Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE

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In the recent Newfoundland and Labrador Court of Appeal decision of *Newfoundland (Treasury Board) v. NAPE*, Justice Marshall accused the Supreme Court of Canada of "undue incursions ... into the policy domain of the elected branches of government ... " He added that these incursions were happening more frequently and invited the Court to "revisit" its interpretation of section 1 of the *Canadian Charter of Rights and Freedoms* in *R. v. Oakes*.

While politically interesting, the authors suggest that the ensuing public debate (over judicial activism and the role of an unelected judiciary with respect to public policy in light of the *Charter*) missed an important point of engagement: whether or not the empirical claims on which Justice Marshall based his comments are an accurate depiction of the Court's behaviour when faced with the possibility of striking down a "majoritarian" decision. In canvassing the quantitative research that is currently available on the matter, it becomes apparent that the data is incomplete as it is not tabulated with the nuances of *Charter* analyses in mind.

The authors attempt to fill the void by building on previous studies, and specifically by distinguishing their handling of the data with stricter definitions of applicable data points. Four hypotheses, drawn from the claims made in the *NAPE* judgement, are tested: (1) the Supreme Court strikes down majoritarian legislation often; (2) judicial activism is increasing over time; (3) judicial activism is largely the product of the Court's *Charter* analysis under section 1; and (4) the *Charter*'s legislative override under section 33 has been deligitimized.

Ultimately, each of the four hypotheses is contradicted by the data: the government wins the overwhelming majority of constitutional challenges brought to majoritarian decisions; judicial activism has not increased over time; the government's success rate in the section 1 analysis is highly dependant on whether or not an internal limit is imposed on a protected right; and the level of judicial activism has not increased as a response to the deligitimaization of the section 33 override.

Whether the judiciary is "unduly" activist or not remains elusive, however, as there are three significant limitations to a study based, such as this one is, on the analysis of government "win rates". At the core, the ambiguous treatment of what is "appropriate" versus "undue" interference makes it difficult to determine whether the Court has exceeded the constitutional scope of its powers. The small data pool and the possibility of a selection bias increase the difficulty of the task at hand. The authors conclude that Justice Marshall's normative claims are based on assumptions that are highly suspect and that before the debate on the propriety of judicial activism proceeds any farther, more quantitative legal research should be conducted to determine whether or not the Court is actually activist.

Dans la décision *Newfoundland (Treasury Board) v. NAPE*, rendue récemment par la Cour d'appel de Terre-Neuve et du Labrador, le juge Marshall a accusé la Cour suprême du Canada de s'introduire indûment dans les politiques publiques relevant de la branche élue du gouvernement. Ayant remarqué une augmentation dans la fréquence de telles incursions judiciaires, il a dès lors invité la Cour à «réviser» son interprétation de l'article 1 de la *Charte canadienne des droits et libertés*, telle que développée dans l'arrêt *R. c. Oakes*.

Bien qu'étant intéressant sur le plan politique, les auteurs affirment que le débat public inspiré par la critique du juge Marshall (sur l'activisme judiciaire à la lumière de la *Charte*) n'a pourtant pas su aborder un point important, à savoir si les éléments empiriques sur lesquels le juge a fondé ses commentaires représentent une description juste et exacte du comportement de la Cour face à la possibilité d'annuler une décision «majoritaire». Or, à l'heure actuelle, les recherches quantitatives en la matière se révèlent incomplètes, et ne tiennent pas compte des nuances fondées sur l'analyse de la *Charte*.

Se basant sur ces études antérieures, les auteurs tentent de combler cette lacune en adoptant des définitions plus strictes des variables applicables en l'espèce. Quatre hypothèses, tirées du jugement *NAPE*, sont ainsi examinées : (1) la Cour suprême annule souvent les législations issues de décisions majoritaires ; (2) l'activisme judiciaire s'accroît avec le temps ; (3) l'activisme judiciaire est généralement exercé lors de l'analyse par la Cour de l'article 1 de la *Charte* ; et (4) la clause de dérogation expresse prévue à l'article 33 de la *Charte* a perdu sa légitimité.

Les analyses démontrent que ces quatre hypothèses ne sont pas confirmées dans les faits : le gouvernement remporte une grande majorité des litiges qui remettent en question des décisions majoritaires sur le plan constitutionnel ; l'activisme judiciaire ne s'est pas accru avec le temps ; le succès du gouvernement au niveau de l'analyse de l'article 1 dépend largement de l'existence ou non de limites internes imposées sur le droit protégé ; le niveau d'activisme judiciaire n'a pas augmenté en réponse à la perte de légitimité de la clause de dérogation expresse prévue à l'article 33.

La détermination du caractère «excessif» de l'activisme judiciaire demeure cependant encore difficile à établir, étant donné les limites inhérentes aux études basées sur une analyse des «taux de succès» du gouvernement. Au centre de ces limites se trouve le traitement ambigu de ce qui est «approprié» par rapport à «excessif», rendant ainsi difficile de déterminer si la Cour a excédé ou non la portée constitutionnelle de ses pouvoirs. Le caractère restreint de la base empirique et les possibles distorsions dans la sélection des données augmentent par ailleurs cette difficulté. Les auteurs en arrivent néanmoins à la conclusion que les commentaires du juge Marshall demeurent fondés sur des hypothèses hautement questionnables, et que, avant de poursuivre plus loin le débat, d'autres études quantitatives devraient être effectuées afin de déterminer si la Cour est effectivement activiste.

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Introduction: Normative Critique, Empirical Premises

"Judicial activism has gone too far"[1] read the headline on the front page of *The Globe and Mail* the week after the Newfoundland and Labrador Court of Appeal handed down its judgment in *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees*[2] last December. Justice Marshall, speaking for a unanimous Court of Appeal, held that provincial legislation denying retroactive pay equalization to a group of female employees violated section 15 of the *Canadian Charter of Rights and Freedoms*[3] but was saved under section 1 because it served a legitimate deficit-reducing purpose. Notwithstanding its importance, the particular issue decided by the Court of Appeal (the extent to which governments may depart from equality norms for fiscal reasons) generated little public interest. Instead, media attention focussed on a few remarkable paragraphs buried in the middle of the 169 page judgment, in which Justice Marshall accused the Supreme Court of Canada of "undue incursions ... into the public domain of the elected branches of government ... "[4]

Interestingly, Justice Marshall did not rehearse the oft-repeated claim that in constitutional adjudication, courts must not intrude on the making of public policy, accepting that "there has always been an element of policy making in judicial decisions ... "[5] He stressed instead that courts and legislatures have different roles with respect to public policy, with there being "no role in policy making for the judiciary beyond that consequential to passing upon whether executive and legislative measures achieved their intended policy through interpretations of their scope."[6] To do otherwise would contravene the "Separation of Powers Doctrine".[7] Against the backdrop of this cluster of constitutional ideas, Justice Marshall argued that the Supreme Court had overstepped the constitutional bounds of its limited policy making power in its *Charter* jurisprudence. The focus of his attack was the Supreme Court's interpretation of section 1 because of what he viewed as the Court's failure to be sufficiently deferential to legislative decisions. Thus, although he conceded that "s. 1 effectively invests [the judiciary] with responsibility to pass upon the justifiability of policy choices behind *Charter* infringements,"[8] his concern was with the interpretation

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[1] Kirk Makin, "Judicial Activism Has Gone Too Far, Court Says" *The Globe and Mail* (12 December 2002) A1.

[2] (2002), 220 Nfld. & P.E.I.R. 1, 221 D.L.R. (4th) 513, 2002 NLCA 72, leave to appeal to S.C.C. granted, [2003] S.C.C.A. No. 45 (QL) [*NAPE*].

[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[4] *NAPE, supra* note 2 at para. 364.

[5] *Ibid.* at para. 349.

[6] *Ibid.* [footnotes omitted].

[7] *Ibid.*

[8] *Ibid.* at para. 362.

given to section 1 in the *Oakes* test.[9] In particular, the need for the means chosen by the government to satisfy the requirement of proportionality was found to be deeply problematic, because it "endows the judiciary with licence to stand in the shoes of the other branches of government as ultimate arbitrator of which policy choices were in the best interests of the governed."[10] As a consequence, Justice Marshall invited the Supreme Court to "revisit" the *Oakes* test,[11] warning of "real potential for heightening unease"[12] if the Court's activism continues unchecked.

Justice Marshall's comments on judicial activism, and his call for the Supreme Court to revise the *Oakes* test, sparked a rare and remarkable public debate in the pages of *The Globe and Mail*. Newfoundland and Labrador Chief Justice Clyde Wells took the highly unusual step of writing to the newspaper to explain that the judgment in *NAPE* reflected "*only* the opinions and comments of one of the three judges sitting on that appeal,"[13] notwithstanding the concurrences of the other two members of the panel in Justice Marshall's reasons.[14] Chief Justice Wells' intervention prompted columnist Jeffrey Simpson to write that the whole episode was "bizarre", "extraordinary", and "unprecedented",[15] and to speculate on the political motivations of the players. Weeks later, in another dramatic twist, former federal Justice Minister John Crosbie lodged a complaint with the Canadian Judicial Council to investigate Chief Justice Wells' comments.[16] This complaint was ultimately rejected, to public criticism from Crosbie.[17]

But this fracas was a sideshow to the much more interesting debate on the substance of Justice Marshall's comments that took place through letters to the editor. Some letters criticized Justice Marshall's suggestion that judicial activism is a bad thing. One expressed the view that the Supreme Court is necessarily activist because of legislatures' unwillingness to tackle difficult issues, observing that "many legislators are probably more than happy to let the [C]ourt take the heat."[18] Another

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[9] *Ibid.* at paras. 354-68. See *R. v. Oakes*, [1986] 1 S.C.R. 103; 26 D.L.R. (4th) 200 [*Oakes*].

[10] *NAPE, ibid.* at para. 362.

[11] *Ibid.* at para. 365.

[12] *Ibid.* at para. 364.

[13] Kirk Makin, "Wells Rejects Interpretation of Ruling" *The Globe and Mail* (13 December 2002) A1 at A9.

[14] *Ibid.* See *NAPE, supra* note 2 at paras. 641-42.

[15] Jeffrey Simpson, "A Little Heresy at the Newfoundland Courthouse" *The Globe and Mail* (17 December 2002) A25. Simpson noted that Wells was Liberal premier when the pay equity payments were rejected, and that Justice Marshall was a former Tory cabinet minister in the governments of Frank Moores and Brian Peckford.

[16] John Crosbie, "Out of Line" *The Globe and Mail* (7 January 2003) A13.

[17] Chantelle MacDonald, "CJC Rejects Complaint over Chief Justice's Letter to the Globe" Lawyers Weekly (4 April 2003) (Lexis); Christin Schmitz, "Former Justice Minister Slams CJC's 'Judicial Whitewash'" *Lawyers Weekly* (16 May 2003) (Lexis).

