

Book reviews

Judicial power and the Charter: Canada and the paradox of liberal constitutionalism, Christopher P. Manfredi, 2d ed., Toronto: Oxford University Press, 2001. xvii, 276 pp.

Reviewed by Sujit Choudhry*

1. The judicial activism debate in Canada

Canada is in the midst of a national debate over judicial activism under the Canadian Charter of Rights and Freedoms.¹ To be sure, fears of judicial activism have been voiced since the coming into force of the Charter in 1982. The first wave of Charter criticism came principally from the left, was largely confined to academic circles, and focused on the concern that notwithstanding the exclusion of rights of property and contract from the Charter, the courts would erect constitutional obstacles to the interventionist, regulatory state.² However, in recent years, the discourse of activism has been taken up by the right and has moved to the center stage of political discourse. There is a litany of charges here—that under the cloak of constitutional judicial review, the Supreme Court of Canada is foisting a particular political agenda upon the Canadian public, a mixture of gay rights, feminism, and under the aboriginal rights provisions of the Canadian Constitution, rights for indigenous peoples.³

Quite remarkably, the criticisms have reached such a fevered pitch that they have forced a response from the Court itself. Members of the Court, both in public addresses and in their judgments, have spoken out in defense of the institution of judicial review.⁴ On occasion, they have conceded ground to the Court's critics. Thus, members of the

* Faculty of Law, University of Toronto. I thank Claire Hunter, Ira Parghi, David Schneiderman, and Lorne Sossin for helpful comments, and Claire Hunter for excellent research assistance.

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the Charter].

² See, e.g., MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (Thompson Educational Publishing, rev. ed. 1994); Andrew Petter, *The Politics of the Charter*, 8 SUP. CT. L. REV. 473 (1986); Andrew Petter, *Immaculate Deception: The Charter's Hidden Agenda*, 45 THE ADVOCATE 857 (1987).

³ See FREDERICK L. MORTON & RAINER KNOPF, *THE CHARTER REVOLUTION AND THE COURT PARTY* (Broadview Press 2000).

⁴ See the majority judgment in *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

Court announced in one media interview a policy decision to restrict interventions by public interest groups in appeals,⁵ and Justice Michel Bastarache opined in another that the Court had perhaps gone too far in protecting the rights of the accused and indigenous peoples.⁶ Indeed, the Court recently went so far as to uphold legislation that clearly departed from one of its earlier judgments, on the basis of a theory of coordinate construction that apparently does not require Parliament to invoke the Charter's legislative override.⁷

For students of comparative constitutionalism, the rise of the right-wing critique of Charter adjudication is instructive. Just as the Charter has shaped the drafting of bills of rights in several jurisdictions, so too can the Canadian experience provide important lessons on the politics of judicial review that will likely emerge in those jurisdictions as well. The second edition of McGill University political scientist Christopher Manfredi's *Judicial Power and the Charter* is therefore worth reading, not only for its discussion of Canadian developments, but also for the light it sheds on the comparative politics of judicial review. Although Manfredi is viewed by many legal scholars as a political conservative, *Judicial Power and the Charter* is a serious, sober academic work, in contrast to the invective that characterizes the writings of some right-of-center commentators.⁸ Moreover, given that Manfredi is generally critical of the Court, some of his positions are surprising. He accepts, for example, that the Charter is here to stay. Moreover, he argues that it should stay because a constitution, including a bill of rights, is an integral component of a liberal political order.

Despite its widespread influence in political science circles, the first edition of Manfredi's book in 1992 was not reviewed by a single Canadian law review. I suspect that the refusal to engage with political scientists reflects a belief in the legal community that nonlawyers have little to contribute to the study of law and legal institutions. But surely the more intellectually open approach is for legal scholars to take the work of political scientists seriously. In this review, I scrutinize two of Manfredi's principal arguments. The first is that liberal democracy in Canada is under threat from the Supreme Court's Charter jurisprudence. The second is the claim that the distinctive Canadian solution to the threat of judicial activism, the legislative override, has been delegitimized, thereby rendering it effectively inoperative as an external check on judicial review. Manfredi links these two arguments, by asserting that the delegitimization of the override has led to a rise in judicial activism. Upon closer examination, though, both of these arguments are flawed.

