

Partisanship as Political Science: A Reply to Rainer Knopff and F. L. Morton

MIRIAM SMITH *Carleton University*

One of the main points of “Ghosts of the JCPC”¹ is that the study of Charter politics is currently dominated by a sterile and well-worn debate over the legitimacy of judicial review. Rainer Knopff and F. L. Morton return to these issues in their reply.² They frequently refer to their own position or to my putative positions in their reply to my work. But, they do not engage in a discussion of *what is*, or in making arguments about how we might understand or explain *what is*, rather than on constantly judging *what is* according to our own personal and partisan political prejudices.

For example, Knopff and Morton claim that I believe that we should be “consistent in assessing” the eras of the Judicial Committee of the Privy Council and the Canadian Charter of Rights and Freedoms. What do Knopff and Morton mean by “assessing?” Do they refer to empirical assessments of explanations of judicial behaviour or of the impact of judicial decisions on society? No, because they write: “It is no good for those on the right to praise judicial activism then and deplore it now, or for those on left to deplore it then and praise it now (32). In other words, we are to assess judicial activism as a good thing or a bad thing. We are to praise judicial activism or bury it. This obsession with what is good and bad about courts, judges, judicial review and court cases carries on throughout their reply. This is perhaps to be expected of the authors of a book whose final chapter is

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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 “Ghosts and Straw Men: A Comment on Miriam Smith’s “Ghosts of the Judicial Committee of the Privy Council,” this JOURNAL 35 (2002), 31-42.

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

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entitled “What’s Wrong with the Charter Revolution and the Court Party?”³

They are chasing a chimera. I do not see it as my job to judge judges. I do not see it as my job to have a “position” on whether parliament or the courts are more or less democratic. Unlike Knopff and Morton, I am not advocating for one concept of democracy over another. I am arguing for a research agenda.

In “Ghosts of the JCPC,” I argue that such a research agenda must focus on *explaining* judicial behaviour in a social context and on teasing out the complex relationships between group politics and litigation over time. Knopff and Morton claim that they have grappled with the state/society relationship in their work. They write, in their reply, that the bulk of their analysis in *Charter Revolution* is devoted to interest groups and social movements and the ways in which these social actors drive Charter litigation. Yet, as I pointed out in “Ghosts of the JCPC,” their work fails to pass the test of either research design or empirical evidence in this area. Claiming to have studied a social movement does not make it so.

Morton and Knopff contest this in their reply and accuse me of ignoring the middle chapters of their book. Although I have already critiqued their treatment of group politics in the original article, I will return to that critique in this reply. The first of the middle chapters (chapter 3) lists various group sectors such as civil libertarians, equality-seekers and social engineers, and characterizes their positions in Charter litigation and judicial review.⁴ The sources for the chapter are legal cases along with secondary literature from sources such as the American conservative Thomas Sowell. To repeat what I said in “Ghosts of the JCPC,” legal cases tell us a lot about legal cases but they do not tell us about the political strategies of the litigating groups and about how litigation is used as a political strategy. Chapter 4 discusses state funding of the “Court Party” groups. Drawing on empirical research on the Secretary of State and Court Challenges Programs conducted by Leslie A. Pal and Ian Brodie, they repeat the argument that the state has been funding the “Court Party.” One of the few places where they offer their own original empirical contribution is in their tally of the Social Sciences and Humanities Research Council’s strategic grants program which awarded “four on feminist issues, two on Charter remedies, and one each on aboriginal rights, elder abuse, rights of the mentally-handicapped, and environmental rights”⁵ in 1990. These data are presented as part of an overall discussion of the

3 F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 149.

4 Ibid., 60-86.

5 Ibid., 100

ways in which the state has funded “advocacy scholarship” on behalf of “Charterphiles” and the “Court Party.”⁶ The authors seem to be unaware of the irony of their criticisms of SSHRC, given that they inform us in the preface that they each received grants from SSHRC to fund the research on which *Charter Revolution* is based.⁷ Their attack on the “Court Party” is apparently defined as a legitimate research project while feminist, Aboriginal and similar projects are derided as “Court Party” advocacy. If we follow this logic, peer-reviewed processes such as SSHRC assessments will become impossibly politicized to the detriment of the research community as a whole. Aside from the SSHRC data and the citation of legal cases, I do not see any primary sources or original research in chapter 4.

