# Manfredi, Christopher. *Judicial Power and the Charter*. Toronto: OUP, 2001.

***Thesis and Summary:***

In *Judicial Power and the Charter*, Christopher Manfredi attempts to explain the dangers involved in what he calls the paradox of liberal constitutionalism. The paradox is this: “if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits”. Thus, although a liberal-constitutional order requires judicial involvement, that involvement creates the possibility of excessive judicial control. In Canada, Manfredi argues, the gradual weakening of any checks on judicial power (through the courts’ interpretation of section one and the gradual enfeeblement of the notwithstanding clause) means that the problem of judicial power in this country is quite grave.

In the central chapters of the book (chapters three through five), Manfredi examines a large number of Supreme Court Charter cases dealing with fundamental freedoms, legal rights, and equality rights. In every case, Manfredi argues, one can see evidence of growing judicial supremacy and a hubristic understanding on the part of the judges about the Court’s freedom from those limits which the Court is itself created to enforce.

In the final chapters of the book, Manfredi assesses the SCC’s contribution to democracy in Canada, arguing that it has largely been negative. The SCC has created incentives for interest groups and social movements to challenge the outcome of political processes rather than engaging directly with those processes. Only an effective override clause, such as the actual use of the section 33 notwithstanding clause, will ensure that Canada remains a state in which the constitution – rather than the judiciary – is supreme.

***Methodology and Theoretical Perspective***

Manfredi’s methodology is almost exclusively legal-historical: he attempts to prove his argument by analyzing dozens of cases, particularly Charter challenges which reached the Supreme Court. His theoretical perspective is based on a classical understanding of constitutional liberalism, one influenced by early American constitutional theory and still prevalent today, according to which the constitution in a liberal democracy is supreme and the judiciary exists as a check on the power of the legislature and the executive.

***Comparison with Other Readings and Contribution to the Literature***

*Judicial Power and the Charter* offers a committed and consistent attack on the post-Charter judiciary in Canada. Manfredi shares with Morton and Knopff a preference for Parliamentary rather than judicial policy-making, arguing that the post-Charter judiciary allows certain groups to access the policy-making process without engaging in the to-and-fro of democratic debate in federal and provincial parliaments. He agrees with Hiebert about the need for Parliaments to assert their role in the interpretation of the Constitution; however, where Hiebert sees some bad examples (e.g. DNA evidence) and some good ones (e.g. Rock’s response to the *Daviault* case), Manfredi sees only bad examples and the ever-increasing power of the judiciary.

Unlike those (e.g. Morton/Knopff, Hirschl, Mandel) whose criticism of the SCC is partially based on the particular *outcomes* of SCC cases – that is, whether certain groups such as the poor or women or gays and lesbians “won” or “lost” – Manfredi’s focus is the structural paradox at the heart of liberal constitutionalism, namely that the need for a constitutional check on legislatures and executives creates the possibility of excessive judicial control.

***Relevant Exam Questions***

Like Hiebert’s *Charter Conflicts*, this book is relevant for any general questions about the Charter and judicial “activism”. It will be particularly useful for questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts.

***Detailed Notes:***

*Introduction*

ix The book explores liberal constitutionalism and rights-based judicial review. On one hand, review is in keeping with liberal constitutionalism because it’s a check on legislative and executive power; on the other hand it can be anti-democratic, modifying the constitution without participation or even public awareness

The argument of the book: judicial power has continued to expand as the legitimacy of the notwithstanding clause has been further eroded: judicial supremacy is overtaking constitutional supremacy.

x The book resists two camps:

1. Those on the left and in the critical legal studies movement, who claim that the individualistic nature of rights, and the conservative nature of the judiciary, means that the Charter impedes progressive social change: best exemplified by Michael Mandel and Allen Hutchinson
2. Those who celebrate judicial review as the essence of democracy because the political process is inadequate: Dale Gibson is an example of this

*Chapter One: Judicial Review and the Paradox of Liberal Constitutionalism*

4-5 In *Vriend v. Alberta*, the SCC asserted it’s judicial power in two ways: first, rather than striking down the statute, it read sexual orientation into it; second, it articulated its view of the relationship between legislatures and courts, namely that it was a trustee of the charter and scrutinize the work of the legislature and executive in the name of the “new social contract” that was democratically chosen

The reason for the more aggressive understanding of judicial review (cf. *Morgentaler* 1988) is that the principal constraint on that power – the notwithstanding clause – has atrophied through lack of use

5-11 The evolution of judicial review in the United States

11-18 The basic legitimacy of judicial review in Canada has been less controversial than in the USA for historical and structural reasons:

Imperial context of BNA Act and the need to enforce the division of powers between the federal and provincial governments was a foundation for justifications of judicial review

What about rights in Canada?

