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**LEGISLATIVE vs. JUDICIAL CHECKS AND BALANCES:
COMPARING RIGHTS POLICIES ACROSS REGIMES**

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Legislative vs. Judicial Checks and Balances: Comparing Rights Policies Across Regimes

Comparing rights policies across regimes is difficult. One approach is to frame the issue in terms of “comparative rights *protection*” – i.e., which regime (or kind of regime) does the best job of protecting rights? To put the issue this way, however, necessarily requires definitional agreement on the nature and content of the rights being compared. Without clear definitions, one cannot possibly know which regime comes closest to full protection of a right. Unfortunately, the nature and content of rights is highly controversial, and the long history of disagreement between contending schools seems unlikely to end anytime soon. The problem is compounded by the inevitable conflicts between rights, however they are defined. Do we conclude that rights are best protected by prohibiting hateful expression in the name of equality or protecting inegalitarian expression; by underlining a woman’s right to choose or protecting a fetus’s right to life; by exempting religious or indigenous groups from otherwise valid laws or applying those laws equally to all?

Such problems can be minimized (though others emerge) if we assume that the best rights protecting regime is one that most consistently produces “moderate” policy outcomes. In other words, given that we are unlikely to agree on the precise definition on rights, or the appropriate balance between them, perhaps it is best to hue to the middle ground, at least avoiding rights threatening extremism. This is a longstanding perspective, dating back to the foundation of liberal (which is to say rights protecting) thought and accounting for its emphasis on institutional checks and balances. There is an equally longstanding controversy, however, about the most appropriate kinds of checks and balances. One view, dating back to the American Constitution as originally conceived by some its most influential founders, holds that rights-protecting moderation is best achieved through checks and balances among the overtly political branches of government. In this view the judiciary plays an important but subordinate role (Hamilton, (1788) 2003). The alternative, equally longstanding view (dating to the first 10 amendments of the U.S. Constitution) holds that the desired moderation requires the additional check of a constitutionally entrenched bill of rights. Bill-of-rights proponents insist that legislatures need calming inter-institutional dialogue with dispassionate courts

to offset their rights threatening extremism (Hogg and Bushell, 1997). Bill-of-rights sceptics respond that greater judicial involvement in policymaking promotes passionate policy extremes at the cost of moderate legislative compromise (Glendon, 1991).

This debate cries out for more detailed comparative study than it has thus far received. In this paper we compare two otherwise similar parliamentary regimes that have placed themselves on opposite sides of this debate: Canada, whose 1982 Charter of Rights is defended partly on the grounds that other effective checks and balances are lacking (Allan, 1993; Roach, 2001), and Australia, which has thus far resisted an entrenched bill of rights partly because of the perception that other checks and balances, particularly effective bicameralism, effectively screen out rights violations (Galligan, 1995; Uhr, 1998). Other, intermediate comparisons are also needed – e.g., among liberal democracies with bills of rights but with different legislative and electoral institutions, as well as among regimes with different kinds of bills of rights – but the comparison between regimes with and without constitutional bills of rights is particularly urgent because so few of the latter remain. We begin by fleshing out the historical and theoretical debate on the best kind of moderating checks and balances. Against this backdrop, the paper then compares the recent treatment of two rights policy issues – same-sex marriage and prisoners voting rights – in Canada and Australia.

Legislative vs. Judicial Checks and Balances

Institutional checks and balances have long been viewed in liberal constitutionalism as a central mode of rights protection. While constitutional bills of rights and the enhanced role of judicial review have become the accepted norm, this was not always the case. The framers of the American Constitution, certainly champions of liberty and rights, deemed it unnecessary to include a bill of rights in the original constitution. In *Federalist* 84, Alexander Hamilton explicitly rejects a bill of rights on the grounds that the “Constitution itself, in every rational sense, and to every purpose is a bill of rights” (Hamilton, (1788) 2003, 525). James Madison agreed. In a letter to his friend Thomas Jefferson, a bill of rights supporter, he spoke of bills of rights as frequently violated “parchment barriers” observing, “experience proves the inefficiency

of a bill of rights on those occasions when its controul [sic] is most needed” (Padover, 1965, 254). As Judge Learned Hand would famously put the same thought much later, “no court can save” a society in which the “spirit of moderation is gone” – i.e., precisely when some kind of “saving” is most needed – adding “that a society where that spirit flourishes, no court need save” (Bickel, 1962, 23).