In chapter 5, entitled “The Jurocracy,” Morton and Knopff cover the following topics: courts, administrative tribunals, government legal departments, the Law Reform Commission of Canada and the National Judicial Institute and Western Judicial Education Centre. To give the flavour of this chapter, the latter two organizations are described as “indoctrination centers for Court Party orthodoxy.”⁸ The chapter provides what the authors term “anecdotal evidence” and “independent anonymous sources” that “left leaning” clerks influence important Supreme Court decisions such as the design of the *Oakes* test.⁹ Aside from anecdotal evidence and anonymous sources, citations for chapter 5 include Robert Bork, Ian Brodie, and, yes, more legal cases. In fact, throughout these chapters, the only primary documents cited as far as I can see are court cases. And, furthermore, to repeat what I said in “Ghosts of the JCPC,” no research whatsoever has been conducted on actual interest group and social movement organizations. Where original empirical research on group politics in Canada is cited, it comes overwhelmingly from the work of Leslie A. Pal and Ian Brodie, supplemented to a lesser extent by the work of Gregory Hein.¹⁰ And, most of the citations from Brodie and Pal do not concern “social influences” or

6 Ibid., 87-104.

7 Ibid., 10.

8 Ibid., 125.

9 Ibid., 111, and note 16, page 190.

10 According to Morton and Knopff’s endnotes, the major works here are Leslie A. Pal, *Interest of State: The Politics of Language, Multiculturalism and Feminism in Canada* (Montreal: McGill-Queen’s University Press, 1993); Ian Brodie “Interest Groups and Supreme Court” (no further citation provided); and Gregory Hein, “Social Movements and the Expansion of Judicial Power: Feminists and Environmentalism in Canada from 1970 to 1995,” unpublished PhD thesis, University of Toronto, 1997. Unfortunately, *Charter Revolution* does not have a bibliography and one has to search the notes to find the complete citations. In the case of Brodie’s “Interest Groups,” I am unable to locate a full reference in the notes.

studies of the politics of interest groups, but data on state funding of "Court Party" groups.

Knopff and Morton claim in their reply that "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" (38). I will leave it to the reader to judge whether counting up the feminist research projects that win SSHRC grants and repeating "anecdotal evidence" about legal clerks constitutes serious empirical research on interest group and social movement politics and litigation.

To take up another theme of their reply, Knopff and Morton argue that their book is not concerned with how groups have benefited from judicial power. They claim I have created a straw man in arguing that their book describes the ways in which groups have obtained policy outcomes through the courts that they could not have obtained through legislatures. They say they are concerned "with how the Court party has sustained judicial power and less with how judicial power has benefited Court Party groups" (40). But, why should we be concerned about the power of courts unless we are concerned about what it is that courts are doing, and by extension and implication, about who is benefiting from judicial power? They cannot credibly claim that they do not care about who wins and who loses when they devote much of their comment to clarifying their individual positions on same sex registered domestic partnerships. If they are not concerned about who is benefiting from judicial power, then why are they at such pains to clarify their personal positions on matters of public policy?

They also argue that I actually agree with them on two points; namely, that there has been a Charter revolution in Canadian politics and that this revolution has been driven by group politics. I disagree. I do not think that we can fairly say that there is any meaningful or significant zone of agreement between their position and mine. That the Charter has had a substantial impact on Canadian politics is about as controversial as claiming that the sun rises in the east. To say that we agree that the Charter revolution "can be explained only in terms of a supporting constituency" (31) is only true on the most superficial level. My understanding of the "supporting constituency" is rooted in political economy and sociology, using as examples of these approaches some of the classic works of Canadian political science. Knopff and Morton have not integrated the insights of the classics into their own. To argue that one law clerk's Harvard education explains important judicial outcomes is an approach based on a methodological individualism that turns group politics into conspiracies of the like-minded. Their "Court Party" is cut off from society and political economy or from any approach which would recognize that social and political structures or collective actors are larger than individuals. It would

seem that, for Knopff and Morton, as for Margaret Thatcher, there is no such thing as society.

