Federalism-e 2014

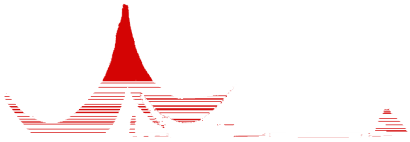

Table of Contents

Federalism-e introduction note

Chawki Bensalem

Federalism-e is an undergraduate peer-reviewed journal on the subject of federalism. Written and edited by undergrads for undergrads, we wish for you to see this work as a representation of the great opportunities that aspiring political scientists can be given in university. Aiming to be a truly Canadian journal, we accept submission from all around the country and in both official languages. In the same fashion, our editorial team is also drawn from a group of volunteer students all around the country who kindly gave up much of their time in order to edit and review submitted papers. Federalism-e is a volunteer effort and what that we are quite proud of. We're thus very proud to present to you this 15th edition of this e-journal and we hope that it will be a positive contribution to the academic community not only through the ideas that are brought to the table but also by inspiring students around the country to get involved while providing both contributors and staff with valuable insight into the world academic publications.

Federalism-e est une publication universitaire en sciences politiques ayant pour sujet le fédéralisme. Les articles et le travail éditorial étant assurés par des étudiants universitaires du bac

In the interest of providing a succinct idea of the journal, it is important for us to clarify that to define federalism purely in terms of governance is to narrow down the subject needlessly and squander many good opportunities for analysis. Federalism, in the way it defines society, is a subject that affects many walks of life and often in a way that would not appear obvious at first such as with gay rights, regional politics, mass media and legalism. Our selection of articles this year touch on such subjects and, we hope, will serve to not only educate all readers on federal governance but will also broaden views on how federalism can be relevant in so many aspects of our lives.

de gouvernance ne sert qu'à limiter la

that responsibiliti

to a region and state while allowing for all regional and state issues to be addressed at their respective levels of government; regional, state, or interstate.

Quôest-ce que le fédéralisme?

Le Fédéralisme se réfère généralement à une manière d'organiser le pouvoir dans une structure étatique. Dans une fédération, le pouvoir est partagé entre un gouvernement central et un certain nombre d'Unités fédérées. Au Canada, on parle de provinces et de territoires; Aux États-Unis, le terme d'états est utilisé et en Russie, pays comportant une structure multi-gouvernementale très versatile, le pouvoir est partagé entre Moscou et un mélange de sujets fédéraux consistant de Républiques, de provinces et de territoires qui possèdent des degrés variés d'autonomie

[12]. Il existe plus de deux dizaines de fédérations mais elles ne sont pas définies par un type précis d'organisation. Il est donc quelque peu difficile de strictement définir un système fédéral étant donné la nature éclectique de l'organisation des pouvoirs dans les fédérations du monde. De par la structure des états modernes, la majorité des systèmes de gouvernance à l'international peuvent être classifiés comme étant soit fédéraux où unitaires. Mais attention, ce n'est pas la simple présence de gouvernements régionaux qui définit une fédération! En effet, il n'existe pas d'états modernes qui ne font pas l'usage de subdivisions administratives. Plutôt, ce qui distingue l'état unitaire c'est que malgré toute forme de délégation par le gouvernement central, celui-ci n'aura généralement pas d'obligations légales par rapport à ses administrations de niveau régional ce qui fait de celles-ci des entités dépendantes pouvoir central. Dans un tel concept, le gouvernement national est libre de réorganiser ses régions où de modifier les pouvoirs détenus par celles-ci. Un exemple récent est celui de la France qui a récemment

[1] Stevenson, Garth, ed. *Federalism: The Canadian Encyclopedia* (2006).
[2] *The Constitution of the Russian Federation*, (1993 Moscow), Ch. 3, Art. 65.

haut niveau de flexibilité et la capacité de tels états à s’adapter aux changements.[6]

les conflits internes qui seraient autrement présent dans une structure centralisée. Cela est encore plus vrai dans le contexte de fédérations multi ethniques.

Bibliography

Bakke, Kristin M., and Wibbels Erik. "Diversity, Disparity, and Civil Conflict in Federal States." *World Politics*. (2006): 1-50. https://csde.washington.edu/~scurran/files/readings/SIS511/bakke.pdf.

Fessha, Yonathan. *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*. Surrey: Ashgate Publishing ltd., 2010.

Forum of Federations: The Global Network on Federalism and Devolved Governance, "Federalism by Country." Last modified 2014. Accessed April 18, 2014. http://www.forumfed.org/en/federalism/federalismbycountry.php.

Gerring, John, Strom C. Thacker, and Carola Moreno. "Are Federal Systems better than Unitary Systems?" working paper. Boston University, 2007. htt

Stevenson, Garth, ed. *The Canadian Encyclopedia*. 2006. "Federalism." http://thecanadianencyclopedia.com/en/article/federalism/ (accessed April 4, 2014).

Watts, Ronald L. *Comparing federal systems in the 1990s*. Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1996. http://www.queensu.ca/iigr/pub/archive/books/ComparingFederalSystemsInThe1990s-Watts.pdf

coverage of Québec nationalism? And to what extent is this impact mediated by market characteristics? I answer these questions with structural and manifest analyses of three Canadian newspapers: the *Globe and Mail*, owned by the Thomson family, and the *National Post* and *Ottawa Citizen*, two corporate papers owned by Postmedia. I have two hypotheses: first, that the *Post* and the *Citizen* will have a more conservative outlook on the Charter of Values than the *Globe*, and second, that the conservative impact of ownership on the *Citizen* will be less than that on the *Post*.

