
Continuing the Conversation: A Reply to Manfredi and Kelly

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In this reply, the authors assert that Professors Manfredi and Kelly's response to their original article either misses the point or is simply mistaken. The authors clarify the limited purpose of their original study, which was to assess the extent to which the Supreme Court is counter-majoritarian under the Charter. Manfredi and Kelly's interpretation of the available data either relies on inappropriate quantitative measures or draws overly fine distinctions between highly variable data sets. The burden of proof is on those who allege that the Court is engaged in judicial activism, and Manfredi and Kelly have not succeeded in demonstrating that the null hypothesis has been disproved.

Dans leur réplique, les auteurs soutiennent que la réponse des Professeurs Manfredi et Kelly rate malheureusement sa cible ou est tout simplement erronée. Les auteurs clarifient les visées restreintes de leur étude originale, qui s'appliquait à découvrir dans quelle mesure la Cour suprême agit de manière anti-majoritaire en ce qui concerne la *Charte des droits et libertés de la personne*. L'interprétation des données disponibles par Manfredi et Kelly se base sur des mesures quantitatives inappropriées, ou effectue des distinctions trop délicates entre des ensembles de données hautement variables. Le fardeau de la preuve repose donc sur ceux qui prétendent que la Cour s'adonne à l'activisme judiciaire, et Manfredi et Kelly n'ont pas démontré que l'hypothèse nulle a été réfutée.

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Introduction

In the academic world, criticism is the highest form of flattery. We are delighted that Christopher Manfredi and James Kelly would so quickly pen a detailed response¹ to our study² of government win and loss rates in the Supreme Court of Canada's jurisprudence under the *Canadian Charter of Rights and Freedoms*.³ In parts of their response, they disagree with the conclusions we draw from our raw data, often by reinterpreting or further refining them. In others, they dispute our alleged methodological bias toward quantitative evidence and respond to our arguments with qualitative evidence that we did not generate or squarely address in our study. Finally, and most seriously, they charge us with misrepresenting the work of political scientists who write on the Charter and with failing to address questions that are of interest to them because of our misapprehension of the goals of their discipline.

Although much of what Manfredi and Kelly say is helpful, unfortunately many of their responses either miss the point of our article or are simply mistaken. In this reply, we respond to their critiques that rely on quantitative data; counter their argument that the Court has been more remedially activist since the delegitimization of the override; describe the academic context within which we situated our original article; justify why the questions we asked and the methods we employed have been of interest to political scientists; and repeat the limitations of a strictly quantitative approach to studying judicial activism that we set out explicitly in our original article.

I. The Quantitative Critique

Manfredi and Kelly accuse us of basing our quantitative definition of judicial activism on a misunderstanding of the nature of counter-majoritarian judicial review and promise to offer “an alternative, equally quantitative definition of judicial activism that better captures the nature and purpose of constitutionally based judicial review.”⁴ But what is their alternative definition? It seems that they disagree with which cases we count for the purposes of calculating government win and loss rates. In our study, we excluded non-Charter cases and cases that did not involve challenges to primary legislation. Manfredi and Kelly would include both sets of cases because doing so “better captures the nature and purpose of constitutionally based judicial review,” which is the protection of “minorities from *any* oppressive government action.”⁵

¹ Christopher P. Manfredi & James B. Kelly, “Misrepresenting the Supreme Court’s Record? A Comment on Sujit Choudhry and Claire E. Hunter, ‘Measuring Judicial Activism on the Supreme Court of Canada’” (2004) 49 McGill L.J. 741.

² Sujit Choudhry & Claire E. Hunter, “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*” (2003) 48 McGill L.J. 525.

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

⁴ Manfredi & Kelly, *supra* note 1 at 744.

⁵ *Ibid.* at 2.