2. The Charter and democratic self-government

Manfredi's first argument begins with the observation, made most recently by Stephen Holmes,⁹ that in the liberal political imagination, written constitutions serve both an

⁵ Luiza Chwialkowska, *Rein in Lobby Groups, Senior Judges Suggest*, NATIONAL POST, April 6, 2000, at A1.

⁶ Cristin Schmitz, *The Bastarache Interview: Reasoning to Results at SCC*, 20(35) LAWYERS WEEKLY 19 (2001).

⁷ *R. v. Mills*, [1999] 3 S.C.R. 668.

⁸ See, e.g., Morton & Knopff, *supra* note 3.

⁹ STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (Univ. of Chicago Press 1995).

enabling and a restraining function. They enable by creating various institutions and defining the rules whereby those institutions can make decisions; they disable by erecting roadblocks that retard the functioning of those same institutions, and by setting substantive limits on the range of decisions that those institutions can make in order to prevent the abuse of public power. The obvious tension between the different functions of liberal constitutions creates serious problems for judicial review, because instead of merely checking the abuse of power, judicial review may go further and threaten the very objective of liberal constitutionalism itself: democratic self-government. In Manfredi's terminology, instead of merely protecting "constitutional supremacy"—defined as the "subordination of all political power, including judicial power, to procedural and substantive constitutional rules" (p. 193)—judicial review can degenerate into "judicial supremacy."

Thus far, the argument is hardly original. What makes it more interesting is Manfredi's positive claim that under the Charter, "the emergence of judicial supremacy out of the process of enforcing constitutional supremacy—has become one of the dominant features of Canadian politics" (p. 196). Since Manfredi is making an empirical claim—and a fairly strong one at that—it would seem that he must do two things to make his argument work. First, he must define what it means for a court to undermine democratic self-government. Second, in light of this definition, he must identify the kinds of evidence that could substantiate this claim and assess the available evidence.

Surprisingly, Manfredi does not address either of these central methodological issues explicitly. Moreover, if we examine his argument in order to infer how he would address them, he fares poorly. What does it mean for a court to undermine democratic self-government? There are two possible answers here. The simplest answer comes from the strongest formulation of the countermajoritarian dilemma—that is, whenever a court second-guesses the decision of a democratically elected legislature, there is some kind of loss for democracy. This is the most straightforward answer that Manfredi could have given. However, he cannot give it, because he makes extremely clear his commitment to constitutional as opposed to parliamentary supremacy, which on his own definition contemplates some legal limits on democratic decision making. For a constitutional supremacist, like Manfredi, not every instance of countermajoritarian decision making is wrong just because it is countermajoritarian, as it is for the parliamentary supremacist. Rather, what the constitutional supremacist who is also a liberal democrat must hold is that there is a right way and a wrong way to be countermajoritarian. And this in turn requires an underlying political theory of the sources and nature of political legitimacy in which an account of legitimate and illegitimate judicial decision making is embedded. On his own terms, then, Manfredi must put some flesh on the bones of his otherwise rather formal conception of constitutional supremacy in order to satisfactorily explain what it means for a court to undermine democratic self-government. Unfortunately, he does not deliver.

Even worse, he rarely addresses this central question, and as a consequence loses the main thread of his argument. Instead, the bulk of the book is devoted to a close analysis of the Supreme Court's jurisprudence, with separate chapters on fundamental freedoms (expression, religion, association, assembly), legal rights (e.g., the right against unreasonable search and seizure, the right to be presumed innocent), and equality rights. These chapters are disappointing. The discussions of the case law are largely descriptive, and are rather superficial and dated. For example, on the question of application (i.e., state action), there have been significant developments, which Manfredi

does not really address, since the Court's landmark judgment in *Dolphin Delivery*.¹⁰ This is a pity, since those cases grapple with and narrow one of the central and most controversial holdings of *Dolphin*, namely that courts are not bound by the Charter, a ruling that for Manfredi is strong evidence of the rise of judicial supremacy. Moreover, to the extent that he offers any analysis, it is largely derivative from the existing secondary literature. This is especially true of the material on application and fundamental freedoms.

