Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science

MIRIAM SMITH *Carleton University*

The role of the courts has often aroused controversy in Canadian politics. Courts have been blamed for social engineering, for ignoring the wishes of the majority and for unjustly privileging minority interests. Judges have been scolded for overstepping their bounds, for taking on policy choices that would be better left to legislatures and even for daring to presume that they should interpret the constitution.[1] Debates on the role of the Supreme Court of Canada, especially over its interpretations of the Canadian Charter of Rights and Freedoms, recall the tenor and substance of the controversies of an earlier era on the impact of judicial review on Canadian society. In his well-known article on the Judicial Committee of the Privy Council (JCPC) in 1971, Alan Cairns wrote:

1 Good surveys of this literature by political scientists are Radha Jhappan, "Charter Politics and the Judiciary," in Michael Whittington and Glen Williams, eds., *Canadian Politics in the 21st Century* (Scarborough: Nelson Thompson Learning, 2000), 217-50; and Richard Sigurdson, "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics," *International Journal of Canadian Studies* 7-8 (1993), 95-116.

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Miriam Smith, Department of Political Science, Carleton University, Ottawa, Ontario K1S 5B6; msmith@ccs.carleton.ca

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> much of the literature of judicial review, especially since the depression of the thirties, transformed the Privy Council into a scapegoat for a variety of ills which afflicted the Canadian polity. In language ranging from measured criticism to vehement denunciation, from mild disagreement to bitter sarcasm, a host of critics indicated their fundamental disagreement with the Privy Council's handling of its tasks. Lord Watson and Haldane have been caricatured as bungling intruders who, either through malevolence, stupidity, or inefficiency channeled Canadian development away from the centralized federal system wisely intended by the Fathers.[2]

Cairns's words still seem apt. Today it is not the Privy Council but the Supreme Court of Canada using the Charter that is the villain and it is the learned justices of Canada's highest court who are derided. Once again, the courts have become, at least to some, the scapegoat for the alleged ills of the Canadian polity.

The public campaign against the Supreme Court, judges and the Charter, led by the *National Post*, the Reform Party[3] and certain Charter critics among political scientists[4] gives the impression that the decisions of the Supreme Court have been "influenced by self-serving interest groups, such as minorities and feminists, who have failed to advance their agenda through the parliamentary process."[5] When three Supreme Court justices sat down with a *National Post* journalist for a discussion marking the Court's anniversary, the headline of the interview read "Rein in Lobby Groups, Senior Judges Suggest."[6] The actual substance of the judges' remarks did not fit the headline. In fact, "the judges unanimously dismissed allegations that the court is helping organized lobbies of minorities, homosexuals and feminists subvert the parliamentary process to achieve their policy goals."[7] Yet, the picture of organized lobbies

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2 Alan C. Cairns, "The Judicial Committee and Its Critics," this JOURNAL 4 (1971), 301.

3 On the Reform party's view of the Charter, see Peter H. Russell, "Reform's Judicial Agenda," *Policy Options* 2:3 (1999), 12-15; and E. Preston Manning, "A 'B' for Prof. Russell," *Policy Options* 2:3 (1999), 15-16.

4 F. L. Morton has been fairly active in the public debate over the power of judges under the Charter. His book with Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), is an updated edition of their earlier attack on the Charter (Rainer Knopff and F. L. Morton, *Charter Politics* [Scarborough: Nelson, 1992]). Other scholars rightfully belong in the "critic" camp, notably, Christopher P. Manfredi (*Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* [2nd ed.; Don Mills: Oxford University Press, 2001]). However, my critique here focuses exclusively on Morton and Knopff's *Charter Revolution.*

5 Luiza Chwialkowska, "Power and Policy," *National Post*, April 6, 2000, B1.

6 Luiza Chwialkowska, "Rein in Lobby Groups, Senior Judges Suggest," *National Post* (Toronto), April 6, 2000, A1.

7 Ibid.

Abstract. This article examines the criticism of the activist Supreme Court of Canada in Canadian political science, as exemplified by the work of F. L. Morton and Rainer Knopff. It compares the debate over the legitimacy of judicial review with a previous generation's debates over the same question with reference to the role and impact of the Judicial Committee of the Privy Council on the development of Canadian federalism. The article argues that, particularly in examining the role of groups in the litigation process, we need to return to the lessons of the previous debate on the JCPC by emphasizing the ways in which group politics and litigation are connected to power relations in Canadian society. In the conclusion, the article offers an alternative approach to exploring the theoretical and empirical relationships between collective actors and litigation based on the Canadian Charter of Rights and Freedoms.

Résumé. Cet article examine les critiques formulées par les politologues, notamment F. L. Morton et Rainer Knopff, à l'endroit de la Cour suprême du Canada et les compare aux controverses qu'ont suscitées dans le passé le rôle et l'impact du Comité judiciaire du Conseil privé sur le développement du fédéralisme canadien. L'article soutient que, quand on analyse le rôle des groupes d'intérêt dans le processus de solution des litiges, il faut tenir compte des enseignements de ces controverses antérieures et montrer que les groupes politiques et les litiges judiciaires sont liés aux relations de pouvoir qui existent au sein de la société canadienne. En se fondant sur la Charte canadienne des droits et libertés, cet article propose une nouvelle approche théorique et empirique d'investigation des relations entre les acteurs collectifs et les litiges devant de la Cour suprême.

of minorities circumventing our democratic parliamentary process through the mechanism of an undemocratic and elitist Court has become a stock in trade of the study of law and politics in Canada, refreshed, once more, by the publication of an update and reprise of F. L. Morton and Rainer Knopff's classic attack on the Supreme Court.[8]

This analysis contends that Morton and Knopff's examination of the courts and the Charter is mired in a series of fundamental problems: their analysis is dominated by normative questions (Is the Charter "good" or "bad"?); where empirical claims are made, they are not supported by systematic evidence; and their theoretical approach, despite disclaimers, is firmly anchored in a pluralist understanding of the relationship between political institutions and organized interests. Debating the normative merits of judicial review is an activity well-suited to the hustings, and even to the law schools, as the latter are charged with the professional training of lawyers and future judges. However, political science is concerned with more than simply political or legal philosophy. As a discipline, it asks not only whether judicial power is good or bad, according to normative political standards, but also how and why judicial power works as it does, as well as what are the implications of judicial power for other actors in the political system and for society as a whole. The study of law and politics in Canadian political science is dominated by normative claims about the Charter's impact on Canadian democracy at the expense of empirical explorations.

8 Morton and Knopff, *Charter Revolution.*

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When Charter critics such as Morton and Knopff do make empirical claims, they tend to be based on outdated theoretical assumptions that are ill-suited to the study of law and politics at the beginning of the twenty-first century and unsupported by the relevant Canadian and comparative evidence. The assumptions of the Charter critics are firmly based in the pluralist approach dominant in political science during the 1950s and early 1960s. This approach privileges a certain depiction of the political relationship among groups, and among groups and courts. As will be discussed below, a pluralist approach does not empirically account for the ways in which groups use the Charter, it ignores the relationship between litigation and the other political strategies of collective actors, it isolates group politics from the structural sources of societal power, it ignores the ways in which judges and courts react to broader social trends and it cannot account for the cultural and symbolic dimension of rights-based litigation strategies.

