

# Ghosts and Straw Men: A Comment on Miriam Smith's "Ghosts of the Judicial Committee of the Privy Council"

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Readers of Miriam Smith's article<sup>1</sup> who have not also read our recent book, *The Charter Revolution and the Court Party*,<sup>2</sup> may conclude that she is critical of everything in that book. This would be a mistake, since nowhere in her article does she challenge the two central claims of the book: (1) that there has been a "Charter revolution," and (2) that this revolution can be explained only in terms of a supporting constituency. Smith accepts these central claims, which are made also by Charles Epp in his fine book, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*,<sup>3</sup> a book Smith praises (9, n. 12; 11).<sup>4</sup> Smith disagrees primarily with our characterization of the Charter revolution as undemocratic. She prefers Epp's view that the rights revolution is democratic because it rests "on a support structure that has a broad base in civil society" (11; quoting

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- 1 "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," this JOURNAL 35 (2002), 3-29.
  - 2 F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); hereafter cited as *Charter Revolution*.
  - 3 Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998). See also Charles R. Epp, "Do Bills of Rights Matter: The Canadian Charter of Rights and Freedoms," *American Political Science Review* 90 (1996), 765-79.
  - 4 We reach a similar conclusion in *The Charter Revolution* (25).

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**Acknowledgement:** Rainer Knopff acknowledges the generous support of the Donner Canadian Foundation.

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*Canadian Journal of Political Science / Revue canadienne de science politique*  
35:1 (March/Mars 2002) 31-42

Epp, *Rights*, 199) precisely, that is, because it is supported by what we call a Court Party and Epp calls a “support structure for legal mobilization.”<sup>5</sup>

Smith also agrees with us that the current debates about judicial power need to be understood against the background of very similar debates about the courts in the 1920s and 1930s in both Canada and the United States. The controversies of that earlier period differ from current debates only in that the ideological positions are reversed.<sup>6</sup> Smith perfectly captures the “mirror image” character of the two periods: “The attacks on the court now come from the right, when they used to come from the left; the Charter is disliked by nationalists in Quebec while the decisions of the [Judicial Committee of the Privy Council] were lauded in francophone Quebec . . . the analytical and theoretical issues are the same today as then” (6).

Finally, Smith agrees with us that one should be consistent in assessing the two eras. It is no good for those on the right to praise judicial activism then and deplore it now, or for those on the left to deplore it then and praise it now. Either judicial activism is justified in both eras or in neither. We differ, of course, on which of these consistent positions to take. In *The Charter Revolution and the Court Party*, we stand with the “sceptics [of judicial power] both then and now”<sup>7</sup>; that is, with the left-wing court curbers of the past and their right-wing counterparts now. We think, for example, that minimum-wage and maximum-hour legislation is foolish and misguided, but not unconstitutional, as both the JCPC and the US Supreme Court said it was during the 1920s and 1930s. Smith, with equal consistency, defends the courts in both eras. It is this consistency that makes Smith an especially worthy interlocutor.

Again, our differences come down, at least in large measure, to our conflicting views on the extent to which judicial power is democratic. Smith argues that our critique of judicial power as undemocratic relies on simplistic, outdated conceptions of democracy and that it fatally exaggerates the democratic bona fides of the non-judicial political process. In our universe, democracy is apparently “a straightforward and uncontested concept that refers to the seemingly simple fact that democratically elected governments will act in a way that reflects the will of the majority” (15). We are said to be unaware of democratic theories according to which “leaders are elected to lead and to govern, not simply to reflect the views of the governed” (15), and to hold the “naively optimistic view that democratically elected

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5 Epp, *The Rights Revolution*, 3.

6 *Charter Revolution*, 29-31.

7 *Ibid.*

politicians represent the preferences of a majority of citizens in contrast to elitist and undemocratic courts” (12). Far from indulging such a naïve view, we make it clear that we are not simple majoritarians. We defend the idea of *representative* democracy against both populist majoritarianism and the politics of rights.<sup>8</sup> Nor do we fail to understand the importance of protecting individual and minority rights against majoritarian excess. The whole point of establishing representative democracy, we argue, was precisely to achieve that very purpose.<sup>9</sup> We simply question whether enhanced judicial power strengthens a desirable system of checks and balances in the context of representative democracy.<sup>10</sup> Although we have tried to outline the conditions under which judicial power might indeed improve the system of checks and balances,<sup>11</sup> we are not terribly optimistic that those conditions can be met, and thus generally take a negative view of judicial power.