[18] Alyn James Johnson, Letter to the Editor, *The Globe and Mail* (14 December 2002) A22.

echoed this view, arguing that "[r]ather than stepping back to allow governments broader powers, our courts should continue to be proactive to ensure that governments don't abuse the power they already possess."[19] Other letters applauded Justice Marshall for speaking up "on the train wreck that is the increasing tendency toward judicial activism by the Supreme Court," arguing that the Court is in fact "encroaching on the prerogatives of the legislative branch."[20]

As well, several letters made the link, not explicit in Justice Marshall's reasons, between judicial activism and the *Charter*'s notwithstanding clause, section 33.[21] One contributor suggested that judicial activism is not a problem because of the availability of section 33, since "[i]t should not be forgotten that the notwithstanding clause—the much hated section 33—of the *Charter* permits governments virtually unrestricted power provided they are willing to revisit their decisions every five years and face the electorate."[22] Another contributor lamented what he viewed as the underuse of the notwithstanding clause, writing that "concern about the *Oakes* test, and judicial activism in general, would be minimized if our politicians had the will to make use of a tool readily available to them—the notwithstanding clause. Such action would, in many instances, put a stop to such odious judicial incursions."[23]

Although this debate attempted to engage Justice Marshall's reasons, it missed an important point of engagement. As will be discussed below, the truly interesting feature of Justice Marshall's reasons is that his normative critique of the Supreme Court and its jurisprudence rely on *empirical* claims—for example, that the levels of judicial activism on the Court are high and have been increasing over time—claims that he did not substantiate with quantitative evidence. Commentators have focussed on a determination of whether high levels of judicial activism are a good or a bad thing, but never questioned whether high levels of judicial activism are real or fictional phenomena. To be sure, these empirical claims were alluded to in one editorial, which suggested that Justice Marshall was wrong to say that the Supreme Court has been systematically activist in its interpretation of section 1, noting that the Court "has waxed and waned, sometimes deferring to Parliament and sometimes striking down laws."[24] But this editorial was the exception, not the rule.

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[19] Scott Nelson, Letter to the Editor, *The Globe and Mail* (13 December 2002) A24.

[20] Jack Tate, Letter to the Editor, *The Globe and Mail* (13 December 2002) A24.

[21] *Charter*, *supra* note 3, s. 33. Subsection 33(1) reads:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter.

[22] Nelson, *supra* note 19.

[23] Tate, *supra* note 20.

[24] "Judge Marshall's Injudicious Tirade", Editorial, *The Globe and Mail* (14 December 2002) A22.

Regrettably, the use of empirical assumptions to bolster normative claims in the absence of quantitative evidence is reflected not only in public debate, but also in the work of prominent political scientists who write about the Supreme Court and the *Charter*. For instance, there is a common, but for the most part unsubstantiated, view among critics of the Court that judicial activism is high in absolute terms, namely that the Court intervenes frequently in political decisions.[25] Political scientist Christopher Manfredi, who writes often about the Supreme Court, has made the additional claim that the level of judicial activism on the Supreme Court has increased over time as a consequence of the delegitimization of the legislative override,[26] but has not offered adequate evidence to substantiate his assertion. As evidence, critics of the Supreme Court rely on anecdotes, referring to highly visible and controversial examples where the Court has struck down legislation. Justice Marshall does just that by referring to the highly emotive case of *RJR-Macdonald v. Canada (A.G.)*,[27] where a deeply divided Supreme Court struck down a prohibition on tobacco advertising.

It is one of the great shortcomings of Canadian legal scholarship that the legal academy has largely failed to engage with political scientists who make empirical claims about judicial activism. This is likely the case because of a mistaken and dated view that political science offers little insight into the study of the courts and constitutional adjudication. But the instances where these empirical assumptions have been adopted by the courts, exemplified by Justice Marshall's reasons in *NAPE*, now make it urgent for the legal academy to assess the accuracy of these claims. To be sure, the use of qualitative evidence, such as the thick narrative descriptions found in Kent Roach's pioneering work, *The Supreme Court on Trial*,[28] is one way to respond. But detailed case studies should be supplemented where possible with quantitative evidence of a systematic nature to give a more comprehensive picture of the actual practice of Canadian constitutionalism. Anecdote will no longer do. For descriptive statistics to be helpful, the design of a quantitative analysis of the Supreme Court's *Charter* jurisprudence must be sensitive to a doctrinal understanding of how *Charter* analysis is done. Thus, rather than simply addressing the distribution of wins and losses—the dominant concern of the political science literature—quantitative analysis must be informed by the structure of *Charter* adjudication. For example, as we explain below, the failure of previous studies to take into account that some *Charter* rights contain internal limitations has led to simplistic and misleading conclusions regarding the Court's behaviour under section 1.

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[25] See *e.g.* F.L. Morton & Rainer Knopff, eds., *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000) at 13.

[26] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Oxford: Oxford University Press, 2001) at 5.

[27] [1995] 3 S.C.R. 199, 111 D.L.R. (4th) 385 [*RJR-MacDonald*].

[28] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

In this article, we take up this task. We begin, in Part I, by offering a quantitative definition of judicial activism, by generating four hypotheses that arise from the empirical claims made by Justice Marshall and other critics of the Supreme Court, and by contextualizing these claims in the legal literature. These hypotheses are: (1) the Supreme Court second-guesses "majoritarian" decisions frequently, (2) the Court does so with increasing frequency, (3) section 1 is the central vehicle whereby the Court exercises its counter-majoritarian power, and (4) the level of judicial activism has risen in response to the delegitimization of the override. In Part II, we address questions of methodology—the creation of our data set, our coding rules, and the manner in which we assess the hypotheses in light of this data—and compare our methods with those of previous studies. In Part III, we offer our results, analysis, and discussion. We find that the data contradicts each of the four hypotheses. For instance, the government wins the overwhelming majority of constitutional challenges brought to "majoritarian" decisions and judicial activism has not increased over time. We also show that although the government loss rate at section 1 is higher than its loss rate overall, this can be explained on further analysis as a function of whether or not the right contains an internal limit. Finally, our data demonstrates that the level of judicial activism did not increase as a response to the delegitimization of the override. The limitations of our study are discussed with our conclusions and our data set is reproduced in the appendix.

I. Measuring Judicial Activism

A. A Quantitative Definition of Judicial Activism

In assessing the empirical assumptions that underlie the arguments made by Justice Marshall and other critics of judicial activism, we must first define "judicial activism". Unfortunately, judicial activism is a notoriously slippery term, which variously means the departure from well-established precedent, adjudication based on judicial preferences, or the judicial reallocation of institutional roles between the courts and other branches of government, depending on who is employing it and in what context.[29] Nevertheless, Justice Marshall's comments give us a starting point from which to approach this ambiguity, at least for the limited purpose of framing a response to his judgment. Justice Marshall suggests that we should be concerned about "undue incursions by the judiciary into the policy domain of the elected branches of government."[30] In other words, the reallocation of institutional roles, or the usurpation of legislative power by courts, seems to exist when judges second-guess

[29] See Sujit Choudhry, Book Review of *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* by Christopher P. Manfredi (2003) 1 International Journal of Constitutional Law 379 at 386 [Choudhry, Book Review].

[30] *NAPE, supra* note 2 at para. 364.

democratically made decisions in a manner that is "undue". Unfortunately, Justice Marshall's judgment does not yield any criteria by which we can identify when the Supreme Court has acted in an "undue" fashion.

In this article, we rely on a *quantitative* definition of judicial activism. This measure focusses on outcomes (i.e., whether a government wins or loses) and posits that courts are more activist the more frequently they find that democratically elected institutions have acted unconstitutionally. There is support for this approach in the existing literature. In a study on the Supreme Court's first one hundred *Charter* judgments, F.L. Morton, Peter Russell, and Michael Withey referred to the low government success rate in the initial phase of *Charter* adjudication as "the Court's initial activism",[31] and the declining government loss rate as a "decline in judicial activism".[32] James Kelly, who updated this original study through to 1997, also worked with a quantitative definition of activism and equated increases and decreases in the government loss rate with parallel fluctuations in judicial activism.[33]

We recognize that a quantitative definition of judicial activism poses a number of problems. First, Justice Marshall refers to "undue" incursions by the Court, which suggests that according to a quantitative definition of judicial activism, the Supreme Court is unduly interventionist when it passes some threshold beyond which the government loss rate is too high. Unfortunately, Justice Marshall does not tell us what that rate might be. Thus, determining whether the rate of government wins or losses is too high is much like assessing whether the rates of unemployment or inflation are too high: it is a matter of highly contextualized judgment, that may change with political circumstances. However, the absence of an absolute threshold does not undermine our ability to measure *relative* activism over time. Moreover, to the extent that critics of the Court employ a quantitative definition of judicial activism, it is for them to explain and justify what the threshold is.

Second, a quantitative definition of activism takes as its baseline of "non-activist" behaviour a government win rate of one hundred percent, a situation where the Supreme Court never second-guesses decisions made by democratically elected institutions. The difficulty this poses is that the very idea of constitutional supremacy, coupled with judicial review, by necessity permits, or even requires, courts to impose some constitutional limits on the scope of government decision making by setting constraints on both the ends and means of governance. Thus, a fuller conception of activism would incorporate some *qualitative* criteria to sort out those judicial incursions that are or are not proper, and then would assess government win and loss

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[31] F.L. Morton, Peter H. Russell & Michael J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1 at 14.

[32] *Ibid.* at 10.

[33] James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall L.J. 625 at 629 [Kelly, "Rebalancing"].

rates only with respect to the latter cases to determine the degree of judicial activism. As a result, a proper definition of the rate of activism would be as follows: the percentage of cases that governments lose, less the percentage of cases that governments should lose. Justice Marshall admits as much, as it seems that he is not concerned with all incursions into the domain of legislatures, but only with those that are "undue". Unfortunately, it is difficult to identify an objective set of criteria that can tell us which incursions are proper and which are "undue". As a result, for the limited purposes of this article, our working definition of judicial activism is one that encompasses all second-guessing of legislatures by courts, understanding that there will always be some portion of this activism that is not actually "undue".

Third, a strictly quantitative measure of outcomes treats all decisions as having equal importance, when in fact each decision's degree of importance may vary. As F.L. Morton, Peter Russell, and Troy Riddell point out in their discussion of the usefulness of empirical studies, "the reasons given to justify a decision are often more important in the long run than a decision's basic outcome or 'bottom line.'"[34] Similarly, comments are often made that are not strictly necessary in order to come to a decision in the particular matter but that may have great effect in lower courts. The importance of these comments cannot be measured through a crude statistical measure. In creating a database of Supreme Court decisions, it is easy for the importance of any one particular judgment to be overstated or understated. For instance, an "as of right" criminal appeal may not raise any new issues, while another case heard the same day creates a new test that redefines the application of a particular *Charter* section. The two cases are clearly not of equal importance, but each becomes merely one data point for the purposes of an empirical study.