1. Judges purported to find an implied bill of rights in the *BNA Act*; this is first raised as a possibility in 1938 in the *Alberta Press Case*, and was explicitly articulated by Douglas Abbott in *Switzman v. Elbling* 1957; the argument was that the “similar in principle” part incorporated civil liberties enjoyed in the UK in 1867; second, freedom of speech is necessary for democratic institutions. But these claims were not powerful enough to provide a foundation for judicial review
2. The 1960 Bill of Rights: it was clear that the court had no intention of giving teeth to the Bill, which was part of the worldwide post-WWII movement to declare the existence of fundamental rights and freedoms; it applied exclusively to the federal government and it discouraged creativity in definition and enforcement; and of course it wasn’t constitutional
3. Charter of Rights and Freedoms in 1982

21-24 The paradox of liberal constitutionalism: counter-majoritarianism and judicial finality are the reasons why judicial review continues to be controversial in liberal democracies, but judicial review is a key element of liberal constitutionalism. Thus the paradox is this: “if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits”.

Why might one be skeptical about this paradox or its dangers?

1. The SCC hasn’t actually granted that many requests to nullify federal or provincial statutes; it seems to be a record of caution; but this is many more than the US Supreme Court, and the SCC has other tools beyond nullification
2. The SCC has conceded the inappropriateness of judicial policymaking and emphasized sections one and thirty-three; the effectiveness of these sections is unclear (section one has been interpreted in a way that expands judicial power)
3. Dahl’s argument that the moral insights of judges aren’t out of step with the society for very long – a weak argument (see chapter seven)
4. The negative impact of judicial decisions can be addressed by crafting new legislation or amending the constitution – a weak argument (see chapter seven)

*Chapter Two: The Dimensions of Constitutional Interpretation:*

25-26 The two general schools: interpretivists (which seeks to discover the pre-existing meaning of the constitution) and non-interpretivists (which seeks to confer meaning on the text of the constitution)

26-31 Interpretivism and Non-Interpretivism: they have emerged as distinct ways of justifying judicial review in constitutional systems; judicial review is an instrument of majority rule for interpretivists; non-interpretivism elevates judicial review above majority rule by assigning it a unique function that’s absent from constitutional/legislative process

31-35 The Canadian Supreme Court has enthusiastically embraced non-interpretivism in the post-Charter era, beginning with their first Charter decision *Law Society of Upper Canada v. Skapinker* 1984; by taking the “living tree” argument out of its context; Justice Bertha Wilson embodies this modern view of judicial review more than anyone

38-42 Interpreting “reasonable limits” – this was intended as a substantial check on judicial power, but it was watered down between 1980 and 1982; it has been further weakened because it, too, is subject to judicial definition; the court’s unwillingness to follow self-imposed limits on judicial review, and control over meaning of section one, allows it to expand and contract the limits as it wishes

*Chapter Three: Fundamental Freedoms*

53-54 Because of the existence of section one, the Canadian Court has been able to accept the broadest possible meaning of fundamental freedoms and devote most of its energy to issues about the applicability of section one

59 Freedom of religion decisions: the founders of liberalism attempted to keep religious conflicts from becoming political conflicts; the *Constitution Act* did not prevent secular authorities from favoring religion over non-religion but the Charter changed the political status of religion in Canada; it’s unclear whether the blunt instrument of judicial review is up to the task of establishing a new compromise

68 Freedom of expression cases in Canada have a disjointed quality; in some (*Keegstra, Butler*) the Court justifies infringements on expression on the basis of minimal empirical evidence of harm, in others (*Zundel, RJR-MacDonald*) the Court requires strong evidence of concrete harm before accepting the reasonableness of an infringement under section one

74 Most important for understanding the relationship between constitutionalism and judicial review is the declaration in *Dolphin Delivery* that the judiciary does not form part of government; the idea that the court is exempt from the limits which it is created to enforce

*Chapter Four: Legal Rights*

82 The court’s decisions in *Operation Dismantle* and the doctrines of standing and mootness in abortion cases indicate that the Court’s self-perception has changed; it has claimed a much wider field of competence for itself, meaning that decisions become more dependent on political factors

95-96 In *Seaboyer, Daviault, O’Connor,* and *Carosella* the SCC expanded the rights of defendants in sexual assault cases; in each case the court refused to accept constraints on judicial discretion (note that he characterizes *Daviault* as a struggle between Parliament and the SCC, whereas Hiebert sees it as a shared responsibility)

