Constraining the Court

Judicial Power and Policy Implementation in the Charter Era

James B. Kelly

UBCPress · Vancouver

Contents

Judicial Power and Policy Implementation in the Charter Era

1

An important scholarly debate in Canada has come to understand judicial power and the *Canadian Charter of Rights and Freedoms (Canadian Charter)*.[1] This debate has produced important findings on the counter-majoritarian difficulty that the Charter poses for Canadian constitutionalism, what Christopher Manfredi referred to as the paradox of liberal constitutionalism.[2] It has also explained the reasons why bills of rights are adopted in advanced liberal democracies,[3] the form that judicialization takes,[4] the conditions that facilitate the judicialization of politics,[5] approaches to legal mobilization,[6] altered litigation strategies,[7] and how the legislative process has changed within government.[8] What the *Canadian Charter* debate has not yet fully explored is the policy impact of judicial decisions.[9] In many ways, the early debate assumed that the Supreme Court of Canada had policy influence because it ruled on important policy issues under the Charter and that these decisions would be faithfully implemented by the responsible legislature.

As I stated in the opening chapter, there is no denying that the Supreme Court of Canada is a powerful institution. It would be folly to suggest otherwise. What is less clear is whether powerful judicial decisions have a clear and unfettered policy impact. This is particularly important when the policy stakes are high and governments are opposed to the direction suggested by the Supreme Court of Canada. Courts can have policy impact. And they may not have any policy impact at all if judicial decisions produce sustained legislative disagreements that structure a legislative response.

Furthermore, if a complex implementation chain is present in a judicialized area of public policy, this can further diminish judicial impact, particularly in a federation such as Canada's.

The purpose of this chapter is to understand judicial impact and to map out when judicial decisions do not fundamentally change policy direction, despite the Court issuing powerful rebukes of government action. In addition, the chapter argues that the dialogue metaphor, while generating an interesting debate on its merits for addressing the counter-majoritarian difficulty, is not particularly useful for understanding judicial policy impact, and it may be time to abandon the metaphor altogether, as Aileen Kavanagh has suggested.[10] Reduced to its core, dialogue theory is the ability of a government to respond to judicial invalidation in the Charter era,[11] as Peter Hogg and Allison Bushell concluded: "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue."[12]

There are several problems with this approach, least of which is that any legislative response, be it formal rejection of the Court's decision via the notwithstanding clause or full compliance with the Court's remedy under section 24(1), is viewed as evidence of dialogue.[13] There is a deeper conceptual problem with the suggested dialogue between courts and legislatures. It is simply not accurate to view Parliament or the legislatures as the centre of policy-making, as legal scholars do, given the executive-dominated nature of our parliamentary system.[14] What dialogue theory does not do is evaluate the nature of the legislative response and whether the Court's decision has policy influence because it is adhered to by the responsible government or does not have any impact because a government seeks to contain and negate the Court's policy preferences. It is not enough to say, as dialogue theory purports, that the counter-majoritarian difficulty has been avoided because a legislature responds to a judicial decision.[15]

How should the judicial-legislature relationship be understood once we are free from the lure and limitations of dialogue? Relying on the work of Matthew Hall,[16] and echoing back to Alexander Hamilton in *Federalist no. 78*,[17] I argue that the Supreme Court of Canada is best understood as an "implementer-dependent" institution when it invalidates statutes and requires a legislative response on the part of Parliament, a provincial or territorial assembly, or all three when a collaborative response is needed. Manfredi, in his earlier work, alluded to this implementation dilemma for courts and their remedial powers under section 24(1):

> While courts may have numerous remedial alternatives available to them, they can only impose those remedies through coercive orders whose implementation depends on institutions over which they have little control. The manner in which a legislature or administrative agency complies (or fails to comply) with an order can significantly affect its impact. All of these factors reduce the flexibility of adjudication as a policy-making tool.[18]

The role of the courts in a judicialized policy process is that of agenda setting, whereby judicial review identifies issues of public policy for parliamentary attention. However, because the courts cannot implement their rulings, with few exceptions, they are dependent on the political executives in the remaining aspects of the policy process: designing legislative responses in light of judicial agenda setting and implementing these responses, either on their own or in partnership with other governments or private actors, such as medical practitioners, in the case of abortion, medical assistance in dying, and supervised consumption sites.

In this chapter, I argue that two variables directly affect judicial policy impact in this implementer-dependent context: first, the popularity of a judicial ruling and evidence of legislative disagreement and, second, the implementation context. Either variable can significantly reduce judicial impact in the post-agenda setting phase. By the popularity of a judicial decision, I am referring to its acceptance by either the government with statutory responsibility for an invalidated statute or any of the governments or actors in the implementation chain once the statutory framework is enacted into law. If any of these actors disagrees with judicial policy preferences, judicial impact is compromised, particularly if a government legislates in opposition to the judicial decision or invokes the notwithstanding clause in section 33 of the *Canadian Charter*. However, the popularity of a judicial decision and its importance is intensified in Canada because of a diverse implementation context, as a breakdown in the implementation chain reduces judicial impact. Although federalism is premised on divided jurisdictional responsibilities, many of the issues judicialized under the *Canadian Charter,* such as healthcare policy (abortion, medical assistance in dying, supervised consumption sites, and so on), are shared responsibilities, from an implementation perspective, between the two orders of governments and the devolved assemblies – one to legislate (Parliament) and two levels to provide access (provincial and territorial legislatures). As Linda White discussed in light of narrow legislative compliance in regard to equality rights decisions, there is an implementation

gap in the Canadian federation when responsibility is divided: "In the case of divided sovereignty, the challenge is not to ensure compliance but rather cooperation."[19]

Federalism as a constraint on judicial impact can arise under a diverse set of scenarios. If the implementation of a policy response rests with one government, as Bill 101, *Charter of the French Language* does with Quebec, then legislative disagreement can fundamentally reshape and redirect judicial impact.[20] As well, if statutory responsibility rests with one order of government, but the public good must be provided by the other order of government, judicial impact can be seriously compromised and even negated. In short, federalism matters, as this chapter will argue in the context of judicial impact in the Charter era. We simply have overlooked it until recently, focusing on macro questions such as the judicial activism debate and the associated questions of judicial power and the response to this debate – Charter dialogue – first as a metaphor and then as a theory of judicial-legislature relationships.

Given that there are existing theories regarding the judicialization of politics – in Canada and abroad – the first section of this chapter surveys these alternative approaches and explains why they are not suited to a consideration of judicial policy impact. The second section unpacks the two variables that can deny judicial impact beyond agenda setting – the popularity of the decision, with a particular focus on legislative disagreement, and the implementation context within the Canadian federation. This chapter considers legislative disagreement in an executive-dominated Westminster parliamentary democracy with a federal and devolved constitutional structure and how these factors significantly affect the impact of judicial decisions.

Theoretical Approaches to Judicial Politics

Stephen Gardbaum and Mark Tushnet have written important works on the institutional approaches to bills of rights in advanced democracies such as Canada, the United Kingdom, and New Zealand. For Gardbaum, these countries advance a new approach to the protection of rights, which he dubbed the "Commonwealth model of constitutionalism" because of their attachment to Westminster parliamentary democracy and their efforts to ensure that these principles are not eroded by adopting rights-based judicial review.[21] What Gardbaum and Tushnet made clear, however, was that a tremendous institutional variation existed between these Westminster systems, best illustrated by Tushnet's "strong-form" versus "weak-form" categorization that allocated the distinct countries along a spectrum of judicial

review. According to Tushnet, the United States exemplifies "strong-form" judicial review for the following reason: while judicial decisions can be reversed, the processes for their reversal are cumbersome, which ensures that decisions by the US Supreme Court endure in the long term. For instance, judicial decisions can be reversed through constitutional amendment or changes in the personnel of the Court that revisit, and reverse, earlier precedents.[22]

The fundamental difference between the two systems is summarized by Tushnet as follows: "Strong-form systems allow the political branches to revise judicial interpretations in the longish run, weak-form ones in the short run."[23] For Tushnet, the inclusion of the notwithstanding clause in the *Canadian Charter* is evidence of the potential for weak judicial review as legislatures can reverse judicial decisions in the short term.[24] He also concludes that Canada is the "strongest" of the weak-form systems, as the *Canadian Charter* is a constitutional document and courts of competent jurisdiction have full remedial authority under section 24(1). These are the strong-form features of Canadian judicialization, which are tempered by the inclusion of the notwithstanding clause, leading Tushnet to conclude that Canada falls just outside of strong-form review. One of the questionable suggestions made by Tushnet is that weak-form systems are unstable and, in the case of Canada, will collapse into judicial supremacy and strong-form review. This is said to occur through political deference to the Supreme Court of Canada and the general reluctance of governments to use the notwithstanding clause.

