

# The New Parliamentary Sovereignty

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*Is parliamentary sovereignty still a useful concept in the post-Charter era? Once a central principle of Canadian constitutional law, parliamentary sovereignty has come to be viewed by many as being of little more than historical interest. It is perhaps not surprising, then, that the doctrine has received relatively little scholarly attention since the enactment of the Charter. But while it is undoubtedly true that the more absolute versions of parliamentary sovereignty did not survive the Charter's entrenchment, we should not be too quick to dismiss the principle's relevance entirely. In this paper I suggest that some variant of parliamentary sovereignty continues to subsist in Canadian constitutional law. I also suggest that the study of parliamentary sovereignty reveals an important connection between the intensity of judicial review and the degree to which Parliament focuses on the constitutional issues raised by a law during the legislative process. Parliament can expand its sphere of autonomous decision-making power relative to courts by showing that it is proactive about securing and promoting constitutional rights.*

*La souveraineté parlementaire est-elle toujours un concept utile dans l'ère postérieure à la Charte? Jadis un principe central du droit constitutionnel canadien, la souveraineté parlementaire est maintenant considérée, par plusieurs, comme ayant rien de plus qu'un intérêt historique. Il n'est donc peut-être pas surprenant que la doctrine a fait l'objet de relativement peu d'attention savante depuis l'adoption de la Charte. Mais quoiqu'il soit sans aucun doute vrai que les versions les plus absolues de la souveraineté parlementaire n'ont pas survécu à la validation de la Charte, il ne faudrait pas rejeter trop rapidement l'intérêt du principe tout à fait. Dans cet article, je suggère qu'une variante de la souveraineté parlementaire continue de subsister dans le droit constitutionnel canadien. Mon opinion est que l'étude de la souveraineté parlementaire révèle un lien important entre l'intensité de la révision judiciaire et le degré auquel le Parlement se concentre sur les questions constitutionnelles soulevées par une loi pendant le processus législatif. Le Parlement peut élargir la sphère de son pouvoir décisionnel autonome par rapport aux tribunaux en montrant qu'il est proactif quant à la protection et la promotion des droits constitutionnels.*

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## I. Introduction

Is parliamentary sovereignty still a useful concept in the post-*Charter*<sup>1</sup> era? Once a central principle of Canadian constitutional law, parliamentary sovereignty has come to be viewed by many as being of little more than historical interest.<sup>2</sup> *Charter* rights place clear limits on Parliament's law-making powers, and the *Charter*'s "notwithstanding clause," a device ostensibly intended to preserve parliamentary sovereignty by allowing legislatures to enact laws inconsistent with *Charter* rights, has been invoked in only the rarest and most controversial of circumstances.<sup>3</sup> This suggests that, as a matter of both law and practice, parliamentary sovereignty has been severely limited.<sup>4</sup>

It is perhaps not surprising, then, that the doctrine has received relatively little scholarly attention since the enactment of the *Charter*. But while it is undoubtedly true that the more absolute versions of parliamentary sovereignty did not survive the *Charter*'s entrenchment, there are at least two reasons why we should not be too quick to dismiss the principle's relevance entirely. First, the Supreme Court of Canada continues to decide cases on the basis of the doctrine of parliamentary sovereignty. Second, parliamentary sovereignty raises important questions about "the reality of Parliament's place within the constitutional order."<sup>5</sup> While it may not be useful to speak of Parliament as being "sovereign" in the traditional Diceyan sense,<sup>6</sup> engaging with some of the questions that parliamentary sovereignty raises can help us develop a more

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 On the historic centrality of parliamentary sovereignty, see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72. See also Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the *Canadian Charter of Rights and Freedoms*" (1983) 31:2 *Political Studies* 239 at 239. For a contrary view, see John D Whyte, "The *Charter* at 30: A Reflection" (2012) 17:1 *Review of Constitutional Studies* 1 at 5 [Whyte]. Of course, parliamentary sovereignty was not absolute even before the entrenchment of the *Charter*, because of the division of powers and the state's commitment to the rule of law: see Bayefsky, *supra* note 2 at 239; Janet Hiebert, "Charter Evaluations: Straining the Notion of Credibility" (June 2015) (unpublished; copy on file with author) at 3.

3 Mark Tushnet, "*Marbury v Madison* around the World" (2004) 71 *Tenn L Rev* 251 at 268 [Tushnet, "*Marbury*"]. See also Barbara Billingsley, "Section 33: The *Charter*'s Sleeping Giant" (2002) 21 *Windsor YB Access Just* 331 at 337 [Billingsley].

4 Elliot speaks of there being "practical political" limits on sovereignty in the British context: see Mark Elliot, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22:3 *LS* 340 at 342 [Elliot, "New Constitutional Order"]. I am grateful to Grégoire Webber for prompting me to make this distinction.

5 Elliot, *ibid*. See also Peter C Oliver, "Sovereignty in the Twenty-First Century" (2003) 14:2 *King's College LJ* 137 [Oliver, "Sovereignty"].

6 Nicholas W Barber suggests as much in "The Afterlife of Parliamentary Sovereignty" (2011) 9:1 *Intl J Const L* 144 [Barber].

coherent account of Parliament's "constitutional functions."<sup>7</sup> A similar process of reflection has generated important new insights about institutional roles in the United Kingdom.

In this paper I suggest that some variant of parliamentary sovereignty continues to subsist in Canadian constitutional law. I also suggest that the study of parliamentary sovereignty reveals an important connection between the intensity of judicial review and the degree to which Parliament focusses on the constitutional issues raised by a law during the legislative process.<sup>8</sup> Parliament can expand its sphere of autonomous decision-making power relative to courts by showing that it is proactive about securing and promoting constitutional rights.<sup>9</sup>

I begin this paper by describing some of the insights that have emerged from recent debates about parliamentary sovereignty in the United Kingdom. In Part III, I examine how Canadian courts have invoked the concept of parliamentary sovereignty since the *Charter's* entrenchment. Part IV discusses the relationship between parliamentary sovereignty and the *Charter's* notwithstanding clause. In Part V, I show how questions about parliamentary sovereignty being examined in the UK might help Canadian scholars generate new insights about Parliament's role as a constitutional actor. I elaborate on what this means for the relationship between Parliament and the courts in constitutional matters, before concluding in Part VI.

## II. Parliamentary sovereignty in the United Kingdom

In this section I describe AV Dicey's original account of parliamentary sovereignty and outline some of the critiques that have been levelled against it over time in the UK. While the Diceyan account continues to exert a gravitational pull — some would even say an "emotional pull"<sup>10</sup> — over much of the

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7 Scott Stephenson distinguishes between "Parliament's constitutional... [and] political functions": Scott Stephenson, "Rights, Disagreement and Norms" (unpublished; copy on file with the author) at 14 [Stephenson] I will use the term "constitutional functions" throughout this article.

8 Others have also noted such a connection: see Janet L Hiebert, "The Human Rights Act: Ambiguity about Parliamentary Sovereignty" (2013) 14:12 German L J 2253 at 2272-73 [Hiebert, "Parliamentary Sovereignty"]; Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory" (2014) 34:3 Oxford Journal of Legal Studies 443 [Kavanagh, "Forbidden Territory"].

9 For a similar argument about institutional dynamics in a slightly different context, see Mark Tushnet, "The Political Institutions of Rights Protection" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 297 at 301.