Further, their reply misinterprets my use of James Mallory by implying that I have a firm position on the state/society question when, in fact, I use Mallory as a vital lesson in disciplinary history for those who may have forgotten the magisterial mix of political economy and institutionalism in *Social Credit*.¹¹ Moreover, Mallory provides us with an example of the type of theoretical approach we might fruitfully employ in contemporary Charter studies and his views on the relationship between courts and public opinion act as a caution against Morton and Knopff's dismissal of public opinion studies that undermine their indictment of the so-called "Court Party." Speaking of the Court Party, in their reply, Knopff and Morton do not engage with my critique of their use of this term, leaving the impression that, far from having an interest in exploring the role and impact of Epp's "support structure" for litigation (what they term the Court Party), they are only interested in decrying it with name-calling.

Knopff and Morton appear to be quite concerned about the issue of lesbian and gay politics. Here again they focus on the merits of court cases, particularly *Vriend*, that arose in Alberta and which (interestingly) has become the *bête noir* of the "gay rights" cases for the right.¹² With regard to *Vriend*, they argue that it is reasonable to debate the pros and cons of lesbian and gay people being fired from their jobs because of their sexual orientation and that, anyway, the *Vriend* debate is really about "a slippery slope" that might lead to "the demise of traditional conceptions of marriage and the family" (n. 19). Their sources on this? The gay Republican journalist Andrew Sullivan along with Stockwell Day, an Alberta politician of the "Christian right" and the province's Conservative premier, Ralph Klein (n. 19,

11 James Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954).

12 This is curious because *Vriend* merely brought Alberta's human rights legislation into line with other provinces and the federal government by ensuring that sexual orientation was included as a prohibited ground of discrimination in provincial human rights legislation. This change first occurred in a Canadian jurisdiction in 1977 and, hence, it is hard to see why it is so controversial. One would think that those opposed to "gay rights" would be more upset over the case of *M v H* in which a lesbian successfully sued her former partner for spousal support upon breakdown of their relationship. *M v H* is by far the most consequential lesbian and gay rights case to date, and has led directly to important amendments to provincial legislation recognizing same sex partners in Quebec, Ontario, Nova Scotia, British Columbia and Saskatchewan, as well as to the federal legislation which overhauled federal laws and regulations to recognize same sex partners. Perhaps right-wing Charter critics are unhappy with *Vriend* because it forced the Alberta government into action. Perhaps they are happy with *M v H* because it privatizes economic support.

n. 22). To say the least, this is a strange list of expert sources on the lesbian and gay rights movement in Canada. If one is only interested in debating the merits of court decisions and the substantive issue of so-called "gay rights," the opinions of gadfly journalists and social conservative politicians in Alberta are as good as anyone else's. But, if one is interested in how interest groups and social movements drive Charter litigation, then one needs to look beyond the opinions of right-wing politicians and journalists.

I can only conclude that Knopff and Morton conceive of political science as a continuation of political battles by scholarly means. I do not share this vision of my vocation as a political scientist. I write from a position that challenges "heteronormativity," that is, the heterosexual and heterosexist organization of social knowledge and practice. A two-sided debate over so-called "gay rights" has little to do with the complex realities of heterosexism and patriarchy in Canadian social and political practices (including within the discipline and profession of political science), let alone with the diversities of the lesbian, gay, bisexual, transgendered and transsexual communities. Knopff and Morton refer in their reply to the positions on various Charter issues which I am alleged to favour, such as same-sex marriage (35). Frankly, the idea that I support every lesbian and gay rights measure is just plain old-fashioned stereotyping that displays a lack of interest in and knowledge of one of the very "interest groups and social movements" that Knopff and Morton claim they studied in their book. *Either* they give up on saying that they have studied the "gay rights" movement and admit that their analysis of *Vriend* rests on a reading of the case supplemented by partisan talking points *or* they give up on saying that their analysis has moved beyond courts and legal decisions and examines "interest groups and social movements." Moreover, until I engage in political action, my position on various lesbian and gay rights issues is not on the table.

In reality, the main issue in this debate has nothing to do with the Charter and its impact on Canadian politics. Rather, it concerns the age-old divide between facts and values in the conduct of social science. If Canadian scholars in the field of law and politics continue to give discursive space to a values-dominated, parochial and partisan style, then the field will risk moving away from the central theoretical, analytical and empirical debates of comparative politics. As students of Canadian politics, we will be isolated behind firewalls of partisan bickering and cut off from the international and transnational disciplinary conversations of our fellow social scientists. Let us avoid this fate and ensure that the study of law and politics in Canada assumes its proper place as an internationally recognized subfield of comparative politics.