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An Unashamed Majoritarian

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The author, a Canadian teaching in Australia, challenges what he regards as the prevailing Canadian orthodoxy, one that he thinks gives the unelected judiciary too much power. He challenges the perception that rights, however understood and though fully supported, necessitate the construction of anti-majoritarian protections such as the Canadian Charter of Rights and Freedoms. Knowing that the Charter is here to stay, he concludes by urging judges to adopt methods of interpretation that build in a much greater degree of deference to the legislature.

L'auteur, un Canadien qui enseigne en Australie, pose un regard interrogateur sur ce qu'il considère comme le courant dominant au Canada qui, selon lui, donne trop de pouvoir aux magistrats non élus. Il s'oppose à la perception que les droits, peu importe la façon dont ils sont compris et même s'ils jouissent d'un appui inconditionnel, ont besoin de protections contraires à la majorité comme, par exemple, la Charte canadienne des droits et libertés. Sachant que la Charte est là pour rester, l'auteur conclut en pressant les juges d'adopter des méthodes d'interprétation qui attirent un degré beaucoup plus grand de respect pour les lois.

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- I. *Rights*
- II. *What Happens Under a Bill of Rights?*
- III. *Majoritarianism v. The Charter*
- IV. *A Lament or Something More?*

I am an unashamed majoritarian. I think that the least bad procedure for resolving disagreements within a society like Canada's is to let the numbers count. More votes should beat fewer votes when it comes to difficult, contentious social policy decisions, even those about rights.

Of course no one these days professes to be against democracy. So proclaiming that one is a democrat tells the reader next to nothing. In particular, it gives no information on where one stands as regards the desirability of strong judicial review under the *Charter of Rights*.¹ Democracy is an "essentially contested concept,"² one broad enough to encompass *both* the position of those who support the current Canadian status quo *and* the position of those who think it gives the unelected judiciary too much power. So any debate about "democratic legitimacy" is likely to end in a debate about the meaning of the word "democracy". The trouble with that, with arguing about the meaning of the word "democracy", to repeat myself, is that democracy is a concept broad and indeterminate enough to be capable of being defined in a variety of plausible ways. Accordingly, not much is to be gained heading down that road, in my view,³ however much there may be clear tactical and rhetorical advantages for both sides in positioning oneself on the side of democracy, with all the strong emotive connotations conveyed by that word.

On the other hand, there are many, many people today in Canada and throughout the western world — in the law schools, the press, the intelligentsia, and even the government — who assuredly are not supporters of majoritarianism. For them, letting the numbers count comes with too big a

1. *Canadian Charter of Rights and Freedoms*, 1982, c. 11. [*Charter*].

2. See W.B. Galie, "Essentially Contested Concepts" (1965) 56 *Proceedings of the Aristotelian Society* at 57.

3. On the question of what is or is not democratic, however, cf. Wayne MacKay, "The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?" (2001) 24 *Dal. L. J.* 37 and F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, On.: Broadview Press, 2000).

price tag: it is too likely to lead to the sacrifice of individual rights while making more likely still the dangers of the tyranny of the majority. Majority rule needs, they say (or think), to be tempered by placing in the hands of the judiciary the power to ensure that legislation (passed on the basis of representative majoritarianism) can be struck down when it is inconsistent with certain enumerated individual rights and when that inconsistency is held not to be reasonable in a free and democratic society such as Canada.

I will call this anti-majoritarian view the "orthodox position" in Canada today or the "status quo". I do not think that it is seriously debatable that this is the status quo view, that the preponderance of elite opinion in Canada today opposes full-blooded majoritarianism and whole-heartedly supports the role that Canada's judges have been given, or have carved out for themselves, under the *Charter*. But if I am right or wrong on that empirical question, it does not affect the merits of whether majoritarianism *ought* to be embraced.

Accordingly, the rest of this paper will attempt to convince the reader that it should be, that it is undesirable to hand over to unelected judges the social policy-making power implicit in being the final arbiters of what content, scope and relative weight rights are to have. We need to balance the potential dangers of majority rule and the spectre of a tyranny of the majority against the potential dangers of minority rule and the spectre of a tyranny of the unelected few (which of course, historically, is the far greater danger).

Let us start that attempt to make the case for majoritarianism with an examination of rights. One cannot assess the desirability of a bill of rights without first being clear about rights themselves.

1. *Rights*

Today, rights are the dominant currency of political and moral philosophy. Following the Second World War there has been an immense increase in rights talk,⁴ both in the sheer volume of that talk and in the number of supposed rights being claimed. Not too long ago rights were rather modestly seen as providing "a legitimization of ... claims against tyrannical or exploiting regimes."⁵ These days there is a strong tendency to

4 See Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Brookfield, VT: Dartmouth, 1996) at 161-188.

5 S.J. Benn, "Human Rights - For Whom and For What?" in Kamenka and Tay, ed., *Human Rights* (London: Edmond Arnold, 1978) 61.

advance virtually all moral claims in the language of rights.

