

'Til Death Do Us Part: The Same-Sex Marriage Debate in Canada and Australia

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Institutional checks and balances have long been viewed in liberal constitutionalism as a central mode of rights protection. And from a comparative perspective, the key institutional difference is that Canada has an entrenched bill of rights, whereas Australia relies on more effective bicameralism. The question then, is whether judicially enforced rights or legislatively protected rights best achieve the moderating influence envisioned by checks and balances theorists?

How do these competing institutional claims fare in light of the Australian Parliament's recent decision to explicitly define marriage as a "man and a woman to the exclusion of all others," while in Canada, judicial decisions under the Charter of Rights and Freedoms contributed to legislation legalizing same-sex marriage? Do these different outcomes support the claim of bill-of-rights proponents that legislatures – perhaps even effectively bicameral ones – need inter-institutional dialogue with dispassionate courts to offset their rights-threatening passions? Or is the opposite claim more nearly correct, namely that greater judicial involvement in policymaking promotes policy extremes at the cost of the moderate legislative compromises?

This paper attempts to do several things. First, it briefly lays out the debate amongst institutional checks and balances theorists. Second, it lays out a method of measuring and operationalizes the notion of policy moderation. Third, it lays out the debate over same-sex marriage in both Canada and Australia. Finally, it offers some preliminary conclusions about the utility of checks and balances in the protections of rights.

Institutional Checks and Balances

Institutional checks and balances have long been viewed in liberal constitutionalism as essential for the protection of rights. Indeed, this contention dates back to the very founding of liberal (that is rights-protecting) thought. While entrenched bills of rights and the enhanced power of judicial review they bring are now the accepted norm, this was not always the case. Indeed, some of the most influential American founders, certainly champions of liberty and rights, deemed it unnecessary to include an enumerated bill of rights in the original constitution. In *Federalist #84* Alexander Hamilton explicitly rejects a bill of rights on the grounds that the "Constitution itself, in every rational sense, and to every purpose is a bill of rights" (Hamilton (1788) 2003). James Madison agreed. In a letter to his friend Thomas Jefferson, a bill of rights supporter, Madison spoke of bills of rights as "parchment barriers" frequently violated

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observing that “experience proves the inefficiency of a bill of rights on those occasions when its controul is most needed” (Padover 1965).

The essential problem for Madison was one of factionalism, which would inevitably lead to rights-threatening extremism. 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” (Ibid.. 52). The answer to this problem lay, not in a bill of rights, but in the famous system of checks and balances among the separated institutions of representative democracy, in which “ambition would be made to counteract ambition,” thereby “supplying, by opposite rival interests the defect of better motives” (Ibid.. 316). In this system, ambitious representatives would engage in a moderating process of coalition building within and across separate political institutions. In this process, the mild “voice of reason” which would otherwise be overpowered by the natural propensity toward zealotry, could emerge to sustain a degree of moderating deliberation (Ibid. 257). The resulting policy outcomes, which would reflect not passionate extremism, but rather the “cool and deliberate sense of community,” would be unlikely to infringe fundamental rights (Ibid.. 384), making a bill of rights superfluous.

It is well known that this bill-of-rights scepticism did not last long in the American system, with James Madison himself shepherding the Bill of Rights through the first Congress. It survived much longer in other liberal democracies, Canada and Australia among them. Both the Canadian and Australian founders were keenly aware of the American Constitution, including the Bill of Rights, when they set about drafting their respective constitutions. Indeed, both adopted significant parts of the American model; yet neither adopted their own bill of rights.

Although it may sound foreign to modern ears, especially in Canada, there was a strong sense in both countries that the best rights-protecting system was found not in a constitutional bill of rights, but in the tradition of parliamentary responsible government, understood as the system in which the political executive (Prime Minister and Cabinet) sit as members of the legislature, retaining their governmental authority insofar as they maintain “the confidence” of a majority in the legislature’s lower house (if there is more than one). Parliamentary government, in this view, is primarily devoted to protecting individual rights. This view is upheld in much of the Classical Liberal tradition. Locke says it. So do Blackstone, De Lolme, and Dicey. The speakers in the Canadian confederation debates repeat the idea over and over.

Richard Cartwright, for example, insisted that he preferred “British liberty to American equality” (Ajzenstat et al. 1999). The “calm and deliberate decision is almost always just,” said Cartwright, echoing the Federalist’s praise of the “cool and deliberate sense of the community,” but finding its source in British rather than American checks and balances.¹

¹ It is important to note that while no one argued in favour of an American-style bill of rights, it is equally true that no one argued against the inclusion of one. The Canadian founders are not hostile to the notion

This view that individual rights were best protected via parliamentary means was also dominant during the Australian founding. Sir Owen Dixon once told an American audience that the Australian founders had been unenthusiastic about a bill of rights, and that Australians of his own time remained “impenitent in their steadfast faith in responsible government” (Menzies 1967).

