LAW AS POLITICS

THE CHARTER REVOLUTION AND THE COURT PARTY by F.L. Morton and R. Knopff (Peterborough, Ontario: Broadview Press, 2000)

I. INTRODUCTION

As the twentieth anniversary of the proclamation of the *Canadian Charter of Rights and Freedoms*[1] draws near, the two political scientist co-authors of *The Charter Revolution and the Court Party*[2] have written a robust right-wing critique of current *Charter* interpretation, and of the coalition of leaders, elites, and interest group supporters which has been influential in shaping the interpretive process. Permeating the book are the interrelated themes of the postmodernist effect on society, academia, and the law; the basis and scope of judicial review; and the relationship of the third branch of government to democratic theory.

Because the co-authors emphasize their right-wing ideological orientation and political science training, they often lapse into the advocacy scholarship in which law is politics for which they criticize their left-wing adversaries. A more subtle interdisciplinary approach could have charted a middle course between the two prescriptive polarities of judicial activism and judicial restraint. Nevertheless, the book is a well-researched, systematically organized, and unusually blunt statement of a minority view in Canadian scholarship that contributes to a wider debate surrounding the *Charter*. Because ideological disagreement can produce vehement hostility, Sir Isaiah Berlin described the potential danger when open-minded academic analyses of conflicting ideas are not encouraged: "[W]hen ideas are neglected by those who ought to attend to them — that is to say, those who have been trained to think critically about ideas — they sometimes acquire an unchecked momentum and an irresistible power over multitudes of men [and women] that may grow too violent to be affected by rational criticism."[3]

In this review, I shall examine the ideology and methodology of the book's content, the co-authors' consideration of Critical Legal Studies, and their contribution to the constitutional theory of dialogue among the branches of government.

II. CONTENT, IDEOLOGY, AND METHODOLOGY

Professors Morton and Knopff begin by defining the *Charter* revolution as the replacement of parliamentary sovereignty by constitutional supremacy bordering on judicial supremacy.[4] This revolution has been driven by the judges and the coalition of social interests that comprise the Court Party, which promotes the growth of judicial

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

2 F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000) [hereinafter *The Charter Revolution*].

3 I. Berlin, "Two Concepts of Liberty" in *Four Essays On Liberty* (Oxford: Oxford University Press, 1969) 118 at 119.

4 *The Charter Revolution*, *supra* note 2 at 13.

power.[5] The judges perform their roles in the *Charter* revolution by means of interpretive discretion and "oracularism." "Oracularism" is defined as the judiciary's tendency to give priority to constitutional policy in litigation rather than restricting itself to a specific dispute.[6] The Court Party is made up of five overlapping and sometimes conflicting constituencies: national unity advocates, civil libertarians, equality seekers, social engineers, and postmaterialists.[7]

The financial patrons of these member groups have included such government agencies as the Secretary of State, the Court Challenges Program, and Legal Aid.[8] The state also provides the Court Party with a rights bureaucracy including courts, administrative tribunals, human rights commissions, law schools, and judicial education programs.[9] This "jurocracy" initiates, funds, legitimates, and implements the rights claims of the Court Party.[10] According to the co-authors, there is a conjunction of power and knowledge in the legal academies which promote the collective self-interest of lawyers, emphasize theoretical and constitutional issues above vocational training, and are influenced greatly by postmodern orthodoxy, especially Critical Legal Studies.[11] The universities provide administrative assistance, rights expertise, and advocacy scholarship in support of the Court Party.[12]

In the concluding chapter, Morton and Knopff assert that the *Charter* revolution is fundamentally undemocratic because it is antimajoritarian and erodes the habits and temperament that are the lifeblood of representative democracy.[13] Modern judicial review does not protect a fundamental core of existing rights, but is being employed as a tool to change public policy through the judicial creation of new rights. The constitutional theory of dialogue among the branches of government is predominantly a monologue in which judges issue most of the authoritative statements, although these are not usually permanent.[14]

The Charter Revolution is a less legalistic Canadian version of *The Tempting of America: The Political Seduction of the Law*[15] by Robert H. Bork. The Senate defeat of President Ronald Reagan's Supreme Court nomination of Judge Bork primarily on

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5 *Ibid.* at c. 3. The co-authors admit that the Court Party is really a coalition. This admission addresses the criticism that the Court Party is not a unified party. See K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 117-118.