Fourth, quantifying *Charter* cases as wins and losses occasionally has the effect of emphasizing form over substance. The clearest example of this problem can be found in comparing the coding of *R. v. Butler*[35] and *R. v. Sharpe*.[36] Both of these cases involved the prohibition of obscene materials by provisions of the *Criminal Code* that on their face were unconstitutionally overbroad (i.e., the provisions prohibited not only speech that was harmful but also speech that was harmless). However, despite the fact that the provisions at issue were defective in the same way, *Butler* is classified as a government win, and *Sharpe* as a government loss. In *Butler*, the Court read down the provision *prior* to analyzing its constitutionality to limit its scope to harmful speech, and thus concluded that the provision passed muster under section 1. Conversely, in *Sharpe*, although the provision was read down in certain respects (thereby reducing potential sources of unconstitutionality), in other respects it was not. In the result, the Court found the provision to be an unjustifiable restriction on

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[34] F.L. Morton, Peter H. Russell & Troy Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992" (1995) 5 N.J.C.L. 1 at 2.

[35] *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [*Butler*].

[36] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1 [*Sharpe*].

harmless freedom of expression. While there is no principled way to distinguish the results, because of the form of each decision, their outcomes will appear differently in our data set.

In short, we recognize that it is important to not fall into the reductionist trap, that is, to privilege variables that can be measured with relative ease from the entire set of *Charter* cases (e.g., wins and losses) without attention to the specific features of constitutional adjudication under specific provisions, let alone the individual details of each constitutional challenge that comes before the Court. Just as qualitative evidence on its own can provide only an incomplete understanding of Canadian constitutional practice, so too is quantitative evidence limited in its ability to shed light on the Court's constitutional jurisprudence. But notwithstanding the limitations of a quantitative approach to measuring judicial activism, our method of analysis has an important place in the study of judicial behaviour. In general, "[d]escriptive statistics provide a factual foundation on which other studies can build, qualify and elaborate."[37] To the extent that normative claims are implicitly grounded in empirical claims, empirical work is critical to the process of evaluating these normative claims. Without empirical analysis, the factual support for the claims made in the judicial activism debate cannot be verified.

B. Empirical Claims on Judicial Activism: Four Hypotheses

We have identified four hypotheses from the empirical assumptions that are either implicit or explicit in Justice Marshall's comments and from the political science literature to be tested against the evidence.

Hypothesis 1: The first claim is that counter-majoritarianism is a widespread and central part of Canadian constitutional practice. Justice Marshall alluded to this claim in his reasons:

> The seeds of this potential are already evident in the unease that has frequently been expressed over undue incursions into the public policy field in *Charter* applications. Despite protestations to the contrary, it has to be acknowledged there is an air of legitimacy to many of these complaints.[38]

Simply stated, the hypothesis is that the Supreme Court strikes down legislation, and does so frequently, making judicial activism high in absolute terms (with the caveats we described regarding this point earlier).[39]

Hypothesis 2: The second claim is that judicial activism is increasing over time. This second hypothesis is made explicit in the public debate that followed *NAPE*[40] and

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[37] Morton, Russell & Riddell, *supra* note 34 at 2.

[38] *NAPE*, *supra* note 2 at para. 365.

[39] See text accompanying notes 31-36.

[40] See Tate, *supra* note 20.

is implicit in Justice Marshall's comments. It is also explicit in much of the political science literature.[41]

Hypothesis 3: The third claim, which Justice Marshall made explicitly, is that there is a particular problem of activism with respect to the Supreme Court's use of section 1. He argued that the Court is not sufficiently deferential to legislatures in cases where there is a violation of a *Charter* right that the government attempts to justify under section 1. This appears to encompass both absolute and relative claims. The first part of the claim is that the Court fails to accept a sufficiently high number of government section 1 justifications. The second part of the claim is that the Court has become less likely to accept section 1 defences over time, particularly since its decision in *RJR-MacDonald*, in which the majority ruling is singled out for special criticism by Justice Marshall.[42]

Hypothesis 4: The fourth claim arises out of Manfredi's analysis of the impact of the delegitimization of the override on *Charter* adjudication and requires elaboration for our purposes here. The override permits Parliament or the provincial legislatures to enact legislation that would otherwise contravene the *Charter* and applies to a limited set of *Charter* rights such as fundamental freedoms, legal rights, and equality rights.[43] Declarations under the override operate for five years. When the *Charter* was first enacted, defenders of the override suggested that it offered an alternative to judicial supremacy, by allowing legislatures to respond to erroneous court judgments without resorting to more drastic measures that might undermine the legitimacy of the Court. One example of a measure the override was designed to avoid is the "court packing" plan proposed by President Roosevelt in the 1930s in response to the invalidation of New Deal legislation by the U.S. Supreme Court.[44] However, the override has hardly been used.[45] Manfredi argues that the override has fallen into disuse because it was delegitimized by its use on one very visible occasion: the enactment of Bill 178,[46] a Quebec law requiring that exterior commercial signs be solely in French. Bill 178 generated a storm of controversy in English Canada, and political scientists argue that since then, it has been exceedingly difficult politically for the override to be invoked by a government.

The delegitimization of the override is a familiar story. Manfredi's twist is his claim that the delegitimization of the override has affected *Charter* adjudication, by

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[41] See Manfredi, *supra* note 26.

[42] *NAPE*, *supra* note 2 at paras. 275, 341-68.

[43] *Charter*, *supra* note 3, s. 33.

[44] Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" International Journal of Constitutional Law [forthcoming in 2004].

[45] Tsvi Kahana, "The Notwithstanding Mechanisms and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Canadian Public Administration 255.

[46] Bill 178, *An Act to amend the Charter of the French Language*, 2d Sess., 33d Leg., Quebec, 1988, cl. 10 (assented to 22 December 1988), S.Q. 1988, c. 54.

making the Supreme Court more activist. His premise is that the Supreme Court acts strategically because it has policy objectives, and its ability to secure those objectives depends on the responses of legislatures to its judgments. Manfredi argues that prior to Bill 178, the threat of override led the Supreme Court to be cautious in its judgments in order not to provoke a legislative reversal of its rulings. The delegitimization of the override, accordingly, has altered the institutional balance between courts and legislatures by removing this external restraint on judicial review. The result, Manfredi argues, is that unconstrained by the threat of the override in the post-Bill 178 period, courts have acted more aggressively, and judicial activism has consequently increased.[47]

Justice Marshall does not mention the override in *NAPE*, although it figures prominently in the debate sparked by his reasons.[48] A connection, however, may be drawn between that judgment and this part of Manfredi's argument for the following reason: Where there is a real possibility of an effective legislative reply to the Supreme Court's judgments, the wind comes out of the sails of those who raise normative objections to judicial activism. Justice Marshall's strong claims about the potential for deep public dissatisfaction with the Court's activism, without any mention whatsoever of the override, seem to depend on the belief that despite the presence of section 33 in the *Charter*, there is no real opportunity for legislative response. The final hypothesis, then, is that the override was delegitimized by its use in Bill 178 in 1988, and that its disuse has contributed to increased levels of activism by an unconstrained Court in the period that has followed.

C. Contextualizing the Claims

These hypotheses, implicit and explicit in Justice Marshall's judgment, are particularly interesting because they run counter to the dominant narrative in the legal academy. The dominant view among legal academics is that after an initial brief adoption of an aggressive approach to *Charter* interpretation, the Court has not been activist at all, but has in fact become rather deferential. Moreover, the site of deference is section 1, the very same provision that Justice Marshall identifies as the instrument of the Court's activism. Kent Roach, for example, expresses this view when he writes that "[i]t is well known that, after an initial bout of enthusiasm, the Supreme Court has become more deferential in determining whether the government has justified restrictions on *Charter* rights."[49] Indeed, Roach argues that deference has increased to such an extent that "the Court will often uphold legislation if the government does a half-way decent job of mounting a section 1 defence."[50] The Court's evolving

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[47] Manfredi, *supra* note 26 at 4-5, 184-88.

[48] See *supra* notes 22, 23 and accompanying text.

[49] Roach, *supra* note 28 at 172.

[50] *Ibid.*

approach to section 1 is a far cry from the signal sent by *Oakes*, which granted to rights a presumptive importance and regarded limitations on rights as exceptional and narrow.

The rise of deference under section 1 can be linked to a variety of doctrines that, taken together, have significantly diluted the stringency of the *Oakes* test. For example, the Court defers to governments when legislation has been enacted to protect vulnerable persons, such as retail workers and children.[51] The Court also defers to legislation that balances conflicting societal interests,[52] as opposed to legislation that pits the state against the individual (so-called singular antagonist legislation).[53] On the issue of what kinds of evidence are sufficient to satisfy section 1, the Court has held that when legislation is enacted against the backdrop of conflicting social science legislation, which does not conclusively establish that constitutionally-protected conduct is harmful, it is enough for the government to show that it had a rational basis for proceeding.[54] And in some cases, such as those involving pornography and hate speech, a "reasonable apprehension of harm" through the taking of judicial notice by the Court drawing on its own experiences is sufficient.[55]

As well, many legal scholars believe that even a highly counter-majoritarian Supreme Court would not be a problem because the override provides a legislative check to judicial review. Several legal scholars have characterized the relationship between courts and legislatures as one of dialogue whereby legislatures may respond to Court judgments by amending legislation that has been held unconstitutional in order to bring it in line with constitutional requirements. They have argued that the site of this sort of conversation is in the section 1 analysis.[56] Moreover, if courts and legislatures ultimately fail to resolve differences over the constitutionality of legislation through dialogne at the section 1 stage, the override gives the legislature the last word. Clearly, if the override has been delegitimized, it cannot serve this function.

Finally, some legal scholars have also considered the impact of the override on constitutional adjudication. From the vantage point of constitutional design, the availability of the override has been offered not as a reason for the Supreme Court to

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[51] *R. v. Edwards Books*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1; *Irwin Toy. Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [*Irwin Toy* cited to S.C.R.].

[52] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545.

[53] This distinction was first set out in *Irwin Toy*, *supra* note 51 at 994. However, see McLachlin J.'s judgment in *RJR-MacDonald* (*supra* note 27 at para. 135) for skepticism about this distinction.

[54] *Irwin Toy*, *ibid.*

[55] *Thomson Newspapers Ltd. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at paras. 115-17; 159 D.L.R. (4th) 385.

