
Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada"

Christopher P. Manfredi and James B. Kelly*

The authors respond to the argument made by Professor Choudhry and Claire Hunter that there is no empirical evidence to support claims that the Supreme Court of Canada is engaged in judicial activism. They first argue that the particular quantitative definition of judicial activism used by Choudhry and Hunter focused exclusively on the impact of rights-based judicial review on primary legislation, and therefore misunderstood the purpose of counter-majoritarian judicial review, which is to protect minorities from *any* oppressive government action. In its place, following Peter Russell and other political scientists, they define judicial activism more broadly as the willingness of courts to impose constitutional limits on government action.

The authors further contend that Choudhry and Hunter misinterpreted the claims of political scientists who study the Supreme Court. Each of the four hypotheses tested by Choudhry and Hunter is an untoward characterization of claims made in the political science literature, and, even if one accepts Choudhry and Hunter's definition of judicial activism, the available data does not support their argument. The authors maintain that if legal scholars truly want to engage with political scientists, they must begin to look at the Supreme Court not only as a judicial institution, but as a political one as well.

Les auteurs répondent à l'argument du Professeur Choudhry et de Claire Hunter selon lequel aucune preuve empirique ne supporte des imputations d'activisme judiciaire à la Cour suprême. Ils soutiennent, en premier lieu, que la définition quantitative spécifique utilisée par Choudhry et Hunter s'est exclusivement consacrée à l'impact de la révision judiciaire de législation primaire sur la base des droits de la personne. Ce faisant, Choudhry et Hunter ont mal compris le but de la révision judiciaire anti-majoritaire, qui est précisément de protéger les minorités contre *toute* forme de mesure gouvernementale oppressive. Les auteurs suggèrent à sa place une définition plus inclusive, inspirée de Peter Russell et d'autres politologues, caractérisant l'activisme judiciaire comme la volonté du tribunal d'imposer des limites constitutionnelles à l'action gouvernementale.

Les auteurs soutiennent de plus que Choudhry et Hunter ont mal interprété les affirmations des politologues qui se sont consacrés à l'étude de la Cour suprême. Chacune des quatre hypothèses évaluées par Choudhry et Hunter dans leur article est à leur avis une caractérisation malheureuse des affirmations faites dans la littérature en science politique et, même en acceptant la définition de l'activisme judiciaire de Choudhry et Hunter, les données disponibles ne supportent pas leur argument. Les auteurs estiment pour leur part que si les théoriciens du droit désirent réellement ouvrir un dialogue avec les politologues, ils doivent commencer par considérer la Cour suprême non seulement comme une institution judiciaire, mais aussi comme une institution politique.

* Christopher P. Manfredi, Professor, Department of Political Science, McGill University; James B. Kelly, Assistant Professor, Department of Political Science, Concordia University.

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Introduction

In their article, “Measuring Judicial Activism on the Supreme Court of Canada”, Sujit Choudhry and Claire E. Hunter present data that, in their words, “raise some serious questions about the empirical assumptions made by critics of the Supreme Court.”¹ Commenting on the article’s findings to *The Globe and Mail*, Choudhry went even further: “I think there has been a systematic distortion of the court’s record under the Charter ... People may or may not like Charter adjudication, but they shouldn’t lie. They shouldn’t misrepresent the court’s record.”² According to both the interview and the Choudhry and Hunter article, the principal agents of distortion are political scientists. Discussing the public debate that followed remarks by Justice Marshall of the Supreme Court of Newfoundland and Labrador (Court of Appeal) about “undue incursions” by the Supreme Court of Canada into “the policy domain of the elected branches of government,”³ Choudhry and Hunter expressed their regret that “the use of empirical assumptions to bolster normative claims in the absence of quantitative evidence is reflected not only in public debate, but also in the work of prominent political scientists who write about the Supreme Court and the *Charter*.”⁴ The fact that Justice Marshall did not cite any political scientist as the source of his remarks, or that none of the participants in the public debate surrounding Justice Marshall’s remarks referred to by Choudhry and Hunter is identifiably a political scientist, did not prevent them from associating the alleged weaknesses of Justice Marshall’s analysis to a specific group of scholars.

As two of the political scientists whose work is cited frequently in the Choudhry and Hunter article,⁵ we feel compelled to respond. Although it is important to test assertions about the Supreme Court’s impact on public policy under the *Canadian Charter of Rights and Freedoms*⁶ empirically, their article is flawed in two fundamental respects. First, their particular quantitative definition of judicial activism, which focuses exclusively on the impact of rights-based judicial review on primary legislation, misunderstands the purpose of counter-majoritarian judicial review, which is to protect minorities from *any* oppressive government action. This is precisely why the Charter applies to “*all matters*” within the authority of Parliament and the

¹ 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 at 556-57.

² Kirk Makin, “Critics of Supreme Court Off Base, Study Says” *The Globe and Mail* (2 February 2004) A4.

³ *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (2002), 220 Nfld. & P.E.I.R. 1 at 98, 221 D.L.R. (4th) 513 (cited in Choudhry & Hunter, *supra* note 1 at 527).

⁴ Choudhry & Hunter, *supra* note 1 at 530.

⁵ *Ibid.* at 530, 532, 535, 536, 538, 539, 541, 545, 546, 547, 548, 549, 552, 555. We leave it to others to decide whether we should be considered “prominent” (at 530).

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

provincial and territorial legislatures.⁷ In our view, there is an alternative, equally quantitative definition of judicial activism that better captures the nature and purpose of constitutionally based judicial review.

The article's second flaw is much more serious. None of the four hypotheses that Choudhry and Hunter purport to test empirically coincides with any claim made in the scholarship they cite in their article. No political scientist has ever argued that governments do not win a majority of Charter cases; nor has any political scientist ever argued that "government loss" (or "claimant win") rates have systematically increased over time. No political scientist has argued that "section 1 is the central vehicle whereby the Court exercises its counter-majoritarian power";⁸ instead, scholarship has focused on section 1 as the site for the exercise of discretionary judicial power on issues that are outside the normal range of judicial expertise. They also present political scientists as being exclusively critics of the Supreme Court, when, in fact, there is significant disagreement within the scholarly community as to the precise impact of the Supreme Court's interpretation of the Charter.⁹ Finally, they misstate Manfredi's argument about the effect of the non-use of section 33, which is an argument about levels of *remedial* activism rather than judicial activism more generally. In essence, Choudhry and Hunter employ superficially sophisticated techniques to construct a largely straw figure argument. In this sense, they fail in their ultimate purpose of engaging with the political science literature on the courts and constitutional adjudication.¹⁰

I. Defining and Measuring Judicial Activism

Repeating a point made by Choudhry in his review of Manfredi's *Judicial Power and the Charter*, the Choudhry and Hunter article depicts judicial activism as "a notoriously slippery term, which variously means the departure from well-established precedent, adjudication based on judicial preferences, or the judicial reallocation of institutional roles between the courts and other branches of government, depending

⁷ *Ibid.*, s. 32 [emphasis added].

