JUDICIAL POWER AND THE *CHARTER*: REFLECTIONS ON THE ACTIVISM DEBATE

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Most legal commentators place my writing squarely within the camp of conservative, or even "right-wing," critics of judicial activism.[1] The principal reason for this characterization is my book *Judicial Power and the Charter*, published in its second edition in 2001.[2] Although these commentators have recognized some merits in my argument, I have been criticized for, among other things, failing to define judicial activism, concealing my preference for legislative supremacy behind the rhetoric of constitutional supremacy, and inconsistency in not criticizing the Supreme Court for failing to act when it should have. At the core of many of the disagreements between me and my critics is whether judicial activism is capable of neutral definition without simply being a "code word" for decisions with which the commentator disagrees. In my contribution to this Forum, I wish to address some of the issues surrounding this debate.

For a book that is considered an integral contribution to the judicial activism debate, it is worth noting that the term "judicial activism" only appears seven times in *Judicial Power and the Charter*. Indeed, there is a reason why the book is entitled *Judicial Power and the Charter*, rather than *Judicial Activism and the Charter*. My concern in writing the book was two-fold. First, I wanted to investigate how the *Charter* had affected the nature of judicial power. Not surprisingly, I argued that the power of courts has increased. Although the Supreme Court of Canada, like all final courts of appeal, has always been a policy-making institution, the *Charter* obviously expands the range of social and political issues subject to its jurisdiction. Second, I wanted to understand and explain how the Court's use of its *Charter*-enhanced power had affected the development of public policy in several key areas. This explains, but perhaps does

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[1] See *e.g.* Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 77; Sujit Choudhry, "Review of *Judicial Power and the Charter, 2d ed.*" (2003) 1 Int'l J. Const. L. 379; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 35.

[2] Christopher P. Manfredi, *Judicial Power and the Charter*, 2d ed. (Toronto: Oxford University Press, 2001).

not fully justify, the decision to focus primarily on cases in which the Court had altered public policy.

There was a further motivation for writing the book, the first edition of which appeared in 1993. In December 1988, four months after I began my academic career at McGill University, the Supreme Court struck down important provisions of Québec's Bill 101. Québec responded with Bill 178, which it immunized from judicial review by invoking the notwithstanding clause of section 33 of the *Charter*. The reaction was swift and negative, with a general consensus emerging that section 33 was at best inconsistent with the idea of constitutionally entrenched rights, and at worst a constitutional abomination. Most famously, Prime Minister Brian Mulroney called section 33 "that major fatal flaw of 1981, which reduces your individual rights and mine." Section 33, Mulroney continued, "holds rights hostage" and renders the entire constitution suspect. Any constitution, he concluded, "that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on."[3]

I decided to write a book which argued that section 33 was, in fact, a positive contribution to constitutionalism in Canada. I argued that the growing opposition to the notwithstanding clause was the product of an historical accident and three conceptual errors. The historical accident was that Canadians experienced a use of section 33 that they found objectionable before the Supreme Court rendered a politically unpopular *Charter* decision. One conceptual error involved a misunderstanding of the constitutional role of legislatures and courts in liberal constitutional theory. There is nothing in that theory which assigns the task of constitutional interpretation exclusively to courts: legislatures also have a legitimate and important role to play. A second conceptual error stemmed from a basic misunderstanding of the legislative process as being characterized by the haphazard adoption of measures motivated by majority tyranny. To be sure, legislatures can act both irrationally and arbitrarily; and judicial review provides an important check on these pathologies of legislative behaviour. Nevertheless, judicial supremacy may be a cure worse than the disease, since courts suffer from their own institutional pathologies when it comes to evaluating complex policy choices. The final

[3] *House of Commons Debates,* (6 April 1989) at 153 (Brian Mulroney).

conceptual error was a basic misunderstanding of the nature of *Charter* adjudication. Although *Charter* cases raise fundamental questions about rights or moral principles, the dispute in most cases is about whether the legislature has chosen the least restrictive means of achieving an important policy objective. Yet, even if *Charter* cases did involve serious disputes about fundamental moral principles on a regular basis, there would be no reason to leave the resolution of those disputes in the exclusive hands of Supreme Court justices.

