“It’s the Charter Stupid!” Electoral Politics and the Supreme Court

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So strongly (and naturally) are we humans inclined to divide into hostile factions, said James Madison in Federalist 10, "that where no substantial occasion presents itself the most frivolous and fanciful distinctions [are] sufficient to…excite [the] most violent conflicts" (Madison et al., 2003: 52). Clearly, Madison is acutely of the politics of exaggeration, even demonization, that seems an inevitable attribute of partisanship in public life, and he knows this passionate tendency, if allowed to go unchecked, can easily lead to the worst kinds of rights violations. For Madison, the task of liberal – i.e., rights protecting – constitutionalism is thus to construct checks and balances to counteract the politics of partisan exaggeration. Because it is natural, the inflation of public disagreements can never be entirely overcome, but institutions should be designed to provide moderating counterweights. As much as possible, matters of reasonable public disagreement – to say nothing of frivolous and fanciful distinctions – should be seen for what they are, and not turned into the extremes of salvation or damnation.

What is the role of judicially enforceable bills of rights in this calculus of moderating checks and balances? In Canada, “dialogue” theorists have recently made a very Madisonian check-and-balances case for the enhanced judicial role under the Charter of Rights and Freedoms (see Hogg and Bushell 1997, Manfredi and Kelly 1999, Morton 1999). The role of the courts, they maintain, is to counteract the policy errors that flow from the over zealous passions and interests of elected politicians. While the latter may have quite appropriate ends in view, their zealotry often leads them to choose means that overshoot the mark in achieving those ends, resulting in unnecessary rights violations. Forcing politicians to engage in a salutary “dialogue” with more dispassionate

judges will pull policy back into the moderate range expected by checks-and-balances theory. In a sense, this view can draw support from James Madison himself, who was, after all, the father of the American Bill of Rights, shepherding the famous first 10 amendments to the Constitution through the First Congress.

An opposing view holds that courtroom rights talk, far from moderating public discourse, fans the flames of extremist polarization. Mary Ann Glendon (1991) has been especially prominent in arguing that regimes characterized by active judicial enforcement of constitutionally entrenched rights, such as the United States and Canada, are much more prone to policy polarization than are regimes that rely more heavily on the processes of legislative accommodation. Ironically, this view can also draw support from Madison, who staunchly opposed a bill of rights for much of his career, in part because of the rights-talk danger. Indeed, having reluctantly conceded the political necessity of a bill of rights, he arguably led its enactment mainly to prevent the stronger and, in his view, more dangerous version desired by the anti-federalists.

Empirical studies informed by this debate about the moderating or polarizing tendency of judicial power usually focus on particular policy issues and outcomes. While such studies are essential this paper asks a slightly different question: how has the judicially enforced Canadian Charter of Rights and Freedoms affected Canadian electoral politics? Electoral politics, of course, represent the most nakedly partisan part of our public life, and thus the arena in which Madison's natural tendency to exaggeration and demonization – let us call it the "demonization temptation" – will be most apparent and most difficult to counteract. Has the Charter moderated or exacerbated this inevitable feature of electoral policy? We believe it has fuelled the fires of partisan exaggeration, as

should be obvious to anyone who has paid attention to political rhetoric during recent federal elections. In this paper, still very much a work in progress, we document how the Charter and the courts have emerged as increasingly salient election issues and in particular how they have fed the partisan tendency to portray matters of reasonable agreement as though the extremes of salvation or damnation were at stake.

That the Charter and the courts have been drawn into electoral politics should come as no surprise. As V.O. Key observed, "where power lies, there influence will be brought to bear" (1958: 154), and virtually everyone agrees that the Charter has enhanced the power of the courts. Certainly, the archetypically powerful U.S. Supreme Court has often been an issue in U.S. presidential elections, and observers predicted that the Charter and the courts would similarly become election issues after 1982. According to constitutional lawyer David Stratas, it took over 20 years, with 2004 being "the first time in [its] history that the Supreme Court [itself] has been an election issue" (Makin, 2004: A4). Perhaps so, if we consider only the official election campaign and only the Supreme Court, but more broadly considered, the Charter and its judicial enforcers had been a matter of partisan jockeying for some time before the 2004 election. The Charter has played a prominent role in the ongoing "Canadian values campaign" of the last several elections.