As I argued with Matthew Hennigar, the central difficulty with Tushnet's conclusion about the *Canadian Charter* is the over-reliance on section 33 in his argument as well as the position that parliamentarians will be reluctant to challenge the Court's decision to nullify their statutes.[25] We suggested, like Kent Roach and Janet Hiebert,[26] that Tushnet failed to appreciate the ability of parliamentary systems, because of the concentration of power within the ministry, to produce strong legislative responses to judicial invalidation in the short term through simple statutory amendment, as the ministry did in regard to the issue of sexual assault in the *Seaboyer-Darrach* and *O'Connor-Mills* dialogic sagas.[27] We labelled this process as "notwithstanding-by-stealth" to indicate legislative reversal without recourse to the notwithstanding clause, though we simply meant that the Cabinet retains the design and implementation functions and can employ them rather rapidly when motivated, regardless of the authority in which the Court renders a Charter decision.[28]

Kavanagh clearly summarized the problem with Tushnet's framework when she asked "what's so weak about 'weak-form review,'" suggesting that he overplayed the formal constitutional design features of the model and undervalued how these systems actually function.[29] She makes a similar criticism of Gardbaum's defence of the "Commonwealth model" and his justification that it allows parliamentary actors to retain the "final word" in the rights-based dialogue between courts and legislatures. Along with Hiebert, I questioned whether dialogic mechanisms produced the engagement of human rights once a bill was introduced into Parliament. We suggested that strong-form government, and not strong-form judicial review, was the most important institutional variable that determined whether legislation complied with rights-based obligations.[30] As our study demonstrated, the functioning of parliamentary democracy, and the dominance of the ministry within both the legislative process and assembly, allowed the ministry to advance its policy agenda without significant input from either the opposition benches or the government backbench.[31] This study on New Zealand and the United Kingdom highlighted the central importance of understanding judicial impact in relation to legislative responses, though it did not consider the critical role of federalism given the unitary structures of these two parliaments.

The Canadian Contributions: Charter Revolutions and Dialogic Constitutionalism

The debate surrounding judicial activism and the response to it in the form of dialogue theory represent the Canadian contribution to judicial politics. In *Governing with the Charter,* I provided an extensive review of the initial academic debate surrounding judicial review in Canada[32] and will simply highlight several of the prominent theories, such as the "court party thesis" by F.L. Morton and Rainer Knopff, and "dialogue theory" by Hogg and Bushell.[33] In addition to the work of Morton and Knopff is that of Manfredi, who explored the paradox of liberal constitutionalism when the boundaries of judicial review are subject to the discretionary choices made by judicial actors. Dialogue theory quickly became an important understanding of the institutional relationships between courts and legislatures and greatly influenced the debates in other Westminster systems that adopted bills of rights, such as the United Kingdom[34] and New Zealand,[35] or were contemplating the adoption of bills of rights, such as Australia.[36]

In *The Charter Revolution and the Court Party,* Morton and Knopff develop the "court party thesis" to explain the fundamental differences between judicial review under the 1960 *Canadian Bill of Rights* (Bill of Rights), and the

1982 *Canadian Charter*.[37] For Morton and Knopff, with the exception of their status as the Bill of Rights is statutory whereas the *Canadian Charter* is constitutional, the degree of judicial activism since 1982 cannot be explained by any fundamental textual differences: "Despite a few textual innovations in the Charter, Canadians did not go to bed on April 17, 1982 with a substantially new set of rights and freedoms."[38] The differences in rates of invalidation and judicial activism, according to Morton and Knopff, are largely explained by the Court succumbing "to the seduction of power" that the *Canadian Charter* provided after 1982.[39] What makes the "Charter revolution" possible, however, was not simply judicial activism but also a broad-based, progressive support structure that embraces judicial review as an instrument of policy change: what Charles Epp referred to as the "legal mobilization support structure" in his comparative study of Canada, India, the United States, and the United Kingdom.[40] This constellation of actors is called the "court party" by Morton and Knopff, is drawn from the political left, and advances a post-material policy agenda in the judicial arena.[41]

What sustains the court party, and, thus, its use of the judicial arena, is "state connectedness" and funding under the Court Challenges Program established by the Trudeau Liberals in 1977[42] as well as a "jurocracy" that supports a progressive agenda set by the Supreme Court of Canada through its Charter decisions.[43] Rights advocacy structures such as human rights tribunals are part of the jurocracy as well as Canadian legal academics that engage in "rights advocacy scholarship," who, in turn, educate and provide future law clerks to the Supreme Court of Canada. In an interesting summation of this development, Morton and Knopff refer to the Supreme Court as the "vanguard of the intelligentsia," suggesting a crypto-Marxist movement in which the Court's role is to ensure that the Charter proletariat achieves the necessary consciousness to sustain the Charter revolution.[44]

Morton and Knopff's engaging work is a notable study of legal mobilization during the Charter era by actors that Marc Galanter referred to as "repeat players" in his seminal article on this phenomena.[45] So is Manfredi's study on the Legal Education Action Fund, which is the best Canadian study of interest groups that pursue sustained and successful legal mobilization.[46] Morton and Knopff draw strong conclusions regarding legal mobilization under the *Canadian Charter*, suggesting that it is "deeply and fundamentally undemocratic."[47] However, while their study considers the implementation of judicial decisions, they largely conclude that the policy direction set by the Supreme Court of Canada is adhered to and produces a direct, though negative, policy impact.

Regime Politics Approach and the Harper Conservatives

This approach to the judicialization of politics is associated with Robert Dahl's defence of judicial nullification, in which Dahl suggested that the US Supreme Court was never far out of line with the views of the dominant governing coalition.[48] In this respect, Dahl was responding to the counter-majoritarian critique by Alexander Bickel that outlined the anti-democratic nature of judicial review.[49] Advanced by Cornell Clayton and Mitchell Pickerill, the regime politics approach (RPA) agrees with Dahl's basic claim that the Supreme Court is generally supportive of the policy direction of the dominant governing coalition. However, RPA does not accept that the Supreme Court is passive, as envisioned by Dahl, but is active in advancing, defending, extending, and according legitimacy to the policy choices of the dominant governing coalition.[50]

Emmett Macfarlane has used the RPA to understand the contentious relationship between the Harper Conservatives and the Supreme Court of Canada in two areas: reference cases involving constitutional reform, such as senate reform, and the *Canadian Charter*. Although Macfarlane is not proposing the RPA as a meta theory to understand Canadian judicial politics, he suggests that it can explain the Harper Conservatives as an outlier since "the 2006 federal election signalled an electoral shift to a government hostile to the Charter project and judicial review generally."[51] Consistent with regime politics approach, the "Harper government's attempt to disrupt the dominant regime was ultimately stymied by the Court."[52] Thus, the dominant governing coalition in Canada, before and during the Harper era, was a "bi-partisan pro-Charter regime in favour of the Court's role and supportive of judicial power."[53] Darrell Bricker and John Ibbitson refer to this group as the "Laurentian Consensus," which is "dominated by elites from the Toronto, Montreal, and Ottawa region (the Laurentian elites), who advance a particular conception of Canadian political identity."[54] While Macfarlane uses the RPA, he recognizes that important institutional differences exist between the American and Canadian political systems that must be considered: first, that it is easier to identify the dominant governing coalition in Canada because of the concentration of power in a parliamentary system and, second, that Canadian prime ministers have not used partisanship (or agreement with the "Laurentian Consensus") as a criteria for appointment to the Supreme Court of Canada.