Yet what are rights? Certainly one can find plenty written about who may claim rights, their extent, their over-riding character, and even the relation of rights to notions of equality and liberty. Yet none of that need deal explicitly with the foundational issue of what, precisely, rights are. Some, when pressed, will say no more than that rights are entitlements or guarantees or protections. Others will be more forthcoming: Rights are protections against interference conferred by rules or norms. Or, rights are part of the liberal emphasis on the individual, affording protections and entitlements to him or her. Or again, rights are associated with the protection and claims of individuals (or maybe groups too), be they against the state, against persons or bodies acting in a public function, or just against other individuals.

One may even hear rights elucidated analytically. On this account, the existence of a right pre-supposes the existence of a rule. A right (“others must”) is the converse of a duty (“I must”) and both are linked to some rule; in other words, a right *is* a rule.⁶ Thus to the query, “where do rights come from?” the analytical answer is straight forward – from a rule which imposes obligations on others, be they individuals, groups, institutions or government. In the *legal* realm, therefore, one finds *legal* rights by finding *legal* rules. These rules can come in statutory form (*e.g.* rules about making valid wills) or be extracted from a line of cases (*e.g.* rules about negligence) or be seen to have grown from customary practices (*e.g.* rules governing the need for consideration in making an oral contract) or even set out broadly and generally in a bill of rights for the judiciary to make more certain and specific in the various cases that arise (*e.g.* whether advertising is to count as protected free speech).

The problem still remains, however. None of these answers about rights gets at the foundational issue of what, precisely, rights are. Even if rights are analytically equivalent to rules, and even if we can all see where *legal* rules come from, that is no help at the level of first principles and political moralities. From where does the *non-legal* rule arise that gives life to a claimed *non-legal* right to free speech in China, say, or to housing in Canada? On the plane of political morality, of offering an account or vision about the place of human beings in society or maybe even in the whole of existence, we still have no answers. Even such an adherent of rights as Ronald Dworkin recognizes this difficulty: “But what are rights

6. This was famously first emphasized by W.N. Hohfeld. See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Aldershot: Ashgate, 2001).

and goals and what is the difference? It is hard to supply any definition that does not beg the question.”

Dworkin can be taken to mean that attempts to provide a theory of rights that does *not* fall back on some sort of consequentialist or utilitarian thinking are by no means easy to defend. Jeremy Waldron is more explicit still: “Non-utilitarian theories [of rights] tend to be technically less sophisticated; often they contain little more than a bare assertion that certain rights are intuitively evident or are at any rate to be taken as first principles.”⁸

I happen to agree with this. In fact, I have written elsewhere⁹ that theories of rights at the level of first principles fall into two broad camps: what I have dubbed “weak rights theories” and “strong rights theories”. The former offers a defence of rights, a political morality, that is “weak” because rights are not seen as good-in-themselves; rather rights are conceived of as instrumentally good because of the further benefits they tend to bring with them. Weak rights adherents want to achieve some state of affairs, perhaps more liberty or more equality or more justice, and they judge it necessary to do this by establishing rights (by enunciating rules), more specifically by creating legal rights. For them, rights *are* valued. But that value comes from the good consequences that experience tells us tend to flow from establishing particular rights, say a right related to free speech or to freedom of assembly or to freedom of religion.

Weak rights adherents can hold any number of deeper philosophical positions.¹⁰ Most obviously, they can be utilitarians who make human happiness or welfare the ultimate good and see the establishment of certain rights (and hence rules) as a means to increase overall human happiness. For our purposes, however, the point is simply that with weak rights theories, rights *are* valued, but in an instrumental way only. To further some goal or value, it is thought to be good to establish certain legal rights.

Of course having made the calculation that the establishment of some particular set of legal rights is a good idea, it in no way follows that

7 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 90

8 Jeremy Waldron, “Introduction” in (J. Waldron, ed.) *Theories of Rights* (Oxford: OUP, 1984) at 19

9 See my “Bills of Rights and Judicial Power – A Liberal’s Quandary” (1996) 16 *Oxford J. Legal Stud.* 337 [“Quandary”] and my *Sympathy and Antipathy* (Aldershot: Ashgate, 2002) [“Sympathy”]. I repeat here what I said there about weak or consequentialist rights theories and strong or non-consequentialist rights theories. And for more on how much of the rights debate leaves aside the fundamental issue of why we should think non-legal rights actually exists, see my “A Defence of the Status Quo” in Campbell, Goldsworthy and Stone, ed., *Protecting Human Rights: Instruments and Institutions* (Oxford: OUP, 2003) 175.