The extent to which current scholarship is dominated by a relatively narrow political debate is particularly striking when compared to a previous generation's battles over the proper role of the courts in Canadian society, namely, the debates on the JCPC. In the 1930s, as in the contemporary era, passions ran high on the subject of judicial power. These passions reflected profound political divisions over the proper role for the state in the economy in a federal state. 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 JCPC were lauded in francophone Quebec; and the legal substance of the cases concern rights claims when it used to concern the division of powers between federal and provincial levels of government. Nonetheless, the analytical and theoretical issues are the same today as then. Do court decisions tend on balance to reflect dominant social forces or do courts act to shape society?

In the 1930s, critics of the JCPC, such as Frank Scott, argued that the court's decisions were an important factor, indeed *the* key factor in the decentralization of Canadian federalism between the wars.[9] We can ask analogous questions about the role of the courts in the period since the entrenchment of the Charter. Are the courts making a brave new world using the Charter as their instrument? Or are they merely reflecting the sociology and the political economy of Canadian society? The debates of the JCPC era foreshadow the debates of the Charter era, for good and for ill, through both the emotionalism of the

9 Among many examples in Scott's writings, see Frank R. Scott, "The Development of Canadian Federalism" [1931], in Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), 35-48.

court's critics in both periods and the lessons that finally emerged from the JCPC debates about the political economy and sociology of studying courts as political institutions. Hence, despite the normative undercurrents of the JCPC debates, the questions raised by the relationship between the court rulings and the evolution of Canadian federalism, reworked by successive generations of political scientists, provide a partial template for the study of law and politics in the Canadian context. Drawing on the lessons of this earlier debate would orient the study of the courts in Canadian politics away from normative questions and pluralist approaches back to concerns about the patterned relationships between institutions and the power structures of society that are at the core of political science as a discipline.

The first section of this article critiques the attack on the activist judiciary, as epitomized in the work of Morton and Knopff, one of the dominant works in the field.[10] It focuses on the normative and pluralist underpinnings of their work as well as on their lack of attention to the empirical validation or invalidation of their claims. The second section returns to some of the classic texts in the JCPC debate written by J. R. Mallory, Alan Cairns, and Richard Simeon and Ian Robinson. In different ways, these texts imply that the roots of the court's impact (whether the impact of the JCPC or the impact of the Supreme Court of Canada since the Charter) are to be found in society, not in the decisions of judges, and that our method as political scientists should not be to read and analyze legal cases, but to examine the dynamic relationships between political institutions and society over time. The third section proposes an alternative approach to exploring the relationship between social interests and the courts, one which explores both the structural relationships between social change and court decisions and an agent-centred focus on the role of organized social forces in litigation. In the latter, it will be argued that social movement analysis provides a better approach to understanding the role of organized interests in Charter litigation than does pluralism, particularly for some of the most contentious Charter issues such as lesbian and gay rights and women's rights.

10 Most others working in the area seem impelled to deal with the Morton and Knopff position in one way or another. Two examples are Janet L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" *Choices* 5 (1999), 3-32; and Gregory Hein, "Interest Group Litigation and Canadian Democracy," *Choices* 6 (2000), 3-25.

Morton and Knopff in Charterland

Morton and Knopff's argument can be subdivided into five main contentions, an examination of which demonstrates how Charter critics are primarily concerned with normative questions, despite their empirical claims, and how they anchor their attempts at empirical analysis in a pluralist perspective, not in the institutionalist approach that they claim. Furthermore, where empirical claims are made, they are not subjected to reasonable tests, or even formulated in a falsifiable fashion, the empirical evidence to substantiate the claims is not presented and the evidence that is presented does not substantiate their empirical claims.

First, Morton and Knopff argue that groups have obtained victories from the courts using the Charter that they would not have been able to achieve through the regular channels of parliamentary democracy. Demonstration of this argument would require several steps. The universe of groups with which Morton and Knopff are concerned would have to be defined and justified: for example, are corporations defined as "groups" in the Morton and Knopff universe? If so, why; if not, why not? Are they 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? Is the term "group" a useful way to conceptualize the social forces accessing the courts under the Charter? Morton and Knopff should then deal with the problem of defining and describing the goals of the groups accurately. How can we know if the groups have won "victories" if we do not know what their goals were? They must then demonstrate that the groups have won legal victories and, in doing so, must define the meaning of "victory" for the litigating groups. They must develop a concept of victory that can account for the fact that some litigating groups may view legal defeats as political victories or legal victories as partial, incomplete, or even as a defeats. What determines the definition of "victory"—the court's definition of a legal victory or the group's assessment of victory?

Morton and Knopff would also require a fairly well developed discussion of the policy-making process through which groups influence government beyond the courts. In order to sustain their view that the same groups that have won victories using the Charter would fail to achieve their goals through the means of parliamentary democracy, the Charter critics would have to describe credibly the process by which groups might exercise power through the "channels of parliamentary democracy" (for example, do groups lobby members of parliament; do they intervene in elections campaigns?) in contrast to exercising power through courts under the Charter. In this discussion, Morton and Knopff would have to account for the well-documented process of anticipatory policy making which, to some extent, takes presumed or assumed Charter rights into account in the legislative process and hence pollutes the

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research question.[11] Because of this anticipatory policy making, it might be difficult to distinguish cases in which groups influenced the parliamentary process independently of the Charter. Comparative analysis is one way to circumvent this problem. Such an analysis would ask if analogous groups have achieved their policy goals in similar systems elsewhere, such as systems that lack a constitutionally entrenched bill of rights (for example, the United Kingdom), or in countries that have a less extensive bill of rights than the Charter (for example, the United States). Another way would be to examine group politics in Canada before and after the Charter. Were groups successful in obtaining their policy goals prior to the Charter? Has their power increased in the wake of the Charter? What are the empirical referents of this increased power and how can we assess or measure them?[12]

Unfortunately, Morton and Knopff's work answers none of the questions above. No matter how many times they assert that "groups" (undefined) are achieving "victories" (undefined) through the courts that they would not be able to achieve elsewhere, they have not proven it, at least as defined by the standards of mainstream empirical social science. Furthermore, Morton and Knopff appear to be unaware of the steps that would need to be taken in order to defend their argument and unaware of the types of empirical evidence that would need to be brought to bear on the questions in which they claim to be interested. They neither allude to nor acknowledge the serious methodological and empirical difficulties that would be encountered by the researcher in pursuit of their argument in the thicket of the empirical evidence on groups and Charter politics. While they do describe legal decisions, they do not describe the politics of the litigating groups with sufficient accuracy for us to know if the groups themselves define these legal wins as "victories" relative to their overall goals. We do not learn how the same groups might have lost out in pursuing their goals through the channels of "parliamentary democracy" because no information is presented on this point. The groups are treated as quasi-conspiracies that arise from the subversive strategies of intellectuals and "ubiquitous" "feminist" lawyers ("shock troops of today's Court Party") who have attended certain so-called "Crit" law schools.[13] It is telling that, in Morton and Knopff's book, the authors

11 James B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government," *Canadian Public Administration* 42 (1999), 476-511.

12 Charles Epp's work has successfully tackled these very methodological and empirical problems in a comparative study that includes Canada (*The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* [Chicago: University of Chicago Press, 1998]).