Despite the use of the RPA by Macfarlane, I do not believe it can be, or should be, applied in the Canadian context. Roach noted that "the judicial activism debate that has emerged in Canada since the *Charter* is an unfortunate

example of a branch-plant mentality that ignores the differences between the *Charter* and American *Bill of Rights*."[55] In Macfarlane's defence, he acknowledges important institutional differences and does account for how the RPA manifests differently in Canada. That being said, the institutional differences are too great, the construction of power too different, and the RPA comes to founder on the Canadian Shield. At the core of the RPA is bipartisanship, as understood in the American congressional system, and the need to construct a dominant governing coalition on salient policy issues on a case-by-case basis. This is the result of a divided government in the United States, where Congress and the executive may be under the control of different parties, as well as the situation within Congress, where the House and Senate may be controlled by different political parties, as it is under the 117th Congress. The fundamental problem with the RPA in Canada is the following: parliamentary systems that produce strong majority government, with disciplined cohesive parliamentary parties, do not need to be part of a dominant governing coalition, nor do they coalesce around such a construct. Thus, public policy is not transactional, and the party leadership is not required to negotiate between parliamentary factions.

On its own, the ministry is dominant within the House of Commons, and, thus, Parliament, and within the party caucus. The characterization of a "bipartisan pro-Charter regime" by Macfarlane is somewhat problematic as bipartisanship in regime politics has a much different construction because of its origin in the United States. For instance, Macfarlane is using it to suggest that the Liberal Party of Canada and the former Progressive Conservative Party, led by Brian Mulroney, represent bipartisan support for the Charter project: in effect, this is the dominant governing coalition of regime politics during the Charter era. This is not, however, how regime politics views bipartisanship in the context of the dominant governing coalition – this is inter-party agreement on the *Canadian Charter* and the Supreme Court's role and not bipartisanship as it is understood in the context of the design and passage of legislation in the American system of divided government.

There is a more basic problem with the RPA in Canada – it requires us to accept that, despite the Harper Conservatives dominating Parliament during minority and majority governments, it was not part of the dominant governing coalition and was simply an outlier during its ten years at the centre of government. It was dominant without being part of the dominant governing coalition. If this is true, then the dominant governing coalition seems out of place in a parliamentary system. What matters in a parliamentary system, such as Canada, is the party that forms the ministry, which chairs

Cabinet, and which staffs the Prime Minister's Office. As such, the institutional differences and power dynamic in a parliamentary system are too different, thus rendering the RPA a questionable way to understand the judicialization of politics in Canada.

Charter Dialogue Revisited

In their seminal article, Hogg and Bushell suggested in their subtitle that "Perhaps the Charter of Rights Isn't Such a Bad Thing after All" as the vast majority of nullifications resulted in a statutory response by the competent legislative body, which they suggested occurred in nearly two-thirds of nullifications by the Supreme Court of Canada.[56] For Hogg and Bushell, judicial nullification initiated a dialogue between the courts and legislatures, with a judicial decision outlining the constitutional boundaries that public policy must operate within and Parliament and the provincial legislatures being free to design statutory amendments that comply with the Constitution, as interpreted by the Court.[57] As a defence of judicial review, it appears to create a path between parliamentary supremacy and judicial supremacy, which largely explains why dialogic constitutionalism became an appealing framework for Westminster parliamentary democracies that contemplated bills of rights after 1982.[58] Indeed, dialogue theory suggests that the benefits of judicial review can be harnessed by parliamentary systems without the costs typically associated with "strong-form" review in systems such as the United States, which involve judicial supremacy and the dominant role of the courts in fundamental policy debates.[59]

I was, for a brief period, a proponent of Charter dialogue theory.[60] Since that time, however, I have talked myself out of this position.[61] A number of criticisms have been made against dialogue theory from across the political spectrum and the academy, and, for the purposes of brevity, I will focus on the substantive criticisms made by the Canadian academic community, though similar criticisms are made by the broader academy.[62] One of the main criticisms of Charter dialogue theory is that a judicial decision rarely allows a legislature to fashion an independent response, which is captured by Grant Huscroft's observation that "a government that wishes to pass replacement legislation must revisit an issue that had been regarded as settled. The price of doing so may be high – so high, in fact, that as a practical matter it cannot be paid."[63] This was based upon Huscroft's assessment of Parliament's response to the invalidation of the *Tobacco Product Control Act* in *RJR-MacDonald*, which closely mirrored the policy framework suggested by the majority opinion authored by Justice Beverley McLachlin.[64] As well,

Carissima Mathen is skeptical about Charter dialogue as a theory and whether it demonstrates the endurance of weak-form review in Canada, noting that "the fact that the legislature can respond – by changing the law or enacting a new one – does not diminish the courts' powers."[65]

There is, I think, a more compelling reason to stop talking about Charter dialogue as a framework to understand judicial politics, at least regarding Canada. As Andrew Petter observed, the fact that governments can, and do, respond to the Supreme Court of Canada, is not particularity surprising.[66] It is the use of dialogue by Hogg, Thornton, and Wright that is problematic, as they move between dialogue as an interactive exchange between courts and legislatures, to dialogue as judicial finality on the meaning of rights and freedoms. On the one hand, Hogg, Thornton, and Wright defend the *Canadian Charter* as consistent with weak-form judicial review until the point, however, that a legislative response (a "second look case") is reviewed by the Court, in which case any continuing statutory disagreement must be resolved in the Court's favour as "final authority to interpret the Charter rests properly with the judiciary."[67] Qualifying this claim, Hogg, Thornton, and Wright state that judicial supremacy over the interpretation of the *Canadian Charter* does not mean judicial supremacy over policy outcomes,[68] suggesting that Charter review and public policy are distinct processes with different institutional authority.

This claim would be acceptable if judicial supremacy was confined to the interpretation of rights and freedoms and not to section 1 of the *Canadian Charter* – the reasonable limits clause – which is a policy test as it asks the following questions about the public policy found to violate a protected right or freedom. Are the policy objectives "pressing and substantial"? Are the limitations on rights the "least restrictive" in the circumstances? Is there a rational connection between the policy objective and the means chosen? Do the societal benefits of the policy outweigh the costs to the rights holder? It is unclear why institutional supremacy, regarding this part of the Charter, rests properly with the judiciary, as Hogg, Thornton, and Wright suggest, or how they can be separated if final interpretive authority must rest with the Court. More importantly, legislative disagreement does not appear to fall within the operationalization of dialogue during "second look cases" because of the normative claim involving the Supreme Court of Canada having final interpretive authority.

In claiming judicial supremacy over the *Canadian Charter* and its interpretation, Hogg, Thornton, and Wright were not separating the judicial (rights construction) from the political (policy construction via section 1)

but were extending it over the whole Charter. Presumably, this would also extend to section 33, where its use, perhaps, could be subjected to judicial review, as was argued by Lorraine Weinrib during the controversy surrounding the Ford government's decision to override the lower court in Bill 31.[69] In the end, Charter dialogue, for its proponents, is about judicial supremacy, strong-form judicial review, and parliamentary deference to courts as policy makers, despite their protestations to the contrary. Instead of mitigating the "counter-majoritarian difficulty," as it intended to do, dialogue theory muddies the institutional roles of courts and legislatures and cannot help us understand policy impact. And, for an understanding of judicial policy impact in the Charter era, it is a "bridge too far" or a quagmire, depending on your metaphorical preference.

The Supreme Court as an "Implementer-dependent" Institution

The preceding discussion has argued that, while valuable, much of the judicialization of politics literature does not consider the impact of judicial decisions on compelling issues of public policy. Either the literature explains why bills of rights are adopted or the form that bills of rights take. When it does consider judicial impact, it is an analysis of the effect of judicial review on the constitutional system, or what Alexander Bickel referred to as the "counter-majoritarian difficulty."[70] These are important questions, but they cannot answer the fundamental question explored in this book regarding judicial impact and salient issues of public policy.