I suggested instead that "section 33 can have a positive impact by encouraging a more politically vital discourse on the meaning of rights and their relationship to competing constitutional visions than what emanates from the judicial monologue that results from a regime of judicial supremacy."[4] I also suggested ways in which section 33 could be amended to enhance its post-Bill 178 legitimacy. Although other scholars took up the discourse or dialogue theme[5] (for which I claim no direct influence), I became increasingly pessimistic that section 33 was having, or would have, this effect. Thus, I wrote a second edition of *Judicial Power and the Charter* in order to update both its review of the Court's impact on public policy and to understand why legislatures had lost most, if not all, of their authority to define rights, as opposed to simply re-evaluating "the balance struck by the courts between constitutional rights and other interests."[6] For there can be no doubt that the Supreme Court has secured exclusive authority to determine the content of rights. The very idea that section 33 involves legislatures' *overriding* rights is evidence of this authority.

I

Much of the debate about judicial activism concerns the very meaning of the term. Sujit Choudhry notes that it is "slippery" and "variously means the departure from well-established precedent, adjudication based on judicial preferences, and/or the judicial reallocation of institutional roles between the courts and other branches of government."[7] Kent Roach argues

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[4] Christopher P. Manfredi, *Judicial Power and the Charter* (Toronto: McClelland and Stewart, 1993) at 207-08.
[5] Roach, *supra* note 1 at 251; Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall L. J.* 75.
[6] Choudhry, *supra* note 1 at 384.
[7] *Ibid.* at 386.

that it has at least four dimensions: judges making law, judges being eager to make and impose the law, judges using rights to trump other values, and judges having the last word.[8] In my view, judicial activism is not that difficult a concept either to define or to identify. At its core, judicial activism is the willingness of courts to reverse or otherwise alter the policy decisions of legislatures and executives. A court that never did this would be entirely deferential; a court that always did it would be completely activist. In the real world, of course, no court's behaviour reflects either of these extremes. In practice, this means that *every* court is at least somewhat activist. Although reasonable people may disagree whether any particular court has been *too* activist or exercised its activism outside the parameters of its constitutional authority, it is possible to compare levels of activism across both time and space. Thus, one can compare the levels of activism in two different courts or on the same court at different periods of time.

By any measure, therefore, the Supreme Court of Canada has been more activist in the post-*Charter* era than during any period of its history since becoming Canada's final court of appeal in 1949.[9] From 1982 to 2002, the Court decided 436 *Charter* cases (about 21 per year).[10] In 152 of those cases (about 35 percent), the Court upheld the *Charter* claim. As a result, the Court nullified 75 federal and provincial statutes, for a rate of 3.6 nullifications per year. Contrast this with the Court's activity under the 1960 Bill of Rights. From 1960 to 1982, it decided 34 Bill of Rights cases (about 1.5 per year).[11] It upheld the claim on only five occasions (14.7 percent), resulting in the nullification of only one statute. The *Charter* Court is more activist even if one takes as the point of comparison constitutional cases under its federalism jurisdiction.[12] From 1950 to 1984, it decided 177 division of powers cases (about five per year),

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[8] Roach, *supra* note 1 at 105-110.

[9] Sujit Choudhry and Claire E. Hunter have recently questioned the Court's post-*Charter* level of activism. See Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525. Space precludes a full response to their analysis here.

[10] James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall L.J. 625 at 641. Professor Kelly kindly provided me his data for the period 1997-2002.

[11] Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 343.

[12] Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 21; Patrick Monahan & Nadine Blum, "Constitutional Cases 2002: An Overview" (2003) 19 S.C.L.R. (2d) 3; Patrick Monahan, "Constitutional Cases 2001: An Overview" (2002) 16 S.C.L.R. (2d) 1; Patrick Monahan, "Constitutional Cases 2000: An Overview" (2001) 14 S.C.L.R. (2d) 3.

and it nullified 65 federal and provincial statutes (less than two per year). More recent federalism data are consistent with this trend: from 2000 to 2002 the Court decided eleven division of powers cases (less than four per year) and nullified only one statute on federalism grounds.