There is good reason for constructing the data set as we have. Our goal in the paper was to assess the extent to which the Court is counter-majoritarian under the Charter. Why? Because the most serious issue raised by Justice Marshall's judgment in *Newfoundland (Treasury Board) v. NAPE*⁶ and by critics of the Charter is that the Court has erected roadblocks in the path of democratic decision-making. We do not deny that the Court has applied constitutional provisions found outside the Charter to find legislation unconstitutional, or that the Court has reviewed the constitutionality of behaviour by government officials under the Charter. But we are not, in this project, interested in those other features of the Court's behaviour. Including other cases in the data set would not enable us to measure the phenomenon of counter-majoritarian Charter adjudication.

But let us grant Manfredi and Kelly their modified criteria of inclusion. What difference does it make? As it turns out, very little.

A. Hypothesis 1

As Manfredi and Kelly concede, their modified criteria make almost no difference to the overall government win rate.⁷ But Manfredi and Kelly go further, and interpret their data as proof the Court has been activist. In our article, we argued that the question of whether a win rate would be considered high or low is a matter of highly contextualized judgment and that the burden of proof rested with critics of the Court.⁸ We were also very careful *not* to say whether these rates are high or low in absolute terms.⁹ Rather, we simply stated that this figure had to be the starting point of any informed discussion on the true extent of judicial activism. Manfredi and Kelly attempt to make such a judgment by comparing Charter win rates to some benchmark. In this respect, they take up the gauntlet we throw down in our paper, because we agree that some kind of benchmark is required to rely on this data as proof or disproof of activism.

The benchmark they rely on is a comparison of win rates under the Charter to those from the Court's jurisprudence under the *Canadian Bill of Rights*¹⁰ prior to 1982. They correctly note that at first glance, the Court has been more activist under the Charter. This, however, is a poor comparison to make because the Bill of Rights was not constitutionally entrenched, and the fact of entrenchment has been identified by the Court as a reason to interpret the Charter differently than it did the Bill of

⁶ (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].

⁷ Manfredi & Kelly, *supra* note 1 at 747.

⁸ Choudhry & Hunter, *supra* note 2 at 532.

⁹ *Ibid.* at 545.

¹⁰ S.C. 1960, c. 44.

Rights.¹¹ Perhaps a better comparison would be the system of *constitutional* judicial review that predates the Charter, namely the federal division of powers. Fortunately, Manfredi and Kelly provide this data elsewhere in their response to argue that absolute levels of activism are higher under the Charter. But if one compares win rates (as opposed to absolute levels of wins and losses) under the division of powers from 1950 to 1984 and under the Charter from 1982 to 2002, the results are roughly comparable.¹² In division of powers cases, the government loss rate is thirty-five per cent, while under the Charter it is only one percentage point higher, at thirty-six per cent (according to Manfredi and Kelly's coding rules). Manfredi and Kelly's point is that the Court's behaviour under the Charter is dramatically different and more activist but, on their own data, the Court clearly is not.

B. Hypothesis 2

We suggest that the evidence does not show that the Court has become more activist over time and that there is an absence of an observable trend of either increased or decreased activism.¹³ Manfredi and Kelly question this claim through the use of three different descriptive statistics.

First, they note that of the five years in which the government win rate was lowest, three of those years (1997, 2001, and 2002) occurred from 1996 to 2002. They also note that the government win rate declined consecutively in 2001 and 2002. Their suggestion is that this clustering is indicative of a potential upward trend in activism. But the problem with their analysis is that the number of cases in each of those years is quite small. In fact, the numbers are so small that if one government loss were switched to a win, the government win rates in those years would be very different. For instance, for 2001 and 2002, the win rates (which are the same regardless of which coding rules are employed) would increase dramatically from 57.1 per cent to 71 per cent, and 45.5 per cent to 55.5 per cent, respectively. The lesson is that it is hard to draw reliable conclusions about trends from very small figures. Indeed, we explicitly note in our paper that the difficulty in finding clear trends is in part due to the problem of the small numbers of cases in each year.¹⁴

Second, they classify the cases according to chief justice and note an increasing trend of activism by chief justice. While this is an interesting approach to analyzing the problem, the results do not strike us as particularly telling. While Manfredi and Kelly note that activism has increased with each chief justice, the differences in the numbers are too small to be meaningful. The range of government win rates over the

¹¹ See *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641; *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655.

