CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

Jeffrey Goldsworthy

PARLIAMENTARY SOVEREIGNTY

CONTEMPORARY DEBATES

CAMBRIDGE

8

Judicial review, legislative override, and democracy

I The 'notwithstanding clause'

Section 33 of the Canadian Charter of Rights famously provides that Canadian legislation 'may expressly declare … that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter'. This 'notwithstanding' or 'override' clause enables legislatures to override those specified sections of the Charter, and the rights they protect, although only for renewable five-year periods.[1]

Section 33 is said to have been 'included in the *Charter* for the very purpose of preserving parliamentary sovereignty on rights issues'.[2] But this exaggerates its effect. It is limited in scope, and by no means preserves the law-making powers previously enjoyed by Canadian parliaments. It does not authorise the amendment or repeal of any provisions of the Charter; it does not authorise the override of all Charter rights; and it authorises override only for five-year periods.

Many supporters of the Charter have strongly criticised s. 33 on the predictable ground that it is incompatible with the main purpose of constitutionally entrenching rights.[3] As they see it, that purpose is to protect rights from being overridden by legislation – in other words, to prevent precisely what s. 33 expressly permits. On their view, what the Charter purports to grant with one hand, it takes away with the other. While posing as a constraint on the power of the majority to override the rights of individuals and minorities, it explicitly authorises the majority to do just that (in relation to the rights specified).

[1] It does not apply to other sections that protect democratic rights, mobility rights and language rights.

[2] P.W. Hogg, A.A.B. Thornton and W.K. Wright, 'A Reply on "*Charter* Dialogue Revisited" *Osgoode Hall Law Journal* 45 (2007) 193 at 201.

[3] See criticisms quoted in M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (2nd edn) (Toronto: Thompson Educational Publishing, 1994), pp. 88–9 and 96.

Section 33 has been eloquently defended by other supporters of the Charter, who reject this criticism as too simplistic. There are basically two ways of defending the clause. One is to argue that a legislature might sometimes be justified in overriding Charter rights in order to protect some competing right or interest, of greater weight in the circumstances, which is not mentioned in the Charter. But the Charter itself already provides for this possibility: s. 1 explicitly states that Charter rights are 'subject … to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In this regard, those who drafted the Charter wisely avoided the impression conveyed by the American Bill of Rights (but seldom taken seriously by the courts) that the rights it protects are absolute and indefeasible. It follows that s. 33 was not needed to permit legislatures to subordinate protected rights to other rights or interests.[4]

The real problem that s. 33 was designed to overcome has to do with judicial interpretations of Charter provisions, including s. 1. This leads to the second way of defending the section, which is to argue that its real purpose must have been to enable legislatures to override judicial interpretations or applications of Charter rights with which they reasonably disagree.[5] This defence of s. 33 is admittedly difficult to reconcile with its wording, which gives rise to difficulties discussed later in this chapter.[6]

This defence has the potential to overcome not only the criticisms of s. 33 made by Charter supporters, but also the objections of those who oppose the Charter on the ground that it is undemocratic. That is not surprising. Section 33 has been described as a uniquely Canadian compromise of two rival constitutional models – the American model of strong judicial review, and the British model of parliamentary sovereignty.[7] Whether it is a genuine compromise is, of course, open to question. Geoffrey Marshall has protested that '[i]t is not so much a compromise as a capitulation' of proper rights protection to parliamentary

[4] L.E. Weinrib argues that the purpose of s. 33 is to enable legislatures to override rights when this cannot be justified under s. 1: 'Learning to Live With the Override' *McGill Law Journal* 35 (1990) 541 at 567–9. But any use of s. 33 that could not in principle (leaving aside judicial versus legislative judgment) 'be demonstrably justified in a free and democratic society' would surely be very difficult to justify at all.

[5] See, e.g., P.H. Russell, 'Standing Up For Notwithstanding' *Alberta Law Review* 229 (1991) 293.

[6] See Section IV, below, and T. Kanaha, 'Understanding the Notwithstanding Mechanism' *University of Toronto Law Journal* 52 (2002) 221 at 233–6.

[7] Russell, 'Standing Up', 294.

sovereignty.[8] Others take the opposite view, complaining that in practical terms it has not succeeded in curbing the undemocratic supremacy of the courts.[9] Perhaps the fact that it has satisfied neither side indicates that it is, indeed, an effective compromise.

Ideally, such a compromise would combine the most attractive features of both models, while discarding their most objectionable features.[10] For example, the most powerful and popular argument against the judicial enforcement of constitutional rights maintains that it is undemocratic for unelected judges to invalidate laws enacted by a democratically elected legislature. But given s. 33, judicial enforcement of the Charter can be argued to add a further check or balance to the political process without diminishing its fundamentally democratic character. On this view, s. 33 is part of a broader constitutional scheme that encourages a 'dialogue' between legislatures and courts, in which the latter are rarely guaranteed the 'final say'.[11] The Charter permits an appeal from the rough-and-tumble of politics to a 'forum of principle', but s. 33 confers a right of final appeal back to a consequently more informed and conscientious legislature.[12] What objection could be made, if the legislature retains the final say? As Peter Hogg has concluded: 'So long as the last word remains with the competent legislative body … much of the American debate over the legitimacy of judicial review is rendered irrelevant.'[13]

One purpose of this chapter is to ask if Hogg is right. As we will see, Canadian legislators are loathe to use s. 33; indeed, a constitutional convention against its use may have formed everywhere except in Quebec. This is one reason why judicial review under the Charter is widely regarded as functionally equivalent to 'strong' judicial review in the United States.[14] And if it is equivalent, then presumably Charter review is

[8] G. Marshall, 'Taking Rights For An Override: Free Speech and Commercial Expression' *Public Law* 4 (1989) at 11.

[9] F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Ontario: Broadview Press, 2000).

[10] Russell, 'Standing Up'.

[11] P.W. Hogg and A.A. Bushell, 'The Charter Dialogue Between Courts and Legislatures' *Osgoode Hall Law Journal* 35 (1997) 75. See also Kanaha, 'Understanding the Notwithstanding'.

[12] See, e.g., R. Knopff and F.L. Morton, *Charter Politics* (Ontario: Nelson Canada, 1992), esp. pp. 205–6 and 225–33.