10 Barber, *supra* note 6 at 152.

scholarship, it is by no means the only or most convincing theory of parliamentary sovereignty.

Dicey explains that parliamentary sovereignty has these essential components: (1) Parliament has “the right to make or unmake any law whatever;” (2) “No person or body” is authorized “to override or set aside the legislation of Parliament;”<sup>11</sup> and (3), parliamentary sovereignty is “absolute and continuing,”<sup>12</sup> meaning that Parliament cannot impose legal limits, whether substantive or procedural,<sup>13</sup> on its own authority or on the authority of subsequent Parliaments.<sup>14</sup>

This definition of parliamentary sovereignty can be criticized on several grounds. While Dicey suggests that Parliament’s law-making power is unlimited, he also says that Parliament may not enact laws that curtail its authority to legislate. These statements are difficult to reconcile.<sup>15</sup> Moreover, as his critics point out, Dicey’s theory is descriptively inaccurate because it does not account for non-legal limits, including political and moral limits, which constrain parliamentary sovereignty. It also fails to provide a “normative justification” for sovereignty.<sup>16</sup> Dicey’s theory is thus ill-equipped to respond to the argument that since “the polity embraces certain principles as fundamental, [...] those principles therefore trace the perimeter of the legislature’s competence.”<sup>17</sup>

To be fair, Dicey’s theory of parliamentary sovereignty was only ever intended to be legal in nature. He was aware that non-legal limits might well constrain Parliament.<sup>18</sup> Parliament could not enact laws for which it was unable

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11 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan & Co, 1965) at 39-40 [Dicey].

12 Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (New York: Oxford University Press, 2005) at 70 [Oliver, *Constitution of Independence*].

13 Oliver, “Sovereignty”, *supra* note 5 at 154.

14 Dicey, *supra* note 11 at 64-65; Oliver, “Sovereignty”, *supra* note 5 at 153.

15 I am grateful to Peter Oliver for pointing this out to me. See also John Lovell, “Legislating against the Grain: Parliamentary Sovereignty and Extra-Parliamentary Vetoes” (2008) 24:1 National J Constitutional L 1 at 6.

16 Elliot, “New Constitutional Order”, *supra* note 4 at 342, 367.

17 Elliot refers to Diceyan sovereignty as “normatively barren”: *ibid*. See also HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 69-70 [Hart]. There is some relationship here to Whyte’s argument in the Canadian context that “the tide of history — as well as the tide of popular conceptions of political legitimacy — is against the idea that political majorities provide all the legitimacy that political power requires”: Whyte, *supra* note 2 at 5.

18 Elliot, “New Constitutional Order”, *supra* note 4 at 341; Oliver, “Sovereignty”, *supra* note 5 at 138; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Portland, OR: Hart Publishing, 2009) at 3, 17 [Young, *Parliamentary Sovereignty*].

to obtain sufficient political support, for example, and certain laws are simply too morally odious to ever be proposed.<sup>19</sup>

Dicey's view can be contrasted with the more limited conception of sovereignty described by HLA Hart.<sup>20</sup> On this view of sovereignty, "legal limitations on legislative authority consist not of duties imposed on the legislator to obey some superior legislator but of disabilities contained in rules which qualify him to legislate."<sup>21</sup> Scholars have tended to treat these so-called "manner and form"<sup>22</sup> requirements — that is, procedures to be followed in the enactment of legislation — differently than "substantive" limits on parliamentary sovereignty.<sup>23</sup> Even adherents of the more rigid variants of parliamentary sovereignty tend to accept that manner and form requirements may be imposed on Parliament without it losing its essential sovereignty.<sup>24</sup>

The scholarship therefore recognizes that while descriptions of parliamentary sovereignty tend to originate in the Diceyan account, the concept can take different forms. "Whatever the history of the Westminster Parliament's sovereignty," Peter Oliver observes, "an array of possible approaches to it emerged in the twentieth century."<sup>25</sup> Oliver and Mark Elliot's work, in particular, has sought to explain how limited sovereignty is compatible with a commitment to fundamental rights.<sup>26</sup>

Oliver and Elliot both emphasize the need to articulate a "normatively rooted"<sup>27</sup> conception of parliamentary sovereignty. Oliver explains that "[f]rom the perspective of morality, sovereignty clearly relates to the ability, collectively and individually to determine one's own destiny."<sup>28</sup> But Parliament is

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19 I am thinking here of the "blue-eyed baby" example: Young, *ibid.* See also Jeff Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) [Goldsworthy].

20 Hart, *supra* note 17; Young, *Parliamentary Sovereignty*, *supra* note 18 at 15; Oliver, *Constitution of Independence*, *supra* note 12 at 6-7; Oliver, "Sovereignty", *supra* note 5 at 148-49.

21 Hart, *supra* note 17 at 70. For a judicial statement to this effect, see the remarks of Lord Steyn in *Jackson v Attorney General*, [2005] UKHL 56.

22 Young, *Parliamentary Sovereignty*, *supra* note 18 at 5-6; Oliver, "Sovereignty", *supra* note 5 at 150-51; Goldsworthy, *supra* note 19 at ch 7.

23 Oliver, "Sovereignty", *supra* note 5 at 154. See also Goldsworthy, *supra* note 19 at ch 7.

24 Goldsworthy, *supra* note 19.

25 Oliver, *Constitution of Independence*, *supra* note 12 at 7.

26 See also Stephen Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8:2 Intl J Const L [Gardbaum, "Reassessing"]; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [Tushnet, *Weak Courts Strong Rights*].

27 Elliot, "New Constitutional Order", *supra* note 4 at 367.

28 Oliver, "Sovereignty", *supra* note 5 at 138, n 2.

not free to determine the political community's destiny in any manner whatsoever. Parliament's "democratic legitimacy" is only assured when it respects those "enabling conditions" which are "implicit in the very idea of a democratic constitution."<sup>29</sup> In other words, "an empirically credible understanding of legal institutions in the democratic era must involve the recognition that sovereignty is only enabled (for law to be law rather than brute power, i.e., valid and legitimate law) where certain rights or limitations are already in place."<sup>30</sup>

In a similar vein, Elliot argues that theoretical accounts of parliamentary sovereignty must do more than state that sovereignty is a "political fact."<sup>31</sup> They must provide some explanation for why Parliament ought to be vested with sovereign authority. The search for a normative justification for parliamentary sovereignty leads Elliot to conclude that parliamentary sovereignty is necessarily a qualified concept.<sup>32</sup> Parliamentary sovereignty can only be defended as a theory if Parliament is constrained by fundamental rights.

Oliver also takes issue with Jeff Goldsworthy's suggestion that courts should never enforce limits on Parliament's sovereignty. While sovereignty concerns might arise from courts constraining Parliament of their own motion, he says, it is far less controversial for Parliament to ask the courts to perform this function.<sup>33</sup> This, in a manner of speaking, is what occurred when the *Canadian Charter of Rights and Freedoms* was enacted. Certainly Lamer J (as he then was) adopted this view of the historical record in *Reference Re BC Motor Vehicle Act*.<sup>34</sup> Through a Joint Resolution of the House of Commons and the Senate, the federal Parliament requested that the British Parliament enact legislation patriating the constitution and entrenching a *Charter of Rights and Freedoms*.<sup>35</sup> Section 24(1) of the *Charter* states clearly that "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied *may apply*

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29 *Ibid* at 150. See also Whyte, *supra* note 2 at 5.