¹² Win rates are a preferable measure because they are not skewed by the absolute number of challenges under each time period.

¹³ Choudhry & Hunter, *supra* note 2 at 546.

¹⁴ *Ibid.* at 555.

three chief justices since the advent of the Charter is from 66.0 per cent under Chief Justice Dickson to 63.0 per cent under Chief Justice McLachlin, a difference of only 3 per cent. And the difference between Chief Justice Lamer and Chief Justice McLachlin is only 0.6 per cent (from 63.6 per cent to 63.0 per cent), which hardly seems like a difference worth noting.

Finally, Manfredi and Kelly calculate a cumulative win rate to suggest that from the mid-1990s to 2002 activism has increased. This is an interesting analysis that we had not previously undertaken, but we do not think that it yields “a different picture”. The key problem is that the band of variation between the periods of low and high activism on this statistic is also very narrow, ranging from a low government win rate of 64.0 per cent in 1989 to a high government win rate of 68.1 per cent in 1996. It seems to us that it is difficult to distinguish between a trend and random noise in the data when the variation is so small. Manfredi and Kelly seem to recognize this as well when they point out that “the data do indicate that judicial activism has reached an equilibrium point.”¹⁵ At the end of the day, even if Manfredi and Kelly are right when they suggest that, it is not “radically inconsistent” with our data to suggest that the Court is becoming increasingly activist, it is equally fair to say that it is not radically inconsistent with our data to suggest that the Court is *not* becoming increasingly activist. This is precisely our point. The data do not show the clear trend that would be necessary for critics of the Court to disprove the null hypothesis that there is no change in judicial activism.

Next, Manfredi and Kelly probe our government learning hypothesis. They are right to cite and discuss Kelly’s important work on the topic, which we mention in our article.¹⁶ They argue that we cannot measure the effect of government learning on legislative drafting through government success in Charter litigation if the legislation was drafted before the Charter came into force. Thus, an important variable is the enactment date of the provision being challenged. One obvious cut off date is 1982, when the Charter (save section 15) came into force. Another watershed date they suggest is 1991, when pre-enactment Charter scrutiny was, according to Kelly, institutionalized within the federal government. Using these cut off dates, Kelly argues that of the thirty-nine pieces of federal legislation subject to constitutional challenge which were enacted *after* 1982, twenty-eight (seventy-two per cent) were enacted between 1982 and 1990. Kelly (and now Manfredi and Kelly) conclude from this that one must only look to the post-1991 vetted statutes to find out whether the government learning hypothesis is correct.

Now to be absolutely clear, this is not actually a critique of our article, but rather, an attempt to refine a hypothesis we advance but do not explore because our article was limited in its examination of judicial behaviour. It is just the right question to ask. There are, however, two problems with the way Kelly has suggested answering it.

¹⁵ Manfredi & Kelly, *supra* note 1 at 750.

¹⁶ Choudhry & Hunter, *supra* note 2 at 548, n. 84.

First, his statistics only rely on challenges to federal laws. To provide a complete answer to the question, he would need to generate comparable data for challenges to provincial laws, adjusted to take into account the date of the institutionalization of pre-enactment Charter review (if any) on a province-by-province basis. We understand that Kelly is currently conducting the research that will enable him to answer this question, and we look forward to the publication of his findings. But there is a much more serious problem—the statistic that Kelly relies on does not enable him to answer the question of whether pre-enactment scrutiny has led to greater government success in Charter litigation. To answer this question, he should have compared the win *rates* for Charter challenges to statutes enacted between 1982 and 1990 and those enacted from 1991 onward. Only if these rates were significantly different would there be proof of government learning. But instead, Kelly argues we should compare the *absolute* numbers of statutes enacted between 1982 and 1990 and from 1991 onward that were found unconstitutional. The problem is that this statistic could be skewed by differences in the numbers of statutes under challenge from each time period. Moreover, it could also reflect the fact that Charter challenges to federal legislation enacted from 1991 onward have not yet reached the Court; for example, the Court has just held the hearing in a Charter challenge to a ministerial decision taken in 1994.¹⁷

