Not Quite Supreme

The Courts and Coordinate Constitutional Interpretation

Dennis Baker

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DENNIS BAKER

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To my grandmother,
Joyce Buckley,
for a lifetime of love and support

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INTRODUCTION

Sharing Interpretive Power

Defenders of judicial power and constitutionally entrenched rights inevitably wrestle with what Alexander Bickel famously described as the "counter-majoritarian difficulty," namely, the awkward fact that judicial power involves unelected judges overturning the decisions of elected officials.[1] One approach to overcoming this difficulty has been to minimize the scope and reach of judicial power by exhorting courts to intervene only to protect the procedural requirements of democracy itself[2] or to exercise restraining "passive virtues" more generally.[3] A second approach – the focus of this study – is to permit courts a wide scope for intervention but to deny finality or supremacy to their pronouncements.[4] This approach emphasizes the freedom of elected actors to disagree with and even overcome the decisions of appointed judges, thus minimizing Bickel's counter-majoritarian difficulty. It has at least two major variants: "coordinate interpretation" and "dialogue theory." While dialogue theory has recently attracted considerable interest in Canada, this study attempts to make the case for the currently unpopular alternative of coordinate interpretation as a means of reconciling Canadian judicial power with the other principles and norms found in the Canadian constitution.

Both "coordinate interpretation" and "dialogue theory" are best understood as part of a continuum, one pole of which is occupied by their common enemy, judicial interpretive supremacy. Judicial interpretive supremacy posits that the constitution is only "what the judges say it is."[5] In this view, the other branches must immediately accept the judicial interpretation of the constitution as correct and adopt the judicial reading as their own. Without exception, all non-judicial actors are expected to exercise their powers in all future cases

and circumstances as if the judicial interpretation were controlling. From this perspective, there is nothing discrete about the exercise of the Supreme Court's interpretive power; the judicial interpretation is constantly "active" in the sense that no alternative interpretation may be legitimately held, even provisionally.

While some jurists and legal commentators argue that the interpretive supremacy of the highest appellate court is an inevitable and necessary consequence of constitutionalism itself,[6] the suggestion that a constitutional court possesses an exclusive and authoritative power to interpret the constitutional text is a relatively recent innovation in the Western liberal-democratic tradition. Despite claims that judicial interpretive supremacy was firmly established in the United States by Chief Justice John Marshall's oft-cited *Marbury v. Madison* decision in 1803,[7] *Marbury* has been understood as standing for interpretive supremacy only since the U.S. Supreme Court's decision of *Cooper v. Aaron* in 1958.[8] Assuming that the pre-Warren court held an unanswerable power to interpret the constitution is, in the words of one scholar, "pretty clearly bad history."[9] It is necessary to make this point because Canadian proponents of judicial interpretive supremacy rely on the claim that judicial finality has a "long history, in this country and elsewhere" and reject any contrary approach as "inconsistent with our traditional institutional arrangements" and "inconsistent with over 150 years of institutional practice."[10] In fact, as this study demonstrates, the traditional Canadian (and Anglo-American) approach to judicial power runs directly against the notion of judicial interpretive supremacy and instead favours the opposite "coordinate" pole of the continuum.

Coordinate interpretation means that each branch of government – executive, legislative, and judicial – is entitled and obligated to exercise its constitutional powers in accordance with its own interpretation of what the constitution entails. Contrary to such critics as Peter Hogg and Allison Bushell Thornton, coordinacy can hardly be reduced to simple "legislative finality" on matters of constitutional controversy.[11] Instead, coordinate interpretation envisions a process whereby "constitutional interpretation takes place over time, not in a single instant at a fixed and privileged institutional locus of interpretive authority," and where "the institutional competitors for interpretive authority [are] linked together in an inextricably nested relationship, so that each would see its interdependence with the others and all would accordingly work toward mutual accommodation."[12] In other words, the

interpretive power is shared between institutions in the course of an unfolding process of constitutional interpretation (in stark contrast to the unilateral "lightning strike" of interpretive authority claimed by judicial supremacists). For the coordinate theorist, it is only through repeated inter-institutional exchanges that enduring constitutional principles emerge.

Even under a coordinate system of constitutional interpretation, it is quite likely that the judicial branch will be at the forefront of most constitutional controversies. Since no other Canadian institution entertains constitutional arguments as directly or as regularly as the Supreme Court of Canada, it has acquired a comparative advantage in interpretive expertise that surely warrants such a leading role and therefore it is unsurprising that Canadians have readily accepted its decisions as authoritative. A leading role, however, does not necessarily mean an exclusive or determinative role and it does not mean that other institutional actors cannot play significant roles. It is the extent of the Court's interpretive authority that this study explores: Is the judicial branch's interpretation of the constitution binding upon all other branches as a rule without exception (judicial interpretive supremacy) or are there opportunities for exceptional inter-institutional disagreement over the correct interpretation of the constitution (coordinate interpretation)? To put it bluntly, when it comes to constitutional interpretation, does the Court enjoy unanswerable obedience from the other branches or is it "not quite supreme"?

