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JUDICIAL POWER AND THE CHARTER: THREE MYTHS AND A POLITICAL ANALYSIS

Christopher P. Manfredi *

I. INTRODUCTION

Does the Supreme Court exercise "too much" judicial power under the Charter? Consider that over 22 years (1960-1982), the federal Bill of Rights generated 34 Supreme Court decisions, five successful claims, and only one partial nullification of a federal statute.[1] During the same period, the number of constitutional decisions issued by the Court totalled 120, or less than six per year.[2] By contrast, over its first 17 years of operation (1982-1999) the Charter generated 390 Supreme Court decisions, 130 successful claims, and 63 nullifications of federal or provincial statutes.[3] As these comparisons affirm, and as everyone acknowledges, the scope of judicial power has increased under the Charter. But has it increased "too much?"

In September, 2000 the Chief Justice of Canada responded to those who might answer this question affirmatively by delivering a speech entitled "Judicial Power and Democracy."[4] Noting the "global expansion of judicial power," the Chief Justice nevertheless argued that "[o]ur task is not to curtail

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1 Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at 343.

2 Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987), at 21.

3 Data for 1982-1997 are found in Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999), 37:3 Osgoode Hall L.J. at 625. Professor Kelly graciously provided me with the data for 1998-99.

4 McLachlin C.J.C., "Judicial Power and Democracy" (Academy Annual Lecture 2000, Singapore Academy of Law, 14 September 2000) [available at <www.sal.org.sg/a_al00sp.htm>, accessed 25 January 2001].

judicial power but to understand how it may most effectively contribute to the just society." In pursuit of this purpose, the Chief Justice identified three misperceptions, or myths, about judicial power. These myths are: (1) that judicial power is "the enemy of democratic government"; (2) that judicial law-making is a novel phenomenon; and (3) that law-making should be the exclusive responsibility of legislatures. When these myths are dismissed, according to the Chief Justice, "judicial law-making thus emerges not as the enemy of democratic government, but as an essential feature of it."

In this paper, I attempt to explain why some Court observers, especially among political scientists, are not persuaded by the Chief Justice's arguments. I do so by also discussing three myths about judicial power and the Charter, although they are not the same ones identified by the Chief Justice. Perhaps surprisingly, I agree with the Chief Justice that judicial power is an essential feature of democratic government, but I disagree that there is something exceptional about that power. The myths I discuss serve to obscure the inherently political nature of Charter review, and like all myths they each contain a grain of truth that lend them credibility. I refer specifically to the vacuum, guardian and dialogue myths.

II. THE VACUUM MYTH

The vacuum myth is that rights-based judicial policymaking is necessary because legislatures are unwilling to grapple with difficult or divisive issues. As the Chief Justice said in her "Judicial Power" speech: "If the legislature does not provide the outlet, dissatisfied citizens will cast their concerns in the language of rights and turn to the courts, and the courts will have little choice but to hear them." There is, of course, an element of truth in this. Governments are willing to deflect difficult issues to courts, as the Ontario government did with respect to funding for Roman Catholic schools. The Chief Justice is also correct to suggest that individuals and groups who fail to achieve their policy objectives in legislatures will turn to courts for action. Beyond these grains of truth, however, there are at least two problems with this myth.

The less important of the two is the assertion that courts are the passive servants of initiatives taken by independent litigants. While this is a largely fair characterization of lower courts, it does not hold for the Supreme Court. Contrary to what Chief Justice McLachlin is reported to have told the Canadian Bar Association last August,[5] the Court exercises tremendous agenda-setting

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[5] According to newspaper reports, the Chief Justice emphasized the Court's passivity. She claimed that in contrast to politicians, judges have virtually no power to set their own agendas, and rely entirely on litigants to decide what issues enter the judicial arena. See Tibbets, "Top judge defends court's role in fishing spat: Native rights ruling" *National Post* (21 August 2000) A7.

powers through its discretion over leaves to appeal and threshold issues like standing and mootness. As its own statistics indicate, it grants less than 15% of the applications for leave that it receives.[6] In addition, since 1981 the Court has gradually replaced categorical rules of standing and mootness with discretionary ones.[7] Finally, the Court's control over the interpretation and application of section 1 of the Charter gives it tremendous discretion to expand and contract the concept of "reasonable limits." So, while it is true that the Court does not control which issues enter the judicial process, it does control the issues it will decide.

The more problematic aspect of the vacuum myth is illustrated by the Court's treatment of the mootness issue in *M. v. H.*[8] After deciding that the case was not moot, Justice Peter Cory observed that, "even if the appeal were moot, it would be appropriate for the Court to exercise its discretion in order to decide these important issues." According to Justice Cory, the "social cost of leaving this matter undecided would be significant."[9] The problem with this statement is that the matter *had not* been left undecided. The Ontario government had attempted to amend the statutory definition of spouse in the *Family Law Act*,[10] and following a vigorous, divisive and sometimes bitter debate, the Ontario legislature defeated the amendment in a free vote. To argue that judicial intervention was necessary in this instance because the legislature was unwilling to tackle a controversial issue simply misstates the facts. Instead, the Court's intervention appears to have been driven not so much by legislative inaction as by disagreement with the outcome of the process.

