**“Committing Social Science” in the Courts: The Evolving Use of Strategic Litigation**

by

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**Section 1: Theoretical Framework**

For constitutional politics in Canada, the introduction of the *Constitution Act, 1982*, and in particular the *Canadian Charter of Rights and Freedoms*, was a watershed moment. Canada went from a system of government operating under parliamentary supremacy to one of constitutional supremacy[[1]](#footnote-1) in which the courts are now frequently tasked with interpreting and enforcing the constitution. In practice, this has meant that judicial rights review has become a major component of Canada’s constitutional order. This transformation is most apparent in Canada’s final court of appeal, the Supreme Court of Canada, which went from a body concerned primarily with resolving private disputes between individuals and business to one of public law (Manfredi 2001; Songer 2008). This has not just changed Canada’s courts, but also the way that individuals can engage with the law and public policy. The *Charter* transformed the way that ‘political outsiders’ can engage in policymaking – so long as your legal argument is framed in the language of the *Charter*, an issue can be forced onto the agenda despite the disapproval or disinterest of the political executive (cabinet and prime minister/premier). This power of individual citizens and courts to bypass the legislative will of a popularly elected government has led scholars to vigorously debate the democratic legitimacy of rights review in Canada (Hiebert 2002; Kelly 2005; Manfredi 2001; Morton and Knopff 2000).

After some thirty-five years, this rights revolution and its ensuing debates can hardly be described as a new trend in Canadian politics; however, within this framework the strategies of *Charter* litigants have hardly remained static. In particular, the rising importance of social science evidence in *Charter* litigation has been increasingly noted by legal scholars (Pal 2014; Lawrence 2015; Choudhry 2006). While not necessarily a wholly new observation (Morton and Brodie 1993), the increasing importance of social science evidence is not just academic, but now acknowledged by the Supreme Court itself.[[2]](#footnote-2) To be sure, not all *Charter* cases necessarily lend themselves to legal argumentation based on social science evidence (see Pal 2014); however, section 7 challenges, which deal with the question of whether a public policy unreasonably violates the ‘life, liberty and security of the person’,[[3]](#footnote-3) now frequently have an empirical record to support legal arguments. This is readily evident in several of the Court’s recent decisions, including those dealing with doctor-assisted death (*Carter* 2014), prostitution laws (*Bedford* 2013), safe injection sites (*Insite* 2011), and medical marijuana (*Smith* 2015), where social science evidence has been at the crux of the Supreme Court’s decision making process.[[4]](#footnote-4)

While the use of social science evidence to inform legal decisions related to public policy may appear quite benign at first blush, it has important implications for both the processes of judicial review and policymaking. The use of social science evidence in rights review has the potential to reopen what once appeared to be settled case law, providing political outsiders a new tool that can constrain the policy choices of governments. Despite this potential for change, a reliance on social science evidence also places a significant empirical burden on applicants in constitutional cases, who must develop a detailed record in order to make a compelling facts-based argument. This greater reliance on social science evidence, in turn, brings up access to justice concerns. Because of the costs associated with building the needed social science evidence, less well-resourced public interest applicants face a clear disadvantage in comparison to their well-funded counterparts. For example, in the recent *Bedford* case on prostitution laws the evidentiary record consisted of over 25,000 pages of evidence in some 88 volumes (*Bedford*, para 15). There also remain difficult questions concerning the limits of social science evidence. The complicated nature of policymaking means that social science research can never be absolutely certain and moreover judges, who are not necessarily trained social scientists, have the potential to misunderstand or misinterpret key data.[[5]](#footnote-5) Indeed, retired Supreme Court Justice Ian Binnie lamented the judiciary’s “scientific illiteracy,” while serving on the Court (Tibbets 2003).

Altogether, the ‘empirical turn’ in *Charter* litigation has important implications for the policymaking process and Canadian politics more generally, and indeed as already noted, not all of them may be positive (see also Lawrence 2015; Daly 2016). Unpacking these implications seems likely to be a major focus of research on constitutional politics moving forward.

