Canadian Journal of Political Science (2022), **55**, 734–739
doi:10.1017/S0008423922000452

CAMBRIDGE UNIVERSITY PRESS

CURRENTS/QUESTIONS D'ACTUALITÉ

The Overturning of *Roe v. Wade*: Are Abortion Rights in Canada Vulnerable?

Emmett Macfarlane

Department of Political Science, University of Waterloo, 200 University Ave. West, Waterloo, ON N2L 3G1, Canada
Corresponding author. E-mail: emacfarl@uwaterloo.ca

Abstract

The revelation, via a leaked draft, that the Supreme Court of the United States was going to overturn the landmark decision in *Roe v. Wade* (1973) sparked immediate questions about whether a similar retrenchment of abortion rights could occur in Canada. Key legal, structural, and political cultural factors mitigate the forces of American-style erosion of norms on the Supreme Court of Canada and in our broader politics surrounding abortion rights. Despite this generally optimistic comparative context, complacency about the status of abortion rights in Canada would be unwise. This short Currents article canvasses factors crucial for not only preserving the policy status quo in criminal law (that is, the absence of criminal law abortion regulation in Canada), but also for advancing the scope of abortion rights in the positive sense, as serious barriers to access persist at the provincial level.

Résumé

La révélation, par le biais d'une fuite, que la Cour suprême des États-Unis allait renverser la décision historique Roe c. Wade (1973) a suscité des questions immédiates quant à savoir si un retranchement similaire du droit à l'avortement pourrait se produire au Canada. Des facteurs culturels, juridiques, structurels et politiques clés atténuent les forces d'érosion des normes à l'américaine à la Cour suprême du Canada et dans notre politique plus large entourant le droit à l'avortement. Malgré ce contexte comparatif généralement optimiste, il serait imprudent de se montrer complaisant quant à l'état du droit à l'avortement au Canada. Ce court article de Currents passe en revue les facteurs cruciaux non seulement pour préserver le statu quo politique en droit pénal (c'est-à-dire l'absence de réglementation de l'avortement en droit pénal au Canada), mais aussi pour faire progresser la portée du droit à l'avortement au sens positif, étant donné que de sérieux obstacles à l'accès persistent au niveau provincial.

Keywords: abortion rights; Supreme Court of Canada; judicial appointments; Charter rights

Mots-clés: droit à l'avortement; Cour suprême du Canada; nominations judiciaires; droits garantis par la Charte

The revelation, via a leaked draft (Gerstein and Ward, 2022), that the Supreme Court of the United States was going to overturn[1] the landmark decision in *Roe v. Wade* (1973) sparked immediate questions about whether a similar retrenchment of abortion rights could occur in Canada (Gallant, 2022). The constitutional status of a right to abortion under the Charter of Rights and Freedoms is somewhat unclear, at least to the extent that the famed *R. v. Morgentaler* (1988) case did not establish a right to abortion per se. Only Justice Bertha Wilson, then the lone woman on the Supreme Court of Canada, found a right to abortion within the ambit of section 7's right to life, liberty and security of the person (as well as within freedom of conscience), while the rest of the majority limited their reasons to narrower procedural grounds. Yet the Charter's jurisprudence has evolved considerably since 1988 and in ways that likely serve to make constitutional protections for abortion more robust. Further, a set of important structural and political cultural factors mitigate the forces of American-style judicial polarization on the Canadian Court and lower the odds that partisanship and more overt ideological considerations will swamp the judicial appointments process. In short, the prospect of anything resembling a criminal "ban" on abortion is remote.

Despite this generally optimistic comparative context, the identification of these various protective factors should not instill a complacency that Canada is immune from the erosion of norms that threaten the collapse of US abortion rights. In light of the need to remain vigilant, this short Currents article canvasses these factors as crucial not only to preserving the policy status quo in criminal law (that is, the absence of criminal law abortion regulation in Canada) but also in advancing the scope of abortion rights in the positive sense, since serious barriers to access persist at the provincial level (Erdman, 2007; Johnstone and Macfarlane, 2015; Johnstone, 2017).