6 *The Charter Revolution*, *ibid.* at 53.

7 *Ibid.* at 59.

8 *Ibid.* at c. 4.

9 *Ibid.* at c. 5.

10 *Ibid.*

11 *Ibid.* at 130.

12 *Ibid.* at 133-47.

13 *Ibid.* at 149.

14 *Ibid.* at 166.

15 R.H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990) [hereinafter *The Tempting of America*]. See also R. Bork, "Courting Disaster" *National Post* (18 February 2000) A18 and R. Lacayo, "The Law According to Bork" *Time* 130:12 (21 September 1987) 28.

ideological grounds prompted Bork to write a wide-ranging attack on the liberal interpretation of the United States Constitution. Bork feigned ideological neutrality and criticized those left-wing groups which advance their political interests through the courts, thus circumventing the legislative process:

> The orthodoxy of original understanding, and the political neutrality of judging it requires, are anathema to a liberal culture that for fifty years has won a succession of political victories from the courts and that hopes for more political victories in the future. The representatives of that culture hate the American orthodoxy because they have moral and political agendas of their own that cannot be found in the Constitution and that no legislature, or at least none whose members wish to be reelected, will enact. That is why these partisans want judges who will win their victories for them by altering the Constitution.[16]

Professor F.L. (Ted) Morton, one of the co-authors of *The Charter Revolution*, was closely associated with the Reform Party of Alberta and presently supports the Canadian Alliance.[17] Preston Manning, the former leader of the Reform Party of Canada (now the Canadian Alliance), advocated various methods of "democratic control over judicial power" and a reversal of the trend of the Supreme Court deciding major social policies, instead of the legislatures and Parliament.[18] The ideological perspective expressed in *The Charter Revolution* regarding the judicial role reflects the general tenor of the Reform Party position. There is even a hint of regional division directed at Ontario, which is described as "the political heartland of the Court Party."[19]

Morton and Knopff focus their attention upon the increase in judicial power caused not only by the *Charter*, but also by a coalition of societal interests. Their work is organized around the four interconnected elements of description, analysis, theme, and prescription. To underscore their ideological approach, the co-authors cleverly apply Marxist analysis and vocabulary in their perception of Canadian constitutional law dynamics. The *Charter* revolution is being carried out by the Court Party consisting of leftist organizations and individuals rooted in a postmaterialist knowledge class and a judiciary which is in the vanguard of the intelligentsia.[20] The failed Soviet experiment in Marxism is cited as

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16 *The Tempting of America*, *ibid.* at 7.

17 F.L. (Ted) Morton was elected as a Senatorial Nominee on behalf of the Reform Party of Alberta in the 1998 Senate Nominee Election. See A. Chambers & A. Jeffs, "Reformers Chosen as Senatorial Nominees" *The Edmonton Journal* (20 October 1998) A1. Professor Morton is the Director of Research for the Canadian Alliance. See Canadian Alliance, "It's Your Alliance," online: Canadian Alliance <www.canadianalliance.ca/policy_dev/index.html> (date accessed: 19 February 2002).

18 E.P. Manning, M.P., "A 'B' For Prof. Russell" (1999) 20:3 *Policy Options* 15 at 15.

19 *The Charter Revolution*, *supra* note 2 at 139. The Reform Party of Canada began as a Western protest party. See P. Manning, *The New Canada* (Toronto: Macmillan Canada, 1992) at 118, and F. Dabbs, *Preston Manning: The Roots of Reform* (Vancouver: Greystone Books, 1997). Professors Morton and Knopff do express reservations concerning right-wing populism related to representative democracy. See *The Charter Revolution*, *supra* note 2 at 154-55.