The Court's post-*Charter* activism should not come as a surprise: it is an inevitable and intentional product of the *Charter*'s design. Indeed, to criticize judicial activism *per se* would be to deny the possibility that legislatures and executives may act in ways that exceed their constitutional authority. Such a denial, however, would be completely inconsistent with the theory of liberal constitutionalism, which is premised on the very notion that checks and balances are necessary to keep political power within constitutional boundaries. Indeed, the purpose of this form of political organization is to protect largely individual rights, including the right to self-government, by limiting political power. These limitations are both procedural—in the sense that they dictate how political power can be exercised—and substantive—in the sense that they prohibit specific uses of political power. The power of judicial review is, therefore, an indispensable and key element of liberal constitutionalism. There is no doubt that section 52(1) of the *Constitution Act, 1982* and section 24(1) of the *Charter* explicitly establish a political regime of constitutional supremacy in which limits on political power are enforced through constitutional judicial review of statutes, regulations, and official conduct.

However, the fact that final courts of appeal are political institutions creates a paradox in modern liberal constitutionalism. Courts make policy not as an accidental byproduct of performing their legal functions, but because their individual members believe that certain rules will be socially beneficial. For almost sixty years the dominant political science paradigm for explaining individual decision making in these courts has rested on two assumptions.[13] The first is that judges, like other political actors, are goal-oriented and seek to advance their goals through legal judgments; the second is that judicial goals include policy preferences shaped by the personal background and experiences of individual judges. By way of example, every justice has his or her own understanding of what a properly functioning criminal justice system looks like. Justices evaluate the rules and practices that present themselves for review in individual

[13] Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).

cases according to this understanding. Where there is no conflict, there is no need to intervene; but where there is a conflict, individual justices must decide how and to what extent the existing rules or practices need to be altered.

The paradox of liberal constitutionalism lies in this: if judicial review evolves such that political power in its judicial form is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits. The framers of the *Charter* recognized this possibility and sought to counter it by providing legislatures with some control over judicial power through sections 1 and 33. Section 1 recognizes that no society can function properly if constitutionally guaranteed rights are absolute. Section 33, by contrast, recognizes that courts can make mistakes when defining and applying rights. Much of the recent debate in Canada about judicial activism and restraint has concerned the effectiveness of these two provisions in establishing an inter-institutional "dialogue" about rights and public policy between courts and legislatures. This debate has occurred among both scholars and justices of the Supreme Court.

II

According to dialogue theorists, sections 1 and 33 provide significant opportunities for legislatures to modify or reverse rights-based judicial decisions. In modifying a *Charter* decision, legislatures accept a decision's fundamental constitutional holding but reject all or part of the decision's section 1 analysis with respect to reasonable limitations. Legislative reversal, or legislative rejection of a decision's fundamental constitutional holding that there is a conflict between the impugned action and the *Charter*, is the most aggressive response to judicial nullification. Where the Court has nullified an existing statute, the sole legitimate means of reversal is the section 33 override, although one can argue whether this is necessary where the conflict involves existing or new common law rules.[14]

[14] Roach would argue that section 33 is necessary in these cases as well. I would argue that simple legislation is sufficient. Indeed, to legislate and invoke section 33 where no statute existed before would pre-empt judicial review of the new statute and undermine any opportunity for dialogue. As I have argued elsewhere, when used preemptively, section 33 does become an instrument of legislative supremacy.

The theoretical and practical robustness of sections 1 and 33 as constitutional limitations on judicial power is questionable. Two developments—one legal and the other political—have limited the effectiveness of these two provisions. The legal development concerns the Court's development of its section 1 jurisprudence. In *R. v. Oakes* (1986), Chief Justice Dickson suggested that *Charter* limitations should be measured against the "values and principles essential to a free and democratic society," which include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[15] The obvious difficulty is that these "values and principles" are both indeterminate and often internally irreconcilable. For example, reasonable people can disagree about the practical consequences of respecting the inherent dignity of the human person, just as this value can conflict with respect for cultural and group identity. The result is that "free and democratic society" licenses judicial discretion rather than constraining it.