Moreover, when Manfredi does address himself to his principal question, the result is unsatisfactory. When he tries to distinguish between the right and wrong ways of being countermajoritarian, he simply relies on well-known distinctions, without probing their cogency, and even worse, without mentioning, let alone engaging with, the extensive critical literature on each. Thus, he variously invokes the distinctions between law and policy (p. 67), political losses and malicious acts of legislative majorities (p. 135), and principle and policy (p. 196), without defining these concepts. As a result, his analysis feels more rhetorical than substantive. This is all the more worrying since many of these distinctions—most famously, the distinction between policy and principle—collapse under scrutiny.

Manfredi might respond that he is ultimately concerned with something more basic, namely the capacity for self-government, and might argue with Mark Tushnet¹¹ that judicial review exacts two democratic costs: (a) the debilitation of democracy by dulling the habits of self-government through the removal from the political agenda of the most controversial and important questions of political morality; and (b) the distortion of policy choices because political institutions must work within the constitutional framework laid down by the courts, either *ex post* (if a law is struck down), or *ex ante* (in anticipation of a finding of unconstitutionality). Fair enough. So what kinds of proof could Manfredi use to substantiate these claims? With respect to democratic debilitation, he might point to studies of citizen engagement, or evidence of widespread citizen dissatisfaction with the Court's Charter jurisprudence. With respect to policy distortion, he might discuss situations where political actors avoided policy options that they would have considered but for the presence of the Charter, or cases in which public discourse was diverted from the consideration of fundamental questions of political morality into finely tuned analyses of constitutional doctrine. Given the strength of his claims, this sort of evidence should be widespread.

Unfortunately, Manfredi by and large does not cite this sort of evidence. On the citizen engagement side, there is some evidence available, and it tells quite a different story from Manfredi's. The Centre for Research and Information on Canada published opinion poll results in April 2002 that demonstrate high levels of public support for both the Charter and the Court's role in Charter adjudication.¹² Thus, 88 percent indicated that the Charter was "a good thing," with 71 percent indicating that the Court should have the "final say" in Charter cases; the latter figure also indicates general satisfaction with the Court's Charter jurisprudence. And going beyond the Charter context, in poll

¹⁰ *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

¹¹ Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 84 MICH. L. REV. 245 (1995).

¹² Centre for Research and Information on Canada, *The Charter: Dividing or Uniting Canadians?* CRIC Paper No. 5, April 2002, available at http://www.cric.ca/pdf/cahiers/cricpapers_april2002.pdf (last visited July 26, 2002).

results published in May 2000, 73 percent strongly agreed or agreed with the statement that the Court could “usually be trusted to make decisions that are right for the country as a whole,” and 79 percent were “somewhat” or “very satisfied” with the way the Court has been working.¹³ The picture that emerges from this cursory overview is one of a Court with widespread public support as an institution (so-called diffuse support).

How about policy distortion? On reflection, Manfredi’s failure to cite widespread evidence of policy distortions should not be surprising, because the whole point of constitutional supremacy is to impose limits on the political process. But surely, one relevant piece of data, easily ascertainable albeit extremely crude, is the rate at which democratic decisions have been second-guessed by the Supreme Court. In a work in progress, Claire Hunter and I try to quantify the extent to which the Court has been counter-majoritarian, by calculating the rate of government wins and losses in Charter cases involving primary legislation, as well as municipal bylaws and regulations (because the latter are often, though not always, issued by institutions that are under the control of political actors). Upon reading Manfredi, a casual observer could come to the conclusion that the Court routinely strikes down the decisions of democratically elected or democratically accountable bodies. However, according to our preliminary results, the government wins the overwhelming majority of Charter cases involving challenges to majoritarian decisions. Between 1983 and mid-2001, the government win rate was over 70 percent. Manfredi might respond that the court’s activism has grown, because the rate at which it second-guesses majoritarian decisions has increased over time. However, this has not happened. Indeed, from 1999 to mid-2001, the government win rate stands at approximately 75 percent, suggesting, at least on this measure, that activism is on the wane, not on the rise.