20 See K. Marx & F. Engels, "Manifesto of the Communist Party" in R.C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: Norton, 1978) at 469-500 for similar references to the Communists as the party which leads the working class proletariat toward revolutionary change of society. See also V.I. Lenin, "What Is to Be Done?" in R.C. Tucker, ed., *The Lenin Anthology* (New York: Norton, 1975) 12 at 53. Published in 1902, this article presented Lenin's theory of the nature, structure, and activities of the revolutionary party organization.

historical evidence of how the elitism of the Court Party is not a temporary measure in service of a more perfect future democracy, but a movement toward undemocratic authoritarianism.[21]

Morton and Knopff employ primarily qualitative rather than quantitative political science research.[22] As indicated in the book's select bibliography, they consult an excellent array of political science and legal literature. The names of legal and political activists in the Court Party are recited.[23] Some of the more colourful stories are so anecdotal that they border on the apocryphal.[24]

Regrettably, the co-authors sometimes commit the same methodological errors for which they criticize the Court Party. They condemn the influence of law clerks "who assist appeal court judges in researching and writing opinions."[25] Clerks should advise, while judges decide. However, it should be noted that Morton and Knopff were "ably assisted by several talented graduate students" in researching their book and consulted M.A. theses and doctoral studies.[26] Although there is a difference between the judicial and academic processes, the role of assistants in each process is ambiguous. Sometimes the philosophy of the subordinate does not influence but reflects the inclinations of the superior.[27] Finally, the intermingling of the academic and political spheres that has produced *Charter* scholarship laced with advocacy, which Morton and Knopff denounce,[28] could describe the content of this book as well as the writings of the Court Party supporters.

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21 *The Charter Revolution*, *supra* note 2 at 76 and 84.

22 The co-authors use quantitative information to show the financial support of state agencies and other organizations for the various constituencies of the Court Party (*ibid.* at 103, 104). Their primarily qualitative analysis stands in sharp contrast to recent judicial politics literature in Canada in which great emphasis has been placed on compiling and analyzing statistical data. See I. Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998), and P. McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000). The American Political Science Association has been shaken by a struggle between quantitative and qualitative researchers. See E. Eakin, "Political Scientists Leading a Revolt, Not Studying One" *The New York Times* (4 November 2000) B11.

23 See *The Charter Revolution*, *ibid.* at 135-36, for the specific identification of rights experts whom the co-authors consider members of the Court Party.

24 *Ibid.* at 111 regarding the formulation of the *Oakes* test and the *Alberta Labour Reference* opinion.

25 *Ibid.* at 110.

26 *Ibid.* at 9-10; 183, n. 69; 186, n. 15; 191, n. 22; and 193, n. 58.

27 See N.A. Lewis, "A Conservative Legal Group Thrives in Bush's Washington" *The New York Times* (18 April 2001) A1 for an admission by an American appeals court judge that he prefers to hire clerks who think like him.

28 *The Charter Revolution*, *supra* note 2 at 137-47.

III. A DOUBLE-EDGED SWORD: THE INFLUENCE OF CRITICAL LEGAL STUDIES

The two co-authors contend that the Court Party is rooted in the postmaterialist or post-industrial knowledge class.[29] This class is influenced greatly by postmodernism, which is described in *The Charter Revolution* as follows:

> Postmodernism rejects the possibility of scientific or objective knowledge, claiming that all knowledge is self-interested and reflects (and supports) unequal power relationships based on class, gender, race, and so forth.... Postmodernism provides the intellectual grounding for many of the postmaterialist social movements: feminism, multiculturalism, gay and lesbian rights, and more radical forms of environmentalism.[30]

The Critical Legal Studies movement ("CLS") is the form of postmodernism that has been influential in the law schools. Unfortunately, Knopff and Morton devote approximately one page of the one hundred and sixty-six page text to a detailed discussion of CLS.[31] Although they contend that several legal academics are leading members of the Court Party, they do not provide sufficient analysis of the philosophy which purportedly animates these academics. Because the flow of philosophy and jurisprudence is not traced, even in an overview, the co-authors fail to explain the relationship of CLS to other schools of thought regarding such fundamental issues as the nature of truth, ideological battles, legal process, and social order.