13 Mary Eberts, a well-known and respected lawyer, is described as "ubiquitous" by Morton and Knopff (*Charter Revolution*, 138). References to "Crit" lawyers, law schools and shock troops are found on page 132.

spend more time detailing the careers and influence of law clerks and "ubiquitous" "feminist" lawyers than they do presenting empirical evidence about the litigating groups. They do not consult the litigating groups' position papers and facta or conduct interviews with the political activists; hence, they do not provide any measure of the litigating groups' resources. So, despite the grand claims made about the role of such groups in shaping public policy through the courts, their resources, positions and strategies are assumed and inferred rather than explored and examined. Instead, they devote much of their presentation to a discussion of the cases. However, the description of legal cases only tells us about legal cases. Legal cases themselves do not tell us who influenced whom, how and why.

A second contention of the Charter critics is that the litigating groups represent minorities—either minority points of view or minority groups (the two are often conflated in Morton and Knopff's writing). However, far from reflecting minority points of view, many Charter groups are very broadly supported by most Canadians, according to public opinion and survey research which reveal that the public approves of the job that the courts are doing with the Charter. The *National Post*, one of the leaders of the current attack on the Supreme Court, reported that its own pollster found that more Canadians than not believe that the courts should be taking away more power from elected politicians, not less. As might be predicted, in the poll the courts had stronger support among the left-leaning voters than among Reform party supporters.[14] Furthermore, studies of the public's opinion of judges and the courts in the wake of the Charter show that, despite the Reform party's decade-long campaign against certain classes of Charter litigants—refugee claimants, accused criminals and the other groups, notably homosexuals and people of colour whom Reform MP Bob Ringma wanted to send to the "back of the store"[15]—the Canadian public broadly supports the work of the Supreme Court of Canada and supports our human rights regime.[16]

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14 Compas, *The Power of Judges: Report to the National Post*, February 18, 2000, http://www.compas.ca/html/archives/powerjudges_surv.html.

15 During the debate over the inclusion of sexual orientation as a prohibited ground of discrimination under the *Canadian Human Rights Act*, Reform MP Bob Ringma said he would send his gay or non-white employees to the back of the store if they drove away customers. See Peter O'Neil, "Reform Sticks to Back of Shop Remark," *Vancouver Sun,* May 1, 1996, A1, A8.

16 Joseph F. Fletcher and Paul Howe, "Supreme Court Cases and Court Support: The State of Canadian Public Opinion," *Choices* 6 (2000), 4-57. On public support for federal, provincial and territorial human rights legislation, see also R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000), 150-68.

Morton and Knopff's contention that Charter groups are "minorities" has a very clear normative dimension: because the groups in question reflect minority points of view, they have achieved their aims against the wishes of a majority of Canadians. Presumably, it is to be regretted that groups obtain policy goals in this manner, even though the explicit purpose of judicial review is the protection of the rights of minorities against hostile majorities. However, in Morton and Knopff's view, the traditional defence of judicial review condones undemocratic, unrealistic and illegitimate interference by the courts in democratic polities. By labeling the groups that are litigating under the Charter as "minorities," or as representing minority points of view, they frankly aim to delegitimate them. They run into problems on their own terms when the groups with which they are concerned represent majorities, such as women, or the views of the majority, for example on lesbian and gay rights, as demonstrated by polling evidence.

Comparison with the extensive literature on group politics and courts in the United States suggests that the accusation of "minority" status has often been made against certain beneficiaries of judicial activism. Yet some of the most important studies of group politics and courts demonstrate that the US Supreme Court, working with an entrenched bill of rights, is not all-powerful. For example, Gerald Rosenberg's work suggests that courts did not have the influence that is normally ascribed to them in the civil rights area but that, to the contrary, the civil rights decisions of the US Supreme Court such as the famous *Brown* decision only took on meaning and force as they became part of the process of political and social mobilization of the civil rights movement. It was the movement that effected social change, not the legal decisions of a supposedly "activist" court.[17] Similarly, in one of the most important comparative studies of group politics and judicial review, Charles Epp argues that "constitutional rights in general, and rights revolutions in particular . . . rest on a support structure that has a broad base in civil society."[18] The US literature works with much more extensive empirical evidence than that proffered by Morton and Knopff and, in the case of Epp, the study includes Canada. Yet, Morton and Knopff do not seriously engage with the theoretical and empirical claims of this literature, even when it specifically includes Canada as part of a comparative case study.

Morton and Knopff's third important contention is their claim that their approach is a form of what they call "institutionalist" analysis because they are arguing that the illegitimate privileging of certain

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

18 Epp, *Rights*, 199.

minority points of view and minority groups has been brought about by political institutions, namely, by courts using the Charter. They argue that courts, as political institutions, favour certain types of groups over others. In their view, litigation favours groups with "better legal resources" and hurts groups "with superior electoral clout."[19] As has been pointed out, this claim would require careful empirical examination. Better legal resources in comparison to what or to whom? How do we measure and evaluate legal resources? How do we know when groups have "superior electoral clout"?

Furthermore, despite Morton and Knopff's avowals of institutionalism, the discussion of the impact of institutions (courts) on group politics proceeds in a classically pluralist fashion. There is no discussion of group politics in terms of systematic and structural social, economic and political inequalities. As critics of pluralism have pointed out since the 1960s, political conflict is not always observable, certain issues may be defined off the public agenda through the mobilization of bias, and certain groups may have more power than others before entering into the observable political process.[20] In fact, certain groups may not need to enter into the observable processes of political conflict at all, because their interests will be automatically accommodated in the political process through anticipation or through ideological dominance. By focusing solely and selectively on certain of the formally organized litigation groups such as the Women's Legal Education and Action Fund (LEAF), Morton and Knopff ignore the fact that such groups represent constituencies (in LEAF's case, women) who are not all-powerful in Canadian society. By restricting their gaze to the process of litigation as the means and measure of group politics, it is inevitable that Morton and Knopff's analysis will reach the conclusion that it is the Court that has "privileged" the groups that win Charter victories relative to either the litigating losers or non-litigating groups. Because they depict the Court has having privileged certain "minority" groups, they argue that their argument is "institutionalist."

However, Morton and Knopff do not follow the strictures of either rational choice institutionalism or historical institutionalism. Rational choice theory would completely undercut their naively optimistic view that democratically elected politicians represent the preferences of a majority of citizens in contrast to elitist and undemocratic courts. Rational choice theory suggests that governments will routinely fail to reflect

19 Morton and Knopff, *Charter Revolution*, 29.

20 On pluralism and its critics, see Steven Lukes, *Power: A Radical View* (London: Macmillan, 1974); John F. Manley, "Neo-Pluralism," *American Political Science Review* 77 (1983), 368-89; and Charles E. Lindblom, *Politics and Markets* (New York: Basic, 1997).

the preferences of a majority of voters.[21] Rational choice institutionalism, as a specific branch of rational choice theory, suggests that institutions create incentives for certain types of self-interested individual behaviour. If Morton and Knopff wished to pursue this approach, they would have to defend the view that litigating groups such as LEAF are composed of self-interested individuals, a difficult task. One of the main concerns of the women's movement has been with the construction of identity and the reconciliation of diverse conceptions of women's interests. Many of LEAF's positions have been criticized in the women's movement, even from within LEAF itself.[22] However, even if Morton and Knopff could sustain the view that groups such as LEAF comprise self-interested individuals, they would then have to demonstrate the ways in which the Charter creates an institutional incentive structure that privileges litigation over other strategies. However, to repeat, Morton and Knopff do not place their analysis of the group politics of the Charter in the broader framework of Canadian political institutions as a whole. Therefore, they cannot make claims about the strength of the Charter and the courts as an institutional incentive structure in comparison to other political institutions such as parliament or the bureaucracy.