Madison was not inclined to leave the cultivation of the requisite “spirit of moderation” to chance. So strongly (and naturally) are we humans inclined to divide into hostile factions, said Madison ((1788) 2003, 52), “that where no substantial occasion presents itself the most frivolous and fanciful distinctions [are] sufficient to...excite [the] most violent conflicts.” To prevent such bellicose extremism from causing the worst kinds of rights violations, Madison proposed the famous checks and balances among the separated institutions of representative democracy, a system in which “ambition would be made to counteract ambition” therefore “supplying, by opposite rival interests the defect of better motives” (Ibid., 316).

This system would force ambitious representatives to engage in a moderating process of coalition building within and across separate political institutions. In this process, the mild “voice of reason” which would otherwise be overpowered by the natural propensity toward zealotry, could emerge to sustain a degree of moderating deliberation (Ibid., 257). The resulting policy outcomes, which would reflect not passionate extremism, but rather the “cool and deliberate sense of community,” would be unlikely to infringe fundamental rights (Ibid., 384). It is in this sense that the pre-Bill of Rights constitution was thought by supporters to be itself a bill of rights. An independent judiciary was certainly seen as a key part of the institutional structure, but it need not be armed with a constitutional bill of rights.

As is well known, this perspective was not uncontested during the founding period, and it became necessary to promise the subsequent enactment of a bill of rights in order to diminish anti-federalist opposition to the constitution. In fulfillment of this promise, James Madison himself became the father of the Bill of Rights, shepherding it through the First Congress, though it has been argued that he did so in part to ensure a weaker bill than its more enthusiastic proponents wanted (Goldwin, 1997). In any event,

the result was the enactment of the Bill of Rights almost immediately after the adoption of a constitution designed not to need one.

While the original American ideal that rights could be protected without an entrenched bill of rights did not last long in the United States itself, it survived much longer in other liberal democracies, including Canada and Australia. Both the Canadian and Australian founders were keenly aware of the American Constitution, including the Bill of Rights. Indeed, both adopted significant parts of the American model, including federalism (Charlesworth, 2002, 18-19). The obvious influence of American constitutionalism on both Canada and Australia did not lead to a constitutional bill of rights in either country, however. When the prominent Australian jurist Sir Owen Dixon told an American audience that Australia had “consciously studied the American Bill of Rights, but that study had fired no one with enthusiasm for the principle,” (quoted in Knopff and Morton, 1992, 199) he was exaggerating, but only slightly. He was wrong to suggest that there were no bill-of-rights enthusiasts at the Australian founding. There were some (Charlesworth 2002, 24), but they did not prevail. The same was true at the Canadian founding.

What did prevail in both foundings was a strong sense that rights were best protected not through a constitutional bill of rights but by parliamentary responsible government, understood as the system in which the political executive (Prime Minister and Cabinet) sit as members of the legislature, retaining their governmental authority insofar as they maintain “the confidence” of a majority in the legislature’s lower house (if there is more than one). Richard Cartwright, for example, insisted that he preferred “to have British liberty to American equality” (Ajzenstat, 1999, 19). The “calm and deliberate decision is almost always just,” said Cartwright, echoing the Federalist’s praise of the “cool and deliberate sense of the community,” but finding its source in British rather than American checks and balances. The British parliamentary system, he argued, abounds:

with safeguards – with latent checks of all kinds – checks established, many of them, more by custom and usage than by positive law – as to make it all but impossible for any majority, however strong, to perpetrate any gross act of injustice on a minority, so long as that minority could

command but one or two resolute representatives on the floor of Parliament (ibid.).

David Christie similarly considered parliamentary government to be an adequate rights-protecting mechanism. Strikingly, he quotes the American Declaration of Independence verbatim in his defence of parliamentary responsible government:

Their [the Americans] institutions have the same features with our own. There are some points of variance, but the same great principle is the basis of both – that life, liberty and the pursuit of happiness are the unalienable rights of man, and that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. This is the secret of strength of the British Constitution, and with a free and full recognition of it no government can be strong or permanent (ibid., 191).