Much later, former Prime Minister Menzies vigorously defended the Australian fathers’ decision not to draft a bill of rights (Menzies, 1967: 52). Menzies gives a powerful endorsement of responsible government as the ultimate guarantee of rights “responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights” (Ibid. 54).

Today, the view that rights can be protected without a judicially enforceable bill of rights is in rapid decline, with Australia being one of an increasingly small number of holdouts. The more common view, advocated by many scholars (see for example: Greene 1989; Hirschl 2004; Roach 2001), is that for rights to be adequately protected there needs to be an entrenched bill of rights. Indeed, proponents who insist that parliamentary systems are capable of protecting rights through institutional checks and balances are seen to be laughably naïve. Far from being an effective system of checks and balances, responsible government is understood in Canada to underpin the increasingly unchecked concentration of power in the hands of first ministers, who are confronted by impotent oppositions and “trained-seal” backbenchers in their own parties. Nor is this decline of checks and balances within legislatures offset by an effective bicameralism, which is non-existent in the provinces and ineffective in Ottawa.

Thus, it is said that in Canada the only meaningful separation of powers – and consequently the only effective inter-institutional checks and balances – lies between the judiciary and Parliament, not between the executive and the legislature, or indeed, between the Houses of Parliament (Hogg 2001). For example, T.R.S. Allan argues that “it seems necessary ... to match executive discretion with judicial discretion” so that judges can check potential abuses coming from the executive branch of government (Allan 1993). Similarly, Ian Greene and his collaborators argue that those opposed to judicial power in Canada “fail to recognize the essentially corrective role of the courts in a system of parliamentary majority rule where the executive dominates the policy process” (Greene 1998).

The “corrective role of the courts” indicated by Green et al. is to supply precisely the moderating effect of inter-institutional dialogue that is otherwise thought to be missing from the Canadian scene. Indeed, the most prominent recent defence of the role of judicial power uses the “dialogue” metaphor, which holds that the dispassionate reason of judges can, in “conversation” with impassioned legislatures, assist the latter to achieve legitimate policy ends in more finely tuned – i.e., more moderate – ways (Hogg 1997). This is said to take place primarily under Section 1 of the Charter of Rights, which

of a bill of rights they simply felt that parliamentary government was more than adequate for the protection of individual freedoms (see for example: Ajzenstat 1997)

permits such “reasonable limits” on rights as can be “demonstrably justified in a free and democratic society.” To qualify under this clause, the “compelling purpose” of the policy must be achieved through legislative means that are “proportional,” in the sense of both having a “rational connection” to the purpose (i.e., actually achieving it) and “minimally impairing” the right in question. Since compelling purpose and rational connection are most often conceded, the inter-institutional conversation is about designing the most moderate policy means under the minimal impairment test. The Court’s task, in short, is to ensure that an extremist policy “sledgehammer” is not used when a more moderate policy “fly swatter” will do.

As indicated, Australia, unlike Canada, remains a notable holdout against the contemporary bill of rights juggernaut.² In part, this is because the other avenues of moderating inter-institutional “dialogue” remain plausible there. Although Australia has a British-style Parliamentary system of responsible government characterized by the executive-enhancing party discipline, especially in the lower house, the elected Senate is a much more effective check on the executive dominated lower house of Parliament. Therefore, when the question of adopting a bill of rights emerges, it is possible in Australia to use bicameralism to sustain the older argument that the proposed judicial check is unnecessary.³ Thus during the 1988 debates on constitutionally entrenching rights, it was said, “the Senate, is the watchdog for the people and the States to see that they are not robbed of any of their rights or freedoms” (Knopff and Morton 1992, 190). It was further argued that the Senate “is the people’s insurance or safety valve. It is the House of review for all legislation” (Ibid. 202). Moreover, the Senate can perform this function because it enjoys “some degree of insulation from the power of the executive government,” (Ibid.) and thus has a “deliberative aspect to it which does not immediately characterize the House of Representatives” (Ibid.). In this view, the Australian Senate achieves the same kind of reasoned check on the more impassioned lower house that the Canadian dialogue theorists attribute to the courts. In short, the argument that non-judicial checks can protect rights as well or better than a judicially enforced constitutional bill of rights remains more cogent in Australia than in Canada, especially with respect to bicameralism. This notion has thus far helped to forestall an entrenched bill of rights in that country.

In short, Canada and Australia have institutionalized two different and long-standing streams of modern liberal-democrat constitutionalism: one embracing enhanced judicial power, while the other resists. The question, then, is how do we set about testing these long-standing streams of liberal constitutionalism in the realm of rights?

Testing Institutional Checks and Balances

² With Britain adopting its *Human Rights Act* in 2000, Australia remains the only Westminster parliamentary tradition without some form of a bill of rights.

³ This is not to suggest that the Australian High Court plays no role in the government of Australia. I am merely suggesting that the High Court does not play the pre-eminent role in protecting rights like its Canadian counterpart.