⁸ Choudhry & Hunter, *supra* note 1 at 531.

⁹ See, for example, the disagreement between Manfredi and Kelly on the question of judicial power: Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, Ont.: Oxford University Press, 2001) [Manfredi, *Judicial Power and the Charter*], and James B. Kelly, "Governing with the Charter of Rights and Freedoms" (2003) 21 Sup. Ct. L. Rev. (2d) 299 [Kelly, "Governing"]. See also Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" (2002) 35 Can. J. Pol. Sci. 3; Rainer Knopff & F. L. Morton, "Ghosts and Straw Men: A Comment on Miriam Smith's 'Ghosts of the Judicial Committee of the Privy Council'" (2002) 35 Can. J. Pol. Sci. 31; Miriam Smith, "Partisanship as Political Science: A Reply to Rainer Knopff and F. L. Morton" (2002) 35 Can. J. Pol. Sci. 43.

¹⁰ See Choudhry & Hunter, *supra* note 1 at 530.

on who is employing it and in what context.”¹¹ In order to overcome definitional ambiguities, they adopt a “*quantitative* definition of judicial activism” that “focusses on outcomes (i.e., whether a government wins or loses) and posits that courts are more activist the more frequently they find that democratically elected institutions have acted unconstitutionally.”¹² Although the focus on outcomes is consistent with the approach taken by Kelly and Morton et al.,¹³ Choudhry and Hunter define activism exclusively in terms of Charter-based challenges to “majoritarian” acts (i.e., federal and provincial legislation and municipal bylaws).¹⁴ They exclude non-Charter cases because of their perception that disputes about the level of activism under section 1 of the Charter—which does not extend to non-Charter rights and freedoms—are an important part of the more general activism debate. They also exclude Charter challenges to common law rules, secondary legislation, and official action because, by not interfering directly with the power of democratically accountable institutions, these challenges are ostensibly less problematic in normative terms.

We agree with Choudhry and Hunter that a non-ambiguous definition that lends itself to quantification, however simplistically, is preferable to one that requires qualitative judgments between “due” and “undue” judicial incursions into public policy. Their definition, however, depends on just such a qualitative judgment, with “non-counter-majoritarian” and “counter-majoritarian” simply substituting for “due” and “undue”. Moreover, Choudhry and Hunter’s definition fails even by its own counter-majoritarian criterion. The Aboriginal and non-Charter language rights cases they exclude are obviously counter-majoritarian in the sense that they seek to vindicate the rights of often very disadvantaged minorities. Similarly, those affected by the common law rules, secondary legislation, and official action that become the objects of Charter challenges, especially in the criminal justice system, are, as Kent Roach has argued, also often among society’s most disadvantaged groups.¹⁵ Consequently, following Peter Russell, political scientists have accepted a more inclusive, and ultimately more neutral, definition of judicial activism as the

¹¹ *Ibid.* at 531 (paraphrasing 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 386).

¹² *Ibid.* at 532 [emphasis in original].

¹³ 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; F.L. Morton, Peter H. Russell & Troy Riddell, “The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992” (1995) 5 N.J.C.L. 1; 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 [Kelly, “Rebalancing”].

¹⁴ Choudhry & Hunter, *supra* note 1 at 539-41.

¹⁵ Kent Roach, *Due Process and Victims’ Rights* (Toronto: University of Toronto Press, 1999) at 9-10.

willingness of courts to impose constitutional limits on government action.¹⁶ A completely restrained court would never do this; a completely activist one would do it at every opportunity.¹⁷ In the real world, of course, no court's behaviour reflects either of these extremes, and every court exercises a mixture of restraint and activism.

It should be uncontroversial that, in absolute terms, the Supreme Court has imposed more constitutional limitations on government action in the post-Charter era than during any period of its history since becoming Canada's final court of appeal in 1949. From 1982 to 2002, the Court decided 436 rights-based cases (20.8 per year); in 152 of those cases, it upheld the rights claim; and in seventy-five instances it nullified a federal or provincial statute (a rate of 3.6 nullifications per year). By contrast, from 1950 to 1984 it decided 177 division of powers cases (5.1 per year), and it nullified sixty-five federal and provincial statutes (1.9 per year).¹⁸ More recent federalism data are consistent with this low annual volume of both cases and nullifications: from 2000 to 2002 the Court decided eleven division of powers cases (less than four per year) and nullified only one statute on federalism grounds.¹⁹ The absolute volume of the Court's post-1982 activism is not surprising: it is an inevitable and intentional product of constitutional design. There is no doubt that subsection 52(1) of the *Constitution Act, 1982* and subsection 24(1) of the Charter explicitly establish a political regime of constitutional supremacy in which limits on political power are enforced through constitutional judicial review of statutes, regulations, and official conduct. Indeed, to criticize judicial activism per se would be to deny that legislatures and executives can sometimes exceed their constitutional authority.

II. Testing the Hypotheses

The real disputes in the literature are about whether the Supreme Court has been *too* active and/or exercised its activism outside the parameters of its constitutional authority. Each of the four hypotheses examined in the Choudhry and Hunter article addresses some aspect of the first issue. Using as their measure of activism the proportion of counter-majoritarian Charter cases that governments win each year (the "government win rate"), they examine whether judicial activism is high (A); whether it is increasing over time (B); whether the Court is particularly activist under section 1

¹⁶ See Peter H. Russell, Rainer Knopff & F. L. Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989) at 19 (defining activism as "judicial vigour in enforcing constitutional limitations on the other branches of government and a readiness to veto the policies of those branches of government on constitutional grounds").

¹⁷ Choudhry and Hunter recognize this point. See Choudhry & Hunter, *supra* note 1 at 532.

¹⁸ Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 151-52 [Monahan, *Politics and the Constitution*].

¹⁹ Patrick J. Monahan & Nadine Blum, "Constitutional Cases 2002: An Overview" (2003) 20 Sup. Ct. L. Rev. (2d) 1; Patrick J. Monahan, "Constitutional Cases 2001: An Overview" (2002) 16 Sup. Ct. L. Rev. (2d) 3; Patrick J. Monahan, "Constitutional Cases 2000: An Overview" (2001) 14 Sup. Ct. L. Rev. (2d) 1.

(C); and whether the legislative override (section 33) has become a less effective check on judicial activism (D).²⁰ We turn now to each of these hypotheses.