Although this view has virtually disappeared in Canada, it has persisted in Australia. When Sir Owen Dixon told Americans that the Australian founders had been unenthusiastic about a bill of rights, he added that Australians of his own time remained “impenitent in their steadfast faith in responsible government” (Menzies, 1967, 54). Former Australian Prime Minister Menzies elaborated the point. He argued:

With us a Minister is not just a nominee of the head of the Government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected, and open to regular question. Should a Minister do something which is thought to violate a fundamental human freedom he can be promptly brought to account in Parliament. If a government support him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, lead to a new General Election, the people will express their judgment at the polling booths (ibid.).

Menzies vigorously defended the Australian founding father’s decision not to draft a bill of rights, maintaining that “with legal definition [of rights], words can become more important than ideas. To define human rights is either to limit them – for in the long run words must be given some meaning – or express them so broadly that ...ordered society

becomes impossible” (ibid. 52). Menzies concludes with a powerful endorsement of responsible government as the ultimate guarantee of rights:

In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of Common Law, we have not felt the need of formality and definition. I would say without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the World (ibid., 54).

Thus, for Dixon and Menzies, the checks and balances of responsible parliamentary government provided ample protection for rights, and there was no reason to abandon this type of protection for American-style constitutional supremacy.

This perspective finds support in the writings of the well known British constitutional scholar A.V. Dicey, whose *Law of the Constitution* makes the claim that parliamentary government secures rights (Dicey, 1960). The two pillars of strength in the Westminster system parliamentary sovereignty and rule of law are said by Dicey to be mutually enforcing. As Janet Aizenstat points out, “the rule of law supports parliamentary sovereignty and in turn – this is the crucial point – protects the rule of law, and with it the entire panoply of English rights” (Aizenstat, 1997, 645). In short, Dicey, the famous proponent of parliamentary supremacy, argues that this is an effective system of rights protection. Like the Canadian and Australian founders, he expects rights guarantees to emerge from the contest among parties in the legislature. Aizenstat quickly reminds us “no argument will suffice to show that rights never suffer in a parliamentary democracy. But Dicey’s claim is that parliamentary democracy is able to protect rights, and does this as well as a constitutional bill of-rights” (ibid., 658).

The lack of an explicit and extensive constitutional bill of rights in both Canada (prior to 1982) and Australia should not be taken to mean the judiciary was unimportant in the overall system of checks and balances, or indeed that no rights at all were protected in the two constitutions. Given the judiciary’s inherent role of choosing between competing interpretations of legislative language, it has always been free to choose the most rights-enhancing interpretation (see for example: *Roncarelli v. Duplessis*, 1959). Moreover, at least a limited number of explicit rights could be found in the constitutional

documents of both countries.¹ In addition, in each country federalism existed as an explicit and judicially enforceable constraint on governmental power, a constraint the judiciary sometimes used in rights-protecting ways. Finally, in both countries, judicial decisions sometimes highlighted rights, such as freedom of expression, that could plausibly be implied from the basic constitutional structure of parliamentary government (*Reference re: Alberta Statutes* 1938; *Switzman v. Elbling*, 1957; *Australian Capital Television Pty Ltd. v. Commonwealth*, 1992; *Nationwide News Pty Ltd. v. Willis*, 1992).

For modern bill-of-rights enthusiasts, however, such mechanisms are insufficient. Today, Australia is one of an increasingly small number of holdouts against the view, advocated by many scholars, that for rights to be adequately protected there needs to be a fully entrenched and extensive constitutional bill of rights (Epp, 1998; Roach, 2001; Schneiderman et al., 1997). Indeed, proponents who insist that parliamentary systems are capable of protecting rights through institutional checks and balances are seen to be laughably naïve. Far from being an effective system of checks and balances, responsible government is seen in Canada to underpin the increasingly unchecked concentration of power in the hands of first ministers, who are confronted by impotent oppositions and “trained-seal” backbenchers in their own parties (Savoie, 1999, 2003). Nor is this decline of checks and balances within legislatures offset by an effective bicameralism, which is non-existent in the provinces and ineffective in Ottawa. In the face of such “executive dictatorships,” judicial checks grounded on less than a constitutional bill of rights are insufficient.