[56] See *e.g.* Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Sucb a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 at 79-82, 84-87, 92-93 ; Roach, *supra* note 28 at 176.

act cautiously, but as a reason for the Court to act aggressively. As Kent Roach recently suggested, the idea is that eliminating judicial supremacy permits courts to operate free of the anxiety that they have the final say.[57] On this view, it also follows that courts should act cautiously *in the absence* of an override. Manfredi essentially turns these propositions on their heads by arguing that an override prompts deference, and the absence of an override prompts activism. In other words, Manfredi (and perhaps Justice Marshall) claims that the override has had exactly the opposite effect on judicial review than the effect anticipated by the legal academy. Determining whether either story is accurate is important to properly understanding Canadian constitutional practice.

II. Methodology

A. Compiling the Data Set

In order to test the claims made in the *NAPE* decision, we generated a data set of all Supreme Court decisions from 1982 to 2002 in which the constitutionality of a "majoritarian" act was challenged on the basis that it violated a *Charter* right. The list of cases (reproduced in the appendix, below) was generated from three sources. First, for the period from 1982 to 1997, we relied on the lists generated in a study by Morton, Russell, and Riddell that examined the period from 1982 to 1989,[58] and in a second study by James Kelly that extended the former group's analysis through to the end of 1997[59] (we will refer to these studies collectively as the "Morton/Kelly work"). Second, we updated this list based on Supreme Court Reporters published after 1997. Third, in order to extend the list of cases to those not yet published in the Supreme Court Reporters at the time our data was collected, we obtained the neutral citations for all unreported judgments from the Supreme Court Website and performed full-text searches of those judgments in Quicklaw to ascertain in which cases there was a *Charter* right at issue.[60]

We build upon and update the Morton/Kelly work, not only in generating our set of cases, but more fundamentally, in relying on the outcomes of constitutional challenges as a quantitative measure of activism. It is important, however, to make clear that both the hypotheses tested and the methodology used in this study make it distinct from previous work. Specifically, our study differs from the Morton/Kelly work in three significant ways. First, although the Morton/Kelly work purports to be about "*Charter* decisions", its definition of *Charter* decisions encompasses not only *Charter* rights, but also Aboriginal rights and denominational school rights. In our

[57] Roach, *ibid.* at 6.

[58] Morton, Russell & Ridell, *supra* note 34 at 55-58.

[59] Kelly, "Rebalancing", *supra* note 33.

[60] This set of cases extends up to 31 December 2002.

study, we include only true *Charter* claims, excluding other types of rights claims. Second, the Morton/Kelly work examines both challenges to individual executive acts (primarily decisions taken by the police) as well as challenges to legislation, both primary and secondary. As will be explained in greater detail below, we include only cases in which primary legislation is challenged because our definition of activism is rooted in counter-majoritarianism. Third, in order to take into consideration the interaction of substantive *Charter* rights with sections 1 and 33 in *Charter* challenges to majoritarian decisions, we draw further distinctions between different categories of *Charter* rights. Thus, when we assess claims about the delegitimization of the override, we break down the data set to distinguish between overrideable and non-overrideable *Charter* rights, to see if there are any differences in judicial behaviour. We also pay close attention to the stage at which *Charter* claims are resolved (i.e., the rights-infringement stage versus the section 1 analysis). To better understand this interaction, we undertake an analysis of the patterns of wins and losses, depending on whether the substantive *Charter* right has been interpreted as containing an internal limitation.

In sum, our study can be distinguished from previous work on the basis that it is rooted in a legal and doctrinal understanding that reflects the methodology of *Charter* analysis. In particular, our study emphasizes the analytical differences between *Charter* rights themselves and of the different relationships that these rights have with sections 1 and 33. The similarities and differences between our study and the Morton/Kelly work will be noted throughout our discussion of methodology and results.

1. What is a *Charter* Case?

We included only *Charter* cases in our data set. This is an important way in which our data set can be distinguished from the Morton/Kelly work, which we relied on to generate the data points on our list prior to 1998. The two studies included Aboriginal rights[61] and denominational school rights[62] in their data sets.[63] We limited our data set in this way for two reasons. First, the claim that the Court is counter-majoritarian is premised in large part on the view that the Court is not sufficiently deferential in its interpretation of section 1. Section 1 applies only to the rights and freedoms set out in the *Charter*. It does not extend to section 35 or section 93 rights.[64] This begs the

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[61] *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[62] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5.

[63] Morton, Russell & Riddell, *supra* note 34 at 55-58; Kelly, "Rebalancing", *supra* note 33 at 627, n. 7.

[64] *Charter*, *supra* note 3, s. 1. Section 1 reads:

> 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.

question, though, of whether there are proxies for section 1 that operate with respect to Aboriginal and denominational school rights. Denominational school rights are not subject to this sort of limitations analysis. But despite the absence of a limitations clause for section 35, the Court's test for Aboriginal rights incorporates a limitations analysis that is extremely similar to the analysis applied in *Charter* cases.[65] We nonetheless excluded Aboriginal rights cases for a second reason: Justice Marshall's judgment, the debate it sparked, and the relevant academic literature all raise concerns of judicial activism principally with respect to the *Charter*.

2. When is a Case Counter-Majoritarian?

Because we are measuring the extent to which the Supreme Court is counter-majoritarian, we only included cases where a majoritarian act is challenged. Our data set consists of three categories of cases. First, we included all challenges to federal legislation. Second, we included all challenges to provincial legislation. Third, we included challenges to municipal by-laws, because they have been enacted by democratically accountable institutions, even though they are not a form of primary legislation.

Our definition of majoritarian decisions resulted in the exclusion of certain categories of cases. First, we excluded *Charter* challenges to common law rules. Common law rules are rules made by unelected judges, and as a result, overruling such a rule is not counter-majoritarian.

Second, we excluded challenges to secondary legislation, that is, regulations enacted by government departments, and by-laws or regulations enacted by independent agencies that exercise powers delegated to them by statute. The rationale for excluding this category of cases is that, although the enactment of regulations is contemplated by legislation, their content has not been approved by a democratically elected body. In some cases, the regulations are enacted by independent bodies, such as the governing bodies of self-regulating professions.[66] It seems clear that this category of cases should be excluded: overruling a decision made by the governing body of a self-regulating profession can hardly be taken to be counter-majoritarian. In other cases, however, the bodies that enact the regulations are indirectly accountable to the legislature. For instance, in cases where a regulation is enacted by a government

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[65] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.

[66] Three data points involving challenges to a regulation of this type were excluded from the study: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317 (the challenge to *Rules of the Law Society of Alberta*, ss. 75B, 154); *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, 56 D.L.R. (4th) 309 (the challenge to *Federal Court Rules*, C.R.C., c. 663, s. 465(1) (1978)); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 (the challenge to R.R.O. 1980, Reg. 447, ss. 37(39), 40).

ministry, the minister is ultimately responsible to Parliament.[67] We recognize that the exclusion of the latter category of cases is more controversial. While an argument could be made that cases involving challenges to regulations enacted by government bodies should be included, we have decided to exclude these cases for the additional reason that the exclusion of both types of secondary legislation promotes replicability and inter-coder reliability (i.e., the degree to which different observers draw the same conclusions in the same circumstances). The exclusion of secondary legislation distinguishes our data set from the Morton/Kelly work, which includes both legislation and regulations in its consideration of statutes.[68]

Third, we excluded *Charter* challenges to actions by government officials, whether elected or not. While we have eliminated these cases as a group, some eliminations are more controversial than others. On the one hand, the elimination of cases that challenge the constitutionality of individual decisions made by government employees, and that are not framed as challenges to primary or secondary legislation pursuant to which they act, should be relatively uncontroversial. For example, the individual conduct of a police officer or an immigration officer, when not directed to act in that way by primary legislation, is not a majoritarian action. More controversial is our exclusion of ministerial action from the data set. The rationale for excluding these cases, however, is the same as the rationale for excluding the cases involving lower-level government employees: the decision of any one actor on behalf of the government does not constitute a majoritarian action unless this actor has secured the positive consent of the legislature.

3. Correcting for Overcounting and Undercounting: Companion Cases and Multiple Provisions

We made two further changes to our list of cases, distinguishing it again from the data set used by the Morton/Kelly work.[69] First, we eliminated companion cases, which we define as cases where *Charter* challenges are brought to the same provision in multiple cases reaching the Supreme Court at the same time, and where the judgments are issued together. Typically these cases are found in the criminal context where multiple defendants in separate actions challenge the provision of the *Criminal Code*[70] under which they are charged. For example, in *R. v. Furtney*,[71] the defendant

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[67] Two data points involving challenges to a regulation of this type were excluded from the study: *R. v. Campbell*, [1997] 3 S.C.R. 3, 206 A.R. 1 (the challenge to *Provincial Court Judges Act: Payment to Provincial Judges Amendment Regulation*, Alta Reg. 116/94); *Reference Re Renumeration of Judges of Prince Edward Island*, [1997] 3 S.C.R. 3, 156 Nfld. & P.E.I.R 1 (the challenge to *Public Sector Pay Reduction Act: Interpretation Regulations*, P.E.I. Reg. EC 1994-631).

[68] See Kelly, "Rebalancing", *supra* note 33.

[69] See Morton, Russell & Riddell, *supra* note 34; Kelly, *ibid.*

[70] R.S.C. 1985, c. C-46.

[71] [1991] 3 S.C.R. 89, 51 O.A.C. 299 [*Furtney*].

challenged the constitutionality of a lottery provision of the *Criminal Code*[72] on the basis that it violated section 11(g) of the *Charter*. In a second case heard at the same time,[73] the defendant challenged the same provision on the same basis. The two judgments were handed down on the same day, and in its reasons on the issue of the constitutionality of the provision in the companion case the Court simply referred to the holding in *Furtney*. Counting both of these cases would essentially be double-counting the Court's holding in *Furtney*. As a result, the companion case was excluded from the data set.

Just as it is an accident of litigation when the same issue arises in multiple cases, often multiple issues arise in the same case, each of which could have given rise to a separate constitutional challenge. Where multiple unconnected provisions of a statute, or provisions in different statutes, are challenged in the same case, it is under-counting to treat that case as a single constitutional challenge. In addition, in some cases the Court arrives at a mixed result, upholding the constitutionality of some impugned provisions while striking others down. In these cases, it is not possible to treat constitutional challenges to multiple provisions as a single challenge. As a result, where the Court considered multiple provisions separately in the judgment, we counted these as separate constitutional challenges. (To note these instances, the number of challenges counted per case is indicated in the final column of the appendix, below). However, if multiple provisions formed a single functional unit, and as a consequence hung or fell together, we counted them as a single constitutional challenge.

B. Coding the Judgments

Once we compiled the list of relevant cases, we coded the cases on five variables:

1. the type of majoritarian action challenged,
2. the right at issue,
3. whether the right challenged was subject to the section 33 override,
4. whether the Court found that a right was violated, and
5. whether the violation was saved by section 1.