C. Hypothesis 3

In our original article, we attack the claim that section 1 is a site of activism and suggest that section 1 win rates have to be understood in their proper doctrinal context—that is to say, when disaggregated by Charter right, win rates are a function of whether the right in question contains internal limits. In response, Manfredi and Kelly run two lines of argument. The first is that we ought to have further differentiated within subsection 2(b) cases between those involving “core” free speech that the Court subjects to stringent review under section 1 and those involving “peripheral” speech that is subject to deferential section 1 review. According to Manfredi and Kelly, our failure to do so means that we “may also be guilty of designing a quantitative analysis around a deficient doctrinal understanding of Charter adjudication,” which presumably masks higher government loss rates under section 1. This is a good suggestion. Unfortunately, as Manfredi and Kelly say, it is a hypothesis that their own anecdotal examples do not either prove or disprove. However, they claim that this does not matter because they are making a larger point—that we assume section 1 is applied in a “neutral” and “technical” manner by the Supreme Court and does not involve “the discretionary choices of the judiciary.”¹⁸ That is a provocative and important claim that has been the subject of an extensive legal

¹⁷ *Hodge v. Canada (Minister of Human Resources Development)*, [2003] 1 F.C. 271, 214 D.L.R. (4th) 632, 2002 FCA 243, leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 345 (QL) (hearing date 18 March 2004).

¹⁸ Manfredi & Kelly, *supra* note 1 at 753.

literature, but it is not one we address in our paper. Our point was much narrower and modest—namely, to demonstrate that descriptive statistics alone cannot prove the claim made by Kelly in previously published work (as he and Manfredi acknowledge in their response) that adjudication at the section 1 stage is a measure of judicial activism.¹⁹

In sum, even if we use the counting rules Manfredi and Kelly suggest, the quantitative criticisms levelled at our paper leave it largely unscathed. Furthermore, the alternative interpretations of the data they put forward are based on drawing overly fine distinctions between rates that are very similar. It bears repeating that the goal of our paper was to show that the quantitative measures of judicial behaviour that have been used in the political science literature could not be relied on as proof of the four hypotheses advanced by critics of the Court. The burden of our argument was negative. In our view, the criticisms put forward in the Manfredi and Kelly comment do not displace our general conclusion that the null hypothesis in each case has not been disproven.

II. Qualitative Evidence

At numerous points, Manfredi and Kelly marshal qualitative evidence to refute some of our hypotheses. In framing these arguments, they have misunderstood the narrow and limited purpose of paper. As we said:

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. ... To be sure, the use of qualitative evidence ... 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.²⁰

In other words, we never claimed that quantitative methods could ever tell the whole story about the Court's record under the Charter. And precisely because we are legal scholars who study judicial reasoning, we spent several paragraphs explaining the limitations of a strictly quantitative approach to the issue, at the end of which we recognized that "it is important to not fall into the reductionist trap ... to privilege variables that can be measured with relative ease from the entire set of *Charter* cases ..."²¹ But as Manfredi and Kelly's own response demonstrates, the fact that numbers alone do not tell the entire story does not mean that they do not matter at all. As we said, "[j]ust as qualitative evidence on its own can provide only an incomplete understanding of Canadian constitutional practice, so too is quantitative evidence

¹⁹ *Ibid.* at 758.

²⁰ Choudhry & Hunter, *supra* note 2 at 530.

²¹ *Ibid.* at 534.

limited in its ability to shed light on the Court's constitutional jurisprudence.²² Legal scholars in Canada, however, have thus far worked largely in a qualitative mode. Our desire was to participate in this debate using methods that most legal scholars generally find alien.