Thus, it is said that in Canada the only meaningful separation of powers – and consequently the only effective inter-institutional checks and balances – lies between the Charter-armed judiciary and Parliament, not between the executive and the legislature, or indeed, between the Houses of Parliament (Hogg, 1997, 7-24). For example, T.R.S. Allan argues that “it seems necessary ... to match executive discretion with judicial discretion” so that judges can check potential abuses coming from the executive branch of

¹ The Australian constitution outlines three rights guarantees: section 80 guarantees jury trial for indictable offenses under Commonwealth law; section 116 guarantees freedom of religion; and section 117 prohibits discrimination against those from another state. In addition, there is a requirement of “just terms” in the Commonwealth’s acquisition power under section 51(xxxi). In Canada section 93 of the *Constitution Act 1867* protects the rights of denominational schools and section 133 lays out a right to use either English or French in the courts and legislatures of Quebec and the federal government.

government (Allan, 1993, 8). Similarly, Ian Greene and his collaborators argue that those opposed to judicial power in Canada “fail to recognize the essentially corrective role of the courts in a system of parliamentary majority rule where the executive dominates the policy process” (Greene, 1998, 6).

The “corrective role of the courts” indicated by Green et al. is to supply precisely the moderating effect of inter-institutional dialogue that is otherwise thought to be missing from the Canadian scene. Indeed, the most prominent recent defence of the role of the court uses the “dialogue” metaphor, which holds that the dispassionate reason of judges can, in “conversation” with impassioned legislatures, assist the latter to achieve legitimate policy ends in more finely tuned – i.e., more moderate – ways (Hogg and Bushell, 1997; Kelly, 2005; Roach, 2001; Roach, 2006). This is said to take place primarily under Section 1 of the Charter of Rights, which permits such “reasonable limits” on rights as can be “demonstrably justified in a free and democratic society.” To qualify under this clause, the “pressing and substantial purpose” of the policy must be achieved through legislative means that are “proportional,” in the sense of both having a “rational connection” to the purpose (i.e., actually achieving it) and “minimally impairing” the right in question. Since compelling purpose and rational connection are most often conceded, the inter-institutional conversation is about designing the most moderate policy means under the minimal impairment test. The Court’s task, in short, is to ensure that an extremist policy “sledgehammer” is not used when a more moderate policy “fly swatter” will do.

Moderating “dialogue” is also said to occur in the context of the Charter’s Section 33 notwithstanding clause, which permits legislatures to override Charter Section 2 and Sections 7-15 of the Charter for renewable five-year periods.² The five-year limit forces a periodic review of the Section 33 use, allowing a sober – and moderating – reconsideration after the passions of representative government have cooled.

As indicated, Australia, unlike Canada, remains a notable holdout against the contemporary bill of rights juggernaut in part because the other avenues of moderating

² The power of the legislative override is not available with respect to the rights guaranteed under ss. 3-6 (voting and mobility), 16-23 (language), and 28 (sexual equality).

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

In sum, Canada and Australia have institutionalized two different and long-standing streams of modern liberal-democrat constitutionalism: one embracing enhanced judicial power under a constitutional bill of rights, while the other resists.

The bill-of-rights proponents in this debate turn the view represented by the early Madison and Judge Learned Hand precisely on its head. To his aforementioned assertion that “no court need save” a society imbued with the “spirit of moderation,” Hand added “that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.” For bill-of-rights proponents, courts will foster precisely the moderation that Hand thought they would undermine. Bill-of-rights

³ With Britain adopting its *Human Rights Act* in 2000, Australia remains the only Westminster parliamentary tradition without some form of a bill of rights.

critics, by contrast, agree with Hand that courtroom “rights talk,” far from cooling the fires of passionate polarization tends to fuel them. They argue that reliance on legislative processes, including legislative checks and balances, is more likely to achieve the desired moderation. Among the critics, Mary-Ann Glendon (1991, 44-45) is well known for updating Hand by arguing that courtroom “rights talk” “increases the likeliness of conflict and inhibits the sort of dialogue that is increasingly necessary in a pluralistic society.” In short, it remains a matter of lively debate whether the moderate policy outcomes desired by checks-and-balances theory are more likely to be achieved through judicial or non-judicial means. This debate can only be addressed through comparative investigation, and in Canada and Australia, countries that are quite similar except for the institutional difference under consideration, we can engage in the kind of comparison that lies “at the heart of the comparative method” (Dogan, 1990, 133).