News media and democracy

If content is indeed affected by ownership, then Canada is in a precarious situation - today, the five largest corporations (Postmedia, Woodbridge, Quebecor, Power Corp, and Torstar) control 82% of daily newspaper circulation. In economics, it is standard to consider a market at risk of harm from oligopoly when the top four firms control more than 50% of the

communicators" - in other words, a professional and dedicated media.[27] In addition to influencing the quality of these discussions, the media also play a large role in determining the subjects themselves.

The fourth role of the media is that of the agenda-setter. Agendas are "a ranking of the relative importance of various public issues," and through their choice of topics, the media exerts a large amount of control over what is on people's minds.[28] While they don't always lead public opinion (since some issues like unemployment tangibly affect many people) they do in many cases simply because some issues affect only a small group.[29] In these cases, the media will necessarily lead public opinion because without coverage there would be no thought given to the matter and therefore no opinion would form.

So, the media determine what information we have, the arguments we see, and the topics *du jour*. The net result of this is that they have a powerful impact on public opinion. While some scholars argue to the contrary,[†] most of this work uses data from a time before concentrated media and interpretive journalism, which are the current context in Canada. As we will soon see, concentrated media tends to reduce the diversity of information and viewpoints available - this necessarily shapes public opinion in the long run, because information is the key to forming opinions. Agenda-setting also has 'priming' impacts: different sets of words trigger different mental associations and thus creates different opinions.[30] For example, contrast "the mission in Afghanistan" with "the war in Afghanistan": one emphasizes purpose and a desire to help, the

---

[27] Benjamin I. Page, *Who Deliberates?: Mass Media in Modern Democracy* (Chicago 1996), 106.
[28] James Dearing, qtd. in Stuart Neil Soroka, *Agenda-Setting Dynamics in Canada* (Vancouver 2002), 6.
[29] Ibid, 10, 20.
[†] Soroka's book on agenda-setting reviews the important works advancing this hypothesis.
[30] nePaul W. Nesbitt-Larking, *Politics, Society, and the Media*, (Peterborough 2007), 335.

other emphasizes violence. A by-product of this is that media influence peaks when a new issue or sub-issue appears and there is an opportunity to frame it in a certain way.[31] The extent to which the media fulfils its roles therefore holds a large amount of sway over public opinion and politics as a whole. So, how well are these roles being performed?

Ownership and the roles of the media

Over the past twenty years, media in Canada and around the world have fallen victim to tabloidization and trivialization. Competition from supermarket gossip magazines such as *People* and *Us* and a declining emphasis on civic responsibility have bitten into their readership; in an effort to hold their place, newspapers' entertainment sections have swollen while their substantive news coverage has gradually been replaced with shallower, easily-digested 'human interest' stories. This shift was on full display in 1994 when the *New York Times* quoted the *National Enquirer* while reporting on the trial of O.J. Simpson. The very definition of what qualifies as news has radically changed, and the quantity of political information we receive has declined considerably.

So too has the quality of this information. Objectivity, the standard of excellence in the mid-20th century, has been eclipsed by interpretive reporting, where factual reporting is accompanied by subjective analysis. This creates a situation in which "people still trust newspapers … and are largely unaware of the political diet being served up along with these other dishes."[32] Declining revenues from readership and advertising have led to staffing cuts - and amongst the first to go are the political correspondents. When combined with the rise of

[31] Soroka, *Agenda-Setting Dynamics in Canada,* 104.
[32] David Taras, *Power and Betrayal in the Canadian Media* (Peterborough 2001), 217.

punditry and political activism amongst the journalists themselves, we end up in a situation of 'activist presses', wherein the press themselves become politicized actors, filling the gaps in their coverage with argumentation and opinion.[33] Now, this isn't necessarily a bad thing: the news media in America has seen all of these changes, yet their marketplace of ideas still works "reasonably well (…) [Because] there is sufficient competition and diversity in the information system."[34]

Canada's information system, on the other hand, is much more concentrated and therefore less competitive - so, how does concentration relate to diversity? There is disagreement on this in the literature - Hale, for example, finds no significant difference in editorials between chain and non-chain papers.[35] Some of the smaller papers purchased by Hollinger seemed to

Unfortunately, these outlooks seem overly optimistic. Empirically, there is “plentiful evidence” from around the world that concentrated ownership leads to lower quality and less diversity.[40] Studies from the UK show the intervention of Rupert Murdoch into the content of his holdings there, while evidence from Italy shows that Silvio Berlusconi used his television empire to gain power and hold on to it.[41] Bagdikian chronicles many interventions by owners in the United States, ranging in size from small-town Delaware to the support of McCarthyism by the Hearst chain,[42] while Dunaway finds that corporate ownership decreases issue coverage in Congressional elections.[43] Hallock shows a decrease in local content due to corporate ownership and reviews other similar findings.[44] Returning to Canada, the Kent Commission also notes negative impacts of corporate ownership on diversity.[45]

conglomerates have many diverse interests outside of media.[63] The Irving family in New Brunswick is an excellent example of this. They hold all of the English-language daily newspapers in the province, and, like most media families, the Irvings have other large interests - among other things, they own the largest oil refinery in Canada, forestry operations, and a frozen foods company. Their papers are known for failing to report on the sometimes-questionable activities of their sister companies. However, there is surprisingly no work done on the impacts of policy on coverage of domestic nationalist movements in Canada, especially given the key role of the media in the 1995 sovereignty referendum.