To be sure, Manfredi would rightly note that this kind of analysis is extremely crude, because (a) it counts all Charter challenges equally without measuring the importance or lack thereof of certain cases, and (b) it looks strictly at results without analyzing reasons, because losses are sometimes also government wins (if the ruling adjusts the legal standard to be more favorable to governments) and, conversely, victories can be losses (if the opposite happens). With respect to limitation (a), for example, Manfredi could correctly point out that the Court has struck down many important laws, such as those establishing offenses of absolute liability¹⁴ and restricting the use of prior sexual history in trials for sexual assault.¹⁵ But even here, governments have had many important victories, winning constitutional challenges against antihate speech laws,¹⁶ anti-pornography laws,¹⁷ back-to-work legislation,¹⁸ strike bans,¹⁹ wage freezes,²⁰

¹³ Joseph F. Fletcher & Paul Howe, *Public Opinion and the Courts*, 6(3) CHOICES 1 (2000), also available at <http://www.irpp.org/choices/archive/vol6no3.pdf> (last visited Jan. 3, 2003).

¹⁴ *Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

¹⁵ *R. v. Seaboyer; R. v. Gayne*, [1991] 2 S.C.R. 577.

¹⁶ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

¹⁷ *R. v. Butler*, [1992] 1 S.C.R. 452.

¹⁸ *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

¹⁹ *Re Public Service Employees Relations Act*, [1987] 1 S.C.R. 313.

²⁰ *PSAC v. Canada*, [1987] 1 S.C.R. 424.

mandatory retirement,²¹ and the selective public funding of Roman Catholic schools.²² Indeed, labor law has been largely immunized from Charter scrutiny, which is a huge government win.²³ With respect to limitation (b), the burden of proof is on Manfredi, should he wish to take it up.

This kind of data would have been easy for Manfredi to generate. At the very least, he could have suggested that a relevant study be done. What accounts for the gap? Perhaps, despite his protestations to the contrary, Manfredi is, in fact, a parliamentary supremacist who has not truly come to terms with constitutional supremacy. Indeed, readers will note that he is critical of the Court only for second-guessing majoritarian decisions. Given the volume of Charter challenges that have been heard, one would also expect him to criticize the Court for *not* second-guessing political decision makers. This he never does, not once.

Perhaps realizing the difficulties of substantiating his claim that Canada is ruled by the courts, Manfredi shifts ground toward the end of the book and argues that the deficiency with the Charter is that it gives judges the final word over constitutional interpretation. His solution is a regime of coordinate construction, whereby legislatures and executives would “possess equal responsibility and authority to inject meaning into the indeterminate words and phrases of the Charter” (p. 188), as do the courts. The principal vehicle for legislative involvement, for Manfredi, would be the legislative override. Now this is a very different sort of argument than the one that occupies the bulk of his book. It focuses not on *how* the Supreme Court has interpreted the Charter, but instead on the institutional arrangements surrounding constitutional interpretation. For Manfredi, the purpose of the override is not to suspend constitutional rights, but rather to allow legislatures to reevaluate the balance struck by the courts between constitutional rights and other interests. And the fact that the override has been delegitimized is a real problem, because legislatures cannot engage in constitutional interpretation, thereby leaving the field to the courts.

But if *this* is Manfredi’s argument, it raises new questions. If his real concern is with judicial finality in constitutional interpretation, the whole point of his earlier analysis is thrown into question. Recall that Manfredi’s basic argument had been that it was the interpretations given to the Charter by the Supreme Court that had undermined constitutional supremacy. Now Manfredi tells us that the problem is not with those interpretations per se, but rather with the failure of the override to function as a check on judicial constitutional interpretations. Even worse, if constitutional supremacy is understood in primarily institutional as opposed to interpretative terms, it does not suggest any obvious criteria for legitimate and illegitimate adjudication. And worst of all, if Manfredi wants legislatures to have the final say on matters of constitutional interpretation, he has to explain what contribution courts make to safeguarding constitutional supremacy. Manfredi does face this issue toward the end of his book in a single sentence, when he states that “constitutional review under the Charter serves a useful

²¹ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

²² *Re Bill 30, An Act to Amend the Education Act (ONT)*, [1987] 1 S.C.R. 1148.