The same can be said about the Court's definition of "reasonable limits." The so-called *Oakes* test contains two elements. First, a government seeking to defend a limit on rights must show that its legislative objective relates "to concerns which are *pressing and substantial* in a free and democratic society"[16] (emphasis added). Second, the limit itself must be proportionate to the legislative objective, which courts determine according to a three-pronged proportionality test. To pass the first prong of this test, the limit must be rationally connected to the legislative objective. Next, the government must show that, by impairing the relevant right or freedom as little as possible, the limit in question represents the least restrictive means of achieving this objective. Finally, it must be clear that the collective benefits of the limit outweigh its costs to the individual.

Although the *Oakes* test provides the basic framework for section 1 analysis, the Court has held that this framework's application should vary according to both the type of public policy and its intended beneficiaries. In 1989, the Court drew an explicit distinction between

[15] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136 [*Oakes*].
[16] *Ibid.* at 138-39.

policies where legislatures are mediating the claims of competing groups and those where government "is best characterized as the singular antagonist of the individual."[17] For policies of the first type, Chief Justice Brian Dickson suggested, the Court should be circumspect in assessing legislative objectives and means. By contrast, the second type of policy frees the Court to exercise its review function more aggressively. However, the Court has been inconsistent in following the implications of its apparently general rule of judicial deference in socio-economic policy cases. To cite just one example, in *RJR Macdonald v. A.-G. Canada* (1995), where a majority nullified restrictions on tobacco advertising, the Court stated that "[t]o carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."[18] In sum, the Court is unwilling to follow even 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 objectives.

As a result, the potential range of legislative responses under section 1 is extremely limited. Rather than encourage a dialogue between equals, section 1 elevates judicial policy preferences to the status of constitutional principle. Consequently, legislatures are placed on the defensive in formulating any response to judicial nullification. A rational legislature, interested in maximizing the likelihood that its legislative sequel will be found constitutional, will choose a policy alternative that deviates minimally (if at all) from the Court's preferred position. Of course, the legislative override in section 33 permits legislatures to reject the Court's position outright, but political developments have made that option increasingly difficult to implement.

Section 33 was the product of hard political bargaining and compromise. When the First Ministers met on November 2, 1981 for a final round of constitutional negotiations, eight provinces still opposed the federal government's patriation plan. During the course of those negotiations, Saskatchewan premier Allan Blakeney argued forcefully for a legislative override provision that would apply to everything in the *Charter* except language rights, democratic rights

[17] *A.-G. Quebec v. Irwin Toy*, [1989] 1 S.C.R. 927at 994.
[18] *RJR Macdonald v. A.-G. Canada*, [1995] 3 S.C.R. 199 at para. 136.

and fundamental freedoms.[19] This proposal attracted the attention of other dissentient provinces, and they also pushed for the extension of the override provision to include fundamental freedoms. Sensing the opportunity for agreement, Prime Minister Trudeau indicated his willingness to accept this proposal subject to the premiers agreeing to a five-year time limit on any specific override clause. In what Roy Romanow and two other participants would describe as a "classic example of raw bargaining," the federal government and nine provincial governments agreed to this provision without which the negotiations might have failed.[20]

The circumstances that produced section 33 inhibited the public development of a coherent theoretical justification for the legislative override. The most extensive public discussion of this provision occurred on November 20, 1981 when then Justice Minister Jean Chrétien introduced the constitutional resolution containing the *Charter* into the House of Commons. Even then, Chrétien's remarks on section 33 covered only eleven paragraphs and were aimed primarily at assuring the House that it did not "emasculate" the *Charter*. The only theoretical point that Chrétien stressed in these remarks was that section 33 would be an infrequently used "safety valve" which would ensure "that legislatures rather than judges have the final say on important matters of public policy." Section 33, Chrétien argued, would allow legislatures "to correct absurd situations without going through the difficulty of obtaining constitutional amendments..."[21]

Contrary to Chrétien's explanation of the circumstances that might lead to the use of section 33, the first government to invoke the notwithstanding clause did so with quite different purposes in mind. On June 23, 1982 the Québec National Assembly passed legislation (Bill 62) amending all existing Québec statutes to include a notwithstanding clause. The Québec government thus used section 33 to make a pre-emptive strike against an agreement to which it had refused to give its assent.