Case Studies: Same-Sex Marriage and Prisoners Voting Rights

Given space limitations, we provide preliminary comparisons of only two rights policy issues: same-sex marriage and prisoner voting rights. These issues are good comparative candidates for two reasons. First, both came to a head at about the same time – roughly within the last 10 years – in both countries, thus minimizing the confounding effect of different time-dependent policy sensibilities. Second, as “two sided moral controversies,” they raise the kind of political clash best suited to our comparative question. Two sided controversies – abortion and school prayer are other examples – stand in contrast to such moral issues as drunk driving, drug abuse and murder,” where virtually everyone is on the same side of the issue, at least as far as the policy objective is concerned. Two sided moral controversies are also “more ideological, more moral, more directly derived from fundamental values, more intense, less utilitarian, more polarized and less prone to compromise” (Lowi, 1998, *i*) than such technical public issues as tax policy. In short, these issues are particularly in need of the moderation expected from institutional checks and balances and thus provide a good test for the competing claims in the bill-of-rights debate.

Operationalizing the concept of policy moderation in order to test the competing institutional claims is at once easy and difficult with respect to the kinds of moral issues under consideration. It is easy to the extent that public policies on these issues tend to fall along a uni-dimensional continuum between two intransigent poles. It is difficult to the extent that, from the perspective of either polar position, where passions tend to run high, allegedly middle-ground compromises tend to appear as strategic positions of the other pole. Viewed from either pole, so called moderates, or middle ground compromisers are seen as sliding – wittingly or unwittingly – down the slippery slope to the opposite pole.

No doubt, there are some issues on which there can be no moderate middle (slavery comes to mind). If James Madison is right, however, it is a natural human tendency to inflate to this level of intransigent opposition disagreements that do not warrant it. Recall his claim that “the most frivolous and fanciful distinctions are sufficient to...excite [the] most violent conflicts.” Thus, while recognizing the difficulties and pitfalls involved, we adopt as our working definition of “moderation” on moral issues any position that falls between the two most intransigent poles of the policy continuum.

In the same-sex marriage controversy, civil union or registered domestic partnerships occupy the moderate middle between the traditional limitation of marriage (and marriage-like partnerships) to heterosexual partners and the full extension of marriage and its benefits to gay and lesbian couples. Civil unions extend many of the legal rights and privileges of heterosexual couples to same-sex couples, but stop short of full marriage.

In the cases of prisoner voting rights, one end of the policy continuum is characterized by a blanket disqualification of anyone who is imprisoned for any purpose and for any length of time. This includes both the murderer and the petty offender serving a few days in jail in lieu of paying a fine. At the other pole is the enfranchisement of all prisoners, however serious the crime and however long the incarceration. In the “moderate middle” are policies that disqualify only “more serious” offenders as defined by their length of incarceration. Such intermediate disqualifications may be either legislatively mandated or left to judicial sentencing discretion.

We gain confidence in this operationalization of policy moderation from the fact that the middle ground positions we identify are not only established policy in many acknowledged liberal democracies but are often the result of recent debates rather than the decisions of bygone eras, maintained only by inertia. Thus civil unions, pioneered by Denmark in the 1980s, have since been adopted in Norway (1993), Sweden (1995), Iceland and Greenland (1996), France (1999) Germany (2001), Finland (2002), the United Kingdom and New Zealand (2005), South Africa (2006), and Italy (2007) (CBC, 2007b). Similarly, some degree of franchise restriction remains widespread among liberal democracies. Countries like France, Italy, Malta, Norway, Poland and Portugal give courts the discretion to impose disenfranchisement as part of the sentence for criminal offences (American Civil Liberties Union, 2006). Other countries – e.g., Belgium, Greece, Luxembourg, Italy, New Zealand, and the United Kingdom – tie disenfranchisement to the length of a prison sentence. Nor are these disqualifications necessarily hold-overs from earlier and more "prejudiced" ages. New Zealand, for example, reaffirmed its inmate disqualification as recently as 1993 (Justice, 1993, ss.81).