Where we found that the Supreme Court did not deal with a constitutional issue on its merits—for instance, where a constitutional challenge was dismissed for a procedural issue such as standing or mootness—we eliminated the case from the data set. We might have included these cases in the data set on the grounds that the Court

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[72] *Criminal Code*, *supra* note 70, s. 190(3).

[73] *R. v. Jones*, [1991] 3 S.C.R. 110, 8 C.R. (4th) 137.

may have manipulated procedural rules in order to dismiss *Charter* applications that it would otherwise have dismissed on substantive grounds. While the inclusion of these cases would bolster our claim that the Court is not as activist as Justice Marshall suggests, we have excluded them on the basis that they are not helpful to an analysis of the Court's approach to *Charter* interpretation. In general, the measures coded in our study were sufficiently crude to produce extremely high inter-coder reliability.[74]

C. Assessing the Hypotheses in Light of the Data

Recall that there are four empirical claims implicit in Justice Marshall's judgment. First, in absolute terms, there is a high level of judicial activism. Second, judicial activism is increasing over time. Third, the root of this activism is a failure of the Court to be sufficiently deferential to governments in its interpretation of section 1. Fourth, the override is of no use in combating judicial activism because it has been delegitimized. We use the empirical data collected here to test these claims, and by implication, the normative arguments that rely on these empirical propositions.

In order to evaluate absolute levels of activism and the increase of activism over time (hypotheses 1 and 2), we measured the government "win rates" by year. In order to determine win rates, we looked at the outcome in each case. Where a claimant was unsuccessful in showing that a *Charter* right had been violated, or where the government was successful in arguing that a rights violation was justified under section 1, the case was coded as a government "win". Where the claimant was successful in showing a rights violation and where the government was unsuccessful in justifying the violation under section 1, the case was coded as a "loss". In order to determine win rates for any given year, the number of cases coded as wins was divided by the total cases decided that year. If hypothesis 1 were true, we would expect to see consistently low government win rates over time. If hypothesis 2 were true, we would expect to see decreasing government win rates over time.

Hypothesis 3 required the isolation of the Supreme Court's behaviour at the section 1 stage of analysis to determine if that provision served as a site of activism. In order to test whether the Court is activist at the section 1 stage of analysis, we looked at two pieces of information. First, we isolated the cases in which a rights violation had been found and where a justification under section 1 was considered (whether or not the government had presented evidence under section 1).[75] We

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[74] The authors coded all the cases used for this study. In order to test inter-coder reliability, however, we tested twenty randomly selected cases coded by a third party and found inter-coder reliability of one hundred percent in the sample.

[75] An example of a case where the government did not present arguments under section 1 is *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693. The inclusion of cases in which the government did not present evidence of a section 1 violation serves to make the Court appear more activist than if these cases had been excluded. Although there is a case for exclusion, we decided in the interests of

calculated absolute government win rates within this group to determine the extent to which the government was successful in justifying rights violations under section 1. We also traced section 1 government win rates from year to year. Second, we divided the cases in this group according to the substantive right at issue, on the basis that section 1 might be differently applied depending on how easy or difficult it was to establish a particular substantive rights claim. We looked specifically at three substantive sections which cover the spectrum in terms of the difficulty of establishing a substantive rights claim. At one end of the spectrum we looked at cases involving section 2(b), which has been interpreted by the Court to encompass virtually all expressive activity,[76] and therefore contains little in the way of internal limits. At the other end of the spectrum we looked at section 7, which has an explicit internal limit.[77] Between these two extremes, we looked at section 15, which contains internal limits "read-in" by the Court.[78] If hypothesis 3 were correct, we would expect to see low government win rates in section 1. Furthermore, we would expect to see fairly consistent government win rates in section I cases across the different substantive rights sections.

In order to test hypothesis 4 (whether or not the section 33 override has been delegitimized) we isolated the cases in which the right at issue was subject to the override (i.e., cases involving section 2 or sections 7 through 15).[79] We isolated these cases from the main data set because the delegitimization of the override should have no effect on government win rates with respect to non-overridable rights (section 33 of the *Charter* has never operated as a constraint on the Supreme Court in the latter group of cases). We calculated government win rates by year in order to test whether there had been an increase in activism in the period after 1988, when the delegitimation of section 33 of the *Charter* is alleged to have occurred. If this hypothesis were correct, we would expect to see a decrease in government win rates after 1988.

III. Results, Analysis, and Discussion

A. Hypothesis 1: Judicial Activism Is High

Figure 1, below, shows the possible outcomes of a *Charter* challenge in terms of government wins and losses. There are three possible outcomes, two resulting in a

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inter-coder reliability to include these cases because it is not always possible to determine from the reasons for judgment whether in fact the government presented evidence on this point.

[76] *Charter*, *supra* note 3, s. 2(b). See *Irwin Toy*, *supra* note 51.

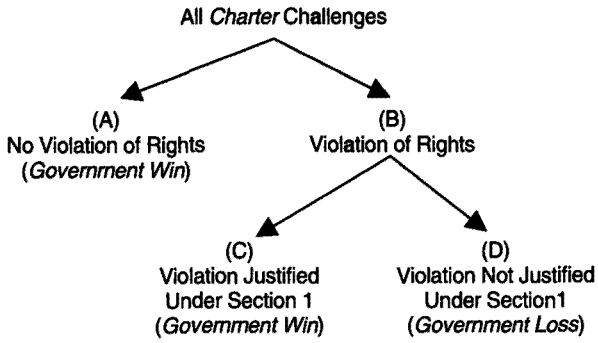
[77] *Charter*, *ibid.*, s. 7 ("[e]veryone has the right ... *except in accordance with the principles of fundamental justice*" [emphasis added]). See *Reference Re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [*B.C. Motor Vehicle* cited to S.C.R.].

[78] *Charter*, *ibid.*, s. 15. See *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1. See also *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 210 D.L.R. (4th) 193, 2002 SCC 23 (where the question of whether section 15 contains internal limits sparked deep divisions within the Supreme Court).

[79] See text of subsection 33(1), *supra* note 21.

government win and one resulting in a government loss. First, the government wins if the claimant is unsuccessful in showing that a right has been violated (outcome A). Second, the government wins if there has been a rights violation, but the violation is justified under section 1 (outcome C). Finally, the government loses only where a right has been violated and that violation is not saved under section 1 (outcome D). Based on the table in Figure 1, the overall government win rate is (A+C)/(A+B). When we calculated the overall government win rate for all of the cases in our data set, we found that governments won 62.4 percent of the time. Put differently, in cases where a majoritarian act is at issue, governments lost only 37.6 percent of the time.

FIGURE 1
Possible Outcomes of a *Charter* Challenge



We imagine that this statistic could be relied on by those in the legal academy who hold that the Court is rather deferential to governments. However, as we noted above in Part I, it is difficult to assess whether this number should in fact be viewed as high or low in absolute terms. If Justice Marshall believes in the idea of constitutional supremacy, he likely recognizes that the Supreme Court is sometimes justified in its interference with majoritarian acts. Unfortunately, it is difficult to quantify the portion of time in which the Court is justified in interfering with majoritarian acts. As a result, it is not possible to measure the portion of government losses that Justice Marshall would consider "undue incursions". However, the number provides useful information for the debate over judicial activism. It is clear that the government is successful in protecting majoritarian decisions from *Charter* challenges nearly two-thirds of the time. The government loss rate of 37.6 percent provides an absolute ceiling for the number of cases that might be characterized as activist by critics of the Court.

It is interesting to note that our overall rate is quite similar to the results obtained in the Morton/Kelly work, detailing the Court's activity from 1982 to 1997.[80] Kelly states that in the first 352 *Charter* cases, from 1982 to 1997, the government win rate was 69 percent in *Charter* cases involving statutes and regulations (versus our finding of 62.4

[80] Morton, Russell & Riddell, *supra* note 34; Kelly, "Rebalancing", *supra* note 33.

percent).[81] If anything, our data shows a higher level of overall activism than the previous work. These differences might be attributable to differences between our methodology and that of these previous studies.[82]

B. Hypothesis 2: Judicial Activism Is Increasing over Time

If hypothesis 2 were true, we would expect to see a downward trend in government win rates across time, assuming that the types of cases heard each year are similar. However, when we analyzed absolute government win rates by year (Figure 2), we observed that they varied widely.

FIGURE 2
Absolute Government Win Rates, 1984-2002

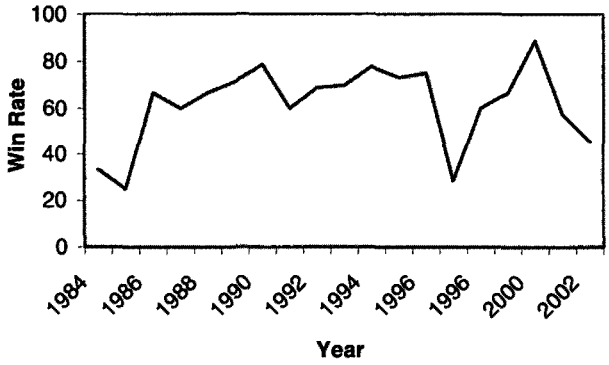
Year	Wins	Losses	Total	Win Rate
1984	1	2	3	33.3%
1985	1	3	4	25.0%
1986	2	1	3	66.7%
1987	3	2	5	60.0%
1988	12	6	18	66.7%
1989	5	2	7	71.4%
1990	15	4	19	78.9%
1991	9	6	15	60.0%
1992	11	5	16	68.8%
1993	16	7	23	69.6%
1994	7	2	9	77.8%
1995	11	4	15	73.3%
1996	3	1	4	75.0%
1997	4	10	14	28.5%
1998	3	2	5	60.0%
1999	6	3	9	66.7%
2000	8	1	9	88.9%
2001	4	3	7	57.1%
2002	5	6	11	45.5%

Moreover, the graphical depiction of the trend over time (Figure 3) shows the absence of a downward trend. Indeed, there was a significant dip in the government win rate in 1997, and had this trend continued, the government win rate should have been quite depressed by 2000 (when, in fact, the government enjoyed its highest ever overall win

[81] Kelly, "Rebalancing", *ibid.* at 656.
[82] See Part II.A, above.

rate). In sum, the evidence with respect to absolute government win rates does not support the hypothesis that judicial activism is increasing over time. These results are bolstered by the results of Kelly's 1997 study, which found a slight upward trend in government win rates in the period between 1984 and 1997.[83]

FIGURE 3
Absolute Government Win Rates by Year, 1984-2002 (Graph)



The question raised by this data is whether there were other factors that influenced and that possibility disguised a downward trend in win rates, thereby masking a result that would otherwise support hypothesis 2. The most plausible explanation is "government learning": As time passes, *Charter* jurisprudence develops and governments study the Court's evolving interpretation of the *Charter*. Over time, governments that are strategically minded learn to conform both their legislation and their arguments in *Charter* cases to the Court's jurisprudence. The result of government learning should be an increase in the government win rate. The absence of either an observable downward trend or an observable upward trend in government win rates, however, could also be consistent with the government learning story if judicial activism increased over the same period. Perhaps government win rates were being pushed upward by government learning, at the same time as they were being pushed downward by increasing judicial activism. The net result would be

