UNCOVERING THE JUDICIAL ROLE IN RIGHTS PROTECTION UNDER THE LEGAL DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

by

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Abstract

In 19th century English constitutionalist Albert Venn Dicey's classic statement of the doctrine of parliamentary sovereignty, Parliament can make any law whatever and no person or body has the authority to invalidate an Act of Parliament. In the Charter era, this doctrine continues to be invoked by supporters and critics of contemporary judicial review to signal a pre-Charter tradition of judicial deference to parliamentary policy choices regarding the definition and protection of rights.

This view of the significance of the doctrine is challenged in this dissertation through a careful and novel re-evaluation of the role Dicey assigned to judges in the doctrine. Indeed, the interpretation of Dicey offered in this dissertation shows that common law judges have long been theorized to have a central role to play in defending common law rights under the doctrine of parliamentary sovereignty. Judicial control over the application of law in particular cases facilitates a central role for the judiciary in rights protection by allowing judges to interpret statutes to minimize their detrimental effect on common law rights. This dissertation offers a significant contribution to Canadian constitutional debate by focussing attention on the fact that the judiciary neither needs a bill of rights to play a key role in protecting fundamental rights, nor is prohibited from playing such a role under the doctrine of parliamentary sovereignty.

In this dissertation, contemporary interpretations of the significance of the doctrine of parliamentary sovereignty for judicial rights protection are contrasted to the arguments of Dicey and his Canadian Depression-era critics who were concerned with the policy implications of the central role Dicey assigned to the judiciary in protecting common law rights. This dissertation challenges the common view that the Charter introduced a radical change in the role played by judges in protecting fundamental rights. In fact, constitutional scholars have long praised and condemned the central role played by judges in protecting rights through judicial control over the application of the law in particular cases. This dissertation highlights the extent to which academic conflicts over the doctrine of parliamentary sovereignty are ultimately rooted in conflicts over more fundamental values.

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Introduction

Despite twenty odd years of experience with the constitutional politics of rights protection, the doctrine of parliamentary sovereignty continues to serve as an orienting concept in Canadian debate over the legitimacy of judicial review of the Charter. The doctrine declares that Parliament can make any law whatever, and no person or group has the authority to invalidate a properly enacted statute. This dissertation examines how constitutional scholars have defined the doctrine and clarifies the uses to which it has been put in the contemporary academic debate over the legitimacy of judicial review of the Charter. In fact, students of the constitution, both legal scholars and political scientists, tend to agree on the democratic and policy implications of the doctrine of parliamentary sovereignty. As will be shown in this dissertation, however, the presence of an academic consensus regarding the doctrine should not be taken to imply that all the questions regarding the judicial role in protecting rights under the doctrine of parliamentary sovereignty have been resolved.

The fact that the doctrine lingers on in contemporary debate over the appropriate means of protecting fundamental rights[1] might seem odd since, at

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[1] Before the Charter, the debate over rights protection tended to use the older language of civil liberties rather than rights. Although it is possible to distinguish traditional civil liberties or freedoms such as religious practice, speech and assembly (which imply the absence of legal restraint) from rights (which require a correlative duty on the part of government) such as political or language rights, I will lump them together for purposes of this dissertation. For a discussion and explanation of the broadening of notions of rights to include civil liberties, political, economic and social rights, see F.R. Scott, "Expanding Concepts of Human Rights" in his *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977).

least for participants in the debate, parliamentary sovereignty signals either the unfortunate absence of security for fundamental rights (for Charter supporters) or a preferred but increasingly passé political approach to rights protection which avoids judicial rights review altogether (for critics of judicial activism). Indeed, as a *legal* doctrine parliamentary sovereignty emphasizes that judges have a duty to refrain from invalidating statutes even if they violate rights.

There is a clear consensus among commonwealth constitutional scholars regarding the core of the doctrine. Going all the way back to the Glorious Revolution of the 17th century, scholars have accepted that Parliament is not to be hindered by any agent or institution from making any statute at all. Furthermore, the judiciary, under the doctrine, lacks the authority to invalidate properly made statutes. While there is no disagreement on the core content of the doctrine of parliamentary sovereignty, this is not the end of the matter. Controversy rather than consensus has marked the debate among Canadian and British constitutional scholars addressing the constitutional role of the judiciary in relation to the protection of fundamental rights under the doctrine.[2]

See also Alan Cairns, *Charter Versus Federalism* (Montreal and Kingston: McGill-Queen's University Press, 1992), chapter 1.