Here Smith will object that the Canadian parliamentary system does not work very well even when measured by the standards of representative democracy, and in particular that in its current executive-dominated version it hardly exhibits the kinds of checks and balances we speak of. Again, we are perfectly aware of this critique of the parliamentary system, and agree with it to a considerable extent.<sup>12</sup> There is indeed much room for improvement in our political institutions, but we are not convinced either that the system is so bad as to be truly oppressive or that judicial power is the best cure for its ills.<sup>13</sup>

More fundamentally, Smith ascribes to us the view, shared by left-wing court curbers in the past, that courts take society in directions it would not otherwise have gone, and that this makes them undemocratic. If we were closer students of the institutionalism we profess, Smith claims, we would understand that courts have no such determining power. On this point, we would direct Smith’s attention to chapter 4 of our earlier book, *Charter Politics*, in which, following Alan Cairns, we reject both legal and sociological determinism, and argue for a more subtle interaction between social and institutional

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8 *Charter Revolution*, 154-55. For a more detailed and extensive exploration of this theme, see Rainer Knopff, “Populism and the Politics of Rights: The Dual Attack on Representative Democracy,” this JOURNAL 31 (1998), 683-705.

9 *Charter Revolution*, 151-54.

10 *Ibid.*, chap. 7; see also Rainer Knopff and F. L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), chap. 8.

11 *Charter Politics*, 225-32. Our argument here is one that our critics love to ignore.

12 *Ibid.*, 198-201; and Rainer Knopff, “Courts Don’t Make Good Compromises,” in Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001), 92-93.

13 *Charter Revolution*, 155; *Charter Politics*, chap. 6; and Knopff, “Courts Don’t Make Good Compromises,” 93.

forces, with the directional arrows running both ways.<sup>14</sup> In Smith's own terms, we subscribe to a form of institutionalism "which is interested in the ways in which organized social forces are shaped by the state as much as by the ways in which they shape the state" (17). Influence runs in both directions.

Ironically, Smith herself takes a more uni-directional position on the relationship between courts and society. Apparently accepting that the ability of unelected courts to shape society would indeed pose democratic problems, she takes the reverse position, with the arrows all running in the other direction. Far from undemocratically imposing their views on society, she contends, the courts "tend to follow the dominant mores of . . . society . . ." (22). Indeed, they generally reflect dominant social forces better than does our executive-dominated political process, making them the more democratic institution. And this was as true for the JCPC era as it is today. How, the reader might ask, is the lack of democratic responsiveness on the part of executive-dominated, but nevertheless elected, institutions to be remedied by a transfer of power to a completely unelected judiciary, which is purposely distanced and insulated from public opinion?<sup>15</sup>

Smith's answer involves Robert Dahl's classic argument that over the long term courts never remain out of step with dominant opinion.<sup>16</sup> Moreover, Smith adds, when courts appear to disconnect with the wider political process, this sometimes reflects an underlying ambivalence in public opinion. This is what the left-wing critics of the JCPC failed to understand. During the early parts of the JCPC era, Canada was not peopled exclusively by clones of John A. Macdonald, but contained a strong contingent of provincial autonomists who would, as Pierre Trudeau used to say, have caused the country to break up long ago had the JCPC not undertaken the statesmanlike accommodation of social reality. Later in the JCPC era, the judicial rejection of Prime Minister R. B. Bennett's New Deal similarly reflected real ambivalence about that policy's propriety and legitimacy. Once the public had truly coalesced behind the idea of the welfare state, the judiciary, as per Dahl's argument, fell into place. In its "delaying" phase, in other words, the JCPC, fully alive to the "dominant [and conflicting] social forces,"

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14 See especially pages 67-73 of *Charter Politics*, where we undertake an extended discussion of Cairns's body of work. Smith implies that we've never heard of Cairns.

15 On this issue, Neil Komesar has insightfully criticized the mistaken tendency to use defects in one institution to support the claimed superiority of another (Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* [Chicago: University of Chicago Press, 1994]).