²³ *See R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, para. 156 (LeBel J). However, this may be changing in light of the Court’s dramatic decision in *Dunmore v. Ontario (Attorney-General)*, [2001] S.C.C. 94, where the omission of agricultural workers from a statutory regime of private sector collective bargaining was found to be unconstitutional.

purpose by forcing legislators to give coherent reasons for their policy choices and to consider whether the *identical* goal might be achieved as *effectively* through other means" (pp. 190–91, emphasis in original).

Alas, it is not clear what Manfredi is getting at. Perhaps he is claiming that by clarifying the conflict between constitutional rights and important social interests, judicial review enriches the quality of democratic discourse. This would explain the amendments he proposes to the override, to limit its use to *after* a judicial finding of unconstitutionality. But this is just the beginning of an argument that Manfredi should have fully developed (as Kent Roach recently has).²⁴ For example, it would have been helpful for him to revisit his extensive discussion of Charter jurisprudence to evaluate the extent to which the reasoning employed by the Court has served this function, and if it has not, why not.

3. The delegitimization of the override?

The legislative override is the distinctive Canadian contribution to the countermajoritarian dilemma, and it is not surprising that Manfredi discusses it in detail. In brief, the override allows provincial legislatures and the federal Parliament to enact laws that would otherwise be unconstitutional because they unjustifiably limit certain (but not all) Charter rights—the fundamental freedoms, legal rights, and equality rights. Once invoked, the override expires at the end of five years. The override was meant to safeguard against the possibility of judicial error, or in other words, to save liberal constitutionalism from itself. In a work in progress, I argue that the addition of the override to the Charter can be viewed as a device designed to protect the Canadian constitutional system from a crisis brought about by prolonged and deep conflict between the courts and legislatures, like the one experienced by the United States during the *Lochner* era.²⁵

The override is of considerable comparative interest, because it offers an alternative set of institutional arrangements to *Marbury*-esque judicial supremacy that strikes a different balance between judicial review and liberal democracy. It is therefore quite startling that it has been used very infrequently in Canada. As Tsvi Kahana has recently demonstrated, the override has been used only by the legislatures of Alberta, Saskatchewan, the Yukon, and Quebec—the first three invoking it once each, the latter on fourteen occasions (although once in an omnibus fashion).²⁶ Only eight uses of the override are currently in force. Students of comparative constitutionalism would want to probe the reasons for the disuse of the override, to determine the extent to which these factors might be present in other jurisdictions, and what those factors say about the efficacy and viability of the override as a feature of a constitutional system.

Manfredi's simple answer to this question is that the override has failed because it has been delegitimized through its use in one highly publicized episode—the decision by the Quebec government on December 18, 1988, to immunize from Charter scrutiny

²⁴ KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (Irwin Law 2001).

²⁵ Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, at http://papers.ssm.com/so13/papers.cfm?abstract_id=363220.

²⁶ Tsvi Kahana, *The Notwithstanding Mechanisms and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255 (2001).

the provisions of Bill 178, a law requiring that exterior commercial signs be displayed only in French.²⁷ This use of the override was very poorly received in English Canada, in large part because it vividly exemplified how the override could be used to abridge constitutional rights, in this case the rights of Quebec's English-speaking minority. But Manfredi goes further and argues that the delegitimization of the override has fundamentally altered the institutional balance between legislatures and courts by removing an external check on judicial review. Manfredi proceeds from the assumption that courts are strategic actors which have policy objectives the attainment of which is dependent on the responses of other institutions (executive, legislature), and which frame their judgments in light of the anticipated responses of those institutions in order to maximize the possibility that they will attain their objectives. For Manfredi, the threat of the override leads to judicial caution, to not provoke a legislative overruling of court decisions, and thus the delegitimization of the override has meant that courts act more aggressively.