30 Oliver, "Sovereignty", *supra* note 5 at 138, n 2.

31 Elliot, "New Constitutional Order", *supra* note 4 at 367.

32 *Ibid*.

33 Oliver, "Sovereignty", *supra* note 5 at 144.

34 *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 496-500, 24 DLR (4th) 536. I am grateful to Leo Russomanno for reminding me of this.

35 As Slattery explains, "The new Constitution is formally an enactment of the British Parliament proceeding on a joint resolution of the Canadian House of Commons and Senate.": see Brian Slattery, "Canadian Charter of Rights and Freedoms: Override Clauses Under Section 33 — Whether Subject to Judicial Review Under Section 1" (1983) 61:1 Canadian Bar Review 391 at 396. See also Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 204-06. I am grateful to Peter Oliver for pointing this out to me.

to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”<sup>36</sup>

Contemporary scholars hold a range of views on whether parliamentary sovereignty continues to subsist in the UK and, if so, in what form.<sup>37</sup> Indeed, debates about the status of parliamentary sovereignty have become commonplace since the enactment of the *European Communities Act, 1972* [ECA] and the *Human Rights Act, 1998*, both of which incorporate EU obligations into UK law.<sup>38</sup> Barber proclaimed the “death”<sup>39</sup> of the concept in the wake of the House of Lords’ decisions in *Factortame I* and *II*,<sup>40</sup> which appeared to accept that parliamentary sovereignty had been substantively limited by the ECA.<sup>41</sup> Other scholars are more circumspect. Elliot suggests that recent events have opened up a “gap” between “the theory of parliamentary sovereignty and the political reality of limited legislative competence,”<sup>42</sup> while Janet Hiebert notes that there is “ambiguity” around the current status of parliamentary sovereignty.<sup>43</sup> Still others argue that more traditional notions of parliamentary sovereignty have been preserved.<sup>44</sup>

Gardbaum classifies the UK as falling within the “new Commonwealth model of constitutionalism.”<sup>45</sup> His theory posits that Canada, the UK, New Zealand and some Australian states have developed a unique set of constitutional arrangements which incorporate elements of both parliamentary and judicial rights protection. In the UK, these arrangements are set out in the *Human Rights Act*. The new Commonwealth model “. . . is normatively appealing to the extent it effectively protects rights while reallocating power between courts and the political institutions in a way that brings them into greater balance than under the two more lopsided traditional models.”<sup>46</sup> Gardbaum’s

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36 *Charter*, *supra* note 1 [emphasis added].

37 For a review of the landscape, see Janet L Hiebert & James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge: Cambridge University Press, 2015) at 257 [Hiebert & Kelly]; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013 at 23, 41 n 66 [Gardbaum, *New Commonwealth*]; Barber, *supra* note 6.

38 See Elliot, “New Constitutional Order”, *supra* note 4.

39 Barber, *supra* note 6 at 144.

40 *Factortame Ltd. v Secretary of State for Transport* (1990), 2 AC 85 (HL); *R v Secretary of State for Transport, ex parte Factortame Ltd. (No 2)* (1991), 1 AC 603 (HL).

41 Barber, *supra* note 6 at 146.

42 Elliot, “New Constitutional Order”, *supra* note 4 at 341, 346.

43 Hiebert, “Parliamentary Sovereignty”, *supra* note 8.

44 Young, *Parliamentary Sovereignty*, *supra* note 18, referring to the impact of the *Human Rights Act* on parliamentary sovereignty.

45 Gardbaum, *New Commonwealth*, *supra* note 37.

46 Gardbaum, “Reassessing”, *supra* note 26 at 168.

theory thus suggests that UK constitutional law is not governed by a pure form of parliamentary sovereignty. In this respect, his theory is similar to the version of parliamentary sovereignty Oliver and Elliot advance. Parliamentary sovereignty is bounded by an *a priori* commitment to rights. While courts play some role in determining whether Parliament has legislated in a manner consistent with its commitments, the “final word” on constitutional questions rests with the legislative branch.<sup>47</sup>

It is important to note, then, that there is no single account of parliamentary sovereignty, and no consensus on the concept’s current status in the UK. The robust academic discussion about this concept in the UK has drawn out a number of thoughtful perspectives on Parliament’s constitutional functions; the limitations on its authority; the prerequisites for valid parliamentary decision-making;<sup>48</sup> and the interaction between the political and the judicial branches of government. The relative paucity of scholarship on parliamentary sovereignty in Canada since the entrenchment of the *Charter* has meant that not all of these questions have been probed to the same extent. In the remainder of this paper I attempt to do so in a limited way.

### **III. Post-*Charter* parliamentary sovereignty according to the Supreme Court of Canada**

The principle of parliamentary sovereignty has a lengthy but distinct history in Canada. Because of the division of powers, limited sovereignty has always been a reality in this country. As the Judicial Committee of the Privy Council explained in *Hodge v The Queen*,

When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred ... authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances ...<sup>49</sup>

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<sup>47</sup> *Ibid* at 169-70.

<sup>48</sup> Oliver, “Sovereignty”, *supra* note 5.

<sup>49</sup> *Hodge v The Queen* (1883), 9 App Cas 117 (UK). See also *Amax Potash Ltd. et al. v Government of Saskatchewan*, [1977] 2 SCR 576 at 590. I am grateful to Mark Walters and Warren Newman for pointing out the historical pre-cursors in this section to me.



The enactment of the *Canadian Bill of Rights*<sup>50</sup> in 1960 raised new questions about the nature of parliamentary sovereignty.<sup>51</sup> The subsequent entrenchment of the *Charter* placed further limits on the legislatures' sovereign spheres. Although the Supreme Court of Canada stated in the 1998 *Secession Reference* that "with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy,"<sup>52</sup> the *Charter* did not render the concept of parliamentary sovereignty obsolete. On the contrary, courts continue to give the concept legal and constitutional weight.

In *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*,<sup>53</sup> a case decided after the enactment of the *Charter* but before the *Secession Reference*, the Auditor General (an officer of Parliament) applied to court seeking to compel the executive to provide him with documents held by a Crown corporation and Cabinet. The Supreme Court concluded that the Auditor General's only remedy under the *Auditor General Act* was to report the failure to turn over the documents to Parliament. For institutional reasons, the matter was not justiciable.<sup>54</sup> In response to the argument that the executive in a majority government could simply impose its will on Parliament, thereby rendering the remedy of little use, the Court stated that "[t]he *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament. The ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament."<sup>55</sup>

In the *Secession Reference*, the Supreme Court referred again to the "sovereign will" but did not invoke parliamentary sovereignty as an unwritten constitutional principle.<sup>56</sup> Instead, it referred to the principle of *democracy*, which it explained co-exists alongside other unwritten constitutional principles, including constitutionalism and the rule of law.<sup>57</sup> "Viewed correctly," the Court observed, "constitutionalism and the rule of law are not in conflict

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50 SC 1960, c 44.

51 Luc Tremblay, *The Rule of Law, Justice* (Montreal & Kingston: McGill-Queen's University Press, 1997) [Tremblay].

52 *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 72, 161 DLR (4th) 385 [*Secession Reference*].

