis of the cases – one that evaluates the substance of the court rulings, their impact upon the legislatures' policy objectives, and the extent to which legislative responses were successful in overcoming, as opposed to accommodating, these impacts."[24] Petter's second critique focuses on the authors' treatment of section 33. Contrary to their claim that the notwithstanding clause has not affected dialogue as a result of its disuse, Petter argues the decision not to use the override has *increased* the strength of judicial review in Canada.[25] In a similar vein, Professor Cameron has argued that section 33 continues to exert a considerable psychological influence which has worked to the advantage of the courts, though she cautions this may not last forever.[26]

Both critiques point to the need for a qualitative analysis of legislative sequels to Supreme Court decisions focusing on how these responses have affected dialogue between the two institutions. Through an examination of a number of legislative reversals of Supreme Court decisions and other defiant legislative responses enacted *without* the procedural safeguards of the override, this commentary assesses an important aspect of the dialogic relationship between courts and legislatures in Canada. Just as legislative compliance with judicial decisions compromises 'dialogue' and poses potential problems for democracy,[27] government by legislative fiat also undermines the relationship between these institutions while diminishing opportunities for public discourse central to parliamentary democracy. The failure of legislatures to be candid about disagreements with the Court's interpretation of a given constitutional principle belies any commitment to a shared responsibility for interpreting the *Charter*. Moreover, legislative defiance detrimentally affects vulnerable groups whose rights such responses are intended to protect.

For the purposes of this study, legislative "reversal" is defined as a legislative rejection of a decision's fundamental constitutional holding. Manfredi adopts a broader conception of reversals which he defines as: "legislative rejection of a decision's fundamental constitutional holding that *there is a conflict between the impugned action and the Charter*."[28] This definition disqualifies legislative responses to Supreme Court decisions *confirming* the constitutionality of legislation. However, since legislatures on occasion respond to decisions that uphold the constitutionality of a statute, but opt nonetheless to reject in whole or in part the Court's interpretation of the underlying constitutional principle, a narrower definition of reversal was preferred here.[29] The analysis is limited to legislative responses to decisions of the Supreme Court as the final arbiter in constitutional matters.[30] Parliamentary *and* provincial legislative enactments are considered since both levels of government are actively involved in interpreting the *Charter*. Finally, the study is limited to an analysis of Supreme Court decisions and legislative replies rendered and enacted on or after 1988, using the Supreme Court's first *Morgentaler*[31] decision as the dividing line.

Before examining legislative reversals enacted *without* the notwithstanding clause, it is helpful first to briefly consider one instance in which the override *was* invoked in support of a provincial legislature's decision to reverse a contentious ruling. In my view, the National Assembly's response to the *Ford*[32] decision is an example of an appropriate, albeit controversial, use of the override to signal a legitimate legislative disagreement with the Supreme Court's interpretation of a fundamental constitutional principle. It therefore provides a useful normative framework for understanding how effective dialogue involving the notwithstanding clause ought to proceed.[33]

III. Legislative Reversals

A. Language Rights: *Ford* v. *Quebec (Attorney General)*

At issue in *Ford* v. *Quebec (Attorney General)* was the constitutionality of Quebec's *French Language Charter* which prohibited the use of any language other than French on signs, posters, commercial advertising and firm names. The Attorney General of Quebec argued that freedom of expression under the Canadian *Charter* and the *Quebec Charter of Human Rights and Freedoms*[34] did not extend to freedom of expression in the language of one's choice. Alternatively, it was contended that the protection afforded freedom of expression did not extend to the kind of commercial expression at issue in this case.[35] The Court rejected both submissions and held that while "requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the Canadian *Charter*, requiring the exclusive use of French has not been so justified."[36]

As often observed, the political situation in Quebec at the time was extremely volatile. Campaigning against the referendum on sovereignty association to be held under the newly elected Parti Québécois of Premier Lévesque, Prime Minister Trudeau promised Quebecers a no vote would constitute a mandate for a renewed federalism with the rest of Canada.[37] While Trudeau succeeded in his goal of uniting Canada by entrenching collective language rights in the *Charter*, patriation was achieved without Quebec's assent during the infamous Night of the Long Knives. An embittered Quebec refused to recognize the *Charter*'s validity and in an act of protest invoked the notwithstanding clause in relation to all statutes enacted prior to April 17, 1982.[38] At the time of the Court's decision in *Ford*, the country was engaged in another episode of mega-constitutional politics as provincial legislatures were considering the terms of the Meech Lake Accord.[39] In an attempt to achieve a compromise between the Court's ruling and the province's policy objectives, the Bourassa government enacted Bill 178 shielding the impugned provisions of the *French Language Charter* from judicial scrutiny by using the notwithstanding clause.

One of the consequences was not only Meech Lake's defeat,[40] but also the degradation of the override as "Quebec's decision to exercise this power to protect the restrictive language provisions of Bill 178 severely undermined the *political* legitimacy of section 33."[41] Others, however, have offered a more sanguine assessment of the override's use by Quebec. Peter Russell has recently argued that the province's invocation of section 33 both in 1982 and in 1988 may actually have had a positive impact. Not only was the override allowed to lapse in 1993 (nor has it been re-enacted in this context by subsequent governments in Quebec), Russell contends "that the availability of the override helped to dampen down nationalist feelings that the 1982 constitutional changes had robbed Quebec of its autonomy."[42]

Thus, while Bourassa's use of the notwithstanding clause in response to the Supreme Court's ruling in *Ford* constituted an unequivocal reversal of the Court's interpretation of freedom of expression in that case, it was a decision which reflected the prevailing values of a majority of Quebecers at the time, and it was enacted in conformity with constitutional standards. Although discussions regarding the consequences of using section 33 in this instance were brief,[43] this ought to be attributed to the prevailing political climate rather than a deficiency with the override or an intent by the Quebec government to abuse its powers. Consequently, Quebec's invocation of the override in 1988 constitutes a valid expression of a legitimate legislative disagreement with the Supreme Court in relation to the appropriate interpretation of freedom of expression.

In a number of responses to subsequent decisions, however, legislatures have chosen to express their disagreement with the Court's interpretation of the *Charter without* deeming it either necessary or expedient to invoke the notwithstanding clause. As we shall see, there were good reasons for such a course of action in two instances only. In the remaining cases, legislative sequels enacted without the override's procedural safeguards have undermined both the Court and the *Charter*, while circumventing opportunities for debate on a number of important issues. The two exceptions noted above are addressed immediately below before turning to an examination of the remaining cases.

B. Sexual Assault: *R.* v. *Daviault* and *R.* v. *O'Connor*

In *Daviault*, the accused was charged with sexually assaulting a sixty-five year old woman confined to a wheelchair while in a state of extreme intoxication. At issue was whether self-induced intoxication resulting in a state closely resembling automatism constituted a valid defence to a general intent offence. The Supreme Court acquitted the accused and ruled that a conviction without evidence of *men rea* violated sections 7 and 11(d) of the *Charter*.[44] The dissenting judges argued that because of the moral opprobrium associated with such offences, neither the principles of fundamental justice nor the presumption of innocence would be violated by substituting the mental element required in voluntarily becoming intoxicated for the mental element required in the commission of subsequent offences. This, they argued, was a logical consequence of the fact that a person is normally presumed to have anticipated the consequences of his actions.[45]

Bill C-72 reversed *Daviault* by adopting the minority's position in that case.[46] A number of elements in the preamble to the legislation corroborate this view.[47] First, parliament disputed the foundation on which the majority opinion was constructed. Possibly anticipating a future section 1 defence, the legislature indicated in its preamble that it was "aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily."[48] Second, the legislature agreed with Canadians "that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it."[49] Third, parliament reversed the majority by enacting the remedy prescribed by the minority in *Daviault*.[50] In creating section 33.1(1),[51] the legislature endorsed the view that "to allow generally an accused who is not afflicted by a disease of the mind to plead absence of *mens rea* where he has voluntarily caused himself to be incapable of *mens rea* would be to undermine, indeed negate, that very principle of moral responsibility which the requirement of *mens rea* is intended to give effect to."[52]

Another clear example of a legislative reversal occurred two years later in parliament's response to *O'Connor*. O'Connor was a Bishop charged with two counts of rape and two counts of indecent assault, both alleged to have taken place some twenty-four years earlier. The accused applied for, and was eventually granted, a stay of proceedings as a result of the Crown's failure to comply with a disclosure order. At issue was the propriety of the stay and the appropriate procedure for obtaining disclosure and production of the private records of complainants in the hands of third parties.

The five member majority ruled that the disclosure and subsequent production of documents in the hands of third parties ought to proceed in accordance with a two-step process.[53] The minority adopted a different approach which balanced the right to full answer and defence with the right to privacy and the right to equality without discrimination.[54] While the first step in the two-step production process set out by the minority also required that the accused demonstrate the likely relevance of the information sought, the threshold imposed at this initial stage was comparatively higher.[55] Furthermore, the minority decided that where the documents were found to be relevant, a weighing of the salutary and deleterious effects of ordering production must take place twice, first on ordering production to the Court, and again (if warranted) on ordering further production of a part or all of the material to the accused.[56] Where the Court is satisfied that production to the accused is warranted having regard to all of the constitutional rights at issue, Justice L'Heureux-Dubé listed a number of factors for consideration, including society's interest in the reporting of sexual offences and the effect of a production order on the integrity of the trial process. In the majority's view, neither were not relevant considerations.[57]

Parliament responded two years later by amending select provisions of the *Criminal Code*.[58] The response to *O'Connor* targeted *R.* v. *Carosella*[59] as well which also dealt with the disclosure of private records in the hands of third parties. Bill C-46 is a clear reversal of the Supreme Court's rulings in *O'Connor* and *Carosella* regarding the appropriate procedure governing the disclosure and production of private records in the custody of third parties. First, parliament rejected the majority's definition of 'likely relevance' as information that 'might be useful to the defence' in favour of the comparatively higher standard proposed by the minority. The elements listed in section 278.3(4) of Bill C-46, any one of which is "not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify,"[60] is a codification of the factors characterized by Justice L'Heureux-Dubé as the kind of "bare, unsupported suspicion" which can never meet the requisite threshold of relevance.[61] Second, and contrary to the procedure set out by the majority, section 278.5(2) mandates the carrying out of a balancing test at the *first* stage of the process involving production of the record *to the court*.[62] Third, in weighing the salutary benefits against the deleterious effects both at the stage of a production order to the court and to the accused, parliament accepted the minority's view that society's interest in encouraging the reporting of sexual offences and obtaining appropriate treatment, and the importance of preserving the integrity of the trial process, are relevant factors for consideration.[63] Finally, the legislature acceded to Justice L'Heureux-Dubé's suggestion that any production of documents ordered be carefully structured so as to minimize any incursions of the complainant's privacy rights.[64]

The preamble to Bill C-46 provides further evidence of parliament's intent to reverse the majority of the Court in both instances on this issue. First, direct reference in the preamble to "the prevalence of sexual violence against women and children" and "the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*"[65] reflects the importance Justice L'Heureux-Dubé attributed to the competing constitutional values at issue and to her belief that "privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness."[66] Moreover, parliament's commitment to encouraging the "reporting of incidents of sexual violence" and to "seeking necessary treatment, counselling or advice"[67] are direct allusions to two of the factors the minority stressed were important considerations in balancing competing interests at both stages of the production process. Finally, recognition in the preamble that "the work of those who provide services and assistance to complainants of sexual offences is detrimentally affected by the compelled production of records and by the process to compel that production"[68] is a testament to parliament's acceptance of the minority's concerns in *Carosella* regarding the preservation of private information in the hands of third parties.

Although the constitutionality of Bill C-46 was upheld in *Mills*, the legislature's reversal of *O'Connor* (and *Carosella* on the issue of the production of records in the possession of third parties) prompted one commentator to observe that "when Parliament overturns precedent by ordinary legislation, characterizing the response as dialogue legitimizes a form of institutional confrontation that should be channelled through s.33's mechanism for overriding the *Charter*."[69] However, while there can be little doubt that the legislative responses to the *O'Connor*, *Daviault* and *Carosella* decisions are clear examples of reversal, in my view they were properly enacted *without* the notwithstanding clause in these cases for the reasons advanced below.

In assessing the legitimacy of legislative responses to alleged *Charter* breaches, it is important to distinguish between judicial review of a statute and judicial review of a common law rule. In the former case, the Court benefits from the legislature's assessment of the appropriate balance between competing rights claims. Where a statute or provision thereof is found to be an unreasonable limit on a *Charter* right and is invalidated on that basis, the override must be used if the legislature wishes to preserve its interpretation of the impugned right. In the latter case, however, use of the override to shield legislation from scrutiny pre-empts judicial review and undermines liberal constitutionalism. Where its decision is based on the common law, the Court does not benefit from the legislature's input regarding the competing rights claims at stake. It is conceivable that legislation designed to reformulate a common law rule will satisfy *Charter* requirements without the legislature having to invoke the notwithstanding clause. Doing so prematurely forecloses the opportunity for the Court to assess the constitutionality of the legislative response, and thus undermines the democratic process:

> Moreover, reasonable disagreements may arise when the judiciary reinterprets a common law rule in light of Charter values. The absence of legislation, hence reliance on the common law rule, means that Parliament has not made clear its assessment of the relative balance struck between Charter principles and law enforcement or other public concerns. Consequently, when the judiciary revises a common law rule, it is not aware of Parliament's perspective. Subsequent legislative judgment might differ from the judiciary's newly formulated rule. The mere fact of this difference does not automatically render Parliament's judgment invalid.[70]

The Court in *Mills* recognized the legitimacy of a legislative response to a ruling based on the common law which adopted a different approach to the one preferred by the Court. According to the majority, "if the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy."[71] In the case of *Daviault*, Roach has argued that parliament should have included the notwithstanding clause as part of its legislative response, and that its failure to do so undermined the Court as well as the interests of the accused.[72] I agree with Manfredi and Kelly that parliament's response in this instance constitutes "an excellent example of genuine dialogue" since it is consistent with the coordinate approach to constitutionalism discussed below.[73] Had *Daviault* involved consideration of a statute rather than a common law rule, parliament's response would have been a clear example of an impermissible legislative reversal. However, under the circumstances, "including the override in the amendments would have deprived the Court of the opportunity to review whether the clarification satisfied its original concerns, or whether the constitutional principle articulated in *Daviault* is so fundamental that is should not be reversed."[74]

With the exception of these three cases and the *Ford* decision, however, there are very few examples of legislative reversals of Supreme Court decisions. The exceptional situations where this has occurred are discussed below. While the legislatures were entitled to rely on contending interpretations of the *Charter* rights at issues in these cases, I argue that the notwithstanding clause constitutes the appropriate procedural vehicle for articulating this kind of institutional disagreement. Without the procedural safeguards section 33 affords, I agree with Professor Roach that such enactments "diminish[...] respect for the Court as an institution, trivialize[...] the Court's precedents, and allow[...] the rights of the most unpopular people to be defined by elected politicians."[75]

C. Abortion: *R.* v. *Morgentaler*

In a decision dealing with the constitutionality of Canada's abortion legislation, the Supreme Court ruled that section 251 of the *Criminal Code* violated the principles of fundamental justice and could not be saved by the reasonable limitations provision of the *Charter*.[76] Four of the five judge majority ruled the provision was deficient on procedural grounds, arguing that "the structure – the system regulating access to therapeutic abortions – is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence."[77] Justice Wilson dismissed the majority's approach which in her view obscured the central issue on appeal.[78] Preferring to address the substantive aspect of the section 7 guarantee, she concluded that the right to life, liberty and security of the person conferred on women the right to lawfully terminate an unwanted pregnancy.[79] Justices McIntyre and LaForest dissented, taking the view that the procedural guarantees afforded by section 7 could not be said to constitute a right that is properly within parliament's jurisdiction.[80]

The fundamental constitutional principle at issue was whether principles of fundamental justice prohibited women from obtaining an abortion in accordance with section 251 of the *Code*. Although the Court was divided on the substantive versus procedural approach to the question, a majority of the justices found the criminal prohibition to be inconsistent with the *Charter*. Five years later, and in response to Dr. Morgentaler's intention to open an abortion clinic in Nova Scotia, the provincial legislature enacted legislation to prohibit the procurement of abortions in non-accredited facilities. Just as section 251 at issue in *Morgentaler I* restricted the procurement of abortions to practitioners operating in an accredited hospital, section 4 of the *Medical Services Act* stipulated that "no person shall perform or assist in the performance of a designated medical service [including an abortion[81]] other than in a hospital approved as a hospital pursuant to the *Hospitals Act*."[82] Through the enactment of the *Medical Services Act* and concomitant regulations, the Nova Scotia legislature attempted to criminalize the procurement of abortions in private clinics in the province.

It might be contended in defence of the Nova Scotia enactments that four of the justices in *Morgentaler I* only ruled on the constitutionality of the prohibition of abortion in accordance with the mechanism created by section 251 of the *Code*, and not on the constitutionality of abortion *per se*. First, however, it must be remembered that Justice Wilson argued forcefully that section 7 granted women the right to an abortion regardless of the procedure mandated by section 251. Second, although the Chief Justice and Justice Lamer confined their opinions to the procedural aspects of section 7, they did not rule out the possibility that a substantive approach to the right to life, liberty and security of the person could afford a broader protection.[83] The most convincing evidence that the legislature rejected the ruling in *Morgentaler I*, however, is to be found in the companion *Morgentaler II* decision.

At issue in *Morgentaler II* was whether the *Medical Services Act* and corresponding regulations were *ultra vires* the Nova Scotia legislature. Answering that question in the affirmative, a unanimous Court held that the pith and substance of the legislation in question was appropriately characterized as criminal law and therefore within the exclusive jurisdiction of the federal government.[84] Of particular interest was the Court's characterization of the "primary objective of the legislation [which] was to prohibit abortions outside hospitals *as socially undesirable conduct*, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession *was merely ancillary*."[85] In enacting the *Medical Services Act*, the Nova Scotia legislature sought to reverse the Supreme Court's decriminalization of abortion in Canada. The proper procedure for expressing its disagreement over this contentious issue was the notwithstanding clause.

D. Same-Sex Common Law Relationships: *M.* v. *H.*

Other Supreme Court decisions have elicited similarly defiant legislative responses from provincial governments. In *M.* v. *H.*, an unmarried lesbian couple had lived in a conjugal union without children. When their relationship ended, M. sought various forms of relief, including a claim for spousal support under the *Family Law Act*.[86] At issue was the constitutionality of section 29 thereof which limited spousal support to married and unmarried opposite-sex couples. A majority of the Supreme Court found section 29 to be a clear violation of the respondents' right to equality which could not be justified in a free and democratic society.[87] In a dissenting opinion, Justice Gonthier attributed a different purpose to the legislation. In his opinion section 29 did not infringe the respondents' right to equality since "individuals in same-sex relationships do not carry the same burden of fulfilling the social role that those in opposite-sex relationships do. They do not exhibit the same degree of systemic dependence. They do not experience a structural wage differential between the individuals in the relationship."[88]

The legislative response to *M.* v. *H.* conveyed displeasure with the Court's ruling. In *An Act to amend certain statutes because of the Supreme Court of Canada decision in M.* v. *H.*,[89] the Ontario legislature created a separate category of beneficiary under section 29 entitled "same-sex partners" which applied to the remainder of Part III of the *FLA*.[90] To some, this might be construed as confrontational reply to the Supreme Court's ruling, if not an outright reversal of the underlying constitutional principle in that decision. A majority of the Court made clear its concern that a distinction between unmarried opposite-sex and same-sex couples regarding the applicability of the spousal support mechanism constituted a discriminatory distinction which could not be justified in a free and democratic society. The legislature contented itself with creating a *separate* category for "same-sex partners" rather than amending the definition of "spouse" which already included married and unmarried opposite-sex couples.[91] Moreover, the *M.* v. *H. Act* amended a host of other statutes by distinguishing between spousal families and same-sex households.[92] The following remarks of counsel for the respondent M. emphasize the statute's narrow focus:

> instead of affirming the equality of gays and lesbians, the statute that credits her tireless court battle as its rationale instead contributes to the very discrimination M was seeking to remedy . . . If [M.'s] case ends with the court condoning the *M.* v. *H. Act*, [M.] will have achieved nothing more than having her pseudonym on a piece of discriminatory legislation.[93]

Notwithstanding the seemingly confrontational nature of this legislative response, it cannot properly be considered a legislative reversal since the legislature did not *reject* the Supreme Court's interpretation of the underlying constitutional principle at issue. In fact, the Court was at pains to constrain the focus of its ruling to the legality of the distinction between *unmarried* opposite and same-sex couples regarding the applicability of the spousal support mechanism under Part III of the *FLA*. In paragraph two of the reasons of a six judge majority, Justices Cory and Iacobucci "emphasize that the definition of "spouse" found in s.1(1) of the *FLA*, and which applies to other parts of the *FLA*, includes only married persons and is not at issue in this appeal."[94] Justice Cory is even more explicit when he states that the "observations on the structure of the *FLA* serve to emphasize that this appeal has nothing to do with marriage *per se* . . . The rights and obligations that exist between married persons play no part in this analysis."[95] Thus it was possible for the legislature to comply with the Court's ruling without altering the definition of spouse in either Parts I or III of the *FLA*.

The same year, however, Alberta amended its *Insurance Act*[96] in a manner which completely contradicted the majority ruling of the Supreme Court in *M.* v. *H.* There can be little doubt that the changes implemented as a result of the *Insurance Statutes Amendment Act*[97] reversed the Court's interpretation of the underlying principle at issue in that case. In a piece of legislation adopted less than six months after the ruling, the Alberta legislature opted to define a "common law relationship" as one "between 2 people of the *opposite* sex."[98] According to one observer, this constituted a "direct *contradiction* [of] the principles articulated in *M.* v. *H.*"[99] In defence of the government's position, the minister argued the *Insurance Statutes Amendment Act* was "not intended to redefine family law."[100] However, all provincial and federal legislative enactments are subject to the *Charter*, regardless of the subject matter they purport to address. Moreover, Alberta has since amended its definition of "spouse" to comply with the decision in *M.* v. *H.*,[101] while other provincial legislatures have modified their definitions of "spouse" as it applies to *both* married and unmarried persons, going beyond the minimal requirements set out in that case.[102] Although not enacted in direct response to the Court's ruling in *M.* v. *H.*, *Bill 44* nonetheless constitutes a clear legislative reversal of the underlying constitutional principle at issue in that case.