Research design and methodology

This paper examines the portrayals of Québec nationalism in Canadian media, specifically with reference to the recently-proposed «Charte des valeurs québécoises», or Charter of Values. The Charter, tabled in the National Assembly on 10 September 2013, has been interpreted as an attempt by the sovereigntist government of Québec to reignite the sovereignty

I use the *Globe* as a baseline against which to compare the other two papers. It is regarded as being fairly centrist, which is sensible given that for most of its history it has had to appeal to the entire population. Moreover, the Thomsons have long taken a 'hands-off' approach to its management.[64] As centrists have less of a penchant for ideological bent, I expect to see the *Globe* use a fairly neutral tone in reference to the Charter.

The obvious counter to the *Globe* is the *National Post*, being the only other national paper. However, the *Post*'s parent company, Postmedia, has a long history of editorial meddling - its origins are in the distinctly conservative Southam newspaper empire, which was then bought by the radically conservative Conrad Black, and then sold to the similarly conservative Asper family. After CanWest went bankrupt, its print arm was spun off into Postmedia, a buying group assembled under the leadership of *National Post* CEO Paul Godfrey. His principle backers in the deal were two large and very conservative American hedge funds, Silver Point Capital and GoldenTree Asset Management. Godfrey himself is also quite conservative - he was close to Frank Miller, former Progressive Conservative premier of Ontario, and worked for Sun Media, another conservative media group, in the early 90s. Postmedia's long history of conservatism and both direct and indirect editorial control make its papers ideal candidates for studying the effects of ownership. As conservatives in Canada have traditionally been extremely hostile towards Québec nationalism, I expect to find both a very negative tone towards the Charter, and

While the *Ottawa Citizen* is not a national paper and so is not directly comparable to the *Globe* and the *Po914.04 Tf2.02ile*

appears to be the diminished newsholes of the Postmedia papers.[†] Smaller newsholes in Postmedia papers may imply that word count may be a better structural

than it was in the *Globe*, which may also imply that corporate papers have a shorter 'attention span' than non-corporate ones. This analysis constitutes a moderate confirmation of my hypothesis.

WH3

My second manifest analysis disconfirms my hypothesis - none of the differences in tone were significant, save the editorial tone difference between the *Globe* and the *Post*, which ran in an opposite di

significant results were not obtained with a method that has proven highly effective in the past. There is, however, indication that the procedure was functional to an extent as the editorials were consistently coded as being more tonal than the news coverage. This analysis only weakly disconfirms my hypothesis because of questions surrounding measurement validity and reliability.

Conclusion

Overall, the results of my analyses moderately support my hypothesis: it appears that the influence exercised on newspaper content by the political views of owners extends to coverage of domestic nationalism in addition to the other areas where its impacts have already been explored. Given the negative reactions engendered by explicit decrees of editorial policy from both journalists and the public in the past, social control is the most plausible causal mechanism. This conclusion implies that we should be seriously concerned for Canadian politics, given the highly-concentrated nature of its media holdings, especially at the national level. If concentration is not reversed, newsholes and substantive coverage may continue to be reduced, thus imperilling the ability of Canadian news media to fulfil their roles, and, by extension, threatening the quality of Canadian democracy in the larger sense. In this way, Canadian news media resemble fruit juice made from a frozen concentrate: only satisfying if you have never tasted the real thing.

Kohut, Andrew. "Self-Censorship: Counting the Ways." *Columbia Journalism Review* 39, no. 1 (2000).

McCombs, Maxwell E. "Concentration, Monopoly, and Content." In *Press Concentration and Monopoly : New Perspectives on Newspaper Ownership and Operation*, edited by Robert G. Picard, ix, 231 p. Norwood, N.J.: Ablex Pub. Corp., 1988.

Miller, John. *Yesterday's News Why Canada's Daily Newspapers Are Failing Us*. Halifax, N.S.: Fernwood Pub.,, 1998.

Nesbitt-

Constitutionality and the Charter

The Judiciary vs. Framerôs Intent

Daniel Attard

For decades there has been controversy surrounding many of the Supreme Court's judgments regarding equality rights, specifically those concerning sexual orientation. The debate stems from whether the Supreme Court has upheld basic civil and human rights through its interpretation of the *Charter* and the inclusion of sexual orientation leading to a more comprehensive and universal understanding of democracy, or whether this instance exemplifies a growing judicial tendency to define the *Charter*, rather than interpret it, moving Canadian society away from "framer's intent." In this sense, democracy is to be understood as the unilateral acceptance of civil rights, free from judicial discrimination and infringement by the political system and legal system. Since 1982, the Supreme Court has faced critics from all sides of the political spectrum, many claiming the court has weakened the *Charter*, and as a result, Canadian democracy. However, as this paper will examine, there is an overabundance of data disproving the framer's intent argument and justifies the legitimacy of the Court as the guardian of the Constitution. This essay will argue that the Supreme Court has upheld democratic universality through its modern interpretation of the *Charter* with regards to sexual orientation and equality rights, and that the Court has been an unbiased yet authoritative mediator between the ever-evolving Canadian society and the fundamental laws that govern it. Specifically, I argue that the analogous grounds of Section 15 justify the need for a modern interpretation of the *Charter*, and that judicial discretion simply allows for the protection of our modern society. As well, this essay finds that in most cases the Court’s use of its remedial powers has been in reaction to the shortcomings of the legislature, as seen in cases such as *Vriend v. Alberta* [1998]. Finally, we will examine the case of *Egan v. Canada* as an example of the Court upholding the fundamentals