For this current paper, the effects of the *Charter* and this ‘empirical turn’ on political communication will be considered. A unique pair of Supreme Court cases (*Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331; *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519), dealing with the criminalization of doctor-assisted death and decided some twenty years apart, facilitates this study. In *Carter*, a unanimous Supreme Court of Canada found that the criminalization of doctor-assisted death was an unreasonable violation of a person’s right to “life, liberty and security of the person” as provided by section 7 of the *Charter*. This decision stands in stark contrast to the Supreme Court’s decision when it was confronted with the same legal question in the 1993 *Rodriguez* case, where the criminalization of doctor-assisted death was allowed to stand. Despite addressing essentially the same legal argument, with similarly sympathetic applicants, the two cases nonetheless reached very different outcomes. As will be explained later in this paper, this remarkable change in outcome can be explained primarily by two key factors: (1) the evolution of section 7 jurisprudence; and (2) the Supreme Court’s changing approach to social science evidence. This paper asks whether these changes to the Supreme Court’s *Charter* jurisprudence are in turn reflected in what is communicated to the Canadian public through news coverage. By undertaking a content analysis of English print media coverage of the Supreme Court’s two decisions on doctor-assisted dying, this paper provides a novel empirical measure of potential changes in the framing of Supreme Court decisions over time.

We will be focusing our analysis on news coverage of the Supreme Court for a number of reasons. Chief among these is the essential role that the media and journalists play in connecting the Court to the public. Beyond issuing a publicly distributed ruling for a case, courts do not explain their decisions to the public. Supreme Court justices do not participate in press conferences and are in comparison to other public officials relatively inaccessible. In practice, the public relies almost exclusively on the media for interpretation and dissemination of judicial decisions (Hausegger, Riddell, and Hennigar 2015; Lydia Anita Miljan 2014; Sauvageau, Schneiderman, and Taras 2006). The relationship between the Supreme Court and the public, with the media as intermediary, has become increasingly important post-*Charter* where the Court is often implicated in controversial and partisan debates by virtue of the cases it decides. Importantly, the response to judicial decisions by other political institutions and actors is highly influenced by media coverage of the decisions of the Court (Sauvageau, Schneiderman and Taras 2006; Macfarlane 2008). Due to its generally inaccessible nature, the Supreme Court’s control over the message starts and ends with the release of a judicial decision, and through news coverage, “journalists are the managers of the political life of judicial decisions” (Peter Russell as quoted in Sauvageau, Scheiderman and Taras 2006).

While it is difficult to underemphasize the importance of the media in providing transparency and accountability to decisions of the Supreme Court, this relationship has not been the focus of much academic research. Sauvageau, Schneiderman and Taras (2006) provide the first and only manuscript-length investigation of the relationship between the media and the courts in Canada. In this important work, the authors find that while the media is essential to disseminating information from the Supreme Court, news coverage of the Court presents several unique difficulties. Most importantly, Supreme Court decisions do not lend themselves to the routine journalistic process. Legal decisions frequently lack compelling visuals, can be very lengthy, abstract, and complex. Together, this can result in a subject matter that is challenging to sensationalize and at times difficult to access for individuals who lack legal expertise (Sauvageau, Schneiderman and Taras 2006). Due to the complexity of judicial decisions and the inaccessibility of the justices, Sauvageau, Schneiderman and Taras find that news coverage of the Court overwhelmingly falls into political framing (the more natural domain for Ottawa journalists). This framing leads to a focus on the strategic aspects of decisions and the winners and losers of cases, rather than social—legal implications. By contrast, Miljan, employing a single case study approach, finds that the news coverage of *Saskatchewan v. Whatcott,*[[6]](#footnote-6)a free speech case, predominately relied on a legal frame (Lydia Anita Miljan 2014). Miljan does not speculate why news coverage for *Whatcott* relies on legal rather than political framing.

Existing scholarship also details how the Supreme Court has made institutional changes to facilitate a better relationship with the media, such as the implementation of media lockdowns for important decisions and the creation of an Executive Legal Officer to act as a liaison between the court and the media (Delacourt 2000; Macfarlane 2009). However, media access to the Supreme Court is subject to a great deal of control by the Court itself and is still extremely limited compared to other public institutions (see: Sauvageau, Schneiderman and Taras 2006). While coverage of the Court has expanded post-*Charter*,the Supreme Court is generally not subject to the continuous, intense scrutiny that other political institutions and actors must endure (Delacourt 2000; Sauvageau, Schneiderman, and Taras 2006). This absence of constant scrutiny can be explained at least in part by journalists’ lack of legal expertise, which could better equip them to question and critique the Court’s rulings, and that newsworthy actions of the Supreme Court are generally episodic rather than constant or thematic (Sauvageau, Schneiderman, and Taras 2006; Macfarlane 2008; Lydia A Miljan and Cooper 2003). According to Miljan and Cooper (2003), this lack of sustained intense scrutiny tacitly supports judicial activism and contributes to judicial power.