To say that something is a matter of basic or fundamental "Canadian values" is to put it beyond the pale of legitimate discussion within the citizen community. Anyone who disagrees with essential Canadian values is by definition "un-Canadian." For example, the corollary of characterizing public health care as essential to Canadian identity is to demonize proponents of greater private delivery as un-Canadian adherents

of the American heresy. In both the 2000 and 2004 elections – and in the minority-government partisanship since the 2004 election– the Charter (along with health care) has featured prominently in this kind of "Canadian values" politics.

Polling data, it is true, show that, in the abstract, the Charter (arguably a kind of *Americanization*) has indeed become a virtually unassailable icon of *Canadian* identity (Fletcher and Howe, 2000). It is equally true, however, that the Charter is a notoriously multi-faceted document, lending plausible support to different and conflicting claims. The same Canadians who staunchly support the Charter in the abstract often find themselves disagreeing profoundly on what it means for particular policy issues – just ask Henry Morgentaler and Joe Borowski. The ambiguity generated by abstract commitment to the Charter and disagreement about its concrete implications provides an opportunity to indulge the "demonization temptation." In particular, it leads political partisans to identify merely plausible readings of the Charter with the Charter itself, thereby demonizing those who disagree as heretically anti-Charter and thus un-Canadian. The inflationary rhetoric of this tactic is most readily apparent when, as often happens, the demonizers have taken the very positions they now find it convenient to demonize, or at least found them to be within the range of reasonable disagreement.

Section 33 Demonization

Section 33, the Charter's "notwithstanding" clause, has been at the heart of this Canadian values discourse. It goes without saying that Liberal Prime Minister Pierre Trudeau, to whom we most obviously owe the Charter, did not like section 33, which allows both federal and provincial governments to override Charter rights for renewable five-year periods. Nevertheless, he found the section to be an acceptable compromise,

and even speculated that it might appropriately be used to overrule a judgment granting abortion on demand (Libin, 2005: 6). Moreover, when most of the provinces demanded a notwithstanding clause for their use during the Charter-making negotiations, Trudeau's then justice minister and future prime minister, Jean Chrétien, insisted that it be available to Ottawa as well. Later, when Conservative Brian Mulroney, for his own partisan purposes, declared that section 33 made the Charter "not worth the paper it's written on," Chrétien disagreed. Clearly Jean Chrétien was central to making section 33 a part of the Charter and had been prepared to defend it (Morton, 2000: A16).

Chrétien's electoral opponents from 1993 on also defended it. The Reform Party, the Canadian Alliance, and finally the Conservative Party of Canada, have often raised the prospect of using section 33 to override what they consider unduly "activist" judicial policymaking. The demonization temptation proved too strong to resist for the Chrétien Liberals. A clause that was clearly a *part* of the Charter, and had been for Chrétien an acceptable and defensible part, now became a "nuclear bomb" of hostility to Charter values, a symptom of truly dark forces. Section 33, said Chrétien during the 2000 election campaign, is "a nice way to destroy the Charter of Rights" (Walkom, 2000: A6). He suggested that the section represented an appeal "to the dark side of people," whereas Liberals (as he noted in a closely related speech) "always appeal to the good side in people, to generosity, to the value of sharing, to understanding, to trust…." (Globe and Mail, 2000: A4). This Liberal "good side" was represented by the rest of the Charter, which "is considered around the world as one of the most modern and encompassing the values that need to be protected in society" (Walkom, 2000:A6). "[W]e have to keep working on" the protection of those values, Chrétien continued, "because we never know

when there will not be a force who will come and appeal to the dark side that exists in human beings" (Walkom, 2000:A6). Indeed, such a force faced him at that very moment, in the form of "dark side" proponents of the anomalous section that would "destroy" the Charter. Other forces of the "dark side," Chrétien emphasized, were the defeated forces of fascism in World War II. The implication – that proponents of section 33 were little short of fascists – was clear, and at least one journalist did not hesitate to make it explicit: "Imagine Heinrich Himmler…living in Canada," wrote Joey Singler for the Toronto Star, "How do you think he'll vote?" (2000: A2). Here we see Madison's politics of inflationary exaggeration in full flower.