While judicial interpretive supremacy is unquestionably the orthodox position of legal scholars in both the United States and Canada, a significant minority of American legal theorists (from all parts of the political spectrum) advocate a coordinate approach of some flavour. They include John Agresto,[13] Robert Burt,[14] Mark Tushnet,[15] Robert Nagel,[16] Larry Kramer,[17] Walter Murphy,[18] Michael Stokes Paulsen,[19] Christopher Eisgruber,[20] and Neal Devins and Louis Fisher.[21] In Canada, save for a very few scholars – Christopher Manfredi[22] and Grant Huscroft[23] being the most prominent – the idea of coordinate interpretation has failed to attract serious consideration.[24] Instead, the focus in Canada has been on formal constitutional mechanisms for non-judicial participation (emphasizing the "reasonable limits" [s.1] and "notwithstanding" [s.33] provisions of the Charter of Rights and Freedoms), especially as incorporated in the middle-ground position of "dialogue theory."

Dialogue theory, as it is most commonly expressed in Canada,[25] emphasizes the fact that legislatures can use section 33 of the Charter to override rights *as judicially construed* or impose "reasonable limits" on those rights *within judicially determined boundaries*. Dialogue theory thus exhibits the inter-institutional give and take of coordinate interpretation but rejects the latter doctrine's premise that courts and legislatures can legitimately come to different, even conflicting, understandings of the essential meaning of constitutional rights or the boundaries of "reasonable limitation." Dialogue theory maintains judicial supremacy as far as *interpretive* authority is concerned, understanding the contribution of legislatures to inter-institutional "dialogue" as being one of helping to determine the appropriate balance between rights (*as judicially understood*) or between judicially defined rights and other, non-rights considerations.[26] "If 'genuine dialogue' can occur only where legislatures share coordinate authority with the courts to interpret the constitution," the authors of the dialogue theory write, "then by definition it cannot exist in Canada."[27] "Dialogue theory" simply recognizes that the representative branches are free to exercise their constitutional (but non-interpretive) powers so long as they are consistent with the always-operational and always-trumping judicial interpretation. On the other hand, as we shall see, coordinate interpretation allows for a degree of power sharing by treating judicial interventions as discrete and finite acts to which the non-judicial branches can respond using alternative interpretations in future cases. Unlike dialogue theory, then, coordinate interpretation contemplates inter-institutional "dialogues" *about*, not merely *within*, judicially defined limits.

On the whole, Canada's jurisprudential culture rejects the coordinate-interpretation end of the continuum.[28] This is shown by the strongly negative reaction to two Supreme Court judgments that flirted with limited forms of coordinate interpretation in circumstances that seemed particularly favourable to it. The first concerns a legislative sequel enacting the dissenting opinion in a very close (5–4) Supreme Court decision. While it is clearly one thing for the legislature to persist in pursuing a policy rejected by a strong majority of the Supreme Court, it might be considered another thing altogether if it enacted the policy preference of the minority in such a closely divided decision (what I will call the "minority retort"). The Court seemed to think so when, in *R. v. Mills*,[29] it upheld such a "minority

retort" to an earlier precedent (*R. v. O'Connor*[30]), arguing that this represented a legitimate form of inter-institutional "dialogue." Most dialogue theorists strongly disagreed or found *Mills* "difficult to rationalize,"[31] maintaining that the Court had wrongly bowed to political pressure and abandoned its role as constitutional guardian. It was not legitimate dialogue, they insisted, for the legislature, through ordinary legislation, to side with four of the judges against five, and for the Court to change its mind as a result.[32] The only legitimate form of dialogue, in this view, would have been for the legislature to use the section 33 override to implement the judicial minority's view. For these critics, the legislation at stake in *Mills* had gone beyond legitimate dialogue and fallen into the error of coordinate interpretation. The Court has not repeated this "error."

The second flirtation with coordinate interpretation came in *R. v. Hall*,[33] which concerned the legislative enactment of the plain language of the constitution itself in response to a judicial interpretation (in *R. v. Morales*)[34] that transcended that language. Here, again, we confront a situation in which the claims of coordinate interpretation seem particularly attractive. Surely, it might be thought, the legislature can legitimately seek to preserve the very language of the constitution itself against judicial revisions to that language. When the Court confronted such restorative legislation in *Hall*, the majority opinion did not as clearly capitulate to the legislative response as the Court had done in *Mills* – indeed, it struck down the new legislation – but it suggested an alternative policy that came close to the one struck down in *Morales*, claiming that this kind of fine-tuning represented appropriate "dialogue." Nevertheless, this decision, too, was strongly criticized as transforming "dialogue into abdication."[35] Using *Mills* and *Hall*, among other cases, chapter 1 will set out in more detail the continuum from judicial supremacy through dialogue theory to coordinate interpretation.

