

dynamiques idéologiques, dont ce néoconservatisme, mériteraient d'être étudiées plus à fond, notamment en opposition (ou en conjonction) avec les autres paradigmes idéologiques dominants du Canada.

PHILIPPE COUSINEAU MORIN *Université d'Ottawa*

Governing with the Charter: Legislative and Judicial Activism and Framers' Intent

James B. Kelly

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James B. Kelly seeks to displace the discussion of the Canadian Supreme Court's "activism" in Charter cases with what he calls a "cabinet-centred" approach to constitutional review under the Charter. Executive government responded to the Charter by developing mechanisms for vetting legislation prior to its introduction to ensure its consistency with the Charter. Sometimes located in legal departments of substantive ministries but at the national level located in the Department of Justice, these mechanisms provide the opportunity for what Kelly calls "legislative activism ... to ensure that the cabinet advances the constitutional guarantees entrenched in the Charter *before* the judiciary reviews legislation for its constitutionality" (26).

One result of Charter vetting is a decrease in the rate of judicial invalidations of legislation: "Few statutes enacted after 1990 have been invalidated by the Supreme Court" (148). Kelly makes the perhaps unsurprising observation that in the early years after the Charter's adoption the Court was dealing with legislation that had not undergone rights vetting and found many such statutes unconstitutional. Rights vetting insulates legislation against Charter invalidation. The "growing deference on the part of the court to the policy choices of the cabinet and its provincial counterparts... is directly related to the emergence of more principled policy decisions by the cabinet, which limits judicial invalidation through legislative activism" (37).

This legislative activism also contributes to centralization of policy making in the cabinet and especially in the prime minister. Kelly provides detailed descriptions of the way in which the national Department of Justice has absorbed the rights-vetting task. The precise mechanisms are perhaps more complex than Kelly outlines. He writes that the cabinet can achieve its legislative agenda "by offsetting bureaucratic centres of power at the department level" (227). The mechanism seems to be this. Substantive departments are committed to carrying out their designated policy missions. They may fail to take into account policy considerations that matter to the cabinet as a whole. Rights vetting by the Department of Justice can compensate for this by inserting a counterweight formed by the department's own mission commitments.

Notably, this mechanism does not require that the cabinet be committed in principle to Charter rights, for what matters is that the cabinet can achieve its policy goals by compromising the competing claims made by mission-committed departments. Second, and perhaps less interesting, the cabinet and the prime minister might be committed in principle to Charter rights. They understand that proposals emerging from substantive departments might not be sensitive to that aspect of the government's overall commitments, and can use the results of rights vetting to explain to the departments why the cabinet has modified their policy proposals.

Lurking in all this is an issue that Kelly does not directly confront, as is suggested by his reference to "principled" policy decisions. We need to distinguish between rights vetting in which the Department of Justice asserts its own view of what the Charter means, and rights vetting in which the Department merely anticipates what the courts will do. In the case of cabinet commitment to Charter princi-

ples, the distinction is important for Kelly's defense of the "mutually reinforcing activist approach to rights that originates with the cabinet and the bureaucratic arena that supports its legislative agenda" (39). He continues, "Judicial activism is more a reflection of the institutional failure of legislative activism to ensure that Charter values are addressed in the design of legislation than it is an indication of the danger of judicial supremacy" (39). But this is true only if we take judicial specifications of "Charter values" as conclusive. The real problems associated with "judicial activism" would occur when—or if—the Department of Justice's rights vetting process relied on the department's independent and reasonable specification of those values. Although Kelly's work opens up important lines of inquiry here, we will need further investigations to fill in the picture he has outlined.

As the book's subtitle indicates, Kelly's analysis moves beyond his central theme into other areas. He argues that the Supreme Court's activism is consistent with the intent of some of the Charter's framers, especially Pierre Trudeau. Though convincing on the level of framers' intent, this argument does not in itself defeat the conservative critique of the Court's activism. On its face, it eliminates one version of the originalist criticism of activism, without affecting other grounds of criticism, such as the non-democratic nature of activism. And even in originalist terms, a framers'-intent analysis is unresponsive to more recent versions of originalism that focus on general public understanding of a constitution's terms and structures. Kelly relies heavily on what specific authors had in mind when they adopted the Charter but does not show that the public understood what it was getting.

Kelly also points out that a substantial number—52 per cent by one count—of Charter cases involve challenges not to the constitutionality of legislation but to the exercise of discretion delegated to public officials, such as the police (35). Such cases raise no deep questions of the consistency between constitutional review and democratic self-government, and indeed can be handled—as they traditionally were under British law—as matters of administrative law.

Kelly's provocative cabinet-centred approach is a major addition to the literature on constitutional review in Canada and should influence discussions of comparative constitutional review as well. He has opened up important lines of inquiry even if he has not fully sorted through distinctions that later scholars will undoubtedly feel compelled to make.

MARK TUSHNET *Harvard Law School*

The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century

Sheri Berman

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Berman's captivating chronological analysis of the development of European social democracy over the last century leaves little to be desired. Uniting both theoretical analysis of social democracy with real world evidence of party development in five European cases (Austria, France, Germany, Italy, and Sweden), her work contextualizes both the broader rise of the welfare state in the post-Second World War era along with the more specific and troubling examples of the ascendancy of fascism and national socialism in Italy and Germany respectively. What is missing is a serious treatment of the rise of the New Right and a deeper discussion of the relative power and importance of pragmatic politics versus idealistic ideology.

Berman begins with a rather unexpected metaphor in relation to ideology in general. Writing as a staunch advocate of social democracy, she nonetheless suggests