[83] Kelly, "Rebalancing", *supra* note 33 at 655-56. Kelly presents his data in terms of *Charter* claimant success rate so he frames the trend as "downward". However, when the trend is recast as government win rates, it reverses (i.e., becomes "upward"). Kelly notes that for the first 100 *Charter* decisions, the success rate of *Charter* claimants in cases involving statutes and regulations was 38 percent. This figure drops to 34 percent for the first 195 *Charter* decisions, and then to 31 percent for the first 352 *Charter* decisions. Recall, however, the distinctions between Kelly's data set and the data set used here, described in Part II.A, above.

that the two forces cancel each other out, leading to the absence of a discernable trend in the aggregate data.[84]

Unfortunately, it is not possible to assess the validity of the government learning theory on the basis of the available data. An assessment of this hypothesis would require data that assesses the behaviour and motivation of various actors, presumably in the form of interviews. First, we would need data that analyzes whether, and to what extent, legislators and bureaucrats take account of the possibility of potential constitutional challenges under the *Charter* in framing legislation. Second, we would need to establish, through interviews, how government litigation counsel determines which *Charter* claims to defend in terms of the level of attention given to prior jurisprudence (particularly the manner in which the counsels frame their section 1 justification cases) and the level of consideration paid to the likely success of each case. In the absence of such data, the possibility of a counter-trend of government learning to a trend of judicial activism is real and must be viewed as a limitation of our study.

C. Hypothesis 3: The Section 1 Analysis Is the Locus of Activism

1. Overview

As Figure 1 shows, there are two points at which the government can win a *Charter* case: at the "rights violation" stage or at the "justification" ("section 1") stage. Recall that Justice Marshall focussed his criticisms at the Supreme Court's section 1 jurisprudence. In particular, Justice Marshall seemed to claim that governments tend to lose at section 1, which he took to be a measure of judicial activism since the section 1 analysis requires the Court to second-guess legislative decisions through the proportionality analysis of the *Oakes* test. Justice Marshall's judgment thus forces us to analyze the specifics of the Court's behaviour.

The overall government win rates on their own do not permit us to draw any conclusions about the Court's behaviour at section 1. To understand why, consider two radically different scenarios, suggesting two very different patterns of judicial behaviour, which would generate the same *overall* government win rates. In one scenario, if governments win, they do so at the rights violation stage. Thus, at this first stage, we would see a mixture of government wins and losses, but very few at the section 1 stage. In the second scenario, when governments win, they do so at the section 1 stage. If this were the case, whether the government ultimately wins or

[84] Kelly alludes to this argument by suggesting that "the administrative state engaged in a process of risk assessment of public policy to minimize the judicial nullification of statutes" (*ibid.* at 664). See also James B. Kelly, "Bureaucratic Activism and the *Charter of Rights and Freedoms*: The Department of Justice and its Entry into the Centre of Government" (1999) 42 Canadian Public Administration 476.

loses, we would expect to see most cases lead to a finding that a right had been violated. We would also expect to see a higher rate of government wins based on a section 1 justification than we would see under the first scenario.

In order to understand *where* the government wins and loses, it is necessary to compare government win rates at the rights violation stage and at the justification stage. In our data set, the government won just over 50 percent at the rights violation stage. At the section 1 stage, the government won just over 25 percent of the time. (Cases that reached this stage of analysis are identified as the "Section 1 Subset" in the appendix, below.) A consequence of these differences in win rates at the different stages of *Charter* analysis is that a very large proportion of government wins occured at the rights violation stage (79.5 percent). Although Kelly did not make this exact comparison, he noted a gap between the overall government win rate (66 percent) and the win rate at the section 1 stage (39 percent) between 1984 and 1997, a slightly different statistical comparison, which reflects the same underlying data.[85] At first, these results seem to support Justice Marshall's view that the Court's activism is located in the section 1 stage.[86] Further analysis shows, however, how this interpretation of the data can be simplistic.

While it is correct to observe that there is a gap between the government win rates at the rights violation stage and at the justification stage, it is important to note that every case that reaches the section 1 analysis has already been through an analysis at the rights violation stage. Only the cases that are found to violate a right will proceed to the section 1 analysis. Therefore, when we compare the government win rate at the rights violation stage to the government win rate at the section 1 stage, the group of cases at the section 1 stage is in fact a sample from the pool of cases tested at the rights violation stage. Moreover, the cases where the government wins at the rights violation stage are not tested at the section 1 stage. The potential problem that we encounter, therefore, is sampling bias. In the cases that reach the section 1 analysis stage, the government has already lost once. It seems prima facie plausible to suggest that a group of cases, in which the government has already lost on one ground, includes more cases that the government actually *ought* to lose than does the group of cases that are never tested at section 1 (because the government won at the rights violation stage).

If true, this would mean that the rights violation analysis acts as a sieve for some constitutional challenges that governments would have otherwise successfully defended under section 1. We would expect that this phenomenon is occurring for cases based on substantive rights with strong internal limits. For example, in order to find a violation of section 7, there must be a deprivation of a protected interest (e.g., life, liberty, and security of the person) *and* that deprivation must infringe principles

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[85] Kelly, "Rebalancing", *ibid.*

[86] This point is also made by some political scientists. See *e.g.* Kelly, "Rebalancing", *ibid.*

of fundamental justice.[87] Once legislation is found to be in non-conformance with the principles of fundamental justice, it seems unlikely (and the Supreme Court has said as much) that it will be found to be "demonstrably justified in a free and democratic society."[88]

In order to test this argument, we isolated section 1 justification results according to the different substantive rights affected. If the substantive rights with internal limits were in fact acting as a sieve, there should be a discernable difference between government success rates at the section 1 stage, depending on whether the substantive right at issue contains internal limits. On the other hand, if government success rates at the justification stage were to remain constant, regardless of the presence or absence of internal limits in the substantive right, this would bolster the claim that the Court is activist in its use of section 1.

2. Variation by Substantive *Charter* Right

We observed a substantial variation in levels of judicial activism depending on the section of the *Charter* at issue. As predicted, there was a monotonic relationship between the internal restrictions of the different substantive *Charter* rights and the government win rates at the section 1 stage (Figure 4). That is, the *easier* it was for a violation of rights to be established, the *higher* the government win rate in section 1. In cases involving section 2(b), a section with few internal restrictions, for example, the government was successful in justifying rights violations 44.4 percent of the time. On the other hand, in cases involving section 7, which contains strong internal limits, the government success rate at section 1 was only 6.3 percent. In between these two extremes are the section 15 cases, where the Court has read-in a set of internal restrictions that are more stringent than the minimal restrictions in section 2(b), but less stringent than section 7's explicit restrictions. As expected, for cases involving section 15, the government's success rate in section 1 was 20.0 percent.

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[87] *Charter*, *supra* note 3, s. 7; *B.C. Motor Vehicle*, *supra* note 77.

[88] *B.C. Motor Vehicle*, *ibid.* at 518; *Gosselin v. Quebec (A.G.)* (2002), 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1, 2002 SCC 84 at paras. 389-90, Arbour J., dissenting; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 99, 177 D.L.R. (4th) 124, Lamer C.J.C.

FIGURE 4
Government Section 1 Win Rates by Substantive *Charter* Right

Substantive *Charter* Right	Government Wins at Section 1 (C)	Government Losses (D)	Section 1 Win Rate (C / C + D)
Section 2(b)	12	15	44.4%
Section 15	2	8	20.0%
Section 7	1	15	6.3%

These results are consistent with our hypothesis that greater internal restrictions in a substantive right result in lower section 1 government win rates. Internal restrictions resulted in only the most egregious cases making it to the section 1 test. This theory is reinforced by examining the aggregate win rate, which includes both government wins at the section 1 stage *and* government wins because of a failure to establish a rights violation, by substantive section (Figure 5). When we isolated the total government win rate by substantive right, we found that the relationship between internal limits and the government win rate was completely reversed. We found that section 7, the section with the lowest section 1 government win rate, had the highest overall government win rate. Conversely, section 2(b), which had the highest section 1 government win rate, had the lowest overall government win rate.

FIGURE 5
Aggregate Government Win Rates by Substantive *Charter* Right

Substantive *Charter* Right	Total Government Wins (A + C)	Government Losses (D)	Overall Win Rate (A + C / A + B)
Section 2(b)	18	15	54.5%
Section 15	16	8	66.7%
Section 7	55	15	78.6%

The implications of this last result are worth noting. Not only is the tracking of section 1 government win rates a poor predictor of overall government success, it predicts in fact *precisely the opposite trend.* The lower the section 1 government win rate, the higher the overall government win rate with respect to a particular right. This conclusion suggests that government success in section 1 is, at the very least, unrelated to its general success in contesting *Charter* challenges, and as a result, a claim of Court activism in its use of section 1 does not go very far to establishing a general claim of judicial activism.

This last line of analysis illustrates the importance of designing quantitative analysis around a doctrinal understanding of the structure of *Charter* adjudication. Previous studies merely noted the relatively low government win rate at section 1, and have concluded from it that the Court was particularly activist at that stage of *Charter* analysis. Morton, Russell, and Riddell stated, for example, that "the Court has been more inclined to reject governments' section 1 defences ... than to accept them ... consistent with the Court's new judicial activism."[89] What these studies have failed to consider is the potential interrelationship between the section 1 win rate and the relative ease or difficulty of establishing a rights violation for particular *Charter* provisions. Demonstrating that such a relationship exists not only makes it more complicated to make charges of judicial activism at the justification stage, but also suggests that a low section 1 win rate may predict government success for challenges brought on the basis of rights with an internal limit.

3. Trends over Time

Another part of Justice Marshall's claim about judicial activism in its use of section 1 is that it has been increasing since the Court's 1995 judgment in *RJR-Macdonald.* Figure 6 shows the government's section 1 win rates over time. There was no clear downward trend in government win rates after 1995. In fact, in 1996, the year immediately following the decision in *RJR-Macdonald,* the government had its highest ever section 1 win rate of 66.7 percent. The absence of a discernable trend in section 1 win rates was also noted in Kelly's 1997 study, where he found that after an initial reluctance to accept section 1 arguments, the Court had been inconsistent in its level of deference under its section 1 analyses.[90]

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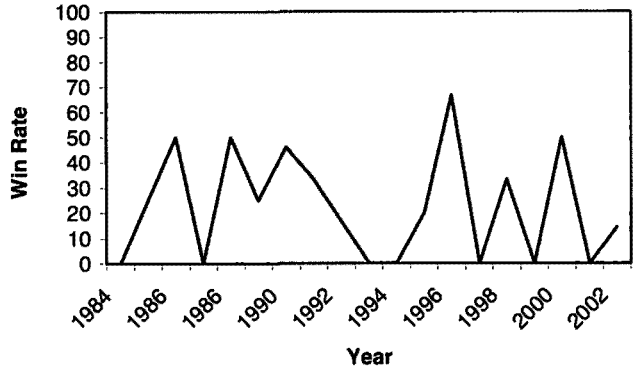
[89] Morton, Russell & Riddell, *supra* note 34 at 30.