The existing literature on the relationship between media and the courts provides an important foundation to our study and highlights the unique nature of reporting on the Supreme Court and the crucial role that the media play in connecting the public to the courts. Altogether, the rise in social science evidence in *Charter* cases and the apparent tendency toward political framing of Supreme Court decisions by the media appear to raise the possibility of a gap between the developing processes of the Court and its representation by the media. In theory we should expect that the Court’s approach to social science evidence should be reflected in its coverage by the media; however, this is only possible if media is willing and able delve to dive into these complexities. Otherwise, we might expect media to continue to rely on political frames, which require less specific knowledge of both the law and social science evidence.

Also worth noting are the limitations of previous scholarship, and in particular, the lack of analysis concerning temporality. Sauvageau, Schneiderman and Taras (2006) consider media coverage of the Supreme Court for one year (September 2000 to August 2001). While Macfarlane’s (2008) study of media coverage of *Charter* cases is notable for spanning five years of decisions, no study has asked whether and to what extent media coverage has changed over time. As a result, we have little understanding if there have been changes in media coverage of the decisions of the Supreme Court.

An examination of the *Rodriguez* and *Carter* decisions on doctor-assisted death provides the opportunity to address whether this ‘empirical turn’ has changed the way the media communicate about rights-based policy making over time. Taking into account the rise in importance of social science evidence in *Charter* litigation, and different scholarly accounts of how the media covers the Supreme Court (legal vs. political framing), this paper asks two main questions:

**Q1:** In comparison to the *Rodriguez* (1992), does media coverage during the time period of the *Carter* (2015) decision more frequently use medical-based framing?

**Q2:** Is there a difference between *Rodriguez* (1992) and *Carter* (2015) in the media’spolitical-based framing of the Supreme Court’s decisions?

To answer these questions and consider some of the implications of our findings, the remainder of this paper proceeds as follows. In Section 2, brief descriptions of the *Rodriguez* and *Carter* cases are presented, including key similarities and differences in the Court’s decisions. Next, the methodology for the media content analysis is presented followed by our findings. In comparing our early *Charter* decision (*Rodriguez*) to our contemporary *Charter* decision (*Carter*), we uncover several findings of interest. For both case studies, the use of political frames increased after the Supreme Court’s decision on doctor-assisted death, suggesting continuity in media coverage of the Supreme Court over time. In terms of noteworthy differences between the cases, we find that medical frames decrease post-*Rodriguez* and increase post-*Carter*. We suggest that the sustained medical-based discussion reflects the change in the policymaking environment post-*Carter*, which required a legislative response from Parliament to regulate physician-assisted suicide. Overall, however, we find little difference in medical-based framing between the two cases, suggesting that social science evidence has not had a significant impact on the way the media covers the Supreme Court’s decisions. Finally, we note that coverage of both cases differs between local and national newspapers. In Section 3, we consider what these findings mean in terms of how the Supreme Court is likely to be understood by the public and the consequences for the practice and study of Canadian courts.

**Section 2: Case Study**

A. Supreme Court and Doctor-Assisted Death

Because we are particularly interested in the use of social science evidence by the Supreme Court, it is useful to clarify the two different types of facts considered in constitutional litigation – adjudicative facts and legislative facts. As set out by the Court in *Danson v. Ontario (Attorney General)* (1990),adjudicative facts are those that relate to the particular context of the immediate parties involved in the case. They are specific and must be proved by admissible evidence. By contrast, legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context (para. 53). Such legislative facts can include social science evidence, in which case they are often referred to as social facts or social science-based facts. As will be seen in the reviews of *Rodriguez* and *Carter*, the use of social science evidence played an important part in the different outcomes in these cases.