clause.[5] She examines the nature of equality rights in Canada under the *Charter*, and explains that while there are certain grounds that must be protected against discrimination, there are also a variety of factors that may not fall into this category. The Supreme Court helps define these characteristics. She explains that it is the role of the judiciary to define equality rights in the Charter, which, in fact, is one of its most difficult tasks.[6] Miriam Smith wrote that, "the entrenchment of the *Charter* in 1985, and, in particular, the coming into force of section 15 in 1985 – eventually attracted the mobilizing energies of the lesbian and gay communities… during this period, the lesbian and gay communities in Canada's urban areas grew substantially and many more lesbians and gays chose to live their lives out of the closet".[7] She goes on to state that the cultural life of the numerous Canadian communities grew because of this.[8] This analysis is evidence that not only did the Supreme Court enhance equal rights for these individuals, but the original *Charter*, the one drawn up by the framers themselves, both responded to the society of the time but also led to its evolution. The evidence indicates that the *Charter* was meant to ensure the equality of all persons, however, sexual orientation being a social taboo and not as accepted in society as today, was omitted at the time. This, however, does not mean it was never to be protected through section 15, which is why the role of the Supreme Court is to oversee and interpret the law, based on what civil and human rights, and in accordance to the just standards of law.

While the analogous grounds of Section 15 have allowed the Court to extend the definition of equal rights, it is important for us to analyze the actual powers allowing the Court to

---

[5] Bayefsky, *Defining Equality.* 110.
[6] Bayefsky, *Defining Equality.* 106.
[7] Smith, *A Civil Society?* 73.
[8] ibid.

do so. The following addresses the remedial powers of the Supreme Court and argues that in most cases, the Court's use of these powers has been in reaction to the limitations the legislature has put on Canadians by refraining to include certain rights in their decision-making, notably that of sexual orientation. Under Section 24(1) of the *Charter*, those who feel their rights have been infringed upon may seek a remedy from the court.[9] In certain cases, such as *Vriend v. Alberta* [1998][10] and *M v. H* [1999][11], the Supreme Court simply used its remedial powers to enhance the *Charter* both for the benefit of society and while remaining within its constitutional boundaries. When we are asked whether the Supreme Court has drifted away from framer's intent by incorporating sexual orientation into the *Charter*, we must answer no because the court has only acted within the boundaries of framer's intent, as it was the framers themselves who gave the courts the power to remedy instances of individual infringement. Mark MacGuigan has analyzed both judicial decision making and activism and states that, "in spite of the judge's role as a legislator, justice must be administered according to law, not according to the judge's individual sense of justice".[12] The point here is that the courts are not making laws according to their individual beliefs; they are working within the limitations placed upon them to advance the law and ensure its advancement.

For the framers to include such remedial powers would have to mean that these individuals knew that there would be future problems and instances of discrimination, therefore they placed the responsibility of rectifying these problems on the courts. One can argue that the interpretation of equality rights, specifically those concerning sexual orientation, is better off

---

9

sitting in the hands of the judiciary than the legislature. While the judiciary may be an appointed position, its judges are bound to the law and are mandated with ensuring the advancement of society and the settling of disputes within the confines of Canadian law. The legislature on the other hand, while also being confined to the law, is an ever-shifting collage of Canadian

While this essay has largely dealt with the Court's ability to interpret the *Charter*, we have not yet examined the actual event that sparked the sexual orientation and judicial interpretation debate, which was born out of the Vriend case. Although society had become increasingly accepting of homosexuals since the time of the *Charter's* inception, there had previously not been an instance where a homosexual person had successfully challenged a violation of their rights.[15] In this instance, Delwin Vriend was fired from his position at a college in Alberta because of his sexual orientation. Vriend argued that this was a violation of his *Charter* rights, and under Section 15 it was illegal for the school to discriminate against him because of his sexual orientation. The case, which worked its way up to the Supreme Court was a fundamental one for Canadian law because, as previously mentioned, not only did the court agree with Vriend, it took it upon itself to rectify the error in Section 15 which did not include sexual orientation.[16] As Mary Hurley has explained, "the purpose of section 15 is to prevent the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice and to promote equal recognition at law of all persons as equally deserving".[17] Therefore, Section 15 forces the courts to ensure that it itself is upheld and that individuals are treated equally as per the *Charter*. Upon reaching a decision in this case, Justice Iacobucci explained that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time".[18] This reasoning is congruent with the previous assessment that while the legislature may be in charge of enacting laws, it often refrains from making such important decisions, or can take an overwhelming amount of time before deciding

---

[15] *Vriend v. Alberta*
[16] ibid
[17] Mary C. Hurle50444<00570003004B}TJETBT2te[(tre)5(a)4(ted e)6(qu7d25.42 Tm[(V)-2(r)3(ien)-6(d14ote)-(.)-2( )-2(HCy)20(u)-

to make a decision, especially when concerning the *Charter*. Margot Young examines the case and the Supreme Court's position in advancing section 15, something many had been quite critical of prior to this case. She explains that "this conclusion [is] critical for the realization of the full substantive potential of section 15(1) itself".[19] She goes on to explain that the Court established positive state obligations as a result of its decision (being that the government was forced to comply with its decision) and had it not had the reasoning it did, the legislative response to such an issue would have been quite minimal.[20] Therefore, it is important for the courts to step in and ensure that people, such as Mr. Vriend, are not taken advantage of, and that the *Charter* is not taken for granted. As a result, sexual orientation was not only acknowledged as equal rights issue, but it was now legally enforced, which led to some of the greatest social advancements in Canadian history. The argument that the Court's decision drifts away from framers' intent is false and the proof that the framers knew a situation such as Vriend's was inevitable was when they decided to leave the Section 15 open-ended and gave the courts the power to deal with the issue whenever it came up.