In the Canadian debate, the "court party" thesis and "dialogic constitutionalism" do consider judicial impact but repeat the mistakes first identified by Alan Cairns in his seminal article on the Judicial Committee of the Privy Council. In this article, Cairns squarely addressed the limitation with early scholarship as it had a singular focus on judicial decisions as the principal variable to account for the evolution of Canadian federalism:

> It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise not have taken. It is evident that on occasion the provinces found an ally in the Privy Council, and that on balance they were aided in their struggles with the federal government. To attribute more than this to the Privy Council strains credulity. Courts are not self-starting institutions. They are called into play by groups and individuals seeking objectives which can be furthered by judicial support. A comprehensive

> explanation of judicial decisions, therefore, must include the actors who employed the courts for their own purposes.[71]

Both the "court party" thesis and "dialogic constitutionalism" equate judicial review with policy impact and, in this sense, place too much emphasis on the Supreme Court of Canada and repeat the mistakes of early scholarship. This comes without a proper consideration of the role of the legislative state. Moreover, they overlook the ability of the ministry to overcome judicial review through a legislative response that disagrees with the Supreme Court. Further, the approaches minimize that a negative rights instrument, such as the *Canadian Charter,* is an impediment to judicial impact. And, finally, such approaches overlook the complex implementation chains facing issues of public policy judicialized under the *Canadian Charter,* particularly when a judicial decision requires coordination and cooperation among the two orders of government as well as the devolved assemblies.

Like Gerald Rosenberg's work that explored the practical limitations of policy change via the judicialization of politics,[72] this book focuses on the implementation challenges that confront any activist judicial decision by the Supreme Court of Canada, particularly when it centres on a substantive issue of public policy. In the American context, the implementation challenge is also explored in the work of Bradley Canon and Charles Johnson who noted the paradox of implementation and how institutional dependence by supreme courts can check judicial policy impact: "Courts must work with existing implementation groups – they cannot fire unenthusiastic implementors and hire new ones. To compound the problem, the groups that immediately implement the policies are frequently parties to the decision. If the implementing group loses its case, then it must immediately execute a decision which it fought against for months or even years."[73]

In the Canadian context, Manfredi's early work was conscious of the implementation paradox under section 24(1) of the *Canadian Charter* and how the Supreme Court of Canada's heavy reliance on Parliament and the legislatures blunted this judicial instrument and, presumably, directly affected judicial policy impact.[74] An important contribution made by Rosenberg, Canon, and Johnson, as well as Manfredi and Hall, is to reintroduce the important insight made by Hamilton in *Federalist no. 78* – that the judiciary can be the "least dangerous" branch, particularly when its decisions are reliant on other actors for their implementation.[75] Indeed, Hall echoes *Federalist no. 78* when he labels supreme courts as "implementer-dependent" institutions as they

are reliant on lower courts and non-judicial actors, such as Congress or Parliament, to implement judicial rulings.[76] Hall classifies judicial decisions implemented by lower courts as vertical issues and those implemented by non-judicial actors such as the ministry as lateral issues. Briefly put, a vertical issue is a final appellant court decision that establishes judicial rules implemented by lower courts, such as the rules governing trial procedures or the admissibility of evidence. A lateral issue arises when a final appellant court reviews the constitutionality of a statute and declares it unconstitutional, and this judicial determination necessitates some response from the political actor with responsibility for the statute in question. The Canadian manifestation of a lateral issue is the "Charter dialogue" debate that has considered the significance of legislative responses to judicial invalidation of statutes by the Supreme Court of Canada.[77]

Hall's position is that the popularity of a judicial decision, combined with the nature of the issue (vertical versus lateral) and the institution required to implement the decision (lower courts versus legislative bodies), determine the conditions under which a supreme court may or may not be powerful. For instance, a supreme court can generally expect a vertical issue, regardless of the popularity of the decision, to be largely implemented by lower courts, given the judicial hierarchy and the fact that lower courts are bound to follow judicial precedents established by the Supreme Court.[78] Similarly, a popular lateral ruling will be implemented since public opinion supporting the decision restricts the ability of legislative bodies to engage in "court-curbing" strategies.[79] However, according to Hall, an unpopular lateral judicial ruling provides the potential for legislative reversal as the parliamentary body required to implement the decision may use popular disagreement with the decision to fashion a legislative response that limits the policy impact of the judicial review.

A Court of "Competent Jurisdiction": Section 24(1) and Judicial Remedies

Leaving aside the classification scheme, a more pressing issue is Hall's reaffirmation of Hamilton in *Federalist no. 78* as well as Rosenberg's position that final appellant courts cannot implement their rulings and must rely exclusively on lower courts or political institutions such as the Cabinet. Given that the *Canadian Charter* includes a remedy clause under section 24(1), the assumption that a final appellant court is an implementer-dependent institution does not fully apply in the Canadian context.[80] This judicial remedy

clause allows a court of "competent jurisdiction" to fashion a remedy that "the court considers appropriate and just in the circumstances." In response, the Supreme Court of Canada has established three-broad remedies for courts of competent jurisdictions,[81] largely in relation to acts of Parliament, the provincial legislatures, and the territorial assemblies: immediate statutory invalidation; suspended declarations of unconstitutionality; and, finally, judicial amendment of legislation.[82]

The first two remedies are clear illustrations of the Supreme Court of Canada as an implementer-dependent institution, as immediate and suspended invalidity leave it to the ministry to decide how, and if, to respond to a judicial determination of statutory incompatibility with the *Canadian Charter*. According to its proponents, they would also constitute evidence of Charter dialogue theory as they generally result in a legislative response and demonstrate the central premise of this defence of judicial review: that the Supreme Court rarely has the final word when it declares that acts of Parliament or the legislatures are unconstitutional.[83] While it has been debated whether a judicial ruling, in fact, can facilitate a legislative response that addresses the counter-majoritarian critique of judicial review, as Charter dialogue theory claims,[84] the first two remedies under section 24(1) do allow for the possibility of judicial policy impact being checked. This is for a very specific reason so that the Court's remedy and policy direction can be reviewed and amended by parliamentary actors.

The remedy labelled as a "judicial amendment" defies the notion that final appellant courts are "implementer-dependent" institutions and, more importantly, that, in the context of Canada, the Supreme Court, as Roach contends, may not have "been careful to craft gentle, patient, and flexible remedies that do not dictate to government the exact steps to be taken to remedy a constitutional violation."[85] The characterization of judicial deference by Kent Roach is correct in terms of immediate and suspended invalidity but less so when the Court has engaged in other forms of remedial activism. To provide some context, the Supreme Court of Canada has issued 3,250 decisions between 1982 and 2022, and 640 of them (or nearly 20 percent) involve the *Canadian Charter*. The breakdown of the decisions involving the *Canadian Charter* is the following: 278 statutes and regulations (44 percent); 355 conduct cases, such as those involving the police (55 percent); and seven cases involving administrative or ministerial discretion (11 percent) such as supervised consumption sites in *Canada v PHS Community Services Society*.[86] In terms of remedial activism and section 24(1) of the *Canadian Charter* (n = 101), the breakdown is as follows: 94 statutes have been nullified

as inconsistent with the *Canadian Charter,* one statute has been found to be inconsistent with the Quebec *Charter of Human Rights and Freedoms*,[87] and six instances of administrative or ministerial discretion have been found to violate the *Canadian Charter*.