The most important legal factors in the protection of abortion rights remain the Charter and the Court itself.[2] There are reasons to believe that most of the justices of the contemporary Court would now recognize substantive abortion rights within the ambit of the Charter, in line with Wilson's lone 1988 concurrence. Section 7 was subject to an expanding understanding of the principles of fundamental justice that animate the right to life, liberty and security of the person. The Court has since recognized "overbreadth" and "gross disproportionality" as fundamental principles (the law in *Morgentaler* was found to be "arbitrary"), meaning laws deemed to be overly broad in application or that result in harms so disproportionate to their objectives that they cannot be supported if they conflict with section 7 rights. The Court has employed these various principles to prevent the closure of InSite, Vancouver's safe consumption site (*Canada v. PHS Community Services Society*, 2011) and to strike down criminal laws indirectly prohibiting prostitution (*Canada v. Bedford*, 2013) and prohibiting assisted suicide (*Carter v. Canada*, 2015). The liberty interests connected to bodily autonomy and the harm principle rooted in security of the person and the right to life have been central to these more recent cases.

Section 15's equality rights may also play a fundamental protective role, not only in preventing unreasonable criminal law regulation of abortion but also in reducing discriminatory barriers in the delivery of health care. Canadian courts have always recognized that section 15 protects a substantive, rather than formal, understanding of equality (*Andrews v. Law Society of British Columbia*, 1989). Recent cases have

https://doi.org/10.1017/S0008423922000452 Published online by Cambridge University Press

pushed this substantive understanding of equality further, analyzing not only the purpose of policy but also its *effects*, even in cases where the overall impact of the impugned policy is already ameliorative in nature (*Quebec v. Alliance*, 2018; *Fraser v. Canada*, 2020). Provincial policies—and even provincial inaction—that result in abortion services being targeted for special restrictions or inadequate funding may be recognized as constituting systemic discrimination. In short, section 15 may not permit the unequal provision of an inherently gendered medical service in the broader context of a publicly insured health care system predicated on delivering core medically necessary services (Macfarlane and Johnstone, 2021). These provisions of the Charter provide a much stronger textual basis for protecting abortion than the underlying rationale in *Roe*, which relied on finding a right to privacy implied in the "penumbras" of various numbered amendments.

Yet the broadly worded provisions of the Constitution, including the Charter, remain open to interpretation, and it is well established in political science that interpretative discretion is informed at least in part by the ideology of the justices on the Court (Ostberg and Wetstein, 2007; Macfarlane, 2013). This is especially true in relation to highly salient policy issues and particular constitutional provisions, like equality rights (Sealy-Harrington, 2021). Motivated prime ministers, who hold the power of appointment, might attempt to upend established jurisprudence by appointing like-minded justices. Indeed, this is precisely the outcome in the US context, featuring the end product of decades of pitched partisan battles over Supreme Court appointments. The result is a polarized and nakedly partisan institution (Devins and Baum, 2019).

In the Canadian context, the effects of partisanship and ideology on the appointments process are subtle and nuanced. There is some evidence that party of appointment influences the policy-making outcomes of individual Supreme Court justices, but these are "relatively modest" and there is "considerable variation" among justices appointed by the same party (Songer, 2008: 196). Overall, "the party of appointing prime minister has a limited or heavily conditional impact on judicial behaviour, at least from a straightforward ideological perspective" (Macfarlane, 2018: 6).

Institutional and political cultural factors have prevented the Canadian Supreme Court appointments process from becoming politicized or partisan. First, there is no legislative confirmation process for executive appointments. Opposition parties have adhered to a strong norm against criticizing or objecting to the selection made by the prime minister. Even the relatively recent adoption of having appointees appear before a parliamentary committee to answer questions has generally avoided overt partisanship. Andrea Lawlor and Erin Crandall (2015) find that MPs do not ask questions about the policy preferences or personal beliefs of appointees. Questions about past or potential cases are verboten. The only evidence of partisanship seeping into committee appearances are opposition attempts to broach topics that may be embarrassing to the appointing government (such as questions to appointee Michael Moldaver concerning his lack of bilingualism).

Second, the introduction of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments in 2016, which submits a short list of names for the prime minister's consideration, further shields appointments from overt partisan or ideological considerations. Under the previous, long-standing system, lists of

https://doi.org/10.1017/S0008423922000452 Published online by Cambridge University Press

candidates were developed by political staff in the Prime Minister's Office or under the direction of the minister of justice. The new process mitigates partisan considerations by having the full short list developed by the advisory board, a majority of whose members are appointed by nonpartisan bodies such as the Canadian Bar Association and Canadian Judicial Council. Since the new process was established, the prime minister has consistently made appointments from the advisory board's list.