Section 33 was central to a similar campaign of vilification in the 2004 federal election. Here, again, the inflationary impact of the demonization temptation is readily apparent. On December 18, 2003, six days after becoming Prime Minister, and prior to the overheated context of an election campaign, Paul Martin mused about the use of section 33. His remarks were triggered by the issue of same-sex marriage. The Liberal government was proposing to extend formal marriage to same-sex couples, and faced concerns about whether this legislation might compromise the freedom of religious institutions to determine which unions they were prepared to consecrate. Martin speculated on a judicial ruling that would "force churches, synagogues, mosques or temples to redefine marriage in a way that particular religion did not want to" (Gunter, 2004: A16). In that case, said Martin, he "would use the notwithstanding clause." The clause, in other words, was not completely beyond the pale, but remained a legitimate (if rarely used) part of the Charter.

That was precisely how Stephen Harper, leader of the Conservative Party, viewed section 33. During the 2004 campaign, he indicated that he "was not opposed to using the notwithstanding clause," reminding voters that it was "a legitimate part of the Constitution" (Dawson, 2004: A9). He cautioned, however, that the clause "should always be applied prudently," and hoped "that we don't get into that situation" (Dawson, 2004:A9). This view, moreover, finds support in the opinions of the Supreme Court, which has clearly underlined the legitimacy of the clause (*Ford v Quebec A.G.*) and its potential in the inter-institutional dialogue between legislatures and the courts (*Vriend v Alberta*).

So, both Martin and Harper agree with the legitimacy and prudent use of section 33. Right? Wrong – at least after the demonization temptation had taken hold in the heat of the election campaign. During the campaign, the Liberals consistently painted the Conservative openness to section 33 as hostility to the Charter itself and thus to fundamental Canadian values. As a necessary corollary, section 33 was depicted as an outright sin that the pro-Canadian values Liberals would *never* commit (Martin's December 18, 2003 comments to the contrary notwithstanding). Martin emphasized that "when Stephen Harper muses about using the notwithstanding clause, I do not agree with him," insisting that he himself "would not do it," and stressing that to use section 33 was to "trifle with the Charter of Rights at great peril to the social cohesion of the Country" (Clark, 2004: A8). He placed an exclamation point on this argument when he said "my refusal to use the notwithstanding clause…is a very clear indication of the depth of the gulf between Mr. Harper and myself" (Clark, 2004: A8).

Martin's justice minister, Irwin Cotler, added that "any attempt to use the notwithstanding clause would be moral failure of leadership" (Gordon, 2004: A1). Cotler especially underlined the "Canadian values" dimension of the argument, maintaining that section 33 was "a radical departure from Canadian tradition," (Canadian Newswire, June 7 2004) despite the fact that as a law professor he knew precisely the opposite to be true (a notwithstanding clause, after all, had been part of the 1960 Canadian Bill of Rights). NDP leader Jack Layton piled on with the comment that "the conservatives want to turn back the clock"(Scoffield, 2004: A4), to the "dark ages" no doubt, despite the fact that leading members of his own party – Ed Broadbent in particular – have argued that section 33 should be used to overturn the Supreme Court's ruling in favour of tobacco advertising in *RJR Macdonald.* The 2004 Liberal campaign on the section 33 issue did not quite match its 2000 predecessor in "dark side" allusions to outright fascism, but it remains a fine illustration of the demonization temptation nonetheless.

The value of section 33 as a way for Liberals to demonize Conservatives during election campaigns would, of course, evaporate if the Liberals ever used the clause themselves. As one of us (Knopff, 2001) has speculated, this probably explains the Liberal approach to the 1999 lower court litigation in *Sharpe*, the famous child pornography case. The trial court finding that the law restricting child pornography was unconstitutional triggered a wave of public outrage and led to an all-party consensus in the House of Commons that the decision was wrong and needed to be overturned. About 70 members of the Liberal caucus wrote to the government asking it to consider the use of section 33:

> We ask that the government not wait for the appeal of the B.C. decision to be heard but immediately act in the defence of Canada's children. The undersigned Liberal members of parliament recommend that strong new child pornography legislation be introduced as soon as the House resumes. We ask also that we consider the use of the notwithstanding clause or other equivalent effective measures to send a clear message that the charter of rights will never again be used to defend the sexual abuse of Canada's children (House of Commons, 1999: 11263).