Appendix 1 outlines this subset of remedial activism (101 cases), and Table 1.1 indicates the general remedy used by the Court under section 24(1): immediate invalidation (fifty cases); suspended invalidity (twenty-seven cases); and judicial amendment (twenty-four cases). Roach is generally correct that the Supreme Court of Canada has adopted "gentle, patient, and flexible remedies" as this has occurred in seventy-seven cases (76 percent) in which it has fashioned remedies under section 24(1). However, in the remaining cases, the Court has acted "more like a *de facto* third chamber of the legislature than a court."[88] In a significant dimension of remedial activism (twenty-four cases), once having found legislation to be unconstitutional or that ministerial discretion has been exercised inconsistently with the *Canadian Charter,* the Court itself has remedied these findings of unconstitutionality. Indeed, leading dialogue theorists, such as Hogg, Thornton, and Wright, have suggested that the judicial amendment of statutes works against Charter dialogue as it generally precludes a legislative response.[89] In addition, there is a clear jurisdictional divide in the use of this remedy, sixteen out of twenty-four cases (68 percent) of judicial amendment by the Court have involved statutes under the authority of the Parliament of Canada.

The most common approach to judicial amendment by the Supreme Court of Canada has been to "read down" statutes to establish their compatibility

Table 1.1 Judicial remedies by the Supreme Court of Canada, 1982–2022

Government	Invalidation	Suspended	Amended	Total
Canada	*36*	13	16	*65*
Quebec	8	2	2	12
British Columbia	2	4	1	*7*
Ontario	1	3	1	*5*
Alberta	2	1	1	4
Prince Edward Island	1	1	0	2
Saskatchewan	0	1	1	2
Nova Scotia	0	1	1	2
Manitoba	0	0	1	1
New Brunswick	0	1	0	1
Total	*50*	*27*	*24*	*101*
Federal	*36*	13	16	*65*
Provincial	14	14	8	*36*

with the *Canadian Charter*, which the Court has used in nearly two-thirds of cases or fifteen of twenty-four cases. Generally speaking, this judicial technique sees the Court sever a section or a phrase to ensure the constitutionality of an offending statute such as the *Criminal Code*.[90] For instance, after determining that the definition of "constructive murder" in section 21(2) of the *Criminal Code* was unconstitutional in *R. v Logan*, the Court severed the phrase "ought to have known" to ensure the continued application of this *Criminal Code* provision.[91]

A more controversial approach, however, is the practice of "reading-in" where the Court changes the intention of legislation by updating statutory definitions or stretches statutory applications to remedy constitutional limitations identified by the Court. In *Vriend v Alberta*, the Supreme Court of Canada determined that Alberta's human rights code, the *Individual Rights Protection Act (IRPA)*, was a violation of section 15(1) by virtue of its underinclusion as it did not extend protection to gays and lesbians.[92] To remedy this constitutional violation, the Court read sexual orientation into several sections and stretched the *IRPA* to cover a ground for protection recognized by the court in *Egan v Canada*.[93] Thus, *Vriend* was remedied by the Court's expansion of equality rights to include sexual orientation in *Egan*.

Less prevalent remedies have involved the use of ministerial discretion, where the Supreme Court of Canada has established constitutional parameters for its exercise. For instance, in *PHS Community Services Society*, the Court read in five criteria that must be used by the minister of health when evaluating applications for supervised consumption sites under section 56 of the *Controlled Drugs and Substances Act (CDSA)*.[94] As well, in *Solski (Tutor of) v Quebec (Attorney General)*, the Court determined that the quantitative approach to the "major part requirement" for assessing eligibility for English public education under the *Charter of the French Language* was incompatible with section 23 of the *Canadian Charter*.[95] To remedy this constitutional defect, the Court read in a four-part qualitative test for assessing eligibility for this public service.[96] In other cases, the Court set aside ministerial directives and reinstated the decisions of other public bodies, as it did in *Arsenault-Cameron v Prince Edward Island* regarding minority language education services.[97]

Curbing Judicial Impact: Issue Salience, Unpopularity, and Federalism

The Supreme Court of Canada, by virtue of statutory review and section 24(1) of the *Canadian Charter*, is an implementer of its decisions. And it is also dependent on governments to implement its rulings. In addition, these parliamentary actors may be dependent on private actors to implement the

statutory frameworks they create in response to judicial invalidation, such as medical and nurse practitioners. Moreover, professional organizations such as the provincial colleges of physicians and surgeons, and their territorial equivalents, have responsibility for the professional standards governing medical services regulated by the federal *Criminal Code* or equivalent statutes.

Despite certain reservations with Hall's framework, which was developed to understand judicial power in the context of the US Supreme Court, it may be better suited to understand the Supreme Court of Canada and salient issues of public policy in the Canadian federation. This is for two reasons. First, the functioning of an executive-dominated parliamentary system, whereby the House of Commons is frequently controlled by a one-party majority government, may be a more hospitable environment for legislative disagreements that limit judicial impact through strong legislative responses challenging judicial remedies and policy directions. Second, as Linda White observed in the context of federalism and the implementation of equality rights decisions in Canada, "federalism complicates matters by involving two levels of government: one to acknowledge the legality of the action; and the other to ensure access to the services."[98] This is particularly relevant in the Charter era, as high-profile invalidations of the federal *Criminal Code* or the *CDSA* regulate activities under provincial control, such as abortion, medical assistance in dying, and supervised consumption sites.

My study focuses only on what Hall describes as lateral issues – policy decisions implemented by political actors – as I consider key areas of public policy invalidated by the Supreme Court of Canada that represent the core responsibilities of the governments of Canadian federalism at the nexus of law and politics during the Charter era. I do not consider judicial impact in vertical issues – judicial rules that are largely implemented by lower courts. The highest court in any jurisdiction has clear impact in vertical issues because of a hierarchal "implementer-dependent" context, but this relationship is not the focus of this study, which is about courts and legislatures in the Canadian federation. Unlike Hall, I consider any issue with a statutory basis to be a lateral issue and, moving forward, will simply refer to these issues as involving statutory review where the focus is on the statutes, regulations, and ministerial discretion. Judicial decisions declaring such instruments or actions unconstitutional require a response, either acceptance of the decision or, as Parliament failed to do on two occasions in response to *Morgentaler*, an inability to amend legislation.[99] Alternatively, Parliament and the legislatures can question, challenge, and, perhaps, reject the policy framework established via remedial activism under section 24(1) of the *Canadian Charter*.

As I will demonstrate, there are several factors that determine the conditions under which the Supreme Court of Canada, despite remedial activism under section 24(1) of the *Canadian Charter,* may not influence legislative outcomes in salient areas of public policy. For instance, does the responsible parliamentary actor agree with the Court's determination that a statute is constitutionality suspect? Second, does the judicial decision impose a constitutional obligation to provide access to a service (a positive right) or does the decision articulate a negative right, where the Court mandates limits on government interference with personal autonomy? As Macfarlane demonstrates in the context of health-care policy, the Supreme Court has generally framed constitutional challenges in *Morgentaler, Carter,* and *PHS Community Services Society* as negative rights cases and has declined to place any policy obligations on provincial governments.[100] As many judicial decisions in the Charter era regulate what governments may not do (negative rights), as opposed to what they must do (positive rights), this creates the conditions for limited policy impact via remedial activism under section 24(1) of the *Canadian Charter.*[101] The third factor considers whether the parliamentary body with statutory responsibility accepts the remedy imposed by the Supreme Court of Canada. And, finally, what is the institutional context of implementing a legislative response to a judicial determination of unconstitutionality?