53 [1989] 2 SCR 49, 61 DLR (4th) 604.

54 *Ibid* at 109-10.

55 *Ibid* at 103. As Peter Oliver has pointed out to me, the word "grundnorm" is inaccurate here. What is clear is that the Court intended to convey the centrality of parliamentary sovereignty in the Canadian constitutional order.

56 *Secession Reference*, *supra* note 52 at para 67.

57 *Ibid* at paras 49, 78.

with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.”<sup>58</sup> The Court’s opinion traced the “legitimacy of democratic institutions” to the fact that they “rest on a legal foundation.”<sup>59</sup> The Court explained that “[i]t is the law that creates the framework within which the ‘sovereign will’ is to be ascertained and implemented.”<sup>60</sup> Parliament’s legitimacy is also grounded in its connection to popular will and “on an appeal to moral values,” some of which are expressed as unwritten constitutional principles.<sup>61</sup>

In *Babcock*, decided after the *Secession Reference*, the respondents argued that the provisions of the *Canada Evidence Act*<sup>62</sup> which permit evidence to be withheld in legal proceedings because the evidence contains cabinet confidences violated the unwritten constitutional principles of the rule of law, the separation of powers, and judicial independence.<sup>63</sup> The Court explained that these “unwritten principles must be balanced against the principle of Parliamentary sovereignty.”<sup>64</sup> It then went on to conclude that in the circumstances, parliamentary sovereignty should prevail: “It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.”<sup>65</sup>

In reaching its decision in *Babcock*, the Court relied heavily on *Singh v Canada (Attorney General)*, a decision of the Federal Court of Appeal.<sup>66</sup> In *Singh*, the Court of Appeal concluded that the cabinet confidence provisions of the *Canada Evidence Act* could not be invalidated by invoking the rule of law. “It appears that the appellants’ arguments are largely based on the premise that parliamentary sovereignty is not one of the principles of the Constitution, or at least ceased to be at sometime around 1982 when the *Charter* was adopted and section 52 of the *Constitution Act, 1982*,” the Court of Appeal explained.<sup>67</sup> This argument could not be sustained: “Both before and after 1982 our system

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<sup>58</sup> *Ibid* at para 78.

<sup>59</sup> *Ibid* at para 67.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 5 [*Babcock*], citing *Canada Evidence Act*, RSC 1985, c C-5, s 39.

<sup>63</sup> *Babcock*, *ibid* at para 54.

<sup>64</sup> *Ibid* at para 55. See also Vincent Kazmierski, “Draconian but not Despotism: The ‘Unwritten’ Limits of Parliamentary Sovereignty in Canada” (Spring 2010) 41:2 Ottawa L Rev 245 [Kazmierski].

<sup>65</sup> *Babcock*, *supra* note 62 at paras 54, 57. See also Kazmierski, *ibid*.

<sup>66</sup> *Singh v Canada (Attorney General)* [2000] 3 FC 185, 183 DLR (4th) 458 [*Singh*].

<sup>67</sup> *Ibid* at para 14.

was and is one of parliamentary sovereignty exercisable within the limits of a written constitution.”<sup>68</sup>

When the Supreme Court was faced with a similar challenge to legislation on rule of law grounds three years later in *British Columbia v Imperial Tobacco Canada Ltd.*,<sup>69</sup> it referred once more to the principles of democracy and constitutionalism, holding that the rule of law could not be invoked to render inoperative validly enacted legislation. The Court explained that

... [S]everal constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms).<sup>70</sup>

What are we to make of the Supreme Court’s treatment of parliamentary sovereignty since the entrenchment of the *Charter*? One striking feature of the jurisprudence is the unpredictable way in which the Court has applied the principles of constitutionalism, democracy, and parliamentary sovereignty. The relationship and degree of overlap between these principles remains uncertain.

The *Secession Reference* is one of the most significant constitutional cases in Canada’s history, both because of its subject matter and because the Court took the opportunity to describe “the underlying principles animating the whole of the Constitution.”<sup>71</sup> Given the case’s importance, it would be easy to conclude that some significance should be attached to the fact that the Court did not explicitly recognize parliamentary sovereignty as an unwritten constitutional principle. We must be cautious about inferring too much from this omission, however. The parties did not argue that parliamentary sovereignty was a relevant constitutional principle in that case.<sup>72</sup> Moreover, the Court referred to parliamentary sovereignty as a constitutional principle four years later in *Babcock*, before relying once again on the principles of constitutionalism and democracy to defeat the appellants’ claim in *Imperial Tobacco*.

Ultimately, the jurisprudence does not shed much light on the continued relevance of parliamentary sovereignty under the *Charter*. The cases make plain

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68 *Ibid* at para 16.

69 2005 SCC 49, [2005] 2 SCR 473.

70 *Ibid* at para 66.

71 *Secession Reference*, *supra* note 52 at 220.

72 I am grateful to Warren Newman, counsel for the Government of Canada on the Reference, for this information. I am also grateful to Carissima Mathen for raising the question of whether parliamentary sovereignty would have been a relevant principle.

that some form of parliamentary sovereignty continues to subsist in Canada, but provide little detail about the nature of this sovereignty. The Federal Court of Appeal's statement in *Singh* is perhaps the most helpful one found in the case law. The Court of Appeal explains that Parliament exercises sovereign authority "within the limits of a written constitution."<sup>73</sup> This view of parliamentary sovereignty — a limited sovereignty — is in my view the one that prevails in Canada today.

#### **IV. The notwithstanding clause**

At this stage, it is appropriate to say something more about the notwithstanding clause. Although there is academic debate about the meaning of section 33 of the *Charter*,<sup>74</sup> the majority view is that the notwithstanding clause permits Parliament (and provincial legislatures) to enact laws that might otherwise be vulnerable to invalidation under the *Charter*, or in the words of Lorraine Weinrib, to "suppress certain rights for a limited period subject to certain formalities."<sup>75</sup> This view is supported by the only decision in which the Supreme Court has interpreted section 33, *Ford v AG Quebec*.<sup>76</sup>

It is often suggested that section 33 preserves a degree of parliamentary sovereignty because it gives Parliament the ability to legislate in a manner inconsistent with constitutional rights.<sup>77</sup> In my view, however, linking parliamentary sovereignty and section 33 misconstrues the nature of both sovereignty and entrenched rights. While some scholars are of the view that a constitutional override is necessary to preserve parliamentary sovereignty in the face of such rights, moreover, not all agree. As Oliver observes:

[I]f sovereignty is the undefeatable ability to determine the law and to have those determinations obeyed, one might also ask whether that ability must be absolute, whether it must literally involve the ability to command *anything* whatsoever. Or is

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<sup>73</sup> *Singh*, *supra* note 66 at para 16.

<sup>74</sup> For a good summary of the variety of academic positions, see Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221 at 226-30; Donna Greschner & Ken Norman, "The Courts and Section 33" (1987) 12 Queen's LJ 155 at 166.

<sup>75</sup> Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999), 33:1 Israel LR 13. Lorraine Weinrib also calls it a "legislative escape" from "judicial review of rights claims": Lorraine Eisenstat Weinrib, "Learning to Live with the Override" (1990) 35:3 McGill LJ 541 at 563 [Weinrib, "Override"]. See also Tremblay, *supra* note 51 at 10.