The Reform Party quickly introduced a motion to the same effect:

> That the government should take legislative measures to reinstate the law that was struck down by a recent decision of the Court of British Columbia regarding the possession of child pornography, even if that entails invoking section 33 of the Constitution Act, 1982 (the notwithstanding clause) (House of Commons, 1999: 11263).

The Liberal government staunchly and consistently resisted this appeal to use section 33, arguing that the normal appellate process should be allowed to play itself out, and expressing confidence that the Supreme Court would eventually uphold the existing law – as, in fact, it ultimately did (with two qualifying exceptions). The government was unmoved by arguments that the appeal process could continue, either in the normal fashion, or fast tracked through a reference case, while section 33 was applied in the interim to continue its protection of children during the period of judicial deliberation. All of this occurred, of course, with the prospect of federal election looming on the horizon. Had the government used section 33 in this instance, it would not have been available for Chrétien's "dark side" demonization in 2000. Vilification of the Reform Party as anti-Charter was already a well-established tactic, and it seems highly likely that the advantages of continuing this tactic played a role in the government's handling of the child pornography incident.

A closer look at the same-sex marriage debate sheds further light on the partisan and electoral advantage for the Liberals of portraying section 33 as an anti-Charter –

hence anti-Canadian – constitutional anomaly. While the Liberals regularly sought to portray their conservative opponents as retrograde social-policy extremists because of their support for the traditional heterosexual definition of marriage, this proved an ambiguous and difficult tactic, given widespread support of traditional marriage among traditionally Liberal ethnic communities. More generally, polls showed that while Canadians disliked discrimination against homosexuals, they saw no reason to dismantle the symbolic heterosexual definition of marriage so long as the substantive benefits and protections of spousal relationship were extended to gays and lesbians through some kind of "civil union" or "registered domestic partnership." As it turned out, this is precisely the position advanced by Conservative leader Stephen Harper in the 2004 election and since. How could the government forestall this potentially popular position and increase support for its own proposal of full-scale same-sex marriage? By arguing that only resort to the nefariously anti-Charter section 33 could sustain the traditionally heterosexual definition of marriage.

This claim found support in a number of recent trial and appeal court decisions ruling the traditional common law definition of marriage unconstitutional, and during the 2004 election Paul Martin relied on these decisions to claim that same-sex marriage "is absolutely a question of human rights, and under those circumstances there is no way that anybody should be allowed to discriminate or prevent same-sex marriage" (Curry, 2004: A7).

But, of course, lower courts do not settle constitutional issues. As we saw in the child pornography episode, the Supreme Court can step in to reverse a lower court trend. Partly in recognition of this, and partly in order to punt a hot political potato out of the

political and into the judicial arena, Prime Minister Chrétien posed a series of reference questions to the Supreme Court in 2003, with the main one asking whether the proposed new definition of marriage was constitutional. Notable by its absence was the obvious corollary question, namely, whether the traditional heterosexual definition of marriage was *also* constitutional. The strategic calculation was obvious. There is little doubt that the constitution *allows* the government to legislate same-sex marriage; the question is whether it *requires* it. To ask whether the traditional definition was *also* constitutional risked the answer that same-sex marriage was in fact not constitutionally required. In the absence of this question, the guaranteed conclusion that such marriage was allowed could be rhetorically fudged. Given the lack of legal sophistication among the general public it is relatively easy to recast constitutional *permission* as constitutional *requirement*, arguing in effect that simply upholding same-sex marriage is tantamount to a constitutional *right* to such marriage. Then one could vilify proponents of traditional marriage as un-Canadian enemies of Charter rights, who could achieve their dark ends only by resorting to the anti-Charter expedient of section 33.

In January of 2004, probably as an attempt to defuse the issue somewhat for the upcoming election campaign and perhaps to delay a judgment until after the campaign, Prime Minister Paul Martin responded to the controversy about same-sex marriage by adding the missing question – whether the traditional opposite-sex definition of marriage was constitutional – to the Supreme Court reference. When the Court handed down its judgment in December 2004, it ruled, as expected, that a re-definition of marriage to include same-sex couples was constitutionally permitted but refused to answer the

question of whether it was required, explicitly indicating that it was Parliament's job (at least initially) to deal with the issue.