E. Bail: *R.* v. *Morales*

Parliament's response to *Morales*, which involved the constitutionality of Canada's bail provisions, is another example of a legislative reversal without the notwithstanding clause. Morales was charged with a number of offences involving narcotics and was awaiting trial for another offence at the time of his arrest. His application for bail was denied but the ruling was overturned by the Superior Court which ordered his release on certain conditions. At issue on appeal was the constitutionality of section 515(10)(b) of the *Criminal Code*[103] which permitted preventive detention in the public interest or for the protection of the public. A majority of the Court upheld the "public safety" component but struck down the "public interest" component on the basis of general vagueness and imprecision. An overly vague provision is deemed to violate the principles of fundamental justice protection by section 7 of the *Charter*.[104] That was the case here since the expression "public interest" "gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention."[105] Justice Gonthier dissented on the grounds that the breadth of the expression "public interest" did not imply impermissible vagueness but rather provided an appropriate measure of judicial discretion.[106]

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

> 515(10): For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
> (c) on any just cause being shown and, without limiting the generality of the foregoing, where detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.[107]

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

The constitutionality of Parliament's legislative amendments to the *Code* as a result of the *Morales* decision was reviewed by the Supreme Court in *R.* v. *Hall.*[108] With respect to the words "any just cause being shown," a *unanimous*[109] Court held such a broad and vaguely worded grant of judicial discretion could not withstand constitutional scrutiny. According to the Chief Justice, "Parliament cannot confer a broad discretion on judges to deny bail, but must lay out narrow and precise circumstances in which bail can be denied."[110] On behalf of the four dissenting judges, Justice Iacobucci noted more tersely that "the vague moniker of "any other just cause" represents a Parliamentary regression to a situation similar to that which existed prior to the enactment of the *Bail Reform Act* in 1972, when bail was a matter of fairly unrestricted judicial discretion."[111]

The constitutional principle at issue in *Morales* was the notion that bail could only be legally denied in a narrow set of circumstances which warrant depriving the accused of his liberty in the interest of promoting the proper functioning of the bail system.[112] According to the Court's interpretation of that underlying constitutional principle, a broad judicial discretion to deny bail in the 'public interest' violated the *Charter* guarantee against being denied bail without just cause. Parliament's response to the judicial caveat that "cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice"[113] was the enactment of a legislative amendment condoning the denial of bail "on *any* other just cause being shown and, *without limiting the generality of the foregoing* . . ."[114] The fact that a unanimous Court devoted a total of seven paragraphs declaring this to be a violation of section 11(e) of the *Charter* suggests this portion of parliament's legislative reply constitutes a clear reversal of the Supreme Court's ruling in *Morales*. There is, however, more to the issue.

The majority of the Court led by the Chief Justice held that the remainder of section 515(10)(c), which legitimated the denial of bail in the interest of maintaining confidence in the administration of justice, was constitutional and characterized Parliament's response as "an excellent example of . . . dialogue."[115] However, Justice Iacobucci argued forcefully that this re-enactment was nothing more than a revival of the condemned 'public interest' ground which could not survive constitutional analysis:

> By enacting s. 515(10)(*c*), Parliament has essentially revived, albeit with more elaborate wording, the old "public interest" ground that this Court struck down in *Morales*. [...] In my view, s. 515(10)(*c*) invokes similarly vague notions of the public image of the criminal justice system, the only difference being that in s. 515(10)(*c*) the public image standard is expressed by the phrase "maintain confidence in the administration of justice" as opposed to the term "public interest".[116]

In Justice Iacobucci's view, parliament's response departs markedly from what might be expected of a supposedly dialogic relationship between courts and legislatures. Commenting on the respective responsibilities of both participants in this process, Justice Iacobucci cited *Mills* with approval, noting that "it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may *build* on the Court's decisions, *and develop a different scheme* as long as it remains constitutional."[117] In other words, the minority took for granted the fact that Parliament was at liberty not only to respond, but to "build on" and construct a "different scheme" from the Court's interpretation of a particular constitutional principle. The fact that it found parliament's response in this case *not* to fall within that sphere of legitimate legislative activity supports the argument that this is a clear example of legislative reversal. Indeed, far from contributing to a healthy dialogue between both institutions, parliament's response in this instance:

> demonstrates how this constitutional dialogue can break down. Although Parliament has responded to this Court's decision in *Morales*, it has not done so with due regard for the constitutional standards set out in that case. *On the contrary, Parliament has essentially revitalized the "public interest" ground struck down in that case.*[118]

The obvious room for disagreement surrounding the constitutionality of this legislative sequel is evinced by the sharp divisions it provoked in the reasons for judgment delivered by the Court in *Hall.* Given the Court's caution in *Morales* that broadly worded judicial discretion in a context where individual liberty is at stake violates principles of fundamental justice, and given parliament's intent to enact a provision justifying the denial of bail "on any other just cause being shown and, without limiting the generality of the foregoing," this was an appropriate case to invoke the notwithstanding clause. The fact that a *unanimous* Court struck down those words as a violation of the guarantee against arbitrary detention, combined with the fact that a minority of four justices took the view that denying bail to maintain confidence in the administration of justice constituted a revival of the 'public interest' standard, corroborates this view.

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

There are, however, a number of instances where the duty to invoke section 33 is less clear-cut. In several cases, rather than completely rejecting the Court's interpretation of the constitutional principle(s) at issue, legislatures have responded by adopting a significantly different approach to the protection of rights than that preferred by the Court. This is indeed an important legislative prerogative and one which ought to be vigorously defended. However, it may be prudent in cases where the approach privileged by the legislatures differs markedly from the approach taken by the Court to invoke the notwithstanding clause to generate a more transparent discussion regarding the policy at issue. Two such 'defiant' legislative responses, though not "reversals" as that term is defined here, provide examples of cases where recourse to the override would afford greater respect for the Court, greater protection for the accused and an opportunity to publicly discuss important policy questions.

IV. Legislative Defiance

A. Warrantless Searches and Consent Surveillance: *R.* v. *Feeney* and *R.* v. *Duarte*

At issue in *Feeney* was the legality of warrantless searches. In the context of a murder investigation, police entered the accused's dwelling without a warrant and arrested him when blood stains were discovered on his shirt. After being read his rights, the accused was questioned and made a number of incriminating statements. He was then transported to the station where he was fingerprinted, given a breathalyser and detained for further interrogation. The Supreme Court divided five to four on three key issues.

First, the majority took the view that entry into the accused's trailer without a warrant was unlawful *both* at common law and under the *Charter*. The police did not have reasonable and probably grounds to believe the accused was involved in the murder. Since this was not a case of hot pursuit and no exigent circumstances existed, forced entry into the trailer without a warrant constituted an unreasonable search and seizure.[119] Justice Sopinka expressly left "for another day the question of whether exigent circumstances other than hot pursuit may justify a warrantless entry in order to arrest. I do not agree with my colleague L'Heureux-Dubé J. that exigent circumstances generally necessarily justify a warrantless entry – in my view, it is an open question."[120] Second, police failure to state their purpose for entry amounted to an improper announcement.[121] In light of the circumstances surrounding the arrest, however, the majority decided "the announcement question . . . does not need to be finally resolved."[122] Third, the accused's section 10(b) rights were violated when the police detained him without immediately reading him his rights and providing him with an opportunity to exercise them.[123] As a result of the seriousness of these Charter breaches and their impact on trial fairness and the repute of the administration of justice, the majority excluded all of the evidence.

Contrariwise, the minority argued warrantless searches are legal where the police have reasonable and probable grounds to believe the accused has committed an indictable offence, is to be found within the premises and where proper announcement is made. Since the police had reasonable and probable grounds to believe Feeney had committed the murder in this case, the entry was justified.[124] The same judges also reasoned that a warrantless search of a dwelling without reasonable and probable grounds is justified in cases of hot pursuit *or* in the presence of exigent circumstances.[125] More, Justice L'Heureux-Dubé held that the announcement requirements were properly fulfilled in this case.[126] Finally, in the minority's opinion the accused's right to counsel was not breached by the brief delay between being detained and being read his rights, since police are entitled to first assess and gain control of the situation.[127]

A succinct analysis of a number of points of contention between the majority and minority opinions will provide a useful framework for assessing the legitimacy of the legislative response to the decision. The first deals with exigent circumstances, and the second with the requirements of announcement prior to entry. While the majority declined to discuss the issue, the minority was of the view that exigent circumstances could indeed justify a warrantless search of a dwelling in keeping with the requirements of section 8 of the *Charter*, and that such circumstances existed in the present case. Specifically, "where there is a genuine fear that evidence of the crime will be lost, this can constitute the necessary exigent circumstances for a warrantless entry."[128] This is in sharp contrast with the position taken by the majority stating that "whether or not there is a need to preserve evidence is logically irrelevant to the question of whether there are reasonable and probable grounds for an arrest."[129] The second point of contention is of particular interest here. Whereas the majority held the police failed to announce their purpose in this case, contributing to the illegality of the entry, the minority was unequivocal that "in some cases it would be contrary to common sense to announce the purpose of entry once it was clear that the person inside was refusing or unable to answer the request to enter."[130] Both points were addressed in parliament's reply to *Feeney*.

Bill C-16 codified the majority's ruling that police must generally obtain a warrant to enter a dwelling for the purpose of conducting an arrest.[131] However, both the preamble to the Bill and the provisions it enacts give precedence to the views expressed by the minority on a number of issues. With respect to exigent circumstances, parliament was careful to note in the preamble that "circumstances may nonetheless exist that justify entry into a dwelling-house [in order to arrest or apprehend a person] *in the absence of prior judicial authorization*."[132] Section 529.3(2) provides a non-exhaustive list of potential "exigent circumstances" which includes entry for the purpose of preventing "the imminent loss or imminent destruction of the evidence."[133] Although the majority declined to discuss the issue of exigent circumstances, they specifically ruled out the possibility of the potential loss of evidence satisfying this threshold.[134] In this regard, the adoption of this provision seems an unqualified rejection of the majority's ruling on this issue.[135] Similarly, section 529.4(3) allows the police to enter a dwelling without prior announcement for security reasons or to prevent the destruction of evidence.[136]

Although Bill C-16 did not overtly reject the Supreme Court's interpretation of the underlying constitutional principles at issue in *Feeney* (with the possible exception of defining exigent circumstances to include the imperative of preserving evidence), several of the provisions enacted either disregard the views expressed by the Court as a whole or adopt a position set forth by the minority. For instance, the authority to enter a dwelling without a warrant in the presence of exigent circumstances exists where police have reasonable grounds to "suspect" that entry is required to prevent imminent bodily harm or to preserve evidence.[137] This comparatively lower threshold is contrary to the positions adopted by both the majority and the minority on this issue.[138] In the same vein, parliament's decision not to require two separate warrants, one authorizing the arrest and a second authorizing entry for the purpose of arresting, is contrary to the majority's ruling. While not an outright reversal, since parliament *did* legislate a requirement that police obtain a warrant authorizing entry (which would at the same time legitimate a subsequent decision to arrest), "what is uncertain is whether the standard for obtaining a warrant to enter a dwelling is high enough to satisfy the court, particularly if the legislation has this effect of allowing police to decide if they have the right person to arrest once they are inside the dwelling."[139] Viewed as a whole, the majority's overarching concern for the privacy rights of the accused and the dangers associated with unwarranted searches was supplanted by more expansive legislation authorizing precisely these kinds of searches. According to Professor Roach, "a due process decision stressing the importance of warrants resulted in legislative authorization of warrantless searches and entries without announcement."[140] A similarly defiant legislative sequel was enacted in response to the Supreme Court's decision in *R.* v. *Duarte*.

Duarte involved the constitutionality of "consent" surveillance. According to this form of electronic espionage, police are able to lawfully intercept and surreptitiously record a conversation without prior judicial authorization, provided that one of the parties (an informant or undercover police officer) consents to the recording. Before the advent of the *Charter*, this type of interception was justified on the basis that those sharing confidences run the risk that the recipient may betray them either by relaying the information to a third party or by testifying against them in court. More recently, however, the Court has taken the view that warrantless consent surveillance constitutes an unreasonable search and seizure contrary to section 8 of the *Charter* and can not be justified in a free and democratic society. The objection is not to the state's use of electronic surveillance in the interests of protecting the public, but rather to the state's ability to employ this particular kind of surveillance without having to establish sufficient grounds justifying the intrusion before a neutral third party.[141] According to the Court in *Duarte*, the absence of such a requirement was not justifiable under the *Charter*. Although unauthorized consent surveillance was found to violate section 8, the evidence obtained in this case was nonetheless admitted on the basis that the police had acted in good faith and could easily have obtained it by alternate means.[142]

Parliament's response to *Duarte* resulted in amendments to the *Code* allowing for precisely the kind of unsupervised surveillance the majority had decided violated the guarantee against unreasonable search and seizure. Indeed, section 4 of the *Act* allows the police to engage in warrantless consent surveillance where the "*officer* believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property."[143] The defiant nature of the response is well captured by Professor Roach:

> Even though the Supreme Court had strongly criticized the use of wires without warrants, the new amendments allowed the police to avoid having to obtain a warrant if there was either 'a risk of bodily harm to the person who consented to the interception; and the purpose of the interception is to prevent bodily harm' or an urgent situation where a warrant could not be obtained 'with reasonable diligence'. *A judicial decision decrying the dangers of warrantless wires produced legislation authorizing them.*[144]

What is being advocated here is neither strict legislative compliance with the dictates of Supreme Court decisions nor immediate invocation of section 33 at the first signs of disagreement. Neither approach would be conducive to effective *Charter* interpretation, while both would undermine the strengths each institution brings to bear in that process. Rather, in cases where legislative interpretation of the *Charter* transgresses the line between innovation and outright disagreement without necessarily *rejecting* the Court's interpretation of the underlying constitutional principle, it may be advantageous to invoke the notwithstanding clause to engage public discussion. Indeed, in relation to the *Feeney* case, parliamentarians expressed significant frustration at not being afforded sufficient time to adequately address all of the contentious issues raised by the decision:

> The process leading to and driving the development, drafting and parliamentary consideration of Bill C-16 has fully satisfied none of the participants who have taken part in it . . . The Committee had only several days to receive, absorb and analyze the issues dealt with in Bill C-16. The process allowed only a short time for the Committee to invite and consider submissions from witnesses. Those who appeared before us did so under severe time constraints and, even so, were of great help to us in our role as lawmakers. The accelerated timeframe, however, did not allow the Committee to benefit fully from all the detailed submissions it would have liked to consider on the complex issues dealt with in *R.* v. *Feeney* and in Bill C-16 itself.[145]

One means of avoiding such an outcome – which includes the enacting of possibly unconstitutional legislation – would be to invoke the notwithstanding clause to ensure the adequate protection of the rights of all those involved through a process of reasoned, public and informed debate.

V. Conclusion

The foregoing analysis of five cases highlights two important points regarding legislative reversals of Supreme Court decisions that do not incorporate the notwithstanding clause. First, there are very few cases where legislatures have reversed the Court surreptitiously, with the exceptions of *Daviault* and *O'Connor*. Legislative responses enacted without the override in those decisions were justified on the basis that they addressed common law rather than statutory deficiencies. However, the legislative responses to *Morgentaler II*, *M.* v. *H.*, and *Morales* should have incorporated the override. Failure to do so undermined the *Charter* rights at issue and the Supreme Court as an institution, and also seriously curtailed an important opportunity to debate salient policy issues. Second, in *Feeney* and *Duarte*, although parliament did not actually reverse the Court, the defiant nature of the legislative responses in each instance justified use of the override to publicly signal the government's disagreement with the Court's assessment of competing rights claims. While recourse to the override may not always be appropriate in similar cases, failure to even consider its use limits opportunities for meaningful dialogue between the respective branches of government.

This chapter has focused on the frequency and propriety of legislative reversals of Supreme Court decisions. The paucity of reversals suggests they are the exception to the rule, and that there are fewer opportunities for dialogue than Hogg, Bushell Thornton and Wright maintain. Moreover, where legislatures seek to register disapproval with the Court's interpretation of fundamental constitutional principles, I have suggested that the appropriate procedural vehicle is the notwithstanding clause. What this discussion has taken for granted, however, and what now needs to be explored in greater detail, is the assumption that *legislative* disagreement with judicial decisions regarding the interpretation of a bill of rights is a legitimate exercise. Do courts have a monopoly on the interpretation of rights, or do the legislative and executive branches have an equally important role to play? Furthermore, does invoking the notwithstanding clause to advance a competing interpretation of a *Charter* right constitute a legitimate exercise of legislative authority? Chapter two addresses both issues by evaluating a number of interpretive theories and by analyzing assessments of the use of section 33 as a means of expressing institutional differences of opinion.

- *Chapter 2* -

> *It should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.*[1]

I. Introduction

In the seminal case of *Marbury* v. *Madison* in the United States, Justice Marshall famously remarked "the powers of the legislature are defined and limited; and that those limits may not be mistaken, the constitution is written. To what purpose are powers limited, and to what purpose is the limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[2] From this supposedly ineluctable truth, Marshall concluded "it is emphatically the province and duty of the judicial department to say what the law is."[3] To be sure, the coherence and logic underlying Marshall's reasoning has been roundly criticized, not least for the seemingly obvious oversight that if constitutions are to limit government power, those limits must necessarily extend to the judiciary as a branch of government.[4] Indeed, this is the essence of Manfredi's paradox of liberal constitutionalism which infers that judicial finality in constitutional adjudication risks destroying the very rights it was meant to protect unless courts themselves are subjected to certain constraints.[5]

In the Canadian context, while section 52 of the *Constitution Act, 1982* states that the *Constitution* is the supreme law of the land and that any law inconsistent with its provisions is of no force or effect to the extent of that inconsistency, nothing in the *Constitution* attributes to the Supreme Court *final* and *authoritative* responsibility for interpreting its terms. Nevertheless, in *Hunter* v. *Southam* Justice Dickson affirmed, in what would become and oft-repeated aphorism, that "the judiciary is the guardian of the Constitution."[6] That assumption has led many to endorse judicial finality regarding the constitutional adjudication of fundamental rights and freedoms.[7] As recently as 2002, the Chief Justice stated emphatically that "the healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again."[8]

In addition to the counter-majoritarian objection to judicial review,[9] the dangers associated with judicial claims to a monopoly on *Charter* interpretation undermine democracy in another important respect. The difficulty here stems from the tendency to relegate complex policy questions at the heart of competing rights claims to courts for final resolution. This pre-empts opportunities for an open exchange of ideas which has educational value and also imbues us with a sense of moral responsibility that comes from publicly engaging important issues. Indeed, the Supreme Court has repeatedly recognized the link between discussion and democracy.[10]

The concern is not so much that judicial review *per se* is inconsistent with the deliberative process – in fact the opposite is contended here – but rather that an uncritical acceptance of judicial finality will undermine the principle of self-government central to democracy. As Peter Russell explains, what must be guarded against is the judicialization of politics:

> The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for

> working out reasonable and mutually acceptable resolutions of the issues which divide them.[11]

This section explores several theories of judicial review, focusing on the role each ascribes to the legislative branch. These can be organized along a continuum ranging from judicial supremacy (the "judicial advocates") to legislative supremacy (the "*Charter* sceptics"), with several intermediary positions allowing for greater or lesser degrees of legislative input (courts and legislatures playing distinct but complimentary roles and coordinate constitutionalism). The view advanced here is that a coordinate approach to constitutional interpretation harnesses the strengths offered by a number of contending theories while avoiding many of the difficulties associated with each of them. In addition, coordinate constitutionalism accounts for the reality, at least in the Canadian context, of executive dominance in the legislative process.