But there is one argument made by Manfredi and Kelly relying on qualitative evidence to which we feel compelled to respond—the claim that there is a link between the delegitimization of the override and the level of judicial activism on the Court. The delegitimization of the override is a familiar story. Like others, Manfredi has traced the delegitimization of the override to the political outcry over its use by Quebec in Bill 178²³ to respond to the Court's judgment in *Ford v. Quebec (Attorney General)*.²⁴ Manfredi's novel contribution to this debate is to argue that the delegitimization of the override has resulted in increased levels of judicial activism by the Court. His argument is that the Court is a strategic actor whose judgments are dependent on the external political environment, including the anticipated responses of legislatures. Manfredi's claim is that while 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 prior to Bill 178, the delegitimization of the override has altered the institutional balance between courts and legislatures by removing this external restraint on judicial review.

In our study, we observed that there was no discernible trend in activism pre- and post-*Ford* as measured in strictly quantitative terms. Manfredi and Kelly respond that we have fundamentally misunderstood Manfredi's argument, because these descriptive statistics mask other ways in which activism has been on the rise. The powerful comparison Manfredi (and now Manfredi and Kelly) deploys is the striking contrast between “two cases involving divisive moral issues,”²⁵ *Vriend v. Alberta*²⁶ and *R. v. Morgentaler*.²⁷ In *Morgentaler* (a pre-Bill 178 case) the Court struck down the Criminal Code's abortion provisions²⁸ on narrow procedural grounds that left considerable room for Parliament to respond through more carefully tailored criminal legislation and a reformed administrative apparatus. In *Vriend* (a post-Bill 178 case), by contrast, “the Court left the Alberta legislature with almost no room to manoeuvre by reading sexual orientation into the province's human rights legislation.”²⁹

²² *Ibid.*

²³ 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.

²⁴ [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [*Ford*].

²⁵ Manfredi & Kelly, *supra* note 1 at xxx.

²⁶ [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [*Vriend*].

²⁷ [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler*].

²⁸ *Criminal Code*, R.S.C. 1970, c. C-34, s. 251

²⁹ Manfredi & Kelly, *supra* note 1 at 760.

One of us has critiqued this more sophisticated version of Manfredi's argument in a book review cited by Manfredi and Kelly.³⁰ Unfortunately, since they do not describe this review in their response, we are forced to repeat and elaborate upon this critique so that readers can draw their own conclusions as to the cogency of Manfredi's argument. As he and Kelly present it here, Manfredi's argument is about the rise of *remedial* activism on the Court, focusing on reading-in, the remedy employed by the Court in *Vriend*. At first glance, reading-in does appear to be a very intrusive remedy because it permits the Court to enter into the domain of legislative drafting. By contrast, a declaration of invalidity (employed in *Morgentaler*) leaves the framing and enactment of constitutionally compliant legislation to legislatures. Moreover, even though legislatures are free to depart from the Court's remedy of reading-in, it could be argued that judicially amended legislation enjoys the burden of legislative inertia, which substantially increases the chance that it will not be modified.

Reading-in has been used by the Court on three occasions—in *Vriend*, *Miron v. Trudel*,³¹ and *R. v. Sharpe*³²—all of which were handed down post-Bill 178. This evidence provides superficial support for Manfredi's story. But a closer examination of the legal and political context surrounding these cases reveals that reading-in does not always reflect judicial aggressiveness. The best example for Manfredi is *Vriend*, which held that the omission of sexual orientation as a prohibited ground of discrimination in Alberta's *Individual Rights Protection Act*³³ was unconstitutional. The three possible outcomes were: (a) a human rights code enumerating sexual orientation as a prohibited ground of discrimination; (b) no code; and (c) a code omitting sexual orientation, protected by the override. If we assume that the Court's desired outcome was (a), Manfredi is right to note that the Court's remedy of reading-in could be evidence of strategic behaviour, on the basis of a calculation that the prospect of (a) was greatest when (a) was the status quo because of the burden of legislative inertia (versus (b) and (c)), the need for some kind of human rights code (versus (b)), and the delegitimization of the override (versus (c)).