An obvious way to contribute to this ongoing debate is to conduct comparative rights case studies of the policy process and outcomes on rights issues in Australia and Canada, two otherwise very similar countries that are on opposite sides of the debate. This paper conducts such a case study on the issue of same-sex marriage. Of course no single case study can settle the issues at stake. This paper contributes only one piece of evidence to the more substantial body of comparative literature that is required.

The choice of same-sex marriage – obviously only one of many eligible issues – was guided by three criteria. First, the competing claims of institutional moderation are obviously best tested with issues that arouse considerable public passion. This is most likely to occur in the context of what Smith and Tatalovich term “two sided moral controversies,” “like abortion, school prayer and gay rights,” which provoke deep conflict between divergent constituencies and interest groups” (Smith and Tatalovich 2003). By contrast, “the politics of sin, which, for example, include drunk-driving, drug abuse and murder,” pose one-sided moral issues, with virtually everyone promoting the same policy end (though with some disagreement about means). Meier (1999) observes, “no one is willing to stand-up for sin,” (683) and “opposition to sin is the equivalent of joining the other side at Armageddon” (685).

Mooney (2001) further suggests that morality politics are characterized by a debate over first principles, in which, “at least one advocacy coalition ... portray[s] the issue as one of morality or sin and uses moral arguments in its policy advocacy” (Haider-Markel 2001; Meier 1994). Kenneth Meier (1994, 4) suggests that morality politics are when “one segment of society attempts by governmental fiat to impose their values on the rest of society.” These policies at their core try to change values and alter behaviour. As such, moral controversies are, “essentially cultural disputes affirming certain cultural values while rejecting others” (Smith and Tatalovich 2003). Thus, the polarizing tendency of two-sided moral controversies provides a unique opportunity to test the competing claims of which set of institutional checks and balances achieves the most moderate policy.

A second criterion of choice for this kind of comparative study is that the moral issue under consideration must have arisen when the institutional difference of concern (Charter/Courts vs. Senate) was in place – i.e., since the 1982 adoption of the Canadian Charter of Rights and Freedoms. Third, during this post-1982 period, it is best if the issue was politically engaged at about the same time in both countries, in order to minimize the confounding effect of different time-dependent policy sensibilities. The same-sex marriage issue qualifies in all three ways. It is certainly a two-sided moral controversy that arouses passion, and it was (and indeed remains) a matter of controversy and decision in both countries during the late 1990s and early 2000s.

An additional problem emerges of how to operationalize the idea of policy “moderation.” This is at once easy and difficult with respect to these kinds of moral issues. It is easy to the extent that public policies on these issues tend to fall along a uni-dimensional continuum between two intransigent poles. It is difficult to the extent that, while the distinction may be clear on a conceptual level, when one attempts to unpack “real world”

issues in this simplistic model, one comes to the realization that they are not as cut and dry as they appear. As noted above, from the perspective of either polar position, where passions tend to run high, allegedly middle-ground compromises are actually strategic positions of the other pole. Viewed from either pole, so-called moderates, or middle ground compromisers are sliding – wittingly or unwittingly – down the slippery slope to the opposite pole. Mooney and Lee (2001, 26) agree “there is a continuum ... rather than a categorical shift from consensus [one-sided] to contentious [two-sided].”

Thus, while recognizing the difficulties and pitfalls involved, this paper adopts as its working definition of “moderation” on moral issues any position that falls between the two most intransigent poles of the policy continuum. Confidence in using this operationalization is strengthened when acknowledged liberal democracies inhabit different places along the policy continuum, including middle-ground positions, especially if these positions are the result of recent debates rather than the decisions of bygone eras, maintained now maintained only by inertia. One can perhaps be even more confident in this operationalization if, in regimes with judicially enforced constitutional rights, judges themselves take different positions on the continuum. In a single regime, this may happen among judges at different levels and in different courts, or, more dramatically, among the several judges of the highest court of appeal. Across regimes, we may also see different national judiciaries taking quite different positions in their interpretation of very similar (even identical) constitutional wording.

Applying this operational definition to the case of same-sex marriage, we find at one end of the policy continuum a complete ban on same-sex relations, instead maintaining the traditional marriage definition (and marriage-like partnerships). At the opposite end of the spectrum, we find complete recognition of same-sex marriage. In the moderate middle we find some type of civil union or registered domestic partnership, vesting all of the legal rights and privileges of heterosexual couples, stopping short of full marriage.

Civil unions, *de facto* relationships or registered domestic partnerships first emerged in Europe during the late 1980s as a middle ground compromise for same-sex couples to receive some of the benefits of married couples. Denmark, for instance, in 1989 enacted such a statute, conferring some of the rights of heterosexual couples on same-sex couples. They, however, stopped short of full marriage and did not allow same-sex couples to adopt children. Variations on this law were adopted in Norway (1993), Sweden (1995), Iceland and Greenland (1996), France (1999) Germany (2001), Finland (2002), the United Kingdom and New Zealand (2005), South Africa (2006), and Italy (2007) (CBC 2007).