II. Theories of Judicial Review

A. Judicial Advocates

Writing in the American context, Ronald Dworkin distinguishes between democracy and pure majoritarianism in order to reconcile judicial review with democratic theory. Democracy, according to this view, implies more than simply majority rule. Legitimate democracy protects minorities against the majority by recognizing an inherent set of moral rights that all individuals enjoy against the state. Conventional wisdom holds that morally divisive issues fall to politically representative institutions for determination. Yet this conception of democracy is nowhere provided for either in the *Constitution* or in practice.[12] Nor can judicial deference to the elected branches be justified on grounds of fairness since it makes little sense to vest the majority with the authority to be the judge in its own cause.[13] This leaves the possibility that courts should defer to legislatures and executives because their judgment on contentious issues is likely to be sounder, presumably because the public, over time, will respond to growing pressures to acknowledge certain moral rights. This view, however, places too much faith in human morality.[14] It follows that only an activist Court can successfully (without meaning infallibly) safeguard the moral rights citizens hold against the state in a legitimate democracy. In Dworkin's view, judges are the most appropriate institutional actors capable of combining "constitutional law and moral theory" in an effort to give meaning to legitimate democracy.[15]

Writing in the Canadian context, Professor Beatty has suggested that an activist Court provides the most effective means of safeguarding *Charter* rights. Beatty argues that in its early years, the Supreme Court adopted a conservative approach to *Charter* adjudication, prompting it to dismiss the vast majority of cases to the detriment of rights claimants.[16] Through the use of conservative interpretive techniques[17] subordinating *Charter* claims to the public interest, Beatty argues the Court not only thwarted rights claimants but also acted unconstitutionally.[18] Such an approach cannot be justified on the basis of the public's tacit acquiescence in the process of judicial review since the nomination process of Supreme Court justices is quintessentially undemocratic. Nor is it justified by constitutional fiat since the purpose of a constitution is to limit state interference with private rights, something a deferential approach would actively undermine. Consequently, only a Court committed to jealously guarding the *Constitution's* values will be successful in vindicating the rights it enshrines. As Beatty explains, "no purpose or tradition of free and democratic societies is served by validating laws that could easily be amended to show greater respect for the freedom and dignity of those they affect without compromising any of the social objectives they were enacted to achieve."[19] As Manfredi has argued, however, the vehicle used by the judiciary to assess reasonable limitations on rights – section one – is itself a product of the kind of whimsical judicial interpretation for which Beatty rebukes the Court.[20]

Professor Weinrib argues that patriation and the entrenchment of a bill of rights transformed Canadian society from a legislative state to a constitutional state where courts are guardians of constitutionally protected rights and freedoms. The new constitutional state acts as a check against the whims of prejudice and ignorance by creating a set of inalienable rights beyond the reach of the elected branches. To illustrate the significance of this transition and its ameliorative impact on rights protection, Weinrib gives the example of the Jewish community that contested the legality of Sunday closing legislation at the turn of the twentieth century.[21] Their initial claim was summarily dismissed by a Christian dominated parliament in a manner which, according to her, aptly characterizes the pernicious effects of unbridled majoritarianism. It was only some seventy-nine years later under the aegis of the *Charter* that the right to freedom of religion was successfully vindicated in *R.* v. *Big M Drug Mart Ltd.*[22]

At its base, the legislative-constitutional dichotomy suggests that legislatures are the perpetrators of rights violations while courts are vested with the ultimate responsibility for protecting rights. As Professor Weinrib has written elsewhere, "Courts . . . are to deliberate upon questions of rights and limits constrained to supreme law values; legislatures shoulder the political responsibility for denial of rights under conditions that intensify the democratic function."[23] Important consequences flow from this characterization of institutional responsibilities. Since attempting to deny rights on cost, administrative convenience and expediency-based arguments are the "stock-in-trade" of the legislative branch, it stands to reason that the responsibility for upholding those rights be vested with the courts. In other words, "the judiciary . . . must lay the ground rules for the constitutional state . . . The legislature and the executive must internalize those ground rules . . . Judges articulate the constitutional norms for adoption by legislatures and the executive."[24]

The reality that Professors Dworkin, Beatty and Weinrib's analyses understate is that courts are also responsible for their share of rights violations. The notion these observers exploit is of a legislative 'Goliath' against whom our only hope for saviour is a David in judicial garb. That the incident Weinrib laments (parliament's response to the Jewish objection to Sunday closing legislation) took place eighty years ago, with many important developments occurring during that interval, suggests that the legislative-constitutional dichotomy she evokes may be a false one. Legislatures are also capable of protecting rights in the absence of an entrenched *Charter* – as the development of an implied bill of rights in cases like *Switzman* and *Roncarelli* make clear[25] – and courts are just as capable of violating them. As Weinrib herself recognizes,[26] the post World War II environment precipitated a growing international commitment to the protection of human rights, of which the *Charter* was a product.[27] To suggest, however, that the constitutional state is the only effective bulwark against discrimination and repression is to overstate the power and authority of the courts, while underestimating the importance of historical evolution, institutional arrangements and political culture. It is unlikely, in other words, that in societies facing extremes of moral depravity, judicial interpretation of an entrenched bill of rights will be sufficient to save us from ourselves.

B. Charter sceptics

Charter sceptics are of a variety. On the one hand are a group of scholars who are concerned with the threat the *Charter* poses to majoritarian democracy, while on the other hand is a group that eschews liberalism and the self-serving rights talk it has spawned. The former are often grouped together under the pejorative label of right wing judicial critics, though there is considerable doctrinal divergence between them. Professors Morton and Knopff criticize the counter-majoritarian nature of judicial review of the *Charter* which they claim judges have interpreted as a carte-blanche to engage in the kind of policy-making more appropriately restricted to the elected branches.[28] Of particular concern to them is the pernicious tendency of influential and elitist interest groups to highjack the judicial process to advance their own agenda rather than engaging elected representatives to debate the issues publicly and transparently.[29] They maintain that the adjudication of important public policy effectively involves an abdication of civic responsibility to discuss contentious questions within representative institutions of government.[30] Much of Morton and Knopff's critique of judicial review, however, is based on a narrow conception of majoritarian democracy which evinces a marked preference for parliamentary sovereignty – an anachronistic concept in light of section 52 of the *Constitution Act 1982* and section 24 of the *Charter* – and a dubious scepticism towards minority rights.[31]

Professor Manfredi recognizes both the validity and importance of judicial review, but expresses concerns that judicial interpretation of the *Charter* is likely to cause a shift from a system of constitutional supremacy to a system of judicial supremacy. The principle reason for this lies in what Manfredi refers to as the paradox of liberal constitutionalism which arises where courts, as self-proclaimed guardians of the *Constitution*, are not themselves constrained by constitutional limits. Judicial activism intended to protect rights and freedoms central to liberal democracy in reality undermines the most cherished right of all – the right to self-government – by circumventing the representative branches and elevating courts above the law.[32] The objection is not with judicial review *per se* but rather with the claim to judicial finality in *Charter* adjudication. Landmark decisions like *Dolphin Delivery*, *Reference re remuneration of judges*, *Vriend* and *Sauvé*, to name only a few, are indicative for Manfredi of the judicial hubris which threatens to unravel the thread of liberal democracy and its attendant emphasis on popular sovereignty.[33]

What this position downplays is the reality that the majority of the Supreme Court's jurisprudence to date has focused on police conduct rather than government policy. Only 33% of decisions between 1982 and 2003 have been activist (in the sense of striking down statutes), suggesting that the crux of the right wing critique is in fact ideologically driven.[34] As Professor Hiebert points out, these critics:

> accept the legitimacy of judicial review to protect the rights they consider fundamental (those associated with limited government), but profess the illegitimacy of judicial review when it confers rights status on policy or "special interest" claims (those not specifically entrenched in a bill of rights). Yet if no set of formal legal rules could possibly evolve from value-free interpretations, this suggests that the rights

> recognized by liberal constitutionalism . . . are no less the product of judicial discretion than are other forms of rights recognition.[35]

A different variety of '*Charter* sceptics' suggests that liberalism itself is the problem. Hutchinson and Petter argue the *Charter* is an embodiment of liberal values and ideals based on what they characterize as a false dichotomy between the public and private spheres. The *Charter's* protection of fundamentally liberal values is illustrated by the fact that its application is restricted to government action, long perceived by classical liberals as the pre-eminent threat to freedom. Government interference in the realm of individual autonomy and liberty is presumptively unjustifiable, regardless of the nature of the intervention and of the rights at issue.[36] The difficulty with this view, they assert, is that is that it is premised on a distinction that is both arbitrary and untenable, and one which represents an anachronistic view of Canadian society, home to a developed welfare state. The practical affects of basing the *Charter* on this false dichotomy is to shield the principle causes of inequality (which derive from the very tenets of the liberal ideology) from *Charter* scrutiny.[37] "As imagined normative bottom lines, these deep-seated [liberal assumptions] allow the legal community to maintain institutional legitimacy by pretending to be exercising its considerable power in accordance with ostensibly neutral and formal directives."[38]

Allan Hutchinson offers a similar view of rights talk which he maintains holds out a hollow promise founded on liberal preoccupations with individual liberty and privacy that are at odds with basic human nature. For Hutchinson, the *Charter* is simply a concrete manifestation of the liberal enterprise which obscures the importance of social context and history by touting individual liberty and privacy as sacrosanct. He develops his argument in relation to the scholarship that purports to empower women and the poor. In both instances, Hutchinson maintains the endeavour is self-serving and ultimately perpetuates injustices endemic to the liberal enterprise rather than emancipating those whom liberalism has neglected.[39] As a solution, Hutchinson proposes a form of "democratic dialogue" which is constitutive of individuality rather than merely an expression of it. "At the heart of this enterprise is the understanding that self-definition is a function of intersubjective experience; it is the relation and not the relating entities that should be protected and nurtured."[40]

This critique is more an indictment of liberal ideology than a rejection of judicial review. Proponents of this view are less concerned by judicial activism and its implications for democratic theory – in contrast with right wing judicial critics – than they are by the tendency among activists to reinforce the imperatives of liberalism. Hutchinson chastises even left wing progressive legal scholars for their failure to transcend the inherent constraints of conservative rights talk and to embrace a conception of society that celebrates rather than reviles the interconnectedness of our social condition.[41] It is not judicial activism itself that is problematic, but rather the dissonance between contemporary activism and the political agenda of this group of scholars. As Professor Kelly remarks, "if judicial activism had facilitated the emergence of social democracy, it is clear that the left wing critique of the unrepresentative and unaccountable nature of judicial review would lessen, and the democratic virtues of judicial review would be celebrated by those who take this critical position."[42]

C. Courts and Legislatures Playing Distinct but Complementary Roles[43]

In Professor Roach's view, both the judiciary and the legislative branches play important roles in the process of judicial review. In referring to these roles as 'distinct but complementary', there is a marked similarity with the coordinate model discussed below. However, there is also an important difference for Professor Roach who maintains that the coordinate approach is devoted to "the discovery and reflection of majority sentiment."[44] While that may be true *in part* of the responsibilities of the legislative and executive branches under the *Charter*,[45] it is much less likely to capture the judiciary's role in the coordinate approach as it is understood here. Ultimately, the justification of judicial review premised on 'distinct but complementary roles' belies Roach's confidence in the legislature's ability to interpret the *Charter*. This judicial bias is particularly evident in his attempt to delineate the responsibilities of each institutional actor. Roach suggests the advantage of the distinct but complimentary approach lies in the fact that "it allows courts to educate legislatures and society by providing *principled and robust articulations of the values of the Charter* and the common law constitution while allowing legislatures to educate courts and society about their *regulatory* and *majoritarian* objectives and the practical difficulties in implementing those objectives."[46] The assumption that the judiciary is somehow better suited to interpreting value-laden *Charter* rights is shared by scholars who provide the theoretical basis for this model.

Bickel believed that legitimate government was government by consent, and that judicial review, while acting as a check on the other branches, could in the long term undermine democracy by desensitizing the public to the importance of actively debating critical policy questions.[47] In his view, government serves two purposes, first, to attend to the immediate needs of those whom it represents, and second, to articulate and promote the fundamental values that undergird a healthy liberal democratic society. For Bickel, the latter task is appropriately entrusted to the courts which are better suited to protect them.[48] But since the courts declared themselves guardians of the *Constitution* in *Marbury* v. *Madison*, there arose a tension between this branch and the legislative and executive branches whose authority, unlike that of the judiciary, was rooted in popular consent. Bickel therefore sought a means of reconciling the courts' legitimate role as protector of society's fundamental values with popular sovereignty.[49]

His solution was to minimize the judiciary's role in constitutional adjudication by urging the Supreme Court, except in rare instances, to adjudicate the cases before it using non-constitutional means. These means Bickel referred to as the "passive virtues", a host of interpretive techniques designed to bounce the issue back into the legislative arena for further consideration and deliberation. He characterized the process as "engage[ing] the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise. All the while the issue of principle remains in abeyance and ripens."[50] In a very real sense, Bickel shared Thayer's concern that unbridled judicial review would operate to the detriment of democracy by shifting the focus of debate from the representative institutions of government to the courtroom where the vast majority of the citizenry will not be given or seek out the opportunity to participate in the debate. Bickel nonetheless ascribed to courts the role of ultimate arbiter of constitutional values, however, only after the issues had first ripened in public debate.

The restrictive role Bickel envisaged for the Court gives rise to a paradox. On the one hand, the Court's minimalist role in the adjudication of constitutional disputes means that a great many legitimate grievances advanced by vulnerable groups would be shuffled back and forth while those whose rights were at stake are left in a jurisdictional limbo. The dialectical process between the various branches takes place at the cost of those it is meant to benefit. On the other hand, on those rare occasions when judicial pronouncement is warranted, the theory fails to provide a rationale for justifying interventionism against the exigencies of democratic theory. It is precisely in these landmark decisions, which exert a considerable influence on policy, that a theory legitimating judicial activism is required. At its base then, the Bickellian approach – and Professor Roach's by extension – rests on an unsubstantiated faith in the inherent superiority of judicial intuition. As Bickel explains, "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."[51]

Yet this faith is precisely what disturbs sceptics of judicial review. The point is not that legislators are imbued with superior wisdom when it comes to interpreting rights, but rather that there is no compelling reason to believe they are any less capable of doing so than judges. The authority marshalled in support of Roach's favoured approach to judicial review belies his commitment to the distinct but complementary roles he ascribes to each institution. What is distinct is the authoritative role attributed to the courts, with little in the way of a meaningful complementary role for legislatures. For instance, Roach draws on Michael Perry's work to support his argument that legislatures are more effective when guided by the courts on questions of morality.[52] In more recent work, however, Perry has contended virtually the opposite, advocating instead a form of normative minimalism which "holds that the Court ought to assume, not the primary responsibility for specifying indeterminate constitutional norms, but only a secondary responsibility, deferring to any "reasonable" specification implicit in the government action under review."[53] Perry's minimalist approach to constitutional interpretation is designed to offset potential problems associated with unbounded judicial discretion and is essentially a response to the counter-majoritarian objection. Ultimately, his conception of normative minimalism is rooted in the project of participatory democracy. Even if there were grounds for believing that the judiciary is better equipped to decide between competing interpretations of constitutional rights, our commitment to democracy, Perry maintains, demands that those decisions be made by the people. Though they may err in this regard, he suggests that "the capacity of ordinary politics to deliberate well about constitutional questions, and then to choose well, will eventually be bolstered if ordinary politics, not constitutional adjudication, is the primary matrix of specifications of indeterminate constitutional directives."[54]

In the final analysis, the 'distinct but complementary' approach ascribes to judges the 'primary responsibility' for interpreting rights while relegating to legislatures the responsibility for ensuring that their enactments comply with *Charter* rights as interpreted by the courts. As professor Roach explains:

> Democracy is enhanced by combining judicial activism under the common law and the *Charter* with legislative activism, as legislatures enact ordinary legislation that places reasonable and justified limits on rights *as proclaimed by the Court.*[55]

In a similar vein, Hogg, Bushell Thornton and Wright have argued that "the final authority to interpret the *Charter* rests properly with the judiciary."[56] Such an approach to constitutionalism is unduly dismissive of legislatures' ability to interpret the *Charter* (and to act on such an interpretation, even where it is at odds with legal precedent), both in devising legislation to advance its policy agenda and in enacting legislative responses to Supreme Court rulings which offer a different interpretation of the constitutional right at issue. Commenting on Bickel's description of the interaction between courts and legislatures as a "Socratic colloquy," Roach argues that the "analogy is not as paternalistic as it sounds, because Socrates' students could always have refused to listen to their frail teacher, or simply overpowered him, if they had been prepared to ignore his words of wisdom."[57] With respect, this seems a rather impoverished conception of democracy that underestimates the worth of the legislative contribution to the elucidation of rights. Certainly the courts have a unique expertise in relation to the adjudication of private law disputes. However, to argue as Roach does that the 'wisdom' of the courts is presumptively determinative in matters involving value-laden constitutional rights suggests that judges can aspire to a degree of moral enlightenment beyond the grasp of legislators. However, as Rousseau reminds us, the importance of the legislative function in a well-ordered society ought not to be underestimated. Indeed: "denying the rules of society best suited to nations would require a superior intelligence that beheld all the passions of men without feeling any of them; . . . Gods would be needed to give men laws."[58]

D. Coordinate constitutionalism

The coordinate approach to constitutional interpretation has a comparatively longer history in the American context. Reflecting on the propriety of giving judges the final say in constitutional interpretation, Madison inquired "upon what principle it can be contended that any one department draws from the constitution greater powers than another, in making out the limits of the powers of the several departments."[59] Similarly, in reaction to *McCulloch* v. *Maryland,* former President Andrew Jackson remarked that the "opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[60] A more contemporary version of this model of judicial review has been articulated by Agresto who rejects judicial supremacy as inimical to the doctrines of separation of powers and checks and balances, both cornerstones of the American *Constitution.* Agresto is not critical of judicial review as such, but rather of its claim to judicial finality in constitutional adjudication. The latter he regards as contrary to the rationale underlying constitutionalism, which is limited government inclusive of the judicial branch[61] as well as a symbolic attestation of *citizens'* commitment to a number of fundamental values:

> The noblest task of the Court . . . should not diminish our awareness of the dangers of judicial supremacy or the potential fallibility of the Court as the reasoning element. Because even the Court can mistake the nature of our binding principles, and because the Court can often be wrong about the relationship of its vision to the pressing needs of a democracy in a complex and changing world, the Court must itself be part of, and not above, the dynamic interaction of American politics.[62]

In this sense, we need to disabuse ourselves of the superior conception of judges in whom we are keen to vest ultimate responsibility for deciding inherently political issues. Contrary to what the public perception of the courts relative to the legislative branch suggests,[63] judges are not infallible superhuman beings imbued with the right answers to morally complex and value-laden issues. In the words of Chief Justice McLachlin, "judges are not living Oracles . . . Judges as human beings are subject to all the vexations and emotions to which ordinary human beings are prone."[64] The coordinate approach, while recognizing the value and importance of judicial review as part of the process of elucidating and protecting constitutionally entrenched rights, accommodates that reality by vesting a commensurate degree of responsibility with the elected branches of government.

Coordinate constitutionalism has been developed by Canadian scholars in the post-patriation context.[65] Discussing the democratic legitimacy of the override, Professor Manfredi contends that section 33 finds its strongest justification not in the preservation of parliamentary supremacy but in its contribution to constitutional supremacy.[66] Drawing on *Edwards* v. *Canada (Attorney General)*,[67] he concludes that:

> legislatures *do* have coordinate authority to interpret the constitution and that this authority is explicitly recognized in the notwithstanding clause of section 33 . . . What we need to encourage is real dialogue about what rights mean, rather than automatic deference to the meaning offered by a single political institution.[68]

Professor Hiebert rejects a judicial-centric approach to *Charter* scrutiny which neglects the important role played by parliament in drafting legislation, either to advance novel policy objectives or in response to the judicial invalidation of existing legislation. Indeed, the danger associated with inflated rights rhetoric is its tendency to undermine the relevance of alternative policy options – some of which may conflict with judicial pronouncements – advanced by the legislative branch. Building on Slattery's work, Hiebert develops a "relational approach" to *Charter* adjudication that rejects the strong judicial bias in the dialogue literature in favour of an institutional reciprocity combining the expertise of courts and legislatures. Accordingly, the government's role is to adopt legislation implementing its policy agenda, a process which involves assessing competing rights claims. The judiciary, in turn, ensures that compromises made by government in furtherance of its legislative objectives comport with the *Charter*.[69] The novelty of the relational approach is its insistence on a positive role for parliament in the legislative process. Rather than being simply responsive to judicial interpretations of the *Charter*, parliament plays a proactive role by "assum[ing] an important responsibility to interpret rights conflicts, arising from an essential task of democratic governance – making political judgments about how to mediate among disparate opinions, assumptions, and expectations."[70]

Professor Kelly has also investigated judicial review from a parliament-centred perspective, focusing on the government's response to the *Charter*. His work offers an *empirical* foundation for the coordinate approach that buttresses the normative claims made by its proponents. Kelly adopts a *cabinet*-centred approach that focuses on the government's response to entrenchment. His is a guarded optimism which suggests that although judicial review has not resulted in the unchecked activism feared by critics, it has nonetheless evolved at the expense of parliamentary scrutiny which has been eclipsed by a executive-dominated cabinet.[71] The result is what Kelly refers to as the "intra-institutional paradox of legislative activism [which] has contained judicial power but has further weakened parliament as an institution at the hands of the cabinet."[72] On this view, activist judicial review points to a failure at the legislative stage, rather than a voluntary abuse of judicial discretion, and substantiates Roach's concern that "if courts ever "govern our lives," the primary cause will be the failure and default of other political institutions."[73]

Kelly's analysis pulls the rug out from under the feet of judicial critics by challenging the very foundation on which their criticism rests: namely, that the process of judicial review is fundamentally undemocratic since unaccountable judges have usurped the policy-making function of the elected branches of government. Such a parochial conception of the policy-making process discounts the extensive involvement of the bureaucracy under the direction of the cabinet and the prime minister in enacting legislation that advances governmental objectives. The extensive involvement of the elected branches of government in designing legislation – what Kelly refers to as "legislative activism"[74] – confirms the existence of a coordinate approach to constitutional interpretation involving *both* parliament and the judiciary. The Supreme Court's section 1 jurisprudence and the increasing use of suspended declarations of invalidity provide additional evidence in support of the coordinate constitutionalism model.

The evolution of the Supreme Court's jurisprudence regarding the reasonable limits clause suggests the Court is aware of the fact that when it comes to assessing competing rights claims, "reasonable people can disagree."[75] *R.* v. *Oakes* was the first case granting the Supreme Court the opportunity to clarify the requirements of the reasonable limitations clause.[76] The difficulty in applying the *Oakes* test, as subsequent cases have shown, derives principally from the minimal impairment requirement which imposes a considerable burden on government. Because of the myriad possibilities for advancing particular policy options involving compromises between conflicting rights, it may not be easy – or even possible – to convince a court that the option chosen is the *least* restrictive of the *Charter* rights at issue. As Manfredi explains, "proportionality and minimal impairment analyses represent strong forms of judicial review. This is because they imply that a court can envision a better law than the one under review, in the sense that a court's alternative would achieve legislative goals at less cost to competing rights claims."[77] However, the strict section 1 test laid down in *Oakes* has been revisited by the Court in a number of subsequent decisions which have relaxed its requirements in recognition of the fact that parliament has an important role to play in assessing competing rights claims and, consequently, in interpreting the *Charter*.