[2] In this dissertation parliamentary sovereignty is not addressed as an explicit claim regarding the legitimacy of legal authority (to be contrasted, perhaps, with popular sovereignty). For purposes here parliamentary sovereignty is considered only as a legal doctrine, as "a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognize as law the rules which Parliament makes by legislation." Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), 149. For consideration of parliamentary sovereignty as a claim to legitimacy which is contrasted with popular sovereignty see Philip Resnick, *Masks of Proteus* (Montreal and Kingston: McGill-Queen's University Press, 1990); Peter Russell, *Constitutional Odyssey: Can Canadians Be A Sovereign People*, 2nd ed. (Toronto: University Press, 1993); Robert Vipond, "Whatever Became

Nevertheless, one might well wonder what role the doctrine can play in Canada's debate regarding judicial review of the Charter when "no role at all" is hardly a feasible prescription for change to Canada's system of Charter rights protection. Kent Roach clarifies this puzzle somewhat when he suggests that legal academics might contrast the doctrine of parliamentary sovereignty to rights protection under the Charter as a way to remind judges to "take a constitutional approach to the protection of rights and freedoms."[3] Since the Supreme Court seems to have got the message,[4] the question of why the doctrine has not faded away remains to be explored.

In explaining why the doctrine lingers on in Charter debate, it will also become clearer that academic attention to the role of the judiciary in Canada's system of rights protection under the Charter has come at the cost of neglect of the significant role which judges can play in protecting rights under the doctrine of parliamentary sovereignty. As this dissertation shows, contemporary Canadian constitutional scholars tend to ignore the arguments of previous generations of academic scholars of the doctrine of parliamentary sovereignty who recognized

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of the Compact Theory: Meech Lake and the Politics of Constitutional Amendment in Canada" *Queen's Quarterly* 96:4 (Winter 1989). See also Greg Clarke, "Popular Sovereignty and Constitutional Reform in Canada" Unpublished Masters' Thesis, Acadia University, Wolfville N.S., 1997.

[3] Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 *Canadian Bar Review* 481, 482-3.

[4] In *Vriend v. Alberta* [1998] 1 S.C.R. 493, 563-4, Justice Iacobucci declares that in adopting the Charter Canadians "forged a new social contract" in which our "constitutional design was refashioned." Because individual rights and freedoms are now to be protected by judicial review of the Charter, we have experienced a transition from "Parliamentary to constitutional supremacy."

that the doctrine need not prohibit judges from playing an important role in protecting rights through their control of the application of the law. In fact, judicial control over the application of the law in particular cases has not changed with the introduction of the Charter, and Canadian constitutional scholars who justify or condemn judicial review of the Charter on democratic grounds, for example, must grapple with the significant role that judicial interpretation of the law might play in protecting rights outside of a Charter context.

In the past decade, Canadian political scientists associated with the ideological right have developed a large body of scholarship critical of contemporary judicial review of the Charter. Two such political scientists, Rainer Knopff and F.L. Morton, offer an interpretation of the doctrine of parliamentary sovereignty based on judicial deference to parliamentary determinations of rights as a way to dramatize the discontinuity in the role judges play in protecting rights which accompanied the introduction of the Charter. Indeed, Knopff and Morton's critique of judicial activism under the Charter depends on the argument that judicial orientations towards Parliament and the legislatures have changed dramatically (for the worse) under the influence of a "Court Party" of interest group leaders, law professors and other intellectuals. Their interpretation of the doctrine of parliamentary sovereignty provides a normative baseline against which to measure and criticize contemporary Charter review. The examination of parliamentary sovereignty presented in this dissertation shows that conflicts over legal doctrine are, ultimately, conflicts over value differences.

Canadians are increasingly familiar with the argument that an activist Supreme Court is undermining Canadian democracy through its interpretation of the Charter. To the extent that Knopff and Morton bolster their version of this argument with an interpretation of the doctrine of parliamentary sovereignty, that interpretation warrants careful attention. In this dissertation I examine the academic use of the doctrine to praise or condemn the contemporary practice of Charter review; this examination does not extend, however, to the influence of the doctrine on the judiciary in its decisions. I am interested in the rhetorical use of the doctrine of parliamentary sovereignty to critique the practice of Charter review, and because academic critiques of contemporary judicial practice are as likely as judicial decisions themselves to influence the way in which journalists frame judicial review of the Charter for the attentive public, a narrow focus on academic work is appropriate.