In 1992, Sue Rodriguez, a woman suffering from amyotrophic lateral sclerosis (ALS), applied to the Supreme Court of British Columbia for an order to declare section 241(b) of the *Criminal Code* invalid so that she could secure a physician administered death. Rodriguez claimed that she wanted to control the manner and circumstances of her death, but would be unable to do so without the assistance of a physician, as her illness had made it physically impossible to do so alone. Rodriguez argued that the criminal prohibition on assisted-death violated her right to life, liberty, and security of the person (section 7), right against cruel and unusual treatment (section 12), and her right to equality (section 15) under the *Charter (Rodriguez v. B.C.*, at paras. 119 to 121)*.* The Supreme Court of B.C. and the B.C. Court of Appeal dismissed Rodriguez’s application and the matter was appealed to the Supreme Court.

In a 5 to 4 decision, the Supreme Court rejected Rodriguez’s application to invalidate section 241(b) of the *Criminal Code*, thus dismissing her appeal. Most of the arguments made by Rodriguez centered on section 7 of the *Charter.* Rodriguez claimed that by making the act of assisting her in terminating her life a criminal one, it deprived her of liberty and security of the person. She argued that the criminal prohibition violated her right to live her life with dignity and the right to control her body (*Rodriguez v. B.C.*, at para 9). The majority of the Supreme Court rejected all of Rodriguez’s section 7 claims, finding that the “…security of the person, by its nature, cannot encompass a right to take action that will end one’s life as the security of the person is intrinsically concerned with the well-being of the living person” (*Rodriguez v. B.C.*, at para. 14). The majority did find merit in the claims that the prohibition on assisted death violated section 15 of the *Charter*, however, it found that this violation was proportional and was justified through section 1 analysis (*Rodriguez v. B.C.* at para. 76).[[7]](#footnote-7) In three separate opinions, the dissenting justices found that section 241(b) of the *Criminal Code* violated section 7 and 15 of the *Charter*, in a manner that was not justified by section 1 analysis and was therefore unconstitutional.

Twenty-two years following the strongly divided opinion in *Rodriguez*, the Supreme Court was asked to reconsider the criminalization of assisted suicide, as provided by sections 14 and 241(b) of the *Criminal Code*. In *Carter v. Canada (Attorney General)*, the Supreme Court was asked to confront the claims of two individuals, Gloria Taylor and Kay Carter, who faced similar terminal diagnoses as that of Sue Rodriguez. However, unlike in *Rodriguez*, the claimants in *Carter* were successful, with a unanimous Supreme Court striking down the criminal prohibition on assisted-death as a violation of section 7 of the *Charter*. In an opinion that focused almost exclusively on the section 7 claims, the Court found that the criminal prohibition on assisted-death is overbroad and that the impact of the provisions too severe, as they inflict unnecessary suffering on individuals, denying them the ability to make end of life decisions (*Carter v. Canada*, at para. 90). While the majority in *Rodriguez* focused on the preservation of life through section 241(b), a goal that they found to be at the core of section 7, the Court in *Carter*, finds the opposite. Instead, in *Carter*, the Supreme Court explains that section 241(b) is not aimed at the preservation of life, and that section 7 not only values life, but is also fundamentally concerned with dignity and autonomy at the end of life (*Carter v. Canada* at para. 68).[[8]](#footnote-8)

The adjudicative facts in *Carter* were very similar to those presented in *Rodriguez*, however the Supreme Court reached the opposite outcome in *Carter*. This divergence with the precedent set in *Rodriguez* is largely explained by two factors. First, when the Court addressed the arguments regarding section 7 in *Carter*, it did so under a much different understanding of the meaning and implications of section 7. Indeed, as the Court notes, the law concerning overbreadth and gross disproportionality had undergone vast changes since it decided *Rodriguez*, *(Carter v. Canada (Attorney General)* 2015 at para. 46). Second, and more centrally to this paper, the Court explains that the social and legislative facts entered into evidence in *Carter* were vastly different from those presented in *Rodriguez*. In *Carter*, the trial judge was presented with a great deal of evidence from Canada and other jurisdictions on end-of-life practices,[[9]](#footnote-9) regulatory regimes that permit physician assisted death and medical ethics, many of which were not available when *Rodriguez* was decided (Klein 2012). Indeed, as Bloodworth (2014) notes, it is not that the Court in *Rodriguez* refused to evaluate the type of social science evidence presented in *Carter*, it simply did not exist at the time. This change in available facts requires fresh analysis and loosens the restrictions placed by *stare decisis*, allowing a court to revisit issues that have been previously decided (Arvay, Tucker, and Latimer 2012; Carter v. Canada (Attorney General) 2015 at para. 47). The outcome in *Carter,* as explained by the influence of social facts, demonstrates the important trend of social science evidence in *Charter* litigation, which can provide opportunities for litigants to influence the courts and to reexamine established precedent.