[13] P.W. Hogg, *Constitutional Law of Canada* (Ontario: Carswell, 1997), 36.10–36.11.

[14] See G. Huscroft, 'Constitutionalism From the top Down' and A. Petter, 'Taking Dialogue Theory Much Too Seriously' *Osgoode Hall Law Journal* 45 (2007) 91 and 147 respectively. But see to the contrary K. Roach, 'Dialogue or Defiance: Legislative Reversals of Supreme

equally vulnerable to objections based on the denial or abdication of the supremacy of democratically elected legislatures. If so, Hogg is wrong.

But even if he is right, his claim is not that s. 33 completely disarms critics of the Charter. Another, equally important purpose of this chapter is to ask how much of the American debate is rendered irrelevant. This requires distinguishing between different objections that have been made to the judicial enforcement of constitutional rights, and asking which of them applies notwithstanding a notwithstanding clause. In particular, it requires distinguishing rights-based from consequentialist justifications of democracy, and corresponding objections to the judicial enforcement of rights. It is possible that a clause such as s. 33 overcomes rights-based objections, because it preserves the democratic right to make the final decision, but does not overcome consequentialist objections.

These issues are relevant to the possible strengthening of human rights protection in Britain along the lines mentioned at the end of the previous chapter. It was suggested that the Human Rights Act 1998 (UK) could be amended to require courts to invalidate any legislation inconsistent with the rights it protects, except for legislation that expressly declares Parliament's intention to amend or repeal them, or to override actual or possible judicial interpretations of them. I have argued that this would be consistent with the doctrine of parliamentary sovereignty, because Parliament would retain full substantive power to change the law however and whenever it should choose. It would have bound itself only with respect to the form of the legislation needed to do so.[15] But the Canadian debate suggests that if Parliament never dared to exercise that power, this arrangement might still be vulnerable to objections based on majoritarian conceptions of democracy.

II The rights-based objection to constitutional rights

A leading contemporary critic of constitutional rights is Jeremy Waldron. His main criticism has consistently been that the judicial enforcement of such rights is inconsistent with the democratic right of ordinary people to participate on an equal basis in public decision-making. Waldron describes this right of participation as 'the right of rights', because it is

Court decisions in Canada and the United States' *International Journal of Constitutional Law* 4 (2006) 347, and P.W. Hogg, A.A.B. Thornton and W.K. Wright, 'A Reply on *Charter* Dialogue Revisited', at 199–202.

[15] Chapter 7, Section VII, above.

the rights-theorists' solution to the problem of authoritatively resolving disputes about rights.[16] He describes his critique as 'rights-based' because it is ultimately based on this 'right of rights'.[17]

Waldron himself has summarised his critique as follows:

> If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some public-spirited citizen who wishes to launch a campaign or lobby her MP on some issue of rights about which she feels strongly … [W]e have to imagine ourselves saying to her: 'You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you … orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' views. When their votes differ from yours, theirs are the votes that will prevail.' It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.[18]

Waldron's argument is explicitly based on a premise that is inapplicable to most of the Canadian Charter.[19] He is concerned only with rights that are 'put effectively beyond revision [that is, amendment] by anyone other than the judges'. In *Law and Disagreement* he puts the point in this way: 'a constitutional constraint is less unreasonable … the greater the opportunity for altering it by processes of constitutional amendment. We need to bear in mind, however, that such processes are usually made very difficult; indeed, their difficulty … is precisely definitive of the constraint in question.'[20] This is not quite right, because s. 33 shows that there can be other ways of overcoming or relaxing constitutional constraints than by constitutional amendment. Section 33 does not give Canadian legislatures any power to amend the Charter, but does enable them to free themselves from most of its constraints. Consequently, where those constraints are concerned, it is not the case that when the judges' votes differ from

[16] J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p. 254.

[17] J. Waldron, 'A Right-Based Critique of Constitutional Rights' *Oxford Journal of Legal Studies* 13 (1993) 18; Waldron, *Law and Disagreement*, pp. 214–25 and 249–54.

[18] Waldron, 'A Right-Based Critique', 50–1. Note that all the main arguments made in *Law and Disagreement* were prefigured in this article.

[19] Earlier in the same article, Waldron makes it clear that he is concerned with constitutionally 'entrenched' rights, which are 'immune' from legislative change, and therefore 'disable' the legislature and the citizens it represents: *ibid*., 27. He also notes that his concern is with 'American-style' judicial review: *ibid*., 19.

[20] Waldron, *Law and Disagreement*, p. 275.

those of the public-spirited citizen and her like-minded supporters, the judges' votes necessarily prevail. We should not say to her: 'When their votes differ from yours, theirs are the votes that will prevail.'[21] The public-spirited citizen can get up a petition, and lobby the legislature to override the judges. She only needs to persuade a majority of legislators to do so. And her ability to do so will depend mainly on her ability also to persuade a majority of her fellow citizens to strongly endorse her views. In Canada, after the Supreme Court invalidated the statutory prohibition of abortion, 'the aroused and losing group went immediately to the parliamentary lobby to press for legislative redress' – but it found that there was insufficient 'inclination on the part of the politicians to use the override'.[22]

Consider another of Waldron's arguments. Discussing the popular thesis that judicial enforcement of constitutional rights can enhance the quality of public debates about those rights, and therefore the character of democratic politics, he replies:

> The idea that civic republicans and participatory democrats should count this as a gain is a travesty. Civic republicans and participatory democrats are interested in *practical political deliberation*, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision. A star-struck people may speculate about what the Supreme Court will do next on abortion or some similar issue; they may even amuse each other, as we law professors do, with stories about how we would decide, in the unlikely event that we were elevated to that eminent tribunal. The exercise of power by a few black-robed celebrities can certainly be expected to *fascinate* an articulate population. But that is hardly the essence of active citizenship. Perhaps such impotent debating is nevertheless morally improving … But independent ethical benefits of this kind are … not the primary point of civic participation in republican political theory.[23]

This reply is based on the assumption that public discussion of judicial decisions concerning constitutional rights is politically impotent: since a constitutional amendment is rarely politically feasible, those decisions are usually conclusive for practical purposes. But if s. 33 of the Charter can be invoked, that assumption is simply inoperative. Public discussion is not politically impotent.