In this dissertation, I present Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty in the context of their constitutional analysis, particularly their critique of judicial activism. Then I examine the similar views of the doctrine presented by constitutional scholars who are not sympathetic to Knopff and Morton's general constitutional analysis. Knopff and Morton, as well as their critics, declare that the doctrine of parliamentary sovereignty relegates the judiciary to a subservient role in Canada's pre-Charter system of rights protection; this interpretation of the doctrine is, in turn, attributed to 19th century English constitutionalist Albert Venn Dicey whose very name

signals a particular interpretation of the legal doctrine of parliamentary sovereignty.[5]

I show that while it is an effective rhetorical technique to associate Dicey with the interpretation of the doctrine of parliamentary sovereignty as judicial deference to Parliament and the legislatures with respect to decisions regarding rights protection, this interpretation does not capture the nuances of Dicey's elaboration of the doctrine. I will clarify the role Dicey gives to the judiciary in the doctrine of parliamentary sovereignty to highlight just how different his argument is from the one typically attributed to him by Canadian constitutional scholars. Not only are there serious flaws in the interpretation of Dicey offered by Knopff and Morton and their critics, but the status of that interpretation as orthodoxy in Canada's constitutional debate has led constitutional scholars to conclude that there is only *one* way to construe the doctrine (and by implication Canada's pre-Charter constitutional tradition). The effect of the presence of this orthodox interpretation of Dicey in contemporary constitutional debate is to desensitize scholars to the central role that Dicey gave to the judiciary in protecting rights; this orthodoxy clouds, in turn, our interpretation of the significance of the legal doctrine of parliamentary sovereignty for our own constitutional tradition.[6]

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[5] Dicey expounds the doctrine in his *Introduction to the Law of the Constitution*, 10th ed. (London: Macmillan, 1959). The text was first published in 1885.

[6] This concern with the way we construe a constitutional tradition is not an instance of rampant antiquarianism. Gordon Schochet points out that to identify a practice in relation to a tradition is "is interpretively to constitute it and functionally to *police* it." It is a "backward looking control" over what the practice is, what it requires and what can be said about it. Indeed, the invocation of tradition sets standards of behaviour and establishes a boundary of permissibility against rivals.

In this dissertation I will show that there is, in fact, no unique way to interpret the significance for the judicial role of the doctrine of parliamentary sovereignty. By engaging in a systematic analysis, from different points of view, of the implications of the doctrine for the judicial role in rights protection, I will show that it is problematic to draw—as Knopff and Morton do—a unique set of judicial "marching orders" from the legal doctrine of parliamentary sovereignty. To highlight this point, I show how Canadian constitutional scholars in the Depression era disagreed with and challenged Dicey's argument regarding the role of the judiciary in protecting rights under the doctrine of parliamentary sovereignty. Once it becomes clear that the doctrine of parliamentary sovereignty is flexible regarding the judicial role in protecting rights, it becomes easier to recognize the one-sidedness of the way our constitutional tradition has been portrayed.

Among Canadian constitutional scholars, Alan Cairns has done perhaps the most to encourage us to consider the strategic role interpretation of Canada's constitutional history plays in contemporary debate over constitutional reform. He suggests, for example, that history is "one of the many battlegrounds on which the struggle to control the future takes place." In Cairns' view, constitutional history is invoked by rivals to "get history on their side in the service of various

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That a tradition might be an invention does not diminish its power. See his "Tradition as Politics and the Politics of Tradition" in Mark Salber Phillips and Gordon Schochet, eds. *Questions of Tradition* (Toronto: University of Toronto Press, 2004), 296-297.

desired constitutional futures."[7] Indeed, reference to a constitutional tradition may be no more than "argument fodder"[8] invoked to generate rhetorical support for, or opposition to, proposals for change in constitutional theory or practice. Recommendations regarding the use of the notwithstanding clause, for example, often also draw upon arguments regarding the fit of such use with our constitutional tradition. Constitutional scholars are well aware that legal doctrines do not, and cannot, remove the judicial discretion inherent in the adjudicative process. The same may be said of the use of doctrine of parliamentary sovereignty in the Charter debate: Canada's constitutional tradition, in the form of parliamentary sovereignty, does not, and cannot, offer a reference point for constitutional debate which is beyond politics.