Morton and Knopff's approach also fails the test of historical institutionalism. Historical institutionlism is not interested in eliding or ignoring social and economic power but in exploring the complex relationships between social and political-institutional power. Again, their analysis fails the test and, again, for the same reason. As they do not acknowledge the existence of social and economic power in society, they cannot explore the relationship between societal power and state power. Thus, their analysis is not institutionalist by either definition of the uses of institutionalism in political science.[23]

By ignoring structured social relations, Morton and Knopff manage to make feminists and other representatives of traditionally disad-

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21 See the survey and critique of rational choice theory and voting behaviour in Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory* (New Haven: Yale University Press, 1994).

22 LEAF was strongly criticized by other feminists in an extensive debate over the anti-pornography stance it took in the *Butler* case on Canada's obscenity law. See Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography," in Brenda Cossman et al., *Bad Attitude/s on Trial: Pornography, Feminism, and the* Butler *Decision* (Toronto: University of Toronto Press, 1997), 48-106.

23 On the distinction between rational choice institutionalism and historical institutionalism, see Kathleen Thelen and Sven Steinmo, "Institutionalism in Comparative Politics," in Sven Steinmo, Kathleen Thelen and Frank Longstreth, eds., *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992), 1-32; and Colin Hay and Daniel Wincott, "Structure, Agency and Historical Institutionalism," *Political Studies* 46 (1998), 951-57.

vantaged groups in Canadian society look as if they are tremendously powerful because of their court victories. In ignoring the imbalance of social, economic and political power between men and women, whites and non-whites, Aboriginal peoples and Euro-Canadians, heterosexuals and homosexuals in our society, they create a "world turned upside down,"[24] in the words of the British historian Christopher Hill, in which the last become first and the first are last. By focusing solely on litigation and ignoring the other means by which corporations, business associations or interest groups influence the political system, this type of Charter critique provides a false picture of group political life and its connection to litigation. They focus on the tip of the iceberg, the observable conflicts, while ignoring the mass lurking beneath the water. It is precisely the icy underside of Canada's sociology and political economy that was uncovered in the JCPC debates, as will be discussed below.

A fourth aspect of Morton and Knopff's argument is the dichotomy they establish between legislatures as centres of democracy and courts as elitist institutions, a dichotomy that flies in the face of most of the empirical analyses of the policy process. Legislatures cannot be counterposed to courts as centres of democratic decision making in our political system because legislatures do not play much of a policy-making role in the Canadian political system, if they ever did. Canada has one of the highest levels of party discipline in the world, which undermines the independent influence of MPs.[25] Because Canadian political parties tend to follow a brokerage or cadre form of organization, power is centralized in the leadership within the parties, at the expense of grass roots or caucus influence in policy making.[26] Increasingly, governments rule by order-in-council instead of by legislation, which makes the role of legislatures even more irrelevant. The legislature of Ontario, Canada's most populous province, met for 34 days in 1999.[27] As well, Donald Savoie has extensively documented the true "court party" in Canadian politics, whereby even the traditional bureaucracy has been eclipsed by the centralization of power in the Prime Minister's Office.[28] Savoie writes:

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24 Christopher Hill, *World Turned Upside Down: Radical Ideas during the English Revolution* (New York: Viking, 1972).

25 C. E. S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), 24.

26 Janine Brodie and Jane Jenson, *Crisis Challenge and Change: Party and Class in Canada Revisited* (rev. ed.; Ottawa: Carleton University Press, 1988); and Kenneth Carty, William Cross and Lisa Young, *Rebuilding Canadian Party Politics* (Vancouver: University of British Columbia Press, 2000), 12-34.

27 *Globe and Mail* (Toronto), June 28, 2000, A17.

28 Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). An article that discusses the otherwise neglected relationship between the executive and the

"When it comes to the political power inherent in their office, Canadian prime ministers now have no equals in western democracies."[29] In the contemporary Canadian political system, legislatures are probably best thought of as electoral colleges through which voters chose governments, rather than as deliberative policy-making bodies. For all these reasons, the dichotomy between the courts as the centre of elite decision making and the legislatures as the seat of democracy is fundamentally misleading.

While Charter critics might like to backtrack and point out that they mean governments and elected politicians, not legislatures per se, this does not save their argument. Here we see the limits of their non-theorization of democracy. Reading the Charter critics, one gets the sense that democracy is 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. But, in fact, there are many types of democratic theory and, in some of them, leaders are elected to lead and to govern, not simply to reflect the views of the governed. How is it that elected politicians or governments represent the views of a majority of Canadians on specific issues? What is the evidence that they do, given that they are rarely elected by a majority of citizens? Which theory or concept of democracy tells us that elected governments will or must do what a majority of voters want? Even if governments wanted to govern in ways that would reflect the views of citizens, what are governments to do about the minorities of citizens that may disagree with majorities on a range of policy issues? How can governments know what a majority of citizens want?[30] What about the role of political leaders and political parties in shaping political culture and public opinion? What about the role of the media in shaping the public's view of its needs and wants?

Even if we assume that governments are rational actors, the extensive literature in public policy making suggests that governments and elected politicians follow very particular paths on controversial issues. For example, the literature on blame avoidance suggests that elected politicians will seek to avoid dealing with controversial issues at all when they arouse small and concentrated minorities such as the pro-gun

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judiciary in relation to Charter debates is Linda Cardinal, "Le pouvoir exécutif et la judiciarisation de la politique au Canada. Une étude du Programme de contestation judiciare," *Politique et sociétés* 19 (2000), 43-64.

29 Donald J. Savoie, "The Prime Minister of Canada: Primus in All Things," *Inroads* 9 (2000), 38.

30 Jennifer Smith has discussed different theories of democratic representation in the context of Canadian parliamentary institutions. This provides a useful antidote to Reform-Alliance nostrums about parliamentary representation. See Jennifer Smith, "Democracy and the Canadian House of Commons at the Millennium," *Canadian Public Administration* 42 (1999), 398-421.

lobby.[31] In such cases, concentrated bands of highly committed people may make it more costly for governments to pursue the middle course that is supported by the majority of middle-of-the-road citizens, and courts may be left to defend the views of majorities in the face of blame-avoiding politicians. As has already been noted, formal public choice theory suggests the very opposite of Morton and Knopff's assumption about the relationship between governments and the governed, namely that governments will not undertake policies that reflect the preferences of a majority of citizens but, rather, the opposite.[32]

A fifth contention is Morton and Knopff's argument that the Charter's influence reflects a postmaterialist values change in Canadian society, a postmaterialism that has been engineered by Charter-obsessed intellectuals. This is a contradictory assertion. In some parts of their work, Morton and Knopff argue that Canadian society is becoming increasingly postmaterialist, suggesting that the decisions of the Supreme Court under the Charter are, to some extent at least, simply reflecting broader social, cultural and values changes occurring not just in Canada but, as the postmaterialist approach suggests, everywhere in the developed world.[33] On the other hand, though, they want to say that organized social forces, which they call "lobbies," are minorities in Canadian society, the better to sustain their view that the Court's Charter decisions are illegitimate. To this end, they argue that intellectuals and the minority groups of what they call the Court Party are the carriers of postmaterialist values. Either postmaterialist values change has occurred, which suggests that the courts, when they make decisions that are congruent with those changes, are reflecting these increasingly postmaterialist social forces, *or* what Morton and Knopff call the Court Party reflects minority points of view, inflicting itself on the innocent majority. The postmaterialist analysis suggests that values changes arise from social and political change over relatively long periods of time; in contrast, Morton and Knopff suggest that such changes have been engineered through the subversive strategies of intellectuals and lobby groups. Hence, their claims about the role of postmaterialism in the group politics of Charter litigation must be treated with skepticism.