16 Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-maker," *Journal of Public Law* 6 (1957), 279-95.

prevented the less democratic legislature from getting ahead of itself. What the left at that time saw as an undemocratic judiciary turned out in fact to be a better barometer of the public mood, and hence the more democratic institution. Smith contends that the same is true today. True, courts are now leading rather than lagging legislatures on such matters as gay and lesbian rights, but, again, they are more in step with public opinion, and hence more democratic. “[W]hat is claimed by Charter critics in the name of democracy,” writes Smith, “is often, in reality, nothing more than good old-fashioned resistance to a rising tide of social and political change” (18).

At this point things become a bit sticky. If there is now a rising tide of social and political change, presumably the parliamentary process will no more be able to resist it *over the long term* (Smith’s preferred time frame) than the judiciary in an earlier era could maintain its resistance to the welfare state. Despite her general characterization of legislative institutions as undemocratic, Smith herself correctly appeals to Gerald Rosenberg on the importance of legislative change to achieve solid reform<sup>17</sup> (though she ignores his complaints about the tendency of the “Fly Paper Court” to misdirect and dilute reform energies.)<sup>18</sup> Why is temporary *legislative* resistance to today’s “rising tide” bad and *judicial* acceleration of that tide good, while the reverse seems to have been the case during the JCPC era? Smith quotes James Mallory on the advantages of what she terms the “relative languor” of the JCPC in catching up with the welfare state: it “permit[ted] public opinion to crystallize, so that the adaptation of the constitution by the courts [came] as a triumphant conclusion to a time of confusion and lack of direction” (19). Why isn’t the “relative languour” of the parliamentary process on some of Smith’s favoured issues equally justified today? Intriguingly, Smith seems prepared to let partisan political controversy and division stand as an indicator of “uncrystallized” public opinion (that is, opinion that should not be implemented quickly) during the JCPC era, but resists a similar conclusion in our own day.

To make this abstract point more concrete, consider the issue of same-sex marriage. Here public opinion is indeed moving in the direction Smith favours, but it remains significantly divided and ambiguous. The public is squarely in favour of protecting gays and lesbians against discrimination in employment; that was never the central issue even in Alberta and even in *Vriend*.<sup>19</sup> Same-sex marriage is much

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17 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).

18 *Ibid.*, chap. 12.

19 Prominent politicians in Alberta indicated that they had opposed putting sexual orientation into the provincial human rights Act mainly because they worried that

more controversial, with the conflicting strands of public opinion reflected in legislative controversy, continuing disagreement on the bench,<sup>20</sup> and even disagreement between the authors of the *Charter Revolution and the Court Party*.<sup>21</sup> Although Smith is convinced that opinion on this issue is moving in the right direction, it is in fact a matter of reasonable disagreement, with plausible arguments on either side, and supportable middle-ground positions.<sup>22</sup> If unsettled and ambiguous public opinion made the JCPC's delay of the New Deal more democratic than legislative haste, why does not similarly unsettled and ambiguous opinion make legislative delay on issues such as same-sex marriage more democratic than judicial haste? Or, to state it the other way around, why was the legislature in the 1930s wrong to lead public opinion in what Smith would surely think was the right direction while the judiciary is not wrong to do the same thing today? In Smith's world, the courts appear to benefit from the rule of "heads I win, tails you lose."

No doubt Smith would respond that the non-judicial political process benefits from a similar rule in our world, and she would be right. Precisely because we are not populists, we reject the populist tendency to depreciate and bypass representative processes in favour of a tribune's allegedly direct pipeline to public opinion or "civil society." The tribune can be a political leader (usually the chief political executive or an aspirant to that office) who claims to speak for the "common sense of the common people," or a court, which will rarely make such a claim directly but whose defenders will, or an international body such as the UN, which claims to represent the "global democracy"<sup>23</sup> of "global civil society."<sup>24</sup> In each case, the institutions of electoral representa-

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such an addition would place public policy on a slippery slope that would end in the demise of traditional conceptions of marriage and the family. See, for example, Don Martin, "Stockwell Day Faces Personal Decision with Heavy Heart," *Calgary Herald*, April 9, 1998; David Bray and Ian Wilson, "Klein Claims Victory," *Calgary Sun*, April 10, 1998, News 5; and Brian Laghi, "Alberta will let Court Ruling on Gay Equality Stand," *Globe and Mail* (Toronto), April 10, 1998, A5.