A. Hypothesis 1: Judicial Activism Is High

According to Choudhry and Hunter, if this hypothesis is correct, one should observe a low government win rate in counter-majoritarian Charter cases. Testing the hypothesis, they found that governments, in fact, *won* 62.4 per cent of all such cases from 1984 to 2002. Putting the point somewhat differently, they argue that the “government loss rate of 37.6 percent provides an absolute ceiling for the number of cases that might be characterized as activist by critics of the Court.”²¹ “This number [37.6 per cent]”, they suggest later in the article, “does not seem as high as some would lead us to believe.”²² But who has ever led anyone to believe that the activism level is higher than what Choudhry and Hunter found? No political scientist of whom we are aware, and certainly none of the authors cited by Choudhry and Hunter, has ever indicated a government loss rate of more than 34 per cent.²³ In our own analysis we included sixty-four statutes invalidated between 1982 and 2003 and focused solely on the *Canadian Charter of Rights and Freedoms*. If we exclude judicial decisions involving statutes reviewed in 2003 to make our results comparable, the difference between our government win rate (63.9 per cent) and that of Choudhry and Hunter (62.4 per cent) is 1.5 percentage points. It is indeed the case, as they suspect, that “[t]hese differences [are] attributable to differences between [their] methodology and that of these previous studies.”²⁴ Nevertheless, it is especially noteworthy that, despite using a more restrictive definition, a study that purports to question the very reality of judicial activism²⁵ finds even more of it.

Of course, determining whether 34 or 36.1 or 37.6 per cent should be considered high is a relative judgment for which we need some baseline comparison. Yet domestic comparisons are problematic because the post-1982 constitutional environment differs so radically from the pre-1982 environment. One comparison might be with activism under the 1960 Bill of Rights.²⁶ On this comparison, post-1982 activism is very high indeed. From 1960 to 1982, the Court decided thirty-four Bill of Rights cases (about 1.5 per year); upheld the claim on only five occasions (14.7 per cent); and nullified a single statute. Moreover, the Court developed a particular

²⁰ Choudhry & Hunter, *supra* note 1 at 543.

²¹ *Ibid.* at 545.

²² *Ibid.* at 556.

²³ See Kelly, “Rebalancing”, *supra* note 13 at 641.

²⁴ Choudhry & Hunter, *supra* note 1 at 546.

²⁵ *Ibid.* at 557.

²⁶ *Canadian Bill of Rights*, S.C. 1960, c. 44.

reputation for restraint in the area of equality rights.²⁷ However, we cannot know whether the justices of the 1960s and 1970s would have been more activist had the Bill of Rights been constitutionally entrenched.

The most important question about judicial activism is not how high it is, but how judicial application of the Charter has affected the substance of public policy and the behaviour of governmental and non-governmental actors. Although observers may reasonably disagree about whether post-Charter judicial activism has made public policy better, it is difficult to deny that there have been profound changes in several policy areas. From decriminalization of abortion to the elements of a fair trial to minority language education rights to same-sex marriage, judicial application of the Charter, and the culture of rights surrounding it, have changed at least the formal legal framework of key public policies.²⁸ Similarly, governments and social movements have adjusted their behaviour to the realities of a post-Charter Canada.²⁹

B. Hypothesis 2: Judicial Activism Is Increasing Over Time

Not surprisingly, the Choudhry and Hunter data demonstrate that activism levels vary significantly from year to year, with no obvious systematic trend in one direction or another. However, it is again unclear that political scientists have made different empirical claims. Indeed, Kelly argued that judicial activism actually declined from 1993 to 1997.³⁰ Nevertheless, even the Choudhry and Hunter data are open to alternative interpretations on this point. For example, one could note that their data indicate that the annual government win rate fell below sixty per cent on only five occasions, but that three of those occasions (1997, 2001, 2002) occurred during the last six years of their analysis. In fact, in 1997 the government had its worst year since

²⁷ See W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53 Can. Bar Rev. 648.

²⁸ We know far less about the practical impact of these changes. For some attempts to examine impact, see W.A. Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002); D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997); and W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

²⁹ See e.g. James B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government" (1999) 42 Can. Pub. Admin. 476 [Kelly, "Bureaucratic Activism"]; Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role* (Montreal & Kingston: McGill-Queen's University Press, 2002) [Hiebert, *Charter Conflicts*]; Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991); Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999); Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002); Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004).

³⁰ Kelly, "Rebalancing", *supra* note 13 at 641.

1985. One could also note the two consecutive years of declining government win rates in 2001 and 2002.

The picture becomes even less clear if one breaks the data down by chief justice or tracks cumulative (rather than annual) government win rates.

Table 1
Government Win Rates, By Chief Justice

Chief Justice	Wins	Losses	Total	Win Rate
Dickson (1984-90)	39	20	59	66.6
Lamer (1991-99)	70	40	110	63.6
McLachlin (2000-02)	17	10	27	63.0

As Table 1 indicates, the Court has become progressively more activist with each successive post-Charter chief justice. The government win rate declined from 66.6 per cent during the Dickson court, to 63.6 per cent under Chief Justice Lamer and then to 63.0 per cent during the years of the McLachlin court covered by the Choudhry and Hunter data.

As Table 2 and Figure 1 indicate, one also gets a different picture by tracking cumulative win rates.

Table 2
Cumulative Win Rates

Year	Cumulative Wins	Cumulative Losses	Cumulative Total	Cumulative Win Rate
1984	1	2	3	33.3
1985	2	5	7	28.6
1986	4	6	10	40.0
1987	7	8	15	46.7
1988	19	14	33	57.6
1989	24	16	40	64.0
1990	39	20	59	66.1
1991	48	26	74	64.9
1992	59	31	90	65.6

1993	75	38	113	66.4
1994	82	40	122	67.2
1995	93	44	137	67.9
1996	96	45	141	68.1
1997	100	55	155	64.5
1998	103	57	160	64.4
1999	109	60	169	64.5
2000	117	61	178	65.7
2001	121	64	185	65.4
2002	126	70	196	64.3

From 1985 to 1990, governments steadily increased their cumulative win rate, suggesting a major decrease in activism during that period. In 1991, the cumulative win rate dropped, indicating that the Court was particularly active during that year. From 1992 to 1996 the Court became less activist and the cumulative win rate again began to climb from 65.6 to 68.1 per cent. There was another particularly activist year in 1997, which reduced the cumulative win rate to 64.5 per cent. Finally, after three years of relative stability, activism increased and the cumulative win rate decreased in 2001 and 2002. In fact, the Court's history with respect to Charter activism might be divided into two phases: a steady decrease from 1985 to 1996, followed by an increase from 1997 to 2002 that saw the cumulative government win rate drop from a high of 68.1 per cent in 1996 to a pre-1990 level just above 64 per cent. It is not radically inconsistent with the Choudhry and Hunter data, therefore, to suggest that the Court became more activist from the mid-1990s until 2002.