The solution to the theoretical and empirical impasse created by Charter critics is to deploy a completely different approach, one which

31 On blame avoidance, see R. Kent Weaver, "The Politics of Blame Avoidance," *Journal of Public Policy* 6 (1986), 371-98.

32 Green and Shapiro, *Pathologies*, 34-78.

33 Morton and Knopff, *Charter Revolution*, 147. On postmaterialism in the Canadian context, see Neil Nevitte, *The Decline of Deference* (Peterborough: Broadview Press, 1996). On a similar theme, see Gilles Bourque and Jules Duchastel, *L'identité fragmenté* (Quebec: Éditions Fides, 1996).

rests in part on the sociological and political economy traditions of Canadian political science.

Reading the Classics: The Social Bases of Court Decisions

In his review of the study of the courts in Canadian political science, written in 1982 at the birth of the Charter, Peter Russell pointed out that J. R. Mallory's work represented a form of judicial realism in which "some of the distinctive interests and insights of the Innis school of Canadian political economy [are] effectively woven into the analysis of constitutional events."[34] This form of judicial realism has much in common with historical institutionalism in comparative politics 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. However, long before historical institutionalism was a glimmer in Theda Skocpol's mind, our own Canadian institutionalist tradition had grappled with the question of state and society in the development of Canadian federalism, as Simeon and Robinson entitled their study for the Royal Commission on the Economic Union and Development Prospects for Canada. To orient the study of the ways in which groups use the courts under the Charter, we need to return to these approaches.

Mallory is usually cited as arguing that the JCPC misinterpreted the constitution because the law lords were concerned to defend property, yet a careful reading of Mallory's classic text reveals a richer and more complex approach to the relationships between state and society in the process of judicial policy making, one that students of the Charter would do well to imitate. Mallory pointed out that Canadian federalism had adapted to the sea change brought about by the shift from individualism to collectivism, as he put it, or, as we might put it, the shift from classical liberalism to Keynesian interventionism.[35] Governments were beginning to legislate in ways that reflected this trend; the groups threatened by it used the courts to resist the pressure. Judges tended to look favourably on the resistor group because their training and background inclined them in that direction. So, says Mallory, groups that had been able to "shift the burden of unfavourable market conditions on to less sheltered groups" cloaked "economic motives in a concern for the public interest by raising doubts as to the powers of the legislature to enact laws to which they objected." This strategy, he argues, was naturally

34 Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science," *Canadian Journal of Law and Society* 1 (1986), 8.

35 J. R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954), 32.

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most effective "where the legislature whose jurisdiction they were defending was the least favourable to economic regulation or the least able to make its regulation effective." Frequently, Mallory tells us, cases challenging federal authority to regulate were brought by litigants seeking to avoid economic regulation and their objection was less to the constitutional law than to the substance of economic regulation.[36] Similarly, what is claimed by Charter critics in the name of democracy is often, in reality, nothing more than good old-fashioned resistance to a rising tide of social and political change.

Mallory argues that the rise of decentralization at the turn of the twentieth century, as contrasted with the relative centralization of the earlier era, was caused by economic factors. As collectivism arose in the late-nineteenth and early-twentieth centuries, the courts, whose traditional tasks were "the narrow interpretation of statutes and the application of the rules of the common law affecting private right," came to be charged with completely different tasks, namely, "the shaping of the constitution of a federal state."[37] Similarly, the Supreme Court today has been charged with a completely different task than that which it was originally assigned: from enforcing the federal division of powers, the Court has been tasked with the shaping of a human rights regime. Furthermore, Mallory pointed out that the division of powers set up by the JCPC fairly reflected pre-1914 Canadian society in which social policy, such as it was in that period, was seen as a purely local concern.[38] However, as he argues, these decisions set up Canadian federalism for the "twenty years' crisis" of the interwar period, in which the effects of Canada's transition to industrialization transformed the world of the early JCPC decisions beyond recognition. Industrialization accelerated the decentralization of Canadian federalism. Then the depression and the rise of Keynesian economic theory "cut the ground almost completely from under the Canadian federal system"[39] because the tools and mechanisms of Keynesian economic policies could not be implemented at the provincial level. Mallory argues that the JCPC decisions of the 1930s such as Prime Minister R. B. Bennett's New Deal which hamstrung Parliament, were reached because of the Privy Council's unwillingness to embrace the interventionist state advocated by Keynesians.[40]

In the long run, Mallory points out, the JCPC *did* follow Canadian society. What happened in the 1930s was a temporary lag as the courts failed to catch up with and reflect the economic, social and

36 Ibid.
37 Ibid., 37.
38 Ibid., 38.
39 Ibid., 41.
40 Ibid., 54.

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political changes that were occurring. In a federal system, according to Mallory, in words that could have been written to account for the demise of the Meech and Charlottetown accords in the 1990s, constitutional amendment will always be difficult to achieve due to "general lethargy and the passionate resistance which comes from the holders of vested rights and interests."[41] Because of the basic impossibility of effectively amending the constitution, the main mechanism of change in the federal system will be the courts, using judicial review. However, according to Mallory, the courts are slow to adapt to social change. Judges will eventually put aside the assumptions of their legal training and class background but "the patience of the general public may be severely tried by the cautious and slow process by which judges adapt the law to meet new conditions."[42] According to Mallory, federal constitutions are slow to respond to "environmental challenge," that is, to challenges to the existing constitutional order that are exogenous to the constitution itself or, to put it another way, to adapt to changes in society brought about by economic changes, such as a shift to collectivism. The advantage of this relative languor, though, is that it "permits public opinion to crystallize, so that the adaptation of the constitution by the courts comes as a triumphant conclusion to a time of confusion and lack of direction."[43] In Mallory's view, this is what happened in the 1930s. Just as Simeon and Robinson argue that the failure of interventionist policies in the interwar period in Canada must, finally, be attributed to the fact that "organized political support for a centralist vision did not exist"[44] in Canadian society at the time, so too Mallory argues that "the paralyzing effects of judicial interpretation on the Canadian constitution in the years between the wars was a reflection of the collective indecision of the Canadian people."[45] Canadian society was divided, the courts were dragged into the dispute and "the courts were not more confused than the people for whose constitution they acted as custodians."[46] Eventually, under the pressure of the war, a clear direction was established for the evolution of Canadian economic policy and Canadian federalism followed suit. An equilibrium was established in which the courts and Canadian society agreed on a new direction.