In certain schools of ancient philosophy, objective truth was viewed as an ideal to be pursued in an effort to widen and deepen human knowledge. Horace sought "to distinguish a straight line from one that was crookèd / And to go questing for truth in the groves that Acádemus planted."[32] Peter Ackroyd, a recent biographer of Sir Thomas More, described the overlap of religion, law, and politics in relation to truth and the social order in late medieval England:

> Religion and law were not to be considered separately; they implied one another. That is why law was considered to be perfect in itself, undamaged by the bad judgments of individual practitioners.... That is why the law was also considered to be permanent; *it was what was known to be true*, withstanding change or decay. It is possible to see how in its theoretical state it became the image and explanatory model for all areas of human activity: *it stood upon the ground which we are now accustomed to call politics* ... and marked out the very nature of society itself.[33]

In the nineteenth and early twentieth centuries, legal formalism was dominant in which objectivity was sought through logic and *a priori* reasoning with little consideration for

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29 *Ibid.* at 78.

30 *Ibid.* at 131.

31 *Ibid.* at 132-33.

32 Horace, "Epistles Book II" in C.E. Passage, ed., *The Complete Works of Horace* (New York: F. Ungar Pub. Co., 1983) at 352. See also A.S. Wilkins, *The Epistles of Horace* (London: Macmillan and Co., 1902) at 297 for an explanatory note.

33 P. Ackroyd, *The Life of Thomas More* (London: Vintage, 1999) at 59 [emphasis added].

empiricism.[34] During the nineteen-thirties, philosophers struggled with the central dilemma of whether the concept of continuous, stable human values could be reconciled with the historical variations in the way these values were expressed.[35] In a 1933 letter, political philosopher Isaiah Berlin quoted Immanuel Kant's observation: "Out of the crooked timber of humanity no straight thing was ever made."[36] In contrast to Horace's ancient attempt to distinguish straight from crooked, Berlin advocated an acceptance of empiricism and pluralism. He asserted that the idea of a single solution was a dangerous illusion.[37] During this time period, the legal realists advocated the application of empiricism and pluralism in the judicial process.[38]

In the nineteen-seventies the Critical Legal Studies movement emerged. The comparison and contrast of this more radical school of legal thought with legal realism, and the overlap of law with politics is expressed well in *Lloyd's Introduction to Jurisprudence*:

> The difference between critical and conventional (including Realist) legal thought is that, although the latter rejects formalism it maintains the existence of a viable distinction between legal reasoning and political debate. Critical legal thought rejects this distinction. Critical legal thinkers believe there is no distinctive mode of legal reasoning. *Law is politics.* It does not exist independently of ideological battles within society.
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> In addition, then, to rejecting formalism, critical legal scholars reject mainstream value-free models of law. *They do not believe the law is neutral*: it is, they claim, an affirmation of division and hierarchy.[39]

Critical legal theorists assert that truth is relative to a given social or historical group. Social order exists only because the struggle among individuals was halted at an arbitrary point, and the truce lines define a society's structure.[40] CLS adherents use legal battles to alter these truce lines, and to reshape social order.[41] This approach causes a crisis in legal interpretation in pluralistic societies, since the legitimacy of justice according to law is challenged. Because adjudication is a form of third party conflict resolution, a judge

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34 Lord Lloyd of Hampstead & M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. (London: Stevens & Sons, 1985) at 679.

35 M. Ignatieff, *Isaiah Berlin: A Life* (Toronto: Viking, 1998) at 88.

36 *Ibid.* at 89. In 1991 Berlin published *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Knopf, 1991). The metaphor is striking because Mendel Berlin, Isaiah's father, had been a successful timber merchant: see Ignatieff, *ibid.* at 12-13.