Third, a broader cultural factor is the relative lack of polarization within the Canadian legal community and within law schools. The progressive "living tree" approach to Charter interpretation is virtually monolithic among Canadian jurists, and only a handful scholars adopt an originalist understanding of the Constitution, something often affiliated with (incorrectly, according to some) a view to rolling back rights (Oliphant and Sirota, 2016; Froc, 2015). An entrenched, organized conservative legal movement in the United States, via organizations like the Federalist Society, "has undertaken a concerted effort to engage with and transform American legal culture directly within law schools against what is regarded as a dominant liberalism" (Macfarlane, 2018: 16; see also Teles, 2010). There is no equivalent movement in Canada.[3] Nonetheless, the recent controversy in the Law Society of Ontario (LSO) over the adoption of a statement of principles (SOP) that would have required lawyers and paralegals to acknowledge "their obligation to promote equality, diversity, and inclusion" resulted in a conservative backlash, including a Stop SOP movement as part of the LSO benchers' election. While one incident does not entrench ideological polarization within the legal community, it does indicate its potential.

However, the best empirical evidence available for assessing the supply of judicial candidates who would adopt a considerably different judicial posture to the Charter, let alone roll back existing jurisprudential supports for abortion rights, are outcomes among appointees of the most recent Conservative prime minister, Stephen Harper, who was widely regarded as desirous of conservative appointments. Studies demonstrate the difficulty Harper had appointing like-minded justices, as his government achieved an impressive losing record before the Supreme Court in highly salient cases even after appointing a majority of its members (Macfarlane, 2018; Hennigar, 2017).

Finally, what factors might inhibit the erosion of political norms that would lead to attempts to criminalize abortion in Canada or to reduce delivery of abortion services at the provincial level? Public opinion on abortion is one important context. Comparative polling shows much stronger support for abortion access in Canada than the United States. For example, one Abacus survey shows that 69 per cent of Canadians view abortion as morally acceptable, compared with 43 per cent of Americans (Anderson and Coletto, 2016). More recent data from 2020 show that nearly 90 per cent of Canadians agree or strongly agree that abortion is a health issue, not a moral one, with only 1 per cent strongly disagreeing (Thomas, 2022). In the last three years, support for abortion in Canada has only increased, and a March 2022 poll shows that 56 per cent of *Conservative Party voters* prefer that the next leader support abortion rights (Fournier, 2022). Canadians are far less divided than Americans over abortion policy.

It also remains the case that major parties in Canada wishing to form government must seek relatively wide appeal and avoid adopting an overly narrow ideological

https://doi.org/10.1017/S0008423922000452 Published online by Cambridge University Press

posture. This does not mean that Canada is not susceptible to a push toward a more extreme right-wing politics. The rise of the far-right Peoples' Party of Canada and the support among some prominent Conservative Party members for the recent convoy protests opposing pandemic measures are illustrative of that threat. Yet electoral incentives are a key reason the Conservative Party has consistently maintained that it would not seek to upend the status quo on abortion policy, a promise that interim leader Candice Bergen repeated the day after the US Court's leak (Walsh, 2022). And while abortion service delivery is spotty at best in many provinces, there is no evidence of recent attempts to curtail access; in fact, important barriers in New Brunswick were lifted in recent years (Macfarlane and Johnstone, 2021), and service finally came to Prince Edward Island in 2017.

Where the fight in the United States is over outright bans on abortion, the fight in Canada has been about improving funding and access, and these respective rights battles have been moving in opposite directions. Yet to preserve and enhance abortion rights in Canada, vigilance is needed to protect the nonpartisan structures and culture surrounding Supreme Court appointments. A more challenging task will be to combat the forces of far-right politics that seem to be emerging within the party system and society. Abortion rights are relatively well protected in the Canadian context. The Charter is not the Bill of Rights, and the Canadian Court is not the American Court. Nonetheless, it is important to remember that rights are neither static nor self-enforcing; they are subject to political and cultural shifts and rely on institutional and normative safeguards.

Notes

1 At the time of writing, it is theoretically possible that one or more justices may get cold feet. My thanks to an anonymous reviewer for ensuring I make note of this.

2 It is worth noting that federalism jurisprudence has also been protective, as it has sometimes prevented provinces from establishing their own restrictions on abortion services (see, for example, *R. v. Morgentaler,* 1993).

3 Some might suggest that the Runnymede Society, an organization formed in 2016 that describes itself as "dedicated to the ideas and ideals of constitutionalism, liberty and the rule of law," is an attempt to replicate the Federalist Society. The problem with this view, at least at this point in time, is that Runnymede only holds speaking events and conferences. These generally include diverse perspectives and focus on topics such as fundamental rights, theories of constitutional interpretation, and structural features (for example, the notwithstanding clause). In sharp contrast to the Federalist Society, Runnymede does not appear to engage in any substantive advocacy, let alone advocacy focusing on socially conservative issues like anti-choice or anti-LGBTQ policies.