[21] Waldron, 'A Right-Based Critique', 50–1.

[22] P.H. Russell, 'Canadian Constraints on Judicialization from Without' *International Political Science Review* 15 (1994) 165 at 171, quoted in M. Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty' *Michigan Law Review* 94 (1995) 245 at n. 151.

[23] Waldron, *Law and Disagreement*, p. 291.

Opponents of judicial review usually respond by pointing out that s. 33 is very rarely used, because it is too politically dangerous. But the most likely reason for legislators not using the override is that the electorate is unlikely to trust their judgment about constitutional rights more than the judges' judgment. And surely that is the electorate's democratic prerogative, which Waldron would be bound to respect. It would not be open to him to object that an ingenuous electorate is likely to be deceived by the specious objectivity of constitutionalised rights, or dazzled by the mystique of the judiciary – by a naïve faith in judges' expert legal skills, superior wisdom, and impartiality. That objection would reflect precisely the same lack of faith in the electorate's capacity for enlightened self-government that motivates proponents of constitutionally entrenched rights. They fear that a majority of voters, motivated by ignorance, prejudice or passion, might trample on the rights of minorities or individuals. Waldron objects that ordinary people should not be presumed to be ignorant, prejudiced or intemperate, because that would be inconsistent with the basis of their having rights in the first place. '[S]ince the point of any argument about rights has to do with the respect that is owed to [the ordinary] person as an active, thinking being, we are hardly in a position to say that our conversation takes his rights seriously if at the same time we ignore or slight anything he has to say about the matter.'[24] But if a majority's opinions about the rights even of minorities and individuals are entitled to respect, surely their opinions about the exercise of one of their own rights – to political participation – is entitled to even more respect, because in that case there is even less danger of ignorance or prejudice. We are concerned here with the 'right of rights' of a majority of ordinary people collectively to make final decisions about rights, if necessary by endorsing a use of the override clause. It would be inconsistent for Waldron to base the right to political participation on the capacity of ordinary people for intelligent and conscientious moral deliberation, but then to doubt that capacity when it comes to deliberating about the use of an override clause. If a majority of ordinary people strongly prefer that an override not be used, because in relation to rights they trust judges more than legislators – or perhaps even more than themselves – how can the rights-based theorist say they are wrong?

This question touches on the Human Rights Act 1998 (UK), which authorises judges to declare legislation to be incompatible with protected rights, but not to invalidate it. The government and Parliament are legally

[24] *Ibid*., p. 251.

free to decide whether or not the legislation should consequently be amended or repealed. It is sometimes suggested that this freedom is illusory, because it is not politically feasible to ignore a judicial declaration of incompatibility.[25] But even if this is the case, it does not follow that the judiciary has been given power to trump the democratic process. The democratic process determines what is or is not politically feasible. The same would be true if the Human Rights Act were to be amended along the lines previously suggested.[26]

Someone might be tempted to respond to this argument along much the same lines that Waldron takes in refuting a very different argument. That different argument is this: if a bill of rights has been adopted democratically, with the support of a majority of the people, then judicial invalidation of statutes for violating those rights is perfectly democratic because the people have authorised it. Waldron replies that if the people chose to establish a dictatorship, it would not follow that the dictatorship was democratic – it would only follow that democracy had been extinguished democratically. He suggests that the democratic adoption of a bill of rights 'amounts to exactly that: voting democracy out of existence, at least so far as a wide range of issues of political principle is concerned'.[27] Could a similar reply be made here – that a routine reluctance to use an override clause to trump judicial decisions is in effect a democratic abdication of democratic rights?

There is clearly a difference between relinquishing or disabling one's power to make certain kinds of decisions, and declining – even routinely – to exercise it. For example, in constitutional law there is a crucial difference between, on the one hand, a legislature irrevocably transferring its powers to another body, and on the other, its delegating those powers while retaining its ability at any time to override its delegate or even cancel the delegation. It is possible to distinguish between many different arrangements, including: (1) the permanent surrender of power; (2) the indefinite surrender of power, subject to the possibility of reclaiming it by onerous means such as a constitutional amendment; (3) the temporary surrender of power to a delegate for a fixed period, followed by its resumption or fresh delegation to the same or some other delegate; and (4) the delegation of power, whether indefinite or temporary, subject to

[25] E.g., A. Kavanagh, *Constitutional Review Under the Human Rights Act* (Cambridge: Cambridge University Press, 2009), pp. 281–9 and 322–4.

[26] See the final paragraph of the previous section.

[27] Waldron, 'A Right-Based Critique', 46.

the retention of power at any time to override the delegate and/or cancel the delegation by non-onerous means.

Democracy is surely compatible with arrangements (3) and (4), even if this is doubtful in the case of (2). Indeed, modern representative democracies resemble (3): the electorate confers legislative power on elected officials for more or less fixed periods, retaining only the power occasionally to decide whether to extend their terms or replace them.[28] We do not generally regard this as undemocratic. Nor do we regard as undemocratic the delegation of extensive law-making power to unelected officials, provided that elected officials retain the power to override them. Much modern law-making consists of regulations made by executive governments, which elected legislatures can scrutinize before they come into operation, and disallow if they see fit. Even if it were the case that legislatures seldom disallow such regulations, that would not in itself demonstrate a diminution of democracy.

It follows that we regard democracy as based on a *right* to participate *indirectly*, rather than a *duty* to participate *directly*, in public decision-making.[29] A right, by definition, does not have to be exercised; otherwise, it would be a duty rather than a right.[30] Of course, a right can be accompanied by a duty to exercise it. In Australia, for example, voters have a legal duty to exercise their right to vote. But a rights-based theorist should surely argue against the imposition of such duties. Rights are maximised if they coexist with rights *not* to exercise them. In countries where voters do not have a duty to vote, for example, some voters deliberately refuse to vote in order to express their disapproval of the candidates or the political process. Their right not to vote reflects a broader freedom not to participate in processes they find distasteful. It follows from all this that a rights-based theorist is not well placed to object to the infrequent exercise of a democratic right to override judicial decisions.