Nevertheless, the data do indicate that judicial activism has reached an equilibrium point. As Choudhry and Hunter suggest, one plausible explanation for this phenomenon is "government learning", which they take to mean that Parliament and provincial legislatures internalize the Supreme Court's approach to the Charter in the legislative process: "Over time, governments that are strategically minded learn to conform both their legislation and their arguments in Charter cases to the Court's jurisprudence."³¹ They contend, however, that testing this hypothesis "would require data that assesses the behaviour and motivation of various actors, presumably in the form of interviews."³² To their credit, Choudhry and Hunter outline the methodological inquiries that such a research project would need to consider, such as the influence that potential Charter challenges have on the framing of legislation by

³¹ Choudhry & Hunter, *supra* note 1 at 547.

³² *Ibid.* at 548.

politicians and bureaucrats, as well as on the litigation strategies of government lawyers that defend challenged statutes before the courts.

Fortunately, some political scientists have already begun to conduct precisely the type of research called for by Choudhry and Hunter.³³ Two points from this research are particularly germane to the government learning thesis. First, rather than simply focus on annual activism rates, it is important to consider the year of enactment of nullified statutes. Indeed, government loss and win rates may be irrelevant empirical indicators if the Supreme Court is generally activist against statutes enacted in the pre-Charter policy environment or shortly after 1982 (i.e., before reforms to the policy process). As Barry Strayer observed after serving as assistant deputy minister of justice during the drafting of the Charter and then as a member of the Federal Court, “some of the substantive laws struck down by the courts, though their demise has caused more anguish in certain quarters, were nevertheless living on borrowed time.”³⁴

This is an important empirical consideration, since many of the statutes used to evaluate the level of judicial activism were enacted before 1982 and before the parliamentary arena engaged in institutional reform to ensure that legislative objectives clearly advanced Charter values. The lack of a discernible pattern in government win rates, therefore, is likely explained by including two types of statutes in the analysis: those enacted before the Charter’s introduction, which remain unaffected by government learning, and those enacted afterwards, which have the benefit of what Kelly referred to as “bureaucratic activism” because of the extensive vetting that potential legislation is subjected to before being passed into law.

An examination of the statutes invalidated on Charter grounds between 1982 and 2003 reveals that a significant number that account for annual variations in government win rates are pre-Charter legislation: statutes, therefore, that were drafted in a less demanding policy context where parliamentary supremacy, and not constitutional supremacy, was the dominant paradigm structuring the design and implementation of legislation. Breaking down the data based on the year of enactment or last amendment reveals that thirty-one per cent (twenty of sixty-four) of the instances of judicial activism involve statutes that were enacted or last amended before the introduction of the Charter or before the internal policy process within government was reformed to explicitly link policy objectives to Charter commitments made by democratic actors. Testing the government learning thesis, therefore, requires that this subset of cases be excluded. The fluctuations in government win rates, therefore, are not necessarily indicative of judicial activism, but are idiosyncratic by-products of the particular statutes reviewed in any one year.

³³ For example, Kelly has conducted this type of research and published his findings in 1999 and 2003: Kelly, “Bureaucratic Activism”, *supra* note 29; and Kelly, “Governing”, *supra* note 9.

³⁴ B.L. Strayer, “Life under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts” (1988) P.L. 347 at 359.

A significant number of post-1982 statutes were proclaimed into law shortly after the Charter's entrenchment and well before the federal and provincial governments took steps to review legislation from a rights perspective.³⁵ Based on the research conducted by Monahan and Dawson, and bolstered by Kelly's research, the benefit of bureaucratic activism was only realized in the period after 1991, which coincides with the institutional reforms at the federal level when "the Clerk of the Privy Council, at the request of the Department of Justice, wrote to all deputy ministers outlining steps to ensure that Charter issues were identified and addressed before new policy proposals were considered by Cabinet."³⁶ Using the institutionalization of bureaucratic activism and rights vetting as the benchmark demonstrates that fifty per cent (thirty-two of sixty-four) of invalidated statutes were enacted or last amended in the 1983 to 1990 period and a significant number in 1985 (twenty-one statutes): periods, incidentally, well before the benefits of Charter vetting could be realized, leaving only eleven statutes to test Choudhry and Hunter's government learning thesis.

The evidence for government learning could thus only be found in the relatively small number of post-1991 *vetted* statutes that are reviewed by the Supreme Court as potentially inconsistent with the Charter. The broader point, however, is that activism exists on more than one level, and includes judicial review, statutory vetting, and legal mobilization by non-governmental actors. To fully understand the Charter's implications, therefore, requires broadening our conceptual apparatus to encompass a phenomenon that might be termed "Charter activism" broadly understood. Judicial activism, in other words, is only a small, though highly visible, part of the picture.

C. Hypothesis 3: Section 1 Analysis as the Locus of Activism

According to Choudhry and Hunter, the basis for this hypothesis is the difference observed between overall government win rates and win rates at the section 1 stage of Charter analysis. Their own data, for example, indicate that government win rates were about twice as high at the rights violation stage than at the section 1 stage.³⁷ This finding, they note, is consistent with Kelly's finding that, between 1984 and 1997, there was a twenty-seven percentage point gap between overall government win rates (sixty-six per cent) and section 1 win rates (thirty-nine per cent). They argue, however, that the hypothesis is misguided because "government success in section 1 is, at the very least, unrelated to its general success in contesting Charter challenges, and as a result, a claim of Court activism in its use of section 1 does not go very far to establishing a general claim of judicial activism."³⁸ Instead, they contend that lower government win rates at this stage should be expected precisely because the

³⁵ See generally Patrick J. Monahan & Marie Finkelstein, "The Charter of Rights and Public Policy in Canada" (1992) 30 Osgoode Hall L.J. 501; Mary Dawson, "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30 Osgoode Hall L.J. 595.

³⁶ Dawson, *ibid.* at 597.

³⁷ Choudhry & Hunter, *supra* note 1 at 549.

³⁸ *Ibid.* at 552.

government has already lost once, at the rights violation stage, before the case even proceeds to a section 1 analysis.

In order to test this alternative hypothesis, Choudhry and Hunter distinguish between rights with strong internal limits (e.g., section 7)—where successful claims at the rights violation stage are more difficult to achieve—and those with no internal limits (e.g., subsection 2(b))—where the initial rights violation is relatively easy to demonstrate. In their view, violations of internally limited rights should be more difficult to justify under section 1 than rights with no internal limits. Not surprisingly, they find a 44.4 per cent government win rate under section 1 in subsection 2(b) cases, compared to only 6.3 per cent in section 7 cases and 20 per cent in section 15 (a partially limited right) cases.³⁹ Nothing in these findings, however, negates the observation that the Court is more activist under section 1 (i.e., government win rates are lower, to use the Choudhry and Hunter definition) than it is generally. The data may *explain* why activism levels are higher under section 1, the reason being that more egregious (and thus more difficult to justify) rights violations reach this stage. Again, reasonable people can disagree about whether section 1 activism is higher than it should be, but no one can question whether it is higher in relative terms.