Another case in which the Supreme Court fundamentally advanced the rights of homosexuals with regards to the *Charter* was M. v. H. In this case, the Court explained that, once again, under section 15 of the *Charter*, individuals who were in same-sex common law relationships must be treated with the same equalities and benefits of those who are in heterosexual relationships.[21] Similarly to the Vriend case, some may claim the Court's decision was an imposition on CanadA54idw H.4(omw-7(pe4(ve)45(re the 5(s)4(ourtsdid,not)-42(moi)-3(vf-6(u)20( )-9

1

1

fundamental justice. As previously explained, in the case of M. v H., the Court did rule that same-sex couples were bound to the same protections as heterosexual couples, however it did not give them the same rights as spouses, as the law clearly defines what benefits and privileges spouses can receive as opposed to common-law couples. Perhaps the most infamous case involving this scenario is that of Egan v. Canada, in which a same-sex common law couple was claiming that one member should receive the pension benefits of the other. The Court held that while the protection against discrimination and the benefits of the law apply universally to all Canadians, the definition of the term "spouse" did not recognize those who were not entered in a civil union of marriage.[25] The court drew a line between marriage and cohabitation, explaining that the latter does not justify the right to old-age security under Canadian law.

There have been both disagreements and praise on the outcome of this case from all sides of the spectrum. Daphne Gilbert explains Justice Claire L'Heureux-Dubé's reasoning on this case, explaining that "her approach would de-emphasize the enumerated and analogous grounds in section 15, focusing instead on historic disadvantage, social context, and the effects of discriminatory practices".[26] She notes that Justice L'Heureux-Dubé came up with her own set of guidelines for an appellant to follow when contesting an infringement of section 15: that they demonstrate a "legislative distinction", that the distinction results in the denial of one of the equality rights on the basis that that person is part of identifiable group, and that the "distinction" is discriminatory by the definition of section 15.

[However] certain cases suggest that the Court is defining discrimination in terms of negative impact or effects".[28] The point here is that while the Court has often seemed to neglect rights, it is evident that these justices are decisive and look for infallible reasoning when a case is presented. It is not as many make it seem, that the court is simply presented with a discrimination case and rules in favour of the infringed party. They look for concrete evidence, as well as apply the law to its full extent, and in many cases this has led to sexual orientation being identified as a possible discrimination factor, which is why it should be protected. Nevertheless, in the *Egan* case, the court remained frank that marriages differed from common-law relationships, and the benefits awarded to one group do not necessarily apply to another, which is a blatant legal standing, not an act of discrimination.

By upholding the definition of spouses regarding sexual orientation and government benefits, the Court demonstrated its unbiased approach, which was neither politically nor morally motivated. It remained frank, explaining that under the law spouses can only receive such benefits, and did not discriminate based on gender or sexual orientation. However, by acknowledging equal rights regardless of one's sexual orientation, we can surmise that this was still somewhat of a social victory for same-sex individuals. As well, those who argue that the decision is flawed because same-sex marriage was not legalized at the time, see their arguments put to rest as this decision was one in a series which advanced same-sex couples' rights and their voice within Canadian society. As such, one can argue that this inadvertently led to the 2005 legalization of gay marriage in Canada. However, with regards to framers' intent, one must maintain the argument that the Court did not stray away from its powers and the official law

[28] Diana Majury, *Equality and Discrimination According to the Supreme Court of Canada*. (1991), 437-439.

under the framers, and as for the eventual legalization of same sex marriage, the decision was

Bibliography

Bailey, Martha. “Regulation of Cohabitation and Marriage in Canada,” *Law and Policy*. 26:1 (2004), 153-175.

Bayefsky, Anne F. “Defining Equality Rights Under the Charter.” in Sheilah L. Martin and

Young, Margot. “Change at the Margins: Eldridge v. British Columbia (A.G.) and Vriend v. Alberta,” *Canadian Journal of Women & the Law* 10:1 (1998), 244-263

au Québec et l’élection de Stephen Harper

peuvent être protégés dans le cadre constitutionnel actuel et que cela justifie l'indépendance[9]. Il y a donc consensus entre les différents partis à l'Assemblée nationale, avec plusieurs distinctions bien sûr, que le fédéralisme canadien comme il a été institutionnalisé en 1982 ne concorde pas avec la vision que bien des Québécois se font du Canada[10]. Afin de bien saisir l'enjeu entourant notre article, il sera important de circonscrire le concept de fédération ainsi que son corollaire beaucoup plus spécifique qu'est le « fédéralisme d'ouverture » dans le contexte politique canadien.