This is illustrated in a series of Supreme Court decisions beginning with *R.* v. *Edwards Books*[78] where both the Chief Justice and Justice La Forest explicitly recognized the importance of favouring a broader approach to section 1 which considers the importance of legislative input in assessing rights claims involved in complex policy issues. According to Chief Justice Dickson, "it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes that are not directly before it, *or to consider what legislation might be the most desirable*."[79] Justice La Forest echoed these concerns, noting that in any section 1 analysis, "a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context."[80]

In *Irwin Toy Ltd.* v. *Quebec (Attorney General)*,[81] the approach to section 1 was made more flexible by distinguishing between two scenarios requiring the government to justify limitations on rights. In the first instance, the state is attempting to balance competing interests and acts in a redistributive capacity, allocating limited resources among competing groups. In the second instance, the state is seen as the "singular antagonist" opposing the interests of an individual whose *Charter* rights are at issue.[82] In the former case, "democratic institutions are meant to let us all share in the responsibility for these difficult choices," whereas in the latter case, "the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen."[83] *Irwin Toy* set the stage for a more nuanced approach to section 1 which was developed in a number of subsequent decisions, including the Supreme Court's controversial ruling in *RJR-MacDonald* v. *A.-G. Canada.*[84]

Although the justices split five to four in that case over whether the state was balancing interests or acting as singular antagonist, a division prompting at least one critic to claim it as another clear manifestation of judicial power,[85] Justice McLachlin (as she then was) nonetheless developed a tailoring approach to section 1 which recognized the inherent institutional limits of judicial review.[86] These cases are indicative of a trend in which the Supreme Court favours a contextual approach to section 1 which allows for a greater degree of legislative input and which implicitly recognizes the important interpretive function played by legislatures in balancing competing rights. As Kelly explains, "the court's changing conception of reasonable limits is a clear indication of its commitment to coordinate constitutionalism."[87]

The coordinate approach to constitutional interpretation is also supported by the Supreme Court's increasing use of suspended declarations of invalidity to allow legislatures to rearticulate their policy objectives. This trend marks a departure from earlier jurisprudence which treated the remedy with circumspection.[88] A number of commentators have linked this development to a preference for dialogue between the judiciary and the legislative branch. For instance, Hogg, Bushell Thornton and Wright note that "the idea of dialogue has been influential in guiding the courts in their increasing use of suspended declarations of invalidity.[89] However, as noted earlier, the supposedly dialogic relationship between courts and legislatures raises a number of problems. First, its proponents tend to relegate legislatures to a responsive position rather than recognizing them as equal participants in the process. Second, legislatures themselves may inadvertently internalize this subordination, as manifested in their tendency to comply with judicial demands rather than pursuing their own objectives. Consequently, recognizing the increasing use of the remedy as "a conception of institutional relationships under the Constitution in which both legislatures and courts take joint responsibility for ensuring compliance with constitutional norms"[90] seems more appropriate. The use of this remedy in labour relations and same-sex marriage cases is indicative of the importance ascribed to legislative input in these areas.[91]

Despite these advantages, scholars have criticized the coordinate construction model on a number of fronts. For instance, Roach argues that a coordinate approach to judicial review of a bill of rights is antithetical to the rule of law "which suggests that the legislature should respect the Court's interpretation of the Constitution."[92] He also points to the seeming paradox of having legislatures be the judge in their own majoritarian cause in assessing the constitutionality of their enactments.[93] With respect to the first argument, however, courts are also subject to the rule of law, a fact which is often conveniently overlooked by critics of coordinate constitutionalism. As Agresto explains, "although the proponents of judicial review have no hesitation in affirming the existence of a judicial check on the other branches, they seem to become uneasy at the thought of direct reciprocal checks on judicial acts, *especially in the area of constitutional interpretation*."[94]

There are several responses to the second argument. First, it should be remembered that prior to the entrenchment of a bill of rights, legislatures were always judges in their own majoritarian causes at common law. This did not mean courts were powerless to intervene in the name of human rights. As Roach himself explains, the common law presumption was a creation of the courts designed to protect vulnerable minorities by requiring that legislatures use clear language to abridge a fundamental right.[95] The rationale underlying this requirement is closely related to the importance of public debate and transparency in government. The complementarity of the common law presumption to the democratic process is clearly illustrated by Roach's description of a hypothetical legislative response to the *Roncarelli*[96] decision:

> The only response open to the government would be to enact legislation that explicitly allowed the premier to revoke the licences of Jehovah's Witnesses or of Frank Roncarelli. If the legislature ever adopted such a law, *it is difficult to believe that, <u>even judges who were prepared to assert the final absolute word over the legislature</u> would be able to do so in a society that would obviously value brute power over law, equality, and the need for reasons to justify the exercise of power.*[97]

Indeed, such a society would be beyond the safeguarding capacity of even the most strong form of judicial review. To criticize coordinate construction on the basis that it transforms legislatures into arbiters in their own cause is to ignore over one hundred years of jurisprudence. Moreover, it exaggerates the ability of the courts to stem the most heinous examples of overt discrimination.

There is, however, a more serious flaw in the second argument which has to do with the assumption that legislatures routinely advance positions held by a majority of Canadians. With its second consecutive minority government at the federal level, and possibly on the brink of a third,[98] Canada's recent experience suggests that the notion of government by majority may be suffering a setback of late. To advance its policy agenda, a minority government must therefore make concessions to minority stakeholders whose support in the form of *ad hoc* coalitions is vital both to its success and longevity.[99] However, there is evidence that even majority governments are more often composed of ephemeral and shifting minorities depending on the issue under consideration. Since government is rarely unified, there are fewer occasions for a dominant majority to impose its views on a vulnerable minority. As Tushnet explains:

> the government in a parliamentary system is rarely unified. Rather, the governing majority is a coalition of factions or interest groups *within* a single party. The executive must bargain with the various factions to ensure that the 'government's' programs are adopted. In some circumstances, a minority faction within the ruling party can exercise the kind of veto that a president can in a separation of powers system.[100]

III. The Invocation of Section 33

The preceding section has attempted to highlight the advantages of a coordinate approach to constitutional interpretation by contrasting it with competing theories of judicial review, each of which takes a different view of the legitimacy of legislative and executive involvement in that process. Having argued that a coordinate approach constitutes the most effective means of protecting fundamental rights and freedoms – one which best accords with the reality of bureaucratic activism and the increasing use of suspended declarations of invalidity – there remains the related issue of whether the invocation of the notwithstanding clause as a means of expressing institutional disagreement over the interpretation of rights can be considered a legitimate exercise of legislative and executive authority. The view defended here, despite its infrequent use to date, is that recourse to the notwithstanding clause constitutes a justifiable exercise of governmental authority which can and ought to be used to advance a competing interpretation of *Charter* rights. Furthermore, section 33 ought not to be limited to exceptional circumstances but rather should be considered a legitimate means of advancing alternate interpretations of rights and of eliciting the participation of all three branches of government, and of Canadians, in the policy-making process.

Nevertheless, Professor Whyte has raised a number of objections to the inclusion of a notwithstanding clause in the *Charter* and to its use by government which merit closer scrutiny. In broad terms, these objections can be characterized as substantive and procedural.[101] Substantively, Whyte contends that section 33 cannot be reconciled with basic principles of constitutionalism in the Canadian context since these are as supportive of doing away with the override as they are of retaining it. For instance, Whyte contends that Canadian political culture is based on the principle of legalism which recognizes commitments as binding promises. In a democracy, we agree to submit disputes arising from these commitments to a neutral arbiter. It is therefore contradictory, Whyte maintains, to attribute this role to the courts and then to subtract certain areas from the purview of legalism.[102]

This argument is predicated on two questionable assumptions. First, it suggests that vesting courts with the responsibility to protect rights and subsequently interfering in that process (in this case by invoking the notwithstanding clause) is a new and illegitimate practice ushered in by the *Charter* and section 33. In fact, this is how the common law has always worked. As explained above,[103] the common law presumption was a creation of the courts designed to protect vulnerable minorities by requiring legislatures to use clear language to limit fundamental rights. While courts were vested with the authority to ensure that legislation complied with the *Constitution*, legislatures often intervened to *override* decisions with which they did not agree. As Professor Roach explains, "common law presumptions are an invitation to the legislature to respond to the judicial decision and to explain to both the public and the Court why limits on the values articulated by the Court are necessary in particular contexts."[104]

Second, the argument overlooks the structural integrity of the *Charter* which, through an combination of sections 1 and 33, explicitly invites the legislative branch to offer its assessment regarding the legitimacy of rights limitations. These mechanisms are difficult to reconcile with Whyte's assertion that the decision to charge courts with the responsibility for protecting rights simultaneously vested them with the *exclusive* right to interpret the *Charter*. Far from being inconsistent, the inclusion of a notwithstanding clause – in conjunction with the limitations clause – provides compelling evidence of parliament's intent *not* to vest the courts with the ultimate responsibility for protecting and interpreting rights.

Whyte also relies on the concepts of democracy and federalism in support of his argument that "democratic principle provides a powerful pedigree for judicial control over political choices that erode some fundamental human rights."[105] With respect to democracy, he claims that although entrenchment undermines majoritarianism, developed democracies are premised on the notion of fundamental rights subject to reasonable limitations which courts are best suited to adjudicate. And since Canadian constitutionalism has long recognized the authority of courts to limit the legislative prerogative in division of powers cases, continuing judicial review without an override would not be inimical to that process.[106]

The latter argument conflates pre versus post *Charter* litigation by assuming that the process in both cases is the same. However, under a system of constitutional supremacy, as Manfredi makes clear in reference to his paradox of liberal constitutionalism, courts as self-proclaimed guardians of the *Constitution* are in a position to decide that a particular issue is beyond the purview of *both* levels of government. Such a privileged position has the potential to effectively elevate courts above the rule of law by making them supreme arbiters of what the law – in this case the *Charter* – requires. This marks a significant break with past practice.[107]

The former argument is more problematic. At its base, the suggestion is that judges can legitimately claim, at least more often than legislatures, to correctly interpret the *Constitution*. Indeed, Whyte contends that judges are better positioned to assess the "legality of legislated oppression" since "they are disciplined by the legal text and by legalism."[108] This is a startling assertion in light of Canada's judicial history,[109] to say nothing of prominent *Charter* decisions which have elicited particularly harsh criticism.[110] Furthermore, it directly contradicts the rule of law according to which all branches of government – which includes the judiciary – are bound by the law, in this case the *Constitution* rather than the *Constitution* as interpreted by the courts.[111]

From a procedural standpoint, Professor Whyte questions the legitimacy of section 33 on the basis of its historical origins. In his view, there are two competing conceptions of the override. Either section 33 was designed to advance an alternate (legislative) interpretation of a right – something the public would likely tolerate – or to legislatively suspend rights without discussion on the basis that legislative programs ought to trump rights claims. Whyte attributes the latter intent to the premiers and argues that because the public is less amenable to such a justification for invoking section 33, it will eventually become obsolete.[112] In making this claim, however, Whyte attributes to the premiers an intention not borne out by the history of the negotiations that led to the inclusion of the notwithstanding clause in the *Charter*.[113] For example, the fact that they agreed to proposed changes in the wording of section 1 from "free and democratic society *with a parliamentary system of government*" (the 'Mack truck clause') to "free and democratic society" demonstrates their acceptance that legislative supremacy would no longer be a controlling principle in *Charter* interpretation.[114] The inclusion of section 52 in the *Constitution Act, 1982* provides further evidence, accepted by the premiers, that the *Charter* operated a transition from a system of legislative supremacy to a system of constitutional supremacy.[115]

The more plausible interpretation, therefore, for the premiers' insistence on including the notwithstanding clause in the *Charter* is that it granted the elected branches an equal right to advance a competing interpretation of guaranteed rights and freedoms. Whyte maintains that even if this is so, section 33 is nonetheless destined to become obsolete since "the Charter is a legal text and the general expectation is that the application of law gains legitimacy when performed by a special agency of the state that has independence, is trained in legal reasoning, is politically neutral, is bound by processes that are open, considered and even-handed, and is committed to fidelity to established legal norms."[116] Again, however, the crux of the argument is reduced to a naked preference for and confidence in the ability of judges to effectively balance competing rights claims. Despite their best efforts, judges are not infallible, and like any other institution, the judiciary is beset by its own institutional biases and limitations.[117]

Contrary to Whyte, Hughes concedes that "courts are not necessarily more progressive than legislatures" and recognizes that both institutions operate in a complementary fashion.[118] Like Whyte, however, Hughes maintains that the advantages of retaining the override are outweighed by its disadvantages. More, she suggests that there are better ways of resolving tensions between competing rights than simply overriding them. To this end, Hughes turns to the limitations clause and the opportunity it provides governments to defend their interpretation of an impugned *Charter* provision. Hughes' reliance on section 1 and the finality it bestows on courts, however, undermines her concession that judges are not infallible. As discussed above, the requirements of section 1 are ultimately determined by the Supreme Court.[119] Hughes also relies on *Vriend* and *M.* v. *H.* to support her argument that the tendency of Canadians to discriminate on the basis of sexual orientation would only be exacerbated by the inclusion of a legislative override. What the author overlooks in the case of *Vriend*, however, is that a majority of Albertans were in fact opposed to the suggestion of invoking the notwithstanding clause to defend the impugned legislation.[120] In the case of *M.* v. *H.*, Hughes relies on statistics showing that 28% of respondents thought section 33 should have been invoked;[121] conveniently overlooked is the fact that it never was.

Finally, Hughes suggests that section 33 institutionalizes a form of historical oppression associated with some of the Supreme Court's earlier jurisprudence.[122] Ironically, all of these examples of oppression occurred prior to entrenchment and therefore in the absence of a legislative override. As Hughes concedes, "after all, until 1982 the situation permitted by section 33 was, in effect, our constitutional practice."[123] It is illogical to attribute to section 33 the potential for the kind of abuse and oppression which took place under a constitutional regime without a notwithstanding clause. As mentioned previously, when a people abandons its commitment to basic moral values, it is unrealistic to expect that courts alone will constitute a sufficient institutional check capable of insulating us from our own vices.

IV. Conclusion

In sum, the most compelling justification for the notwithstanding clause is neither to prevent judicial supremacy nor to ensure legislative supremacy, but rather to stimulate the kind of transparent discussion which is parliament's raison-d'ête. The greatest bulwark against oppression is continuous public involvement in openly debating the myriad issues that divide us. Rousseau was alive to this reality. Indeed, the key to resolving his famous paradox – "man is born free, and everywhere he is in chains"[124] – is rooted in the importance of consent. Politics, for Rousseau, is constraining, and his desire was therefore to create a legitimate order which, by virtue of its legitimacy, would be liberating. However, for politics to be consistent with liberty, we must *choose* constraint. Through politics, we activate an intrinsic and latent morality which is liberating precisely because it allows reason to trump self-serving inclinations. Choosing self-legislation by taking part in the formulation of the general will is what enables us to extricate ourselves from nature, "for to be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty."[125] In other words, subservience is the antithesis of moral freedom. As Rousseau observes, "if . . . the populace promises simply to obey, it dissolves itself by this act, it loses its standing as a people. The very moment there is a master, there no longer is a sovereign, and thenceforth the body politic is destroyed."[126]

A number of commentators have expressed similar views linking the importance of discussion and debate to the vitality of a democracy. Mark Tushnet argues in favour of a populist constitutional law that would remove the constitution from the courts altogether and vest citizens with the responsibility for discussing contentious political issues. Accordingly, the principle justification for abolishing judicial review would be to stimulate constitutional thinking outside the judicial forum by inculcating in citizens a duty to resolve political disagreements themselves.[127] What must be guarded against is the judicialization of politics where citizens abdicate their responsibility to resolve moral dilemmas by relinquishing them to an unelected and unaccountable body.

This tendency is particularly worrisome under a regime distinguished by an accrual of power at the centre. Indeed, Canada is characterized by an executive dominated legislative system which vests considerable authority in the hands of the prime minister and central agencies at the expense of elected members of the House of Commons.[128] Furthermore, and perhaps in part as a result, there has been a shift in public support favouring the courts as the most suitable institution for resolving complex policy disputes.[129] Both factors operate to the detriment of representative institutions. Indeed, the decision to entrench a limited number of rights and freedoms has, to a degree, threatened the vitality of debate in this country. Minorities whose interests are often not effectively represented by government are turning to the courts to mobilize support for their grievances.[130] The government's *response* to entrenchment has further marginalized parliament as a forum for discussion and debate.[131] The most important application of section 33 is therefore to provide the impetus for discussion. It is a testament to the fact that liberal democratic theory does not assign "the task of constitutional interpretation exclusively to courts: legislatures also have a legitimate and important role to play."[132]

Despite the inclusion of a notwithstanding clause in the *Charter*, however, the potential for greater public involvement in the interpretation of rights has not been realized. Chapter three examines some of the possible reasons for the override's seeming obscurity. The identification of a particular institutional deficiency accounting for its relative disuse would suggest avenues of reform in order to restore a degree of legitimacy to parliament and provincial legislatures.

- *Chapter 3* -

> *Not only is Parliament fractured along regional fault lines, and dominated by an all-powerful prime minister; it is excessively influenced by the media, financial contributors, and disciplined rent-seeking lobby groups . . . This has caused frustration, especially among groups that feel – and often are – excluded or marginalized. When these groups are unable to influence public policies through conventional social and political mobilization, constitutional litigation seems the only possible alternative.*[1]

I. Introduction

In this section, some of the possible reasons for the override's seeming obscurity are examined. The greatest impediment to section 33's use is the popular misperception that a decision to invoke the notwithstanding clause implicates the state in the abrogation of citizens' rights. This view is the result of a combination of apprehensions. First, the override is seen as the result of a constitutional bargain – one that has a tainted legitimacy – rather than the product of an activist framers' intent. Second, the powerful influence of American constitutionalism and its attendant emphasis on judicial supremacy has reinforced a pervasive bias favouring the adjudication rather than the deliberation of rights claims. Third, an executive-dominated parliamentary process with limited opportunities for popular participation reduces the likelihood of section 33 being considered except where its use directly benefits the government. It follows that popular understanding of the notwithstanding clause as antithetical to rights protection must be overcome if the provision is to serve its intended purpose of vesting the elected branches with equal authority to balance competing rights claims.

II. The Notwithstanding Clause and Framers' Intent

During the period of patriation negotiations between 1980 and 1982, virtually no mention was made of the possible inclusion of a notwithstanding mechanism. However, the notion of a legislative override has a considerable historical pedigree. Indeed, a mechanism allowing provincial legislatures to opt out of constitutional amendments contrary to their interests was discussed in relation to a number of early amending formulas, notably the *Alberta Model* proposed in February, 1979.[2] Section 2 of Diefenbaker's 1960 *Bill of Rights* included a notwithstanding clause designed to preserve the convention of parliamentary supremacy, and the *Victory Charter* of 1971 included what has been referred to as a "soft *non obstante*" clause which was to serve as a directive to judges that rights are not absolutes and ought therefore to be interpreted accordingly.[3] A soft *non obstante* clause was also included Bill C-60 introduced in June, 1978, the federal government's second attempt at major constitutional reform, and in subsequent negotiations with the provinces in the Continuing Committee of Ministers on the Constitution ("CCMC") which began the same year.[4] However, as Professor Kelly's detailed analysis of the discussions which took place within the framework of executive federalism and in proceedings before the Special Joint Committee on the Constitution of Canada ("SJC") has shown, only the last of nine draft *Charters* included a notwithstanding clause.[5]

Some commentators have suggested that the legacy of the override is a reflection of its legislative history. For these authors, the notwithstanding clause was a political expedient to resolve a deadlock rather than the product of analysis and debate. As Leeson has argued, "the particular version that emerged in November 1981 and was ultimately enacted in 1982 had more to do with the raw politics of bargaining and chance phone calls late at night than with reasoned debate about what might constitute a rational compromise between democracy and constitutional law."[6] Cameron echoes this view in pointing to the disjunction between the rhetoric of shared institutional authority and the reality of section 33's limited use. While the notwithstanding clause is frequently described as a compromise between constitutional and parliamentary supremacy, its inclusion in the final draft constituted a symbolic representation of provincial protest.[7] In a more sanguine assessment of the constitutional context in which 33 was adopted, Weinrib argues that rather than creating a dichotomy between judicial and parliamentary supremacy, the final round of negotiations may have laid the foundations for a middle ground which draws on the strengths of each paradigm.[8] To an important degree then, the salience of 33's legacy rests on how it was understood by those who managed to secure its inclusion in the *Charter*.