So an override clause is not subject, merely because it is rarely used, to an objection similar to Waldron's rebuttal of the 'democratic' justification of entrenched constitutional rights. This point can be taken one

[28] This resembles (3) because the electorate is usually unable to exercise legislative power itself, and therefore cannot resume it. It is restricted to choosing those who will exercise the power on its behalf.

[29] Except in Australia, where compulsory voting in both elections and constitutional referendums in effect imposes a duty to participate both indirectly and directly in different decision-making processes.

[30] Of course, a right can be accompanied by a duty: in Australia, the right to vote is accompanied by a duty to exercise it.

step further. The existence of an override clause rebuts Waldron's rebuttal. He objects that judicial enforcement of a bill of rights is undemocratic even if the bill was adopted democratically. His objection assumes that by adopting a bill of rights, the democratic process more or less permanently transferred to the judiciary the power of ultimate decision-making with respect to those rights. But to the extent that judicial decisions can be overriden, that assumption is inapplicable, and the objection therefore baseless. The transfer of power to the judges is more like a delegation of power to make decisions that can be overridden by the legislature, just as it can override the exercise of powers it has delegated to the executive. The 'democratic' justification of entrenched constitutional rights then stands undefeated.

III Goal-based objections to constitutional rights

According to Waldron, '[i]f there is a democratic objection to judicial review, it must also be a rights-based objection'.[31] But that is surely wrong. Democracy has been defended on many grounds other than rights, such as perfectionist and consequentialist grounds (which I will collectively call goal-based grounds). For example, it has been argued that widespread participation in public debate and decision-making, in which all are treated as equals, helps develop important civic virtues: it lessens feelings of powerlessness, and improves self-confidence and self-respect; it promotes education, a broadening of horizons, and an appreciation of other points of view; and by doing so, it fosters co-operation and compromise, a sense of responsibility to the community, and a more willing acceptance of group decisions.[32]

Representative democracy may be more conducive to the realisation of these benefits than direct democracy. A system in which decisions can only be made by representatives of the people, after debating contentious issues face to face, rather than by the people themselves in a mass plebiscite, encourages due deliberation before decision-making. The presence of legislators representing all affected interests makes it more likely that pertinent information will be duly considered, and participation in debate requires legislators to listen carefully to one another, even if only to sharpen their rebuttals. Since prejudice

[31] Waldron, *Law and Disagreement*, p. 282.

[32] For a critical discussion of arguments of this sort, see W. Nelson, *On Justifying Democracy* (London: Routledge & Kegan Paul, 1980).

and intolerance tend to diminish when people engage in dialogue with one another, representative democracy is thought to promote mutual respect, moderation and compromise.[33] Moreover, legislators must build coalitions with one another if they are to be effective: all majorities are groupings of minorities that have joined forces, either in a political party, a coalition of parties, or a temporary alliance. It is taken for granted that political power is impermanent, and that opponents defeated today might turn the tables tomorrow. This adds to the impetus towards moderation, for two reasons: first, the frequent necessity to sacrifice parochial and extreme demands in order to build the necessary coalitions; and second, the fear of backlash if one's temporarily defeated adversaries should gain the upper hand in the future.[34] As Martin Diamond has put it,

> The discovery that one's grossest demands are absurdly impossible of achievement can lead to an enlightened kind of self-interest, a habitual recognition of the indisputable needs of others and a general sobriety about the general requirements of society. And something still worthier can happen. As the extremes of selfishness are moderated, the representative can become free to consider questions affecting the national interest on their merits.[35]

It is sometimes argued that the realisation of these benefits is jeopardised when politics is 'judicialised' by the enforcement of constitutional rights through litigation. 'Democratic debilitation', a term coined by Mark Tushnet, is a useful label for many ways in which, it has been alleged, such litigation might damage both the process and spirit of representative democracy.[36] Democratic debilitation can affect either legislatures, the electorate, or both. Moreover, predictions of debilitation are sometimes difficult to reconcile with one another. For example, some expect the judicialisation of politics to engender apathy and irresponsibility among legislators and the electorate, whereas others anticipate an aggravation of political extremism and intolerance, which is hardly a symptom of apathy.

[33] This may seem to be belied by the frequent angry and contemptuous exchanges between legislators in Australian parliaments. But it is often surmised that these are histrionics, because outside the media limelight the same legislators are respectful and even friendly towards one another.

[34] I owe the ideas in this paragraph to R. Knopff, 'Populism and the Politics of Rights: The Dual Attack on Representative Democracy' *Canadian Journal of Political Science* 31 (1998) 683 at 689–94.

[35] M. Diamond, *The Founding of the Democratic Republic* (Itasca: F.E. Peacock Publishers, 1981), p. 78, quoted in Knopff, 'Populism and the Politics of Rights', 691.

[36] Tushnet, 'Policy Distortion'.

The argument for apathy and irresponsibility goes something like this. First, legislators might be inclined to devote less attention to the compatibility of proposed legislation with protected rights, if the matter is likely to be litigated in the courts anyway. They might become reckless as to compatibility or, worse still, 'pass the buck' to the courts, and shirk responsibility for unpopular decisions they would otherwise have to make. Secondly, frequent resort to litigation to advance claims of rights might divert vital funds and energies from grass-roots political mobilization, and even victory in the courtroom could engender political impotence due to complacency. Constitutional challenges are 'conducted via technocratic representation, i.e. lawyers, who only demand fund-raising from their clientele, not advice, not meetings, marches or votes. A victory in the courts may still leave a broke and apathetic rump organisation behind, not one capable of moving forward any further.'[37] Thirdly, if political debate is subsumed by constitutional debate, couched in legalistic jargon and formulae, lay-people (including legislators) may come to be regarded, and to regard themselves, as incompetent to participate.[38] Consequently, they might lose interest in the debate. Fourthly, the loss of ultimate responsibility for how questions about rights are decided might make the electorate more politically enervated, apathetic, or even irresponsible. James Bradley Thayer famously urged judicial restraint partly because an excessive readiness to overrule the legislature might gradually diminish 'the political capacity of the people' and its sense of moral responsibility.[39]

The argument for extremism and intolerance has been put most eloquently by leading Charter critics F.L. Morton and Rainer Knopff. They argue that when judges can enforce rights, political antagonists become more inclined to resolve disagreements through litigation, rather than

[37] H. Glasbeek, 'A No-Frills Look at the Charter of Rights and Freedoms, or How Politicians and Lawyers Hide Reality' *Windsor Yearbook of Access to Justice* 9 (1989) 293 at 344. For strong evidence of this in the US, see G. Rosenberg, *The Hollow Hope; Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), pp. 12, 282, 313–14 and 339–41. On the other hand, Rosenberg also reports that courtroom victories can galvanise the opposition into strenuous political efforts to overturn them: pp. 155–6, 138–9 and 341–2.