[90] Kelly, "Rebalancing", *supra* note 33 at 663. Kelly finds that from 1984 to 1987, "only 20 [percent] of section 1 defences ... were accepted by the Supreme Court. ... In the three-year period between 1988 and 1990, this number increased to 55 [percent] ... However, between 1984 and 1992, the Court accepted 39 [percent] ... of the section 1 defences presented by government" (*ibid.*). This rate was the same for the period between 1993 and 1997.

FIGURE 6
Government Section 1 Win Rates, 1984-2002 (Graph)



These results support the view of those in the legal academy who discount the precedent-setting importance of the section 1 analysis in *RJR-Macdonald*. Kent Roach, for example, remarks that "the majority's decision striking down the tobacco advertising restrictions did not mark the abandonment of the more deferential approach."[91] Our explanation for the lack of any discernable impact of *RJR-MacDonald* on the Supreme Court's approach to section 1 is that the judgment can be explained by some unique features of the case. In particular, the Attorney General of Canada took the astonishing position of refusing to disclose to the Court its own studies on the effectiveness of a ban on the advertising and marketing of tobacco in reducing tobacco consumption. In his judgment, Justice Iacobucci (with whom Chief Justice Lamer concurred) expressed concern that "the Attorney General of Canada chose to withhold from the factual record evidence related to the options it has considered as alternatives to the total ban it chose to put in place,"[92] and arguably resolved the appeal against the government for that reason. Our analysis of section 1 government win rates supports this view that *RJR-Macdonald* did not have a significant impact on levels of judicial activism in section 1.

D. Hypothesis 4: The Override Has Been Delegitimized

The final hypothesis is that the override has been delegitimized through its unpopular use by Quebec in 1988, and that as a result, the Court, emboldened by the lack of constraint, has become increasingly activist in the following years. This is a question that was not examined by previous studies. In order to test this hypothesis,

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[91] Roach, *supra* note 28 at 162.

[92] *RJR-Macdonald*, *supra* note 27 at para. 186.

we isolated from the data set only the cases that involved overrideable rights (i.e., cases involving sections 2 or 7 through 15 of the *Charter*), on the basis that only these types of cases would be subject to the impact of a new activism brought about by the delegitimization of the override. (These cases are identified as the "Override Subset" in the appendix, below.) If the delegitimization of the override by Bill 178 has fueled an increase in judicial activism, there ought to be some difference between the observed level of activism in the judgments prior to 1988 and in the period that followed the supposed delegitimization.

FIGURE 7
Government Win Rates in Overrideable Rights Cases, 1984-2002

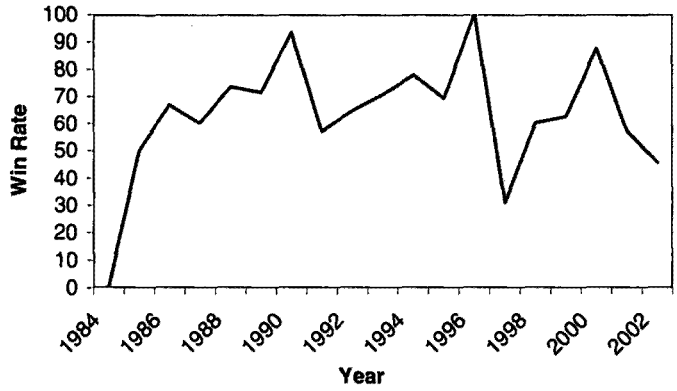

Figure 7 shows government win rates for cases involving overrideable rights from 1984 to the present. There is no discernable trend with respect to this rate, and certainly no obvious drop-off in 1988 or 1989. Moreover, if we take overall measures of win rates in the periods before and after the use of the override to immunize Bill 178, we see that there is little if any difference in win rates. In the period between 1984 and 1988, governments won cases involving overrideable rights sixty-five percent of the time. From 1989 to 2002, they won sixty-eight percent of the time. If we move the cut-off date back one year to 1989, to allow time for the supposed delegitimization to have taken effect, the story does not change much. In the period from 1984 to 1989, governments won sixty-eight percent of the time and from 1990 to 2002, governments won sixty-five percent of the time.

It is important to be clear about the significance of this finding. This result undermines the allegation of a pattern of judicial behaviour that is part of Manfredi's account of the impact of the delegitmization of the override on *Charter* adjudication (i.e., that the levels of judicial activism have risen since the delegitimization of the override through its use in Bill 178). However, the absence of such a trend does not prove that the override has not been delegitimized. In fact, this result is consistent with

a number of different hypotheses. Perhaps, and contrary to Manfredi's assertions, the override has not been delegitimized. It is interesting, for instance, to note that the override was used by the Alberta legislature in March 2000 to shield the heterosexual definition of marriage from constitutional challenge.[93] On the other hand, perhaps the override has been delegitimized and replaced by other constraints to judicial activism in the Canadian constitutional system, such as public opinion, to which the Court is responding strategically. A poll taken in May 2002 reported that fifty-four percent of respondents opposed the very idea of the override.[94] Finally, perhaps the override was and remains irrelevant to the adjudication of constitutional cases. Regardless of which story is ultimately true, we did not observe anything that suggested definitively the deligitimization of the override on *Charter* adjudication.

Conclusion

There are three significant limitations of this study that prevent us from providing a stronger positive account of judicial activism or response to Justice Marshall's remarks in *NAPE*. The first limitation is the inability of our study to differentiate between the Supreme Court's legitimate interference with legislative decisions and "undue" interference. While our working definition of counter-majoritarian judicial activism captures all instances in which the Court interfered with a majoritarian decision, even critics of the Court's activism, who are nonetheless committed to a regime of constitutional supremacy enforced by judicial review, must admit that there are some instances that call for the Court's interference. Because we are not able to distinguish appropriate from inappropriate interference, we are not able to ascertain whether the levels of appropriate interference stay constant over time, or whether there is significant variation in the levels of appropriate interference. In analyzing our data, we have assumed that there was some constant but unknown portion of government losses that would be considered legitimate, which allowed us to draw inferences about the meaning of trends in win rates for judicial activism. If our assumption is wrong and this number is changing over time, our inferences may be faulty.

The second limitation is the small number of counter-majoritarian *Charter* cases at the Supreme Court level in some years. For example, in the years of 1984 to 1987, 1996, and 1998, there are five or fewer *Charter* cases per year in our data set. As we divide the data set further to isolate section 1 or overrideable cases, this problem of a small number of cases is exacerbated.

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[93] Bill 202, *Marriage Amendment Act*, 4th Sess., 24th Leg., Alberta, 2000, cl. 5 (assented to 23 March 2000), S.A. 2000, c. 3. The statute will probably not have this effect, because it is likely unconstitutional on federalism grounds.

[94] Choudhry, Book Review, *supra* note 29 at 387.

Third, there is the potential problem of the Supreme Court's selection bias. Most of the Court's docket (with the exception of as of right criminal appeals) is controlled by the Court itself, which grants parties leave to appeal. As a consequence, it is open to the Court to determine the mix of *Charter* challenges that it hears. Although the *Supreme Court Act*[95] provides that the Court grants leave to appeal in cases that raise questions of "public importance",[96] the Court grants leave to appeal without issuing reasons (save for exceptional circumstances), making it difficult to ascertain whether other criteria enter into its decisions in leave applications. It is therefore possible that the Court could use the leave to appeal process to respond to the activism debate. For example, in an effort to appear less activist, the Court may intentionally grant leave to appeal in a few cases each year where governments will win, in order to enhance the perception that the Court is deferential to governments. On the other hand, it is entirely plausible that the Court may disproportionately take cases where it will find a majoritarian decision to be unconstitutional, reducing the number of cases on its docket where it would have deferred. Another possibility is that the Court simply hears cases that raise interesting points of law, without regard to the potential unconstitutionality of a majoritarian decision (a neutral factor in the Court's calculus) or to the public debate raging over judicial activism. The issue of selection bias is evidently an important, confounding variable, and as a consequence, must be viewed as a serious limitation to our study.

The empirical evidence that we have collected does not appear to be consistent with any one of the four hypotheses that we derived from the empirical assumptions underlying Justice Marshall's claims about judicial activism. While the Court interferes with majoritarian decisions in 37.6 percent of cases, given that at least some interventions would be perceived even by critics to be legitimate, this number does not seem as high as some would lead us to believe. When we look at the government's success rate over time, there is little support for the view that judicial activism is systematically increasing. We paid particular attention to section 1 cases in order to assess Justice Marshall's concerns about a lack of deference at the section 1 stage of analysis. We found that deference at this stage is intimately linked with the nature of the substantive right at issue, and that government success in the rights violation analysis was much more important to overall government success than was government success with section 1 justifications. Finally, we tested the hypothesis that the delegitimization of the section 33 override has led to widespread activism in the post-Bill 178 period, and concluded that there was no evidence to support such a hypothesis.

The data collected in this study is not sufficiently detailed for us to offer a positive account that explains both the scope and causes of judicial activism, and the extent to which its levels are changing over time. The data presented here, however, does raise

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[95] R.S.C. 1985, c. S-26.

[96] *Ibid.*, s. 40(1).

some serious questions about the empirical assumptions made by critics of the Supreme Court. Justice Marshall's normative claims in *NAPE* rely heavily on a number of assumptions that we have shown here to be highly suspect. While constitutional scholars have long engaged critics of the Court on a normative level, Justice Marshall's judgment in *NAPE* makes it imperative to engage the Court's detractors in a logically prior conversation as well. The question should no longer be merely whether judicial activism is good, but also whether judicial activism is real.