Although they would undoubtedly have preferred the Court to find the traditional definition of marriage constitutional, proponents of this definition of marriage nevertheless applauded the Court's restraint. David Brown, who argued for the intervening Association for Marriage and the Family, said "this is an astute political judgement by the Court" (MacCharles, 2004: A1). Constitutional expert Eugene Meehan said it is a "thinly disguised" message "We do our job, you do yours" (MacCharles, 2004: A1). Meehan further argued, "What the Supreme Court is saying is the next move is yours. It's not for us to fix your legislation in advance. Better that you proceed and we'll look at it afterward" (MacCharles, 2004: A1). Conservative leader Stephen Harper said that the decision is "not the end of the marriage debate but a new beginning" (Harper, 2005: A25). Harper further argued, "The Court's decision is an opportunity to discuss the alternatives, rather than rushing to judgement" (Harper, 2005: A25).

The Liberal government, by contrast, preferred to treat the Court's silence on the constitutionality of the opposite-sex definition of marriage as though it confirmed lower court judgments against that definition – i.e., as though it implicitly confirmed the constitutional *requirement* of same-sex marriage. While this conclusion is dubious, the fact that the Court's silence left the lower court judgments in place allowed Martin to argue that federal legislation implementing same-sex marriage nationally was necessary to prevent "the balkanization of marriage across the country" (Tibbets, 2004: A1).

There was, of course, another way to prevent such balkanization, namely, to enact federal legislation confirming the opposite-sex definition of marriage as the national

standard. This, combined with civil unions for same-sex couples, was precisely how Stephen Harper's Conservatives proposed to handle the issue. At this point, the now well-established section 33 vilification was brought into play. If one wanted to retain the opposite-sex definition of marriage, Martin insisted, "the only choice [was] to invoke the notwithstanding clause to deny a Charter right. And that, we will not do" (Campbell and Makin, 2004: A1).

When Stephen Harper (2005) tried to insist that the Supreme Court had *not* declared a Charter right to same sex marriage, and that it was thus unnecessary to use section 33 to defend federal legislation in favour of traditional marriage, 134 law professors wrote him an "open letter" defending Martin's interpretation. "The truth is," they maintained, that "there is only one-way to accomplish your goal: invoke the notwithstanding clause" (Choudhry et al., 2005). Moreover, such "use of the notwithstanding clause would have to be justified to Canadians, who overwhelmingly support the Charter" (Choudhry et al., 2005). Note the implicit characterization of section 33 as hostile to the Charter, rather than a legitimate part of it. Why was the anti-Charter expedient of section 33 necessary in this case? Because "if Parliament were to … define marriage to exclude same sex couples, this legislation would very quickly end up in court, and be struck down as unconstitutional," in which case section 33 would need to be invoked in any case (Choudhry et al., 2005). Since the notwithstanding clause would be inevitable after a Supreme Court ruling, the only "honest" course of action would be to admit the fact up front and include the clause in any legislation designed to protect traditional marriage. As is well known, the Harper Conservatives were regularly accused

of having a "hidden agenda," in the sense of not being completely honest about their real goals. In effect, the law professors were making just such a "hidden agenda" claim.

The law professors were certainly correct in suggesting that a legislative defence of the opposite-sex definition of marriage would quickly end up in court, but just how did they know with such certainty that the Supreme Court would strike it down, given that it had studiously avoided the question in the reference case? Because there was a clear "consensus" among lower courts and "constitutional experts" on the issue. Perhaps so, but if that is the case, one wonders why a Supreme Court is necessary. Why not just poll other judges and law professors? More to the point, the opposite-sex definition of marriage struck down by the lower courts was a "common law" (i.e., judge-made) definition, and the Supreme Court has been quite clear that contemporary legislative positions deserve greater deference in Charter litigation than does old judge-made law. As Alan Brudner, a University of Toronto law professor (and no friend of Stephen Harper), wrote in reply to his 134 colleagues:

> Mr. Harper is correct to point out that the judicially-declared unconstitutionality of the common-law definition of marriage does not entail the unconstitutionality of parliamentary legislation affirming the same definition.
>
> This is so because, in R. v. Swain, the Supreme Court of Canada said that, where a common-law rule is challenged, the court will not show the same deference to the policy of the rule as it will when legislation is at issue, since no question of respect for the democratic will arises. For all we know, therefore, courts may uphold heterosexual-only marriage as a reasonable limit on the right against discrimination when the restriction comes from a democratic body (Brudner, 2005: online).