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[19] The details of these negotiations are set out in Roy Romanow, John Whyte and Howard Leeson, *Canada Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984) at 193-215.
[20] *Ibid.* at 211.
[21] *House of Commons Debates,* (20 November 1981) at 13042-43 (Jean Chrétien).

Despite this unexpected use of section 33, most observers still considered it a viable part of the constitution. Nowhere is this more evident than in the Supreme Court's January, 1988 abortion decision.[22] The political context of the decision meant that there was at least the possibility that the Progressive Conservative government of the day could find public support to override a judicial declaration of a constitutional right to abortion. This possibility presented the Court with a strategic dilemma. On the one hand, maintaining its *Charter*-based institutional authority to participate in controversial policy debates meant that the Court could not simply avoid the abortion issue, as it had in 1976. On the other hand, faced with uncertainty about whether judicial nullification of the federal abortion policy would trigger a legislative override, the justices confronted the possibility that the Court might "lose" its first direct confrontation with Parliament over a highly visible policy issue. In the long-term, this outcome could have seriously undermined any future claims the Court might make to constitutional supremacy.

Chief Justice Dickson's solution to the dilemma was to nullify the existing law while maximizing the set of alternatives to legislative override. He did this by discovering administrative flaws in the operation of the abortion law while making it quite clear that it was "neither necessary nor wise" to "explore the broadest implications" of liberty in analyzing the abortion provisions.[23] One plausible explanation for this cautious approach was the viability of section 33. That viability would suffer a significant blow less than one year after the abortion decision, when Québec Premier Robert Bourassa invoked section 33 in the midst of a language rights dispute, costing him three members of his cabinet and leveling a fatal blow against ratification of the Meech Lake Accord.

This sequence of events severely undermined the political legitimacy of section 33, and no government has used it in major legislation since. Indeed, in March 1998 the Alberta government learned a very hard lesson about the politics of section 33. On March 10, Alberta introduced a bill to compensate victims of provincial eugenic sterilization laws that were in effect from 1929 to 1972. One element of the bill was a provision to prohibit victims from suing for additional compensation, and the government proposed to shield that provision from judicial

[22] *Morgentaler, Smoling and Scott v. The Queen*, [1988] 1 S.C.R. 30.
[23] *Ibid.* at 51.

review through the notwithstanding clause. In purely legal terms there was nothing particularly unusual about this provision. For example, provincial workers' compensation and no-fault automobile insurance regimes also prohibit individual lawsuits as a *quid pro quo* for a simplified system of guaranteed compensation. On an emotional level, however, wielding the notwithstanding clause against this vulnerable group smacked of mean-spiritedness. As a result, one day after introducing the bill, the provincial attorney general withdrew it under intense political pressure. Alberta's premier Ralph Klein explained the decision to withdraw the bill in the following terms: "It became abundantly clear that to individuals in this country the Charter of Rights and Freedoms is paramount and the use of any tool...to undermine [it] is something that should be used only in very, very rare circumstances."[24] It thus came as no surprise that the Alberta government summarily dismissed the idea of invoking the notwithstanding clause after the Supreme Court's decision one month later in *Vriend*[25] that its *Human Rights Act* must be read as providing protection on the basis of sexual orientation.

The recent debate over same-sex marriage appeared for a time to revive interest in section 33. For example, in March 2000, a private member's bill—the *Marriage Amendment Act*—passed in Alberta that defined marriage exclusively as an opposite sex union and contained a notwithstanding clause to protect that definition from *Charter* review. Although probably unconstitutional on federalism grounds, the bill indicated the possibility that a social innovation as fundamental as changing the legal definition of marriage might provoke sufficient political resistance to revitalize the legislative override. Ironically, it was precisely this possibility that may have made the notwithstanding clause even more difficult to invoke.