37 Ignatieff, *ibid.* at 285. See also M. Berger, "Isaiah Berlin, Philosopher and Pluralist, Is Dead at 88" *The New York Times* (7 November 1997) A1. Berlin's liberal tolerance was a reaction against the totalitarianism of the twentieth century. It invited the criticism that his position led to relativism: see Ignatieff, *ibid.* Jacques Barzun contends that the term relativism is misused in a pluralistic society in which shared absolute values are difficult to ascertain: see J. Barzun, *From Dawn to Decadence: 500 Years of Western Cultural Life, 1500 to the Present* (New York: HarperCollins Publishers, 2000) at 760-63. The challenge of law is "to find principles of order that would compose the anarchy of human experience without suppressing the vitality of diversity and disarray": see P.A. Freund, *On Law and Justice* (Cambridge, Mass.: Belknap Press, 1968) at 248.

38 Lloyd & Freeman, *supra* note 34 at 683-84.

39 *Ibid.* at 710 [emphasis added].

40 A.C Hutchinson & P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1983-84) 36 Stan. L. Rev. 199 at 215-16.

41 *Ibid.* at 216.

must be a genuine third party who possesses a high degree of impartiality and independence.

The co-authors of *The Charter Revolution* do little to lessen this crisis. They criticize the judiciary and the Court Party for a host of left-leaning rulings related to search and seizure, right to counsel, same-sex spouse, aboriginal rights, and procedure affecting standing, mootness, and costs.[42] The reader is left with the nagging impression that Morton and Knopff would reverse these decisions through right-wing judicial appointments. Close scrutiny reveals that the co-authors agree with the Critical Legal theorists that there is no value-free model of law. Although they prefer to fight their ideological battles that establish social order in the legislature rather than the courtroom, they seem prepared to support an activist judiciary which will reverse the legal gains of their left-wing opponents.

Professors Morton and Knopff do acknowledge the historical see-saw for judicial power between conservatives and liberals in the United States and Canada.[43] However, they do not overtly recognize that a transference of greater power to the legislative branch cannot be accomplished without an ideological transformation of the judicial branch and a right-wing reversal of standing decisions.

An examination of recent American history illustrates the double-edged sword of judicial power and the overlap of politics and law. In *Bush* v. *Gore*[44] five Republican appointees of the United States Supreme Court voted to halt the recount ordered by the Florida Supreme Court in the 2000 presidential election. The state court was viewed as having liberal leanings, and some Supreme Court justices perceived "a partisan effort [by the state court] to manipulate the rules in order to bring about a Gore [Democratic] victory."[45] Once George W. Bush became President, his Republican administration launched a concerted effort to turn the federal courts to the right by means of judicial

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42 *The Charter Revolution*, *supra* note 2 at 20, 43, and 54.

43 *Ibid.* at 29-31.

44 531 U.S. 98 (2000). Justices Stevens and Souter, two Republican appointees, dissented with Justices Ginsburg and Breyer, two Democratic appointees. The Oregon Democratic Party endorsed a campaign to impeach the five justices who voted to stop the Florida recount: see Reuters, "Oregon Democrats Seek to Oust Justices" *The New York Times* (23 July 2001) A15.

45 L. Greenhouse, "Election Case a Test and a Trauma for Justices" *The New York Times* (20 February 2001) A1. See also E. Thomas & M. Isikoff, "Settling Old Scores in the Swamp" *Newsweek* 136:25 (18 December 2000) 36. An avalanche of legal and political analyses of the Supreme Court's decision has been published. See, for example, E. Bronner, "Posner v. Dershowitz" *The New York Times* (15 July 2001) section 7, p. 11, which compares and contrasts Professor Alan Dershowitz's book *Supreme Injustice: How the High Court Hijacked Election 2000* with Judge Richard Posner's book *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*. Since the terrorist attacks upon the United States on September 11, 2001, the public interest in the Florida recount has waned: see J. Ibbitson, "U.S. Media forget about dimpled chads" *Globe and Mail* (11 October 2001) A1. A recent review of uncounted Florida ballots indicated that George W. Bush would have won the 2000 presidential election if the recount had continued: see F. Fessenden and J.M. Broder, "Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote" *The New York Times* (12 November 2001) A1.