Civil unions are controversial because they represent a moderate middle position on the policy spectrum surrounding same-sex marriage. Supporters of same-sex marriage suggest that anything less than full same-sex marriage is a tacit form of discrimination based on sexual orientation. Contrast this to marriage traditionalists who suggest that civil unions are the first step down the slippery slope to the inevitable recognition of marriage for same-sex couples. The irony, in this is that these two arguments come close

to mirroring one another. Neither side is willing to acknowledge the other for fear of sliding towards the oppositions preferred position.

This paper does not attempt to settle this contentious debate over the merits of same-sex marriage. Rather, it has a much narrower focus in the sense that it examines how judicial and legislative checks and balances have affected this plausible moderate policy compromise in Canada and Australia. It is to that question that I now turn.

The Case of Same-Sex Marriage in Australia

The constitutional power of marriage (section 51 (xxi)) is one of the 39 enumerated exclusive powers of the Australian Commonwealth Parliament. Until 1961 marriage was governed by state and territory law, however, when a marriage bill was introduced into the Commonwealth Parliament in 1961, it did not define marriage. During second reading, then Attorney-General Barwick said, “it will be observed there is no attempt to define marriage in this bill. None of the marriage laws which I have referred contains any such definition” (Norberry 2004).

Yet, the definition of marriage was raised during Senate debate. For instance, a Country Party Senator unsuccessfully proposed that marriage should be defined and suggested a number of amendments to the act “marriage” means the union of one man with one woman for life to the exclusion of all others, such union being contracted in the manner provided in this Act” and “marriage” means the voluntary union of one man with one woman, for life to the exclusion of all others” (Ibid.. 2). Both amendments were defeated in the Senate the latter, 40 votes to 8.

While not specifically entrenching a definition of marriage the pith and substance of the English common law definition of marriage does appear in the 1961 Act. Section 46 of the Act suggests that celebrants of marriage should explain to the couple the nature of marriage in Australian law with words that include, “[m]arriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life [or words to that effect].” It is important to note that this was meant as a *guide* rather than a *definition* of marriage.

It was not until 2004 that the *Marriage Act* was once again in the spotlight. The Howard Government moved to amend *Marriage Act 1961* to include the common law definition of marriage as “man and a woman to the exclusion of all others entered voluntarily for life.” The amendment also sought to exclude the recognition of same-sex marriages from international jurisdictions (e.g. Canada) and to prevent same-sex couples from adopting international children (Norberry 2004).

In his second reading speech, Attorney-General Phillip Ruddock outlined the reasons for the amendment:

The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best

environment for raising children. The government has decided to take steps to reinforce the basis of this fundamental institution (Ruddick 2004).

The “trade-off” for opposition parties supporting the ban of same-sex marriage was a settlement allowing gay couples to have the same rights of superannuation as married couples (Cooper 2005). The marriage amendment was conditionally supported by the Labor Party only because it entrenched the common law definition of marriage, rather than adding a level of discrimination against gay and lesbian couples. Shadow Attorney-General Nicola Roxon said in a press release “Labor has made it clear that we do not support gay marriage” (Cooper 2005). Critics countered that this move was not done for gay couples specifically, but rather it was driven by a concept of interdependence which may have include elderly sisters living together in an interdependent relationship.

While the Labor Party supported the marriage amendment in principle, they did not support the second piece of the amendment which would have prevented same-sex couples from adopting foreign born children. Since adoption is a state matter, Labor was hesitant to interfere in states realm of competence (House of Representatives Official Hansard 2004). So while the bill passed the House of Representatives with ease, Labor and smaller party Senators referred the bill to the *Senate Committee on Legal and Constitutional Affairs* for an inquiry. The Senate Committee was charged with looking at whether the power of legal interpretation of marriage, whether the draft bill breached international treaties, and the consequences of the bill coming into law (Senate Official Hansard 2004).⁴

It is worth noting that we see the Senate playing its traditional role of the moderating sober voice. Rather than passing a bill which would have wide and sweeping ramifications without much public consultation, we see the bill referred to a Senate committee for further inquiry. This allows Senators and indeed the public to gain perspective and time, perhaps allowing cooler heads to prevail. Also of note is the debate within the Senate over when the committee report would be tabled. Liberal-Coalition Senators wanted the report tabled quickly, whereas Labor and Opposition Senators wanted the report to be tabled after a suitable consultation period. After some debate, it

⁴ Specifically the committee was charged with looking at:

1. The legal interpretation of the marriage power in the constitution, and the extent of this power with regard to the creation of marriage law and the recognition of foreign marriages
2. Whether the bill raises internal comity issues, or inconsistency with laws, politics and standards o domestic and overseas jurisdictions
3. Whether the bill breaches international instruments including the Hague Convention and human rights mechanisms prohibiting discrimination on the grounds of sexual orientation.
4. Whether treaties relied upon in Schedule [2] of the Bill provide the Commonwealth with the necessary power to act, and how this action interferes with state and territory responsibilities to legislation for and to run adoption processes
5. The consequences of the bill becoming law and those remaining avenues available to the Commonwealth for legal recognizing inter-personal relationships including same-sex relationships
6. The government’s insistence that this Bill be introduced as a matter or urgency when there has been no demonstrated reason for its urgent introduction and no community consultation for the provisions of the bill

was decided that the committee would table the report on October 7th 2004 to prevent the Amendment being used as a possible election wedge.