[38] This may also impoverish political debate, by confining it to a procrustean bed of constitutional formulae. As Waldron suggests, it is healthier to discuss issues of principle directly and freely, 'rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional caligraphy': Waldron, *Law and Disagreement*, pp. 220 and 289–90.

[39] See P. Kurland (ed), *John Marshall* (Chicago: University of Chicago Press, 1967), pp. 85–6.

respectful discussion with one another in a search for compromise. This aggravates and polarises disputes, by inflating policy claims that are open to reasonable disagreement, into moral absolutes that brook no opposition. The rhetoric of rights encourages the assumption that there is a single, correct answer to contentious questions of social policy, resistance to which is wrong or even illegitimate, and should therefore be permanently overridden. 'The courtroom process is inescapably about claiming the uncompromisable trumps known as rights, and it thus encourages participants to speak the language of extremism both in and out of the courtroom.'[40] Morton and Knopff summarize their objection to the Charter as follows:

> To transfer the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise politics with the intensely held policy preferences of minorities. Rights-based judicial policymaking also grants the policy preferences of courtroom victors an aura of coercive force and permanence that they do not deserve. Issues that should be subject to the ongoing flux of government by discussion are presented as beyond legitimate debate, with the partisans claiming the right to permanent victory. As the moralist of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion. The result is to embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens …[41]

Although these two arguments, for apathy and irresponsibility, and for extremism and intolerance, are not obviously compatible, they are reconcilable. It might be hypothesised that the majority of legislators and citizens – who occupy the broad 'middle ground' of politics – will become more apathetic and irresponsible, while those closer to the ends of the political spectrum will become more zealous and intolerant of their opponents. This might happen if a policy status quo, established by the moderate majority, strikes a compromise between two passionately opposed minorities. If one minority persuades a court to overturn that status quo in its favour, members of the moderate majority might not think it worth the effort required to overturn the judicial decision, given that their views were not passionately held in the first place. Their reluctance to do so might be reinforced by lack of confidence in their competence to dispute the complex legalistic reasoning of judges presumed to possess special expertise about constitutional rights. On the other hand, the opposed

[40] Knopff, 'Populism and the Politics of Rights', 702.
[41] Morton and Knopff, *The Charter Revolution*, p. 166.

minority, outraged by their adversaries' courtroom victory, might mount a furious effort to reverse it, escalating the political struggle between these groups and aggravating their mutual animosity. According to Mary Ann Glendon, this was precisely what happened in the aftermath of the abortion decision in *Roe* v. *Wade*.[42]

> American experience suggests that the real danger represented by regular invalidation of legislation on constitutional grounds is not that elected representatives will rise up in anger against the courts. On the contrary, legislators are often relieved at being able to say that their hands are tied by the courts, especially where controversial matters are concerned. One danger is, rather, of atrophy in the democratic processes of bargaining, education, and persuasion that takes place in and around legislatures. Another is that by too readily preventing compromise and blocking the normal political avenues for change, courts leave the disappointed majority with no legitimate political outlet … Public debate about abortion in Europe has not put an end to controversy. But it is not marked by the degree of bitterness, desperation, and outrage that occasionally erupts into violence in the United States.[43]

Although Canadian legislatures can override judicial decisions, they may fail to do so for the very reasons just described. Apathy or political inertia on the part of the moderate majority, and the increased intransigence of the opposed minorities, can make it impossible to assemble the necessary numbers. That is how Morton and Knopff explain the failure of Canadian legislatures to make better use of s. 33 to override unpopular judicial decisions.[44] But their argument also suggests that on the odd occasions when legislatures do employ s. 33, the political process is likely to be further embittered by howls of outrage from the defeated minority, whose self-righteousness would have been inflated by vindication in the courts.[45] Whatever the outcome, on this view, the flames of extremism are likely to be fanned.

Morton and Knopff's analysis is contested by Peter Hogg, who claims that in Canada, judicial enforcement of rights has generated a 'dialogue' between courts and legislatures that has actually enhanced the democratic process.[46] He has systematically examined legislative responses to

[42] *Roe* v. *Wade* (1973) 410 US 113.

[43] M. A. Glendon, '*A Beau Mentir Qui Vient De Lion*: the 1988 Canadian Abortion Decision in Comparative Perspective' *Northwestern University Law Review* 83 (1989) 569 at 588.

[44] Morton and Knopff, *The Charter Revolution*, pp. 163 and 165.

[45] See *ibid*., pp. 155–7, on the 'moral inflation' encouraged by the rhetoric of rights.

[46] See P.W. Hogg, 'The *Charter* Revolution: Is It Undemocratic?' *Constitutional Forum* 12 (2001/2002) 1.

judicial decisions invalidating legislation under the Charter, and concludes that in most cases new legislation was passed that accomplished the legislature's original objective consistently with the courts' interpretation of relevant Charter rights.[47] If so, then at least in these cases, the claim that Charter successes tend to induce defeatism and apathy among moderate majorities, and thereby entrench the views of extremist minorities, would seem to be falsified.[48] Morton and Knopff concede that legislatures often fail to respond to Charter decisions because they concern moral questions that are 'not a priority for the government, the opposition parties, or the majority of voters', and that '[w]hen the policy is central to the government's program, the government should have little difficulty mustering the political will to respond effectively'.[49] This suggests that the main stumbling block to effective legislative responses is not general political apathy caused by the Charter, but relative indifference about particular issues that is independent of it. Moreover, legislators would surely be more willing to use s. 33 if they did not fear that doing so would be unpopular with voters. Carefully designed surveys of public opinion in Canada indicate that in the abstract, more than two-thirds of the Canadian public prefer the courts, rather than legislatures, to have the final say in relation to Charter rights. This proportion declines, particularly among francophones, when people consider the question in the context of specific issues such as laws controlling trade unions or assisting poor people; but it remains over fifty per cent.[50] This has been attributed partly to the diminished moral authority of Canadian legislatures, due to their lack of adequate internal checks and balances.[51] This does not suggest apathy among voters, but rather, a positive distrust of their elected legislators. And who can confidently say that this distrust is undeserved?