Is the policy context relatively straightforward, conforming to the division of powers, thus requiring only one order of government to frame a response to the Supreme Court of Canada's ruling? Is the policy context complicated, requiring coordinate action by both orders of government to realize the full impact of remedial activism under section 24(1) of the *Canadian Charter*? In relation to an issue that requires coordinate action, is there a consistent approach by the provincial and territorial legislatures – do some comply, while others engage in non-compliance that mitigates the impact of remedial activism by the Supreme Court of Canada? How does "checkerboard" federalism and asymmetrical access to services given constitutional parameters by the Supreme Court of Canada factor into our analysis of judicial power in the Charter era? In short, how do institutional context, federalism, and the reaction of the actor(s) with statutory responsibility affect the implementation of judicial decisions in salient areas of public policy?[102]

Legislatures and Disagreement: Popularity in an Executive-Dominated Parliamentary System

In *The Nature of Supreme Court Power,* Hall contends that the popularity of a judicial decision determines whether Congress or a legislature accepts a

ruling involving a lateral issue, suggesting that "elected officials may be unwilling or unable to resist the Court when it is supported by strong public opinion."[103] In contrast, an unpopular ruling provides the possibility for non-compliance, as Congress may pursue its own policy preferences if a consensus forms against a judicial ruling.[104] Much of Hall's consideration of popularity is derived from public opinion surveys, which he uses to determine whether a popular basis exists for a judicial decision to be opposed and judicial power can be constrained.[105]

In a two-party congressional system based on the separation of powers, such as the United States, popular support may be a useful indicator whether Congress, or a state legislature, can oppose a judicial decision. For instance, in a system of divided government, supporters of a judicial decision can mobilize and target either chamber of Congress, or, failing this, the executive branch can safeguard the intended policy impact of a judicial decision. Even an unpopular judicial decision may be more difficult to reverse in the American context, given that backers of the decision can target the House of Representatives, the Senate, or the executive branch in support of the decision, thus complicating or even preventing a legislative response that seeks to limit the policy impact of a judicial decision. Congressional responsiveness to public opinion is stronger, perhaps, in the United States, with mid-term elections every two years that limit the distance that political actors can move away from public opinion on salient issues of public policy.

Again, the Canadian case requires a different approach to the issue of popular support as the latitude to strike a policy response may be greater in Canada. This may occur not because public opinion is less important but, rather, because it is channelled very differently and operates under a different set of constitutional principles, with a different threshold in a multi-party parliamentary system. Turning first to the constitutional principles of significance, the fusion of power in a parliamentary system creates fewer points for popular opinion to constrain legislative action. Indeed, the presence of disciplined parties within a multi-party setting,[106] and the dominance of the ministry within the legislature,[107] provides a policy latitude that does not exist in the two-party American compound republic. For instance, there have been twelve federal elections during the Charter era, and the party forming government has averaged 39.1 percent of the vote in each election.[108] Controlling for majority governments (seven elections) increases the plurality slightly to 41.85 percent support, though the last two majority governments, led by Stephen Harper and Justin Trudeau, have secured control of the House of Commons by securing less than 40 percent of the vote. The appointed

Senate has not historically constrained the ministry in any meaningful way, though this may be changing as a result of the reforms introduced by Justin Trudeau, first as Liberal Party leader and subsequently as prime minister. Even greater autonomy is exercised by provincial ministries that operate within comparatively small unicameral legislative assemblies.[109] The Canadian case is thus distinct from that of the American as the ability of popular opinion to influence legislative opinion is much reduced.

In his assessment of the United Kingdom's *Human Rights Act 1998* and whether it has constrained the ministry, K.D. Ewing provided a pessimistic view, suggesting that the *Human Rights Act*'s ineffectiveness is "the problem of centralized power and executive dominance, and the ability of governments with the support of the House of Commons to do pretty much what they want."[110] This assessment does not fully hold in Canada as judicial review is much stronger and the remedies available to Canadian courts are not permitted in the United Kingdom.[111] However, it does suggest that the structure of parliamentary systems, particularly ones such as the Canadian and the British, where the threshold for majority government is based on a declining plurality of the vote, requires a different approach to public opinion as a constraint on legislative action. Moreover, the recurring presence of one-party minority governments in Canada since 2004 has not undermined the ability of the government to achieve its legislative agenda. What is of greater importance in a parliamentary system, therefore, is whether an incumbent government agrees with a judicial decision invalidating a statute under its legislative and constitutional authority. George Tsebelis refers to this as "policy congruence" in parliamentary systems,[112] and I simply refer to it as the popularity of a judicial decision within an incumbent government. Clearly, public opinion influences legislative perception of a judicial decision, but it is not paramount in a parliamentary system such as Canada's.

Federalism and the Implementation Gap

In her study of equality rights and implementation, White analyzed policy areas where responsibility was functionally divided between the federal and provincial/territorially governments: abortion and reproductive choice and the issue of same-sex marriage. In particular, the federal government determines the legality of these issues, and the provincial and territorial governments have responsibility for providing access to the services legally regulated by the federal government. White refers to this as an "implementation gap" that "requires a second and (sometimes reluctant) autonomous player to act in order to ensure implementation" where the second government's "distance

from the original legislative action can create a gap in response, or even outright defiance of the judicial ruling."[113] This is an important observation. However, it is not limited to equality rights but is also an implementation "dilemma" across the entirety of judicial review under the *Canadian Charter*. Indeed, it is a seminal factor that strongly determines whether judicial review can produce policy change or whether governments can bend the judicial decision through the implementation prism to better reflect their policy preferences and priorities.[114]

In one of the first analyses of the *Canadian Charter* and federalism, Cairns voiced concern that judicial review would have a centralizing effect on Canadian federalism and undermine the sovereignty of the provinces in their areas of responsibility.[115] The "centralization thesis" was an important element of the academic debate surrounding the *Canadian Charter* during its first two decades. The consensus position was that judicial interpretation of a national charter of rights by the Supreme Court of Canada would have serious negative implications for the principle of policy diversity and provincial autonomy.[116] What this important critique discounted, however, was the ability of federalism to be safeguarded, either by the courts demonstrating sensitivity to this principle in its Charter jurisprudence[117] or by governments redesigning the policy process within the bureaucracy to safeguard against judicial invalidation and, thus, preserve the constitutionality of statutes in core areas of responsibility.[118] Added to this is the implementation context of Canadian federalism that allows for a range of responses to judicial activism that may negate, or significantly constrain, the impact of judicial review: a development referred to as "safeguarding federalism" in the American context, whereby state legislatures protect their jurisdictional authority by determining how, and whether, to participate in policy exercises led by the national government.[119]

Morton was skeptical that the provinces could protect their constitutional authority and suggested that, in the context of the *Canadian Charter* and federalism, "provinces can win a Charter 'battle' but still lose the policy 'war.'"[120] As I will demonstrate, governments can lose the Charter "battle" but win the policy "war" since they, and they alone, control the design and implementation of legislative responses to statutory nullification. Several of the prominent areas of public policy considered in this book, such as abortion, medical assistance in dying, and supervised consumption sites, allow the provincial and territorial governments to decide whether to participate in national policy frameworks governed by the *Criminal Code* or other federal statutes such as the *CDSA*.

This demonstrates the importance of White's observation that "when reviewing major legislation or definitive rulings, it is important to scrutinize not only the outcomes of the decisions but also the implications regarding the legislative authority of the federal parliament vis-à-vis provincial legislatures."[121] In particular, judicial invalidation of federal statutes such as the *Criminal Code* and the *CDSA* may not necessarily result in greater access to these public services, as it requires legislative responses on behalf of both orders of government: Parliament, in amending the legislation declared unconstitutional by the Court, and the provinces and territories, which must decide whether to provide access to these services. This is further complicated when the provinces and territories diverge in their responses to the implementation gap. As the Court rarely mandates the provision of public services, the impact of judicial review is conditioned by the scope of the remedy, federalism, and policy choices of the provincial and territorial governments.