The more problematic aspect of the Choudhry and Hunter analysis of section 1 is its assumption that judicial review is a neutral, technical act where the outcome of a case is determined by the characteristic of a Charter right and not the discretionary choices of the judiciary. There are important reasons why the government win rate at subsection 2(b) is one of the lowest and is paradoxically the highest at section 1. The Supreme Court has applied a large and liberal approach to fundamental freedoms and has determined that corporate interests are included within the term “everyone” and are therefore protected by the fundamental freedoms.⁴⁰ Moreover, the Supreme Court created distinctions among different kinds of expression: it is extremely difficult to justify a limitation on expression that is central to the functioning of a democratic system such as political expression, whereas limitations on commercial expression and other expression outside the core require less justification.⁴¹

While the form of protected expression does not have any bearing on the government win rate at the subsection 2(b) analysis, as most expression is protected unless it has a violent content, the hierarchy of protected expression created by the Supreme Court clearly affects the government win rate at subsection 1; judicial discretion and not the neutral application of Charter rights, thus has a direct bearing

³⁹ *Ibid.* at 550.

⁴⁰ See *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577; *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

⁴¹ Hiebert, *Charter Conflicts*, *supra* note 29 at 81. See also *R. v. Keegstra*, [1990] S.C.R. 697 at 759-767, 61 C.C.C. (3d) 1, [1991] 2 W.W.R. 1 [*Keegstra* cited to S.C.R.]; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 279-82, 127 D.L.R. (4th) 1 [*RJR-MacDonald* cited to S.C.R.].

on government win rates. In *Thompson Newspapers Company v. Canada (A.G.)*⁴² the Supreme Court found that the *Canada Elections Act* and the publication ban on polling three days before an election violated freedom of expression, and in *R. v. Keegstra*⁴³ the Criminal Code restriction on hate propaganda also violated subsection 2(b). However, the determinations of constitutionality were very different, as the Supreme Court found the limitation reasonable in *Keegstra* but unreasonable in *Thompson Newspapers*. The different outcome occurred because the Court required a higher standard of justification to satisfy section 1 in *Thompson Newspapers* because it involved a core form of expression,⁴⁴ whereas the Criminal Code restriction in *Keegstra* was “directed at expression distant from the core of free expression values,” and therefore required a drastically lower standard to justify the infringement.⁴⁵

These different outcomes reveal a fundamental limitation in the attempt by Choudhry and Hunter to redirect the analysis away from section 1 and the discretionary decisions of the Supreme Court and to focus on the characteristics of the right. Without making distinctions between the types of expression in their analysis and failing to compare government win rates based on core or peripheral forms of expression, they have treated subsection 2(b) as a uniform Charter right when this is not the case. Indeed, if the analysis focused principally on political expression, to which the Supreme Court has applied a high standard of justification for section 1 analysis, we hypothesize that the government win rate would be as low, or even lower, than Choudhry and Hunter found for section 7. The pattern of government win rates as a reflection of internal restrictions within a right, therefore, does not hold because of the central importance of section 1 in the determination of constitutionality. In other words, they may also be guilty of designing a quantitative analysis around a deficient doctrinal understanding of Charter adjudication.⁴⁶

Beyond the problematic nature of the empirical analysis used to test Hypothesis 3, Choudhry and Hunter have erred in attributing this claim to political scientists. Although Kelly argued that, “because of the highly discretionary nature of sections 1 and 24(2), their use provides an accurate measure of judicial activism under the Charter,”⁴⁷ he did not claim that section 1 represents the locus of activism. Instead, he suggested that more important forms of activism preceded judicial review involving the Charter. Bureaucratic activism, as Kelly contended, was far more significant than judicial activism because of the emerging rights culture within government that allowed Parliament to remain the centre of government.⁴⁸

⁴² [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385 [*Thompson Newspapers* cited to S.C.R.].

⁴³ *Keegstra*, *supra* note 41.

⁴⁴ *Thompson Newspapers*, *supra* note 42 at 945.

⁴⁵ *Keegstra*, *supra* note 41 at 787.

⁴⁶ Compare Choudhry & Hunter, *supra* note 1 at 552.

⁴⁷ Kelly, “Rebalancing”, *supra* note 13 at 662.

⁴⁸ Kelly, “Bureaucratic Activism”, *supra* note 29 at 506-507.

Discretion and institutional capacity, rather than judicial activism per se, are the real issues under section 1. Although the *Oakes*⁴⁹ test provides the basic framework for section 1 analysis, the Court has held that this framework's application should vary according to both the type and intended beneficiaries of a public policy. In 1989, the Court drew an explicit distinction between policies where legislatures are mediating the claims of competing groups and those where government "is best characterized as the singular antagonist of the individual."⁵⁰ For policies of the first type, Chief Justice Dickson suggested, the Court should be circumspect in assessing legislative objectives and means. By contrast, the second type of policy frees the Court to exercise its review function more aggressively.⁵¹ The Court, however, has been inconsistent in following the implications of its apparently general rule of judicial deference in socio-economic policy cases. For example, in *RJR-MacDonald v. Canada (A.G.)*, where a majority nullified restrictions on tobacco advertising, the Court stated that

to carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.⁵²

In sum, the Court is unwilling to follow even self-imposed limits on its judicial review function, and its control over the interpretation and application of section 1 allows it to expand and contract those limits to suit its immediate policy objectives.

Moreover, the type of activism exercised under section 1 generally involves judicial micro-management of public policy on the basis of poor evidence. Take, for example, *Libman v. Quebec (A.G.)*.⁵³ At issue was a set of provisions under the *Quebec Referendum Act* which effectively placed a six hundred dollar ceiling on expenditures by groups unaffiliated with the two "national" committees established to conduct referendum campaigns. The Quebec law exemplified a long-standing policy of controlling the role of money in the electoral process by combining public subsidies to candidates and parties with strict regulation of independent expenditures. By 1997, however, successive Charter challenges had weakened the second pillar of this policy.⁵⁴ After two elections (1984, 1988) in which independent expenditures went unregulated, the federal government imposed a one thousand dollar spending limit on independent expenditures for the 1993 federal election. In 1996, the Alberta Court of Appeal declared that this ceiling violated freedom of expression, freedom of

⁴⁹ *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

⁵⁰ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 994, 58 D.L.R. (4th) 577 [*Irwin Toy* cited to S.C.R.].

⁵¹ *Ibid.* at 993-94.

⁵² *RJR-MacDonald*, *supra* note 41 at 332-33.

⁵³ [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385.

⁵⁴ See Janet L. Hiebert, "Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" (1998) 31 Can. J. Pol. Sci. 91 at 92-98.

association, and the right to vote.⁵⁵ In *Libman*, the Court agreed that limits on independent expenditures are necessary to ensure equality and fairness in the electoral process, but nevertheless found Quebec's specific expenditure ceiling on non-affiliated groups too restrictive of their freedom of expression. By disapproving, however, of the Alberta court's decision while praising the royal commission that recommended the one thousand dollar ceiling in the federal law, the Court indicated that Quebec could satisfy its constitutional obligations in this field by increasing the independent expenditure limit to the federal level.