But now compare *Miron*. In *Miron*, the Court read common law partners into the definition of "spouse" in a provincial law prescribing that all automobile insurance contracts provide benefits to the spouse of the policy holder, with "spouse" defined as a husband or wife. In principle, there were three possible outcomes: (a) a definition of spouse that included common law partners; (b) no law mandating accident benefits for spouses; or (c) a law mandating accident benefits only for spouses in a marriage, protected by the override. Manfredi could argue by analogy with *Vriend* that (a) was

³⁰ Sujit Choudhry, Book Review of *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* by Christopher P. Manfredi (2003) 1 Int. J. of Const. L. 379 at 385-89.

³¹ [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693 [*Miron*].

³² [2001] 1 S.C.R. 45, 194 D.L.R. [*Sharpe*].

³³ R.S.A. 1980, c. I-2, now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14.

the Court's desired option and that reading-in was the way to secure it. But the history of the provision under challenge tells a different story. The provision under challenge was enacted in 1980. In 1990—after the accident that prompted the litigation took place—the legislation was amended to expand the definition of spouse to include common law spouses. The 1990 amendments were relied on explicitly by the majority as a reason to read-in, as opposed to strike down. As Justice McLachlin, as she then was, explained in her plurality judgment:

the fact that in 1990 the Ontario Legislature amended the eligibility criteria in a way which would include the appellants, thus giving an indication of what it would do if the matter were remitted to it anew. While this does not meet concerns that the social and legislative picture may have changed further in the years since 1990, or resolve the problem for the other Ontario statutes containing similar provisions, it does offer reasonably conclusive evidence of how the Legislature would have remedied the 1980 legislation had it been required to do so when the appellants' claim arose.³⁴

In other words, the Court did not read-in on the basis of a calculation that the delegitimization of the override would allow it to outmanoeuvre the Ontario legislature. Rather, it read-in because it was reasonable to assume that the legislature would simply amend the legislation to include common law partners (i.e., that it would have arrived at the same end point as the Court).

Finally, consider *Sharpe*, where the Court read-in defences to a law prohibiting the possession of child pornography which it found unconstitutional because of overbreadth. There were three possible outcomes: (a) a criminal prohibition narrowed by defences that would survive Charter scrutiny; (b) no special criminal prohibition on child pornography; and (c) an overbroad criminal prohibition, protected by the override. Manfredi would argue that *Sharpe* is on all fours with *Vriend*, because (a) was the Court's desired option. But this analogy is simplistic. The use of the override was actively discussed throughout the litigation culminating in the *Sharpe* decision. There was a great deal of pressure on the federal government to invoke it had the Court adopted the "deferential" remedy of striking down the provision in its entirety. Ironically, it may well have been fear of the override that led the Court to turn to the superficially aggressive remedy of reading-in. To be sure, reading-in was likely a strategic choice by the Court, but it was one made to allow Parliament to save face by claiming the prohibition had been left largely intact without the need to invoke the override.

So where does this leave us? On the broader issue of whether the Court acts strategically in response to the external political environment, we do not necessarily disagree. Indeed, we think there is a lot to this view. One of us argues in a work-in-progress that the Supreme Court of Canada acted strategically in the *Quebec Secession Reference* to craft a road map to secession in face of the profound failure of

³⁴ *Miron*, *supra* note 31 at 509. Justice McLachlin (as she then was) spoke for four members of the Court. Justice L'Heureux-Dubé concurred with this aspect of her reasons (at 481).

federal political institutions to do so.³⁵ But on the narrow issue of whether the Charter remedy of reading-in could be understood as a consequence, and as proof of, the delegitimization of the override, the evidence turns out to be quite equivocal. To reiterate a point we made in our article, we do not infer from all of this that the override has not been delegitimized. As we carefully said in our article with respect to our quantitative finding:

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 ... 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. 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. Finally, perhaps the override was and remains irrelevant to the adjudication of constitutional cases.³⁶

Conclusion: The Existing Literature, the Goals of Political Science, and the Value and Limits of Quantitative Methods