10 For more elucidation on this, see “Quandary” article, *ibid.* at 340-342.

turning these rights into entrenched constitutional rights is also a good idea. That is a separate calculation. Some weak rights adherents will be in favour; some will be opposed. But because, for them, rights are not goods-in-themselves, the calculation will depend on something else, most probably on whether a constitutionalized bill of rights is thought to deliver good consequences or not.

The other way broadly to defend rights takes a more vigorous, non-instrumental stance as regards rights. Strong rights theories conceive of rights as goods-in-themselves. The idea here is that each human being simply has basic rights. Regardless of other aims, goals, duties, or even of fairly horrendous long-term consequences to the cumulative welfare of society, certain basic entitlements or protections just are mandated. On this strong rights view of the world, rights are *not* mediately justified; they are good-in-themselves, come what may. Jeremy Waldron writes "To believe in rights is to believe that certain key interests of individuals, in liberty and well-being, deserve special protection, and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests under the heading of the public good."¹¹

To be clear, then, strong rights theories are political moralities which refuse to look behind the claim to rights. The basic currency of these moralities is rights themselves; they are the starting point. Adherents will not, or logically cannot, answer the question "Why are certain rights good or desirable?" in terms of some other end as to do so would be to collapse one's political morality into a weak rights theory.

In my opinion, the rebirth of rights thinking since the end of the Second World War and the massive extent to which virtually all moral claims are advanced in the language of fundamental human rights rest largely on a natural law foundation. That is to claim that most — not all, but most — rights adherents today hold, explicitly or implicitly, strong rights views. They may be Dworkinians, Rawlsians, Kantians, born-again natural law believers and more,¹² but they share the conception of humans as autonomous, self-governing beings, entitled to respect and responsibility, and bearers of some set of rights *regardless of their instrumental effects*.

To repeat, I think that strong rights theories, as an empirical matter, are more widely held than weak rights theories. At the same time, I also agree with Waldron that strong rights theories, when pushed to their core,

11. Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 *Oxford J. Legal Stud.* 18 at 30.

12. For more on the many sorts of theories that start by making rights fundamental, and goods-in-themselves, see "Quandary" *supra* note 9 at 342-344.

"contain little more than a bare assertion that certain rights are intuitively evident or are at any rate to be taken as first principles."¹³ In fact I would go further and say that I find all the strong rights theories that I have read to be unconvincing and implausible.¹⁴ I think weak rights theories are far more convincing, though this is a minority view.

Yet whatever one's view of the relative attractions of strong rights and weak rights theories, notice that the strong rights adherent who sees certain rights as inherently good, and who will presumably want his or her society to make those rights into legal rights, need not be in favour of constitutionalizing those rights as part of an entrenched bill of rights. For the strong rights adherent, just as with the weak rights adherent, it is an open question whether adopting or retaining a bill of rights is a good idea.

The difference is this: strong rights adherents come to the question of the desirability or otherwise of strong judicial review with a view of their fellow humans as autonomous, self-governing bearers of inherent rights. One such right looks to be the right to participate in social decision-making, indeed to have an equal say in all important issues, even issues related to the scope, content and relative weight of rights. Given the views strong rights adherents bring to the table, on what grounds can they be in favour of disenfranchizing the overwhelming majority of the population (in favour of a few select judges) on major social policy or on basic rights questions? It is hard to see how it can be on the basis of a distrust of their fellow citizens, given the views they have for supporting rights in the first place. But then what does an entrenched bill of rights do if not disenfranchise the non-judge on all sorts of issues? The right to participate, the right of rights, gets to some extent shunted aside.¹⁵

Weak rights adherents, on the other hand, have no such difficulties. They will just opt for the set-up which delivers the best consequences, with or without a bill of rights. They have always made rights subject to costs and benefits. It is at least odd, though, even ironic, for strong rights subscribers now to put aside their core level non-consequentialism and choose between a bill of rights regime or a non-bill of rights regime on the basis of which is thought to deliver better outcomes. Why, precisely, do strong rights believers subordinate the right to participate to a consequentialist calculation of likely outcomes?

13. *Supra* note 11.

14. See my "Sympathy", *supra* note 9, for this argument in length.

15. And that, in far too brief a form, is the general idea of Jeremy Waldron's attack on bills of rights. These instruments do not take seriously the right to participate. See, e.g. Jeremy Waldron *Law and Disagreement* (Oxford: Clarendon Press, 1999) ["Law"].

The case for majoritarianism can now turn to consider what actually happens under a bill of rights. What is it that judges end up deciding? This will matter. Yet perhaps one last point about rights should be made, and made unequivocally. Waldron writes “No one now believes that the truth about rights is self-evident or that, if two people disagree about rights, one of them at least must be either corrupt or morally blind.”¹⁶

If rights were self-evident, if it were obvious to all right thinking beings how, say, the right to free speech should affect campaign finance rules or hate speech laws or defamation provisions, so that all was consensus and agreement, then “who decides?” would be an unimportant matter. But that sort of agreement simply does not exist. It is true that the anti-majoritarian case would be stronger if it did, if there was widespread consensus about the scope, range and weighting of rights. But as I shall argue below, down in the quagmire of using amorphous rights guarantees to draw difficult social policy lines, it is clear to all that disagreement and dissensus virtually always exist.