<sup>76</sup> *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*]. See also Constitutional Law Group, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 790.

<sup>77</sup> Goldsworthy, *supra* note 19 at ch 8.

it possible that the “sovereign” *cannot* effectively command *anything*, but that instead its commands must prevail only *within a (usually broad) permitted range of options*?<sup>78</sup>

According to this second view, constitutional rights might be said to create a framework “within which”<sup>79</sup> Parliament exercises sovereign decision-making power.<sup>80</sup> While Parliament’s authority is circumscribed, it still retains its sovereignty.

Section 33 was not part of the federal government’s initial constitutional proposal.<sup>81</sup> It was introduced at a late stage in the constitutional negotiations in an attempt to mollify provincial leaders concerned about the *Charter*’s potential impact on their authority.<sup>82</sup> Grafting a constitutional override onto the *Charter* may have addressed the concerns of political leaders, but it presents a challenge in terms of developing a coherent account of Canadian constitutionalism.

The notwithstanding clause does not create an unlimited override power. The override can only be used to suspend the operation of certain provisions of the *Charter*, namely sections 2 and 7 through 15.<sup>83</sup> Any legislation subject to the override must include “an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*.”<sup>84</sup> Once legislation invoking the notwithstanding clause has been enacted, it is operative for five years, although it can be renewed.

Those who argue that the notwithstanding clause preserves parliamentary sovereignty rely on a version of sovereignty fraught with problems. To put it bluntly, characterizing the notwithstanding clause as preserving sovereignty is inconsistent with the only descriptively and normatively plausible variant of parliamentary sovereignty in Canadian constitutional law: a limited sovereignty conditioned by conditional rights. Allowing the executive to introduce legislation that suspends rights for purely political reasons does not preserve constitutionally important values.<sup>85</sup> Section 1 of the *Charter* already permits

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78 Oliver, “Sovereignty”, *supra* note 5 at 138-39.

79 *Secession Reference*, *supra* note 52; *Singh*, *supra* note 66. I will make use of this language throughout.

80 Robert Alexy, “On Constitutional Rights to Protection” (2009) 3:1 *Legisprudence* 1 at 1 [Alexy, “Protection”]; Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010) [Alexy, *Theory*]; Elliot, “New Constitutional Order”, *supra* note 4; Oliver, “Sovereignty”, *supra* note 5; *Secession Reference*, *supra* note 52; *Singh*, *supra* note 66.

81 Weinrib, “Override”, *supra* note 75 at 563.

82 *Ibid.*

83 Weinrib, “Override”, *supra* note 75 at 554.

84 In *Ford*, *supra* note 76 at para 33, the Court wrote that “Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case.”

85 Including parliamentary sovereignty.

Parliament and the executive to *justifiably* limit constitutional rights. In a constitutional state, it is difficult to defend also allowing them to limit rights *unjustifiably*. Such an understanding of section 33 would undermine the logic of constitutional rights and the version of parliamentary sovereignty I advance in this paper.

Assuming that the notwithstanding clause is unlikely to be repealed,<sup>86</sup> it is necessary to re-think how we conceptualize section 33. Rather than interpreting section 33 as permitting political actors to limit constitutional rights without adequate justification, the provision should be understood as creating a mechanism for mediating differences of opinion between the political branches and the judiciary on matters of constitutional interpretation.<sup>87</sup> In other words, when politicians and courts take different positions on what the *Charter* requires in a particular situation, the political branches may invoke the notwithstanding clause to insist upon their interpretation of the *Charter*. Several scholars suggest that this is a plausible way of conceptualizing section 33.<sup>88</sup>

This interpretation of the notwithstanding clause has obvious benefits from the standpoint of constitutional theory. When section 33 is framed in the manner just described, the question becomes “which interpretation of *Charter* rights should prevail?” rather than whether the *Charter* should apply at all. On this view, *Charter* rights “trace the perimeter” of parliamentary sovereignty.<sup>89</sup> At least one of the premiers participating in the pre-*Charter* constitutional negotiations, Allan Blakeney, understood the notwithstanding clause in this way. As Hiebert explains,

For Blakeney, the notwithstanding clause would guard against the *Charter* evolving in a manner that excluded a parliamentary role in defining the scope of protected

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86 Prime Minister Paul Martin suggested repealing the notwithstanding clause during the 2006 election campaign. The Liberals were ultimately defeated in the election. See Brian Laghi, Campbell Clark & Daniel Leblanc, “Martin hits hard at Harper”, *The Globe and Mail* (10 January 2006), online: <[www.theglobeandmail.com/news/national/martin-hits-hard-at-harper/article964940/](http://www.theglobeandmail.com/news/national/martin-hits-hard-at-harper/article964940/)>.

87 Grégoire CN Webber, “The Unfulfilled Potential of the Court and Legislature Dialogue” (2009) 42:2 Can J Political Science 443; Janet L Hiebert, “Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding” in James B Kelly & Christopher P Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 107 [Hiebert, “Dominant Narrative”].

88 Janet L Hiebert, *Charter Conflicts: What Is Parliament’s Role?* (Montreal & Kingston: McGill-Queen’s University Press, 2002) at 220-21; Tushnet, “*Marbury*”, *supra* note 3 at 264-65; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 265 [Roach, *Supreme Court on Trial*]; Webber, *supra* note 87.

89 “Elliot, New Constitutional Order”, *supra* note 4 at 367.

rights. The notwithstanding clause, in other words, was not thought of to negate rights but, rather, to allow for a more expansive understanding of human rights, in which Parliament, as well as the judiciary, would be responsible for their articulation and protection.<sup>90</sup>

Permitting political actors to dispense with the *Charter* for purely political reasons is inconsistent with the core assumptions of rights-based constitutionalism. The fact that the notwithstanding clause has only rarely been invoked does not weaken this conclusion.<sup>91</sup> *Charter* rights represent fundamental values. It is surely sufficient that Parliament has the power to justifiably limit constitutional rights; it cannot also be necessary to interpret section 33 as creating a political sledgehammer.

The sovereignty-preserving interpretation of the notwithstanding clause is not the only theory of section 33 that can claim to be rooted in democratic principles. Rights protection is central to the Canadian polity's collective self-understanding. Both Oliver and Elliot argue that this kind of ongoing, popular support for rights is important to modern conceptions of limited parliamentary sovereignty.<sup>92</sup> Part of what lends "legitimacy" to the political process is that political actors govern within boundaries established by the Constitution.<sup>93</sup>

Finally, the view of parliamentary sovereignty I argue for in this paper finds support in the Supreme Court's opinion in the *Secession Reference*. There, the Court observed that "[i]t is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented."<sup>94</sup> It also echoes the reasoning of the Federal Court of Appeal in *Singh*. In Canada in 2016, it is hard to sustain the argument that the executive and Parliament should be permitted to limit rights without adequate justification. I return to the significance of justification in the next section.

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90 Hiebert, "Dominant Narrative", *supra* note 88 at 115-16.

91 Tushnet, "Marbury," *supra* note 3 at 268; Billingsley, *supra* note 3 at 337; Richard Albert, "Advisory Review: The Reincarnation of the Notwithstanding Clause" (2008) 45:4 *Alta L Rev* 1037 at 1038.