Manfredi's argument is novel and provocative, for three reasons. First, it runs counter to the dominant narrative in Canadian legal circles, according to which the Supreme Court initially adopted an aggressive approach to Charter review, and since about the time of the enactment of Bill 178 has become not more activist, but more deferential through the development and use of a variety of substantive and remedial doctrines that have both reduced the number of circumstances in which laws can be found unconstitutional and minimized the disruptive impact of rulings on governments. Thus, the Court now asserts that when faced with conflicting social science evidence and the balancing of competing interests, courts should defer to legislatures.²⁸ As well, the Court routinely suspends declarations of invalidity to allow legislatures to respond to and preempt findings of unconstitutionality.²⁹ Second, the idea that a court acts strategically with respect to other institutions, although well established among political scientists, has not taken hold in legal circles, at least in Canada. Third, scholars such as Kent Roach³⁰ have argued that the override counsels more aggressive judicial review, rather than judicial caution, because it provides a safety net for courts. If the override produces the opposite effect, then there is a fundamental flaw in the design of the Charter that should not be replicated in other bills of rights.

Manfredi's thesis raises a number of issues. First, there is the question of the definition of judicial aggressiveness or activism. Unfortunately, Manfredi never defines activism, let alone offers a defense of that definition. This makes it difficult to assess the accuracy of his claim. It is all the more unfortunate because activism is a notoriously slippery term that 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. It seems that Manfredi thinks that judges are activist when they second-guess democratically made decisions, and that the more they do so, the more activist they are. The problem with this definition, though, is that since activism cannot be understood without reference

²⁷ An Act to Amend the Charter of the French Language, S.Q. ch. 54, § 10 (1988).

²⁸ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927.

²⁹ *Schachter v. Canada*, [1992] 2 S.C.R. 679.

³⁰ See ROACH, *supra* note 24.

to some baseline of judicial behavior, to define activism simply as the second-guessing of democratically made decisions means that courts act normally when they do not find laws to be unconstitutional. But this raises the same problem we encountered earlier: if Manfredi were a parliamentary supremacist, he could adopt this definition, but since he is a constitutional supremacist, he cannot. Perhaps Manfredi has some more conceptual work to do here.

Even if we work with Manfredi's implicit definition of activism, the next question is whether we witness a post-Bill 178 rise in activism in response to the delegitimization of the override. To answer this question, Claire Hunter and I have gone through our data set and eliminated from it those cases in which challenges were made on the basis of nonoverridable rights, because in those cases the Court could not have been subject to the external check of the override. Our assumption was that the remaining cases would allow us to assess the effect, if any, of the delegitimization of the override on judicial behavior. Our preliminary results were quite surprising. Between 1982 and 2001, the government win rate for these cases was over 65 percent. In order to examine the effects of Bill 178, we divided this data into two different time periods, 1984 to 1988 (pre-Bill 178) and 1989 to mid-2001 (post-Bill 178). For the first time period, the government win rate was approximately 65 percent; during the second time period, the government win rate was approximately the same, if not slightly higher, suggesting at best no real rise in judicial activism, at least on this crude measure. Moving the cutoff point one year later to 1989 did not change this picture much.

Thus, our preliminary results do not support Manfredi's story and are consistent with a number of different hypotheses. Perhaps the override was never delegitimized. In this connection, it is worth noting that the override was used relatively recently, in March 2000, by the Alberta legislature in an attempt to shield the heterosexual definition of marriage from constitutional challenge.³¹ Perhaps the override was and remains irrelevant to the adjudication of constitutional cases. Or perhaps the override has been delegitimized, but has been replaced by other institutional constraints in the Canadian constitutional system to which the Court is responding strategically. Indeed, the same May 2002 poll shows that 54 percent of Canadians are opposed to the very idea of the override,³² suggesting that the latter scenario may hold true. Which of these stories is correct is of pressing importance, particularly for constitutional drafters looking to the override as a model for other jurisdictions, and is deserving of close attention by political scientists. Unfortunately, Manfredi's book does not equip its readers to answer this important question.

Manfredi might respond that these data hide other ways in which activism is on the rise. For example, he appears to claim that the Court is now more likely to hand down "broad" decisions, in Cass Sunstein's sense of that term.³³ The two cases that he compares are *Morgentaler*³⁴ and *Vriend*. Both count as government losses. However, in the

³¹ Marriage Amendment Act, S.A., ch. 3, § 5 (2000). The statute will probably not have this effect because it is unconstitutional on federalism grounds.