Brudner admits that it seems likely that the Supreme Court would indeed strike down an opposite-sex definition of marriage, but he insists that even so, the right course of action for a government that wishes to protect that definition is *not* to use the notwithstanding

clause pre-emptively but to resort to it only retrospectively, *after* a negative Supreme Court ruling on the legislation.

Now, Brudner knows perfectly well that the Supreme Court has ruled in *Ford* that the pre-emptive use of section 33 is constitutionally permissible. Nevertheless, Brudner is far from alone in thinking that what *can* be done in this respect *should not* generally be done. Prior to *Ford*, it had been strenuously argued that the appropriate dialogue between courts and legislatures required legislatures to let courts have their say before answering back with a section 33 override. And since *Ford*, it is still argued that this kind of iterative "dialogue" is preferable to pre-emptive legislative action.

At this point we venture an as yet unresearched and thus unconfirmed hypothesis: that at least some of the 134 signers of the open letter to Stephen Harper number among those who in the past have opposed the very kind of pre-emptive use of section 33 they here insist upon as the only "honest" course of action. In their letter, these law professors accuse Harper of "playing politics with the Supreme Court and the Charter." We suspect that they are open to the same charge. And if they are "playing politics" in this way, it is no doubt because they, too, have succumbed to the demonization temptation. Despite the tone of reasonableness in the letter, there can be no doubt that the implicit message is the same as the blunter versions of it used by Martin and especially Chrétien in the election campaigns. As Ted Morton has vividly summarized this message:

> The Charter is Canada's new religion; the judges the new priests; the Notwithstanding Clause Original Sin; and Stephen Harper the Devil. As true believers and judicial-priests in waiting, the LawProfs are quick to denounce and root out evil (Morton, 2005: A16).

The Disappearing Middle Ground: Same-Sex Marriage And Abortion

The effect of Madison's politics of exaggeration, as we have said, is to turn what might, on more dispassionate analysis, be reasonable disagreements between plausible alternatives into implacable oppositions of good and evil. One's opponents are portrayed as "extremists," holding positions beyond the pale of legitimate discussion. Among other things, the overheated rhetoric of such politics makes it difficult for middle ground compromises to appear as what they are. Instead, they become part of the other "extreme," either as the edge of the slippery slope to that extreme or as a temporary defensive holding posture of those who, having been forced to give ground by the good and true policy, are regrouping to "turn back the clock."

This recasting of compromise positions as the epitome of extremism is certainly evident in the same-sex marriage debate we have been considering. Recall that Stephen Harper's Conservatives advocate not just the continuing limitation of "marriage" to opposite-sex couples but also the extension of most marriage-like protections and benefits to same-sex couples through the mechanism of civil unions. From the point of either extreme in this debate, this will appear less as a compromise than as a concession to the other extreme. Thus implacable marriage traditionalists will see it as a large step toward the ultimate goal of full same-sex marriage, while those who see same-sex marriage as an uncompromisable right will see it as part of a "hidden agenda" of hateful discrimination against gays and lesbians, moderated only by necessity, and biding its time to "turn back the clock." The latter is certainly the position now taken by the Liberal government toward the Conservative position. That this posture reflects the demonization temptation is evident from the fact that in 1999, the Liberal government of Jean Chrétien,

in which Paul Martin was a prominent minister, passed a parliamentary resolution affirming the traditional definition of marriage:

> In the opinion of the House, it is necessary in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage (House of Commons, 1999 06 08).

The motion passed 216-55, with both Chrétien and Martin voting for it. Within a very few years, however, partisan temptations have led the Liberal government to portray their own former position as a frightening form of social extremism (even though a significant part of the Liberal caucus continues to agree with the Conservatives on the issue).