92 Elliot, "New Constitutional Order", *supra* note 4 at 345-46; Oliver, "Sovereignty", *supra* note 5 at 137-38.

93 *Ibid.*

94 *Secession Reference*, *supra* note 52 at para 67.

## **V. Important questions about political actors and the courts**

In this section I suggest that parliamentary sovereignty continues to be a meaningful concept in Canadian constitutional law in part because of the important questions it prompts us to ask about the role of political actors and courts under the *Charter*. I then venture a few answers to some of these questions.

One insight that emerges from engaging with the concept of parliamentary sovereignty is that the space allocated to legislative choice is influenced by Parliament's (and the executive's) willingness to adopt a *Charter* values-inspired politics. Scholars have suggested that the more that law-making is influenced by constitutional values, the less courts will interfere with Parliament's will as expressed in legislation.<sup>95</sup> Conversely, the more the executive and Parliament flout their constitutional duties by making policy inconsistent with or in blatant disregard of rights, the less the courts will defer.<sup>96</sup>

Discussion of the continued relevance of parliamentary sovereignty in constitutional states sometimes focuses on which institution of government has the last word. On most accounts, either Parliament has the last word, or the courts do by virtue of their ability to check Parliament.<sup>97</sup> Deep engagement with the concept of parliamentary sovereignty reveals that this framing fails to capture the legal and political dynamics at play in Canadian constitutional law, for at least two reasons. First, all institutions of government play a role in protecting and promoting rights.<sup>98</sup> Second, the relationship between Parliament and the courts is a complex and dynamic one. The balance of power may shift depending on Parliament's level of responsiveness to constitutional rights.

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95 Hiebert, "Parliamentary Sovereignty", *supra* note 8; David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (London: Hart Publishing, 1997) 279 at 304 [Dyzenhaus, "Politics of Deference"]; TRS Allan, "Deference, Defiance and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41 [Allan]; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (London: Hart Publishing, 2003) 337 [Hunt]; Hiebert, "Parliamentary Sovereignty", *supra* note 8 at 2272-73; Gardbaum, "Reassessing", *supra* note 26 at 175.

96 Hiebert, "Parliamentary Sovereignty", *supra* note 8; Kavanagh, "Forbidden Territory", *supra* note 8.

97 Hunt refers to "competing supremacies": Hunt, *supra* note 95 at 339-40.

98 Jeff A King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxford J Leg Stud 409 at 428 [King]; Hunt, *supra* note 95; Gardbaum, "Reassessing", *supra* note 8.



Constitutional rights can be understood as creating a framework for governance.<sup>99</sup> By this I mean that *Charter* rights structure the law-making process by placing demands on political actors. If constitutional rights represent our basic values as a society, then it stands to reason that Parliament and the executive ought to “implement”<sup>100</sup> rights in a meaningful way.<sup>101</sup> Political actors can only claim to govern legitimately if they ensure that rights play a role in determining which policies they pursue and how those policies are structured.<sup>102</sup>

Hunt, writing in the UK context, argues that there is “explicit recognition in this country’s institutional arrangements that Parliament has an important role in both the definition and protection of fundamental rights and values.”<sup>103</sup> King concurs. In an article about “institutional” theories of deference, King departs from the premise that rights protection and promotion are shared obligations:

... [T]he institutional approach ... takes the view that the three primary branches of government essentially collaborate in the general promotion of commonly accepted public values such as fairness, autonomy, welfare, transparency, efficiency, etc. Parliament, the executive and courts are on this vision part of a joint-enterprise for the betterment of society.<sup>104</sup>

These statements also apply in the Canadian context. As Hunt and King point out, however, traditional conceptions of sovereignty obscure the “collaborative” nature of rights protection.<sup>105</sup> The dominant theories of judicial review and deference, which King contests, posit that “courts are the forum of principle and that policy is to be decided by democratically accountable bodies.”<sup>106</sup> King problematizes this account of institutions by arguing that courts do consider

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99 Vanessa MacDonnell, “The Constitution as Framework for Governance” (2013) 63 UTLJ 624 [MacDonnell, “Framework”].

100 Mattias Kumm, “Who’s Afraid of the Total Constitution?” in Augustín José Menéndez & Erik Oddvar Eriksen, eds, *Arguing Fundamental Rights* (Dordrecht, NL: Springer, 2006) 113 at 115; Jennifer Nedelsky, “Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 93 at 121 [Nedelsky].

101 I have also made the stronger claim that the executive *must* implement rights: see MacDonnell, “Framework”, *supra* note 99.

102 For more on legitimacy, see Oliver, “Sovereignty”, *supra* note 5. Oliver argues that it is possible to conceive of a variant of parliamentary sovereignty that accommodates socioeconomic rights: see *ibid*.

103 Hunt, *supra* note 95 at 339.

104 King, *supra* note 98 at 428. See also Aileen Kavanagh, “Judicial Restraint in the Pursuit of Justice” (2010) 60 UTLJ 23 at 38 [Kavanagh, “Pursuit of Justice”]; Tushnet, *Weak Courts, Strong Rights*, *supra* note 26; Gardbaum, “Reassessing”, *supra* note 8.

105 King, *supra* note 98 at 428. See also Hiebert & Kelly, *supra* note 37 at 8-9.

106 King, *supra* note 98 at 415.

the policy dimensions of legal issues and should not be precluded from doing so.<sup>107</sup> He also critiques the way this account characterizes the political branches, noting that courts do not have a monopoly on principle.<sup>108</sup> While political actors are subject to political “pressures” and imperatives that are different from courts, politicians “can and should act in principled ways”<sup>109</sup> — in Canada, in ways dictated by the *Charter*.

In my view, King’s description of the relationship between political actors and courts as “collaborative” offers something more than the “dialogue metaphor”<sup>110</sup> so often invoked in Canadian constitutional theory. The term “collaboration” suggests cooperation and common purpose. While it is likely correct to say that these are also features of dialogue theory, those who write about dialogue sometimes describe the interaction between the political branches and the courts in rather more discordant terms. Roach’s work brings this out especially clearly: he refers to one variant of “legislative sequel”<sup>111</sup> as the “in-your-face” response.<sup>112</sup> Of course, institutions can collaborate while also disagreeing,<sup>113</sup> but King’s emphasis on shared goals is important to the vision of constitutionalism I advance here.

This brings us to a second point that I wish to make in this section, which is that the relationship between political actors and courts is not static. Institutions interact in ways that transcend individual cases, rights and issues. The dynamics between institutions can change over time as institutions assert themselves and interact with one another. For the moment, I am less concerned with the way that political actors and courts advance competing views

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107 *Ibid.*

108 *Ibid* at 428.

109 Amy Gutmann, “Foreword: Legislatures in the Constitutional State” in Bauman & Kahana, *supra* note 100, ix at x [Gutmann].

110 Peter W Hogg, Alison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited: Or “Much Ado about Metaphors” (2007) 45:1 Osgoode Hall L J 1 [Hogg, Bushell Thornton & Wright, “Dialogue Revisited”]. See also Peter W Hogg & Allison A Bushell Thornton, “The *Charter* Dialogue Between the Courts and the Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75 at 84-87 [Hogg & Bushell Thornton, “*Charter* Dialogue”]; Roach, *Supreme Court on Trial*, *supra* note 88.