This empirical fact of disagreement might yet be overcome if you could easily characterize your opponents as unreasonable, morally blind or wicked. That sort of characterization may frequently enough be felt, but in my view it is unwarranted. The fact is that smart, reasonable, even nice people disagree about how rights should play out. Part of living in a democracy is that you win some and you lose some — your views do not automatically prevail simply because *you* think them the morally best views. Your opponents think that too. And of course disagreement about rights is not restricted to voters. The unelected judges themselves regularly disagree, sometimes by 5-4 margins. And when it comes to these moral, value-based disagreements about rights, there is simply no way to resolve them that is remotely analogous to resolving disputes about what is happening in the external causal world, the world of fact and science where there *is* an imposed, external, mind-independent reality, however much it may be filtered and interpreted by humans. (Even the ardent deconstructionist, postmodernist, anti-foundationalist zealot will not jump from the sixth story window — he knows in his heart that gravity is *not* a social construct, created by the dominant position of males over females or capitalists over proletariat.)

So “right answers” about rights must be understood quite differently

16 Waldron, *supra*, note 11 at 29. Grant Huscroft has pointed out to me that in Law, *ibid.*, Waldon has changed this to “No one in the trade now believes . . .”. I am unsure what to make of this. What follows is part of the general Waldronian critique.

from right answers in the world of medicine, aviation or engineering. This is true whether one is a strong rights adherent or a weak rights adherent. In fact, even if rights were transcendent, mind-independent moral entities, and even if there were a moral truth to how they should play out — both possibilities I think implausible — the fact remains that we humans would have no way to know what that mind-independent moral truth was. We would have our beliefs about them, but then so would our opponents. Surely it is unlikely, in that case, that any one person or group of people would have a pipeline to this sort of godly wisdom that all who disagree lack.

This last point about rights must always be remembered. *People disagree about how rights should apply down in the quagmire of detail.* The majoritarian says that that disagreement should be resolved by voting, by letting the numbers count. Proponents of strong judicial review want that disagreement resolved by unelected judges. When those judges disagree amongst themselves, ironically, they get to vote. Everyone else is disenfranchised.

II. *What Happens Under a Bill of Rights?*

The rights set out in a bill of rights — the right to freedom of expression or of religion or of association or movement, to equality or to be secure against unreasonable search and seizure — enunciate very general standards about the place of the individual in society. That is to say, bills of rights offer an emotionally attractive statement of entitlements and protections in vague, amorphous, very broad terms. Nearly all of us can support rights while they remain up in the Olympian heights — viscerally appealing but indeterminate. That is why such instruments are sold to the public up there. Who, after all, would say she is against free speech?

However, the effects of bills of rights are not felt up in these Olympian heights. They are felt way down in the quagmire of detail of where to draw the line when it comes to pornography and hate speech and when some criminal activities might be serious enough to be punished, in part, by taking away the offender's voting franchise; they are felt when it comes to drawing lines over what rule to have about abortion, or where to strike the balance between road safety and allowing impaired driving suspects to call a lawyer or between controlled, affordable immigration procedures and allowing refugee claimants an oral hearing before a judge. It is down here where bills of rights have to be given a context specific to the case in hand, that judges make their decisions; decisions that amount to drawing social policy lines.

And notice yet again that down in this quagmire of detail, of giving rights a context specific to the case in hand, there is always disagreement, debate and dispute about how these rights should play out. All the consensus and near unanimity is found only up in the Olympian heights. Down where unelected judges decide real life cases there are only differences of moral opinion. And those who happen to disagree with one's own views about how rights should rank against one another, who is to possess them, and whether and when they should lose out to broader social interests cannot easily be dismissed as unreasonable, morally blind, evil or in need of re-education. It is simply a fact that how rights should play out is highly debatable, and not self-evident.¹⁷

Put in place a bill of rights, then, and you transfer at least some power to unelected judges to make some of these social policy decisions, to draw some of these contentious lines under the cover provided by the amorphous, appealing language of rights. That is what happens under a bill of rights regime.

As an unashamed majoritarian I think the effect of adopting a bill of rights is that too much power gets transferred to an unelected judiciary. Nothing in the nature of rights themselves justifies this transfer. Whether weak rights adherent or strong, one can be in favour of rights themselves but not in favour of bills of rights. Be clear about this point. It is *not* only those who (explicitly or implicitly, but usually implicitly) endorse undercutting citizens' participation in drawing fundamental lines about the reach, force and weight of rights who value rights. The majoritarian who trusts his fellow citizens to draw these lines values rights too.