Libman, as much as any judgment, should raise questions about popular perceptions of judicial decision-making under the Charter. At the core of these perceptions is the belief that Charter-based review represents the ultimate triumph of principle over policy. In actual fact, Charter review is more likely to involve more prosaic questions, as it did in *Libman*. Once the Court accepted the proposition that the Charter permits limits on independent expenditures, there was no legal or constitutional principle against which to evaluate the specific amount of the expenditure ceiling. Indeed, if *Libman* announces any principle, it is that the amount of money it takes to violate freedom of political expression is four hundred dollars.

Let us provide two further examples of the type of micro-policy questions involved in Charter litigation, as well as the Court's ability to manage them. One is the Supreme Court's 1990 *Askov* decision, which concerned unreasonable trial delays.⁵⁶ Comparing systemic delays in judicial districts in several provinces, Justice Cory concluded that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."⁵⁷ Although Justice Cory referred to evidence contained in an affidavit by political scientist Carl Baar, he actually generated the six to eight month rule on the basis of data concerning trial lengths in three Montreal area superior courts, which were not included in the Baar study. The time period covered by the data also indicate that Cory acquired them *after* oral argument in *Askov*.⁵⁸ According to Baar himself, the Court's use of legislative facts suffered from two fatal flaws.⁵⁹ First, by relying on evidence obtained through its own efforts, the Court avoided even the minimal critical review provided by the adversary process. Second, by using these data to invent a formula for determining unreasonable trial delays, the Court imposed a standard without taking any measure of its potential impact. As Baar later argued, "the Supreme Court went beyond the facts in *Askov*, and beyond the material presented in both affidavits, to establish principles of law not necessary for the decision in the

⁵⁵ *Somerville v. Canada (A.G.)* (1996), 184 A.R. 241, 136 D.L.R. (4th) 205 (C.A.).

⁵⁶ *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355 [*Askov* cited to S.C.R.].

⁵⁷ *Ibid.* at 1240.

⁵⁸ Carl Baar, "Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy Making" (1993) 72 Can. Bar Rev. 305 at 315.

⁵⁹ *Ibid.* at 316-17.

case, principles founded on incomplete and incorrect analysis of the material before it.”⁶⁰

As it turned out, Justice Cory’s clumsy foray into policy analysis was costly. Although he had confidently predicted in *Askov* that stays of proceedings “will be infrequently granted” as remedies for “unreasonable” delays,⁶¹ the reality was that *Askov* led to dismissals, stays, or withdrawals of almost 52,000 criminal charges involving more than 27,000 cases in Ontario alone between October 1990 and November 1991.⁶² In unprecedented public comments on the unanticipated consequences of *Askov*, Justice Cory expressed the Court’s “shock” at the “rigidity of the interpretation” given to *Askov* by some lower courts.⁶³ According to Cory, the justices were unaware of how extensive the impact of the decision would be.⁶⁴ Indeed, in *R. v. Morin*⁶⁵ the Court found itself compelled to clarify that it had only intended to articulate general guidelines in *Askov*, and it held that a fourteen-month delay was reasonable in this case. Unfortunately, the Court’s decision in *Morin* actually compounded the legislative fact errors it had made in *Askov*.⁶⁶ Finally, in *R. v. Bennett*⁶⁷ the Court apparently gave up altogether trying to understand the social science of court delay.

The second example involves a contrast between two important freedom of expression cases, *R. v. Butler*⁶⁸ and *RJR-MacDonald*. At issue in *Butler* was the constitutionality of the anti-obscenity provisions of the Criminal Code. Granting wide deference to Parliament’s interpretation of admittedly “inconclusive social science evidence,”⁶⁹ Justice Sopinka upheld these provisions on the grounds that Parliament had a rational basis for concluding that obscenity generates harmful antisocial attitudes, particularly towards women. At issue in *RJR-MacDonald* were regulations concerning tobacco advertising, promotion, and labelling contained in the *Tobacco Products Control Act*. A majority of the Court found all three types of regulations overly restrictive of expressive freedom, with three justices also refusing to find a

⁶⁰ *Ibid.* at 314.

⁶¹ *Askov*, *supra* note 56 at 1247.

⁶² *Barr*, *supra* note 58 at 314.

⁶³ “Hampton Calls for Review of Ruling in *Askov* Case” *The Globe and Mail* (17 July 1991) A5.

⁶⁴ *Ibid.*

⁶⁵ *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1 [*Morin*]. Interestingly, Justice Cory was not a member of the panel hearing this case.

⁶⁶ *Barr*, *supra* note 58 at 321-30.

⁶⁷ [1992] 2 S.C.R. 168, 9 O.R. (3d) 276, Sopinka J. (“We do not share the views of the appellant with respect to the emphasis placed on statistics. Applying the factors in *Morin*, we agree with the Court of Appeal that there was no unreasonable delay in this case” at 168-69). See *Barr*, *ibid.* at 331.

⁶⁸ *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [*Butler* cited to S.C.R.].

⁶⁹ *Ibid.* at 502.

rational connection between an absolute ban on tobacco promotion and the legislative objective of preventing the harmful effects of tobacco consumption.⁷⁰

The Court's treatment of social science evidence in these two cases is particularly instructive. In *Butler*, it took its reading of the evidence concerning the complex relationship between pornography consumption and violent behaviour largely by consulting secondary sources. In particular, the Court relied on the interpretation of that evidence contained in government reports written to justify the very anti-obscenity provisions under review. The absence of an independent critical evaluation of the evidence contrasts with the greater use of primary sources and wider range of opinion canvassed in *RJR-MacDonald*.⁷¹ Moreover, the Court in *RJR-MacDonald* suddenly discovered the problematic nature of using legislative facts in constitutional adjudication.⁷² As a result, the federal government faced vastly different evidentiary burdens in each case, despite their common concern with matters of social policy. Like any political actor, the Court generated evidence from the outcome rather than vice versa. The best conclusion that one can draw from comparing *Butler* to *RJR-MacDonald* is that the Court found pornography more socially undesirable than smoking.

The general point of this admittedly selective survey of the Supreme Court's Charter judgments is that they raise fundamental questions about the traditional sources of judicial authority, which are impartiality and expertise. Although the justices are not partial in the sense of having personal material interests at stake in the outcomes of specific cases, they do have policy preferences that they can advance through their discretionary control over the rules of the judicial process and the Charter's meaning. Moreover, the issues on which most Charter decisions turn are outside the traditional boundaries of judicial expertise and depend on subjective assessments of often conflicting social science evidence. In the final analysis, there is no compelling reason to grant authoritative status to the Court's judgments in Charter cases, especially when those judgments are based on a section 1 analysis.