References

Anderson, Bruce and David Coletto. 2016. "Canadians' Moral Compass Set Differently from That of Our Neighbours to the South." Abacus Data, July 9. https://abacusdata.ca/canadians-moral-compass-set-differently-from-that-of-our-neighbours-to-the-south/.

Devins, Neal and Lawrence Baum. 2019. *The Company They Keep: How Partisan Divisions Came to the Supreme Court*. Oxford: Oxford University Press.

Erdman, Joanna. 2007. "In the Back Alleys of Health Care: Abortion, Equality and Community in Canada." *Emory Law Journal* **56** (4): 1093–55.

Fournier, Philippe J. 2022. "Why Canada's Conservatives Are Keeping Quiet on Abortion." *Politico*, May 5. https://www.politico.com/news/2022/05/05/canada-conservatives-abortion-00029908.

https://doi.org/10.1017/S0008423922000452 Published online by Cambridge University Press

Froc, Kerri A. 2015. "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment.'" *Review of Constitutional Studies* **19** (2): 237–79.
Gallant, Jacques. 2022. "Could Abortion Be Criminalized in Canada?" *Toronto Star*, May 3. https://www.thestar.com/politics/federal/2022/05/03/could-abortion-be-criminalized-in-canada.html.
Gerstein, Josh and Alexander Ward. 2022. "Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows." *Politico*, May 2. https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.
Hennigar, Matthew. 2017. "Unreasonable Disagreement? Judicial Executive Exchanges about Charter Reasonableness in the Harper Era." *Osgoode Hall Law Journal* **54** (4): 1245–74.
Johnstone, Rachael. 2017. *After Morgentaler: The Politics of Abortion in Canada*. Vancouver: UBC Press.
Johnstone, Rachael and Emmett Macfarlane. 2015. "Public Policy, Rights, and Abortion Access in Canada." *International Journal of Canadian Studies* **51**: 97–120.
Lawlor, Andrea and Erin Crandall. 2015. "Questioning Judges with a Questionable Process: An Analysis of Committee Appearances by Canadian Supreme Court Candidates." *Canadian Journal of Political Science* **48** (4): 863–83.
Macfarlane, Emmett. 2013. *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*. Vancouver: UBC Press.
Macfarlane, Emmett. 2018. "'You Can't Always Get What You Want': Regime Politics, the Supreme Court of Canada, and the Harper Government." *Canadian Journal of Political Science* **51** (1): 1–21.
Macfarlane, Emmett and Rachael Johnstone. 2021. "Equality Rights, Abortion Access, and New Brunswick's Regulation 84–20." *University of New Brunswick Law Journal* **72**: 302–24.
Oliphant, Benjamin and Léonid Sirota. 2016. "Has the Supreme Court of Canada Rejected 'Originalism'?" *Queen's Law Journal* **42** (1): 107–64.
Ostberg, C. L. and Matthew E. Wetstein. 2007. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: UBC Press.
Sealy-Harrington, Joshua. 2021. "The Alchemy of Equality Rights." *Constitutional Forum* **30** (2): 53–84.
Songer, Donald R. 2008. *The Transformation of the Supreme Court of Canada: An Empirical Examination* Toronto: University of Toronto Press.
Teles, Steven M. 2010. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton: Princeton University Press.
Thomas, Melanee (@MelaneeLThomas). 2022. Twitter, May 3, 2022, 11:52 a.m. https://twitter.com/MelaneeLThomas/status/1521517966436802562.
Walsh, Marieke. 2022. "Conservative MPs, Senators Ordered Not to Comment on Leaked Draft U.S. Supreme Court Decision to Strike Down Abortion Rights." *Globe and Mail*, May 3. https://www.theglobeandmail.com/politics/article-conservative-mps-senators-ordered-not-to-comment-on-leaked-draft-us/.

Cases Cited

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
Canada (*Attorney General*) *v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.
Canada (*Attorney General*) *v. PHS Community Services Society*, 2011 SCC 44.
Carter v. Canada (*Attorney General*), 2015 SCC 5.
Fraser v. Canada (*Attorney General*), 2020 SCC 28.
Quebec (*Attorney General*) *v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.
R. v. Morgentaler, [1988] 1 SCR 30.
R. v. Morgentaler, [1993] 3 SCR 463.
Roe v. Wade, 410 U.S. 113 (1973).

Cite this article: Macfarlane, Emmett. 2022. "The Overturning of *Roe v. Wade*: Are Abortion Rights in Canada Vulnerable?" *Canadian Journal of Political Science* **55** (3): 734–739. https://doi.org/10.1017/S0008423922000452