Hogg's 'dialogue' theory, and analysis of legislative responses to judicial decisions that underlies it, have been challenged.[52] It is beyond the

[47] See P.W. Hogg and A.A. Bushell, 'The Charter Dialogue Between Courts and Legislatures' *Osgoode Hall Law Journal* 35 (1997) 75.

[48] Hogg goes so far as to suggest that Morton and Knopff's two examples of legislative inertia are in fact examples of dialogue: Hogg, 'The *Charter* Revolution', pp. 6–7; contra, Morton and Knopff, *The Charter Revolution*, pp. 162–5.

[49] Morton and Knopff, *The Charter Revolution*, pp. 164 and 165.

[50] Predictably, politicians are much more inclined to favour legislatures, and lawyers to favour courts. See P.M. Sniderman, J.F. Fletcher, P.H. Russell and P.E. Tetlock (eds.), *The Clash of Rights, Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996), pp. 163–7.

[51] Knopff and Morton, *Charter Politics*, p. 232.

[52] See, e.g., C. Manfredi and J.B. Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' *Osgoode Hall Law Journal* 37 (1999) 513; C. Manfredi, *Judicial Power and the*

scope of this chapter to attempt to settle that debate, or the broader question of the impact of judicial enforcement of Charter rights on Canadian political culture. That would require gathering and interpreting empirical evidence of changes in the behaviour and motivations of citizens and legislators throughout the country, involving very difficult questions of cause and effect. For present purposes, the important point is that when a bill of rights includes a comprehensive override clause, it survives Waldron's rights-based objection. The question of its compatibility with democratic values then depends on sociological evidence that is inevitably impressionistic and contestable.

IV The desuetude of s. 33

Even if Morton and Knopff are right, it is natural to ask why s. 33 has not been effective in preventing or at least minimising the democratic debilitation that they report. When judicial interpretations of rights are conclusive (subject only to constitutional amendment), it is easier to appreciate how democracy might be debilitated. But the whole point of an override clause is to ensure that the judges do not have the final word. Precisely because it enables them to be overridden, such a clause has the potential to stimulate robust and potent political debate, among both legislators and the electorate, about questions of rights that may be or have been decided by judges. In doing so, it could 'encourage a more politically vital discourse on the meaning of rights and their relationship to competing constitutional visions than what emanates from the judicial monologue that exists in a regime of judicial supremacy'.[53]

There is general agreement that s. 33 has failed to fulfill that potential in Canada. This is partly because it is widely believed that the clause has been used only once outside Quebec, and not at all since 1988.[54] In a recent thorough study, Tsvi Kanaha has demonstrated that it has in fact been used more often than this, but the fact remains that it has been used very rarely.[55] Kanaha also shows that the use of the clause has often failed to generate, among the electorate, the 'politically vital discourse on the

Charter; Canada and the Paradox of Liberal Constitutionalism (2nd edn) (Ontario: Oxford University Press, 2001), pp. 177–9; P. Hogg and A.A. Thornton, 'Reply to "Six Degrees of Dialogue" ' *Osgoode Hall Law Journal* 37 (1999) 529.

[53] Manfredi, *Judicial Power and the Charter*, p. 191. [54] *Ibid*., p. 5.

[55] T. Kanaha, 'The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of Section 33 of the Charter' *Canadian Public Administration* 44 (2001) 255.

meaning of rights' that its supporters had anticipated, although he fails to consider the extent to which legislators have engaged in such discourse before using it.

The clause has been invoked so rarely that arguably '[s]omething like a convention against its use may have emerged, precisely because the political costs of invoking the power turned out to be too great'.[56] Just as conventions develop through regular practice evolving into prescriptive custom, the less s. 33 is used, the more its use is likely to be disapproved of.[57] In 1998, the Premier of Alberta withdrew a proposal to use s. 33, explaining that '[i]t became adundantly clear that to individuals in this country the Charter of Rights and Freedoms is paramount and the use of any tool … to undermine [it] is something that should be used only in very, very rare circumstances'.[58] This attitude apparently extends to many legislators. Michael Mandel reports that when Prime Minister Mulroney condemned s. 33, after Quebec's perceived abuse of it, his speech 'led to the usual declarations by opposition members of their sincere hatred for the clause, and even a challenge to the Prime Minister to abolish it'.[59] Grant Huscroft concludes bluntly that s. 33 is now 'unused, and all but unusable' and is therefore 'simply irrelevant'.[60]

It is not clear why s. 33 has been so rarely used. Morton's and Knopff's explanation has already been discussed.[61] Howard Leeson hypothesises that it is the result of a combination of factors: the unwillingness of legislators to 'take on' the judiciary because of its superior popularity among the general public; the professionally ingrained and career-oriented tendency of government lawyers, who advise the responsible minister, to recommend deference to the courts; a preference for less drastic legislative responses of the kind discussed by Hogg, with override relegated to weapon of last resort; and a sense of futility given that an override expires after five years, unless it is renewed.[62] But two other reasons, not mentioned by Leeson, are often suggested.

[56] Tushnet, 'Policy Distortion', 296, citing A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), p. 147.
[57] Howard Leeson, 'Section 33, the Notwithstanding Clause: A Paper Tiger?' *Choices* 6(4) (2000) 20 (Institute for Research on Public Policy).
[58] Quoted in Manfredi, *Judicial Power and the Charter*, pp. 187–8.
[59] Mandel, *The Charter of Rights*, p. 95.
[60] G. Huscroft, 'Constitutionalism From the Top Down', at 96.
[61] Text to n. 42, above.
[62] Leeson, 'Section 33', pp. 18–19.