Clearly, coordinate interpretation has met strong resistance even in situations where its claims might appear strongest and most tempting. *Mills* stands out as the lone instance in which the Supreme Court clearly gave in to that temptation. The fact that the majority in *Hall* tries so hard not to appear to be "abdicating" its original opinion in *Morales*, but is nonetheless charged with doing exactly that, says much about overall level of hostility to coordinate-interpretation pole of the continuum. The hostile reaction to these cases is important because future exceptions to judicial interpretive authority are less

tenable if previous non-judicial interpretive exercises are perceived as illegitimate aberrations from a judicial supremacy norm. Chapter 2 attempts to explain the hostility to such coordinate responses exhibited by Canada's leading constitutional theorists. This study's attempt to recover the case for coordinate interpretation, at least in the kinds of limited circumstances represented by the *Mills* and *Hall* situations, runs strongly against the grain.

The project may seem especially problematic inasmuch as I propose to defend coordinate interpretation as being more compatible than its alternatives with the Canadian doctrine of separated powers and checks and balances among the legislative, executive, and judicial branches. Such a claim surely risks incredulity, if not outright ridicule, given the conventional wisdom that Canada has no functioning separation of powers between the legislative and executive branches, and thus no effective checks and balances within and between those branches. "There is no general 'separation of powers' in the Constitution Act, 1867," writes Peter Hogg, Canada's leading constitutional scholar.[36] Political scientist James Kelly even attributes Canada's "distinct political culture" to, at least in part, "the absence of a separation of powers theory."[37] Patrick Monahan agrees, and his well-regarded text, *Constitutional Law*, features a section boldly entitled "No Separation of Powers between the Executive and the Legislature."[38] According to these constitutional scholars, the "separation of powers" and Canada's convention of "responsible government" are mutually exclusive: "Any separation of powers between these two branches would make little sense in a system of responsible government," explains Hogg.[39] Federal Court judge Barry Strayer, a key legal adviser during the drafting of the Charter, similarly argues that the separation of powers is the "antithesis" of responsible government and thus not a prominent part of the Canadian constitution.[40] So does law professor Marilyn Pilkington, who considers any "assertion of a doctrine of separation of powers [to be] inconsistent with Canada's historical, legal, and political organization."[41] That Canada's system of responsible government precludes a separation of powers between the executive and the legislature has clearly become the orthodoxy among scholars.[42] The main reason is that, under responsible government, the executive dominates the legislature far too much to consider the two as separate institutions. Nothing has done more damage to the reputation of Canada's constitutional doctrine of separated powers

than the fact of executive control of the legislature. The overstatement (or formalization) of this fact has skewed Canadian constitutional theory to the point that it can be seriously suggested that no institutional separation of powers exists in Canada but that between the judiciary and the elected institutions.

A corollary of the orthodoxy is evident in Eugene Forsey's assertion that, while checks and balances were "a basic feature of the United States Constitution, *with its separation of powers*, it is no part of ours"[43] – that is, where there is no separation of powers, there can be no checks and balances.[44] Since unchecked governmental power is almost universally considered to be a bad thing, it is therefore fortunate that there *is* after all *some* separation of powers in the Canadian system, and thus some opportunity for checks and balances. The separation lies, not between the executive and the legislature, but between these two political bodies and the independent judiciary. Thus, while Hogg believes that "the close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions,"[45] he concedes a "little separation of powers doctrine" to protect the judicial functions in sections 96 to 100 of the 1867 British North America Act.[46]

It is the separate and independent judiciary that is thought by many scholars to provide some of the desirable but otherwise missing checks and balances. In this view, the augmentation of judicial power by the 1982 Charter of Rights and Freedoms was a good thing in part because it improved the ability of this checking institution to counterbalance the obviously substantial power of the executive-legislative complex. Thus, Ian Greene et al. upbraid Charter sceptics for failing "to recognize the essentially corrective role of the courts in a system of parliamentary majority rule where the executive dominates the policy process."[47] Lorne Sossin argues that "a robust and independent judiciary" is one of the few "external checks" on the "very small group of very powerful individuals [who] shape the policy and politics of the country."[48] In parliamentary systems, T.R.S. Allan similarly argues, "it seems necessary ... to match executive discretion with judicial discretion" so that judges can offer "genuine protection from abuses of executive power."[49] With executive-dominated legislatures failing to hold the government accountable, this argument runs, the judiciary plays a vital role in restraining what would otherwise be an unlimited and unchecked executive.[50]