The doctrine of parliamentary sovereignty tends to be linked to an interpretation of Canada's constitutional tradition based on a political doctrine of faith that representative democracy, "majoritarian" politics, or the parliamentary process can produce public policy in which rights are secure despite the absence of judicial review of a bill of rights. Indeed, when the doctrine of parliamentary sovereignty is associated with such a faith, judges are assumed to accept a duty to interpret statutes to avoid obstructing the policy purposes of parliamentarians (unless doing so contradicts the federal division of powers). After all, if

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[7] Alan Cairns, "Author's Introduction: Whose Side is the Past On?" in Douglas E. Williams, ed. *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, 1995), 15.

[8] Robert Cox, "Memory, Critical Theory, and the Argument from History" *Argumentation & Advocacy* 27:1 (Summer 1990), 2.

parliamentary sovereignty is associated with confidence in the ability of elected politicians to make public policy consistent with fundamental rights, judges must defer to the policy choices of parliamentarians.

In this dissertation I re-examine Dicey's doctrine of parliamentary sovereignty to show that faith in parliamentary rights-protection is not required by the doctrine of parliamentary sovereignty. In fact, the doctrine has been made to do more than one kind of work for the scholars who discuss its implications for the judicial role in rights protection. The invocation of parliamentary sovereignty in contemporary debate addressing the legitimacy of Charter review should not signal a unique balance of courts and legislatures, or a single approach to statutory and constitutional interpretation justified on the basis of a single conception of democratic politics. Again, once it becomes clear that the doctrine of parliamentary sovereignty cannot be pinned down to a single set of consistent and interconnected institutional and policy implications, it will be easier to see that we have turned our pre-Charter constitutional tradition into a one-dimensional rhetorical tool by the repetition of a particular interpretation of the significance of the doctrine.

In this dissertation, I examine the scholarly elaboration of the doctrine of parliamentary sovereignty by Dicey and by the generation of Canadians who responded to his elaboration in the Depression era to show that the judiciary plays a central role in protecting rights under the doctrine. It is particularly helpful to examine Depression-era scholarship on the policy implications of the doctrine

of parliamentary sovereignty for the judicial role in protecting rights. The economic and social crisis of the Depression ensured that Depression-era constitutional scholars would be well positioned to recognize that the doctrine of parliamentary sovereignty could have different policy implications depending on the degree of support for the policy agenda of elected governments among judges. J. Alex Corry was particularly adept at pointing out that such changes in policy implications occurred despite the absence of any overt change in the doctrine, and his scholarship will be examined in detail in this dissertation. The hallmark of the doctrine—the judicial prohibition on the invalidation of statutes—was not understood to negate the vital role for the judiciary in defending fundamental rights through its traditional function of applying the law. Contemporary Canadian constitutional scholars have been inclined to posit that the corollary judicial duty under the doctrine of parliamentary sovereignty to apply the will of parliament amounts to an imperative for judges to defer to the policy choices of parliamentarians. While both critics and supporters of contemporary Charter review get rhetorical and political mileage out of the argument that the doctrine of parliamentary sovereignty implies judicial deference, I show in this dissertation that judicial control over the application of statutes under the doctrine has not necessarily favoured the policy choices of parliamentarians.

From Dicey's point of view, the judiciary is assigned the task of protecting fundamental rights under the constitutional principle of the rule of law. This is not to deny that judges are obliged under the constitutional principle of the legal

sovereignty of parliament to apply statutes even if their clearly worded purpose is to violate common law rights; this obligation, however, must be understood in the context of the judicial duty to protect common law rights. In Dicey's elaboration of the doctrine of parliamentary sovereignty, this means that judges will interpret statutes and executive action so as to minimize their impact on common law rights even as they refuse to invalidate statutes.

Indeed, if judges defer to the policy choices of parliamentarians under the doctrine of parliamentary sovereignty, it is not because it is their duty under the doctrine to do so. Such deference should be understood instead to be the product of implicit agreement between the judges of the common law courts and parliamentarians regarding the content of the principles of good government. In this dissertation I argue that if government policy deviates from the common law rights as understood by the judiciary, there is every reason to expect judges to interpret the statutes and executive decisions implementing that policy in the spirit of the common law rather than in the spirit of the policy objectives of parliamentarians. Dicey expected no less and understood such judicial activism to be perfectly consistent with the doctrine of parliamentary sovereignty. Canadian constitutional scholars in the Depression era recognized that the new government policy agenda they supported, which deviated from the values and principles underlying the common law at that time, was threatened by control over the application of statutes by an independent judiciary steeped in the

principles of the common law and tasked with the protection of fundamental common law rights.