appointments.[46] Since 1953 an American Bar Association ("ABA") committee has provided non-binding ratings of the federal judicial nominees. Because many Republicans have detected a liberal bias in the ABA process, President Bush ended the long-standing practice.[47] Guidance from other groups, including the Federalist Society, a very influential conservative legal organization, would be sought.[48] The Democrats who control the Senate Judiciary Committee retaliated by refusing to vote on any judicial nominee until the ABA committee had provided its assessment.[49]

In *The Charter Revolution*, Professors Morton and Knopff do not provide relief from the ideological warfare of the double-edged sword. There is a middle course between the left and the right wings of the political spectrum which the content of *The Charter Revolution* does not explore. Although legal systems are not politically neutral, there is considerable scope for the judiciary to strive toward a high level of independence and impartiality.[50]

There are two distinct archetypes of the rule of law which are included in the Canadian legal tradition. The first archetype, which is derived from Aristotelian philosophy, focuses upon the individual decision-maker.[51] This conception is based on the rule of reason and the character of those who deliver legal judgments. They must maintain a disposition to act fairly and lawfully, and they must reason syllogistically and dispassionately. In the second archetype of the rule of law, which is derived from Montesquieu's work, law is viewed as a series of institutional constraints.[52] Power is to be checked by power so that the arbitrariness of the executive or legislative branches will not violate a private sphere of conduct. The Canadian judiciary possesses no direct democratic mandate and operates within a system that contains elements of both archetypes of the rule of law. In an instruction to those engaged in pendulum politics, Mr. Justice Cardozo described the discretion of choice within the constraints of a balanced judicial method:

> The judge, even when he [she] is free, is still not wholly free. He [She] is not to innovate at pleasure. He [She] is not a knight-errant roaming at will in pursuit of his [her] own ideal of beauty or of goodness. He [She] is to draw his [her] inspiration from consecrated principles. He [She] is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He [She] is to exercise a discretion informed

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46 N.A. Lewis, "President Moves Quickly on Judgeships" *The New York Times* (11 March 2001) section 1, p. 34.

47 N.A. Lewis & D. Johnston, "Bush Would Sever Law Group's Role in Screening Judges" *The New York Times* (17 March 2001) A1 and T. Frieden, "White House Feuds with ABA over Judges," online: Cable News Network <www.cnn.com/2001/LAW/08/31/aba.judges/index.html> (date accessed: 15 October 2001).

48 Lewis, *supra* note 27.

49 Frieden, *supra* note 47.

50 P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 21. Morton and Knopff allude to "an alternative route" or middle course, but do not adequately develop this very important point: see *The Charter Revolution*, *supra* note 2 at 198-99, n. 1.

51 J.N. Shklar, "Political Theory and the Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1.

52 *Ibid.*

by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.[53]

IV. A COMPLEX METAPHOR: THE CONSTITUTIONAL DIALOGUE AMONG THE BRANCHES OF GOVERNMENT

Dean Peter Hogg and Allison Thornton have promoted the constitutional theory of dialogue among the branches of government. Although the judiciary issues binding decisions, it is engaged in a dialogue with the executive and legislature, since judicial decisions are subject to reversal, modification, or avoidance by the competent legislative body.[54] The Supreme Court of Canada has approved of the dialogue theory in *Vriend* v. *Alberta*[55] and in *R.* v. *Mills*.[56]

In *The Charter Revolution*, Professors Morton and Knopff correctly point out the distorted simplicity of Hogg and Thornton's theory, which does not explain fully the interacting political and legal dynamics of the governmental system.[57] The co-authors focus upon a government's ability to respond to judicial nullification of a policy. If it is a central policy, then the government can respond effectively. However, if the issue cuts across partisan allegiances and divides the government caucus and public opinion, then