Cairns makes a similar argument in which he not only tears holes in the interwar critiques of the JCPC decisions, but argues that the

41 Ibid., 46.
42 Ibid.
43 Ibid.
44 Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 53.
45 Mallory, *Social Credit,* 56.
46 Ibid.

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decisions fairly reflected the society of the time; as he puts it, echoing Mallory: "The most elementary justification of the Privy Council rests on the broad sociological ground that the provincial bias which pervaded so many of its decision was in fundamental harmony with the regional pluralism of Canada."[47] Cairns argues that the regional diversity of Canada and the role of Quebec within the federation were sufficient in themselves to derail the centralist dreams of JCPC critics.[48]

Simeon and Robinson follow in footsteps of Mallory and Cairns by arguing that the JCPC decisions were not the main impetus to the decentralization of Canadian federalism between the wars but that, in contrast to the views of the JCPC critics, the political support in the country for centralist and social democratic solutions to Canada's interwar social and economic problems simply did not exist. Simeon and Robinson, like Cairns, emphasize the role of Quebec in supporting the provincial position, pointing out that, for good electoral reasons, it would have been supremely difficult for Prime Minister Mackenzie King to alienate his Quebec support with a massive intrusion into provincial jurisdiction through social democratic social policies with which the Church would not have been in sympathy. Furthermore, Simeon and Robinson point out that, even leaving Quebec aside, the rest of the country was not united behind a centralist social democratic approach; in particular, it is unlikely that such an approach would have found favour in parts of western Canada.[49]

The implication of this work is that the decisions of courts (and the work of judges in making judicial decisions) must be placed within a broader sociological context that takes into account the economic, political and social environment in which litigation occurs. It is precisely this big picture that is missing from the work of the critics and at least some of their would-be opponents. The big picture for Mallory was the political economy of Canada; for Cairns it was what he termed the sociology that underpins judicial policy making; for Simeon and Robinson, it was both the underlying political economy of Canadian regionalism and nationalism, and its political expressions through the party system. With respect to the debates on the JCPC, it is safe to say that those like Mallory, Cairns and Simeon and Robinson who advocated an approach rooted in judicial realism are viewed from a contemporary vantage point as having won the argument with the JCPC critics.[50] No one outside the law schools seriously believes 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

47 Cairns, "Judicial Committee," 320.
48 Ibid.
49 Simeon and Robinson, *State, Society,* 50-62.
50 Russell, "Overcoming," 8-9.

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constitutional law.[51] From the perspective of Canadian political science as represented by Mallory, Cairns and Simeon and Robinson, the law has always been political, and some Canadian law has always been "judge-made." These classic texts on the JCPC remind us of these facts of our disciplinary life.

Implications for the Charter Debate

What, then, are the specific lessons of the JCPC debate for the study of the courts and the Charter today? The classic JCPC texts suggest the need to ground our analysis of litigants and litigation in patterns of power relationships in society. Two ways in which this could be accomplished are broadly sociological, but they operate at different levels of analysis, broadly conforming to the idea of "structures" and "agents."

Structure-based Analysis

At the structural level, as the analysts of the JCPC point out, one of the major questions that should be animating the Charter literature is the extent to which the decisions of courts are driving social change or reflecting social change. Such an analysis could present social change in terms of political economy ("new" or "old"), multinationalism, the demise of patriarchy, or political cultural change (such as the rise of postmaterialism), and examine the relationship between social change and court decisions over time. Do court decisions tend to run ahead of social changes or behind them? Courts themselves could be viewed as part of the structure of political institutions, an institutional complex that, as both the rational choice and historical institutionalist literatures point out, have interests of their own.[52] It might be hypothesized that the institutional self-interests of courts render them sensitive to clearly articulated social changes, especially those demonstrated through public opinion polls (for example, a majority of Canadians favour same sex rights), party politics (for example, the rise of the Reform party), and changing social mores (for example, increased female labour force participation). In order to protect its own legitimacy as a political institution, a legitimacy which is crucial to the exercise of judicial power, it might be argued that courts will tend over time to produce a pattern of judicial decisions that reflects these social changes, as Mallory contended. Does this turn out to the be case?

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51 By this I do not mean that everyone in law schools advocates legal positivism. I only mean that advocates of legal positivism are most likely to be found in law schools.

52 Thelen and Steinmo, "Institutionalism," 4-7.

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These types of questions might be examined by exploring the pattern of judicial decisions in a given area over time and then comparing the pattern of decisions to indicators of social change.

For example, polls on lesbian and gay rights consistently show that a majority of Canadians support measures to prohibit discrimination in areas such as employment and housing and, perhaps more importantly, that a majority of Canadians support adoption, same-sex benefits, and even marriage for lesbian and gay couples. These numbers have changed substantially. In 1977, 52 per cent of Canadians believed that lesbians and gays should be protected from discrimination; in 1985, this number had rise to 70 per cent.[53] By 1996, the question on discrimination was no longer even posed by pollsters.[54] Instead, they inquired into Canadians' views on issues such as same-sex spousal benefits, marriage and adoption by lesbian and gay couples, towards which Canadians were increasingly favourable.[55] This change in attitudes towards lesbian and gay rights coincides with a period of legal change in the status of lesbian and gay rights claims. What is the relationship between changing social attitudes, rights claims and court decisions? Joseph F. Fletcher and Paul Howe's study of public attitudes towards the courts and the Charter is consistent with other polling data: the public is broadly supportive of the work of the Court.[56]

These results suggest that there is some validity in an analysis that focuses on the court's responsiveness to both social change and public opinion. If this type of sociologically grounded approach is correct, then the traditional view—that the courts defend beleaguered minorities from the trampling feet of the intolerant majority—is a dewy-eyed misrepresentation. The sociological argument suggests that courts *will not* defend unpopular minorities over the long run at the expense of the support of the majority's point of view. Despite the theory and ideology of judicial independence, the lessons of the JCPC debate clearly imply that judges cannot inflict on Canadian society what Canadian society is not ready for. *In the long run*, perhaps with some bumps, digressions and lags, the Court will tend to follow the dominant mores of the society of which it is a part, and the values and discourse of rights-based litigation itself will become part of the strategy of social movements to change society. Hence structural approaches

53 Polling data are cited at EGALE, "What Do Canadians Think?" http://www.egale.ca/features/polls1.htm.

54 Angus Reid's 1996 poll did not ask about discrimination per se, but about attitudes towards spousal benefits, same sex marriage and adoption by same sex couples (http://www.angusreid.com/pressrel/gayrights.html).

55 Angus Reid poll.

56 Fletcher and Howe, "Supreme Court Cases and Court Support," 54.

which focus on the connections between courts and patterns of social, economic and political change in comparative perspective will yield more fruitful results than the partisan debates on the old chestnut of the legitimacy of judicial review.