One is the wording of s. 33. It authorises Canadian legislatures to declare that their enactments 'shall operate notwithstanding a provision included in [the specified sections] of this Charter'. The power is thus posed as a power to override the Charter itself, rather than disputed judicial interpretations of the Charter. This must make its use very difficult to justify. When the judiciary disagrees, or is expected to disagree, with the legislature as to the 'true' meaning and effect of Charter provisions, the legislature cannot ensure that its view will prevail without appearing to override the Charter itself. And that is vulnerable to the politically lethal objection that the legislature is openly and self-confessedly subverting constitutional rights. Indeed, Waldron argues that precisely because s. 33 places legislatures in this predicament, it does not render his democratic objection to constitutionally entrenched rights inapplicable to the Canadian Charter.[63]

There is surely no need for an override clause to convey that impression, which, at least from the legislature's point of view, is erroneous. Section 33 has always been defended on the ground that, since rights are not absolute, but must often give way to other rights and interests, what they require in particular cases is often a subject of reasonable disagreement; and that there is no good reason to assume that when judges and legislators disagree, the former are necessarily correct.[64] It is unfortunate that this justification is not reflected in the wording of the section itself. Knopff and Morton complain that '[i]t is surely eloquent testimony to the power of legalism that the Charter provision most obviously embodying non-legalistic scepticism of judicial power was phrased in legalistic language. The form and content of section 33 are mutually contradictory, and the former symbolically undermines the latter!'[65] But an override clause could conceivably be drafted differently, to authorise the legislature to declare that a statute or statutory provision shall be deemed by the courts to be consistent with specific, nominated rights. In a healthy democracy, responsible legislators would feel free to override actual or anticipated judicial interpretations of constitutional rights that, after careful and conscientious reflection, they do not agree with. That, after all, is a

[63] J. Waldron, 'Some Models of Dialogue Between Judges and Legislators', in G. Huscroft and I. Brodie (eds.), *Constitutionalism in the Charter Era* (Canada: LexisNexis Butterworths, 2004) pp. 7 and 34–9; J. Waldron, 'The Core of the Case Against Judicial Review' *Yale Law Journal* 115 (2006) 1347 at 1357, n. 34.

[64] See Russell, 'Standing Up'.

[65] Knopff and Morton, *Charter Politics*, pp. 179–80.

power exercised by the judges themselves, when they overrule previous judicial decisions that they have come to regard as erroneous. They do not treat their predecessors, or expect their successors to treat them, as infallible oracles.

A related obstacle inherent in the wording of s. 33 is its limitation of any override to renewable five-year periods.[66] Overrides are thereby treated as short-term expedients, no doubt because they are described as overriding the Charter itself. If judicial interpretations of rights, rather than the rights themselves, were treated as overridden, there would be less reason to impose such a limit. That would remove an additional disincentive to using the clause. It is difficult enough for a legislature to summon the political will to use it once, let alone twice or thrice, and a one-off use may not seem worth the effort.

A second reason for the apparent desuetude of s. 33 concerns the history of its use. It was first used by the Quebec legislature to insert a notwithstanding clause into all of its statutes then in force. This sweeping and indiscriminate use of the clause was upheld by the Supreme Court of Canada in *Ford* v. *Quebec (Attorney-General)*,[67] notwithstanding contrary expectations about its proper use, and respectable arguments in favour of a narrower interpretation.[68] This confirmed the worst fears of those who had originally objected to the clause,[69] although Hiebert observes that it 'did not evoke widespread public condemnation'.[70] The section was next used by the legislature of Saskatchewan, to protect a statute ordering public employees to end a strike, which was vulnerable to challenge on the ground that it violated freedom of association. This use of s. 33 did not incur any voter backlash, and may even have assisted the government's successful bid for re-election.[71] But subsequently, Quebec used the section to protect a law prohibiting the use of English in public signs. This was extremely unpopular throughout the rest of Canada, and probably sabotaged the Meech Lake Accord that was being negotiated at the time.[72] Quebec's use of the section was widely interpreted as subordinating individual rights (of Anglophones) to majoritarian preferences (of Francophones), which

[66] I am grateful to Grant Huscroft for emphasising this point in comments sent to me.
[67] [1988] 2 SCR 712 (Can).
[68] Manfredi, *Judicial Power and the Charter*, p. 184.
[69] *Ibid*.
[70] J. Hiebert, *Limiting Rights; The Dilemma of Judicial Review* (Canada: McGill-Queen's University Press, 1996), p. 139.
[71] Knopff and Morton, *Charter Politics*, p. 30.
[72] Hiebert, *Limiting Rights*, pp. 140–1; Mandel, *The Charter of Rights*, p. 92.

seemed to confirm the view that the protection of individual rights could be safely entrusted only to the courts. Prime Minister Mulroney immediately condemned s. 33 as a 'fatal flaw' that made the Charter 'not worth the paper it was written on'.[73] As a result, it 'became virtually impossible to defend the use of section 33 outside of Quebec';[74] 'section 33 has now, except for the francophone majority in Quebec, generally assumed the mantle of being constitutionally illegitimate'.[75]

This was arguably the result of fortuitous events in Canadian history, rather than a general law of political dynamics. Quebec's perceived abuse of the section made s. 33 virtually unusable before it had been given a 'fair go'. 'The opposition to any use of the notwithstanding clause', argues Manfredi, 'is [partly] the product of historical accident … Canadians experienced a use of section 33 that they found objectionable before the Supreme Court rendered a politically unpopular Charter decision.'[76] Moreover, s. 33 could have been either drafted so to deter Quebec's perceived abuse of it, or interpreted in the *Ford* case so as to invalidate that abuse.[77] In either case, s. 33 might have been saved from its current ignominious fate.

It is still possible that s. 33 will be resuscitated sometime in the future. It has been argued that the obstacle posed by its wording is not insurmountable because, first, regardless of formalities, the general public is sufficiently intelligent to realise that the legislative intention is to override a judicial interpretation of the Charter rather than the Charter itself, and secondly, because the legislature can clearly state that intention in a statutory preamble.[78] Furthermore, '[o]nly the fact that public opinion outside Quebec has not been deeply disturbed by decisions of the Court has so far kept the override locked up and out of sight'.