To illustrate, the *Morgentaler* decision saw the Supreme Court of Canada invalidate the legal framework governing access to therapeutic abortion as a violation of the security of the person protected by section 7 of the *Canadian Charter*. According to a majority of the Supreme Court, section 251(4) of the *Criminal Cod*e was unconstitutional because the procedural framework governing abortion, whereby a woman was required to have the approval of a therapeutic abortion committee, resulted in unnecessary delays that undermined both the physical and mental security of women seeking this medical procedure. While the Court did not rule on a right to abortion, it ruled that the regulation of abortion under the *Criminal Code* violated section 7. In particular, the Court took exception to the cumbersome process for approving legal abortion under the *Criminal Code* and noted that, in certain provincial jurisdictions, there were significant accessibility issues at public institutions. For the Supreme Court, the *Criminal Code* required women to decide between two stark choices regarding unwanted pregnancy: approval by a therapeutic abortion committee, where issues of accessibility and delay required women to carry an unwanted foetus longer than what was necessary, posing a risk to their physical and mental health, or to seek a private and illegal abortion that subjected them and the performing physician to legal jeopardy and potential imprisonment.[122]

What was the policy impact of this activist decision? Did it result in greater access to abortion services once the Supreme Court invalidated the *Criminal Code*'s provisions governing legal abortions? As Joanna Erdman observed, "the decriminalization of abortion thus ensured neither its availability nor

accessibility as an integrated and publicly funded health service."[123] At first glance, the Supreme Court appeared to engage in "strong-form" judicial review in the context of the criminalization of abortion services outside of public institutions, as it invalidated the *Criminal Code* restriction.[124] In turn, Parliament failed to enact a legislative response on two attempts, and, thus, the Supreme Court's decision endures as the constitutional statement on the legal provision of abortion services in Canada. However, as an implementer-dependent institution, the Supreme Court of Canada needed more than Parliament's acceptance of *Morgentaler* via legislative failure. What was necessary, though not required as part of the *Morgentaler* decision, was for the provinces and territories to address delays by increasing the availability of abortion as a public service in facilities approved by the provincial and territorial ministers of health. As Rachael Johnstone's book suggests, the provinces and territories adopted a varied response.[125] Some increased access to publicly available abortion services, others increased the procedural restrictions on this medical service, while others simply refused to allow public institutions to provide abortion services.[126] Federalism, or, more correctly, the implementation context in a federation such as Canada's, conditions the policy impact of judicial invalidation.

Legislative Disagreements and Issue Salience

In Table 1.2, the salient issues of public policy discussed in this book are outlined, with a particular focus on the jurisdictional structure and implementation context of legislative disagreements under the *Canadian Charter*. The next chapters consider when the governments of Canadian federalism fight for policy autonomy in the context of judicialization and how judicial impact is mitigated through the jurisdictional structure (watertight or coordinated) and implementation chains (watertight or coordinated and voluntary) once judicial invalidation serves a discursive function as agenda setting. The characteristic of "watertight" is used to describe an issue of public policy that conforms to the division of powers, and only one government is required to legislate and to implement a public policy response. In contrast, "coordinated and voluntary" is used if a policy issue requires coordination by the two orders of government and the devolved assemblies – a legislative response by one government, usually Parliament regarding the *Criminal Code* or another criminal justice statute, and the provision of a service by the provincial and territorial governments. This scenario generally arises in health-care policy and the regulation of moral issues, such as abortion, supervised consumption sites, and medical assistance in dying. These issues

Table 1.2 **Legislative disagreements, issue salience, and implementation context**

Chapter	Issue	Statute/Regulation	Judgment	Right	Implementation context
Chapter 3 *A.G. (Que.) v Quebec Protestant School Boards*, (1984)	Language of instruction **Salience:** High	*Charter of the French Language (CFL)*	**Unanimous:** (The Court) **Remedy:** Invalidation	**Positive:** section 23 (minority language education rights)	**Jurisdictional structure:** Watertight – National Assembly of Quebec has sole responsibility for the *CFL*. **Implementation chain:** Watertight – National Assembly of Quebec is sole implementation actor. **Veto player(s):** Single – National Assembly is both designer and implementer of legislative response.
Chapter 4 *Solski (Tutor of) v Quebec (Attorney General)*, (2005) *Nguyen v Quebec (Education, Recreation and Sports)*, (2009)	Language of instruction **Salience:** High	*CFL*	**Unanimous:** *Solski* (The Court); *Nguyen* (LeBel) **Remedy:** *Solski* (Judicial amendment); *Nguyen:* (Suspended declaration)	**Positive:** section 23 (minority language education rights)	**Jurisdictional structure:** Watertight – National Assembly of Quebec has sole responsibility for the *CFL*. **Implementation chain:** Watertight – National Assembly of Quebec is sole implementation actor. **Veto Player(s):** Single – National Assembly is both designer and implementer of legislative response.
Chapter 5 *Ford v Quebec (Attorney General)*, (1988) *Devine v Quebec (Attorney General)*, (1988)	French-only public signs **Salience:** High	*CFL* *Regulation Respecting the Language of Commerce and Business*	**Unanimous:** (The Court) **Remedy:** Invalidation	**Negative:** section 2(b) (freedom of expression)	**Jurisdictional structure:** Watertight – National Assembly of Quebec has sole responsibility for the *CFL*. **Implementation chain:** Watertight – National Assembly of Quebec is sole implementation actor. **Veto Player(s):** Single – National Assembly is both designer and implementer of legislative response.

Chapters 6–7 *Canada (Attorney General) v PHS Community Services Society*, (2011)	Supervised consumption sites **Salience:** High	*Controlled Drugs and Substances Act (CDSA)*	**Unanimous:** (chief justice) **Remedy:** 1. Court issued temporary exemption to Insite 2. Court created five-part guidelines for ministerial discretion under section 56	**Negative:** Section 7 (right to life, liberty, and security of the person)	**Jurisdictional structure:** Coordinated – Parliament has statutory responsibility for the *CDSA*; provinces have responsibility for the provision and access to the health service. **Implementation chain:** Coordinated and voluntary – provinces are not required to provide service (negative rights). **Veto player(s):** Multiple – Parliament as sole designer of legislative response; provinces as coordinate and voluntary providers of services.
Chapter 8 *Carter v Canada (Attorney General)*, (2015)	Medical assistance in dying **Salience:** High	*Criminal Code (CC)*	**Unanimous:** (The Court) **Remedy:** Suspended declaration	**Negative:** Section 7 (right to life, liberty, and security of the person)	**Jurisdictional structure:** Coordinated – Parliament has statutory responsibility for the *CC;* provinces have responsibility for the provision and access to the health service. **Implementation chain:** Coordinated and voluntary – provinces are not required to provide service (negative rights). **Veto player(s):** Multiple – Parliament as sole designer of legislative response; provinces as coordinate and voluntary providers of services.

are also described as "voluntary" because the provincial governments are under no constitutional or legal requirement to provide services regulated by a federal statute. Indeed, this is the negative rights dilemma that confronts judicial policy impact in salient issues of public policy in the Charter era.[127]

Several important characteristics emerge from this comparison of legislative disagreements. Whether an issue of public policy conforms to the "watertight compartment" approach to federalism or "coordinated and voluntary" appears to make only modest differences regarding legislative disagreement and stunted judicial impact. Successive Quebec governments have overcome judicial invalidation of the *Charter of the French Language* through statutory amendment and regulatory changes. As the *Constitution Act, 1867* provides Quebec with sole responsibility for this jurisdictional issue, the ministry has been able to overcome strong-form judicial review of the *Charter of the French Language*.[128] Indeed, the watertight model allows the Quebec government to act as a veto player that consigns judicial impact to agenda setting, as the Court's judgments have resulted in several amendments to the *Charter of the French Language* in response to judicial invalidation. However, these amendments have not favoured judicial preferences regarding language of instruction but have seen Quebec reassert its legislative sovereignty and policy preferences that mitigate judicial impact.

The only notable difference in jurisdictional structure is the possibility of a legislative agreement and disagreement co-existing that does allow for some judicial impact in areas of public policy. This has arisen in the context of the legalization (in Parliament) of health-care policy (provincial/territorial responsibility). Indeed, the issue of supervised consumption sites demonstrates how this agreement/disagreement co-existence among the provinces and territories can moderate judicial policy impact. The initial response to the *PHS Community Services Society* decision by the Harper government clearly exhibited legislative disagreement, as the *Respect for Communities Act* created a cumbersome process designed to prevent the submission of new applications for additional facilities.[129] In this respect, the Harper government acted as a veto player, using its jurisdictional responsibility for the *CDSA* to marginalize any judicial impact outside of the Insite facility in Vancouver. However, the Trudeau government that succeeded the Conservatives was in broad agreement with the Supreme Court of Canada and its support for supervised consumption sites. It rescinded the *Respect for Communities Act*, replaced it with amendments to the *CDSA*, and streamlined the application criteria to conform to those suggested by the Court in *PHS Community Services Society*.