B. Methodology

The similarities between these two Supreme Court cases facilitate this research study by minimizing potentially influencing factors. This allows us to more easily focus on our variable of interest - the manner that the media frames the Supreme Court’s decisions on doctor-assisted dying. Newspaper articles were collected from the Dow Jones Factiva database for two time periods that overlay with the six months prior to and after each of the Supreme Court’s doctor-assisted death decisions (1993-03-30 to 1994-03-30; 2014-08-06 to 2015-08-06). The dataset features all articles that included the designated search terms in the article.[[10]](#footnote-10) The papers used in this study are *The Globe and Mail*, *National Post*, *Toronto Star*, *the Montreal Gazette,* and *Winnipeg Free Press*. This resulted in 323 articles for the first time period and 466 from the second time period, for a total of 789 articles.

We performed a dictionary-based analysis of these articles using Lexicoder v3.0, a java package developed for automated content analysis (Daku, Soroka, and Young 2015). While dictionary-based analyses have trouble accurately capturing nuance, humor, and context, over a large enough dataset, characteristics of the corpus emerge that can be difficult to observe with close readings. This approach is also clear, straightforward and replicable, as the counts do not depend on the interpretation of a particular researcher. Limitations aside, automated coding of topics proves promising vis-à-vis the reliability of human coders (Albaugh et al. 2013) and it can provide insights at a macro level.

This approach relies on custom dictionaries built specifically to capture particular frames in the text. For this study, three dictionaries are used: legal, political, and medical. While legal and political dictionaries have been used to study media coverage of the courts in previous studies (Lydia Anita Miljan 2014; Johnson and Socker 2012), the medical dictionary is unique to this study and customized for the topic of doctor-assisted death. For our purposes, the medical dictionary acts as a proxy for social science coverage. To build these dictionaries, we examined a random sample totaling 5 per cent of the stories from the two time periods in order to identify the words and phrases used to describe doctor-assisted death. The *Rodriguez* and *Carter* decisions were also reviewed to identify additional words and phrases. Finally, the legal and political dictionaries were supplemented with keywords compiled by Johnson and Socker (2012). To give examples of the words found in these dictionaries, the legal dictionary contains words and phrases such as ‘reasonable limits’ and ‘minimal impairment’, the political frame dictionary contains words and phrases such as ‘dogma’, ‘ideology’, and all words with the root ‘legislat’, while the medical frame dictionary includes words and phrases like ‘terminally ill’ and ‘informed consent’.

C. Results

Recall our research questions set out earlier, which asked whether the content of framing varied between media coverage of the two Supreme Court cases. Figure 1 illustrates the mean number of frames by decision. For both cases, frames featuring medical-based words were by far the most prominent. The mean frequency of medical frames does increase from *Rodriguez* to *Carter*; however, this increase is tempered by the fact that the mean number of legal and political frames also increased from *Rodriguez* to *Carter*. Notably, the mean number of legal frames also increased from about three mentions per article to almost five. With this increase from *Rodriguez* to *Carter*, legal framing outpaced all other frames but medical in terms of mean mentions for the second case (see Table 1). [If you wanted to add more here on strategic, legislative, and social science, you can – as these all had statistically significant changes from rodriguez to carter.]

[Insert Figure 1 approximately here.]

However, these important differences are further unpacked when media coverage reported before and after the Court’s decisions are compared. Because our media analysis covers the six months before and after each of the Supreme Court’s decisions, we are also able to consider how these rulings affected media coverage of doctor-assisted death. This breakdown is presented in Figure 2 and shows notable differences both within and between our two cases. Here again, medical frames outpaced the legal and political frames both before and after the Supreme Court’s decisions. In the case of *Rodriguez*, the mean number of medical frames decreased slightly by about one mention after the Supreme Court’s decision whereas in *Carter* the mean number of medical frames decreased by 0.2 mentions. Though statistically insignificant, this difference in coverage is not especially surprising. With the Supreme Court’s decision to uphold the criminal code provisions in *Rodriguez*, there would be no pressing need for media to cover the medical features of doctor-assisted death as it remained prohibited. The Supreme Court’s decision to strike down these criminal code provisions in *Carter* means that the practicalities of implementing doctor-assisted death must now be considered and debated, a reality that is likely reflected in this increase in medical frames.