Indeed, at times the Court seems to exercise judicial power not because of legislative inaction, but "to correct a democratic process that has acted improperly."[11] While the Court certainly has the power to nullify or otherwise modify unconstitutional legislation, the standards for determining whether the democratic process has acted so improperly as to require judicial correction are unclear. Despite the Court's attempt to anchor the power of judicial review in its status as an independent adjudicative body with special expertise and

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6 See Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics 1988-1998*. Social scientists are just now beginning to study the factors underlying leave to appeal decisions. See Flemming, "The Selection of Appeals for Judicial Review in the Supreme Court of Canada: A Multivariate Model" (2000 Annual Meeting, Canadian Political Science Association, Quebec City, 29 July-1 August 2000).

7 See Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001), at 21, 82.

8 *M. v. H.*, [1999] 2 S.C.R. 3.

9 *Id.*, at para. 44.

10 R.S.O. 1990, c. F.3.

11 *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 176.

responsibility in constitutional matters, judgments like *M. v. H.* simply affirm its character as a political institution.[12]

III. THE GUARDIAN MYTH

The basic form of this myth is that the "Charter entrenched the role of judges as interpreters and guardians of the rights it guaranteed."[13] This myth made its most recent appearance in *United States of America v. Burns*, where the Court said explicitly that *it* "is the guardian of the Constitution."[14] In considering the constitutionality of "extradition without assurances," the Court saw itself as protecting the "basic constitutional value"[15] that "in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped."[16] But if this is the Canadian view of fundamental justice, then why did the Minister of Justice agree to extradite without assurances? The Court's reasoning leaves only two explanations: ignorance of, or disregard for, this principal of fundamental justice. Yet there is a third explanation — the current status of capital punishment in Canada is not a constitutionally-entrenched principal of fundamental justice, but a contemporary policy choice that is subject to revision.

The guardian myth flows from two related and problematic assumptions. First, that the Charter's meaning exists independently of judicial interpretation; and second, that Charter interpretation is predominantly, and perhaps exclusively, a legal exercise. Both of these assumptions are evident in the following sentences from the Chief Justice's "Judicial Power" speech: "There must be a body that determines whether the legislature is acting within its powers under the constitution. That body must be judicial, since the issue is a legal issue."[17] To quote Justice Wilson, the judiciary is simply "an agency to monitor compliance" with the rules set down in the Charter.[18]

One difficulty that a political scientist has with this characterization of judicial power is that for over half a century this discipline has rejected the view that judicial decision-making in final courts of appeal is driven by legal

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[12] The Court's ability to make political calculations is also evident in two additional features of *M. v. H*. First, it appeared to learn a lesson from the controversy that followed its *Vriend* remedy, and moderated the impact of its judgment by not reading a new definition of spouse into the *Family Law Act* and by suspending its remedy for six months. Second, it released the judgment in the midst of a provincial election campaign, thereby insulating it from government criticism.

[13] Hon. Beverley McLachlin, "Courts, Legislatures and Executives in the Post-Charter Era" (June 1999), 20(3) *Policy Options Politiques* 43.

[14] *United States of America v. Burns* (2001), 195 D.L.R. (4th) 1, 2001 SCC 7, at para. 35.

[15] *Id.*, at para. 35.

[16] *Id.*, para. 84.

[17] McLachlin C.J.C., *supra*, note 4, at 7.

[18] Wilson J., "We Didn't Volunteer" (March 1999), 20(5) *Policy Options Politiques* 9.

considerations.[19] Cases reach these courts precisely because the applicable legal rules are ambiguous, and legal ambiguity enhances the importance of policy considerations in judicial decision-making. This disciplinary attitude is especially strong when analyzing judicial power under the Charter because of the importance of the reasonable limits clause in section 1. In most Charter cases, the dispute is reduced to a conflict about the minimal impairment prong of the proportionality component of the *Oakes* test. However the Court defines "minimal impairment," it simply does not provide a legal standard for evaluating government action.

A second difficulty with these assumptions is that they tend to blur the distinction between the Charter as a constitutional document and the meaning attached to that document by the Court. This is particularly apparent in judicial attitudes toward the use of the notwithstanding clause. For example, in her 1999 article the Chief Justice explained legislative unwillingness to invoke section 33 as flowing from the difficulty legislators face in saying "to the people ... 'Notwithstanding your rights, we are going to violate them' ... Individual rights have substance and they should not be lightly cast aside."[20] Similarly, in *Vriend v. Alberta*, Justice John Major noted that section 33 allows legislatures to "override the Charter breach" identified by the Court.[21] These statements only make sense if one assumes that judicial decisions alone determine the Charter's meaning, and that the Court is almost never wrong about the substantive content of rights (although it may be mistaken in individual cases about the best way to protect the right in question).