Tout d'abord, le concept de fédération sera défini. Selon l'équipe de Perspective Monde

Philip Resnick distingue deux types de fédérations : Les fédérations territoriales et les fédérations multinationales. Au sein des premières est proposé une vision commune de la nationalité alors qu'au sein des secondes, les diverses nations qui la composent ont droit à une certaine reconnaissance[14]. Selon lui, ces deux visions sont présentes au Canada, car la plupart des Québécois envisagent la fédération comme étant multinationale, tandis que la plupart des habitants des neuf autres provinces la considèrent surtout comme étant territoriale[15]. Cette division est clairement illustrée par les sondages qui démontrent que les résidents du Québec se définissent d'avantage comme Québécois que comme Canadiens et les résidents des autres provinces ont en général développé un sentiment d'appartenance beaucoup plus grand envers le

du côté canadien à faire des concessions[20]

constitutionnelle, il sera intéressant de se demander où se situe Stephen Harper aujourd'hui face à cet engagement électoral. À ce jour, peu d'études ont été faites permettant de porter un tel constat. En passant en revue les aspects saillants des relations intergouvernementales entre le Canada et le Québec depuis son arrivée au pouvoir en 2006, quel bilan peut-on faire du

«

manqués de Meech et de Charlottetown[27].

Pour Philip Resnick, en reconnaissant les Québécois comme une nation et non le Québec la motion évitait de manière habile de reconnaître le caractère national du Québec et toute possibilité de lier l'identité nationale québécoise avec le pouvoir politique du Québec, ce qui est incompatible avec la vision mono-nationale du Canada, excluant bien-sûr la reconnaissance des droits collectifs des peuples autochtones et les différents traités signés avec ceux-ci[28]. Comme le rappelle Mathieu Bock-Côté, cette reconnaissance n'a pas eu d'effets politiques, ses effets se limitant à une portée purement symbolique[29]. Il l'interprète même comme étant une tentative de «[…]décrocher durablement le désir de reconnaissance identitaire et symbolique de la nation québécoise de ses conséquences politiques[…][30].» Vision quelque peu pessimiste du geste de Stephen Harper, à moins que l'on considère ce geste comme purement électoraliste, visant à agréger les votes du plus de Québécois possible alors qu'il ne formait qu'un gouvernement minoritaire. Mathieu Bock-Côté rappelle que les principes l'orientant ne sont clairement pas un désir de redéfinir l'identité canadienne sur sa matrice dualiste[31].

C'est aussi en 2006, suite à l'élection d'un gouvernement conservateur mené par Stephen Harper, que le Québec s'est fait accorder une place au sein de la délégation canadienne à l'Organisation des Nations unies pour l'éducation, la science et la culture (UNESCO)[32]. Cependant, ce gain provincial n'a rien de si surprenant, car la doctrine Gérin-Lajoie, existant

[27] P. Resnick. *Le Canada* (2013), 34.
[28] P. Resnick. *Le Canada (2013),* 34-45.
[29] M. Bock-

depuis 1965, permet aux provinces d'agir à l'international dans leurs champs de compétence[33]. Pour Réjean Pelletier, ce geste représente peu, car la délégation canadienne à l'UNESCO ne devant parler que d'une seule voix, le Québec est donc limité à une fonction de lobbyiste auprès des autres membres de la délégation canadienne ou des autres pays membres, d'où la qualification de strapontin[34]. Ces propos sont à nuancer, car malgré les limites de la participation

Harper avait promis de s’attaquer.

l'autodétermination de la nation québécoise[56]. Son parti est même allé récemment contester la loi québécoise qui n'allait pas dans le même sens que la loi C-20[57]. Il serait donc difficile de conclure que Stephen Harper est parvenu à mettre fin à l'ère de confrontation entre le gouvernement canadien et le Québec.

[56] M. Bock-Cöté. *De la reconnaissance du Québec* (2007), 15.
[57] Agence QMI. *Harper veut invalider la loi 99* (2013).

Bibliographie

Agence QMI. « Harper veut invalider la loi 99 », *Le Journal de Montréal,* [En ligne], 19 octobre 2013, http://www.journaldemontreal.com/2013/10/19/harper-veut-invalider-la-loi-99, (Page consultée le 25 novembre 2013)

Bock-Côte, Mathieu. « De la reconnaissance du Québec à celle des Québécois: retour sur la reconnaissance de la nation par le gouvernement de Stephen Harper à l'automne 2006 », *Institut de recherche sur le Québec*, [En ligne], Avril 2007, pp.1-18. http://irq.qc.ca/storage/etudes/IRQ-Etude_MBC_final_8.pdf, (Page consultée le 20

Godbout, Luc. « Les cinq années au pouvoir de Stephen Harper », *La Tribune*, [En ligne], 17 janvier 2011, http://www.lapresse.ca/la-tribune/opinions/201101/17/01-4360837-

Noël, Alain. « Le fédéralisme symétrique », *Option politiques*, février 2012, p.104.

Ouellet

Is the Notwithstanding Clause a Viable Option To Maintain Constitutional Supremacy?