> Make no mistake about it: if conflict between the judicial and legislative branches in Canada ever approached the intensity and duration of the conflict that occurred in the United States during the Lochner era (1905–1937) or during, and just after, the Warren Court (1953–1973) (and that continues to this day with respect to abortion), the current reluctance by

[73] Quoted in W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994), p. 311.
[74] Manfredi, *Judicial Power and the Charter*, p. 187.
[75] Hiebert, *Limiting Rights*, p. 139.
[76] Quoted in Tushnet, 'Policy Distortion', 296.
[77] *Ibid*., 299.
[78] P.W. Hogg, A.A. Bushell Thornton and W.K. Wright, 'Charter Dialogue Revisited – Or "Much Ado About Metaphors"' *Osgoode Hall Law Journal* 45 (2007) 1, 35.

> Canadian politicians to use the override would disappear. Indeed, the use of the override by Quebec to protect its French language policy is a reliable indication of what would happen elsewhere in the country if a cherished policy were threatened by the Court.[79]

V Conclusion

If a bill of rights were to include a comprehensive override clause, the question of its compatibility with democratic values could not be settled by appealing to Waldron's 'right of rights' – the right to participate on an equal basis in the final determination of public policy. This is because the override clause would preserve that right. Instead, the question is whether, despite the existence of the override clause, judicial enforcement of constitutional rights would corrode 'the habits and temperament' that are necessary for democracy to thrive.[80] This could only be resolved by sociological evidence of differences in political culture that would be extremely difficult both to collect and to interpret.

In principle, an override clause such as s. 33 should help legislators resist the democratic debilitation that might otherwise attend the legalization of rights. The failure of Canadian legislatures to make more use of their override clause is something of a puzzle. It may be due to factors peculiar to Canada, especially the ways in which the clause was drafted, interpreted and allegedly abused by Quebec. Amendments to s. 33, which cannot be discussed here, have consequently been proposed in the hope of reinvigorating it.[81] If, even in Canada, there is still hope that a differently worded override clause might be put to better use, the same must be true of other countries. In Australia, the Constitutional Commission observed in 1988 that 'Canadian experience in the use of such a power is no safe guide to how such a power might be used in Australia … There is no knowing how Australian governments might seek to utilise a legislative override power.'[82]

On the other hand, it is possible that the drafting and early usage of s. 33 were not the crucial factors, and that no over ride clause – regardless of its wording – would have proven politically useable. The major obstacle

[79] P.W. Hogg, A.A.B. Thornton and W.K. Wright, 'A Reply on "*Charter* Dialogue Revisited" ' *Osgoode Hall Law Journal* 45 (2007) 193 at 201.

[80] Morton and Knopff, *The Charter Revolution*, pp. 149 and 151.

[81] See, e.g., Manfredi, *Judicial Power and the Charter*, pp. 192–3 and Hiebert, *Limiting Rights*, p. 142.

[82] Final Report of the Constitutional Commission (Canberra: Australian Government Publishing Service, 1988), vol.1, pp. 494, para. 9.222 and 495 para. 9.224.

to the more frequent use of the clause might lie 'less in the existing section 33 than in the perspective of oracular legalism. To the extent that judicial pronouncements are seen as the very embodiment of the constitution, rather than as debatable interpretations of it, the use of section 33 will be seen as illegitimate.'[83]

On this view, legislators, the electorate, or both, are the victims of a kind of false consciousness. They are deluded by the specious objectivity of constitutional rights, and a naïve faith in judges' capacity to discern their true import by virtue of superior legal expertise, wisdom and impartiality.

It is beyond the scope of this chapter to assess this claim, which in the absence of careful empirical research into public attitudes, presumably rests on anecdotal and impressionistic evidence. Legislators and voters show little sign of being overawed by 'oracular legalism' when seemingly lenient sentences imposed by judges on criminals are subjected (as they often are) to voluble public criticism. But perhaps matters are different where constitutional rights are concerned. In the absence of sufficient evidence to assess the claim, some general points can nevertheless be made.

As previously observed, there are two obstacles to rights-based democrats making such a claim. First, even if legislators and the electorate are deluded, their democratic right to the final say remains intact. Secondly, alleging such a delusion is difficult to reconcile with the basis of that right: namely, the presumption that ordinary people are sufficiently intelligent, knowledgeable and virtuous to deserve it.[84]

The first of these obstacles does not prevent goal-based democrats from alleging that legislators or the electorate are deluded in this way. From their perspective, the mere preservation of the democratic right to the final say is not the crucial issue. More important are the beneficial consequences that flow from its frequent exercise, and these may be jeopardised if – for whatever reason – it is exercised rarely.

But the second obstacle is not so easily avoided. Goal-based democrats regard the cultivation of intelligence, knowledge and virtue throughout the community as one of the main beneficial consequences of democracy.

[83] Knopff and Morton, *Charter Politics*, p. 231; Waldron, 'The Core of the Case', 1357, n. 34; G. Huscroft and P. Rishworth, "You Say You Want a Revolution": Bills of Rights in the Age of Human Rights', in D. Dyzenhaus, M. Hunt and G. Huscroft, eds., *A Simple Common Lawyer; Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009) pp. 123, 145; A. Petter, 'Taking Dialogue Theory Much Too Seriously' (*Osgoode Hall Law Journal* 45 (2007) 147 at 161–2.

[84] See text to n. 24, above.

Nevertheless, democracy would not be viable unless there was a considerable fund of these qualities to start with. Therefore, even goal-based democrats should have considerable faith in the inherent intelligence, knowledge and virtue of the electorate. Two points follow. First, if there are alternative explanations for a popular opinion, one dismissing it as a delusion, and the other accepting it as reasonable and possibly even justified, then goal-based democrats should accept the second explanation unless there is very clear evidence of the alleged delusion. Secondly, they should also be confident that their fellow citizens have sufficient intelligence to enable any delusion to be readily dispelled by the dissemination of accurate information. Both points apply to the apparent opinions of ordinary Canadians that their rights are better protected by judges than by legislators, and that the override clause should rarely be used.

It is dangerous for any democrat to allege that the electorate is deluded in this way. If the electorate can be duped by the claim that a small group of people possess superior expertise or wisdom, and persuaded to defer unquestioningly to the judgments of that group, then perhaps they might defer as readily to demagogues as to judges.[85] But that would strengthen the case in favour of constitutional rights.

[85] I owe this way of putting the point to Kristen Walker.