I argue the framer's saw the notwithstanding clause as a means to advance contending interpretations of *Charter* rights rather than to circumvent legislative debate and suspend rights talk. To defend this claim, however, the perspectives of the override's framers must first be ascertained. Establishing framers' intent has always been a controversial exercise. It raises the twofold problems of identifying the framers as well as their intentions. As Perry explains, constitutional texts are not always successful at communicating what was meant to be communicated, despite saying what was meant to be said.[9] Moreover, nothing suggests these individuals either expected or intended their views to be determinative or binding.[10]

Kelly contends that the *Charter's* framers are appropriately restricted to those participants whose views prevailed at entrenchment. On this view, the principle framers of the *Charter* include Trudeau and other political figures under his leadership, senior

Department of Justice officials and the individuals and groups who appeared before the Special Joint Committee on the *Constitution* ("SJC"). Kelly is reluctant to include the premiers in this category – with the noted exception of premiers Davis and Hatfield – since their opposition to the *Charter* and their grudging acceptance of only a limited number of watered down rights was ultimately unsuccessful. Consequently, their views ought not to be accorded significant weight.[11] However, the premiers *were* successful in entrenching both a notwithstanding clause, which Trudeau and his colleagues had opposed, and a provision protecting mobility rights. As Kelly explains, "at worst, the premiers would not even be considered framers of the Charter, *but I am reluctant to exclude them because of the inclusion of the notwithstanding clause* and changes to mobility rights at their insistence during the first ministers' conference of 2-5 November, 1981."[12]

From this perspective, the views of the premiers *with respect to the notwithstanding clause* ought therefore to be accorded significant weight. Chief among the override's proponents was Alberta premier Peter Lougheed. As former Ontario Attorney-General Roy McMurtry has observed, "it was quite evident that Peter Lougheed had the pivotal role to play in any possible compromise."[13] The former Premier's views on the override are therefore critical. Although enamoured of parliamentary supremacy, Lougheed valued section 33 not for its ability to trump rights claims but rather for the opportunity it provided legislatures to participate in the interpretation of *Charter* rights. On the one hand, the override allows elected branches to respond to judicial decisions with which they do not agree.[14] More fundamentally, however, the former Premier recognized that "it should not only be the responsibility of the Courts to determine whether a limit is reasonable or demonstrably justifiable in a free and democratic society."[15] In other words, Lougheed welcomed the participation of both branches in balancing rights claims. Lougheed's view contrasts sharply with Whyte's fear that legislatures might use section 33 to suspend rights without discussion.[16]

Saskatchewan premier Alan Blakeney and Manitoba premier Sterling Lyon were also supporters of the notwithstanding mechanism, although for different reasons. Blakeney in particular favoured the inclusion of a notwithstanding clause during the November 1981 first ministers' conference. On several occasions, he expressed the view that with the exception of language rights, democratic rights and fundamental freedoms, a notwithstanding clause ought to apply to the rest of the *Charter*, if only to stem the opposition of other provinces reluctant to cede parliamentary sovereignty.[17] In their view, the override's virtue was that it allowed legislators to offer their own interpretation of a *Charter* right. Rather than allowing governments to suspend rights, it created the opportunity for a meaningful rights discourse.[18]

Roy McMurtry was another key participant in a last-ditch attempt to arrive at an agreement during the first ministers' conference in November 1981. In a meeting which would later be dubbed the "kitchen accord", McMurtry, Romanow and Chrétien hammered out a tentative agreement – the turning point in the negotiations – which included an override provision.[19] Reflecting on those negotiations in his memoirs, McMurtry confides "the fact is that the [notwithstanding] clause does provide a form of balancing mechanism between the legislators and the courts *in the unlikely event of a decision of the courts that is clearly contrary to the public interest.*"[20]

Professor Weiler, an advocate of the notwithstanding mechanism who confided in the premiers and appeared before the SJC, holds a similar view of the override which he argues is a legitimate procedural vehicle for advancing contending interpretations of *Charter* rights. Legislatures should not be reluctant to use it, since "section 33 is a sensible response to a real problem with full entrenchment – *the risk that our judges will make some serious mistakes* in drawing the line between individual rights and community needs."[21] Responding to Whyte's claim that Canadians agreed post-*Charter* that certain public issues are not only adjudicable but "*ultimately* adjudicable,"[22] Russell argues that the *Charter* entrenched a notwithstanding clause as evidence that Canadians "made no such commitment."[23] Weiler echoes this view. It follows from the framers' rejection of unmitigated judicial power through their insistence on the inclusion of a legislative override that its use ought not to be constrained:

> The point is that Canadians did not opt for full-blown judicial supremacy under our Charter, but instead for a special form of dialogue between judge and legislator, *and the integrity of that arrangement should not be undone by legislators abdicating their own responsibilities. Constitutional rights and freedoms are far too important a subject to be left entirely in the hands of our judges and lawyers.*[24]

The framers were not interested in suspending rights discourse; in fact, there is evidence to suggest that use of the override may not be unintelligible to Canadians. According to recent survey research, only half of Canadians have even heard of the notwithstanding clause, with the highest level of unawareness registered in Quebec.[25] Among those aware of the override's existence, there was no consensus as to whether its use by either level of government would be appropriate. Moreover, the fact that "the public has no clear view on the legitimacy of the notwithstanding clause, of which only half of them are aware"[26] suggests that support for its invocation may in fact be issue driven.

It is difficult to ascribe the override's current status to its earliest uses in Quebec in 1982 and 1988 and in Saskatchewan in 1986.[27] Insofar as Quebec is concerned, a significant amount of time has elapsed since these more controversial applications of the notwithstanding clause, and while they may have created an impediment to its use in the early 1990s, they offer a less convincing explanation for its continued disuse some twenty years later.[28] Moreover, the notwithstanding clause has been used on numerous occasions since then, most frequently in Quebec. In fact, the override has been invoked a total of seventeen times (including one instance in which the legislature in question had a last minute change of heart) and in several cases, legislation incorporating the override remains in force.[29] In the majority of these cases, however, 33's use has gone completely unnoticed while in only five instances has it generated debate and captured the public's attention.[30]

Kahana argues this is because of the near invisibility and inaccessibility of decisions to invoke the override. These decisions have been largely invisible since they dealt with issues that were not on the public radar. They were inaccessible since they involved complicated policy issues framed in detailed legislative enactments. The most viable solution to this problem, according to Kahana, is to prohibit pre-emptive uses of the override by restricting its application to legislation enacted in response to a Supreme Court decision.[31]

Even Supreme Court decisions, however, will not always result in the kind of public debate and discussion that invocation of the notwithstanding clause is more likely to generate. Kahana is no doubt correct in suggesting that waiting for the final determination of legal questions is likely to be conducive to greater public awareness of those issues. There is nonetheless a pervasive reluctance to invoke the override to advance alternative and equally valid legislative interpretations of the *Charter*. Despite a number of much criticized rulings,[32] there have been only two instances in which the notwithstanding clause has been invoked as a formal rejection of what was perceived to be an undesirable policy outcome.[33] Thus, even when the issue is in the public domain and is not unduly complex, there remains a popular reticence to use section 33 to express legislative disagreement with judicial decisions. One explanation for the infrequent use of the notwithstanding clause by legislatures is the influence of American theories of constitutionalism and their emphasis on final judicial interpretation of constitutional issues.

III. The Influence of American Constitutionalism

While Bickel has been cited by Canadian commentators in support of a dialogic conception of judicial review,[34] he was in fact adamant that in clear cases, the judiciary ought to be assertive and render final judgments where conflicting rights are involved. According to Hiebert, "the majority of Charter commentators draw almost exclusively from American understandings of how a bill of rights operates, with its core assumptions that judges and not legislatures interpret rights, and for rights to be adequately protected, judges' decisions must prevail over legislative judgment when courts have concluded that rights have been unduly violated."[35]

There are many examples of this bias in Canadian scholarship. In their follow-up study on the vitality of dialogue in Canada, Hogg, Bushell Thornton and Wright maintain that final judicial interpretation of the *Constitution* rests properly with the courts. While the authors agree the legislative and executive branches are free to respond to judicial determinations regarding *Charter* rights – indeed this is the essence of the dialogue they quantify – they are not at liberty to advance an interpretation of those rights which conflicts with prior judicial pronouncements:

> where the interpretive task takes place against the backdrop of a prior relevant judicial decision, the legislature and the executive may not act on an interpretation of the *Charter* which conflicts with an interpretation provided by the courts. Why? Because, in doing so, they would be doing (or refraining from doing) something that the courts have said would unjustly infringe the *Charter*, and under our system of constitutional democracy, that is impermissible.[36]

There are a number of dangers associated with the notion that judges are better equipped than legislators to interpret *Charter* rights, a view popularized by American constitutionalism. First, there is little reason or evidence to believe that judges are capable, despite their best intentions, of divorcing themselves from their own ideologies in balancing competing rights claims. As noted earlier, "judges are first and foremost human beings. As such, their conclusions on the facts and the law are shaped by their training and their personal experiences."[37] Second, in interpreting the *Charter*, judges are constrained by the language of a liberal document in the context of a modern welfare state, as section 1 requires courts to assess the validity of rights limitations in a "free and democratic society" that recognizes the legitimacy of an interventionist state.[38] As Andrew Petter has remarked, the *Charter* "is a 19th century document let loose on a 20th century welfare state."[39] Third, the numerous differences between the American and Canadian constitutions and systems of government point to the dangers of making unqualified comparisons between the two. The concentration of power in Westminster parliamentary democracies is anathema to American constitutionalism which is characterized by a separation of powers and a system of checks and balances.[40] For this reason, as Professor Kelly explains, "judicial theories developed for a limited constitution where the state is viewed as the principle threat to individual liberty are problematic in a society where the state has been an important and activist actor designed to advance individual liberty and collective freedom through the use of public power."[41]

Despite these important differences, the commentary is replete with models and theories inspired by the American experience. In my opinion, Manfredi relies too heavily on U.S. theories of constitutional interpretation to substantiate his critique of judicial review in Canada.[42] Roach has lamented the tendency of observers to extrapolate from the American debate on judicial review while ignoring the differences between their respective bills of rights and the institutions which interpret them.[43] This is ironic given Roach's preference for a Bickellian approach to judicial review which is rooted in a belief in the superior ability of judges to interpret the constitution.[44] As a result of this influence, "the idea that political judgment should prevail over judicial judgment, via the notwithstanding clause, is viewed as highly suspicious if not contradictory with constitutional norms."[45] More problematic still are the consequences which follow from the assumption that judges are better equipped, and therefore ought to have the final say, in balancing rights. Such a view corrupts democracy from within by relegating to others the responsibility for facing difficult issues head on, and is in this sense inimical to notions of popular sovereignty.

The influence of American theories of constitutionalism in Canada has been empirically verified. In recent survey research asking Canadians whether courts or legislatures should have the final say in determining the constitutionality of legislation, 60% of respondents expressed their faith in the judiciary.[46] The authors deduce that this view negatively impacts the override since "the regular recourse to the notwithstanding clause advocated by some is not likely to win public favour."[47] This makes sense if one assumes the average Canadian is aware of a legislature's options to respond to an unpopular judicial decision. But as Nick Nanos' research has shown, a majority of Canadians is unaware of the override's existence.[48] Therefore, a general preference for courts over legislatures may not translate into an unqualified acceptance of judicial supremacy. Indeed, Fletcher and Howe's earlier research suggests precisely the opposite. When asked whether the Supreme Court's right to decide *controversial* issues ought to be reduced, a significantly higher proportion of respondents, 50%, answered in the affirmative.[49] Thus, while evincing a healthy confidence in the judicial process, Canadians have by no means endorsed judicial finality in the realm of constitutional politics. Nonetheless, our increasing affinity with the judicial resolution of policy disputes stems at least in part from the influence of American constitutionalism.

IV. Executive Dominance and the Committee System

The most compelling explanation for the override's continued disuse has to do with the government's reaction to the *Charter*. Drawing on Professor Kelly's research, I argue that an executive-dominated parliamentary process has undermined the effectiveness of parliament as a deliberative institution. Fewer opportunities for parliamentary involvement in the formation of public policy have decreased the likelihood of section 33 being used to generate discussion on questions which are fundamentally philosophical in nature. A combination of factors has contributed to the subordination of legislatures in the policy-making process, and a host of reforms has been proposed to bolster their legitimacy. The reinvigoration of the notwithstanding clause as a mechanism for eliciting debate on important issues is one means of offsetting the marginalization of parliament in the policy-making process. While not a panacea, increased opportunities for citizen participation – both directly and indirectly through representatives – would rejuvenate flagging support for an institution whose primary purpose is to hold the government accountable.

Docherty contends that conventional accountability mechanisms like question period, use of the legislature to block the passage of bills, committees, caucuses and the Office of the Auditor General have not been successful in checking the power of the executive branch. Consequently, "the reality of modern parliament in Canada has been 'the inversion of responsible government,' where cabinet controls the Commons instead of the other way around."[50] Réjean Pelletier contends that a similar evolution toward an executive-dominated legislative process has also taken place at the provincial level. In his view, the confluence of individual ministerial responsibility, the emergence of an elected monarch (the premier) to replace the governor, and the rise of party discipline have resulted in a system of parliamentary democracy that subordinates the legislative to the executive branch. Pelletier's characterization of the parliamentary process at the provincial level is an equally apt description of the policy-making process in federal politics: "in short, virtually complete domination by the executive and its leader, the new modern monarch, over all parliamentary and administrative institutions."[51]

C.E.S. Franks argues that the power structures of parliament are in fact executive-dominated.[52] This is so historically because executive authority flows from the Crown. In addition, individual members of parliament (MPs) are subordinate policy-makers as a result of the related principles of ministerial solidarity and party discipline, both cornerstones of responsible government. The reforms introduced by Pearson and Trudeau in the 1960s designed to wrest power from the bureaucracy and to rationalize the cabinet decision-making process ended up shifting the locus of power from the bureaucracy to central agencies and the prime minister.[53] The expansion of government over the past thirty years has also led to "bureaucratic pluralism" – a collection of government departments and agencies and the various interest groups with which they interact to develop policy – which has in turn weakened parliament as a policy-making institution.[54] According to Franks, the relationships between government bureaucracy and interest groups "are an important forum for policy-making which for the most part operates below the purview of parliamentary discussion. Parliament and members of parliament serve as a last resort for interest groups when they have failed to get their way with the government bureaucracy or with ministers."[55] The high turnover rate and political amateurism of rookie MPs further compromise the effectiveness of parliament as a check on executive power and solidify the concentration of power at the centre.[56] In combination, these factors reduce opportunities for meaningful participation by parliamentarians and consequently lessen the likelihood of serious discussion regarding the potential use of the notwithstanding clause.

If executive dominance predates the *Charter*, the government's response to entrenchment has only exacerbated that reality. As Kelly has shown, the most significant impact of the *Charter* has been the emergence of bureaucratic activism through the rise of the Department of Justice to the status of a central agency.[57] Contrary to the claims of judicial critics, the government's response to the *Charter* has been characterized by bureaucratic activism as a result of the requirement that all memoranda to cabinet be vetted by the Department of Justice ("DOJ"). Consequently, the primary responsibility for ensuring that policy initiatives are *Charter* compliant and satisfy the government's objectives falls to bureaucratic actors under the direction of the prime minister, with virtually no oversight by elected members of parliament:

> instead of instituting parliamentary scrutiny of legislation to counterbalance the DOJ and to act as a further constraint on judicial power, the political response to the Charter has been to strengthen the policy capacity of cabinet, albeit dominated by the prime minister, by instituting bureaucratic review to ensure the constitutionality of the cabinet's legislative agenda.[58]

Kelly rejects a judicial-centred approach to judicial review that neglects the input of parliamentary actors in the policy-making process. As a result of "pre-introduction" scrutiny of legislation by the Department of Justice (bureaucratic activism) and "post-introduction" scrutiny by members of parliament (parliamentary activism), legislatures, at least theoretically, play an important role in shaping policy under the *Charter*.[59] Consequently, rather than evincing the power of the courts, supposedly 'activist' decisions in many instances are indicative of an antecedent parliamentary process which has failed in its responsibility to ensure the constitutionality of its policy initiatives.

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

> This aspect of Charter politics, whereby the cabinet co-opts parliamentary institutions to overcome judicial invalidation of legislation, is no less executive-dominated than the certification process by the minister of justice during the normal legislative process that precedes judicial review. In truth, during the post invalidation period . . . parliament has a constructive – yet orchestrated – role when the cabinet attempts to re-establish the constitutionality of an invalidated statute.[60]

Executive dominance in the process of legislative *responses* to the judicial invalidation of statutes therefore also marginalizes legislatures. Fewer access points in the legislative process means fewer opportunities for MPs and Senators not in cabinet to consider the notwithstanding clause as a means of generating public discussion.[61]

Reflecting on the dominance of the executive, Franks observes that "executive-centred policy-making does not lead to the mobilization of consent while policies are being developed. Parliament is unimportant. It ratifies and authorizes decisions worked out elsewhere."[62] Donald Savoie, who expressed a similar view in relation to the concentration of power in the hands of central agencies and the prime minister, reports that caucus, once a forum for consultation and debate, has become a place where Ministers seeks to gain MP support for policy decisions *ex post facto*: "cabinet used to meet the day after caucus – now it meets the day before."[63] These and other changes operate to the detriment of parliament as a deliberative institution by limiting opportunities for the kind of discussion section 33 is meant to generate. A number of proposals have been advanced to address these problems, including reducing the number of confidence votes, relaxing party discipline, introducing fixed elections, strengthening the committee system, senate reform, and the introduction of some form of proportional representation.[64] My research underlines the need to reform the existing committee system by creating a parliamentary standing committee for the scrutiny of legislation from a rights perspective which would increase the likelihood of section 33 being considered as a viable legislative complement to judicial interpretations of *Charter* rights.

Standing, legislative, joint and special committees perform a critical role in the legislative process, acting in an oversight capacity and engaging in policy-making.[65] Furthermore, they provide an important contact point for backbench MPs and members of the public to actively engage in a policy exercise. Yet a number of observers have spoken to the relative weakness of the existing committee system in serving as an effective accountability mechanism in the legislative process. Part of the problem stems from the fact that committee composition mirrors the distribution of seats in the legislature and party discipline applies to its members, making it difficult for opposition and backbench MPs and MLAs to advance interests that conflict with the government's policy agenda. There is also a tendency for committee reports to be effectively disregarded by legislatures, contributing to the members' sense of removal from the policy process.[66] A dearth of financial and personnel resources have further limited the ability of committee members and chairs to adequately carry out their functions.[67] A number of reforms have been proposed to address these deficiencies.[68] However, failure to successfully their recommendations has not only hamstrung the ability of committee members to actively participate in policy exercises but has also increased the power of the executive.[69]

The creation of a special standing committee charged with reviewing all legislative initiatives from a rights perspective would also help restore the balance between legislative and executive responsibilities in interpreting the *Charter*. Kelly has advocated the creation of such a committee to examine legislation from a rights perspective before it is enacted, affording parliamentarians the opportunity to participate in *Charter* scrutiny as well as reducing the likelihood of subsequent judicial invalidations.[70] Constituting a joint committee with members from both houses would also mitigate some of the problems associated with party discipline and the partisan composition of House committees.[71] Moreover, such a committee would provide an important point of contact for the public to become actively involved in policy exercises. I agree with Peter Lougheed who has argued "the purpose of the override is to provide an opportunity for the responsible and accountable public discussion of rights issues, and this might be undermined if legislators are free to use the override *without open discussion and deliberation of the specifics of its use*."[72] The creation of a special joint committee would increase the participation of parliamentarians and the public in the policy-making process by generating discussions on how best to protect rights. In such an environment, use of section 33 is more likely to be frankly considered in open deliberations regarding critical policy issues. It is this kind of *intra*-institutional dialogue which, in conjunction with judicial review, offers the best safeguard for constitutionally protected rights.

Hiebert has also recommended the creation of a special parliamentary *Charter* committee to scrutinize legislation from a rights perspective. Such a committee would confer a number of advantages. First, mandating a specific body to consider the *Charter* implications of new legislation would "allow for specialization and the cultivation of greater expertise of members,"[73] avoiding some of the problems associated with MP amateurism in parliament.[74] Second, involving parliamentarians in the assessment of the constitutionality of legislation would help make the process more transparent to the public, particularly since the parallel process of bureaucratic review is (even if of necessity) confidential in nature. Third, the existence of such a committee would enliven dialogue between the elected and non-elected branches as courts would be forced to pay close attention to their deliberations before deciding to invalidate legislation. Fourth, a specialized committee would reflect the responsibility of parliamentarians to actively engage important public policies and to solicit the input of Canadians in debating these issues. The purpose of such a committee

> would be to ensure that legislative decisions, which have implications for fundamental rights, are made only after more public deliberation. In short, its role would be to provide a foundation for Parliament's

> collective and principled judgment about whether policies are important and responsible in light of the Charter and consistent with the values of a free and democratic society.[75]

Although Hiebert's discussion focuses on the use of a parliamentary committee in the pre-judicial review examination of legislation, it would also play a critical role in assessing legislative responses to judicial decisions. I disagree, however, with Hiebert's position that while a specialized committee might properly evaluate the *merits* of using 33, it should not be able to initiate such a recommendation which must instead originate with government.[76] Her approach conflicts with the conception of section 33 defended here according to which parliament – not simply cabinet – plays a vital role in interpreting the *Charter*.

While a more significant role for parliamentarians and citizens will offset some of the disadvantages associated with executive dominance and will generate political space for considered use of the notwithstanding clause, additional reforms to section 33 itself would also increase the likelihood of its being invoked in future. Weinrib has criticized the *Ford* decision for exempting legislatures from having to specify the right(s) being overridden.[77] Russell goes farther, noting that in addition to identifying which *Charter* rights are being overridden, legislatures must identify the right(s) in need of protection.[78] In the same vein, Professor Manfredi has proposed several amendments to the notwithstanding clause to make it more democratic. These changes are reproduced below, with one additional modification (underlined) designed to address Weinrib and Russell's concerns:

> 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act

> or a specific provision thereof shall operate notwithstanding *a final judicial decision that the legislation or a provision thereof abrogates or unreasonably limits* an explicitly referenced provision included in section 2 or sections 7 to 15 of this Charter. *A declaration under this subsection becomes effective on the agreement of three-fifths of the House of Commons and Senate or three-fifths of the provincial legislature, as the case may be . . .*
> (3) A declaration made under subsection (1) shall cease to have effect *upon the dissolution of the Parliament or legislature making the declaration* or [sic] five years after it comes into force or on such earlier date as may be specified in the declaration.[79]

The addition of "specific" and "explicitly referenced" would require legislatures to identify the section(s) of the impugned legislation which are in need of protection as well as the specific right(s) being overridden. This is consistent with Lougheed's suggestion that "the legislature or Parliament should be required to spell out the purpose of the legislation . . . to disallow, as Quebec has done, standard form overrides."[80]

The foregoing changes would obviously require a constitutional amendment, an event which seems not only unlikely but also fraught with controversy. Nonetheless, it is to be hoped that the implementation of other changes regarding the committee system and the creation of a special joint committee would help increase opportunities for informed discussion by revitalizing the role of parliamentarians and by tempering the power and influence of the executive. Under these conditions, there is a greater likelihood the override would be considered in an environment that is conducive to the involvement of backbench and opposition MPs and that encourages public participation in debating polarized policy issues.

V. Conclusion

In my first chapter, I demonstrated that there have been very few legislative *reversals* of Supreme Court decisions as that term was defined, bearing in mind the reasons given in support of parliament's exceptional responses to *Daviault* and *O'Connor*. Notwithstanding that reality, chapter two argued that legislatures have an equal right – even a duty – to interpret the *Charter*, and that the notwithstanding clause is an important tool to this end. In this chapter, I contended that a more liberal approach to the override is appropriate, not to assert legislative supremacy but rather to bolster parliamentary and public involvement in the policy-making process. Such an interpretation is supported by a manifestly activist framer's intent in relation to the notwithstanding clause.

To get a better sense of the kinds of cases in which the override might reasonably be invoked in future, it is useful to consider past decisions addressing issues that would undeniably have benefited from greater public deliberation. As further evidence in support of my thesis, chapter four undertakes a brief review a number of Supreme Court decisions where section 33 might have been successfully used to elicit greater public engagement in resolving policy issues of national importance. The following analysis focuses on a number of decisions where parliaments, as 'talking places', would be used to better effect by actively engaging citizens – through their representatives – in a discourse on important philosophical issues affecting them all.