The day after (Thursday 24 June 2004) the Senate committee decided that the table date would be October 7th. Attorney-General Phillip Ruddock re-introduced the marriage legislation into the House of the Representatives. There was, however, a change in the bill. This incarnation of the *Marriage Amendment Bill 2004 (no.2)* did not contain the provision about same-sex couples adopting international children. The Bill was re-introduced on the grounds that, “there is significant community concern about the possible erosion of the institution of marriage” (House of Representatives Official Hansard 2004). Ruddock cited cases of same-sex couples seeking, “recognition of offshore arrangements” as part of the reason for the reintroduction of the Amendment. Ruddock also claimed:

It is the government’s view that the provisions of the marriage act which we are seeking to enact should not be delayed by and should not be subject of Senate referral. The opposition having indicated its support for these measures should endure – having restricted it to those matters that relate to a definition of marriage and the recognition of overseas marriage, which they support – that they receive speedy passage (House of Representatives Official Hansard 2004).

The response from the Labor Party was swift. Said Shadow Attorney-General Nicola Roxon, “[t]his is extraordinary. [T]he Attorney want[s] to use the processes of this House to get around procedures that have been agreed to in the Senate” (House of Representatives Official Hansard 2004). Ms. Roxon also addressed the perceived need for speedy passage of the legislation in the face of the petitions before the court. “The Attorney would have us believe [...] that the reason for needing to urgently press ahead with this matter is that, if we do not, there would be a major crisis in this country. [...] He has manufactured a crisis out of this matter. There is no crisis” (House of Representatives Official Hansard 2004).

Despite the reaction from the Labor benches, the Shadow Attorney-General conceded that Labor would still support the bill. She said, “the content of the bill is something that we do not have an objection to, and obviously we will not be voting against the bill. But we object strenuously to the process which is being used” (House of Representatives Official Hansard 2004). However, she warned that her colleagues in the Senate may not be as supportive. Indeed, the Ruddock amendment was denied first reading in the Senate (27 against 25 in favour) in favour of the previously announced Committee process (Senate Official Hansard 2004). Again, we see the Senate pulling back on the reigns of the lower house.

After the second marriage Bill was denied first reading in the Senate, the Prime Minister remained committed to changing the *Marriage Act 1961*. In an address to the National Marriage Forum, Prime Minister John Howard said:

If there is to be a change in the understanding of marriage in this country [...] it is not something that should happen bit by bit, judgement by

judgement, through a judicial process. Rather, if there is a change, it is a change which is to be legislated by an expression of will of the Australian people through the national parliament (Howard 2004).

He continued that he failed to see the necessity of a Senate inquiry; “[y]ou don’t need a Senate inquiry on something like that. It’s not a complicated issue” (Ibid.). The Prime Minister also committed to re-introducing the bill without the adoption component in the next sitting of Parliament.

At the same forum, Shadow Attorney General Nicola Roxon commented that the Labor party remained committed to upholding the traditional definition of marriage. She said:

Labor supports these provisions [banning same-sex marriage and recognition of overseas marriages]” (Roxon 2004). She continued “Labor does believe that the public should have a right to have a say on this matter whether they support or oppose the bill. That’s why we supported sending the Bill to a Senate committee (Ibid.).

On August 12 2004 the *Marriage Amendment Bill 2004 (no 2)* was re-introduced to the Senate for first reading. The bill was read and the debate over the bill was heated and at times rather unparliamentary. The bill was passed with a 38-6 vote in favour of the amendment (Senate Official Hansard 2004). However, it is important to note that the original bill that was referred to committee – *Marriage Amendment Bill 2004 (Cth)* - would remain at committee, with a narrower mandate of only looking at overseas adoptions by same-sex couples.

It is significant for the purposes of this paper to examine the role that the Senate played in moderating the impassioned lower house. When the *Bill (no 1)* was introduced into the Senate there was debated and referred to a Senate committee charged with delving deeper into the ramifications of passing such legislation. There was a further desire of the lower house to have the committee report sooner than is customary in an attempt, according to some, to have the bill become part of the impending legislation. Again, the Senate pulled back the House deciding on a reporting date which would not interfere with a possible early election. Once the Senate committee decided on a reporting date, again the lower house tried to circumvent the process debated in the Senate. The bill was re-introduced in an amended form examining only the same-sex marriage aspects of the bill. Since the committee was in the middle of receiving submissions, the Senate denied the bill first reading as to not interfere with the committee process. When the *Bill (no 2)* was introduced into the Senate a third time, only after the committee submission date had passed, was it debated and finally passed.