Agent-based Analysis

A complementary approach would be an agent-focused analysis which would explore the role of groups or, more accurately, organized interests, in litigation. Structural changes in Canadian society influence the courts in part through agents, through the role that individual litigants and interveners play in bringing cases before the courts and, indirectly, through shaping the social context in which judges do their work. Litigation and Charter politics have been used by groups not only to change public policy but, more importantly, to challenge the dominant mores and values of Canadian society, an effort that long predates the Charter.[57] That collective actors play an important role in Charter litigation is agreed upon by all sides in the current debates over judicial activism. As Epp has shown, the resource support which litigants enjoy (such as funding and organizational and legal support) is a key factor that enables a constitutionally entrenched bill of rights to have legal effect.[58]

How is such group politics to be understood? Rights-based groups, particularly equality-rights section 15 stakeholders, are among the most contentious of Charter claimants. While Epp's comparative analysis focuses on the mobilization of resources in the legal support structure, it cannot account for the reasons that such support arises. Social movement analysis, drawn from sociology and exemplified in the work of political scientists such as Sydney Tarrow, provides an important avenue for understanding the role of these types of groups in the litigation process.[59] Such an approach allows the researcher to examine the

57 For before and after evaluations, see Kent Roach, "The Role of Litigation and the Charter in Interest Advocacy," in F. Leslie Seidle, ed., *Equity and Community: The Charter, Interest Advocacy and Representation* (Montreal: Institute for Research on Public Policy, 1993), 159-88; and Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," *American Political Science Review* 90 (1996), 765-79.

58 Epp, *Rights Revolution*, 2-3.

59 Sydney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (2nd ed.; Cambridge: Cambridge University Press, 1998). The social movement literature is large and varied. I suggest my own synthesis, built on the work of McAdam, McCarthy and Zald. My approach is similar to theirs except that it places more emphasis on the subjective and interpretative elements in the framing of social movement goals by social movement actors and activists themselves (Doug McAdam, John D. McCarthy and Mayer N. Zald, "Opportunities, Mobilizing Structures, and Framing Processes—Toward a Synthetic, Compara-

meaning of litigation for a specific organization and in a specific context. This examination, which must be pursued in part through time-consuming, qualitative research, conducted group by group, demonstrates important dimensions of the group politics of litigation which are central to the debate over judicialized politics in Canada and elsewhere. Why do organizations choose to pursue certain types of political strategies and not others? Why do organizations choose litigation and not other strategies? How does litigation fit in with the broader ideological, strategic and tactical goals of organizations? How are organized interests connected to the broader social, political and economic structures of power relations in society? How does the pursuit of litigation change the politics and values of an organized group? Social movement analysis suggests several fruitful avenues for exploring the answers to these questions.

Rather than assuming, à la pluralism *pur et dur*, that the goal of litigation is to influence public policy, social movement analysis inquires what litigation means to a given movement. In the process, social movement analysis uncovers the broader strategies and "meaning frames" of which litigation is only a part. This affects the analysis of both the goals and the strategies and values of such groups. In contrast to much of our existing Charter literature, which suggests a polarization and binary opposition between courts and legislatures, social movement analysis suggests that influencing the courts is part of a broader political strategy that includes supporters influencing governments. Viewing courts and legislatures as completely separate and opposed to each other as realms of political influence is to display a lack of familiarity with the way in which the most common organizations of Charter interveners, such as the women's movement and the lesbian and gay rights movement have actually operated. For many Charter litigants, litigation is intimately tied to other experiences of political activism. In lesbian and gay rights, about two thirds of litigants were either activists before they undertook litigation or became activists as a result of their litigation.[60] Alexandra Dobrowolsky's analysis of the constitutional politics of the women's movements clearly demonstrates the ways in which the movement has mixed its strategies, employing both insider and outsider tactics in pursuit of

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tive Perspective on Social Movements," in Doug McAdam, et al., eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* [Cambridge: Cambridge University Press, 1996], 1-21).

60 Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999), 86-92.

shifting and contested goals.[61] As one feminist activist pointed out with respect to the women's movement's role in shaping the provisions of the Charter, "At bottom . . . the greatest achievement of women's constitutional struggle may not have been the rewriting of the law, but the process of strengthening mass collective action."[62] This reflects a typical social movement mix of state-focused and movement-focused goals.

Furthermore, by definition, social movements are actors that cannot be understood apart from their networks.[63] The implicitly pluralist approach to political science, among its many other failings, suggests that groups such as "feminists" are coherent actors, like the nation-states of realist theory in international relations. Following the assumptions of a simple pluralism, Morton and Knopf assume that the preferences of collective actors are given and that such groups are unitary actors. In contrast, the social movement literature suggests that these movements comprise ever-shifting networks of activists whose goals, values and strategies change, which in turn has effects on the goals of movement organizations. Within social movement organizations, movements and networks, goals and values, far from being given, may be the subject of an ongoing politics of contention vital to the life of the movement itself. In large networks of social movement activism, only a minority of activists may belong to formal organizations such as LEAF or EGALE, the organizations of women and of lesbians and gays, respectively, that are typically mentioned by the dominant literature on the Charter and included in catalogues of group politics.[64] According to the assumptions and methods of social movement analysis, focusing solely on organizations generates a distorted picture as it would miss the extended informal networks of contention that are key to a movement's identity and politics. Even postmaterialism may be misleading as a picture of the environment of cultural change as epitomized by such movements because even the archetypal "new" social movements,[65] such as the women's movement and, certainly, the lesbian and gay rights movement, have strong material interests in equality and have substantial internal diversity and dissent over class

61 Alexandra Dobrowolsky, *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada* (Don Mills: Oxford University Press, 2000), 8-14.

62 Cited in Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983), 13.

63 Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (Oxford: Blackwell, 1999), 110-36.

64 For example, Hein, "Interest Group," 6.

65 The so-called new social movements are not always new. For Canadian evidence, see Lorna Weir, "Limitations of New Social Movement Analysis," *Studies in Political Economy* 40 (1993), 73-102.

issues.[66] It is impossible to characterize social movements as wholly concerned with one side or the other of the materialism/postmaterialism equation. In most cases, the truth is somewhere in between.

Rather than assuming that the meaning of litigation for Charter stakeholders solely concerns changes to public policy and clearly identifiable "wins" and "losses," social movement analysis problematizes strategies, values and discourse of groups. Rather than taking the preferences of groups as given, social movement analysis understands organized groups to be parts of broader networks in which there may be intense contestation over identity, values and preferences. Dobrowolsky's analysis shows how different branches of the women's movement saw constitutional and rights issues differently across time and space. The lesbian and gay rights movement contains diverse strands which have quite different stakes in equality-seeking under the Charter.[67] Social movement theory helps us to explain why some organizations may act in seemingly irrational ways. In some cases, social movement organizations with obvious legal interests in the Charter have refused to become involved in litigation; in others, the possibility of Charter litigation does not appear to have been considered by movement organizations, even when such litigation would have helped the group to achieve its avowed policy goals.[68]

This type of analysis draws our attention beyond the instrumental goals of groups. As has often been noted in the extensive literature on social movements, such movements often challenge the dominant codes of society as much as they challenge or change public policy outcomes.[69] Hence, the greatest changes wrought by an entrenched bill of rights may have nothing to do with whether or not particular groups win or lose before the courts. This may be the single biggest mistake in the literature—the obsession with win/loss ratios before the courts and the belief that court decisions in themselves constitute public policy.