Contemporary constitutional scholars who argue that a judiciary which fails to defer to the policy choices of parliamentarians has fallen away from the benchmark of rights protection under the doctrine of parliamentary sovereignty simply neglect to grapple with the control that the judiciary has long had over the application of statutes under the doctrine. While judges indeed claim the authority to invalidate statutes under the Charter, this practice is not unlike the judicial role in protecting fundamental common law rights through the application of statutes under the doctrine of parliamentary sovereignty.

I will show that there is nothing anachronistic about a careful examination of the significance of the doctrine of parliamentary sovereignty for rights protection in the pre-Charter era. If the conventional understanding of the significance of the doctrine for rights protection is set aside, it becomes easier to analyze the relationship between Parliament and the judiciary in contemporary Canadian government and politics. A nuanced understanding of the significance of the doctrine of parliamentary sovereignty is also central to the realization that conflicts over legal doctrine are ultimately conflicts over value differences.

Plan of the dissertation

In chapter one I present Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty and place it in the context of their well known concerns

regarding judicial activism. Knopff and Morton argue that Dicey was sceptical of judicial rights protection yet had faith that parliamentarians would not violate fundamental rights; following from this particular configuration of faith and scepticism, Knopff and Morton imply, judges have a duty under the doctrine of parliamentary sovereignty to defer to the policy choices of democratically elected governments. Translated into an approach to adjudication, this means that judges are obliged to interpret statutes literally by relying on textually oriented forms of judicial reasoning. Knopff and Morton do not argue that this interpretive technique avoids the influence of judicial discretion on the process of interpreting and applying statutes; their point is that judges under the doctrine of parliamentary sovereignty accept a duty to use textual forms of reasoning to ensure that the policy agenda of parliamentarians is not obstructed.

Knopff and Morton offer their interpretation of the doctrine of parliamentary sovereignty to bolster their argument that judges, particularly those on the Supreme Court, no longer accept a duty to defer to the policy choices of elected governments. In this chapter I will elaborate somewhat on Knopff and Morton's critique of judicial activism and present their views on the approach judges should adopt when interpreting the Charter. While Knopff and Morton's argument regarding the existence and normative inadequacy of judicial activism has received sustained criticism, their interpretation of the doctrine of parliamentary sovereignty has not. Some of this secondary literature which is critical of Knopff and Morton will be reviewed to show that it neglects to assess Knopff and

Morton's interpretation of the doctrine of parliamentary sovereignty. In the next two chapters I argue that some of Knopff and Morton's critics appear to be unwilling or unable to challenge their interpretation of parliamentary sovereignty because Knopff and Morton's critics draws from a similar interpretation in their own work, if for different reasons.

In chapter two I argue that legal scholars may neglect to examine Knopff and Morton's interpretation of parliamentary sovereignty because they assume that the doctrine is justified by a majoritarian understanding of democracy in which, in the view of legal scholars, judicial involvement in the protection of fundamental rights is democratically illegitimate. Canadian legal scholars who discuss democratic theory in the context of judicial review of the Charter tend to write as if they are responding to the "counter-majoritarian difficulty" made famous by Alexander Bickel.[9] Their responses take the form of arguments that judicial review of the Charter is democratically legitimate because the very concept of democracy in the Charter era includes judicial supervision of democratic values in addition to representative self-government. Because the legal doctrine of parliamentary sovereignty precedes judicial review of the Charter in the temporal evolution of rights protection in Canada, a number of constitutional scholars assume that if judicial review of the Charter is counter-majoritarian (as Bickel argues), then parliamentary sovereignty must be

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[9] See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill), 1962.

associated with a majoritarian theory of democracy. In this chapter I argue that the contrast of majoritarian and counter-majoritarian theories of democracy has no necessary bearing on Canadian constitutional debate since Bickel's framework is the product of his own particular intellectual and ideological circumstances; there is no inherent connection between majoritarian democracy and the doctrine of parliamentary sovereignty.

After showing that legal scholars appear to understand the doctrine of parliamentary sovereignty's prohibition on the judicial invalidation of statutes as justified by political faith in majority rule, I show that these views typically lead to the conclusion that the doctrine of parliamentary sovereignty offers no means for protecting rights against the will of the majority. This view is thoroughly developed by Lorraine Weinrib, and the chapter will conclude with a thorough presentation of her argument that the doctrine of parliamentary sovereignty offers no assurance whatsoever that statutes will protect fundamental rights.