What makes the transfer of power to judges under a bill of rights appear attractive is the unspoken assumption that the lines drawn by judges are always the right lines. The attractions and prestige of rights themselves need to be transferred over to the judiciary and whatever lines they happen to be drawing in the name of those rights. When people think "Only this judge drawn line is the rights-respecting line," they will also think critics of the judiciary are critics of rights.

Let me put that another way. It is easy to see the attractions of binding future legislatures and generations to an entrenched and overriding list of rights outcomes when the appropriateness of some list, over others, is evident. Where the formulating of a list of rights outcomes — say, all the outcomes decided by our judges under the *Charter of Rights* these past 23 years — is believed to be easy and obvious, then any quibbling by dissent-

17. Waldron, *supra*, note 11.

ers can be put down to bad faith or knavery or self-interest or not being in favour of rights. The trouble is, of course, that the appropriateness of any list of *rights outcomes* (as opposed, possibly, to a list of rights themselves¹⁸) will never be evident or uncontentious or obviously fitting or clear to all right-thinking, reasonable, nice human beings. When judges decide cases about rights they are drawing lines that could have been drawn elsewhere, and still in the name of rights themselves.¹⁹

In the Canadian context it needs to be said that the section 1 abridging enquiry is no less a matter of drawing debatable lines than is any earlier step of deciding on the scope and application of rights. Having to decide when a law prescribes reasonable limits on a right is no less contentious, no less lacking in self-evident rights answers, than the earlier step. The “reasonable limit on rights” lines drawn by a committee of ex-lawyers are not obviously morally superior to lines that would be drawn by others, or at least we would want to hear a fairly extensive argument as to why judges have superior moral perspicacity than the rest of us or why being a judge makes it empirically more likely that a “right line” (assuming one exists) will be drawn.

We can now move from the abstract to the concrete. We are now in a position to consider whether there might be any special answer the non-majoritarian can give the majoritarian in the Canadian context.

III. *Majoritarianism v. The Charter*

Recall the essence of the majoritarian case. Bills of rights undercut citizens’ participation in social decision-making. They transfer too much power to unelected judges. From that premise the critique can and does branch out in various ways. Some critics assert that (in consequentialist terms) unelected judges do *not*, in fact, deliver noticeably better rights outcomes — for those with minority views, practices, characteristics, for the weak — than the elected branches of government.

Others note the irony of rights adherents (most of whom are strong rights believers) appealing to a hard line consequentialist justification namely that judges deliver better outcomes than elected politicians.

18. And people even disagree here, about what is the most appropriate list of rights to set out in a Bill of Rights.

19. This should be obvious from 5-4 decisions in top courts. Otherwise a change of vote by one judge would change the right answer, the right place to draw the line, the rights-respecting outcome. On this way of thinking some particular outcome would be right *because* five judges happened to say so, instead of the other way around.

Others warn of an excessively politicized judiciary, however much this may be masked by having one political party in power for most of the past 40 years and so having had them appoint almost all the top judges in Canada.²⁰

Others, again, point to the sort of “living tree”, “contemporary values” interpretive techniques which generally accompany bills of rights and which impose few, if any, constraints on the outcomes judges can reach.

And others still observe that bills of rights establish a dispute resolution system that is every bit as procedural as majoritarian democracy. In the event of disagreement about where to draw difficult lines about the extent and weight of rights, the judges vote. Five votes beat four. The victory does *not* go to the judge writing the most moving judgment or the one with the most references to moral philosophy. Any or all of these further supplements can be part of the majoritarian’s anti-bill of rights critique.

Does anything save the orthodox position in Canada today, the *Charter* status quo, from these critiques? Is it possible to respond that these majoritarian concerns do not really apply to *Charter* adjudication? Kent Roach thinks the answer to both questions can be “yes.”²¹ Roach asserts that sections 1 and 33 of the *Charter* make all the difference to rescuing us from over-powerful judges. I disagree, as will become plain.

Let us start with section 33, the override or notwithstanding provision. Roach concedes that the override is rarely used, though he does say that “[r]eports of the death of the override may, however, be exaggerated ... [it] still provides the ultimate weapon should legislatures be unwilling to accept court decisions.”²²

In fact, a more accurate statement of the override — or rather its lack of use — would note that in over twenty years it has never been used, *not one single time*, by the federal Parliament²³ (and the 2004 federal election

20. Note that Canada differs from the United States and Australia in that the top judges in the provinces are chosen by the federal government. This gives a sense of homogeneity of judicial outlook not present in the US or Australia. Imagine if John Kerry had won the US presidency and could appoint the top judges in Texas. Then consider if Ralph Klein would appoint the same sort of judges to the Alberta Court of Appeal as the federal Liberal Party has done. The point is that widespread homogeneity of judicial outlook and approach is not proof of an apolitical judiciary.