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66 For example, Claire F. L. Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost?" *Dalhousie Law Journal* 17 (1994), 534-59.

67 Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation," *Osgoode Hall Law Journal* 28 (1989), 789-815; and Brenda Cossman, "Same Sex Couples and the Politics of Family Status," in Janine Brodie, ed.; *Women and Public Policy* (Toronto: Harcourt Brace, 1996), 223-54.

68 On the ways in which social movements may "see" or "miss" political opportunities, see Lee Ann Banaszak, *Why Movements Succeed or Fail: Opportunity, Culture and the Struggle for Woman Suffrage* (Princeton: Princeton University Press, 1996), 31-35.

69 The idea that the primary function of social movements is to challenge the dominant codes of society is central to the work of Alberto Melucci (*Challenging Codes: Collective Action in the Information Age* [Cambridge: Cambridge University Press, 1997]). Again, if we pay attention to the ways in which social movement actors understand their own actions and goals, we will often uncover societally oriented (rather than state-oriented) goals.

Rather, as the literature on the role of the US Supreme Court has repeatedly shown, groups may win in court but lose in society when court decisions are unenforced by other branches of government.[70] The win/loss ratio may be irrelevant to the group for other reasons—the goal of the group may not be to influence the state. The greatest impact of Charter litigation may be on the ways in which rights claims function as symbolic resources for social movement organizations: symbolic resources which play a dual role of, first, solidifying and reinforcing a particular political identity in the interests of social movement cohesion, however provisional in practice, and, second, effecting the very types of culture change of which the postmaterialists write.[71] If this approach is correct, it suggests that social movements may have a greater impact on society and on public policy through using rights as political resources aimed at their own constituencies, and at society at large than they do through the success or failure of litigation efforts. In the case of the lesbian and gay rights movement, the failures of the movement before the courts in both the pre- and post-Charter eras were key episodes in the life of the movement, in the construction of its political identity and in the ways in which it succeeded in its primary goal of challenging the dominant codes of a heterosexist society.[72] This provides a particularly compelling example, because it is plain to see how oppressive social codes might render formal legal rights meaningless for individual lesbians and gays who might not want to pay the social costs of outing themselves.[73] The idea that movements may use rights claims to influence society as much as the state, and that social movement organizations, whatever the basis of their claims, may have a greater impact on social attitudes than they do on public policy, is well recognized in the comparative literature on

70 Rosenberg, "The Hollow Hope," 336-43; and Stuart A. Scheingold, "Constitutional Rights and Social Change: Civil Rights in Perspective," in Michael W. McCann and Gerald L. Houseman, eds., *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Glenview: Scott, Forseman, 1989), 73-91.

71 Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974).

72 Miriam Smith, "Social Movements and Equality-Seeking: The Case of Gay Liberation in Canada," this JOURNAL 31 (1998), 285-309.

73 The deployment of both legal and other political strategies in the lesbian and gay rights movements is documented in the growing comparative and Canadian literature on this movement: David Rayside, *On the Fringe: Gays and Lesbians in Politics* (Ithaca: Cornell University Press, 1998); Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); Barry Adam, *The Rise of the Lesbian and Gay Rights Movement* (2nd ed.; Boston: Twayne, 1995); and Miriam Smith, "Political Activism, Litigation and Public Policy: The Charter Revolution and Lesbian and Gay Rights in Canada, 1985-1999," *International Journal of Canadian Studies* 21 (2000), 81-110.

such movements.[74]

Social movement analysis is consistent with a structural approach. It is not convincing to assert that the state created the contentious group politics of the Charter through its funding policies.[75] The state does not create groups willy-nilly. EGALE, an organization representing lesbians and gay men—the constituency that has seen its rights position most radically transformed as a result of section 15 litigation—has never received a penny of core organizational funding from government.[76] An agent-centred social movement analysis connects to the structural approach in that both social movement analysis and various structural theories of social change such as postmaterialism, suggest that social movement organizations are connected to broad movements of social change that, while they may have been influenced by states, were not created by them.

Conclusions

Charter critics are wrong to focus on the illegitimacy or legitimacy of the Charter. Although it is perfectly valid to engage in a normative and philosophical debate about the role of courts and rights claims in relation to Canadian democracy, it is not valid to permit the entire field of law and politics in Canadian political science to be dominated by such debates. Theoretical and empirical claims made by Morton and Knopff are anchored in a pluralist approach to understanding the relationship between groups and the state. However, the specific contentions produced by this approach are not subjected to reasonable empirical tests. By advocating a pluralism in which the litigating actors are viewed as operating on the same level playing field before they are privileged by the so-called ''activist'' courts, litigants and interveners are presented as disconnected from the broader movements of which they are a part and, for the Charter critics, implicitly treated as a form of deviant growth on the body politic, instead of as legitimate collective actors.

This means that important dimensions of the politics of litigation are simply ignored in the Canadian literature, a silence that is all the more lamentable because Canada is a fascinating ''test case'' for a number of alternative questions and hypotheses about litigation and

74 For example, Marco G. Giugni, ''Was it Worth the Effort? The Outcomes and Consequences of Social Movements,'' *Annual Review of Sociology* 98 (1998), 371-93.

75 Morton and Knopff, *Charter Revolution,* 87-10. Pal also argues that the state played a key role in creating Charter stakeholders (Leslie A. Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada* [Montreal: McGill-Queen's University Press, 1993], 265-80).

76 Smith, *Lesbian and Gay Rights*, 101-03.

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group politics. As a test case, Canada will become more important in the years to come as Europeans (particularly the British) will want to see the effects of rights-centred judicial power in parliamentary political systems. Surely scholars can do better than tell the old story about the (il)legitimacy of judicial review, or warn them to watch out for subversive minorities.

We should recall the disciplinary lessons of the JCPC debates on judicial power. As Mallory, Cairns, and Simeon and Robinson have argued, we should seek to understand the decisions of courts in their larger social, political and economic context. Two other possibilities are a focus on the relationship between court decisions and structural social change and an agent-centred focus on the ways in which groups pursue litigation in relation to other political strategies, values, interests and goals. The structural approach would highlight the rational behaviour of courts as defenders of their own institutional self-interest in a changing social context, while the agent-centred approach would highlight not only the ways in which groups may pursue instrumental and material goals through litigation but, also, and perhaps more importantly, the ways in which organizations use litigation as a tool in a larger symbolic struggle for political and social legitimacy. The results might lead to more nuanced conclusions about the impact of the constitutional entrenchment of the Charter than we have yet reached. We might find that the "judicialization" of Canadian politics has occurred more at a symbolic and ideological level than at an instrumental or policy level. It is not that groups have achieved policies using the Charter that they could not or have not achieved elsewhere by other means, including in countries that lack anything like the Canadian Charter of Rights and Freedoms as a set of constitutional rights guarantees. Rather, it is that groups are able to use rights claims to produce a symbolic and contentious politics that challenges the previously dominant "codes" of Canadian society.

By not seeing or defining the collective actors for what they are, the dominant literature on the courts and the Charter in Canadian political science largely silences and rules out of bounds the interesting questions about the dynamic relationships between political institutions and organized interests. The result is a field of study which, despite the substantial growth of empirically oriented scholarship, is still dominated by the same old debate over the legitimacy of the Charter's entrenchment. It's time to move on.