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53 B.N. Cardozo, *The Nature of the Judicial Process*, 28th reprint (New Haven: Yale University Press, 1968) at 141 in a section subtitled "The Judge as a Legislator." Although Ronald Dworkin has criticized Cardozo as holding a "romantic 'craft' view" of law that is too unstructured and mysterious, Cardozo is generally placed in the highest rank of American judges: see R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) at 10; 417, n. 7. As a legal theoretician, Cardozo has been described as "thoroughly pragmatic, suspicious of absolutes, and yet always respectful of traditional ways": see D.N. Atkinson, "Mr. Justice Cardozo: A Common Law Judge On A Public Law Court" (1980) 28 Chitty's L.J. 211 at 223. Having served eighteen years on the New York Court of Appeals before his appointment to the United States Supreme Court, Cardozo developed the style of a common law judge. In applying a broad principle, he was sensitive to the circumstances of a case and adapted the theory within the confines of legal doctrine to fit the practicalities of the situation. In *The Nature of the Judicial Process*, Cardozo warned against the formalism of legal classicism and presented a pragmatic jurisprudential philosophy. His approach built upon the writings of Oliver Wendell Holmes, Jr., and was developed further by the legal realists: see R.A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990) at 21.

54 P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 at 79-80.

55 [1998] 1 S.C.R. 493. See also L.M. Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999) at 15-16, and K. Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 501-502.

56 [1999] 3 S.C.R. 668. Daigle, C.J.N.B. also endorsed the dialogue theory in an extrajudicial speech: see Chief Justice J. Daigle, "Encaenia Address" (University of New Brunswick, Fredericton, N.B., 18 May 2000) [unpublished] at 4.

57 *The Charter Revolution*, *supra* note 2 at 162-66. Similar criticisms are discussed in C.P. Manfredi & J.B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513.

the judicial decision may create a "rights-based policy status quo" that will not be reversed by the political branches.[58]

Dean Hogg is a legal positivist. He believes "that law consists exclusively of 'positive law,' meaning law that has been made by the law-making institutions of the state."[59] In their dialogue theory, Hogg and Thornton adhere to legal positivism by examining court rulings and formal legislative responses. They do not analyze the effects of partisan allegiances, caucus divisions, and fragmented public opinion upon constitutional interpretation. The political science critique of the dialogue theory provided by Morton and Knopff broadens the list of relevant factors that may account for the tone and the outcome of the dialogue in specific cases. The making of public policy is not a tidy process.

In *Marbury* v. *Madison*,[60] United States Chief Justice John Marshall recognized that a constitution is both a political and a legal document. As a legal document, it could be interpreted by the courts. Marshall did not assert that the Supreme Court was the "ultimate" interpreter of the Constitution.[61] He painstakingly carved out a place for the judiciary alongside the executive and legislative branches of government in the competition for power.

One of the important issues surrounding the dialogue theory is which branch of government has the final or at least the dominant word. President John Adams, who had appointed Marshall to be Chief Justice, asserted that there must be three separate parts of government to establish a balance.[62] This suggests coordinate or co-equal branches of

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58 *The Charter Revolution*, *ibid.* at 165.

59 P.W. Hogg, "On Being a Positivist: A Reply to Professor Vaughan" (1991) 29 Osgoode Hall L.J. 411 at 412. In "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529, Dean Hogg and A.A. Thornton structure their article like a statement of defence in civil litigation.