How did the recent Canadian and Australian engagement with these issues turn out? In the case of same-sex marriage, the traditional definition of marriage as the union of one man and one woman to the exclusion of all others was a matter of common law rather than legislation in both Australia and Canada until the mid-2000s. When the same-sex marriage issue peaked around the world in the 1990s and 2000s, governments in both countries attempted to reaffirm the traditional definition. Responding to Charter-based litigation concerning same-sex relationships, the Parliament of Canada in 1999, passed the *Definition of Marriage Motion*, which affirmed the heterosexual definition of marriage. The motion passed overwhelmingly, by a vote of 216 to 55 (CBC, 2007a). Since litigation had already extended some of the rights of heterosexual couples to their gay and lesbian counterparts, this motion implied a civil-union kind of middle ground policy. However, the parliamentary device of a "motion" lacked the force and weight of legislation.

Legislation was the preferred course in Australia in 2004, when the Howard government attempted to enact the common law definition of marriage. The proposed legislation also sought to exclude the recognition of same-sex marriages from international jurisdictions (e.g. Belgium) and to prevent same-sex couples from adopting international children (Norberry, 2004). The legislation faced potential difficulties in the Senate, even though the government was in the unusual situation of having a majority in both houses. Although it is typical for the government party in the House of Representatives to lack clear control of the Senate, in this case the government enjoyed a one-vote majority in the upper chamber. Because some Coalition senators were “soft” on this issue, however, the government’s Senate majority turned out to be too narrow for comfort, and it adjusted its draft law to ensure Senate support. The end result was that the prohibition on same-sex couples adopting children was dropped and it was agreed that same-sex couples would have the same rights of superannuation as unmarried, *de facto* couples (Cooper, 2005).

In Canada, litigation under the Charter has continued to adjust the policy. Just five years after Parliament voted overwhelmingly in favour of the traditional definition of marriage, a number of lower courts ruled (*EGALE Canada v Canada (Attorney General)*, 2003; *Halpern et al v Attorney General of Canada et al* 2003) that this definition was unconstitutional, and all provinces except Prince Edward Island and Alberta enacted same-sex marriage legislation (CBC, 2007a). The Liberal government in Ottawa decided to accept these judgments. In a subsequent reference case, the Supreme Court confirmed that the legislative enactment of same-sex marriage proposed by the Liberals would be constitutional but declined to say whether a legislative enactment of the traditional heterosexual definition might also pass constitutional muster. Although this ruling technically left the door open to a civil union compromise, the widespread view that the Supreme Court would ultimately strike down such legislation entered partisan politics in ways that made such compromise virtually impossible.⁴ In the result, the Liberal government’s 2005 enactment of full same-sex marriage (one of the policy poles) stands

⁴ When the Conservative government of Stephen Harper came to power in 2006, it was committed to holding a free vote on the question whether to enact a civil union compromise, but the issue had been so polarized by then that the vote failed. For background, see Knopff, Rainer and Andrew C. Banfield. 2005. "It's the Charter stupid! Electoral politics and the Court." Paper presented at the Canadian Political Science Association, London On: University of Western Ontario.

in marked contrast to the middle ground position adopted in Australia. Nor can it be doubted that Charter-based litigation had a major effect in pushing Canadian policy from an overwhelming 1999 motion in favour of the traditional definition of marriage to the 2005 enactment of full same-sex marriage. Those of the judicial-polarization view will find some support in the Canadian experience with this issue. They might well acknowledge that Charter-based litigation played a role in extending some of the benefits of civil unions to same-sex couples, but would point to the ways in which continued judicial involvement contributed to Canada overshooting this middle ground compromise. In Australia, by contrast, the Senate, playing the role envisioned by those who prefer legislative to judicial checks and balances, moderated the Howard government's support of tradition and moved the country along the civil union path.

The case of prisoner voting is less clear cut. The recent controversies on this issue had very different starting points in the two countries. As a matter of historical inheritance, Canada had occupied one of the extreme policy positions – a blanket disqualification of all prisoners – for most of its history. Challenges to this policy under the Charter of Rights after 1982, along with a Royal Commission's recommendation that only serious criminals, as defined by length of sentence, be disenfranchised for the duration of their imprisonment, led the federal government in 1993 to amend the law to disqualify only prisoners serving sentences of two years or more. Shortly after the new law came into effect, the Supreme Court, in litigation begun under the previous legislation, ruled unanimously that a blanket disqualification was indeed unconstitutional. The Court did not explicitly address the constitutionality of the new 2-year cut-off, however, and litigation on that question began immediately. Australia, by contrast, had had a sentence-dependent disqualification for most of its history, with the length of sentence triggering disqualification varying over time between 1 and 5 years. In 2006 the Howard government brought the issue to a head by substituting a blanket disqualification of all prisoners for the 3-year cut-off that had been in effect since 1983.