How did Martin justify his about face? By claiming to have seen the Charter light. "I believe fundamentally in the Charter of Rights," he said in a 2004 year-end interview with CTV. "And there is no doubt that it was that decision *by the Charter* that essentially tipped the balance as far as my own decision is concerned (emphasis added –Bunner, 2005: 35). It wasn't really Martin's own decision on the merits, in other words. Rather, it was a matter of his faith in the Charter and his eventual comprehension of what that document had decided for him on the issue. This view was perfectly captured in the March 2005 Liberal policy convention by a popular button reading "It's the Charter, stupid." The message of the button was unmistakable: "You can't blame us for proposing to legislate same-sex marriage without attacking the Charter." Anyone unable to comprehend this "obvious" truth, was a "stupid," anti-Charter (hence anti-Canadian) extremist. And, to be sure, a certain tit-for-tat counter hyperbole did emerge at the subsequent Conservative policy convention, in the form of a button reading "It's the stupid Charter."

But what of the actual Conservative position on same-sex marriage? If the Harper Conservatives do indeed represent extremism on this issue, they are in good company. The compromise they advocate is in fact the position of a great many well-regarded liberal democratic states, including Denmark, Finland, France, Germany, Iceland, Norway, Portugal, Sweden, New Zealand and three Australian states. Full-scale same-sex marriage is legal only in the Netherlands, Belgium, and Switzerland. In Canada, however, only one of the polar positions on this policy continuum, a position adopted by a small minority of regimes, is considered enlightened and moderate, and the middle ground actually adopted by many secular, left-leaning regimes is portrayed as darkly extreme. The Charter and the courts do not, of course, cause this politics of demonization. It is, from a Madisonian perspective, an entirely expected form of politics, and it no doubt exists in all of the regimes that have adopted the middle ground compromise. Why it has not succeeded there is an important question, but beyond our present scope and capacity. What seems clear is that in Canada at least, our judicially enforceable Charter of Rights has fuelled the demonization temptation rather than moderating it.

The demonization temptation has played a similar role with respect to the abortion debate in Canada. For Mary Ann Glendon (1987), abortion politics was a prime example of the pernicious impact of courtroom "rights talk." She found that regimes that emphasized legislative policymaking, the difficult and tragic tradeoffs involved in abortion were given their due, and embodied in compromise solutions. Public debates were not carried out exclusively in the black-and-white discourse of rights – a woman's choice versus a fetus's life – but took into account a wider context of relevant policy issues, such as the availability of child care for single mothers and the potential of

adoption as an alternative to abortion. As a result, there emerged middle ground compromise solutions, which tended to permit relatively easy access to abortion, subject to certain constraints, such as required access to counselling and/or materials outlining alternatives. In the United States, observed Glendon, emphasis on the rights talk of judicial policymaking tended to polarize the issue, so that European-style middle ground compromises were squeezed out. The same has happened in Canada, even though the Supreme Court's judgment in Morgentaler was itself decidedly restrained, striking down the existing law but leaving open the possibility of intermediate positions short of completely unencumbered freedom of choice. Despite the Court's moderate *reasoning* on the issues, the immediate (and now long persisting) result was the absence of any legal constraint whatsoever, and thus the practical victory of the pro-choice pole of the policy continuum. Publicly, this outcome has come to be seen as central to Charter values, and any opposition to it is excoriated as anti-Charter extremist social conservatism. This is so especially in electoral politics, and again we are led to attribute it to the demonization temptation rather than to actual conviction by the fact that the demonizers occasionally let it slip that they have some sympathy for the views their calculations of partisan advantage cause them to demonize.

This is perhaps most dramatically illustrated in the demonization of Conservative MP Rob Merrifield during the 2004 federal election. The controversy turned on the issue of counselling women on alternatives to abortion. In the first week of the campaign, when Paul Martin was asked in a Saskatoon high school his views on the right to life question, declared that he was pro-choice provided the woman had the opportunity to receive counselling before enduring the procedure. He echoed the sentiment the next day when

he observed, “I think that you should always refer to counselling” (Martin, 2004: A16). Curiously, this went unnoticed in the media until Conservative health critic Rob Merrifield told the *Globe and Mail* that third party counselling would be “valuable” for women contemplating an abortion. Said Merrifield “I would think that they should have all the information in front of them. I think with any procedure that’s a valuable thing to have” (Martin, 2004: A16).