[Insert Figure 2 approximately here.]

Interestingly for both cases, the framing of the issue became more political after the decision was made (see Table 2). This is the only pre- post-difference in framing to reach statistical significance. This finding seems especially notable for the *Carter* case, where words associated with legal frames were more frequent than those associated with political frames over the one-year of media coverage analyzed. When broken down into two six-month periods, however, media coverage used legal and political frames at a similar rate post-decision. This appears to be a noteworthy similarity in media coverage across time: that the framing of doctor-assisted death became more political after the Supreme Court’s decisions. This finding is also consistent with the work of Sauvageau et al. (2006), who find that media tend toward political frames when reporting on Supreme Court decisions.

Table 1: Summary statistics by case

|  |  |  |  |
| --- | --- | --- | --- |
|  | *Rodriguez* | *Carter* | *PR(|T| > |t|)* |
| Legal | 3.37  (.31) | 4.88  (.32) | 0.00\*\*\* |
| Strategic | 1.43  (.11) | 1.95  (.14) | 0.00\*\*\* |
| Legislative | 2.55  (.21) | 3.58  (.26) | 0.00\*\*\* |
| Social Science | 1.26  (.11) | 1.82  (.14) | 0.00\*\*\* |
| Medical | 9.96  (.65) | 11.48  (.65) | 0.11 |

\* Significant at 10%; \*\* Significant at 5%; \*\*\* Significant at 1%; Standard error in brackets

Table 2: Summary statistics by status of case

|  |  |  |  |
| --- | --- | --- | --- |
| *Rodriguez* | Before Decision | After Decision | *PR(|T| > |t|)* |
| Legal | 3.60 | 3.27 | 0.63 |
| Strategic | 1.20 | 1.53 | 0.17 |
| Legislative | 2.12 | 2.77 | 0.15 |
| Social Science | 1.30 | 1.24 | 0.80 |
| Medical | 10.55 | 9.68 | 0.54 |
|  |  |  |  |
| *Carter* | Before Decision | After Decision | *PR(|T| > |t|)* |
| Legal | 4.27 | 5.32 | 0.11 |
| Strategic | 2.22 | 1.75 | 0.10\* |
| Legislative | 2.85 | 4.11 | 0.02\*\* |
| Social Science | 1.58 | 2.00 | 0.13 |
| Medical | 11.59 | 11.39 | 0.88 |

\* Significant at 10%; \*\* Significant at 5%; \*\*\* Significant at 1%

The media studies literature suggests that there are differences between national and local news coverage of public policy issues (Lawlor 2015). Do we see this with Canadian news coverage of doctor-assisted death? While our selection of newspapers is relatively small, it does include both national and local news coverage, which permits us to make tentative observations about differences in coverage.[[11]](#footnote-11) Interestingly, the breakdown of media coverage by newspapers in Figure 3 shows that the two national newspapers largely drove the increase of legal frames seen during the *Carter* period. In comparison, the *Toronto Star*’s coverage had nearly the same mean number of legal and political frames, while the *Winnipeg Free Press*’s coverage actually had a larger number of political frames during this period. [Discuss Gazette] The latter’s coverage also employed medical frames far less than the other three papers in their coverage of doctor-assisted dying. Altogether, this suggests that local media coverage did frame doctor-assisted dying differently than national coverage and in particular was more likely to use political framing.

[Insert Figure 3 approximately here.]