In chapter three I offer an analysis similar in structure to the one offered in chapter two except that I try to explain legal scholars' neglect of Knopff and Morton's interpretation of parliamentary sovereignty with reference to assumptions regarding the relationship between parliamentary sovereignty and legal adjudication rather than that between parliamentary sovereignty and majoritarian democracy. Legal scholars agree that a positivist theory of law is associated with the doctrine of parliamentary sovereignty. A number of critical legal scholars, however, also assume that legal positivism implies a widely

discredited approach to statutory interpretation in which judges interpret statutes literally and objectively. Canadian critical legal theorist Richard Devlin offers a systematic critique of this approach to statutory interpretation for its neglect of the ineradicable discretion which accompanies the interpretive process. Because critical legal scholars, including Devlin, assume that literal interpretation is a corollary of the doctrine of parliamentary sovereignty, they simply dismiss the doctrine.

Although Devlin's systematic critique of literal interpretation deserves attention on its own merits, it is his published exchange with Peter Hogg which makes Devlin's work particularly worth discussing in this chapter. His response to Hogg's discussion of constitutional interpretation makes clear the extent to which critical legal scholars such as Devlin neglect to address the significance of legal positivism as a theory of legal hierarchy, because they focus instead on the inability of literal interpretation to constrain judicial discretion. In the context of its association with the doctrine of parliamentary sovereignty, legal positivism requires that judges refrain from invalidating statutes even if they conflict with the principles of the common law or some other source of morals. Devlin's response misses this dimension entirely in its focus on the failure of literal interpretation to constrain discretion.

While legal scholars tend to dismiss the doctrine of parliamentary sovereignty because they associate it with a discredited approach to statutory interpretation, the doctrine does not depend on one particular approach to

statutory interpretation. Parliamentary sovereignty and legal positivism both require only that the statute be raised above the common law in the legal hierarchy. Neither prescribes a particular approach to statutory interpretation. This point is developed clearly by David Dyzenhaus, and his argument wraps up the chapter.

Even though the arguments canvassed and analyzed in chapters two and three do not often engage Knopff and Morton's interpretation of parliamentary sovereignty directly, they do, nevertheless, illustrate the state of legal scholarship which helps to explain why the doctrine might be neglected by legal scholars. In chapter four I deal more directly with Knopff and Morton's views on parliamentary sovereignty by assessing the veracity of their interpretation of Dicey's doctrine. Then, in chapter five, I proceed to consider how Dicey's views regarding the judicial role under parliamentary sovereignty were received and criticized by Canadian constitutional scholars during the Great Depression.

In chapter four I examine and challenge the contemporary terms of debate regarding the significance of the doctrine of parliamentary sovereignty for the judicial role in protecting rights. When Canadian constitutional scholars quote Dicey's classic definition of the doctrine that Parliament can make any law whatsoever and judges lack the authority to invalidate legislation, they tend to draw Dicey into a framework of faith in parliamentary rights protection and scepticism regarding a central judicial role in protecting fundamental rights. Certainly this is how Knopff and Morton portray the underlying impetus of the

legal doctrine as expounded by Dicey. After showing just how widespread this interpretation of Dicey is in Canadian constitutional and legal scholarship, I will examine in some detail the interpretation of Dicey offered by Janet Ajzenstat because Knopff and Morton draw from it extensively in their own work. The key to Ajzenstat's argument that Dicey had faith in parliamentary rights protection is that she looks for evidence of this faith in the way Dicey reconciles two foundational constitutional principles: parliamentary sovereignty and the rule of law.

Contrary to Ajzenstat's argument that Dicey's reconciliation of the two principles favour parliamentary rights protection, I argue that Dicey places judicial protection of the values and principles of the common law at the centre of the English constitution. Although the doctrine of parliamentary sovereignty, as Dicey expounds it, does indeed prohibit judges from invalidating statutes, it does not in any way prevent judges from interpreting statutes to ensure that they remain consistent with common law principles. In fact, Dicey does not just tolerate an active role for judges in defending fundamental rights as identified in and protected by the common law; he demands it as a function of the judicial duty under the rule of law. When Dicey emphasizes the doctrine of parliamentary sovereignty, he does so not as an expression of faith in parliamentary rights protection but rather as a way to ensure that all government activity falls under the supervision of the judiciary.