Christian Holloway

Introduction

It has become apparent throughout the history of the *Canadian Charter of Rights and Freedoms* that section 33, or the Notwithstanding Clause, has been utilized very little in the parliamentary arena, yet has been the subject of an abundance of arguments, both in favour and opposed, in the academic spectrum. This is because section 33, to many theorists, is the mechanism that balances the Supreme Court of Canada and maintains constitutional

accommodating competing interests, including interests that bear on the characterization of rights claims".[2] It was also intended that the Notwithstanding Clause would only be used as a final method to correct the judiciary.[3] This means that the original framers' intent was not to have section 33 used as a method to constrain the rights of Canadian citizens, but it was a method to maintain supremacy

Critics would argue, however, that judicial supremacy has not occurred because the decisions made by the Supreme Court of Canada to deem a piece of legislation unconstitutional are the result of legislative action before it is even brought before the courts. This argument comes from the cabinet centered approach, and is of the belief that the cabinet is the reason the courts have this supremacy when it fails to ensure its legislation is consistent with the Charter and is 8 Tm[( )] TJETBT1 0 0 1 72jt71.k-Tm01 20- 1 21 1060 112 79 112 reW*nJET BT8. 922 12 Tf1 01.34 485

discussed in the previous section, there have been a handful of attempted and abandoned uses of the Notwithstanding Clause, but only two clear, straightforward examples of actual invocation and the resulting effects of using section 33. The first is the case of *R. v. Ford* and its relation to *Bill 101*. The second is the use by the government of Saskatchewan in the *Dispute SettlemDispute*

Clause was a viable option for the government of Quebec to protect the French language. The Quebec government's ability to use the Notwithstanding Clause is an example of the framers' intent behind section 33, and as such, allowed the government and people of Quebec to override a judicial nullification of something important to their policy as a distinct society.

The second case is the *Saskatchewan's Government Employee Union Dispute Settlement Act*. In this circumstance the Saskatchewan government implemented section 33 because they believed the *SGEU Dispute Settlement Act* infringed the workers right to the freedom of association as guaranteed under section 2(d) of the *Canadian Charter of Rights and Freedoms* by using the legislation to end a strike and return to work. Unlike the use of the Notwithstanding Clause in the example of the *Quebec Charter of the French Language*, the use in the *SGEU Dispute Settlement Act* is a moment that has stigmatized the Notwithstanding Clause. This is because the use of section 33 in this manner was a pre-emptive measure used by the government of Saskatchewan in fear of it being deemed unconstitutional and of no force and effect by the Supreme Court of Canada.[10] This action by the Saskatchewan government diverges from the original framers' intent of using the Notwithstanding Clause as a last resort method to implement public policy that limits rights, but is beneficial in its circumstances. Instead Saskatchewan used the notwithstanding clause as a preemptive method to avoid the checks and balances by the Supreme Court of Canada, and to pass legislation that the government of Saskatchewan was aware was unconstitutional. It is this deviation from the original purpose of section 33, and the framers' original intent, that causes the public to have the negative view of the Notwithstanding Clause it possesses. It is also why legislatures are faced with opposition if they were to try and

[10] Christopher P. Manfredi. *Judicial Power and the Charter* (Toronto 2000), 184.

invoke it today. This does not mean however, that the Notwithstanding Clause is forever condemned from use, but it does however need to be adjusted to have the connotations of being justifiable.

How to salvage section 33

While it may be seen that the Notwithstanding Clause is a feeble, unused

their own interpretations, justifications, and reasons behind their views which would create a back and forth repetition between the two. The resulting effect would be a stalemate of mutual recognition that both parties have valid claims to their argument, and no interpretation would ever be agreed upon.

Another approach of how to fix the Notwithstanding Clause is that of a parliamentary Bill of Rights model, similar to one presented by Janet Hiebert. The parliamentary Bill of Rights model is stemmed from the idea that the protection of rights should occur within the government and not, however, solely reliant on the judiciary to determine the constitutionality of legislation.[12] This approach would eliminate the need for the Notwithstanding Clause because the structure of this argument is to have final authority within the government, the very purpose of the Notwithstanding Clause. This is similar to the cabinet centered approach discussed before in that the discretion of the constitutionality of rights rests within the legislature. It therefore suffers the same criticisms as well. The criticism being that since it is the Supreme Court that gives the second decision on the constitutionality of a piece of legislation, the legislatures are not going

There does exist one argument however that does present an extremely valid option for the future of the Notwithstanding Clause. This argument is presented by Christopher Manfredi. It is an argument that "just as constitutional amendments require extraordinary majorities to become law, legislative overrides of constitutional decisions should also require an extraordinary majority before becoming effective".[16] This view presents that, similar to the three-fifths vote to invoke a constitutional amendment, if a legislature would like to invoke a section 33 override to a piece of legislation, it would require more support from democratically elected actors; this would make it more likely to be consistent with correcting the

and Freedoms.[18] This change would allow for Parliament to demonstrate to the public the true intention of the Notwithstanding Clause without being associated with the negatives attached to section 33 at the present time. While it essentially would have the same purpose and effect as the Notwithstanding Clause, by changing the wording in the section of the *Charter* it would allow for marketing the new section in a positive manner to the public, erasing the political ramifications feared when it is invoked in today's political arena.

Conclusion

The Notwithstanding Clause certainly has not been the most used section of the *Canadian Charter of Rights and Freedoms*, nor will this change in the near future. This develops a problem for the system of government in Canada because it has resulted in a shift into an era of judicial supremacy. The reason behind this shift is because the Notwithstanding Clause was intended as the bar protecting against judicial supremacy, and that since this method is no longer a viable option for such purposes, the Supreme Court of Canada has become supreme over the legislatures. This lack of activity has been the curse of section 33 since its inception. The

a justifiable use of the Notwithstanding Clause to protect a piece of

BIBLIOGRAPHY

Blakeney, Allan E. "The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing." *Constitutional Forum* 19, no. 1 (2010), 1-9.