It is . . . time for our legislatures and members of the executive to show some guts by considering and using the notwithstanding clause of the Charter more frequently when important issues of public policy, involving vast expenditures of public monies, are decided by a non-elected and non-accountable judiciary composed of middle-aged lawyers appointed without prior scrutiny of what their philosophy or prejudices or thoughts might be with respect to these important issues of public policy.[1]

- Chapter 4 -

I. Introduction

Central to my thesis has been the argument that using the notwithstanding clause in response to a judicial ruling is a perfectly legitimate exercise for legislatures wishing to advance a contending interpretation of a disputed *Charter* right. However, there will likely always be disagreement over *which* decisions in particular warrant legislative responses using the override. As I have argued in chapter three, that is an issue which ought to be considered by a special standing committee and then voted on by the legislature as a whole. To illustrate the kind of situation where such an initiative might be appropriate, I next consider a non-exhaustive list of Supreme Court decisions interpreting fundamental *Charter* rights. The purpose of revisiting the holdings in these cases is not to second guess the Court's right to assess competing rights claims or even to suggest that the Court may have been wrong in reaching the decision that it did – although some will argue that is the case. Rather, the purpose is to emphasize that parliamentarians and the public also play a legitimate role in shaping *Charter* rights, and the use of section 33 provides the opportunity for the kind of critical debate that is parliament's *raison d'être*.

II. 'Cases' for Invoking the Override

A. RJR-MacDonald Inc. v. *Canada (Attorney General)*

In *RJR-MacDonald*, a five-to-four majority of the Supreme Court invalidated federal legislation prohibiting all advertisement of tobacco products, barring tobacco companies from promoting cultural or sporting events, and requiring the use of un-attributed health warnings on all packaging. While a unanimous Court held the legislative provisions violated freedom of expression, a majority ruled that the impugned provisions failed the minimal impairment test under the reasonable limitations clause. The majority was unimpressed with the government's decision not to adduce evidence in its possession regarding the possible effects of less intrusive advertising bans and attributed health warnings.[2] In their opinion, a ban on lifestyle advertising only, a prohibition on advertising directed at children and adolescents and the use of attributed health warnings all would have constituted reasonable limits on the appellants' freedom of expression.[3] Parliament responded with Bill C-71 which implemented the Court's suggestions by limiting the ban on advertising to lifestyle advertising and by requiring warnings attributed to the health authorities.[4]

Of particular concern in this case was the expansive view of freedom of expression endorsed by a unanimous court. None of the justices seemed the least bit bothered by the context in which protection of the right to free expression was being claimed. The right at issue did not pertain to freedom of political expression, an integral component of our commitment to democratic government, but rather to the economic right of tobacco companies to maximize profits. The nature of expression involved in this case is far removed from the Supreme Court's articulation of the fundamental values underlying that freedom.[5] While the Court has accepted that section 2b) extends to commercial expression,[6] decisions including *Ford*, *Irwin Toy*, *Rocket* and *RJR-MacDonald* have progressively diluted the values underpinning freedom of expression to the point where, in the latter decision, "the language of rights has been invoked strategically, but inappropriately, to dress up a corporate policy interest that does not reflect any reasonable moral or normative claim on society."[7] This is particularly troublesome in light of the fact that the entrenchment of a bill of rights was conceived to protect the interests of Canadians,[8] rather than property and economic rights which were consciously omitted from the *Charter*. Other observers have expressed similar reservations about the propriety of extending rights central to our commitment to democracy to corporate interests motivated by other, frequently conflicting, concerns.[9]

This is precisely the kind of issue that would have benefited from a comprehensive public debate. Consideration of the notwithstanding clause in support of the government's legislative response to *RJR-MacDonald* would have prompted parliamentarians to scrutinize the implications of extending freedom of expression to corporate interests. It would also have garnered public attention and engaged Canadians in a policy exercise of considerable national importance. The point is not that the Court's ruling was without merit, or that parliament's initial response was normatively superior, but rather that government action in this case would have benefited from a more open and informed discussion regarding the competing rights at stake. As Professor Roach has explained, "surely it would not have been difficult to explain the need for the override to a public that was ready to believe the worst about tobacco companies and was concerned about rising health care costs."[10] In the end, however, parliamentarians – and by extension

Canadians – were never given the opportunity to consider such an option since the possibility of invoking the override was, according to the former health minister, "discussed and dismissed *by Cabinet*."[11] As Hiebert explains:

> the government neither contested the claim that tobacco advertising deserved constitutional protection *nor discussed publicly whether its objectives warranted more comprehensive legislation (which, given the court's prior ruling, would inevitably have led to discussion of whether the enactment of the legislative override was justified)*."[12]

B. Reference re Remuneration of Judges of the Provincial Court (P.E.I.)

Another case in response to which the override might have been used to good effect is the Supreme Court's ruling in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.[13] The case dealt with three separate appeals regarding the constitutionality of legislation in each province reducing the salaries of provincial court judges.[14] In a six to one ruling, the Supreme Court held that unilateral changes in the remuneration of provincial court judges violated the principle of judicial independence entrenched in both the preamble to the *Constitution* and section 11(d) of the *Charter*. The majority ruled that for changes in the salaries of judges to be constitutional, each province was required to create an independent judicial compensation commission to report to the executive and legislative branches on proposed salary changes affecting the judiciary. Any alterations in judicial compensation made without the committee's input would be *ipso facto* unconstitutional. Furthermore, although the committee's report would not be binding, the Court required that governments wishing to depart from its recommendations defend their position according to a standard of rationality, "if need be, in a court of law."[15]

Leaving aside the issue of whether the *Constitution*'s preamble does in fact incorporate the principle of judicial independence and whether section 11(d) extends beyond guaranteeing accused persons the right to a trial before an independent and impartial tribunal,[16] the decision presents a more serious problem. The Court showed no awareness of the manifest conflict of interest adjudication of the issue presented. Determination of the judicial remuneration question is the paradigmatic example of Manfredi's paradox of liberal constitutionalism where judges are no longer constrained by constitutional limits.[17] One way to ensure this does not happen and to afford legislatures the opportunity to offer an alternative interpretation of an important *Charter* right is to recognize the legitimacy of legislative input through consideration of the notwithstanding clause.

In contemplating recourse to section 33, parliamentarians and members of the provincial legislatures would have been given the chance to evaluate whether in their view the creation of independent judicial compensation commissions was in fact mandated by constitutional imperative. Had the issue gained the notoriety use of the override guarantees, it is conceivable that Canadians might have been disinclined to give courts the final say in determining judges' salaries. But as Leeson explains, "the issue here, however, is that none of the legislatures involved contemplated using the notwithstanding clause in this case. It should at least have been discussed, since the case turned in part on section 11(d)."[18] The situation may be retrieved, however, since provincial and federal legislatures can still override any ruling(s) invalidating legislation enacted in response to a compensation committee's recommendations. In fact, the federal Judicial Compensation and Benefits Commission recently recommended that judges' salaries be increased. The government has declined to follow the Report's recommendations, suggesting instead a lesser salary increase.[19] The government's position on who bears ultimate responsibility for responding to the Commission's report is instructive in this regard:

> *It is ultimately for Parliament and not the Government* to decide whether the Commission recommendation, the Government's proposal or some other salary increase is to be established . . . *The Government calls on all parliamentarians to assume and carefully discharge their important constitutional responsibilities* in light of the constitutional and statutory principles that are engaged.[20]

The government's official response to the Committee's Report was enacted without the notwithstanding clause.[21] However, if the new legislation is challenged, the government may do well to consider invoking section 33 to solicit the input of parliamentarians on this issue.

C. Chaoulli v. *Quebec (Attorney General)*

A third decision which may eventually provide grounds for considering use of the override is the Supreme Court's ruling in *Chaoulli* v. *Quebec (Attorney General)*.[22] *Chaoulli* invalidated provincial legislation prohibiting Quebecers from contracting private insurance for services not provided by the public system within reasonable delays. A four-to-three majority ruled that the impugned provisions violated the right to life, liberty and security of the person and could not be saved by section 9.1 of the *Quebec Charter of Personal Rights and Freedoms.* Three justices held that the provisions also violated section 7 and did not constitute a reasonable limit under section 1 of the Canadian *Charter*.[23] The decision has been criticized, however, on the ground that is has far reaching policy consequences which ought to be considered by the legislature, not the judiciary.

The Court's treatment of the issue of wait times under section 7 has raised a number of concerns. For instance, to successfully invoke the protection guaranteed by the right to life, liberty and security of the person, claimants must establish a direct causal connection between the alleged deprivation and state action or inaction.[24] In the present case, the majority's position that this connection had been satisfactorily established is not beyond dispute. It is conceivable that removing the prohibition against contracting private insurance would *not* significantly reduce wait times since a large section of the population unable to access the private system at present would henceforth be able to do so. At least one observer has argued this would either increase the wait times in the private sector, drive up insurance premiums or both.[25] It is therefore unclear that current wait times, which pose certain health risks, can be entirely attributed to government action, in this case the prohibition against contracting private insurance. There are serious consequences in not requiring a clear causal link between an alleged deprivation and state action, while simultaneously adopting a large and liberal interpretation of section 7 of the *Charter*. Such an approach allows courts to use section 7 as a Trojan horse to reformulate policy decisions within the expertise of the elected branches to suit their own conceptions of fundamental justice.[26]

Also problematic in *Chaoulli* was the Court's disregard for its own section 1 jurisprudence. In a number of decisions following the *Oakes* case, the Supreme Court has developed a contextual approach to assessing the reasonableness of rights limitations which considers both the actors involved and the nature of the policy at issue.[27] In *Chaoulli*, despite the state's role in balancing the public's interest in free and accessible health care against the citizens' rights to access private care in certain situations, the majority declined to recognize a 'margin of appreciation' allowing government to mediate these conflicting claims. As McCaig emphasizes, the Court in *Chaoulli* did not merely invalidate two provisions of provincial legislation but directly challenged the foundational principles of the *Canada Health Act*.[28]

In its legislative response to *Chaoulli*,[29] the government does not invoke the override in the Quebec or Canadian charters. However, an invocation might have been judicious to allow the government sufficient time to consider its options as well as its commitment to respect its obligations under the *Canada Health Act*. Indeed, the Court's decision to declare the offending provisions inoperative prompted the Quebec government to file a motion seeking to have the judgment suspended for an eighteen month period. In support of its motion, "the Quebec government pointed out that operationalizing the *Chaoulli* decision required careful examination of how it could be managed within the parameters of the *Canada Health Act*."[30] There is a clear and present danger in deferring to the courts on these issues when they have not been adequately deliberated beforehand in the representative branches of government:

> Pire encore, cela peut conduire à la déresponsabilisation des élus. Sous prétexte qu'un tribunal leur a ordonné de faire telle ou telle chose, ces derniers peuvent non seulement court-circuiter le débat sur une question controversée, mais également prendre des mesures qui sont susceptibles de bouleverser la vie des citoyens, sans avoir à en porter tout le poids.[31]

To be sure, the majority judgment in *Chaoulli* is based on the Quebec *Charter*, not the Canadian *Charter*. However, should the Court eventually revisit the issue under the auspices of the federal bill of rights, it may well endorse the broad interpretation of the right to life, liberty and security of the person articulated by the Chief Justice in *Chaoulli*. Should that happen, at least one observer has expressed the hope "that a majority of our elected representatives will have the guts and the brains to debate the issue and use the override if they conclude that the Supreme Court of Canada's national health policy is not good for the country."[32]

D. Michael Esty Ferguson v. *Her Majesty the Queen*

Finally, as recently as November 13, 2007, the Supreme Court heard arguments in the case of *Michael Esty Ferguson* v. *Her Majesty the Queen* to determine whether courts have the ability to grant constitutional exemptions from minimum sentences where the accused can successfully demonstrate that imposition of the minimum sentence in a particular case would constitute cruel and unusual punishment.[33] The issue is of particular relevance in light of Bill C-2, recently introduced by the Harper government, which proposes longer minimum sentences for specific offences.[34] The use of section 33 would allow the government of the day to advance its own interpretation of section 12 of the *Charter* in the face of a contending judicial interpretation, and to throw the debate open to the public. Public involvement in deliberations on philosophical issues is, after all, one of parliament's primary functions.

III. Summary and Conclusion

The recent Charter @ 25 Conference was devoted in part to debating the continued relevance of the dialogue metaphor and the notwithstanding clause in a system of constitutional supremacy.[35] Both issues are controversial. Just as one observer recently sounded the death knell for dialogue,[36] another (as noted earlier) has called for "a comprehensive qualitative analysis of the cases – one that evaluates the substance of the court rulings, their impact upon the legislatures' policy objectives, and the extent to which legislative responses were successful in overcoming, as opposed to accommodating, these impacts."[37] This study has been guided by a guarded optimism insofar as its central contention is that dialogue in theory serves an intrinsically valuable purpose in a liberal democracy, however, dialogue in practice is not as pervasive as a number of commentators have suggested. Specifically, the paucity of legislative reversals of Supreme Court decisions using the override undermines the opportunity for an inter-institutional conversation harnessing the strengths of the judiciary and legislatures in framing the parameters of a public discussion on the meaning of fundamental rights and freedoms. In the view advanced here, section 33 ought to have been invoked in enactments *reversing* the underlying constitutional principles at issue in *R.* v. *Morgentaler*, *M.* v. *H.* and *R.* v. *Morales*,[38] and in the defiant legislative responses to *R.* v. *Feeney* and *R.* v. *Duarte*.[39] Furthermore, it should generally be considered a legitimate legislative prerogative for advancing contending interpretations of competing rights claims.

Unfortunately, the scholarship in this area is polarized and tends to be supportive of either judicial *or* legislative finality in constitutional interpretation. *Charter* advocates conveniently ignore the fact that courts are responsible for their share of rights violations and that legislatures in the Westminster system play an important role in safeguarding rights. *Charter* sceptics, on the other hand, often exaggerate the extent to which judicial activism threatens the all-important right to self-government. The seemingly more moderate position espoused by Roach employs the rhetoric of complementarity as a smokescreen for judicial finality in constitutional interpretation. I contend that coordinate constitutionalism, a theory supported by the Supreme Court's section 1 jurisprudence and the increased used of suspended declarations of invalidity, provides the most accurate account of the institutional reciprocity that characterizes the relationship between legislatures and the courts. Furthermore, it recognizes the legitimacy of invoking the notwithstanding clause as a means of expressing institutional disagreement over the interpretation of rights as a valid exercise of legislative and executive authority.

I attribute the override's desuetude to a combination of factors, including the perception that its enactment was the result of a tainted constitutional bargain, the influence of American theories of constitutionalism with their emphasis on judicial supremacy, and an executive-dominated parliamentary process which has evolved at the expense of legislatures as *bone fide* deliberative bodies. However, I maintain that an activist framers' intent, in conjunction with the creation of a special standing committee charged with scrutinizing legislation from a rights perspective, both justify recourse to the override, not as a means of trumping rights claims, but to promote a rights discourse in connection with policy issues of national importance. As further evidence in support of my thesis, I point to a number of Supreme Court decisions where section 33 ought to have been invoked to engage the public in resolving the kinds of rights claims that arise in relation to philosophical questions at the core of politics.

- Chapter 1 -

[1] Grant Huscroft, "Constitutionalism from the Top Down," *Osgoode Hall Law Journal* 45 (2007): 101.
[2] Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue Between Court and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such A Bad Thing After All," *Osgoode Hall Law Journal* 35 (1997): 75-124 [hereinafter *Charter Dialogue*].
[3] See generally Richard Haig & Michael Sobkin, "Does the Observer Have an Effect? An Analysis of the Use of the Dialogue Metaphor in Canada's Courts," *Osgoode Hall Law Journal* 45 (2007): 67-90.
[5] [1998] 1 S.C.R. 493.
[6] *Ibid.*, 139.
[7] [1999] 3 S.C.R. 668.
[8] *Ibid.*, 55 [citations omitted].
[9] [2002] 3 S.C.R. 309.
[10] *Ibid.*, para. 127. Haig and Sobkin categorize this use of dialogue by the Supreme Court as "descriptive" rather than "prescriptive" on the basis that "neither the majority nor the dissent invoked the metaphor to justify a particular result in the case." Haig & Sobkin, *Does the Observer Have an Effect?*, 76. I would argue that Justice Iacobucci's reference to the dialogue in this instance is prescriptive in that his understanding of the metaphor dictated a different outcome in the decision.
[11] [2002] 3 S.C.R. 519, para. 17. For a complete discussion of the intra-institutional debate between justices of the Supreme Court regarding dialogue, see Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003," *Supreme Court Law Review* 23 (2004): 105-131 [hereinafter *The Life of a Metaphor*].
[12] Christopher P. Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé* v. *Canada*," *Osgoode Hall Law Journal* 45 (2007): 105-123.
[13] And subsequently Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, "*Charter* Dialogue Revisited – Or "Much Ado About Metaphors," *Osgoode Hall Law Journal* 45 (2007): 1-65 [hereinafter *Charter Dialogue Revisited*].
[14] Hogg and Bushell, *Charter Dialogue*, 79. For a critique of this definition, see Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell," *Osgoode Hall Law Journal* 37 (1997): 513-527 [hereinafter *Six Degrees of Dialogue*]. For a response to this critique, see Peter W. Hogg and Allison A. Thornton, "Reply to Six Degrees of Dialogue," *Osgoode Hall Law Journal* 37 (1999): 529-536 [hereinafter *Reply to Six Degrees*]. In the recent update of their initial article, Hogg, Bushell Thornton and Wright prefer a definition of dialogue whereby "a judicial decision striking down a piece of legislation for inconsistency with a *Charter* right or freedom is followed by some action by the competent legislative body." Peter Hogg, Bushell Thornton and Wright, *Charter Dialogue Revisited*, 45.
[15] Manfredi, *The Life of a Metaphor*, 125-129.
[16] [1994] 3 S.C.R. 63; [1995] 4 S.C.R. 411.
[17] [1993] 3 S.C.R. 463 [hereinafter *Morgentaler II*]; [1999] 2 S.C.R. 3; [1992] 3 S.C.R. 711.
[18] [1997] 2 S.C.R. 13; [1990] 1 S.C.R. 30.
[19] The commentary in this section follows up on Kent Roach's suggestion that a "fertile area for dialogue scholarship will be to study how various reforms to the electoral and legislative process may affect dialogue between courts and legislatures." Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship," *Osgoode Hall Law Journal* 45 (2007): 189 [hereinafter *Sharpening the Dialogue Debate*].
[20] Hogg and Bushell, *Charter* Dialogue, 97.
[21] While the authors' critique of Hogg and Bushell's work is informative, it should be noted that *Charter Dialogue* was intended to be descriptive rather than justificatory or normative. See Hogg, Bushell Thornton and Wright, *Charter Dialogue Revisited*, 27-29.
[22] This aspect of their critique assumes, incorrectly in my opinion, that a legislative decision to repeal a provision or an entire act is less deserving of respect than a decision to amend a provision. See Hogg and Thornton, *Reply to Six Degrees*, 536. While such a response may indeed give rise to varying degrees of policy distortion, as the authors point out, that is a consequence of judicial interpretation of constitutions generally rather than the result of an activist interpretation of an entrenched bill of rights in particular.
[23] Hogg, Bushell Thornton and Wright, *Charter Dialogue Revisited*, 10-26.
[24] Were legislatures to acquiesce to the Court's interpretation of the *Constitution* all of the time, the result would be one hundred per cent 'dialogue' but would be meaningless in terms of effective discussion.

Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)," *Osgoode Hall Law Journal* 45 (2007): 152-153.
[25] *Ibid.*, 153.
[26] *Ibid.*, 161-162. C.f. Roach who emphasizes that in three of four second look cases, legislative responses to judicial nullifications were upheld (suggesting the override acts as a check on judicial power). The only exception was *Sauvé* v. *Canada (Chief Electoral Officer)* where section 33 was not available. Roach, Kent, "Dialogue or Defiance: Legislative reversals of Supreme Court decisions in Canada and the United States," *International Journal of Constitutional Law* 4 (2006): 347-370 [hereinafter *Dialogue or Defiance*]. Note, however, that the Court has struck down legislation in first look cases where section 33 was an option. See *RJR-Macdonald Inc.* v. *Canada (Attorney General)* [1995] 3 S.C.R. 199; *Chaoulli* v. *Quebec (Attorney General)*, [2005] 1 S.C.R. 791.
[27] Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" *Supreme Court Law Review* 23 (2004): 164-165.
[28] See Manfredi, *The Life of a Metaphor.*
[29] *Ibid.*, 123 [emphasis added].
[30] Hogg and Bushell, *Charter Dialogue*, 104-105. See for example *Duarte* and parliament's legislative response: S.C. 1993 c.40.
[31] For reasons in support of the exclusion of lower court decisions, see Manfredi & Kelly, *Six Degrees of Dialogue*, 517. Hogg and Bushell have dismissed this criticism on the basis that dialogue is dialogue, even where it occurs at the lower levels: see Hogg and Bushell, *Reply to Six Degrees*, *supra* note 36, 531. While this may be true, the focus here is on the *outcome* of dialogue, and since the Supreme Court is Canada's final Court of Appeal, the analysis is limited to a consideration of its decisions.
[32] *R.* v. *Morgentaler* [1988] 1 S.C.R. 30 [hereinafter *Morgentaler I*].
[33] *Ford* v. *Quebec (Attorney General)* [1988] 2 S.C.R. 712.
[34] Several commentators have attributed section 33's disuse to Bourrassa's decision to invoke the override in response to *Ford.* However, in my view this argument does not attribute enough weight to the particularly volatile political climate in Canada at the time. Tensions were at an all-time high between English and French Canadians as a result of the 1976 electoral victory of the Parti Québécois, the 1980 referendum, patriation of the *Constitution* without Quebec's consent in 1982 and Quebec's blanket use of the notwithstanding clause three weeks later. Public perception of the override after it was invoked by Bourrassa in 1988 must therefore be viewed in that context.
[35] R.S.Q. c. C-12 [hereinafter the *Quebec Charter*].
[36] *Ford*, paras.41, 49.
[37] *Ibid.*, para. 73.
[38] Kenneth McRoberts, *Misconceiving Canada* (Toronto: Oxford University Press, 1997), 158.
[39] *An Act Respecting the Constitution Act, 1982, S.Q.* 1982, c. 21.
[40] See generally, Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994), 127-162.
[41] *Ibid.*, 138-141.
[42] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, ON: Oxford University Press, 2001), 187 [emphasis in original].
[43] Peter Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy," paper presented at the *Charter @ 25 Conference*, Montreal, Canada, February 14-16, 2007.
[44] C.f. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004), 145.
[45] *Ibid.*, 23.
[46] *Ibid.*, 44-45.
[47] *An Act to Amend the Criminal Code, S.C.* 1995, c. 32, s. 1.
[48] On the use of preambles generally and their importance in contributing to dialogue, see Kent Roach, "The Uses and Audiences of Preambles to Legislation," *McGill Law Journal* 47 (2001): 129-160.
[49] *An Act to Amend the Criminal Code, S.C.* 1995, c. 32, preamble.
[50] *Ibid.*
[51] Kent Roach, *Dialogue or Defiance*, 359.
[52] Section 33.1(1) provides that: "It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to

commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)." *An Act to Amend the Criminal Code, S.C.* 1995, c. 32, s. 1.
[53] *Daviault*, para. 45.
[54] *O'Connor*. First, the accused must petition the court in writing, supported by affidavit evidence, setting out the grounds on which disclosure to the court of the information sought is likely to be relevant or useful to the defence. Where this is found to be the case, the second stage involves a judicial examination of the records to determine the extent of their relevance for production to the accused. In making this determination, the presiding judge must weigh the salutary benefits of a production order insofar as they affect the right of the accused to full answer and defence against the deleterious effects of such an order having regard to the complainants' constitutionally protected right to privacy. This latter determination requires the court to consider a number of factors which essentially involve a weighing of these competing interests. *Ibid.*, paras.21-22, 26.
[55] The importance attributed to these concerns by the minority is evinced by the statement that "the question is not whether the defence can be limited in its attempts to obtain production of private records held by third parties, but how it can be limited in a manner that accords appropriate constitutional protection to all of the constitutional rights at issue." *Ibid.*, para. 55, 56 [emphasis in original].
[56] "The accused's demonstration that information is likely to be relevant must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning." *Ibid.*, para. 68.
[57] *Ibid.*, para. 72-73.
[58] *Ibid.*, para. 74.
[59] *An Act to amend the Criminal Code (production of records in sexual offence proceedings), S.C.* 1997, c. 30 [hereinafter *Bill C-46*].
[60] [1997] 1 S.C.R. 80 [hereinafter *Carosella*].
[61] *Bill C-46*, s. 278.3(4).
[62] See *O'Connor*, 68-69.
[63] *Bill C-46*, s. 278.5(2). The majority held such a balancing test was appropriately confined to the *second* step in the production process where courts consider whether the impugned records ought to be produced to the accused.
[64] *Ibid.*, s. 278.5(2)(f)(g) and (h). The majority did not feel these criteria were relevant since they could be adequately addressed through other means.
[65] Compare *Bill C-46*, s. 278.7(3) with *O'Connor*, para. 76.
[66] *Ibid., Bill C-46*, preamble.
[67] *O'Connor*, para. 65.
[68] *Bill C-46*, preamble.
[69] *Ibid.*
[70] Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R.* v. *Mills*," *Alberta Law Review* 38 (2001): 1057. For a similar view, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001), 282 [hereinafter *The Supreme Court on Trial*].
[71] Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), 59.
[72] *Mills*, para. 57, per Justices McLachlin and Iacobucci.
[73] Roach, *The Supreme Court on Trial*, 276-277.
[74] Manfredi & Kelly, *Six Degrees of Dialogue*, 520; for a discussion of the merits of coordinate constitutionalism, see *infra* chapter 2, note 59 and accompanying text.
[75] Manfredi, *The Life of a Metaphor*, 124-125.
[76] Roach, *The Supreme Court on Trial*, 276-277.
[77] *Morgentaler I.*
[78] *Ibid.*, 72 per Dickson C.J. and Lamer J. Justices Beetz and Estey also focused on procedure in their resolution of the appeal. *Ibid.*, 81-82.
[79] *Ibid.*, 161-162: "If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless."
[80] *Ibid.*, 171.
[81] *Ibid.*, 136-137, 143.
[81] *Medical Services Designation Regulation, N.S. Reg.* 152/89, Schedule A, para. (d).

[82] *An Act to Restrict the Privatization of Medical Services, R.S.N.S.* 1989, c. 281, s. 4.
[83] *Morgentaler I*, 53, per Dickson C.J.: "I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to life, liberty and security of the person". [...] In the present case, I do not believe it is necessary for the Court to tread the fine line between substantive review and the adjudication of policy. [...] it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice" [emphasis added]. The Chief Justice's focus on the procedural aspects of section 7 may simply have been a political expedient to avoid the more controversial issue tackled by Justice Wilson directly.
[84] *Ibid.*, 30.
[85] *Ibid.*, 40. Referencing the legislative history of the *Act*, the Court noted that: "the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and [...] there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated." *Ibid.*, 40.
[86] *R.S.O.* 1990 c. F.3.
[87] *M.* v. *H.*, paras. 43, 46, 49, 51.
[88] *Ibid.*, para. 84.
[89] *S.O.* 1999, c. 6 [hereinafter the *M.* v. *H. Act*].
[90] *Ibid.*, s. 25(2).
[91] In fact, the lower court rulings in the case suggested remedying the constitutional defect in the definition of "spouse" found in s.29 by severing the words "a man and woman" and reading in the words "two persons". See *M.* v. *H.*, (1996), 27 O.R. (3d) 593 (Ont. Ct (Gen. Div.)); *M.* v. *H.*, (1996), 31 O.R. (3d) 417 (Ont. C.A.).
[92] See for example s.36(1) of the *M.* v. *H. Act* which provides that:
'household', when used with reference to a person, means,
(a) any individual who belongs to the person's family,
(b) the person's same sex partner, and
(c) any adult who is related to the person's same-sex partner, shares a residence with the person and is primarily dependent on the person or same sex partner for financial support.
[93] Cited in Jason Murphy, "Dialogic Responses to *M.* v. *H.*: From Compliance to Defiance," *University of Toronto Faculty of Law Review* 59 (2001): 306 [hereinafter Dialogic Responses to *M.* v. *H.*]. Then Attorney General Jim Flaherty's remarks in relation to the legislation also illustrate the government's confrontational attitude in response to the Supreme Court's decision: "This Bill responds to the Supreme Court of Canada decision while preserving the traditional values of the family by protecting the definition of "spouse" in Ontario law. This legislation is not part of our ... agenda. We are introducing the bill because of the Supreme Court of Canada decision." *Ibid.*, 304-305 [emphasis in original].
[94] *M.* v. *H.*, para. 18.
[95] *Ibid.*, para. 32.
[96] *R.S.A.* 1980, c. I-5.
[97] *S.A.* 1999, c. 31 [hereinafter *Bill 44*].
[98] *Ibid.*, s.1(2) [emphasis added].
[99] Dialogic Responses to *M.* v. *H.*, 310 [emphasis added].
[100] Alberta, *Legislative Assembly Debates*, 22 November 1999, p. 1936 (Ms. Graham, MLA).
[101] *Adult Interdependent Relationship Act, S.A.* 2000, c. A-4.5, s. 45.
[102] See for example *An Act to amend various legislative provisions concerning de facto spouses, S.Q.* 1999, c. 14; *Definition of Spouse Amendment Act, 2000 S.B.C.* 2000, c. 24; *Spousal Relationship Statute Law Amendment Act, 2005, S.O.* 2005, c. 5.
[103] *R.S.C.* 1985, c. C-46 [hereinafter the *Code*].
[104] *Morales*, 727.
[105] *Ibid.*, 732.
[106] *Ibid.*, 759-760.
[107] *An Act to amend the Criminal Code and certain other Acts, S.C.* 1997, c. 18, s. 59(2).
[108] [2002] 3 S.C.R. 309.
[109] The four dissenting judges focused their disagreement on the constitutionality of the part of s.515(10)(c) referring to the importance of maintaining confidence in the administration of justice.
[110] *Hall*, para. 22.

[111] *Ibid.*, para. 65.
[112] *Morales*, 726.
[113] *Ibid.*, 729.
[114] *An Act to amend the Criminal Code and certain other Acts, S.C.* 1997, c. 18, s. 59(2).
[115] *Hall*, para. 43.
[116] *Ibid.*, para. 104.
[117] *Mills*, para. 55, cited in *Hall*, para. 125 [emphasis added].
[118] *Hall*, para. 127 [emphasis added].
[119] At common law, a warrantless search of a dwelling is authorized, *inter alia*, where the police have reasonable and probable grounds to believe that the accused has committed an indictable offence and is to be found in the dwelling. However, the majority reasoned that the *Charter* afforded greater protection of privacy rights and therefore read into the *Code* a requirement that a warrant be obtained specifically authorizing entry into a private dwelling for the purpose of executing an arrest. *Feeney*, para. 48
[120] *Ibid.* para. 47[emphasis in original].
[121] *Ibid.*, para. 50.
[122] *Ibid.*, para. 26.
[123] *Ibid.*, para. 57-58.
[124] *Ibid.*, para. 109-126.
[125] *Ibid.*, para. 148-149.
[126] *Ibid.*, para. 136-138.
[127] *Ibid.*, para. 182.
[128] *Ibid.*, para. 156.
[129] *Ibid.*, para. 30.
[130] *Ibid.*, para. 136.
[131] *An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings), S.C.* 1997, c. 39, ss. 529, 529.1 [hereinafter *Bill C-16*].
[132] *Ibid.*, preamble [emphasis added].
[133] *Ibid.*, s. 529.3(2)(b).
[134] See *supra* note 163. See also Hiebert, *Charter Conflicts*, 155: "The majority was not at all sympathetic to the minority position that the need to preserve evidence (at least in the context of the *Feeney* case) justified entering the suspect's dwelling without a warrant."
[135] Kent Roach, *Dialogue or Defiance*, 359.
[136] Whereas section 529.4(1) contemplates entry without prior announcement pursuant to judicial authorization, subparagraph 3 allows the police to forego judicial authorization with respect to announcement in these two cases.
[137] *Bill C-16*, s. 529.3(2)(a)(b).
[138] See Hiebert, *Charter Conflicts*, 154: "Justice Minister McLellan acknowledged that suspicion involves a lower standard than that suggested by the court, but she indicated her belief that this standard was justified to prevent imminent bodily harm or death."
[139] *Ibid.*, 156.
[140] Kent Roach, *Due Process & Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), 85.
[141] "By contrast to the general provisions on electronic surveillance, the *Code* places no restriction on participant surveillance. The police may employ this practice in their absolute discretion, against whom they wish, and for whatever reasons they wish, without any limit as to place or duration. There is a total absence of prior judicial supervision of this practice." *Duarte*, 46-47.
[142] *Ibid.*, 59-60.
[143] *An Act to amend the Criminal Code, S.C.* 1993, c. 40, s. 4 [emphasis added].
[144] Roach, *Due Process and Victims' Rights*, 74 [citations omitted; emphasis added].
[145] Canada. House of Commons. *Standing Committee on Justice and Human Rights, Second Report.* http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=116&Lang=1&SourceId=36800 (accessed November 17, 2007).

- Chapter 2 -

[1] J.B. Thayer, *John Marshall* (Boston: Houghton Mifflin, 1901), 106-107 as cited by A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 22.
[2] *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803), 176.
[3] *Ibid.*, 177.
[4] See J. Agresto, *The Supreme Court and Constitutional Democracy* (New York: Cornell University Press, 1984), 71; Bickel, *The Least Dangerous Branch*, 3-4. Justice Marshall's ruling was reaffirmed post *Brown* v. *Board of Education* in the case of *Cooper* v. *Aaron* where the Court held that the case of *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation . . . enunciated by this Court . . . is the supreme law of the land." *Cooper* v. *Aaron* 358 U.S. 1 (1958) 1, 17.
[5] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont: Oxford University Press, 2001), 22.
[6] *Hunter* v. *Southam Inc.* [1984] 2 S.C.R. 145, para. 16.
[7] See *infra* note 56 and accompanying text.
[8] *Sauvé* v. *Chief Electoral Officer of Canada* [2002] 3 S.C.R. 519, para. 17. See also Christopher P. Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé* v. *Canada*," *Osgoode Hall Law Journal* 45 (2007): 105-123 [hereinafter *The Day Dialogue Died*].
[9] Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue Between Court and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such A Bad Thing After All," *Osgoode Hall Law Journal* 35 (1997): 77 [hereinafter *Charter Dialogue*].
[10] "[A] functioning democracy requires a continuing process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas". At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solution to public problems will rise to the top." *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 68 [citations omitted].
[11] P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 30 (1983): 52.
[12] Dworkin is referring to the American *Constitution*, but the same is true in the Canadian context.
See Ronald M. Dworkin, *Taking Rights Seriously* (Cambrige, Mass: Harvard University Press, 1978), 141.
[13] *Ibid.*, 142.
[14] As Dworkin explains, "rights against the state are claims that, if accepted, require society to settle for institutions that may not suit it so comfortably. The nerve of a claim of right (...) is that an individual is entitled to protection against the majority even at the cost of the general interest." *Ibid.*, 147
[15] *Ibid.*, 149.
[16] David Beatty, "A Conservative Court: the Politicization of Law," *University of Toronto Law Journal* 41 (1991): 147, 151 [hereinafter *A Conservative Court*].
[17] These include denial, avoidance and abdication. See David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990): 84, 88, 99.
[18] Beatty, *A Conservative Court*, 162.
[19] *Ibid.*, 166.
[20] Manfredi, *Judicial Power*, 42.
[21] Lorraine E. Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State," *Israel Law Review* 33 (1999): 16-19 [hereinafter *Canada's Constitutional Revolution*].
[22] [1985] 1 S.C.R. 295.
[23] Lorraine E. Weinrib, "The Supreme Court of Canada and Section One of the Charter," *Supreme Court Law Review*, 10 (1988): 495.
[24] Weinrib, *Canada's Constitutional Revolution*, 35.
[25] *Switzman* v. *Elbing* [1957] S.C.R. 285; *Roncarelli* v. *Duplessis* [1959] S.C.R. 121.
[26] Weinrib, *Canada's Constitutional Revolution*, 14-15.

[27] See Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal & Kingston: McGill-Queen's University Press, 2003).
[28] F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000), 44.
[29] *Ibid.*, 84.
[30] *Ibid.*, 149.
[31] As Roach points out, Morton & Knopff rely on Lord Durham's conception of parliamentary sovereignty which was unsympathetic (to put it charitably) to minority rights and federalism. Kent Roach, "*Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*," *The Canadian Bar Review* 80 (2001): 495, note 34.
[32] Manfredi, *Judicial Power*, 22.
[33] *RWDSU* v. *Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*]; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3 [hereinafter *Provincial Court Judges*]; *Vriend* v. *Alberta* [1998] 1 S.C.R. 493; *Sauvé* v. *Canada (Chief Electoral Officer)* [2001] 3 S.C.R. 426.
[34] James B. Kelly, *Governing With the Charter* (Vancouver: UBC Press, 2005): 35, 37.
[35] Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), 40.
[36] Allan C. Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter," *University of Toronto Law Journal* 38 (1988): 284-285.
[37] *Ibid.*, 287, 292.
[38] *Ibid.*, 279.
[39] Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), 97, 102.
[40] *Ibid.*, 205.
[41] *Ibid.*, 96, 106.
[42] Kelly, *Governing with the Charter*, 32.
[43] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001), 246.
[44] Roach, *Constitutional and Common Law Dialogues*, 495.
[45] As discussed below, *infra* note 112 and accompanying text, it is unclear to what extent there are always readily ascertainable majorities in any government. The pattern of relationships among the various interests is perhaps more aptly described as a coalition of constantly shifting minorities.
[46] Roach, *Constitutional and Common Law Dialogues*, 485 [emphasis added].
[47] Bickel, *The Least Dangerous Branch*, 20-23.
[48] *Ibid.*, 24.
[49] "The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it (...) and whose performance by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility." *Ibid.*
[50] *Ibid.*, 70-71.
[51] *Ibid.*, 25-26.
[52] Roach relies on the following statement from Perry: "What the majority comes to believe in the long term, after having been rebuffed by the electorally unaccountable Supreme Court in the short-term, is more likely to be morally correct than are established but untested, unreflective moral conventions . . ." Michael J. Perry, *The Constitution, the Courts and Human Rights* (New Haven: Yale, University Press, 1982), 111, cited in Roach, *Constitutional and Common Law Dialogues*, 499, note 52.
[53] Michael J. Perry, "The Constitution, the Courts and the Question of Minimalism," (1993) 88 *Northwestern University Law Review*: 87 [hereinafter *Minimalism*].
[54] *Ibid.*, 138.
[55] Roach, *The Supreme Court on Trial*, 250 [emphasis added].
[56] Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, "*Charter* Dialogue Revisited – Or "Much Ado About Metaphors," *Osgoode Hall Law Journal* 45 (2007): 31 [hereinafter *Charter Dialogue Revisited*]. However, the authors acknowledge two exceptions to the principle of judicial finality: first where new evidence or a material change in circumstances calls into question the legitimacy of a prior

judicial ruling, and second where the legislature invokes the notwithstanding clause. *Ibid.*, 34. The foregoing begs the question whether an assertion of judicial finality with exceptions (e.g. section 33) and a coordinate approach are not the same thing. While the outcome may indeed be the same, the process by which it is arrived at differs in one important respect. On the judicial finality view, legislatures can invoke section 33 to override a right *as determined by the Court*, whereas from a coordinate perspective, the invocation of the override is simply a procedural vehicle for expressing an equally valid *legislative* interpretation of the same right. The difference is not merely semantic, since on the latter view, legislatures are empowered to participate in the definition of rights. On the former view, they are relegated to a largely reactive role which shifts the issue from the elected branches to the courts and potentially results in an abdication of our social responsibility to discuss and debate contentious policy issues.

57 Roach, *The Supreme Court on Trial*, 247.

58 Jean-Jacques Rousseau, *On the Social Contract*, trans. D.A. Cress (Indianapolis: Hackett Publishing Company, 1987), 38-39.

59 James Madison, "Speech on Removals from Office" (June 17, 1789), in *The Writings of James Madison*, Vol. 6, ed. Gaillard Hunt. (New York: Putnam, 1904), 403.

60 James D. Richardson, *Messages and Papers of the Presidents* (Washington: Government Printing Office, 1896-99), 576-591, as cited in M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), 15.

61 Tushnet, *Taking the Constitution Away from the Courts*, 106.

62 *Ibid.*, 98.

63 See Joseph Fletcher and Paul Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective," *Choices* 6 (2000): 4-29 [hereinafter *Canadian Attitudes*].

64 The Right Honourable Beverly McLachlin, P.C., *Judging in a Democratic State*, (June 3, 2004), http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/DemocraticState_e.asp (accessed December 21, 2007).

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

66 Manfredi, *Judicial Power*, 188.

67 [1930] A.C. 124 [hereinafter *Edwards*].

68 Manfredi, *The Day Dialogue Died*, 123 [emphasis in original].

69 Hiebert, *Charter Conflicts*, 53.

70 *Ibid.*, 54.

71 Kelly, *Governing With the Charter*, 223.

72 *Ibid.*

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

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

75 Manfredi, *Judicial Power*, 66-67.

76 [1986] 1 S.C.R. 103., para. 69-71. In order to successfully limit a *Charter* right, the government has the burden of demonstrating not only that the objective of the legislation is "pressing and substantial," but also that there is a proportionality between the limitation and that objective. Proportionality requires the government to demonstrate to the court's satisfaction that the limiting measure is rationally connected to the legislative objective, that it minimally impairs the right in question, and that the deleterious effects of the limiting measure are proportionate to the objective

77 Manfredi, *The Day Dialogue Died*, 116.

78 [1986] 2 S.C.R. 713.

79 *Ibid.*, para. 150 [emphasis added].

80 *Ibid.*, para. 183.

81 [1989] 1 S.C.R. 927.

82 *Ibid.*, 993-994.

83 *Ibid.*

84 [1995] 3 S.C.R. 199.

85 Manfredi, *Judicial Power*, 42: "In the final analysis, the distinction between socio-economic balancing and adversarial infringement of individual interests is not sufficiently tangible to provide the foundation for a principled guide to judicial action. (...) In sum, the Court is unwilling to follow self-imposed limits on its

judicial review function, and its control over the interpretation and application of section 1 allows it to expand and contract those limits to suit its immediate policy preferences."

[86] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1995] 3 S.C.R. 199, para. 160.

[87] Kelly, *Governing With the Charter*, 138; see also Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*," *McGill Law Journal* 48 (2003): 537.

[88] *Schacter* v. *Canada* [1992] 2 S.C.R. 679.

[89] Hogg, Bushell Thornton and Wright, *Charter Dialogue Revisited*, 18 [emphasis added]. This characterization suggests that the legislature was in error since only the courts can correctly and definitively interpret the *Charter*. See also Sujit Choudhry & Kent Roach, "Putting the Past Behind Us?" *Supreme Court Law Review* 21 (2003): 232.

[90] *Ibid., Putting the Past Behind Us*, 233 (although the authors associate the increasing use of this remedy with dialogue, this description of it also fits well with a coordinate approach).

[91] Kelly, *Governing With the Charter*, 175.

[92] Roach, *Constitutional and Common Law Dialogues*, 493.

[93] *Ibid.*

[94] Agresto, *The Supreme Court and Constitutional Democracy*, 101 [emphasis added].

[95] Roach, *The Supreme Court on Trial*, 254.

[96] *Roncarelli* v. *Duplessis* [1959] S.C.R. 121.

[97] Roach, *The Supreme Court on Trial*, 256-257 [emphasis added].