We acknowledge that political scientists have a variety of views on the Charter and Charter adjudication. Manfredi and Kelly are two cases in point. But in recognizing the diversity of opinions among political scientists, one must not gloss over the fact that many political scientists have made very negative assessments of the Court's record under the Charter, and have energetically and persistently advanced these views in public debate. The leading example here is Ted Morton. Morton is a well-known academic critic of the Court's record under the Charter. But he has also been very active politically and has been centrally involved in making judicial activism a concern of the Conservative Party of Canada (and the Reform and then Alliance Parties preceding it).³⁷

Manfredi and Kelly suggest that we have constructed a straw man and proceeded to knock him down. However, the so-called straw man is constructed from scholarship and commentary in this area. Throughout the paper, we link our hypotheses to claims found in the literature. The claim we examine in our first hypothesis, that judicial activism is high in absolute terms, can be found in Morton

³⁵ Sujit Choudhry, "Constitutional Moments in Translation? Ackerman's Higher Lawmaking and the *Quebec Secession Reference*", which is part of a book project, tentatively entitled *Searching for Legitimacy through Legalism: The Constitutional Politics of Quebec Secession*.

³⁶ Choudhry & Hunter, *supra* note 2 at 554-55.

³⁷ See e.g. F. L. Morton, "Dialogue or Monologue?" *Policy Options* (April 1999) 23.

and Knopff's *The Charter Revolution and the Court Party*.³⁸ The third hypothesis, that judicial activism is located in section 1, was a primary focus of Justice Marshall's reasons in *NAPE*. While Manfredi and Kelly are right to note that Justice Marshall did not cite political scientists for this claim, we nonetheless thought it important to place his claim in the context of the critical literature to illustrate how Justice Marshall's statements are part of a wider critique of the Court's record under the Charter. Finally, Manfredi himself has made the claims we examine in the second and fourth hypotheses, namely that judicial activism is increasing over time and that increased levels of activism are tied to the delegitimization of the override.³⁹

So we did frame our response to political scientists who have been critical of the Charter. And in framing our response, we addressed precisely the types of issues that political scientists have found important. Unfortunately, Manfredi and Kelly stridently disagree. They state that we "attempt ... to disprove claims that, in the final analysis, are at the periphery of our concern with the Supreme Court and the Charter." We must confess that we find this statement deeply puzzling because it contradicts Manfredi and Kelly's own definition of the basic concern of their discipline—"the institutional relationships between actors that exercise power and to evaluate how this power is used."⁴⁰ The power we are examining is the power of judicial review. The institutional relationship we are examining is the interaction of legislatures and courts, in particular, the Supreme Court of Canada. In this interaction, many things matter. *Ex ante* strategic behaviour is very important, and in our learning hypothesis, we suggest as much. But surely the Court's judgments that hold legislation to be unconstitutional count as well—because political outcomes ought to count, and count centrally, for political scientists. Put simply, it should matter whether governments are frustrated in achieving their policy objectives by the courts, especially the highest court in the land. We can look to the political science literature itself to see that these issues do in fact matter to political scientists. In fact, we developed the idea for the original study not only in response to *NAPE* but also after reviewing the critical literature. The principal quantitative studies of the Court's behaviour have been done only by political scientists themselves.⁴¹ And we relied on studies by political scientists not only to identify which questions to pose, but also to determine which methods to employ in answering those questions. Indeed, the most recent study that uses quantitative methods is by Kelly himself.⁴²

³⁸ F.L. Morton & Rainer Knopff, eds., *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). See also Choudhry & Hunter, *supra* note 2 at 530, n. 25 and accompanying text.

³⁹ Choudhry & Hunter, *ibid.* at 530, n. 26, 535, n. 41 and accompanying text.

⁴⁰ Manfredi & Kelly, *supra* note 1 at 763.

⁴¹ 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.

⁴² 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.

One objective of our article was to spark a much-needed dialogue with political scientists on the Supreme Court of Canada's record under the Charter. The fact that Manfredi and Kelly would respond to our article suggests that we were partially successful. Unfortunately, we clearly have a long way to go before we engage each other directly. We look forward to continuing the conversation.