- 20 See *EGALE Canada et al. v. A-G Canada et al.* 2001 BCSC, Docket: L002698.
- 21 Morton does not fully share Knopff's argument in "The Case for Registered Domestic Partnerships," *Policy Options* 20 (June 1999), 53-56.
- 22 Ibid. See also Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con* (New York: Vintage, 1997).
- 23 For example, UN Secretary-General Kofi Annan has referred to "the NGO revolution" as "the new global people-power" (quoted in *National Post*, "The Uncivil Society," December 13, 1999), which "information technology has empowered to be the true guardian of democracy and good governance everywhere" (quoted in Richard John Neuhaus, "Forget the Bilderbergers," *First Things*, February 2000, 79).
- 24 See the speech given to the Canadian Parliament by Vaclav Havel, president of the Czech Republic, on April 29, 1999. See also Ann Marie Clark, Elisabeth J.

tion are depicted as insufficiently democratic and unelected institutions are said to be more in touch with “civil society” and hence more democratic. Smith accuses us of being old fashioned for believing that parliamentary institutions are more democratic than courts. We happily plead guilty. Our parliamentary institutions certainly need improvement—they are far too executive-dominated—but enhancing the power of an unelected judiciary capitulates to and indeed even feeds the problem of executive domination rather than helping to cure it. As one of us (Knopff) has written elsewhere,

Ironically, the rhetorical use of civil society to “democratize” such unelected bodies as the UN and the judiciary furthers the already pronounced strengthening of the political executive at the expense of the legislature. The executive often allies itself with civil society constituencies to achieve international agreements or court decisions that can be used to justify ramming controversial policies through the legislature, arguing that the Constitution or our international commitments leave us no choice. Indeed, the courts sometimes read international developments into the Constitution, thereby completing a tight circle that leaves out representative legislatures. [Using] the decline of legislatures to justify the search for greater “democracy” in civil society [results in] a self-fulfilling prophecy, in which an alliance of courts, international institutions, and the domestic executive further marginalizes legislatures. A truly vicious circle.<sup>25</sup>

We believe that representative institutions have the right to be wrong, if by wrong one means being out of step with public opinion. They have the right to launch the welfare state or abolish capital punishment, even if public opinion remains unsettled and divided on these issues. They similarly have the right to resist same-sex marriage. And, most importantly, they have the right to change their minds on such issues. The legitimacy of policy flux is built into parliamentary institutions, while judicial rulings based on the constitution often imply the permanent victory of one side. This, not the fact that victories are won in court that could not be won in legislatures, is at the heart of our critique of judicial power, as any fair-minded reader of chapter 7 of the

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Friedman, and Kathryn Hochstetler, “The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women,” *World Politics* 51 (1998), 1-35. The term “international civil society” is also used: Dianne Otto, “Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society,” *Human Rights Quarterly* 18 (1996), 107-41. Another Synonym is “world civil society”: Gordon A. Christenson, “World Civil Society and the International Rule of Law,” *Human Rights Quarterly* 19 (1997), 724-37.

25 Rainer Knopff, “Civil Society vs. Democracy,” in Kathy Brock, ed., *Improving Connections between Governments and Nonprofit and Voluntary Organizations: Public Policy and the Third Sector*, forthcoming.

*Charter Revolution* would attest. We agree with Smith that constitutionalizing a policy is rarely as permanent as it seems, that in the long term courts will fall into line with dominant opinion.<sup>26</sup> But as John Maynard Keynes famously observed, in the long term we are all dead. The US Supreme Court did not permanently prevent legislation prohibiting child labour, but it prevented such legislation for about 25 years, the “childhood lifetime” of several generations.<sup>27</sup> Moreover, draping inherently contestable policy in the rhetorical mantle of permanent victory (even if that mantle cannot be maintained) does little to ameliorate the natural human tendency to exaggerate and inflate policy disagreements.

Insofar as it helps sharpen the debate—and it does—Smith’s article makes a valuable contribution. Her contribution would have been stronger had Smith more accurately stated the position she criticizes.<sup>28</sup> We have already indicated several ways in which she has missed or distorted our position. There are many more. For example, the reader relying on Smith’s presentation of our views would be forgiven for thinking that we are unaware that “studies of the public’s opinion of judges and the courts in the wake of the Charter show that . . . the Canadian public broadly supports the work of the Supreme Court of Canada and supports our human rights regime” (10). To the contrary, *The Charter Revolution and the Court Party* explicitly acknowledges these studies.<sup>29</sup>

Smith also criticizes us for not placing our study into the “big picture” of social-institutional relations. Instead of learning from scholars such as Mallory and Cairns “not . . . to read and analyze legal cases, but to examine the dynamic relationships between political institutions and society over time” (7), we allegedly devote “much of [our] presentation to a discussion of the [legal] cases,” an approach that cannot “tell us who influenced whom, how and why” (10). In fact, our central theme is that the Charter revolution is driven not by law but by societal influences, including especially interest groups and social movements, and the bulk of our analysis is devoted to exploring this theme. Contrary to Smith’s claim, our book is in this respect very much in the tradition of Cairns and Mallory, both of whom we cite.