111 Hogg & Bushell Thornton, “*Charter* Dialogue”, *ibid* at 82.

112 This response, he says, consists of outright defiance of the Court’s view of what the *Charter* requires. Roach, *Supreme Court on Trial*, *supra* note 88 at 273.

113 King puts it as follows: “Tension and disagreement between institutions is not regarded as a cacophonous power struggle, but rather as part of the dynamic process of give and take that the public chooses as part of the complete package of modern democratic government.” King, *supra* note 98 at 428.

of constitutional rights or weigh conflicting rights and interests.<sup>114</sup> I am more interested in how institutions situate themselves in relation to one another over the medium to long term.

Institutional dynamics are shaped by a number of factors. They can be influenced by the structure and function of the institution itself,<sup>115</sup> as well as by an institution's self-perception and core commitments. They are also shaped by their interactions with other institutions.<sup>116</sup> It stands to reason that a court's willingness to defer will depend on the degree to which political actors are responsive to constitutional rights. The version of parliamentary sovereignty I advance in this paper suggests that Parliament's authority is constrained and legitimated by its respect for constitutional rights. If Parliament and the executive show a commitment to rights, there is good reason to expect that courts will grant them a wider berth to interpret and implement constitutional rights. The opposite is also true. If Parliament were to internalize this reality, it might experience an expansion in sovereign authority relative to courts.

Scholars have taken great interest in the concept of deference in recent years. Important work has been done to define deference and to suggest criteria for determining when it is appropriate. Kavanagh, for example, explains that "judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy."<sup>117</sup>

This paper suggests that there is — and should be — a connection between the "diligence"<sup>118</sup> with which Parliament considers and addresses constitutional questions during the legislative process and the intensity of constitutional review by courts.<sup>119</sup> By diligence I mean whether parliamentarians closely scrutinize bills during the legislative process with a view to identifying the constitutional dimensions of the proposal. It would also include ensuring that a bill balances competing rights appropriately and limits rights proportionately and only when necessary. The theory that best captures this form of deference is

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114 Hogg & Bushell Thornton, *supra* note 110; Mark Tushnet, "Interpretation in Legislatures and Courts: Incentives and Institutional Design" in Bauman & Kahana, *supra* note 100 at 355 [Tushnet, "Interpretation"].

115 Kavanagh, "Pursuit of Justice", *supra* note 104; Tushnet, *Weak Courts, Strong Rights*, *supra* note 26.

116 Kavanagh, "Pursuit of Justice", *supra* note 104 at 26: "... judicial restraint in public law adjudication had an explicitly relational aspect vis-à-vis the legislature and executive."

117 Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 Law Q Rev 222.

118 Allan, *supra* note 95 at 50. I will make use of the term diligence throughout.

119 For a sophisticated rendering of this argument in the UK context, see Kavanagh, "Forbidden Territory", *supra* note 8. See generally Hiebert, "Parliamentary Sovereignty", *supra* note 8.

Dyzenhaus’ “deference as respect.”<sup>120</sup> Dyzenhaus distinguishes “deference as respect” from “deference as submission.” In his words, “deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that be the statutory decision of the legislature, a judgment of another court, or the decision of administrative agency.”<sup>121</sup>

When legislatures take their constitutional functions seriously, it is appropriate to recognize this by not only considering how and why Parliament has legislated in the manner it has (what Kavanagh refers to as “minimal deference”<sup>122</sup>), but also deferring (in a “substantial” way, in Kavanagh’s terms) based on Parliament’s preferred position.<sup>123</sup> Both Hunt and Allan take a similar approach to the relationship between Parliament and the courts. Hunt links deference to the principle of justification<sup>124</sup> and explains that “deference from the courts must be *earned* by the primary decision-maker by openly demonstrating the justifications for the decisions they have reached and by demonstrating the reasons why their decision is worthy of curial respect.”<sup>125</sup> Allan echoes this point, noting that “the court’s enquiry must extend to the quality of the relevant procedures.”<sup>126</sup>

It is a well-established principle of Canadian and UK law that courts will not inquire into the process by which legislation is enacted.<sup>127</sup> Kavanagh explains that this has not prevented UK courts from assessing whether legislators have weighed the rights consequences of proposed legislation. Her careful

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120 Dyzenhaus, “Politics of Deference”, *supra* note 95 at 286.

121 *Ibid.*

122 Aileen Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication” in Grant Huscroft, ed, *Expanding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 191.

123 *Ibid.*

124 David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14:1 SAJHR 11, cited in Hunt, *supra* note 95 at 340, 351. See also David Dyzenhaus, “What is a ‘democratic culture of justification?’” in Murray Hunt, Hayley Hooper & Paul Yowell, eds, *Parliament and Human Rights: Redressing the Democratic Deficit*, 1st ed (Oxford: Hart Publishing, 2015).

125 Hunt, *supra* note 95 at 340. See also Dyzenhaus, “Politics of Deference”, *supra* note 95 at 306.

126 Allan, *supra* note 95 at 45. See also David Dyzenhaus, *The Constitution of Law: Legality in Times of Emergency* (Cambridge: Cambridge University Press, 2006) at 147 [Dyzenhaus, *Constitution of Law*], cited in Allan, *supra* note 95 at 54. See also Hunt, *supra* note 95.

127 *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525; Article 9, *Bill of Rights 1689*, 1 William & Mary Sess 2 c 2; *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another*, [2014] UKSC 3; *Wilson & Ors v Secretary of State for Trade and Industry* [2003] UKHL 40, Lord Nicholls of Birkenhead; *Edinburgh & Dalkeith Railway Company v Wauchope* [1842] UKHL J12. See also Dicey, *supra* note 11 at 55; Kavanagh, “Forbidden Territory”, *supra* note 8.

study of the UK jurisprudence reveals that while judges are aware of the perils of measuring the “quality or sufficiency of the reasons advanced in support of a legislative measure during the course of parliamentary debate,”<sup>128</sup> they do take into account “the quality of the decision-making process in Parliament with reference to the human rights issue.”<sup>129</sup> This can involve asking whether there was “a legislative focus on the human rights issue,” “active parliamentary deliberation on that issue,” and whether “opposing views [were] fully represented.”<sup>130</sup> Importantly, Kavanagh would reject the suggestion that Parliament must weigh the rights consequences that flow from proposed laws in “explicit” terms.<sup>131</sup> Rather, she argues that there ought merely to “be some focus on the implications or consequences for the interests underpinning human rights.”<sup>132</sup> This is consistent with the view that political actors may legitimately approach rights questions differently than courts.<sup>133</sup>

A similar review of the Canadian case law reveals that judges do consider the extent to which Parliament has weighed the rights implications of new policies when they engage in constitutional review. *Mills* is perhaps the best example of this.<sup>134</sup> The legislation at issue in *Mills* provided a legal framework for accessing complainants’ therapeutic records in sexual assault cases. The Court had invalidated an earlier such scheme on constitutional grounds in *O’Connor*.<sup>135</sup> In upholding the legislation against constitutional challenge, the majority pointed to preambular language in the new legislation which reflected a sensitivity to the constitutional rights at stake.<sup>136</sup> It noted that the legislation being challenged “reflects Parliament’s effort at balancing these rights,”<sup>137</sup> and that “Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in *O’Connor*.”<sup>138</sup> Applying Kavanagh’s criteria, the majority in *Mills* appears to have been influenced by the “legislative focus” on rights as well as by Parliament’s “active deliberation” about the constitutional concerns raised by the legislation. It might even be fair to say that the majority inferred from

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128 Kavanagh, “Forbidden Territory”, *ibid* at 464, citing Wilson, *ibid*.