In short, in the recent prisoner-voting controversies being compared, the Canadian Parliament had moved to the moderate middle, while its Australian counterpart had abandoned moderation in favour of the very extreme Canada had rejected. Moreover, litigation under the Charter clearly contributed to policy moderation in Canada while the

Australian Senate did not prevent a move to one of the extremes in Australia. In our institutional debate, therefore, this comparison, at least at first glance, supports those who distrust legislative checks and balances and see courts as the better moderating force.

The story is more complicated, however. When litigation challenging the new Canadian law reached the Supreme Court in 2002, a narrow majority (5-4) moved Canadian policy to the liberal extreme on the policy continuum, concluding that no restrictions on prisoner voting could be justified as “reasonable limits” on the Charter’s right to vote. In Australia, by contrast, the High Court, using a constitutionally implied right to vote, struck down the Howard government’s blanket disqualification but affirmed the constitutionality of a sentence-dependent disqualification. The result was to revive the previous 3-year cut-off. Here we see one high court moving policy toward an extreme, contrary to legislative preference, while the other high court counters legislative extremism and reinstates moderation. It is worth noting that the more extremist court relied on more explicitly entrenched rights while the more moderate court relied more on constitutional implications. This outcome is consistent with previous findings that courts tend to be less adventurous in their use of implied rights (Bottomley, 1997). We need to keep in mind, however, that the swing of a single vote would have led the Canadian Court to similar policy moderation.

The story is further complicated by the Howard government’s unusual, if narrow, Senate majority. The issue of prisoner voting had arisen at several earlier junctures in Australian history, with one or other of the policy extremes being discussed and sometimes preferred in the House of Representatives. In these earlier cases, the Senate often exercised the moderating influence envisioned by legislative-checks-and-balances side of our institutional debate by rejecting the policy extremes in favour of time-based cut-offs for prisoner disenfranchisement. We noted above that the Senate had played this kind of moderating role on the same-sex marriage issue despite the same party enjoying a majority in both houses. If this had also occurred on the prisoner voting issue in 2006, there may have been no need for the High Court’s intervention. In the event, however, a Senate majority that had been too narrow for comfort on same-sex issues in 2004 was sufficient to secure the government’s preferred policy extreme on prisoner voting rights two years later.

Conclusion

The longstanding and richly textured debate about which kinds of checks and balances best promote rights-protecting policy moderation cannot be settled by one or two brief case studies. Our case studies are suggestive, however. In particular, they underline the need for carefully nuanced comparison. While bicameralism can indeed fulfill its classical moderating purpose, even in a parliamentary systems, it does so better when the disciplined government party that controls the lower house lacks full control of the upper chamber. Although one of our cases shows that the Senate can continue to play this role when both houses are controlled by the same party if that party's Senate majority is fragile, the other shows that even fragile Senate majority can support policy extremes. Similarly, while a judicially enforceable entrenched bill of rights can certainly derail legislative attempts to achieve middle ground compromises on two-sided moral controversies, it can also stimulate the move toward such compromises. In Canada, Charter-based litigation certainly played a role in moving prisoner voting policy from a blanket disqualification to the middle ground length-of-sentence cut-off. Had just one judicial vote gone the other way, one could not conclude that continued judicial involvement caused policy evolution to overshoot the moderate middle. In Australia, moreover, when bicameral moderation broke down on the question of prisoner voting, the High Court was able to step in and restore the moderate middle. Was the comparatively moderate position on this issue by the Australian Court attributable not only to the vagaries of a swing vote in the Canadian case but perhaps also to the different weight of implied and entrenched rights? That would be consistent with other findings (Bottomley, 1997). To gain more purchase on these questions, we need not only more numerous and more detailed case studies but also quantitative analysis, and not only in Australia and Canada but across a variety of regimes.

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