⁷⁰ *RJR-MacDonald*, *supra* note 41 at 339-42.

⁷¹ Among the sources cited by the Court were Simon Chapman & Bill Fitzgerald, "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion" (1982) 72 *Am. J. Pub. Health* 491; Neil E. Collishaw, Walter Tostowaryk & Donald T. Wigle, "Mortality Attributable to Tobacco Use in Canada" (1988) 79 *Can. J. Pub. Health* 166; Gerald J. Gorn & Renée Florsheim, "The Effects of Commercials for Adult Products on Children" (1985) 11 *J. Consumer Research* 962.

⁷² See John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 213-32. See also Brian G. Morgan, "Proof of Facts in Charter Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 159-86. See also Ann Woolhandler, "Rethinking the Judicial Reception of Legislative Facts" (1988) 41 *Vanderbilt L. Rev.* 111.

D. Hypothesis 4: The Override Has Been Delegitimized

In this section of their article, Choudhry and Hunter examine whether “the level of judicial activism has risen in response to the delegitimization of the override” that allegedly occurred after Quebec’s enactment of Bill 178 in 1988.⁷³ They argue that this “claim arises out of Manfredi’s analysis of the impact of the delegitimization of the override on Charter adjudication.”⁷⁴ They describe Manfredi’s argument in the following way:

[Manfredi’s] premise is that the Supreme Court acts strategically because it has policy objectives, and its ability to secure those objectives depends on the responses of legislatures to its judgments. Manfredi argues that prior to Bill 178, 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. The delegitimization of the override, accordingly, has altered the institutional balance between courts and legislatures by removing this external restraint on judicial review. The result, Manfredi argues, is that unconstrained by the threat of the override in the post-Bill 178 period, courts have acted more aggressively, and judicial activism has consequently increased.⁷⁵

In order to test this claim empirically, Choudhry and Hunter examine government win rates in overrideable rights cases from 1984 to 2002. Their finding is that there “is no discernible trend with respect to this rate, and certainly no obvious drop-off in 1988 or 1989.”⁷⁶ In fact, the government win rate was only slightly lower (sixty-five versus sixty-eight per cent) from 1990 to 2002 than from 1984 to 1989. “This result,” they argue, “undermines the allegation of a pattern of judicial behaviour that is part of Manfredi’s account of the impact of the delegitimization of the override on Charter adjudication (i.e., that levels of judicial activism have risen since the delegitimization of the override through its use in Bill 178).”⁷⁷

Although superficially persuasive, the Choudhry and Hunter analysis misunderstands Manfredi’s argument and thus uses an incorrect measure to test it. Although they rely on the summary version of the argument found in *Judicial Power and the Charter*, Choudhry and Hunter do not refer to its full elaboration in a paper entitled “Strategic Judicial Behaviour and the Canadian Charter of Rights and Freedoms”.⁷⁸ Manfredi’s principal concern in that work was to understand why the

⁷³ Choudhry & Hunter, *supra* note 1 at 531, 535-36 and 553-55.

⁷⁴ *Ibid.* at 535.

⁷⁵ *Ibid.* at 536 (paraphrasing Manfredi, *Judicial Power and the Charter*, *supra* note 9 at 4-5, 184-88).

⁷⁶ *Ibid.* at 554.

⁷⁷ *Ibid.*

⁷⁸ Christopher P. Manfredi, “Strategic Judicial Behaviour and The Canadian Charter of Rights and Freedoms” in Patrick James, Donald E. Abelson & Michael Lusztig, eds., *The Myth of the Sacred*:

Supreme Court had selected a more intrusive remedy in *Vriend v. Alberta*⁷⁹ than it had in *R. v. Morgentaler*,⁸⁰ two cases involving divisive moral issues. In *Morgentaler*, the Court refused to declare a constitutional right to abortion and struck down the Criminal Code's abortion provisions on procedural grounds. While these grounds were sufficient to nullify the existing law, they were narrow enough to leave room for the re-criminalization of abortion under a different administrative scheme. By contrast, in *Vriend* the Court left the Alberta legislature with almost no room to manoeuvre by reading sexual orientation into the province's human rights legislation.

One obvious explanation for these different outcomes is attitudinal: changes in the Court's composition—eight of nine justices turned over from 1988 to 1998—produced an institution that was collectively more willing to exercise judicial review aggressively. However, evidence concerning the individual voting behaviour of the 1998 and 1988 justices in Charter cases suggests that this explanation is insufficient.⁸¹ The principal alternative to the purely attitudinal explanation is that the Court in both instances was reacting strategically to different sets of institutional constraints. This explanation suggests that the level of *remedial activism* increased from *Morgentaler* to *Vriend* because the justices perceived fewer institutional constraints in the latter case on their ability to assert constitutional supremacy over the legislative and executive branches of government. The principal difference, Manfredi argued, was that the Court in *Vriend* could be more confident that it would not face the possibility of legislative override, because of both the particular circumstances of the case and the general decline of the override's political legitimacy.

With this more elaborate version of Manfredi's argument in mind, it is possible to see where the Choudhry and Hunter analysis goes astray. The measure they use in the analysis assumes that Manfredi's argument concerns restraint versus activism when, in fact, it is about different *forms* of activism (i.e., nullification versus imposition).⁸² Manfredi suggested that the strategic relationship between the Supreme Court and legislatures under the Charter could be modelled as a game that begins when a group or individual challenges the constitutionality of legislation. The game's first move belongs to the Court, which has a choice among three options.

- The Court can defer to the legislature, uphold the legislation, and leave the policy status quo intact.
- The Court can declare the legislation unconstitutional and nullify it. If it nullifies, the legislature can then defer to the Court, pass an alternative law, or override the Court's judgment by invoking section 33. To some degree,

The Charter, the Courts and the Politics of the Constitution in Canada (Montreal & Kingston: McGill-Queen's University Press, 2002) at 147-67. Choudhry and Hunter do not cite this chapter.

⁷⁹ [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [*Vriend*].

⁸⁰ [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler*].

⁸¹ Kelly, "Rebalancing", *supra* note 13 at 680.

⁸² Both *Morgentaler* and *Vriend* are activist decisions even by the Choudhry and Hunter definition (i.e., they both involve government losses where a majority act was challenged).

the legislature's options among these three alternatives depend on the basis for nullification. For example, if the Court nullifies because of an insubstantial governmental objective or an irrational connection between means and ends, then it will be extremely difficult to re-legislate. In any event, legislative deference produces a policy vacuum; alternative legislation produces a new status quo that could be challenged later; and an override produces a reinforced status quo that is immune to Charter review for at least five years.

- The Court can impose a different policy. In this case, the legislative options are reduced to two: defer or override. The first choice produces the Court's ideal policy, while the second produces a reinforced status quo.

In essence, where the Court perceives that legislatures are unlikely to override its decisions, it is in a stronger position to impose its ideal policy preferences on legislatures.