³² See *supra* note 12.

³³ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (Harvard Univ. Press 1999).

³⁴ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

former case, the Court struck down Canada's abortion law on narrow procedural grounds, leaving Parliament an opening to reregulate abortion; in the latter case, the Court found unconstitutional the omission of sexual orientation as a prohibited ground of discrimination in a provincial human rights code, and at the remedial stage read this ground into the statute. The only possible government response was to repeal the human rights code in its entirety, or to invoke the override. This is a powerful comparison, and viewed in isolation, may lend weight to Manfredi's hypothesis.

However, Manfredi is being very selective. The Court handed down decisions before the supposed delegitimization of the override that are broad and has handed down decisions since then that are narrow. For example, a broad pre-Bill 178 case is the *B.C. Motor Vehicle Reference*,³⁵ which constitutionalized minimum standards for *mens rea* on the basis of a rather robust theory of criminal responsibility. A narrow post-Bill 178 case is *Godbout v. Longueuil*,³⁶ in which six members of the Court declined to deal with a constitutional challenge to a residency requirement for municipal employees under the Charter's due process clause, resolving the issue on the basis of a statutory bill of rights. The question to which Manfredi should have addressed himself is whether there are any systematic trends that support his theory.

Even if we focus on remedial activism specifically, it is not clear that activism is on the rise. Consider the remedy of reading-in, the addition of words to legislative texts by courts. At first glance, reading-in appears to be a very aggressive remedy, because it allows the Court to enter into the domain of legislative drafting. By contrast, the leading alternative, a declaration of invalidity (i.e., striking down), leaves the design of constitutionally compliant laws to legislatures. And even though legislatures are free to depart from the Court's remedy, critics of reading-in argue that the judicially amended law enjoys the burden of legislative inertia, significantly increasing the likelihood that it will survive attempts at modification.

The fact that the three occasions on which the Court has read-in all took place post-Bill 178 supports Manfredi's thesis. But a close examination of the context surrounding these cases reveals that reading-in does not always reflect judicial aggressiveness. Consider two cases in which it has been used, *Vriend* and *Sharpe*.³⁷ In *Vriend* (which found unconstitutional the omission of sexual orientation as a prohibited ground of discrimination in a provincial human rights code), the three possible outcomes were (a) a human rights code enumerating sexual orientation as a prohibited ground of discrimination, (b) no code, and (c) a code omitting sexual orientation, protected by the override. If we assume that the Court's desired outcome was (a), Manfredi would argue with some justification that the Court acted strategically by reading-in, on the basis of a calculation that the likelihood of achieving (a) was greatest when (a) was the status quo, because of the burden of legislative inertia (as compared with (b) and (c)), the need for some kind of human rights code (as compared with (b)), and the delegitimization of the override (as compared with (c)).

In *Sharpe*, the Court read-in defenses to a law prohibiting the possession of child pornography, which it found to be unconstitutional because of overbreadth. Again, there were three possible outcomes: (a) a criminal prohibition with defenses to guard

³⁵ [1985] 2 S.C.R. 486.

³⁶ [1997] 3 S.C.R. 844.

³⁷ *R. v. Sharpe*, [2001] 1 S.C.R. 45.

against overbreadth that would survive Charter scrutiny, (b) no criminal prohibition at all, and (c) an overbroad criminal prohibition, protected by the override. Manfredi would likely argue that *Sharpe* is on all fours with *Vriend*, because (a) was the Court's desired option. But the analogy does not hold. The use of the override was actively discussed throughout the litigation culminating in the *Sharpe* decision, and the federal government was under a great deal of pressure to invoke it had the Court adopted the "deferential" remedy of striking down the law in its entirety. Ironically, it was probably the fear of the override that prompted the Court to turn to the superficially aggressive remedy of reading-in, on the grounds that it allowed Parliament to save face by claiming that the prohibition had been left largely intact and would not provoke a legislative overruling of the Court's decision.