Same-Sex Marriage in Canada

As mentioned above, in 1982 the Canadian Government under the leadership of Pierre Elliot Trudeau patriated the Canadian Constitution and added an entrenched *Charter of Rights and Freedoms*. Of particular interest to historically discriminated-against groups, women for instance, was the inclusion of Section 15(1) of the Charter which laid out the equality provisions, in particular the enumerated grounds for anti-discrimination

protection. It is important to remind readers that this list while extensive was not exhaustive and that additional protections could be extended via Section 15(2) the non-enumerated grounds clause.

Despite the fact that a number of protections were extended to other disadvantaged groups, including criminals, such political rights were not extended to gays and lesbians. Then Justice Minister Jean Chretien was adamant that his government did not want the words “sexual orientation” in the Charter of Rights (Morton 2000). Notwithstanding the exclusion from the Charter, gays and lesbians made significant inroads on the way to the recognition of same-sex marriage.

The trajectory to same-sex marriage can be traced to a tetralogy of Charter cases. The first problem facing the gay community was that they were not considered a discrete and insular minority under the law and therefore not protected on the basis of sexual orientation under Section 15(1) of the Charter. In *Egan and Nesbitt v. Canada* ([1995] 2 S.C.R. 513) the Court considered the constitutionality of excluding same-sex couples from federal old age security programs. Egan, who had recently retired filed for spousal support for his partner of 21 years. The government denied the claim on the basis that Egan and his partner did not fit the definition of spouse under federal law. Egan appealed this decision on the grounds that his partners’ exclusion from the benefits was discriminatory on the grounds of sexual orientation.

The Court delivered its opinion it unanimously recognized that sexual orientation was indeed a discrete and insular minority which should be protected under Section 15(1) of the Charter. However, the Court also ruled under Section 1 analysis that the exclusion of same-sex couples from old age benefits was an acceptable limit on same-sex rights. Justice Sopinka, writing in concurrence, suggested that he would accept an incremental change from the political realm in the area of homosexual rights. Thus, while Sopinka agreed with the majority that the denial of benefits to same-sex couples was a violation of the Charter, he concluded that it could be saved under section 1 analysis.

In *Egan* we see the court playing this moderating sober-second-thought role that dialogue theorists suggest is possible. In particular, we see this role coming from Justice Sopinka and his incremental approach to policy change.

The second case in the tetralogy is *Vriend v Alberta* ([1998] 2 S.C.R. 493). Vriend had been a school teacher at a Christen school who had been fired when it was discovered he was a homosexual. Vriend challenged his firing with the *Alberta Human Rights Commission*. The problem was that the sexual orientation was not recognized under the *Individual Rights Protection Act*, and therefore he challenged the legality of the Act in court. He challenged the *Act* based on the rights won in *Egan*, arguing that sexual orientation was a protected analogous non-enumerated right under section 15(2) of the Charter.

At issue in *Vriend* was the question of whether a legislature – in this case the Alberta legislature – could choose not to add sexual orientation to their provincial human rights

act. In particular, the question posed was, “if a legislature, purporting to speak on behalf of the people, wishes to discriminate against gays and lesbians, should the courts “interfere with democracy?” This was a particular difficulty since a number of times the legislature had decided not to include sexual orientation into the *Individual Rights Protection Act* (see for example: Morton 1999). The Court which ruled in *Vriend* was vastly different from the court that heard *Egan*. Justice La Forest had retired, and Justice Sopinka passed away suddenly, placing two new justices on the bench.

The Court agreed with *Vriend* that the exclusion of sexual orientation from the *Individual Rights Protection Act* was a violation of the Charter under section 15. Moreover, the exclusion could not be saved under Section 1. Indeed, the Court found a lack of a pressing and substantial reason for the Alberta Government to exclude sexual orientation. Strikingly, 8 of the 9 Justices choose to “read in” sexual orientation into the *Alberta Act*. By reading in sexual orientation rather than striking down the law and allowing the legislature to remedy the *Act*, we see a dramatic shift from *Egan* to *Vriend*. Far from the incremental approach taken by Justice Sopinka, we see a statement by the Justices that discriminatory practices against gays and lesbians would no longer be tolerated.

Here we see the Court playing the role that the critics contend is so often the case with judicial intervention. Indeed, it led F.L. Morton to conclude that judicial intervention into policy outcomes is more of a “monologue” rather than a dialogue (Morton 1999; Morton and Knopff 2000).

The third case in this tetralogy is *M v H* ([1999] 2 S.C.R.3). At issue in *M v H* was Section 29 of the *Ontario Family Law Act* which excluded same-sex couples from the protections provided to heterosexual common law couples legal and family protections in the event of a partnership ending. “M” was in a long-term lesbian relationship (12 years) with “H.” Over the course of the relationship, they were completely interdependent ranging from pooling all income, shared expenses, and they were sexually intimate. When the partnership broke down, H informed M that she was not entitled to income or assets acquired over the 12-year period because of the lesbian partnership. If, however, the partnership had been a heterosexual relationship M would have been entitled to legal protections (CBC 2007).