21. See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin, 2001). My critique here of Roach’s position is taken from my “The Author Doth Protest Too Much, Me Thinks” (2003) 20 N.Z.U.L. Rev. 519.

22. Roach, *ibid.* at 78.

23. And at the provincial level, outside of Quebec which did not sign up to the 1982 repatriation of the Constitution with its Charter, s. 33 has been used not more than a handful of times, with some of those uses being redundant, irrelevant or inconsequential. I do not know if, outside of Quebec, s. 33 has ever been used to overturn a court decision.

campaign made it seem to this observer that it is nearing the “never can be used” precipice). Moreover, any use of the provision will only last for five years unless renewed for another term. It cannot be used to gainsay the judges’ line drawing as regards all of the *Charter*’s rights, only some.²⁴ In short, at least to this observer, the section 33 override is as close to dead and useless as you can get without believing in reincarnation.

That is not all. As both Jeffrey Goldsworthy²⁵ and Grant Huscroft²⁶ have already made clear, section 33’s²⁷ wording authorizes Canadian legislatures to declare that their enactments “shall operate notwithstanding a provision included in [specified sections] of this Charter.” The wording implies, incorrectly and inaccurately, a power to override the *Charter* itself. What it should say is that the elected legislature has a power to override disputed and debatable judicial interpretations of the *Charter*. Otherwise you beg the question *by assuming* that judges’ views are a better indication of what the *Charter* does or does not require than are the views of elected legislators. But that assumption is the very point in dispute. So the wording of the *Charter* section 33 override makes a legislative response extremely difficult from the beginning by making it seem as though legislators, when invoking the override, are against the *Charter* and against rights, when a far more accurate characterisation would be that they are simply taking a different view of what the amorphous Olympian rights guarantees require down in the quagmire of detail.

And even that is not all there is to say about the “rarely used override.”²⁸ One could even argue that what this override may do in practice, paradoxically, is to free the judges up to be even more activist – even more prepared to use their moral views to second guess the legislature’s line drawing — than they would have been without the “cover” provided by such an override. American judges know they have the last word and that this cannot be disguised. In Canada, judges can point to section 33 to escape this conclusion, and they can do so even while knowing that the

24. See text accompanying note 31.

25. See Jeffrey Goldsworthy, “Judicial Review, Legislative Override, and Democracy” in Campbell, Goldsworthy and Stone, eds., *Protecting Human Rights: Instruments and Institutions* (Oxford: OUP, 2003) 263 and “Legislation, Interpretation and Judicial Review” (2001) 51 U.T.L.J. 75.

26. See Grant Huscroft, “Rights, Bills of Rights, and the Role of Courts and Legislatures” in Huscroft and Rishworth, eds., *Litigating Rights* (Oxford: Hart Publishing, 2002) 12. See also his chapter “A Constitutional ‘Work in Progress’? The Charter and the Limits of Progressive Interpretation” in Huscroft and Brodie, eds., *Constitutionalism in the Charter Era* (Markham, Ont.: Butterworths, 2004) 413.

27. Charter, *supra* note 1, s. 33.

28. Roach, *supra* note 21 at 78.

practical chances of it being used are barely above zero.

In my opinion it is not far-fetched to think that this may make some judges feel more free to indulge their own personal moral views about where to draw debatable lines, to be less deferential to the elected legislature. Who knows for sure? What we do know is that many of the people who point to section 33 to justify a more self-assured, less deferential judiciary would assuredly be adamantly opposed to any actual use of section 33. They would be amongst the first ones to shout, falsely, that by invoking section 33 the government, and public, was against rights, against the *Charter*, and even against the Constitution.

If section 33 does little to help Roach fend off the majoritarian's criticisms, what about the section 1 abridging enquiry provision? As I noted above, deciding on what is or is not a reasonable limit to a right is no less a matter of drawing debatable and contested lines than is the earlier step of deciding how an amorphous right guarantee from up in the Olympian heights is going to play out down in the quagmire of detail. And as regards both steps, the status quo position under the *Charter* is that the judges decide. In Canada we may have a two step process; American judges by contrast, make their decision about what is reasonable and justifiable all in the same single step of defining the scope of the right. But in Canada, every bit as much as in the US, *it is the judges who are deciding* what restrictions are permissible, not the elected legislators or the electorate.

Roach says Canadian judges, under section 1, "must also listen to government's justifications for limiting such rights."²⁹ True, the judges have to listen, but only in the sense that the elected branches get to plead their case in court. No matter how you look at section 1 it is still, solely and exclusively, the judges who get to decide what are reasonable and justifiable limits.