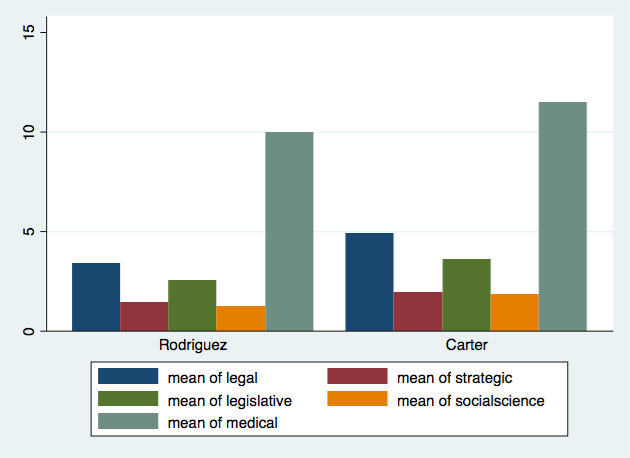
**Section 3: #Trending in Canada**

This paper considered whether changes to the Supreme Court’s *Charter* jurisprudence are in turn reflected in what is communicated to the Canadian public by the media. By analysing the same legal issue (doctor-assisted death) as considered in two separate Supreme Court cases spaced some twenty years apart, we were able to consider whether: 1) media coverage of the Supreme Court has changed over time, and 2) in particular, if the trend toward social science evidence in *Charter* cases, of which doctor-assisted dying is a part, is reflected in media coverage. The empirical turn in rights-based litigation is an important trend in Canadian politics that has significant consequences for the way the courts perform their role, as well as for public policy making. Being able to compare the topic of doctor-assisted death – one where the Supreme Court took different approaches to social science evidence in the decisions analysed here – permitted us to consider whether this development has changed the way that media has covered this development. The answer appears to be that there has been little change. While the Supreme Court has undergone significant changes in its approach to *Charter* litigation, our results indicate that the Canadian media has remained largely unchanged in its approach to covering the Court.

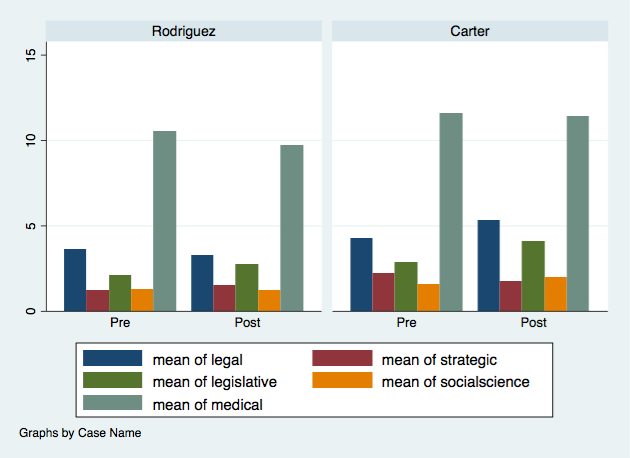
While we did find increases in all three of the frames considered here (medical, legal, political) from *Rodriguez* to *Carter*, the differences are relatively small and again, do not suggest that media coverage has changed substantively over time. What arguably stands out most from the media analysis undertaken here is the increase in media frames for both *Rodriguez* and *Carter* after the Supreme Court rendered its decisions, which is consistent with previous findings on media coverage of the Supreme Court (Sauvageau, Schneiderman, and Taras 2006; Macfarlane 2008). Despite differences in the Supreme Court’s use of evidence and reasoning in these two cases, both periods saw an increase in political frames after the Court’s decision was rendered.

This study also makes a methodological contribution to the study of political communication and Canadian courts. While there is a developed body of research that has looked at how *Charter* jurisprudence has developed over time and its consequences for Canadian governance and policy making, there have been far fewer studies focussed on how these Supreme Court decisions are communicated by the media and none that have considered what changes, if any, have occurred over time. The use of automated content analysis makes this kind of longitudinal media analysis more practicable and can allow us to identify trends that may otherwise go undetected. Moving forward, findings from this study suggest that closer attention should be paid to possible differences in national versus local media. The limitations of the present analysis also prompt questions for future study. While we do not find substantive differences in framing between *Rodriguez* and *Carter*, this type of automated approach cannot address some of the nuances of media coverage. In particular, it would be useful to undertake a manual analysis to consider to what extent, if at all, the media make explicit reference to social science evidence in their coverage of doctor-assisted death, which could further build on this area of study. Furthermore, future research could attempt to investigate the quality of the coverage provided by the media. Does the media provide an important accountability function by scrutinizing the Court’s decisions? Or is this contribution limited by the reliance on political framing by journalists and the unique difficulties in reporting on the Canadian Supreme Court?