129 Kavanagh, “Forbidden Territory”, *ibid* at 465 (emphasis removed).

130 *Ibid* at 463 (emphasis removed).

131 *Ibid* at 467.

132 *Ibid*.

133 Gardbaum, “Reassessing”, *supra* note 26 at 173.

134 *R v Mills*, [1999] 3 SCR 668 [*Mills*].

135 *R v O’Connor*, [1995] 4 SCR 411.

136 *Ibid* at para 48. See also Hogg, Bushell Thornton & Wright, “Dialogue Revisited”, *supra* note 110 at 21-22.

137 *Mills*, *supra* note 134 at para 18. See also *ibid* at para 58.

138 *Ibid* at para 59.

Parliament's "lengthy consultation process"<sup>139</sup> and "years of Parliamentary study and debate"<sup>140</sup> that "opposing views [were] fully represented."

Similar statements appear in *JTI-Macdonald*,<sup>141</sup> *Sauvé*,<sup>142</sup> *Hall*<sup>143</sup> and *Harkat*.<sup>144</sup> These are all "second look" cases — cases in which the Court is asked to determine the constitutionality of legislation enacted after an earlier law was struck down on *Charter* grounds.<sup>145</sup> One might expect the Court in these cases to be particularly attuned to the question of whether rights were considered. The point here is not to provide a comprehensive accounting of all cases in which the Court has considered Parliament's attentiveness to rights. Rather, it is simply to demonstrate that courts *do* examine whether Parliament took rights into account in the legislative process.

In this paper, I also argue that courts *should* consider this issue in determining whether deference is appropriate.<sup>146</sup> I do so on the basis that the requirement that political actors be attentive to rights flows from the constitution itself.<sup>147</sup> Interestingly, Hogg, Thornton & Wright explain that the Supreme Court's decisions do not point in a single direction in terms of whether deference is appropriate in so-called "second look" cases.<sup>148</sup> In some cases, such as *Mills*, the Court has adopted a deferential posture, whereas in others, like *Sauvé*, it has not.<sup>149</sup>

As Hunt notes, justification is at the core of the concept of deference as respect. Justification has many virtues. One of them is that the process of providing a justification can help clarify for the decision-maker exactly what is at stake when it proposes a new policy. This is important because constitutional issues are often more complicated than they first appear. Policy issues rarely implicate a single, discrete right.<sup>150</sup> Rather, they typically engage multiple constitutional rights that must be accommodated within a single policy response.<sup>151</sup>

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139 *Ibid* at para 17.

140 *Ibid* at para 125.

141 *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 7-8, 11, [2007] 2 SCR 610.

142 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 9, [2002] 3 SCR 519. But see para 13.

143 *R v Hall*, 2002 SCC 64 at para 18, [2002] 3 SCR 309.

144 *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 55, [2014] 2 SCR 33.

145 Hogg, Bushell Thornton & Wright, "Dialogue Revisited", *supra* note 110 at 6.

146 Kavanagh makes a similar argument: see Kavanagh, "Forbidden Territory", *supra* note 8.

147 *Mills*, *supra* note 134 at para 58; Wilson, *supra* note 127, Lord Hobhouse of Woodborough.

148 Hogg, Bushell Thornton & Wright, "Dialogue Revisited", *supra* note 110. See also Gardbaum, *New Commonwealth*, *supra* note 37 at 122-23.

149 *Ibid*.

150 Alexy, *Theory*, *supra* note 80.

151 *Ibid*; *Mills*, *supra* note 134 at para 59. See generally Jeff King, "The Pervasiveness of Polycentricity" (2008) Public Law 101.

To conclude the point, Parliament and the courts are “partners”<sup>152</sup> in a shared project of rights protection and promotion.<sup>153</sup> Parliament has the ability to expand its sphere of sovereign decision-making relative to courts by demonstrating that it diligently identifies and responds to the constitutional implications of proposed laws.<sup>154</sup> Where multiple constitutional interests are engaged, as they often will be, Parliament must also show that it has given thought to how best to accommodate those interests.

A second insight that emerges from the study of parliamentary sovereignty is that Parliament enjoys considerable law-making power notwithstanding the presence of the *Charter*. Constitutional rights create parameters for governance but they do not remove Parliament’s sovereign decision-making power. Parliament retains authority to make decisions within a limited but still considerable “sphere.”<sup>155</sup>

The *Charter* does not impose a complete ban on intrusions on constitutional rights. Rights can be justifiably limited in the service of competing rights or social interests.<sup>156</sup> Thus, Parliament retains the discretion to limit rights where, after careful deliberation, it concludes that there is sufficient justification for doing so. In this way, it could be argued that section 1 imposes a requirement of deliberation and careful decision-making on political actors.<sup>157</sup> Judicial intervention is warranted only where the decision to limit constitutional rights cannot be justified.<sup>158</sup>

As Allan points out, moreover, “there is usually more than one decision compatible with the complainant’s rights, and it is for the public body rather than the court to choose between them.”<sup>159</sup> This observation has important consequences for our assessment of the size of the sovereign policy space that Parliament retains in the wake of the *Charter*. Taken together with what I suggest is the correct approach to deference, it is fair to say that Parliament retains considerable freedom to make policy within the confines established by the *Charter*.

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152 Kavanagh, “Pursuit of Justice”, *supra* note 106 at 38.

153 *Ibid*; King, *supra* note 98 at 428; Dyzenhaus, *Constitution of Law*, cited in Allan, *supra* note 95 at 54.

154 See Gardbaum, “Reassessing,” *supra*.

155 Oliver, “Sovereignty”, *supra* note 5 at 138-39. See generally Alexy, *Theory*, *supra* note 80.

156 Section 1 of the *Charter* states that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

157 For a similar view, see Allan, *supra* note 95 at 45.

158 *Ibid* at 43.

159 *Ibid*.

Now, this is not Diceyan sovereignty — far from it. But as long as Parliament is attentive to the demands imposed upon it by the *Charter*, it will enjoy considerable legislative freedom. The laws that emerge from this process are legitimated not only by their democratic character, but also by their fidelity to constitutional rights.

## **VI. Conclusion**

In this paper I have argued that a theory of limited sovereignty can plausibly be invoked to describe Parliament's powers in the post-*Charter* era. Under this version of parliamentary sovereignty, the *Charter* creates a framework within which Parliament exercises decision-making authority. Although Parliament's sovereignty is delimited by constitutional rights, its scope to legislate remains robust.

Engaging with the concept of parliamentary sovereignty also shows that there is a connection between the diligence with which Parliament considers and responds to constitutional demands and the deference afforded to legislative judgment on judicial review. Parliament can increase its decision-making authority relative to courts by taking constitutional rights seriously. Political actors and courts have a common obligation to secure and promote constitutional rights. When Parliament upholds its end of the bargain, courts are more likely to take a hands-off approach. By demonstrating its commitment to implement constitutional rights in a meaningful way, Parliament will have “earned”<sup>160</sup> the courts' deference.

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160 Hunt, *supra* note 95 at 340.