While this legislative agreement created the possibility of judicial impact in regard to supervised consumption sites, it still requires coordinated and complementary action on the part of the service providers – the ten provincial and three territorial governments. Provincial and territorial health facilities must submit applications, and these applications must be supported by provincial and territorial departments of health. However, provincial and territorial departments of health are under no constitutional obligation to support supervised consumption sites or to permit their operation. Currently, supervised consumption sites are available in five provinces (Alberta, British Columbia, Ontario, Quebec, and Saskatchewan), as these are the only jurisdictions to have applied under the terms established by the *CDSA* and Bill C-37, *Act to Amend the Controlled Drugs and Substances Act*.[130] The Supreme Court of Canada has had a policy impact because the Trudeau government has accepted the five guidelines established by the Court in *PHS Community Services Society* and removed the administrative obstacles constructed by the Harper Conservatives under the *Respect for Communities Act*.

The Court has also had a policy impact because several provincial jurisdictions agree with supervised consumption sites as a component of healthcare treatment and voluntarily agreed to establish facilities under the terms of the *CDSA*. Thus, legislative agreement and voluntary actions cannot be minimized as factors that facilitate judicial impact. Conversely, judicial impact has been offset by a majority of the provinces and territories that have yet to apply for an exemption to operate supervised consumption sites under section 56 of the *CDSA*. While the remaining provinces do represent a significant proportion of the Canadian population, nevertheless, it illustrates how important the implementation chain is to an understanding of judicial policy impact, particularly when an issue of public policy requires coordinate, independent, and voluntary action in the Canadian federation.

Conclusion

Understanding judicial impact in salient areas of public policy is an important, yet understudied, endeavour in the Charter era. My argument – that judicial impact has been misunderstood and largely assumed in salient areas of public policy – is not meant to convey that existing theories of judicial review or the judicialization of politics are without value. Quite the contrary. They are simply better suited to answering the first-generation questions of this scholarly endeavour, such as why bills of rights are adopted, the form that bills of rights take, and the institutional implications of judicial review for constitutional theory, better known as the "counter-majoritarian" difficulty.

They are also well suited to the second-generation questions that consider the broader institutional response to judicialization, whether it involves legal mobilization, the "court party" thesis in Canada, or changes to the machinery of government and the attempt to govern with the *Canadian Charter* under the guidance of the Department of Justice and its provincial counterparts.

Dialogue as a framework is viewed as a compelling response to the third generation of Charter inquiry – the public policy impact of judicial review. For the defenders of dialogue, judicial impact is real, comprehensive, and largely beneficial for Canadian democracy and public policy. This understanding of judicial impact concludes that Charter dialogue improves public policy in the following way: by identifying Charter values overlooked by Parliament and the legislatures. In turn, this requires a court to invalidate such legislation as constitutionally suspect; judicial invalidation allows for a statutory "second look" by the competent legislature, which largely, though not always, amends a statute to ensure its continued legal application. In short, according to its defenders, Charter dialogue answers the "countermajoritarian" difficulty as courts rarely have the final word on issues of public policy. And Charter dialogue is suggested to have a positive impact on public policy as judicial invalidation requires a rights-based response by the legislature with statutory authority. Rights talk, therefore, is the principal outcome of judicial review, and this impacts how public policy is framed, designed, and implemented by the governments of Canadian federalism.

For a period, this dialogic approach was viewed as a compelling answer to the third-generation questions that consumed the scholarship. As I have argued in this chapter, the fundamental problem with dialogue theory is that it focuses on the act of responding and not on the substance of a legislative response. If every legislative response, or nearly every one, is dialogue, then what does dialogue say about courts and legislatures in the Charter era? In this respect, the dialogic framework overlooks a central feature of the institutional relationship at the core of its understanding of judicial impact – that the Supreme Court of Canada is, in the context of a legislative response and remedial activism under section 24(1) of the *Canadian Charter*, an "implementer-dependent" institution reliant on the cabinets at both orders of government. Once this is understood, it allows for the introduction of variables that explain the actual impact of judicial review on public policy outcomes. It also requires a more modest view of judicial reach and rediscovery of the continued centrality of the ministry, particularly when federal, provincial, and territorial cabinets disagree with judicial policy incursions.

To understand judicial impact, I have introduced two variables when a salient issue of public policy is invalidated by the Supreme Court of Canada: first, legislative disagreement and how it can be the beginning of the end for judicial impact. This is not to suggest that legislative disagreement is the default response by governments to judicial invalidation. In fact, governments generally comply with judicial invalidation. Why then focus on legislative disagreement if the assembled cabinets largely accept judicial impact in public policy? For a very simple reason – legislative disagreement is likely to arise in compelling or salient issues of public policy and presents the ideal test of judicial impact. Although the notwithstanding clause is an instrument of legislative disagreement, it does not feature prominently in this book. Instead, the focus is on the more common aspect of disagreement – statutory amendments that seek to mitigate judicial impact. The second variable is the implementation chain and how a legislative response in a federal system, particularly when it requires coordinated and voluntary action, can mitigate the impact of the most forceful judicial decision.

Two complementary themes frame the remaining chapters: first, that federalism and devolution matters for an understanding of judicial impact in the Charter era and, second, that legislative disagreements are the best way to understand judicial impact. Indeed, if the ministry disagrees with judicial decisions, but simply accepts judicial policy directions and legislates accordingly, then judicial impact is real, evident, and confirmed. Perhaps, then, Charter dialogue theory is right after all. However, if judicial disagreement produces legislative responses that mitigate judicial review, then our assumptions about judicial impact must be rethought and dialogue reframed as a metaphor and not as a theory. I suspect that these two considerations will not dissuade dialogue theorists about fidelity to their understanding of the *Canadian Charter*. Nor will the critics of judicial power be deterred that, as an "implementer-dependent" institution operating within a complex federation, the Supreme Court of Canada is not as powerful as they claim.

In the remainder of this book, I explore the significance of the legislative disagreement/agreement dichotomy that manifests as statutory amendments, and the implementation chains that exist in salient issues of public policy judicialized in the Charter era. A consideration of these variables begins in the next four chapters that focus on Quebec, the *Charter of the French Language*, and the successful resistance to judicial invalidation and policy impact in *la belle province* by all the successors to the Lévesque government.

UBC Press is a Benetech Global Certified Accessible™ publisher. The epub version of this book meets stringent accessibility standards, ensuring it is available to people with diverse needs.

Library and Archives Canada Cataloguing in Publication

Title: Constraining the court: judicial power and policy implementation in the Charter era / James B. Kelly.
Names: Kelly, James B. (James Bernard), author.
Series: Law and society series (Vancouver, B.C.)
Description: Series statement: Law and society series | Includes bibliographical references and index.
Identifiers: Canadiana (print) 20240316223 | Canadiana (ebook) 20240316290 | ISBN 9780774870474 (hardcover) | ISBN 9780774870504 (EPUB) | ISBN 9780774870498 (PDF)
Subjects: LCSH: Judicial power – Canada – Cases. | LCSH: Judicial review – Canada – Cases. | LCSH: Political questions and judicial power – Canada – Cases. | LCSH: Federal government – Canada. | LCSH: Canada. Supreme Court. | LCSH: Canada. Canadian Charter of Rights and Freedoms. | LCSH: Canada – Social policy.
Classification: LCC KE4775 .K45 2024 | DDC 347.71/012 – dc23

Canada Council for the Arts | Conseil des arts du Canada
Canada
British Columbia Arts Council
British Columbia

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada, the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Scholarly Book Awards, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press is situated on the traditional, ancestral, and unceded territory of the xʷməθkʷəy̓əm (Musqueam) people. This land has always been a place of learning for the xʷməθkʷəy̓əm, who have passed on their culture, history, and traditions for millennia, from one generation to the next.

UBC Press
The University of British Columbia
www.ubcpress.ca