The Liberal Party quickly seized upon Merrifield’s comments as evidence that the Conservatives had an extremist “hidden agenda” on social issues. Public Health Minister Carolyn Bennett observed, “this really does cut to the core of one of the key women’s issues in this country and gradually these people are taking their sheep’s clothing off” (Mahoney and Laghi, 2004: A1). Deputy Prime Minister Anne McLellan said “the notion of state-imposed, third party counselling as if we are children, as it we are not able to make out own decisions about our health and bodies, is to me, at the beginning of he 21st century, profoundly disturbing and, dare I say it, is very frightening” (Mahoney and Laghi, 2004: A1). The next day in the *National Post* McLellan again criticized Merrifield. “Its déjà vu all over again. I think a lot of younger women had hoped this kind of issue was behind us and it’s very alarming” (Martin, 2004:A16). Immigration Minister Judy Sgro appeared at a Harper campaign stop shouting “What rights are you going to take away next?” (Martin, 2004: A16). McLellan acknowledged that Martin had also said something about counselling, but insisted that “There’s a huge difference between our position and saying that a woman must get counselling, that the full force of the state requires you to get counselling before you can choose to have this medical procedure in consultation with your doctors” (Martin, 2004: A16).

It is not clear that McLellan's attempted distinction between Martin's statement and Merrifield's holds up, or if it does, that it is a distinction with much of a difference. What is clear is that in much of continental Europe, something like the Martin/Merrifield musing is embedded in law. In France, Germany and the Netherlands, abortion is legal until the 12th week of pregnancy (until viability in the Netherlands) on the condition that a woman seeks counselling on the alternatives, and serves a one-week waiting period. Similarly in Britain and Finland, abortion requires the consent of two physicians, and women must be provided with information detailing the significance and effects of the procedure. Looking beyond Europe, in New Zealand, abortion is legal under 20 weeks, but it also must be approved by two doctors, an obstetrician and a gynaecologist, and the mother may be subject to counselling. Again, as in the case of same-sex relations, we find that a middle ground compromise well established in many liberal democratic regimes is demonized in Canada as unacceptable social extremism, often after unguarded expressions of sympathy by the demonizers for the very position they find themselves demonizing.

Conclusion

A central task of liberal democratic constitutionalism is to construct institutional checks and balances to offset and moderate the natural demonization temptation. Canadian dialogue theorists portray the Charter and the courts as just such a moderating check and balance, one that forces self-interested and passionate politicians to engage in a moderating dialogue with dispassionate judges. Sceptics counter with the claim that judicial power under constitutionally entrenched rights promotes and intensifies an uncompromising "rights talk" that feeds the temptation to turn reasonable disagreements

into a clash of salvation and damnation. This paper asks how these conflicting claims fare in the context of partisan, and especially electoral, politics.

The evidence seems clear. In the past several elections, the government has attempted to wrap itself and its policies in the Charter and portray its opponents as anti-Charter and hence disloyal Canadians. Positions that often seemed attractive to the government under some circumstances come to be portrayed as impermissible extremism, prohibited by the Charter. This occurs even when judicial decisions remain ambiguous or when the judges of the Supreme Court are themselves sharply divided on the issue. The middle ground on controversial social issues is regularly recast as extreme, even when it is the position of most secular progressive regimes elsewhere. In the context of Canadian electoral politics at least, the critics of judicialized rights talk are clearly correct. The Charter and its enhancement of judicial power have fuelled the demonization temptation rather than moderating it.

We are thus returned to the task of liberal democratic constitutionalism: building countervailing checks and balances. The Charter is with us to stay. How could we offset its contribution to inflationary public discourse? A possible check and balance was built into the Charter itself, in the form of the section 33 notwithstanding clause, but that has itself been effectively demonized as anti-Charter. Where else might we turn? Having raised the question, we immediately admit to having no compelling answer. We hope to be guided by the feedback and discussion at this conference.

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