**Figure 1 Overall media coverage of doctor-assisted death**

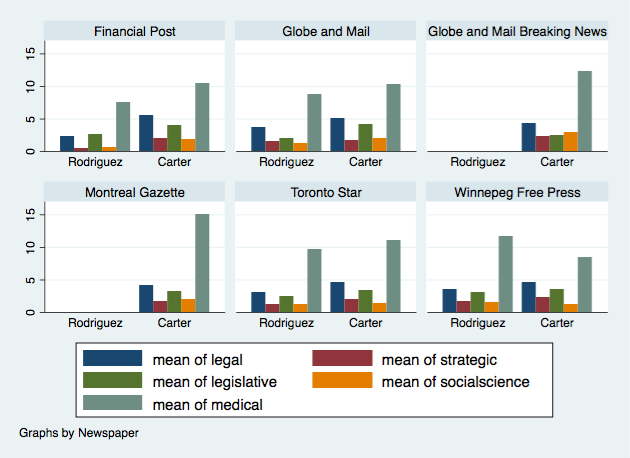
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**Figure 2 Media coverage of doctor-assisted death, before and after Supreme Court decisions**

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*Note: “Pre” is media coverage six months prior to decision, and “Post” is media coverage six months after decision.*

**Figure 3 Media coverage by Newspaper**

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1. Section 52 (1) of the Constitution Act, 1982 states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” [↑](#footnote-ref-1)
2. Whereas in the 1995 case *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), the Court suggested thatlegislative facts were owed less deference than adjudicative facts, by 2013 this hierarchy had been explicitly dissolved. Writing for a unanimous court in *Canada (Attorney General) v. Bedford* (2013), a case dealing with the constitutionality of Canadian prostitution laws, Chief Justice Beverly McLachlin explained that the use of social science evidence and expert witnesses in Charter litigation had evolved significantly in the years since *RJR-MacDonald Inc.* and that “[t]he distinction between adjudicative and legislative facts can no longer justify gradations of deference” (para. 53). [↑](#footnote-ref-2)
3. Section 7: “Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.” [↑](#footnote-ref-3)
4. The full citations for these cases are: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; 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, [2011] 3 S.C.R. 134; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602. [↑](#footnote-ref-4)
5. *R v. Askov,* [1990] 2 S.C.R. 1199,a case where the Supreme Court misinterpreted and misapplied social science data regarding trial delay which resulted in thousands of cases being stayed or withdrawn in a one year period serves as case in point. See: Baar (1997). [↑](#footnote-ref-5)
6. Full citation: *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 S.C.R. 467. [↑](#footnote-ref-6)
7. Section 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” [↑](#footnote-ref-7)
8. It is interesting to note that the Court, having recognized the violation of section 7, finds it unnecessary to consider if section 241(b) and 14 of the *Criminal Code* violate section 15 of the *Charter*, the site for the sole victory of the rights claimant in *Rodriguez*. The litigants in *Carter* did not make any arguments regarding section 12 of the *Charter*, as had been done in *Rodriguez.*  [↑](#footnote-ref-8)
9. It is important to note that since hearing *Rodriguez*, the legalization of physician-assisted death in Western democracies had drastically changed and that a number of jurisdictions (such as Belgium, the Netherlands and the states of Oregon and Washington) comparable to Canada permitted and regulated physician assisted death. At the time of *Rodriguez,* criminal prohibitions regarding aiding or assisting in the termination of life were the norm in the Western world (see: *Rodriguez v. B.C.*, at paras 48-52 and Bloodworth 2014). [↑](#footnote-ref-9)
10. The full search terms were ["doctor-assisted suicide" OR "doctor-assisted death" OR "doctor-assisted dying" OR "physician-assisted suicide" OR "physician-assisted death" OR "physician-assisted dying" OR “medically assisted dying” OR “medically-assisted death” OR “medically-assisted suicide” OR “assisted-death” OR “assisted-dying” OR “euthanasia”]. [↑](#footnote-ref-10)
11. The *National Post/Financial Post*, *The Globe and Mail* are Canada’s two national newspapers. The *Toronto Star* has a large, though primarily regionally based, readership and the *Winnipeg Free Press* is considered the newspaper of record for province of Manitoba. [Gazette] [↑](#footnote-ref-11)