Underlying this myth is a powerful modern syllogism about judicial power: The Constitution is supreme law; courts are the authoritative source of the Constitution; therefore, courts are the authoritative source of supreme law. But what if we reject the second premise in this syllogism and refuse to privilege judicially articulated Charter values and requirements? Nothing in liberal constitutional theory assigns the task of constitutional interpretation exclusively to courts, and constitutions do not exist solely as tools for judicial review. As Mark Tushnet argues, the "misplaced allocation of sole constitutional responsibility to the courts" debilitates democracy as it distorts policy.[22]

To be sure, there is widespread denial that courts exercise "sole constitutional responsibility." Indeed, the Court celebrated its 1999 judgment in *R. v. Mills* as proof that "courts do not hold a monopoly on the protection and

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[19] Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997), at 57.

[20] McLachlin C.J.C., *supra*, note 13, at 45.

[21] *Vriend*, *supra*, note 11, at para. 197.

[22] Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995), 94 Mich. L. Rev. 261.

promotion of rights and freedoms."[23] Such denials, however, simply perpetuate a third myth about judicial power, which is embodied in the so-called dialogue metaphor.

IV. THE DIALOGUE MYTH

This is probably the most important myth that now exists about judicial power and the Charter. The "dialogue metaphor" became an explicit part of the Supreme Court's vocabulary in *Vriend*.[24] According to Justice Frank Iacobucci, the Charter redefined Canadian democracy to establish a "more dynamic interaction among the branches of governance."[25] Justice Iacobucci characterized this interaction as a dialogue about the proper balance between individual rights and collective purposes.

During the past year the dialogue metaphor appeared explicitly in Justice Iacobucci's partial dissent in *Little Sisters*. Noting that the "Court has frequently recognized the importance of fostering a dialogue between courts and legislatures," Iacobucci J. urged his colleagues to strike down the impugned Customs regulations in order to "encourage much needed changes."[26] The metaphor also hovered conspicuously in the background in Justice Gonthier's judgment for the Court in *R. v. Darrach*. His somewhat oblique reference to the metaphor came in a citation to the Court's 1999 *Mills* judgment, where he stressed that insisting on " 'slavish conformity' by Parliament to judicial pronouncements 'would belie the mutual respect that underpins the relationship' between the two institutions."[27]

Mills is particularly important in assessing the dialogue metaphor. In *Mills* the Court upheld the so-called "privacy shield" amendment to the *Criminal Code*, enacted as a legislative sequel to the Court's 1995 *O'Connor*[28] judgment. Commentators hailed *Mills* as evidence of an effective judicial-legislative

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[23] *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 55-58. Note that the Court did not deny that it holds a monopoly on the *interpretation* of rights and freedoms.

[24] Justice Iacobucci drew the metaphor from Hogg & Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall L.J. 75. For an exchange about this article, see Manfredi & Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999), 37 Osgoode Hall L.J. 513, and Hogg & Thornton, "Reply to 'Six Degrees of Dialogue' " (1999), 37 Osgoode Hall L.J. 529.

[25] *Vriend*, *supra*, note 11, at para. 138.

[26] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 268.

[27] *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46, at para. 34, citing *Mills*, *supra*, note 23, at para. 55.

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

dialogue,[29] and the Court emphasized its willingness to uphold a legislative scheme that "differs significantly" from its earlier judgment. The problem is that, although Bill C-46 departed from the five-justice *O'Connor* majority judgment, it did conform slavishly to the minority judgment. Indeed, section 278.5(2) of the *Criminal Code*[30] is taken virtually word for word from Justice L'Heureux-Dubé's judgment.[31] Similarly, in *Darrach* the Court upheld a legislative scheme that was simply "a codification by Parliament of the Court's guidelines in *Seaboyer*."[32] If any dialogue occurred in these two instances, it was among the justices themselves.

V. A Political Analysis of Judicial Power

If none of these myths adequately captures the truth about judicial power under the Charter, what is the alternative? From the perspective of political science the Supreme Court is, first and foremost, a political institution: it makes policy not as an accidental by-product of performing its legal function, but because its members believe that certain rules will be socially beneficial. The Charter increases judicial policymaking power because it expands the range of social and political issues subject to the Court's jurisdiction. The best example is the Court's sexual orientation judgments, where it identified policy errors, used section 15 to assert jurisdiction over the errors, and then articulated corrective policies.