Appendix
Counter-Majoritarian Cases

Counter-Majoritarian Cases	Section 1 Subset	Override Subset	Number of Challenges Coded
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143	•	•	1
B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315		•	1
British Columbia Government Employees' Union v. British Columbia (A.G.), [1988] 2 S.C.R. 214	•	•	1
British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3		•	1
Baron v. Canada, [1993] 1 S.C.R. 416	•	•	3
Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358	•	•	1
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892	•	•	1
Canadian Broadcasting Corp. v. New Brunswick (A.G.), [1996] 3 S.C.R. 480	•	•	1
Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R .157		•	1
Canadian Newspapers v. Canada (A.G.), [1988] 2 S.C.R. 122	•	•	1
Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711		•	1
Comité paritaire de l'industrie de la chemise v. Potash, [1994] 2 S.C.R. 406		•	1
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203	•		1
Corporation professionelle des médecins du Québec v. Thibault, [1988] 1 S.C.R. 1033	•		1
Cunningham v. Canada, [1993] 2 S.C.R. 143		•	1
Del Zotto v. Canada, [1999] 1 S.C.R. 3		•	1
Delisle v. Canada (A.G.), [1999] 2 S.C.R. 989		•	1
Devine v. Quebec (A.G.), [1988] 2 S.C.R. 790	•	•	2
Dunmore v. Ontario (A.G.), [2001] 3 S.C.R. 1016	•	•	1
Dywidag Systems International Ltd. V. Zutphen Brothers Construction Ltd., [1990] 1 S.C.R. 705		•	1
Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326	•	•	1
Egan v. Canada, [1995] 2 S.C.R. 513	•	•	1
Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712	•	•	1
Godbout v. Longueuil (City of), [1997] 3 S.C.R. 844	•	•	1
Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703		•	1
Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995			1
Harvey v. New Brunswick (A.G.), [1996] 2 S.C.R. 876	•		2
Hunter v. Southam Inc., [1984] 2 S.C.R. 145	•	•	1
Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631		•	1
Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927	•	•	1

Counter-Majoritarian Cases	Section 1 Subset	Override Subset	Number of Challenges Coded
Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779		•	1
Lavallee, Rackel & Heintz v. Canada (A.G); White, Ottenheimer & Baker v. Canada (A.G.); R. v. Fink, 2002 SCC 61	•	•	1
Lavigne v. Ontario's Public Service Employees Union, [1991] 2 S.C.R. 211	•	•	1
Lavoie v. Canada, 2002 SCC 23	•	•	1
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497		•	1
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357			1
Libman v. Quebec (A.G.), [1997] 3 S.C.R. 569	•		1
Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120	•	•	2
M. v. H., [1999] 2 S.C.R. 3	•	•	1
Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405	•	•	1
Mahe v. Alberta, [1990] 1 S.C.R. 342	•		2
Miron v. Trudel, [1995] 2 S.C.R. 418	•	•	1
Nova Scotia (A.G.) v. Walsh, 2002 SCC 83		•	1
Ontario v. Canadian Pacific Ltd. [1995] 2 S.C.R. 1031		•	1
Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69	•	•	1
P.(D.) v. S.(C.), [1993] 4 S.C.R. 141		•	1
Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869		•	1
Professional Institute of Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367		•	1
Quebec Association Of Protestant School Boards v. Quebec (A.G.), [1984] 2 S.C.R. 66	•		1
R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209		•	1
R. v. Bain, [1992] 1 S.C.R. 91	•	•	1
R. v. Beare, [1988] 2 S.C.R. 387		•	1
R. v. Bernard, [1988] 2 S.C.R. 833		•	1
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295	•	•	1
R. v. Brown, [1994] 3 S.C.R. 749		•	1
R. v. Butler, [1992] 1 S.C.R. 452		•	1
R. v. Chaulk, [1990] 3 S.C.R. 1303	•	•	1
R. v. Colarusso, [1994] 1 S.C.R. 20		•	1
R. v. Corbett, [1988] 1 S.C.R. 670		•	1
R. v. Creighton, [1993] 3 S.C.R. 3		•	1
R. v. Darrach, [2000] 2 S.C.R. 443		•	3

Counter-Majoritarian Cases	Section 1 Subset	Override Subset	Number of Challenges Coded
R. v. DeSousa, [1992] 2 S.C.R. 944		•	1
R. v. Duarte, [1990] 1 S.C.R. 30			1
R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713	•	•	1
R. v. Finlay, [1993] 3 S.C.R. 103		•	1
R. v. Finta, [1994] 1 S.C.R. 701		•	2
R. v. Fitzpatrick, [1995] 4 S.C.R. 154		•	1
R. v. Furtney, [1991] 3 S.C.R. 89		•	1
R. v. Généreux, [1992] 1 S.C.R. 259	•	•	1
R. v. Goltz, [1991] 3 S.C.R. 485		•	1
R. v. Grant, [1993] 3 S.C.R. 223	•	•	2
R. v. Guignard, [2002] 1 S.C.R. 472	•	•	1
R. v. Hall, 2002 SCC 64	•	•	1
R. v. Hess; *R. v. Nguyen*, [1990] 2 S.C.R. 906	•	•	1
R. v. Heywood, [1994] 3 S.C.R. 761	•	•	1
R. v. Holmes, [1988] 1 S.C.R. 914		•	1
R. v. Hufsky, [1988] 1 S.C.R. 621	•	•	1
R. v. Jobin, [1995] 2 S.C.R. 78			1
R. v. Jones, [1986] 2 S.C.R. 284		•	1
R. v. Jones, [1994] 2 S.C.R. 229		•	1
R. v. Keegstra, [1990] 3 S.C.R. 697	•	•	1
R. v. L. (D.O.), [1993] 4 S.C.R. 419		•	1
R. v. Laba, [1994] 3 S.C.R. 965	•	•	1
R. v. Ladouceur, [1990] 1 S.C.R. 1257	•	•	1
R. v. Landry, [1991] 1 S.C.R. 99	•	•	1
R. v. Latimer, [2001] 1 S.C.R. 3		•	1
R. v. Lee, [1989] 2 S.C.R. 1384	•	•	1
R. v. Levogiannis, [1993] 4 S.C.R. 475		•	1
R. v. Lippé, [1991] 2 S.C.R. 114		•	1
R. v. Logan, [1990] 2 S.C.R. 731	•		1
R. v. Lucas, [1998] 1 S.C.R. 439	•	•	1
R. v. Lyons, [1987] 2 S.C.R. 309		•	1
R. v. Martineau, [1990] 2 S.C.R. 633	•	•	1
R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627		•	1
R. v. Mills, [1999] 3 S.C.R. 668		•	1

Counter-Majoritarian Cases	Section 1 Subset	Override Subset	Number of Challenges Coded
R. v. Milne, [1987] 2 S.C.R. 512		•	1
R. v. Morales, [1992] 3 S.C.R. 711	•	•	3
R. v. Morgentaler, [1988] 1 S.C.R. 30	•	•	1
R. v. Morrisey, [2000] 2 S.C.R. 90		•	1
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606		•	1
R. v. Oakes, [1986] 1 S.C.R. 103	•	•	1
R. v. Osolin, [1993] 4 S.C.R. 595		•	1
R. v. Parr, R. v. Sawyer, [2001] 2 S.C.R. 344		•	1
R. v. Pearson, [1992] 3 S.C.R. 665		•	1
R. v. Penno, [1990] 2 S.C.R. 865		•	1
R. v. Pontes, [1995] 3 S.C.R. 44		•	1
R. v. Potvin, [1989] 1 S.C.R. 525		•	1
R. v. Ratti, [1991] 1 S.C.R. 68	•	•	1
R. v. Richard, [1996] 3 S.C.R. 525		•	1
R. v. Rose, [1998] 3 S.C.R. 262		•	1
R. v. Rube, [1992] 3 S.C.R. 159		•	1
R. v. Ruzic, [2001] 1 S.C.R. 687	•	•	1
R. v. S.(R.J.), [1995] 1 S.C.R. 451		•	1
R. v. Sawyer, [1992] 3 S.C.R. 809		•	1
R. v. Schwartz, [1988] 2 S.C.R. 443		•	1
R. v. Seaboyer, R. v. Gayme, [1991] 2 S.C.R. 577	•	•	1
R. v. Sharpe, [2001] 1 S.C.R. 45	•	•	1
R. v. Simmons, [1988] 2 S.C.R. 495		•	1
R. v. Sit, [1991] 3 S.C.R. 124	•	•	1
R. v. Skalbania, [1997] 3 S.C.R. 995		•	1
R. v. Skinner, [1990] 1 S.C.R. 1235	•	•	1
R. v. Smith, [1987] 1 S.C.R. 1045	•	•	1
R. v. Swain, [1991] 1 S.C.R. 933	•	•	1
R. v. Thomsen, [1988] 1 S.C.R. 640	•	•	1
R. v. Turpin, [1989] 1 S.C.R. 1296		•	1
R. v. Vaillancourt, [1987] 2 S.C.R. 636	•	•	1
R. v. Wholesale Travel Group, [1991] 3 S.C.R. 154	•	•	1
R. v. Whyte, [1988] 2 S.C.R. 3	•		1
R. v. Yorke, [1993] 3 S.C.R. 647	•	•	1
R v. Zundel, [1992] 2 S.C.R. 731	•	•	1

Counter-Majoritarian Cases	Section 1 Subset	Override Subset	Number of Challenges Coded
Ramsden v. Peterborough (City of), [1993] 2 S.C.R. 1084	•	•	1
Re Therrien, [2001] 2 S.C.R. 3		•	1
Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721	•		1
Reference Re Motor Vehicle Act (British Columbia), s. 94(2), [1985] 2 S.C.R. 486	•	•	1
Reference Re Provincial Electoral Boundaries (Saskatchewan), [1991] 2 S.C.R. 158			1
Reference Re Public Schools Act (Manitoba), ss. 79(3), (4) and (7), [1993] 1 S.C.R. 839	•		1
Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3	•	•	10
Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Manitoba), [1990] 1 S.C.R. 1123	•	•	2
Reference Re Workers' Compensation Act, 1983 (Newfoundland), ss. 32 & 34, [1989] 1 S.C.R. 922		•	1
RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199	•	•	3
Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519			1
Ruby v. Canada (Solicitor General), 2002 SCC 75		•	2
Rudolph Wolff & Co. v. Canada, [1990] 1 S.C.R. 695			1
Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267		•	1
Sauvé v. Canada (A.G.); Belczowski v. Canada, [1993] 2 S.C.R. 438	•	•	1
Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68	•	•	1
Schachter v. Canada, [1992] 2 S.C.R. 679	•	•	1
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3		•	2
Symes v. Canada, [1993] 4 S.C.R. 695		•	1
Tétrault-Gadoury v. Canada (Employment & Immigration Commission), [1991] 2 S.C.R. 22	•	•	1
Thibaudeau v. Canada, [1995] 2 S.C.R. 627		•	1
Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commissier), [1990] 1 S.C.R. 425		•	1
Thomson Newspapers Ltd. v. Canada (A.G.), [1998] 1 S.C.R. 877	•	•	1
United Food and Commercial Workers, Local 518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083	•	•	1
Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 S.C.R. 10		•	1
Vriend v. Alberta, [1998] 1 S.C.R. 493	•	•	1
Walker v. Prince Edward Island, [1995] 2 S.C.R. 407			1
Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625		•	1
Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519		•	1
Young v. Young, [1993] 4 S.C.R. 3		•	1