Canadian Charter of Rights and Freedoms. Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act, 1982. U.K. 1982, c. 11

Ford v. Quebec (Attorney-General), [1988] 2

length, they must maintain the confidence of the house as well as public favor, and are also bound by *stare decisis*. Furthermore, parliamentary conventions of deference to the court and a tradition of non-interference are also observed by those in office.

The relationship between judges and parliamentarians is in balance due to a situation where acting out results in punishment and accountability is maintained by externalities. Both parliamentarians and judges are under scrutiny; the courts are under the scrutiny of parliament and parliament is under the scrutiny of the opposition and the people. As well, both face the potential loss of employment. Politicians face re-election and judges face the tool of S.99(1)

the constitutional role of political actors."[175] It is the role of the politicians to create the framework of the constitution, thereby creating the rules of the Supreme Court which the court must adhere to, which therefore makes the courts answerable to parliament. This demonstrates the democratic

based on precedent and the Charter. This helps to keep politicians in check and helps to avoid legal oversights which are bound to happen in an ever-changing system.

In the reference case *Prov. Electoral boundaries (Sask.)*, the court examined the right to redraw electoral boundaries to reflect population disbursement more appropriately with regards to S.3.[184] The court upheld the provinces actions on the grounds that the province did not impinge the public's right to vote in redrawing electoral boundaries. This demonstrate vm v courts' even handed approacC ssue vof the constitution. Finding that "The purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se* but the right to 'effectve representton'". [185] Because the court is bound to the constitution, and S.3 does not guarantee equality of voting power, the court upheld the right of democratically elected officials to draw boundaries where social/physical geography and population necessitate change. This is important because it distinguishes the limitations of S.3 of the Charter and ensured that the province was able to adapt to the changes it faced.

The Supreme Court is not affiliated with the provinces, and its members are chosen by Federal Cabinet. The court had no impetus to prefer the province in this decision. This reinforces their a] v ence to the 'blac Ğ Ḿ l é m l m law'vofvm v hartm D Ŏ M ʎ y abst] ʊ ɹ ʊ ng from mec

due weight to regional issues involving demographics and geography."[186] This shows a consideration for the right to vote and therefore a continuation of the commitment to the democratic process previously discussed in *Figueroa v. Canada.* The concern of misuse leaves room for future decisions to rule against unfair or illogical gerrymandering. The ruling upholds the

Protection act (1985), found the federal government's right to criminal law allowed them to create laws which crossed into provincial jurisdiction. They could so, as long as it concurred with the constitutional right and in no way impeded the provinces right to "regulate and control the pollution of the environment either independently or to supplement Federal action."[190] The court was promoting shared governance, suggesting that both provinces and the federal government had roles to play in the environment, and that the two could function in their own spheres or seek to compliment on another provided they did not act *ultra vires*.

The increased role of the judiciary in Canadian politics since 1982 has had the effect of evening the playing field in the federalist arena. Between 1949 and 1982, the division of power cases fell consistently in favour of the federal government. Major blows were also dealt to the provinces in regards to economic and energy policy cases.[191] This centralization shaped the views of many political scientists, that the courts were bias in favour of the federal government, for the obvious reasons of appointment and control of funds. Kelly argued that "Under the division of powers, the court determined which level of government has jurisdiction in specific policy areas".[192] The effect of which, was to consistently rule in favour of the federal government. This is demonstrated by the statistical data, from 1949 to 1982 where "the Court invalidated 25 of 65 (38.5 percent) challenged provincial laws, but only 4 of 37 (10.8 percent) challenged fedea − ɣ .

aspect of federalism and given the courts the ability to “rule that neither level of government may

of the federal government. As it has substantially more experience than any one province it can more effectively deliver its case and consider rights implications before creating public policy. Statistic evidence of fairness does not suggest that improvements cannot be made.

Despite the benefits of the Charter and Supreme Court, there are inherent flaws in the system. Judges are chosen by cabinet, thus, justice selection is not as democratic as it could be. There is a simple solution to this; to make all of parliament vote on Supreme Court Justices in a manner similar to the procedure of the electing the speaker of the house.

Another problem that was not discussed in the research for this essay is the effect of an out of date Charter on Canadian federalism. If the Charter became outdated and unrepresentative of the people due to a lack of constitutional advocacy on behalf of parliament, the court would become the sole interpreter of the constitution and upset the balance struck. The absence of the legislature in the form of constitutional and rights advocacy would in effect make the entire process undemocratic. The vote of the people must be directly connected to constant revision of the Charter in order to maintain the democratic link between parliament and the Supreme Court. Without parliamentary guidance, the court would be forced to act unilaterally as the interpreter of the Charter, not as its guardian. The solution to this potential problem is to esta

To summarize, the courts democratic justification comes from a balance of accountability found in the relationship between the courts, parliament and the voting public. Each has the ability to hold the other accountable when any branch acts outside of their mandate. The measures of ‘good behavior’ for judges and *stare decisis* coupled with public scrutiny for politicians ensure that no party is in a position of privilege. This is a direct result of the introduction of the Charter in 1982 which has increased the role of the judiciary. The statistical d

Bibliography

Canada, G. o. *Department of Justice*. Retrieved February 28th, 2013, from Canada's Court System, (2012).