102 The great theme in the realm of legal rights is the growing paramountcy of judicial discretion, which has become the centerpiece of its Charter jurisprudence

*Chapter Five: Equality Rights*

111 Prior to the Charter, the court was very cautious about equality rights, which was largely a result of judicial uncertainty about their power to give the Bill of Rights paramountcy over other federal legislation

115 The story of section 15 and the SCC is one of “equality-seeking” in which groups have sought recognition under that section in order to extract policies from governments

133-35 Three important characteristics stand out in the SCC’s equality rights jurisprudence since 1995:

1. The increasing importance of status and recognition in defining discrimination: distinctions can be discriminatory even when they don’t generate tangible, material disadvantage
2. An unprecedented degree of judicial hubris cloaked in democratic humility: claim that the judicial role was a deliberate decision by the provincial and federal legislatures and that they are the trustee of the Charter: they are the guardian of the democratic values and principles of the Charter
3. A growing tendency to label every political loss by an equality-seeking group as evidence of discrimination: blur the difference between discrimination and the ordinary vicissitudes of democratic politics

*Chapter Six: Democracy, Public Policy, and the Charter*

139 The important and deep question is whether the Charter enhances or threatens democratic participation in Canada

163 The tension between traditional adjudication and Charter adjudication results from the fact that most of the Charter questions in the SCC can’t be resolved through the authoritative application of pre-existing norms; the *Oakes* test shows that the Court must exercise political judgment in resolving its most important cases

168 The SCC has been less concerned with regulating the political process than with policing the outcome of the process: the court’s impact on democratic participation has been small (with the exception of extending the vote to very small groups such as prison inmates)

By effectively endorsing regulation of campaign spending the Court has made it easier for those in power to erect barriers to entry for potential new players in the process (?)

The Court’s jurisprudence has created incentives for groups to challenge the results of the political process rather than having contributed their participation in that process

*Chapter Seven: Confronting Judicial Supremacy*

177-78 According to Hogg and Bushell, the empirical evidence refutes the critique of the Charter based on democratic legitimacy, since the court’s decisions leave room for a legislative response (Hogg and Bushell show that 80% of SCC Charter strikedowns were addressed by a legislative sequel)

Hogg and Bushell’s argument suffers from several flaws, including the use of judicial nullification as the sole indicator of judicial interference; biased case selection; improper inclusion of lower court decisions in the data set; treatment of cases that produced a single sequel as evidence of multiple ones; in fact the Charter dialogue is more complex and considerably less extensive than they claim

Second, there’s a problem when legislators choose policies that are less effective but more easily defensible than other alternatives; besides, most legislative sequels occurred *before* a final court decision, indicating that the court was still interested in asserting their supremacy

181-88 Section 33 is controversial because of the political circumstances out of which it emerged; in 1982 the Quebec legislature amended all existing Quebec statutes to include a notwithstanding clause; the use of the clause by the government of Saskatchewan to pre-empt a constitutional challenge of back-to-work legislation; these actions by Quebec and Saskatchewan increased the voices calling for the repeal of 33

The SCC’s decision in *Ford* signaled to governments that section 33 would be subject to very minimal judicial scrutiny (NB! An important check on his argument!) – the decision was *Ford v. A-G Quebec* and it held that blanket overrides were acceptable

As the likelihood of using the override has declined, assertions of judicial power have increased; the Court can be less reticent about asserting control

194-95 The opposition to the notwithstanding clause is due to historical accident and three conceptual errors:

1. Historical accident: use by Quebec which most found unacceptable *before* the SCC had rendered a politically unpopular Charter decision, which limited the ability of governments to use the notwithstanding clause
2. First conceptual error: misunderstanding of the constitutional role of legislatures: the task of interpretation is not exclusively the courts’ task; legislatures also have a legitimate role to play
3. Second conceptual error: misunderstanding of the legislative process as characterized by the haphazard adoption of measures motivated by majority tyranny; yes, judicial review is an important check, but the cure may be worse than the disease, since courts suffer from pathologies too
4. Third conceptual error: misunderstanding of the nature of Charter adjudication, which rarely involve disputes about fundamental rights and almost never address fundamental moral principles: they are about the application of the least-restrictive-means component of the *Oakes* test

It is unrealistic to expect judges to be self-restrained in their exercise of political power; a structural check on judicial power is needed in order to ensure constitutional supremacy rather than judicial supremacy