On September 16, 2003, the federal Opposition introduced a motion in Parliament "to reaffirm that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada."[26] The motion presented members of the governing Liberal party with a dilemma: most of them had supported an almost

[24] Allyson Jeffs "About Face: Massive outcry forces Klein to back down on controversial move to limit sterilization settlements" *Edmonton Journal* (12 March 1998) A1.
[25] *Vriend v. Alberta,* [1998] 1 S.C.R. 493.
[26] *House of Commons Debates,* (16 September 2003) at 7379 (Stephen Harper).

identical motion in 1999, but the government's new policy was that the definition of marriage should be changed to include same-sex unions. The Prime Minister suggested that those members could vote differently in 2003 in good conscience because a vote for the motion would be a vote against the *Charter of Rights and Freedoms*. Why? Because "all necessary steps" might include invoking the notwithstanding clause, and to invoke the notwithstanding clause would undermine the *Charter*. The Prime Minister's gambit worked: by the narrowest of margins (the Speaker casting the tie-breaking vote against it) the House of Commons rejected an amendment to remove the reference to "all necessary steps," leading to the rejection of the main motion by a vote of 137-132. The successful transformation of a motion about the definition of marriage into a *de facto* referendum on the notwithstanding clause affirms earlier perceptions of a growing constitutional convention that it should never be invoked by any legislative body.[27]

To base a theory of dialogic constitutionalism on the mere existence of section 33 is thus an overly simplistic, ahistorical and apolitical type of legal formalism. Of course legislatures *could* reverse by override, but the advocates of judicial power—if not of supremacy—have altered the political context to put the presumptive advantage in debates about rights squarely in the hands of the Supreme Court. Indeed, the very idea that section 33 involves legislatures' *overriding* rights enhances the judicial advantage. Under these circumstances there cannot be inter-institutional dialogue in any real sense.

III

In the final analysis, neither section 1 nor 33 has inhibited the expansion of judicial power under the *Charter*. That this has occurred is hardly surprising: constitutionally entrenched bills of rights inevitably shift power to final courts of appeal. Although it is useful and important to debate the normative implications of this shift in power, its legitimacy or illegitimacy is somewhat beside the point. Greater and more active use of judicial power under the *Charter* simply *is*. It is much better to recognize the inherently political nature of rights-based adjudication, which is about

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[27] Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 147.

redistributing power among society-based actors and between different components of the state. Mobilizing judicial power through constitutional litigation is simply an alternative means of achieving of preferred policy outputs. Although the desire of Canadians, frustrated by perceived bureaucratic and legislative inaction, to seek policy solutions from the courts is understandable, the benefits and costs of this path to change merit closer attention.

The obvious benefit is that courts can order governments to act more quickly and forcefully than can citizens. Yet litigation is not without disadvantages. First, the articulation of policy demands in the form of constitutional rights can exclude alternative policy choices from consideration. Second, the adversarial nature of litigation is best-suited to resolving concrete disputes between two parties by imposing retrospective remedies. Complex policy issues—like health care, to cite perhaps the "hottest" new *Charter* issue—involve multiple stakeholders, constantly changing facts and evidence, and predictive assessments of the future impact of decisions. Finally, rights-based litigation, particularly at the Supreme Court level, by definition imposes national solutions on inherently local problems. These solutions can ignore differences among provinces and suppress the provincial experimentation necessary to find innovative approaches to policy problems.

The purpose of criticizing judicial power under the *Charter* is not to deny its legitimate existence, but to question its exclusive authority to define constitutional rights and the policy consequences that flow from those rights. As Mark Tushnet has written, the "misplaced allocation of sole constitutional responsibility to the courts" distorts policy and debilitates democracy.[28] Contrary to some arguments, the Canadian model of rights entrenchment has not resolved this paradox.

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[28] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," (1995) 94 *Mich. L. Rev.* 245 at 261, n. 60.