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26 *Charter Revolution*, 166.

27 John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984), 31; and *Charter Politics*, 206–08.

28 It is striking that an article that devotes nearly 40 per cent of its space to a critique of our book has, by our count, only six footnote references to that book. Two of those are general citations in the article’s introductory sections and simply acknowledge the book, leaving four substantive references. Only three appear in the lengthy section devoted to criticizing our book, and only two of those directly address one of the five central claims Smith attributes to us.

29 *Charter Revolution*, 17. Also *Charter Politics*, 17, 204.



There can be few books on the Charter that spend less time on legal decisions and more on extra-judicial influences.<sup>30</sup>

Despite her protestations to the contrary, Smith is, of course, perfectly aware that our book is preoccupied with the social groups that drive the Charter revolution. Why else would she also criticize us for our treatment of those groups? She accuses us, for example, of failing to define the “universe of groups” with which we are concerned, and in particular to say whether corporations are included or not (8). In fact, we clearly define our universe of groups—the groups we call the Court Party<sup>31</sup>—and we explicitly explain why corporations are not included.<sup>32</sup> We expect Smith to disagree with us on this point, but it is highly misleading to pretend that we do not address the issue.

Smith goes on to ask whether “Morton and Knopff [are] focusing on a certain subset of groups rather than others[.] . . . If so, is the choice of groups biasing the questions they ask or the empirical results they obtain?” (8). That depends, of course, on the question we are trying to answer. Given that the Charter revolution cannot be explained except in terms of a supporting social constituency—a conclusion Smith’s whole approach also leads to—our central question is “what is that constituency?” In other words, where do we find systematic (as opposed to opportunistic) litigation strategies and, even more important, where do we find systematic defences of judicial power. We conclude that today’s Court Party is found on the political left, just as yesteryear’s was on the right. We make it clear that the right makes use of the courts just as the left continues to use all of the other policy-influencing tools and strategies available to them. Indeed, we argue that any political interest would be foolish to ignore the full panoply of available institutional pressure points, and that groups are not that foolish.<sup>33</sup> We do not, in short, subscribe to a “polarization and binary opposition between courts and legislatures,” nor do we deny that “influencing the courts is part of a broader political strategy that includes supporters influencing governments” (24). Moreover, we argue that all parts of the political spectrum win their share of victories and endure their share of losses. Nevertheless, the systematic defence of judicial power is not evenly distributed across the political spectrum. Despite its wins, the right today is not mounting a systematic defence of judicial power; to the contrary. Despite its losses, it is the left that is mounting that defence. If a supporting con-

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30 We engage in the discussion of cases primarily to establish the reality of a Charter revolution and the role of judges in that revolution (chaps. 1 and 2), though even then cases are not our primary thematic focus.

31 *Charter Revolution*, chap. 3.

32 *Ibid.*, 85.

33 *Ibid.*, 85-86.

stituency is necessary to fuel the growth of judicial power, it is today on the left.<sup>34</sup>

Smith disputes neither this conclusion nor the evidence we use to support it. Instead, she insists that both our evidence and our conceptual apparatus is insufficient to support a different claim, namely, that groups have won victories through the courts that they would not have been able to win through the parliamentary process.<sup>35</sup> But that is not our central question in this book. Although the issue does come up, it does so rarely, rather than being our endlessly repeated mantra, as Smith suggests.<sup>36</sup> The fact is that in this book we are mainly concerned with how the Court Party has sustained judicial power and less with how judicial power has benefited Court Party groups. Here is what we say on this point:

Explaining why the Court Party is attracted to judicial power and how it has contributed to the growth of that power, as this book tries to do, is one thing. Determining the precise extent to which the Court Party has, to use Mallory's term, "captured" the courts is quite another, and must be reserved to another occasion.<sup>37</sup>