What happens if the elected legislature, under section 1, responds to a judicial striking down by passing something similar to the same statute again? Will this sort of "in-your-face repl[y]",³⁰ one that impliedly says the legislature thinks the Court's moral view (its view of where to draw the line) is wrong, make any difference?

Apparently not, at least if the recent saga in which the Canadian

29. Roach, *supra* note 21 at 234

30. Roach, *supra* note 21 at 277. Notice that Roach dislikes these sort of "in-your-face replies". He says reliance on such statutes "is dangerous because it diminishes respect for the Court as an institution . . . without the special safeguards and sober second thoughts of the override". (Roach, *supra* note 21 at 276-277).

federal Parliament tried to reinstate limits on the voting rights of some convicted, incarcerated prisoners³¹ is any indication:

Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a “dialogue”. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between legislature and the courts should not be debased to a rule of “if at first you don’t succeed, try, try, again.”³²

Unless one simply assumes that elected legislators cannot make reasonable interpretations about rights, cannot draw reasonable lines down in the quagmire of detail, it is hard to see how the section 1 abridging enquiry provision helps ward off the majoritarian’s criticisms.

Now some people do assume this — do think that legislators are morally deficient when compared to their judicial colleagues. Such people rarely say this straight out. But when pushed it becomes clear that their support for the status quo Canadian *Charter* position actually rests on a belief that judges will give them more of what they want, as social progressives, say, or as prisoner advocates, or whatever. (Some of them may combine this with a belief that there are knowable right moral answers about where to draw the lines of social policy,³³ but this is not necessary). Certainly it is easier to say you are “for rights” than to say you are “for unelected judges”, although in my view that is all adherents of the *Charter* status quo can mean. Majoritarians are “for rights” too. They just happen to think that the line drawing which is inevitably a part and parcel of being “for rights” is better done by the elected branches.

Let us consider the not too implausible hypothetical of someone who believes that there are right moral answers down in the process of line drawing and that those right answers broadly align with whatever is the most “progressive” or social democratic alternative. She would support

31. After the Supreme Court had earlier struck down a complete ban on prisoner voting. See *Sauvé v. Canada (Attorney General)* [1993] 2 S.C.R. 438.

32. *Sauvé v. Canada (Chief Editorial Officer)*, [2002] 3 S.C.R. 519 at para. 17 (per the Chief Justice). Notice here again the conflation of “conforming to what we judges say the Constitution requires” and “conforming to the Constitution.”

33. People who believe that there *is* some morally right answer to how a set of vague, amorphous rights guarantees should play out down in the quagmire of detail almost always also believe, *mirabile dictu*, that *they*, and *not* their opponents, happen to have an almost God-like access to what those answers are.

the *Charter* status quo because she thinks judges better deliver the goods in the Canadian context than does Parliament. On the other hand, were she in the US during President Clinton's tenure, she might opt instead for the elected legislature.

The majoritarian rejects that sort of self-interested approach. Whatever line the unelected judges may draw, the majoritarian says it is better for the elected legislators to draw it whether he agrees with the result or not.³⁴ He is prepared to win some, but also to lose some (or rather, *he should be so prepared*, though as a matter of fact there are obviously some Alec Baldwins out there who threaten to move away when votes do not go their way). He thinks that part of living in a healthy society is that when contentious issues arise, including issues surrounding rights, deciding by voting, by "letting the numbers count" is preferable to deciding by letting an aristocratic judiciary decide (by themselves voting, though with a markedly more restricted franchise). He is unashamed to be a majoritarian. In fact, this looks to him to be a more desirable, more potent moral stance than that taken by the anti-majoritarian whose embrace of rights so often carries with it a moral self-righteousness and disdain for (or condescension regarding) the capacities and abilities of her fellow citizens and their elected representatives, at least when it comes to rights. The majoritarian values highly the right to participate, be it on a strong rights or weak rights basis. He values it even when it comes to rights themselves and how they should play out and be limited down in the quagmire of detail. He is not prepared to subordinate the views of the many, to the views of a committee of ex-lawyers.

Accordingly, I say again as I said to begin this article, I am an unashamed majoritarian, however unpopular that view may be in today's Canada or in its law schools.

IV. *A Lament or Something More?*

The reader will by now be wondering what the point of this article is. Whatever the attractions might be (or might not be) of Parliamentary Sovereignty on the "ought" level of what *should* be the case, we all know

34 For more on this see "Sympathy", *supra* note 9, especially the "Concluding Remarks."

that in Canada that option is gone forever. The *Charter* is here to stay.³⁵ So is this whole article just a pessimistic lament?