This comparison of *Vriend* and *Sharpe* raises the final difficulty with Manfredi's strategic account of judicial behavior—it is a provocative theory in search of evidence. To be fair, there is a lot to it. I strongly suspect that strategic behavior explains two of the most important decisions of the last twenty years, the *Patriation Reference*³⁸ and the *Quebec Secession Reference*,³⁹ in which the Court adjudicated upon the issue of national unity. However, as with any empirical theory, the strategic account needs to be substantiated. Compare Epstein and Knight's *The Choices Justices Make*,⁴⁰ a well-known American account of strategic behavior by the U.S. Supreme Court, which Manfredi cites. Epstein and Knight consult a wide range of materials, including internal court memoranda and draft judgments. Moreover, theirs is a systematic approach that examines a broad collection of cases because it is not enough to point to isolated cases in order to conclude that a court acts routinely in a strategic fashion. Manfredi, as a political scientist, should have delved into the methodological issues raised by the strategic account. Without this, and without some more evidence, the strategic account is at most a promising research agenda, not a fully worked-out theory.

4. Conclusion

Notwithstanding its limitations, *Judicial Power and the Charter* is worth reading, if only to bridge the chasm between political scientists and legal scholars who write about law and adjudication. As political scientist Gerald Rosenberg has recently lamented, "[a]lthough there is a large empirical literature on law and courts written by political scientists, it is virtually unknown to legal academics."⁴¹ Rosenberg is right. In September 2000, the Supreme Court of Canada held a national conference to commemorate its 125th anniversary. The list of presenters was a who's who of Canadian legal academia. But that list did not contain a single political scientist, or for that matter, any academic from outside a law school. Legal academics should take the lead in redressing this regrettable state of affairs. To some extent, this has already begun in the area of constitutional law, with Canadian legal scholars and political scientists

³⁸ Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753.

³⁹ Re Secession of Quebec, [1998] 2 S.C.R. 217.

⁴⁰ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (CQ Press 1997).

⁴¹ Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 2D 267, 268 (1999–2000).

engaging in a vigorous debate over whether the relationship between courts and legislatures under the Charter can best be characterized as a dialogue between partners of comparable status, or a monologue in which courts dictate public policy to elected legislatures.⁴² *Judicial Power and the Charter* provides a good basis for continuing that interdisciplinary conversation.

⁴² JANET L. HIEBERT, *CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE?* (McGill–Queen's Univ. Press 2002); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 *OSGOODE HALL L.J.* 75 (1997); Christopher P. Manfredi & James B. Kelly, *Six Degrees of Dialogue: A Reponse to Hogg and Bushell*, 37 *OSGOODE HALL L.J.* 513 (1999); ROACH, *supra* note 24. See also the contributions of Peter Hogg and Allison Thornton (formerly Bushell), Rainer Knopff, Frederick L. Morton, Sébastien Lebel-Grenier, and Lorraine E. Weinrib to the April 1999 issue of *Policy Options*, a leading public policy journal in Canada.

Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government, Nathan J. Brown, Albany: SUNY Press, 2002. xv, 244 pp.

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There is a tendency, especially prevalent in the developed West, to think of the rule of law and constitutional governance in binary terms: either you have them or you don't. If due process applies except when it does not, or if constitutional strictures bind government actors except when they do not feel like following them, then it often may be empty or even deceptive to speak of the presence of the rule of law or of a meaningful constitution.

One can imagine good reasons to think of these important phenomena in such absolute terms. For one thing, an almost inescapably normative tone accompanies most of our discussions of the rule of law and of constitutionalism. So if we speak of a partial rule of law or of an incomplete constitutional form of government, we run the risk of appearing to legitimate what may be convenient façades—Potemkin constitutions erected to convey a false sense of regularity and fairness where neither exists. For another, it is philosophically defensible to say that the rule of law in its deepest sense cannot exist so long as the possibility of arbitrary or discriminatory deviation from the law exists. To the extent that a written constitution aspires to embody rule-of-law principles by reducing norms of governance to a form recognizable as positive law, enforceable by and against government actors, it, too, would seem to be fundamentally defective if the law can be ignored by those it is intended to constrain. But of course

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