Had our central purpose been to assess and explain courtroom victories that could not be achieved through the parliamentary system we would indeed have to take into account such subtleties as legal defeats that are considered "political victories" by the allegedly "defeated" interest. Smith writes as though we are unaware of such nuances, when in fact we have contributed to the literature on them. For example, Morton and Pal wrote an early piece on precisely the issue of legal defeats leading to (and even being sought as) political victories.<sup>38</sup> Similarly, Morton and Allen have elsewhere identified the multiple purposes of group litigation, including agenda setting, mobilization, problem-definition, legitimation, and consolidation;<sup>39</sup> indeed, they cite Smith's own research on these matters.<sup>40</sup> Morton and Allen

34 Ibid., 31.

35 It is revealing that Smith does not quote us on this point. Instead, she quotes the following from a *National Post* article by Luiza Chialkowska: the Supreme Court has been "influenced by self-serving interest groups, such as minorities and feminists, who have failed to advance their agenda through the parliamentary process" (see footnote 5 in Smith's article).

36 "No matter how many times [Morton and Knopff] assert that 'groups' (undefined) are achieving 'victories' (undefined) through the courts that they would not be able to achieve elsewhere . . ." (9).

37 *Charter Revolution*, 86.

38 L. A. Pal and F. L. Morton, "Bliss v. Attorney-General of Canada: From Legal Defeat to Political Victory," *Osgoode Hall Law Journal* 24 (1986), 141-60.

39 F. L. Morton and Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" this JOURNAL 34 (2001), 82-83.

40 Ibid., 83.

have also addressed the question of “measuring success in interest group litigation.”<sup>41</sup> Nor can we fairly be accused of neglecting the symbolic and identity-forming dimension of Charter Politics, having written a chapter in *Charter Politics* entitled “Political Symbols and the Politics of Status.”<sup>42</sup> These and related considerations do not figure prominently in the *Charter Revolution and the Court Party* because that book has a different purpose.

Likewise, had we been primarily concerned to assess courtroom victories and losses, we would indeed have done well to write more extensively about the many differences and disagreements within and among the social movements, disagreements that would lead various protagonists to quite different definitions of victory. We never deny such differences; indeed we explicitly acknowledge them.<sup>43</sup> A very different and no doubt fascinating book could have been written about them, but that was not the book we set out to write. To repeat, we were concerned to chronicle those parts of the social landscape that come together in a systematic defence of judicial power, and thus help support and legitimize that power. Our point is that “[w]hile many of the Court Party constituencies would have gained prominence in the absence of the Charter, the opposite is not true. Without a Court Party, the Charter and the courts would not have attained their current political significance.”<sup>44</sup>

There is much more that could—and needs to—be said,<sup>45</sup> but let us conclude this short response by emphasizing that we value Smith’s agreement on fundamentals as much as we decry her distortion of our argument. We agree that “it is not valid to permit the entire field of law and politics in Canadian political science to be dominated by” normative debates about the legitimacy of judicial power (28). (Why did Smith imply that we thought otherwise?) We agree that the assessment of judicial power must become more consistent across time and

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41 This is the subtitle of their article (*ibid.*, especially 58-69).

42 *Charter Politics*, chap. 4.

43 For example, *Charter Revolution*, 27, 31, 69, 72-74, 142.

44 *Ibid.*, 59.

45 We have by no means exhausted the distortions of our argument. To take just one additional example, Smith correctly identifies Cairns, Mallory, and Simeon and Robinson with a tradition of legal realism that has effectively destroyed the view “that what judges do is beyond politics, or that judicial decision making is now, or ever was, a simple matter of correctly interpreting the text of a constitutional law” (20-21). By falsely placing us in opposition to this school, Smith implies that we subscribe to simple-minded legalism. To the contrary! we have written that “to base the separation of powers between legislators and judges on a distinction between making and applying the law is to base it on a distinction without a difference,” and that any attempt to treat judging as non-political is a “naïve account of reality” (*Charter Politics*, 167).

ideological persuasions. We agree that the consistency of judicial power with democracy properly understood is a central criterion of assessment. We disagree on how democracy should be properly understood, an issue that is essentially normative in Smith's terms, and one that simply cannot be avoided, however far from "the core of political science as a discipline" Smith may think it is (7). There is much here that is worth continuing discussion and debate, including the tension between pluralist and structural approaches to democracy. And there is indeed much empirical work that needs to be done. Let the debate continue—and let us minimize the straw men.