In part, yes. Having lived and worked overseas now for nearly two decades I find it depressing, and embarrassing, to return to my native Canada for half a year to find so many citizens willing to throw their lot in with an aristocratic judiciary, to let these committees of unelected ex-lawyers draw so many of the lines surrounding rights. Likewise, or perhaps worse, I frankly cannot imagine any political party (on the right or left) in New Zealand or Australia or the United Kingdom ever making one of its main election planks the promise that the elected representatives of the people would never second guess the judges, i.e. that if returned to power they would never invoke the section 33 notwithstanding clause. But this is more or less the promise that was made by the Liberal Party before the 2004 federal election.³⁶

Some, like Kent Roach, might put the blame for this state of affairs on the elected politicians and the electorate, not on the judges: “[Insufficient use of section 33] may be true, but if blame must be assigned, it should be directed at ... governments and not the *Charter* ...”³⁷ Roach continues: “If section 33 is not used to correct judicial decisions that the public finds fundamentally unacceptable, the fault seems to lie more in the public’s acceptance of the infallibility of judicial declarations of rights or the government’s lack of will than in the structure of the *Charter* or the Court.”³⁸

The answer to unacceptable judicial activism under a modern bill of rights is legislative activism and the assertion of democratic responsibility for limiting or overriding the Court’s decisions.³⁹

35. The judges sometimes tell us they did not ask for the *Charter*. But then neither did I. There were no referenda on whether to have it: there were no elections, federal or provincial, on whether to have it: indeed the election that brought in a Prime Minister committed to bringing it in was fought on the price of gas. And anyway, however democratic a process may be that opts to move to a new constitutional regime, it in no way follows that the newly chosen regime is itself more democratic than the old. People could vote in huge majorities to move to a political system where a massive amount of line-drawing input is given to priests or to military caudillos. But that would not make what they chose somehow more democratic than the rawer majoritarianism that preceded it. One must distinguish end result procedures from the procedures used to move between end results. Jeremy Waldron has made this point somewhere in his many writings.

36. Perhaps this sort of ready abdication to the judiciary of the power to draw highly contested social policy lines goes some small way to explaining the appallingly low 61% voter turnout rate in that 2004 election, or the much, much worse rate amongst young voters. Certainly Canadians are no longer in a position to look on smugly at US voter turnout. The two countries’ rates were virtually identical in the two respective 2004 elections.

37. Roach, *supra* note 21 at 60.

38. Roach, *supra* note 21 at 78.

39. Roach, *supra* note 21 at 296.

In my opinion, this is too easy and unconvincing a reply (to say nothing of the issue raised above of how many of those who give this reply actually in their hearts hope for a “greater assertion of democratic responsibility”). Surely the judges also have some responsibility for the current state of affairs.

I think they do.⁴⁰ Judges too often talk as though the choice in supporting or rejecting the *Charter* status quo is one between having rights or not having rights. This assertion is palpably false, as I hope this article has convinced the reader.

Not just that, judges here could adopt methods of interpretation that build in a much greater degree of deference to the legislature, and that emphasize the importance of that deference, through some sort of vigorous “margin of error” doctrine or through use (or greater use or more restrictive operation) of such American doctrines as political questions, ripeness, mootness and standing.⁴¹ They could even transplant some of their willingness to look to original intentions in the sections 91 and 92 context over into constitutionalized rights adjudication.⁴² The point is that the rights in the *Charter* are not self-defining and that nothing in that instrument forecloses more deference on these difficult line drawing exercises than is currently shown by Canada’s top judges.

Even those with a near absolutist commitment to equality might pause for a moment and consider which process more fully treats their fellow citizens as equals — one in which everyone gets the same vote and thus the same (however statistically insignificant) say or one which is litigation driven and in which lawyers, legal academics, certain pressure groups and most notably a handful of unelected judges are given massively more say. In terms of the “right to participate”, the status quo Canadian *Charter* position comes nowhere close to delivering equality. More to the point, however flawed our representative democratic institutions might be, the current status quo comes nowhere close to delivering the same equality of input as the pre-*Charter* position.

If a few judges (and even the odd legal academic) started speaking up about how they do *not* have a pipeline to heavenly wisdom on all these morally fraught issues, and about how those who disagree with their

40. For a similar view see Grant Huscroft’s “Thank God We’re Here: Judicial Exclusivity in Charter Interpretation and its Consequences” (2004) 25 Sup. Ct. L. Rev. 241.

41. See Lawrence Tribe, *American Constitutional Law*, 3d ed., (New York: Foundation Press, 2000) at 311-385.

42. See the chapters of Justices Binnie and Scalia in *Constitutionalism in the Charter Era*, *supra* at note 26.

decisions down in the quagmire of detail can still be strong supporters of rights up in the Olympian heights, maybe we would see the emergence of a bit of backbone in the electorate and traces of will in the elected politicians. Maybe then Kent Roach's seeming endorsement of a bit of "legislative activism and the assertion of democratic responsibility for limiting or overriding the Court's decisions"⁴³ might be something other than hollow.

I, for one, would welcome both.

43. Roach, *supra* note 21 at 296.