60 5 U.S. (1 Cranch) 137 (1803). A similar judicial review concept was articulated earlier by Chancellor George Wythe of Virginia in *Commonwealth* v. *Caton*, 8 Va. 5 (Sup. Ct. 1782). John Marshall had been influenced greatly as one of Wythe's law students at the College of William and Mary during the spring term in 1780: see C.T. Cullen, "New Light on John Marshall's Legal Education and Admission to the Bar" (1972) 16 *American Journal of Legal History* 345 at 348. In 1870, New Brunswick Chief Justice William Johnstone Ritchie, who later became the second Chief Justice of the Supreme Court of Canada, submitted a memorandum to Prime Minister Macdonald regarding a bill to establish the Supreme Court of Canada. In similar words to those used by Marshall in *Marbury*, Ritchie described the constitutional relationship of judicial and legislative power in the federation: " 'The British North America Act, 1867,' is the Supreme Law of the Dominion, and must be universally and implicitly obeyed. All Acts of the Parliament of Canada, or of the Legislatures of the respective Provinces, repugnant to the Imperial Statute, are necessarily void; and of like necessity when cases come before the legal tribunals, it pertains to the judicial power to determine and declare what is the law of the land": see G. Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991) Appendix 2 at 340.

61 J.E. Smith, *John Marshall: Definer of a Nation* (New York: H. Holt & Co., 1996) at 525-26, n. 12. I advised Professor Smith regarding Marshall's legal career, which is acknowledged at 527, n. 28. Professor Kent Roach has taken a less historical approach than Professor Smith and asserted that the structure of the American Constitution "since *Marbury* v. *Madison* was based on judicial supremacy": see Roach, *supra* note 55 at 497.

62 D. McCullough, *John Adams* (New York: Simon & Schuster, 2001) at 560, 375.

government. Professor Gary Wills contends that the concept of co-equal branches is a myth. In his opinion, the legislative branch is to be dominant since "Congress always gets the last say (if it wants it)."[63] The spectrum of possibilities is completed by Professor Kent Roach's observation that several American "conventional constitutional theories" are based on the assumption of judicial supremacy in enforcing the Constitution.[64]

Professors Morton and Knopff contend that the dialogue "is usually a monologue, with judges doing most of the talking and legislatures most of the listening."[65] They seek to redress a perceived imbalance in the ongoing competition among the branches of government based upon an expansion of judicial power. Even Dean Hogg has recently declared that the Supreme Court of Canada is "a powerful lawmaker, not just in constitutional law, but in public law generally and in private law," and that the exercise of this power by non-elected judges raises issues of democratic legitimacy.[66] In *The Charter Revolution*, the co-authors provide a strong right-wing critique of judicial authority that would shift greater power to the more politically accountable branches of government.

V. CONCLUSION

Professors Morton and Knopff have achieved their objective of analyzing the social underpinnings of the *Charter* revolution through a systematic examination of the judicial interpreters of the *Charter* and the coalition of interest groups that comprise the Court Party.[67] Because their perspective is rooted in a right-wing ideology, the co-authors' methodology resembles the advocacy scholarship which they condemn. The significant influence of Critical Legal Studies in constitutional jurisprudence is not adequately considered. Although Morton and Knopff favour a transference of greater power to the legislative branch consistent with a majoritarian philosophy, it is also apparent that they desire an ideological transformation of the judicial branch. Their useful political science view of the dialogue theory broadens the relevant factors that affect the tone and the outcome of specific constitutional controversies.

In viewing law as politics, the co-authors miss the opportunity to explore a middle course between the ideological extremes. Those who seek to discern and follow this middle course in the law desire to promote "amid the jarring clamors of the zealots of the world ... [a] wistful admiration for the voice of moderation; ... a hope that beneath the raucous slogans of the partisans a sensitive ear may listen for undertones of common

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63 G. Wills, *A Necessary Evil: A History of American Distrust of Government* (New York: Simon & Schuster, 1999) at 85-86.

64 Roach, *supra* note 55 at 489.

65 *The Charter Revolution*, *supra* note 2 at 166.

66 P.W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis" (2001) 80 Can. Bar Rev. 171 at 179.

67 *The Charter Revolution*, *supra* note 2 at 21.

speech; an awareness that civilization, like the legal order, is not to be nurtured arduously for all by uprooting it conveniently for some."[68]

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[68] Freund, *supra* note 37 at 251.