As a result, M filed a statement of claim challenging the constitutionality of Section 29 of the *Ontario Family Law Act*. M’s argument was based on the constitutional ground-work laid in *Egan* and *Vriend*. Specifically, her theory was that legislative schemes that include common law heterosexual partners, but not homosexual partners, are discriminatory on the basis of sexual orientation and violate the Charter (*Egan*). Moreover, based on the Court’s ruling in *Vriend*, discrimination cannot be justified and therefore must be remedied. These were the (powerful) constitutional prongs of M’s argument. In an 8-1 decision, with Gonthier dissenting, the Court held that M’s assertion was correct. Specifically, the Court held that by excluding same-sex couples from the legislation, the *Act* was discriminatory on the basis of sexual orientation. The Supreme Court ruling had an immediate impact rendering Section 29 of the *Family Law Act* of no

force or effect and giving the Ontario Legislature 6 months to bring the Act into line with the Court's ruling (CBC 2007).

Again, we see the Court abandon the pragmatic incremental approach in favour of the approach outlined in *Vriend*. The Court's ruling in *M v H* seems to suggest that married couples and cohabitating same-sex couples are the same in law. Thus, if married couples and common law couples are the same in law and same-sex couples are technically common law (*M v H*), then it may be safe to conclude that married couples and same-sex couples are the same. This taken together, gives gay rights advocates a strong legal argument to push for full same-sex marriage recognition.

The response to the ruling in *M v H* was quick from all levels of government. For instance, the federal government just five days after *M v H* was handed down moved to pass the *Act to Establish the Public Sector Pension Investment Board* (S.C. 1999, C. 34 (Bill C-78)). The amended act gave survivor rights to same-sex couples.

However, as a direct response to *M v H* the Federal Parliament passed a motion in June 1999 which affirmed 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 women 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 (CBC 2007).

Now it is important to note, that motions, much like pre-ambls have no legal force, but are important symbolically. The *Definition of Marriage Motion* passed 216-55 in favour of the heterosexual definition of marriage (Ibid.).

Taken together – the motion and new legislation – they seem to suggest that same-sex couples all of the benefits of marriage, without disrupting the traditional definition. In this sense, we see the court serving as moderate voice that is suggested by dialogue theorists. The Court ruled that the exclusion of same-sex couples was discriminatory, struck down the offending laws, but gave the legislatures a change to succeed with a legislative “sequel” that achieved the policy goals of the government.

An extension of this legislative sequel came in February of 2000 when the Federal Government introduced *Bill C-23: The Modernization of Benefits and Obligations Act* (S.C. 2000, c.12). The Act would amend 68 federal statutes, bringing them in line with the *M v H* ruling, by recognizing same-sex couples as equals with common law partners. *Bill C-23* maintained a distinction between common law relationships and marriage, with same-sex couples only permitted to enter into the former. Implicitly this meant that marriage was only available to heterosexual couples. Not wanting to leave this to chance, traditional marriage advocates were successful in amending *Bill C-23* to include, for the first time, a traditional heterosexual definition of marriage into Canadian law (see para 1.1).

Yet, gay rights advocates were not satisfied with mere recognition of a civil union, indeed some suggested that a civil union relationship denying equal marriage was analogous to “separate but equal” treatment in the U.S. Two lower court decisions, one in Ontario and one in BC challenged the federal definition of marriage as a man and a woman to the exclusion of all others. In *Halpern et al v Attorney General of Canada et al* ([2003] 225 D.L.R. (4th) 529 (Ont. C.A)) and *EGALE Canada v Canada (Attorney General)* ([2003] 225 D.L.R. (4th) 472 (B.C.C.A)) the Appeal Courts of Ontario and BC respectively, found that the common law definition of marriage, i.e. “a man and a woman to the exclusion of all others” was a violation of Section 15 equality rights. Moreover, this violation could not be saved under Section 1 jurisprudence. The Federal Government choose not to appeal either decision to the Supreme Court of Canada.

On June 17, 2003, the Federal Government announced that the decisions from the Courts of Appeal were correct, and decided to propose legislation that would respect the rulings. Accordingly, the Federal Government drafted legislation and asked the Supreme Court of Canada for a Reference opinion on the constitutionality of the draft bill. This request set the stage for the final case in our tetralogy – *The Reference re: Same-Sex Marriage* ([2004] 3 S.C.R. 698).

In July of 2003, the Reference asked whether the power to change the legal definition of marriage was in the power of the federal government, whether same-sex marriage was consistent with the Charter and whether religious persons were compelled to perform same-sex marriage if it was against their religious beliefs.⁵ The objective in seeking a reference opinion, according to former Justice Minister Irwin Cotler, “was to ensure that when the bill was debated through the parliamentary process, that debate would be informed and constructive” (Cotler 2006). An additional question was added in January of 2004 asking whether the opposite-sex requirement for marriage was constitutional.

Again, quoting Minister Cotler:

The fourth question was included in the Reference, not because the government supported this position [...] but because in the interests of democracy, we wanted to ensure that those who disagreed with the

⁵ Specifically the Court was asked:

1. Is the Proposal for an Act respecting certain aspect of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, what particular or particulars and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious official from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law-Civil Law Harmonization Act, No. 1 consistent with the Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

position of the government could argue this position before the court”
(Ibid. 63).