Thus, an overall decline in the legitimacy of the override should result in more aggressive remedies, which is a very different hypothesis than the one tested by Choudhry and Hunter. Indeed, because courts can nullify without necessarily imposing specific policy consequences on legislatures, the availability or likelihood of a legislative override is unrelated to the basic choice between restraint and activism. To be sure, the strategic argument based on the override's delegitimization might still be wrong for either theoretical or empirical reasons. Theoretically, the Court's justices might not be strategic actors who seek to maximize their ideal policy preferences in a context of institutional constraints. Empirically, the override may not have been delegitimized, or there may be no evidence that the Court has more frequently relied on intrusive remedies like "reading in" since 1988. However, since the evidence presented by Choudhry and Hunter on Hypothesis 4 speaks to a different phenomenon, it does not necessarily refute Manfredi's argument.

Is there any evidence, however, to support Manfredi's claim? Leaving aside the theoretical question,⁸³ there is independent support for the empirical components of the argument. The most obvious evidence for the override's lack of legitimacy is its non-use by governments. Although notwithstanding clauses currently exist in provincial legislation,⁸⁴ no *government* has used section 33 to *override* a judicial decision since Bill 178. This includes the Alberta marriage statute, which was a

⁸³ This question can only be resolved by gaining access to information that the Canadian court is presently unwilling to provide. For discussions of the US Supreme Court as a strategic actor, see Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), and Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998).

⁸⁴ See Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Can. Pub. Admin. 255 (listing sixteen legislative invocations of the notwithstanding clause, seven of which were still in force in 2001).

private member's bill and is undoubtedly unconstitutional on federalism grounds (as Choudhry and Hunter point out).⁸⁵ For a scholar like Patrick Monahan, who once defended section 33, the Bill 178/Meech Lake episode suggested that "the inclusion of the notwithstanding clause in the 1982 constitution was clearly a very serious mistake."⁸⁶ Indeed, Andrew Heard has argued that the episode so undermined the political legitimacy of section 33 that the reluctance of governments to invoke the clause may develop into a binding constitutional convention.⁸⁷ Even members of the Court, when both active and retired, have indicated their awareness of the political difficulty of invoking the override.⁸⁸

It is more difficult, but not impossible, to demonstrate empirically that the Court adjusted its decision-making behaviour to changes in the override's political viability. In addition to Manfredi's micro level analysis of *Morgentaler* and *Vriend*, consider the Court's decision in the *Alberta Labour Reference*⁸⁹ that freedom of association does not include the right to strike. The Court rendered this decision against the background of Saskatchewan's pre-emptive use of the override to shield back-to-work legislation from precisely this constitutional claim. The Court could have indirectly confronted Saskatchewan, but this might have provoked Alberta into invoking the override. With Saskatchewan having successfully set a precedent in this area, labour unions may have been the victims of strategic restraint by the justices. Macro level support for the argument also exists. Prior to 1991, the Court did not once use "reading down" or "reading in" as a remedy for Charter violations, and nine of the ten uses of these remedies have occurred since 1993.⁹⁰ Indeed, the Court has systematically enhanced the scope of remedial powers under the Charter from

⁸⁵ Bill 202, *Marriage Amendment Act*, 4th Sess., 24th Leg., Alberta, 2000, cl. 5 (assented to 23 March 2000), S.A. 2000, c. 3. See Choudhry and Hunter, *supra* note 1 at 555.

⁸⁶ Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991) at 169. Monahan's earlier position can be found in Monahan, *Politics and the Constitution*, *supra* note 18 at 118-19.

⁸⁷ Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 147. Heard's view was largely confirmed during the September 2003 debate on the opposition's opposite sex marriage resolution. See Christopher P. Manfredi, "Same-Sex Marriage and the Notwithstanding Clause" (2003) 24:9 *Policy Options* 21.

⁸⁸ Bertha Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (1988) P.L. 370 at 375 (suggesting that the notwithstanding clause had "only rarely been invoked, presumably because it might spell political suicide for any government that invoked it!"); Robert Fife, "Right Wants Power Back from Courts" *National Post* (22 February 1999) A2 ("G rard La Forest ... told the National post yesterday that elected politicians risk public censure if they start overruling court judgements ... 'generally speaking [s. 33] is not a clause that the population has wanted any wide use of. I suspect that is why [governments] have not used it.'").

⁸⁹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161.

⁹⁰ See James B. Kelly, *Governing with the Charter* [manuscript in preparation] (data also on file with authors).

Schachter v. Canada (1992)⁹¹ to *Doucet-Boudreau v. Nova Scotia* (2003).⁹² As James Gibson has argued, judicial decision-making is a “function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”⁹³ The progressive delegitimization of section 33 has changed Canadian judicial perceptions of the feasible scope of policy intervention.

Conclusion

It should be beyond dispute that the Charter has enhanced judicial power by expanding the range of social and political issues subject to the Supreme Court's jurisdiction. What is contentious is the implication of Charter review for Canadian democracy and the appropriate balance between judicial and political institutions attempting to govern with the *Canadian Charter of Rights and Freedoms*. In this article we raised questions about Choudhry and Hunter's interpretation of claims made by political scientists on the question of the Supreme Court and judicial power. Although intended to expose and debunk alleged misrepresentations of the Supreme Court's record by political scientists, the Choudhry and Hunter article itself misrepresented the contributions of political scientists to this debate and erroneously attributed claims about judicial activism to an identifiable group of scholars.

While we disagree with their interpretation of the Supreme Court's record because it generally downplays the importance of judicial power, we attribute that disagreement to differences in the types of questions asked by law and political science. In our view, the Supreme Court has been, is, and always will be a political institution. Its justices make policy not as an accidental byproduct of performing their legal functions, but because they believe that certain legal rules will be socially beneficial. Indeed, the central objectives of political science, which are to understand the institutional relationships between actors that exercise power and to evaluate how this power is used, prevent the discipline from simply focusing on judicial activism, and instead allows it to understand how the Charter shapes the use of political power by every political institution it affects. It is within this framework, where judicial activism is simply one dimension of the response to entrenched rights, that we seek to understand the implications of judicial power. On this most fundamental issue, therefore, Choudhry and Hunter failed to engage political scientists by attempting to

⁹¹ [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 (holding for the first time that “reading in” is an appropriate remedy for Charter violations).

⁹² [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577 (holding that the meaningful protection of Charter rights may require novel remedies, and that the remedial power cannot be strictly limited by statutes or common law). Although this is a minority education language rights case to which the override does not apply, the majority's discussion of remedies applies to all Charter rights.

⁹³ James L. Gibson, “Decision Making in Appellate Courts” in John B. Gates & Charles A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991) at 256, citing James L. Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behaviour” (1983) 5 *Pol. Behav.* 7 at 7.

disprove claims that, in the final analysis, are at the periphery of our concern with the Supreme Court and the Charter.