If this characterization is true, what explains the apparent deference or restraint in Charter cases during the past year? The Court is a strategic player in the policymaking game.[33] In high profile cases courts must balance the pursuit of immediate policy objectives against long-term institutional legitimacy. More precisely, they must ask the following question: How far can we intervene before provoking a negative reaction from other political actors that might undermine our constitutional authority? Courts must therefore be cognizant of the capacity of other political actors to negate specific policy decisions or to challenge the legitimacy of the institution itself. In particular, the Court must avoid provoking the legislative override because it represents a double blow to achieving judicial goals. On the one hand, it negates the effects of the Court's immediate intervention in the policy process. On the other hand, it challenges the Court's long-term institutional authority by immunizing an issue from judicial review.

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[29] Makin, "Top Court Bows to Will of Parliament" *The Globe and Mail* (26 November 1999) A1, A9.

[30] R.S.C. 1985, c. C-46.

[31] See Manfredi, *supra*, note 7, at 180-82.

[32] *Darrach*, *supra*, note 27, at para. 20.

[33] See Epstein & Knight, *The Choices Justices Make* (Washington: CQ Press, 1998) for a description of the strategic model of judicial decision-making.

Let me therefore borrow a different metaphor — the "separation of powers game"[34] — to understand the judicial-legislative relationship under the Charter. According to this metaphor, the relationship is conceptualized as one of strategic interaction between different political actors to establish rules that will structure outcomes in a manner favourable to them. Rights-based judicial review is redistributive on two levels: it redistributes power among society-based actors and between different components of government.

This strategic interaction can be modelled, although in an obviously simplified way, in game-theoretic terms (see Figure 1). In brief, the game begins when a group or individual challenges the constitutionality of legislation. The game's first move belongs to the Court, which has a choice among three options. It can defer to the legislature, uphold the legislation and leave the status quo (*SQ*) intact. Alternatively, it can declare the legislation unconstitutional, and either nullify it under section 52 of the *Constitution Act*[35] or impose a different policy, either directly through section 24(1) or indirectly through the instructions contained in its section 1 analysis. If the Court nullifies or imposes, the next move belongs to the legislature. In the event of nullification, the legislature can defer to the Court, pass an alternative law, or override the Court's judgment by invoking section 33. Legislative deference produces a policy vacuum (*V*); alternative legislation produces a new status quo (*SQ'*) that could be challenged later; and an override produces a reinforced status quo (*SQ!*) that is immune to Charter review for at least five years. In the event of judicial policy imposition, legislative choice is reduced to two: deference or override. The first choice produces the Court's ideal policy (*CI*), while the second produces a reinforced status quo (*SQ!*).

Figure 1
MODELLING JUDICIAL-LEGISLATIVE INTERACTION

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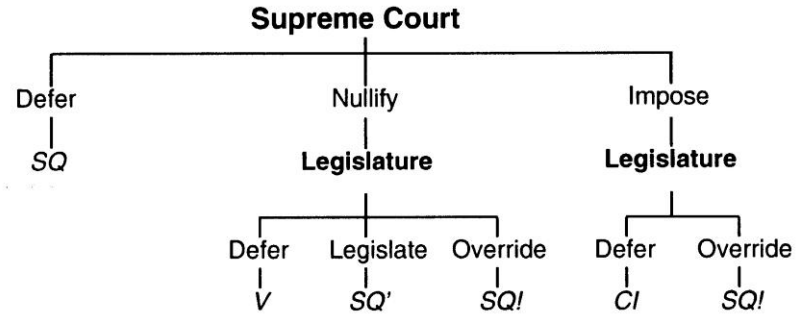
[34] Segal, "Separation-of-Powers Games in the Positive Theory of Congress and Courts" (1997), 91 Am. Pol. Sci. Rev. 28.

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



In Charter cases the Court has unlimited discretion to defer to, nullify or replace the challenged policy. Like other political actors, its decisions "represent a complex individualized judicial calculus enveloped by external and social forces."[36] Judges, this approach argues, pursue their personal and institutional goals in an environment characterized by uncertainty over outcomes. Although they must justify their decisions in legal terms, their choice among a wide array of alternative legal outcomes and justifications is the product of strategic considerations. Their most important calculation concerns the potential likelihood of successful legislative resistance to the Court's judgments. Judicial activism, in the form of increasingly intrusive remedies, increases when the Court perceives fewer institutional constraints on its ability to assert constitutional supremacy.

The 18th century Blackstonian rhetoric that is often used to describe judicial power under the Charter, even by members of the Supreme Court itself, should not disguise its political character. Nor should the rhetoric of democratic humility so prevalent in many of the Court's recent judgments mask the reality of an institution whose growing control of constitutional interpretation means that public policy will inevitably be set closer to judicial rather than to legislative preferences.

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[36] Haynie, "Judging in Black and White: Decision Making in the South African Appellate Division, 1950-1990" (2000) [unpublished manuscript on file with the author], at 177.