Cynically, it was suggested that the fourth question was added to avoid having the opinion delivered during a closely contested election campaign.

The opinion of the Court was delivered in December of 2004. In answer to question 1 it declared that:

The proposed legislation was intra vires Parliament [...] the legal capacity for civil marriage falls within the subject matter of 91(26) [...] and do[es] not relate to the core of the power in respect of ‘solemnization of marriage’ under 92(12) (*Reference re: Same-Sex Marriage* at para. 18).

In answering question 2 the court said:

The purpose of s. 1 [of the act] is to extend the right to civil marriage to same-sex couples and, in substance, the provision embodies the government’s policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the proposed legislation and with the preamble thereto, points unequivocally to a purpose which, far from violating the Charter, flows from it (at para. 43).

The answer to question 3 was that:

Religious freedom in s. 2(a) of the Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs (at para. 60).

Surprisingly, the Court declined to answer the fourth question; “an answer to Question 4 has the potential to undermine the government’s stated goal of achieving uniformity in respect to civil marriage across Canada” (at para. 72). Following the decision the government tabled legislation in February 2005, with the *Civil Marriage Act* receiving Royal Assent on July 20, 2005.

It appears that once again we see the Court playing a moderating role on the issue of same-sex marriage. The court ruled that the constitutional right to change the common-law definition of civil marriage and that the policy goal underlying the change “flowed from” Charter values. Moreover, the Court ruled that a religious official could not be compelled to perform a same-sex marriage if it were against his or her religious convictions. Finally, the Court declined to rule on the constitutionality of opposite-sex marriage for fear “of undermining the government’s stated goal.” The Court gave a legal opinion to ensure parliamentary debate “was informed and constructive.”

This, however, may not be the best explanation of the decision. The judgement was heralded as the Court being deferential to parliamentary will. On closer inspection, it can be read as being analogous to a mother responding to a child, “you make your own choice,” all the while knowing that if the wrong choice is made, the mother will step in and correct it. Now, in fairness to the Court, they did allow Parliament to respond to the decision, and it is useful to remember that lower court decisions striking down the heterosexual definition of marriage do not speak for the whole of Canada. Until the

Supreme Court speaks, it is impossible to say with any authority what the final ruling would be.

Moderation Reconsidered?

The question remains as to which set of institutional arrangements – legislative or judicial checks and balances – best fulfil the moderating claims of checks and balances theorists. For the case of same-sex relations in Canada and Australia, one has to be careful not to draw too much from one case study; however, some preliminary thoughts are in order.

At the Commonwealth level in Australia we see the Senate playing this moderating role of in the area of same-sex marriage. While the House of Representatives was willing to push through legislation entrenching the heterosexual definition of marriage as a “man and a woman to the exclusion of all other entered in to for life voluntarily,” the Senate took a much more pragmatic role. At the urging of Labor and the smaller parties, the bill was referred to a standing committee for further examination. And when the House of Representatives tried to push the bill through again, albeit in an amended form, the Senate denied it first reading. The Senate declined first reading favouring the established committee process. Only when the committee inquiry had completed the initial submission stage did the bill succeed in passing the Senate. More interestingly, the bill that was passed through the Senate was a much narrower version of the one that was initially introduced into the Senate. The Howard Government quickly found that the Senate would not be willing to pass all of the amendments suggested in the original bill. So we could conclude on this basis that the Senate played its traditional moderating role. More importantly, the Parliament of Australia is able to go back and reconsider their decisions, if they so choose.

In Canada, we see the court start by playing this moderating role in *Egan* but then quickly shift to one of polarizing in *Vriend*, and *M. v H*. Moreover, with careful reading, it can be suggested that a similar conclusion can be derived from the Reference case. But the role of the Court in pushing Canada toward same-sex marriage cannot be overstated. Just five years after Parliament voted overwhelmingly in favour of the traditional definition of marriage, lower courts ruled that this definition was unconstitutional (*Halpern*). Moreover, the Supreme Court of Canada gave tacit approval to same-sex marriage by declining to answer the fourth question posed to it in the *Reference*.

Dialogue theorists contend that judicial involvement in the policy process tends to promote moderate policy outcomes. Yet, the Canadian experience with same-sex unions does not support this claim, especially when viewed through a comparative lens with Australia. Indeed, in the Canadian case, it appears that judicial involvement is more likely to polarize the debate, rather than promote the “moderate middle.” This polarized outcome stands in stark contrast to the Australian experience where we see the Senate pulling back, and offering reflection on the decisions of the House of Representatives, thus promoting a more moderate middle outcome on the policy spectrum.

At this point, it is useful to remind my readers not to make too much of one case study. To determine the moderating or polarizing tendencies of Courts and legislatures, systemic case studies are needed. This paper adds but one piece to the larger body of literature needed to sustain this argument of moderation.

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