[98] Andrew Mayeda, "'Challenging Year' ahead, Harper warns in year-end interview," *Ottawa Citizen*, (December 20, 2007), http://www.canada.com/topics/sports/story.html?id=f5ec9cef-6654-4acc-9164-9e468011b18e (accessed January 16, 2008).

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

[100] Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World", *University of Toronto Law Journal* 53 (2003): 97.

[101] Whyte's insights are particularly relevant since he was among the Saskatchewan delegation advising then Premier Allen Blakeney during the constitutional negotiations which led to the patriation of the *Constitution*. There is some irony in the fact that Whyte, an ardent supporter of judicial activism and longtime critic of the notwithstanding mechanism, was an advisor to the Premier who expressed concern about the judicialization of politics and only agreed to patriation on condition that the *Charter* include a notwithstanding clause.

[102] John D. Whyte, "On Not Standing For Notwithstanding," *Alberta Law Review* 28 (1990): 350-351.

[103] See *supra* note 95 and accompanying text.

[104] Roach, *The Supreme Court on Trial*, 260.

[105] Whyte, *On Not Standing for Notwithstanding*, 352.

[106] *Ibid.*, 354.

[107] See also Peter H. Russell, "Standing Up For Notwithstanding," *Alberta Law Review* 24 (1991): 306.

[108] Whyte, *On Not Standing for Notwithstanding*, 356.

[109] Canadian courts have approved denying women equal status as persons, deporting Japanese Canadians, striping Aboriginal women of their status and denying women maternity benefits. The cases referred to are: *Edwards* v. *Canada [Attorney General)* [1928] S.C.R. 276; *Cooperative Committee on Japanese Canadians et al.* v. *Attorney General of Canada et al.* [1947] A.C. 87; *Lavell* v. *Canada (Attorney General)* [1974] S.C.R. 1349; *Bliss* v. *Attorney General of Canada* [1979] 1 S.C.R. 183.

[110] *British Columbia Government Employees' Union* v. *British Columbia (A.G.)* [1988] 2 S.C.R. 214; *Dolphin Delivery*; *Egan* v. *Canada* [1995] 2 S.C.R. 513; *Provincial Court Judges*; *Mackin* v. *New Brunswick (Minister of Finance)*; *Rice* v. *New Brunswick* [2002] 1 S.C.R. 405; *Ontario Public Service Employees Union* v. *Ontario (A.G.)* (2002), 58 O.R. (3d) 577 (Ont. C.A.).

[111] For a discussion of the rule of law, see *Quebec Secession Reference* [1998] 2 S.C.R. 217, para. 71.

[112] John D. Whyte, "Sometimes Constitutions Are Made In The Street" (paper, The Charter @ 25, Montreal, Canada, February 14-16, 2007) [hereinafter *Constitutions*].

[113] I develop this argument in chapter 3.

[114] Kelly, *Governing With the Charter*, 67, 74 and 76. Furthermore, even prior to entrenchment, Canadians have always been subject to judicial limitations extending beyond the simple division of powers in the *Constitution*. See Russell, *Standing Up for Notwithstanding*, 294.
[115] Manfredi, *Judicial Power*, 188.
[116] Whyte, *Constitutions*, 9.
[117] For example, see *supra* notes 109-110.
[118] Patricia Hughes, "Section 33 of the Charter: What's the Problem Anyway? (Or Why a Feminist Thinks Section 33 Does Matter)" *University of New Brunswick Law Journal* 49 (2000): 173 [hereinafter *Section 33 of the Charter*].
[119] See *supra* note 73 and accompanying text.
[120] Kelly, *Governing With the Charter, 101*-102.
[121] Hughes, *Section 33 of the Charter*, 180.
[122] See for example the decisions referred to *supra* note 107-108.
[123] Hughes, *Section 33 of the Charter*, 182.
[124] Rousseau, *On the Social Contract*, 17.
[125] *Ibid.*, 27.
[126] *Ibid.*, 30.
[127] Mark Tushnet, *Taking the Constitution Away from the Courts*, 174.
[128] Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), 72. The PCO has also become increasingly powerful, undercutting the representational function of elected representatives of government: Donald J. Savoie, "The Federal Government: Revisiting Court Government," in L. Bernier, K Brownsey & M. Howlett, eds. *Executive Styles in Canada: Cabinet Structures and Leadership Practices in Canadian Government* (Toronto: University of Toronto Press, 2005), 24-26.
[129] Fletcher & Howe, *Canadian Attitudes*, 11.
[130] See generally T*he Court Party*. See also Christopher P. Manfredi, "Judicial Power and the *Charter*: Reflections on the Activism Debate," *University of New Brunswick Law Journal* 53 (2004): 197 [hereinafter *Reflections on the Activism Debate*].
[131] Kelly, *Governing with the Charter*, 223: "(...) it has led to a further marginalization of parliament as an institution and deepened prime-ministerial government. The result is a democratic deficit that is not the result of the Supreme Court's interpretation of the Charter but of the prime minister's decision to govern with the Charter from the centre. This is the intra-institutional paradox of legislative activism: it has contained judicial power but has further weakened parliament as an institution at the hands of the cabinet."
[132] Manfredi, *Reflections on the Activism Debate*, 186.

- Chapter 3 -

[1] Harry Arthurs, "Constitutional Courage," *McGill Law Journal* 49 (2004): 12.
[2] Roy Romanow, John Whyte and Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984), 87 [hereinafter *Canada...Notwithstanding*].
[3] Howard Leeson, "Section 33, The Notwithstanding Clause: A Paper Tiger?" *Choices* 6 (2000): 8 [hereinafter *Section 33*].
[4] *Ibid.*, 9-10.
[5] James B. Kelly, *Governing With the Charter* (Vancouver: UBC Press, 2005): 46-73.
[6] Leeson, *Section 33*, 298.
[7] "This history, in combination with the text's hierarchy between rights, make it plain that a conception of the override as a founding principle of partnership or dialogue between the courts and legislatures is an *ex post facto* rationalization." Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" *Supreme Court Law Review* 23 (2004): 141.
[8] Lorraine E. Weinrib, "Learning to Live With The Override," *McGill Law Journal* 35 (1990): 564.
[9] *Ibid.*, 165.
[10] Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) *Osgoode Hall Law Journal* 25 (1987): 96.
[11] Kelly, *Governing With the Charter*, 87-88.

[12] *Ibid.*, 88 [emphasis added].
[13] The Honourable R. Roy McMurtry, "The Search for a Constitutional Accord – A Personal Memoir," *Queens Law Journal* 8 (1982): 60 [hereinafter *Memoirs*].
[14] Peter Lougheed, "Why A Notwithstanding Clause?" *Points of View* 6 (1998): 13.
[15] *Ibid.*, 16.
[16] John D. Whyte, "Sometimes Constitutions Are Made In The Street" (paper, The Charter @ 25, Montreal, Canada, February 14-16, 2007), 6 [hereinafter *Constitutions*]. See *supra* chapter 2, note 112 and accompanying text.
[17] Romanow, Whyte and Leeson, *Canada...Notwithstanding*, 197, 200.
[18] As Peter Russell has recently argued, the premiers' enthusiasm for the override was based on their view that "(...) a clause was needed for those exceptional occasions when elected legislators, federal, provincial or territorial, after careful deliberation, conclude that the way judges have construed, or are likely to construe, a Charter right or freedom is an unreasonable constraint on democratic power or threatens a vital interest of society." Peter H. Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy" (paper, The Charter @ 25, Montreal, Canada, February 14-16, 2007), 3 [hereinafter *The Notwithstanding Clause*].
[19] Romanow, Whyte and Leeson, *Canada...Notwithstanding*, 209.
[20] McMurtry, *Memoirs*, 65. "The judges might apply aspects of American jurisprudence inconsistent with the Canadian experience. The *non obstante* provision allows for legislative corrections of these judicial bloopers while the courts are feeling their way" [emphasis in original]. Paul Weiler, "Rights and Judges in a Democracy: A New Canadian Version," *University of Michigan Law Review* 18 (1984): 81.
[21] Paul Weiler, "The Evolution of the Charter: A View from Outside," in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, eds. Joseph M. Weiler and Robin M. Elliot (Toronto: Carswell, 1986), 59 [emphasis added; hereinafter *The Evolution of the Charter*].
[22] John D. Whyte, "On Not Standing For Notwithstanding," *Alberta Law Review* 28 (1990): 351 [emphasis in original].
[23] Peter H. Russell, "Standing Up For Notwithstanding," *Alberta Law Review* 24 (1991): 307.
[24] Weiler, *The Evolution of the Charter*, 59 [emphasis added].
[25] Nick Nanos, "Charter Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights," *Policy Options* 28 (2007): 50, 54 [hereinafter *Charter Values*].
[26] *Ibid.*, 55.
[27] For an argument that these are largely responsible for the override's relative obscurity, see Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont: Oxford University Press, 2001), 84-88 [hereinafter *Judicial Power*].
[28] Russell, *The Notwithstanding Clause*, 5.
[29] Tsvi Kahana, "The notwithstanding mechanism and public discussion: Lessons from the ignored practices of section 33 of the Charter," *Canadian Public Administration* 44 (2001): 256, 272 [hereinafter *The notwithstanding mechanism and public discussion*]. The invocation of section 33 has been renewed as recently as 2004 in Quebec: see Tsvi Kahana, "Legalism, Anxiety and Legislative Constitutionalism," *Queen's Law Journal* 31 (2006): 555.
[30] These include Quebec's blanket use of the override in 1982 as a sign of protest against patriation and again in 1988 in response to the Supreme Court's decision in *Ford*, Saskatchewan's use of the override in 1986 in back-to-work legislation and Alberta's use of the provision in 1998 in legislation addressing potential claims by victims of its eugenics program and again in 2000 in legislation confining marriage to a union between a man and a woman. *Ibid.*, 258, 268-272.
[31] *Ibid.*, 274-276.
[32] See, for example, *Ford* v. *Quebec (Attorney General)* [1988] 2 S.C.R. 712 [hereinafter *Ford*]; *RWDSU* v. *Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, *R.* v. *Daviault* [1994] 3 S.C.R. 63; *Egan* v. *Canada* [1995] 2 S.C.R. 513 [hereinafter *Egan*]; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3; *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*], to name only a few.
[33] Section 33 was invoked by Quebec in response to *Ford* and by Alberta in 2000 in response to *Egan*, *Vriend* v. *Alberta* [1998] 1 S.C.R. 493 and *M.* v. *H.* [1999] 2 S.C.R. 3 (although in the latter instance, the protest was registered in the form of a private member's bill).
[34] See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001), 246-250 [hereinafter *The Supreme Court on Trial*].

[35] Janet L. Hiebert, "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" *Supreme Court Law Reivew* 23 (2004): 175 [hereinafter *Canada's Notwithstanding Clause*]; see also Arthurs, *Constitutional Courage*, 11.
[36] Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, "*Charter* Dialogue Revisited – Or "Much Ado About Metaphors," *Osgoode Hall Law Journal* 45 (2007): 33 [hereinafter *Charter Dialogue Revisited*].
[37] The Right Honourable Beverly McLachlin, P.C., *Judging in a Democratic State*, (June 3, 2004), http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/DemocraticState_e.asp (accessed December 21, 2007).
[38] Hiebert, *Canada's Notwithstanding Clause*, 179.
[39] Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda," *Advocate* 45 (1987): 857.
[40] James Madison, "The Federalist No. 51," in *The Enduring Debate: Classic and Contemporary Readings in American Politics*, 4th ed, eds. David T. Canon, John J. Coleman and Kenneth R. Mayer, 51-54 (New York: W.W. Norton & Company, 2006), 53.
[41] Kelly, *Governing With the Charter*, 13.
[42] Manfredi, *Judicial Power*, 26-31. Manfredi also draws on the U.S. experience in his defence of coordinate constitutionalism: *ibid.*, 189-190.
[43] Roach, *The Supreme Court on Trial*, 69, 95. To be fair, Roach notes this tendency is understandable "given that most of what has been written about the role of courts under bills of rights has been shaped by the overpowering experience." *Ibid.*, 69. See also Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), 35; Kelly, *Governing With the Charter*, 13.
[44] Roach, *Constitutional and Common Law Dialogues*, 497; Bickel, *The Least Dangerous Branch*, 25-26.
[45] Hiebert, *Canada's Notwithstanding Clause*, 178.
[46] Joseph Fletcher and Paul Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective," *Choices* 6 (2000): 11 [hereinafter *Canadian Attitudes*].
[47] *Ibid.*, 25.
[48] Nanos, *Charter Values*.
[49] Fletcher and Howe, *Canadian Attitudes*, 17, 19.
[50] David C. Docherty, "Parliament and Government Accountability," in M.W. Westmacott and H.P. Mellon, eds. *Public Administration and Policy: Governing in Challenging Times* (Scarborough, Ont: Prentice Hall and Bacon Canada, 1998), 42.
[51] Rėjean Pelletier, "Responsible Government: Victory or Defeat for Parliament?" F.L. Seidle and L. Massicotte, eds. *Taking Stock of 150 Years of Responsible Government* (Ottawa: Canadian Study of Parliament Group, 1999), 66.
[52] C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), 17-19 [hereinafter *The Parliament of Canada*].
[53] David Johnson, *Thinking Government*, 2nd ed. (Peterborough: Broadview Press, 2006), 224-230. See also D. Savoie, "The Federal Government: Revisiting Court Government" in L. Bernier, K Brownsey & M. Howlett, eds. *Executive Styles in Canada: Cabinet Structures and Leadership Practices in Canadian Government* (Toronto: University of Toronto Press, 2005), 29.
[54] Franks, *The Parliament of Canada*, 207, 209.
[55] *Ibid.*, 210.
[56] David C. Docherty, *Mr. Smith Goes to Ottawa* (Toronto: University of Toronto Press, 1998), 45-46, 51-55 [hereinafter *Mr. Smith Goes to Ottawa*].
[57] Kelly, *Governing With the Charter*, 222-257.
[58] *Ibid.*, 223.
[59] James B. Kelly, "Parliament and the Charter of Rights: An Unfinished Constitutional Revolution," *Policy Options* 28 (2007): 103 [hereinafter *Parliament and the Charter of Rights*].
[60] Kelly, *Governing with the Charter*, 248.
[61] The government might also *favour* invoking the notwithstanding clause in response to a judicial decision, in which case executive dominance would be an advantage. However, where public opinion on the merits of invoking the notwithstanding clause differs from the executive's, executive dominance (in combination with party discipline) operates to the disadvantage of the legislative branch.
[62] Franks, *The Parliament of Canada*, 215.
[63] Savoie, *Governing from the Centre*, 93.

[64] Jennifer Smith, "Debating the Reform of Canada's Parliament," in F.L. Seidle and D.C. Docherty, eds. *Reforming Parliamentary Democracy* (Montreal: McGill-Queen's University Press, 2003): 150-168.
[65] The Parliamentary Centre, *Forum on parliamentary reform*, 16, http://www.parlcent.ca/publications/pdf/reform_e.pdf (accessed November 13, 2007) [hereinafter *Forum on parliamentary reform*].
[66] Docherty, "Parliamentarians and Government Accountability," 49.
[67] Peter C. Dobell and Martin Ulrich, "A Challenge Facing the Canadian Public Service," *Occasional Papers on Parliamentary Government* 21 (September, 2005), 14, http://www.parlcent.ca/publications/pdf/PG%2021%20Final%20ENG.pdf (accessed December 21, 2007).
[68] These include monitoring committee composition to ensure that membership reflects Canadian interests, that members have appropriate policy expertise, that committee reports are actually debated in the House and that committees are endowed with sufficient resources to fulfil their mandates. *Forum on parliamentary reform*, 16-22.
[69] "(...) because of the dominance of party discipline, majority governments, extreme partisanship in the House of Commons, and the undervalued role of the Senate, the parliamentary committee system in Canada is prevented from acting as an adequate check on the legislative agenda of the political executive." Kelly, *Governing With the Charter*, 246.
[70] Kelly, *Parliament and the Charter of Rights*, 107.
[71] *Ibid.*
[72] Lougheed, *Why A Notwithstanding Clause?* 16 [emphasis added]; see also Russell, *Standing Up For Notwithstanding*, 299.
[73] Janet L. Hiebert, "Wrestling With Rights: Judges, Parliament and the Making of Social Policy," *Choices* 5 (1999): 27 [hereinafter *Wrestling With Rights*].
[74] Docherty, *Mr. Smith Goes to Ottawa*, 40-42.
[75] Hiebert, *Wrestling With Rights*, 28.
[76] *Ibid.*, 30-31.
[77] Weinrib, *Learning to Live With The Override*, 557-558.
[78] Russell, *Standing Up for Notwithstanding*, 301-302.
[79] Manfredi, *Judicial Power*, 193; the underlined portions are the authors, while the italicized portions are Manfredi's amendments to the original section 33.
[80] Lougheed, *Why A Notwithstanding Clause?*, 17.

- Chapter 4 -

[1] John Crosbie, "Our system 'is out of whack': Parliament should tell Canadians what it thinks of judicial activism," *The Globe and Mail*, August 31, 1998, sec. A23.
[2] *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1995] 3 S.C.R. 199.
[3] *Ibid.*, at para. 164, 174.
[4] *Tobacco Act, S.C.* 1997, c. 13.
[5] These include: (1) seeking and attaining the truth; (2) participating in social and political decision-making; and (3) cultivating diversity in the forms of human self-fulfillment and human flourishing in a tolerant and welcoming environment. *Ford* v. *Quebec (Attorney General)* [1988] 2 S.C.R. 712, 765-767.
[6] See *Ford*; *Irwin Toy Ltd.* v. *Quebec (Attorney General)* [1989] 1 S.C.R. 927.
[7] Janet L. Hiebert, "Wrestling With Rights: Judges, Parliament and the Making of Social Policy," *Choices* 5 (1999): 12.
[8] *Ibid.*, 11.
[9] James B. Kelly, *Governing With the Charter* (Vancouver: UBC Press, 2005): 142. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001), 185-186.
[10] Roach, *ibid.*, 185.
[11] Hiebert, *Wrestling With Rights*, 15, note 39 [emphasis added].
[12] Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), 90.
[13] [1997] 3 S.C.R. 3 [hereinafter *Provincial Court Judges*].
[14] In two of the three provinces, legal challenges were commenced by accused while in the third legal action was taken by the Provincial Court Judges Association.

[15] *Ibid.*, para. 133.
[16] For a critique of the *Provincial Court Judges* case on related grounds, see Robert G. Richards, "Provincial Court Judges Decision – Case Comment," *Saskatchewan Law Review* 61 (1998): 575.
[17] See Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont: Oxford University Press, 2001), 22.
[18] Howard Leeson, "Section 33, The Notwithstanding Clause: A Paper Tiger?" *Choices* 6 (2000): 20.
[19] For the Report of the Judicial Compensation Commission, see Roderick A. McLennan, *Report of the Second Judicial Compensation and Benefits Commission*, (May 31, 2004) http://www.quadcom.gc.ca/rpt/report.20040531.pdf, (accessed November 21, 2007). See also Department of Justice Canada, *Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission* (May 29, 2006), http://canada.justice.gc.ca/en/dept/pub/jcbc/response_e.pdf, at 10-11 (accessed November 21, 2007).
[20] *Ibid.*, 11 [emphasis added].
[21] *An Act to amend the Judges Act and certain other Acts in relation to the Courts*, S.C. 2006, c. 11. The statute comes into force on the date determined by order in council.
[22] [2005] 1 S.C.R. 791 [hereinafter *Chaoulli*].
[23] Justice Deschamps ruled that the legislation violated the *Quebec Charter* and was joined in her opinion by Justices McLachlin, Major and Bastarache; the latter three held that the same provisions violated the *Charter*. Justices Lebel, Binnie and Fish dissented, arguing that the right to quality health care within a reasonable time is not a principle of fundamental justice. Similarly, in their view the occasional violation of the right to life, liberty and security of the person is justifiable under section 9.1 of the *Quebec Charter of Personal Rights and Freedoms*, R.S.Q. c. C-12.
[24] See for example *Blencoe* v. *British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307, para. 60.
[25] Geneviève Tremblay-McCaig, "L'affaire *Chaoulli* c. *Procureur générale du Québec* : appartient-il aux tribunaux de remettre en question les objectifs politiques qui modèlent le système de santé?" *Revue Juridique Thémis* 41 (2007): 180 [hereinafter *L'affaire Chaoulli*].
[26] *Ibid.*, 190.
[27] See *supra* chapter 2, note 75 and accompanying text.
[28] McCaig, *L'affaire Chaoulli*, 199. See also Christopher P. Manfredi and Antonia Maioni, "'The Last Line of Defence for Citizens': Litigating Private Health Insurance in *Chaoulli V. Quebec*," *Osgoode Hall Law Journal* 44 (2006): 267 [hereinafter *Litigating Private Health Insurance*].
[29] *An Act to amend the Act respecting health services and social services and other legislative provisions, S.Q.* 2006, c. 43.
[30] Manfredi and Maioni, *Litigating Private Health Insurance*, 266.
[31] McCaig, *L'affaire Chaoulli*, 203.
[32] Peter H. Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy" (paper, The Charter @ 25, Montreal, Canada, February 14-16, 2007), 7.
[33] Supreme Court of Canada, *Michael Esty Ferguson* v. *Her Majesty the Queen*, http://cases-dossiers.scc-csc.gc.ca/information/cms/case_summary_e.asp?31692 (accessed November 23, 2007). See also Richard Foot, "Top court ponders mandatory jail terms," *Montreal Gazette*, November 13, 2007, sec. A12.
[34] Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, 2nd sess., 39th Parliament, 2007, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3078412&Language=e&Mode=1&File=24 (accessed November 23, 2007).
[35] See *The Charter @ 25*, homepage, (2006), http://misc-iecm.mcgill.ca/conf2007/welcome.html (accessed December 20, 2007).
[36] Christopher P. Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé* v. *Canada*," *Osgoode Hall Law Journal* 45 (2007): 105-123.
[37] Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)," *Osgoode Hall Law Journal* 45 (2007): 153.
[38] Respectively: [1993] 3 S.C.R. 463; [1999] 2 S.C.R. 3; [1992] 3 S.C.R. 711.
[39] Respectively: [1997] 2 S.C.R. 13; [1990] 1 S.C.R. 30.

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