Knopff and Morton draw from Dicey's work to argue that the doctrine of parliamentary sovereignty prescribes judicial deference to the policy agenda of elected governments; Dicey's argument, however, does not support this interpretation. Nevertheless, beginning during the Depression era, Canadian constitutional scholars began to urge judges to be restrained in a way similar to that prescribed by Knopff and Morton. At this time, Canadian constitutional scholars expressed great concern regarding the central place of the judiciary in protecting common law rights under the doctrine of parliamentary sovereignty. In chapter five I clarify the reason why constitutional scholars such as J. Alex Corry urged judges to ensure that their interpretation of statutes did not undermine the policy agenda of parliamentarians. Of the Canadian constitutional scholarship written during the Depression, Corry's work deserves particular attention because he not only delineated the contours of the federal government's new "collectivist" policy agenda, but he also considered its impact on the machinery of government, the judicial role, and on Canadian constitutionalism in general.

Corry noted that during the Depression judges defended fundamental rights against "attack" by governments seeking to implement a policy agenda which deviated from traditional common law principles of private property and limited government. This is not to say that judges began invalidating statutes which delegated the authority to agents of governments tasked with the implementation of the new policy agenda; however, judges continued to rely on

their control of the way in which statutes are interpreted and applied to minimize the negative effect of statutes on traditional common law rights.

Corry did not challenge the central role that the judiciary plays in interpreting and applying statutes under the doctrine of parliamentary sovereignty; he did, however, urge judges to interpret statutes implementing the government's new policy agenda with reference to the principles underlying that agenda rather than to the principles of the common law. If contemporary constitutional scholars assume that the doctrine of parliamentary sovereignty is necessarily associated with judicial deference to the policy agenda of parliamentarians, then judicial behaviour during the Depression appears to be an instance of illegitimate activism. Corry's work indicates that the significant constitutional issue during the Depression was not judicial activism so much as the central role played by the judiciary in defending common law rights. The problem was that as parliamentarians began to adopt new understandings regarding the proper role of government and the content of fundamental rights, the judiciary continued to apply statutes as if they were consistent with traditional common law principles, with the result being judicial obstruction of the effective implementation of governments' new policy agenda.

In general, once the doctrine of parliamentary sovereignty is pulled out of the contemporary framework of faith in parliamentary rights protection and scepticism regarding judicial involvement in protecting fundamental rights, it becomes possible to recognize that its policy implications are not determined by

the content of the doctrine alone. Within the confines of the basic rule that judges lack the authority to invalidate statutes, a rule with roots in the Glorious Revolution compromise between Parliament and the common law courts in their joint struggle against the Crown, the policy implications of the doctrine of parliamentary sovereignty depend on the way in which the doctrine is reconciled with other constitutional principles.

Dicey, for example, expounded the doctrine so as to ensure that the judges of the common law courts would be able to supervise as much government policy as possible. Corry, on the other hand, did not reject the doctrine of parliamentary sovereignty but rather differed from Dicey in his sense of the way the doctrine should be reconciled with other constitutional values. The effect of Corry's own reconciliation of parliamentary sovereignty with other constitutional principles was to justify the judicial application of statutes according to the new policy agenda of governments. Indeed, as the examination of the doctrine of parliamentary sovereignty presented in this dissertation shows, constitutional conflicts over legal doctrine really are, ultimately, conflicts over value differences.

The contemporary debate over the legitimacy of judicial review of the Charter has ensured that the doctrine of parliamentary sovereignty is not forgotten. Nevertheless, there is more to the doctrine than one gathers from that debate. The orthodox view of the significance of the legal doctrine of parliamentary sovereignty is that it commands judicial deference to the policy

choices of parliamentarians who will faithfully protect rights. Such an interpretation, I argue in this dissertation, does not capture the centrality of the judicial role in protecting fundamental rights and it exaggerates the extent of discontinuity in Canada's constitutional tradition. If the judiciary is indeed activist in the 21st century, such a phenomenon is evidence of the existence of value differences between judges and parliamentarians or executive actors; judicial activism in the name of the protection of fundamental rights as defined by an independent judiciary is as likely under the doctrine of parliamentary sovereignty as it is under the Charter. All that differs over time is the content of the rights being protected and the balance of support for those rights among the institutions of government, including the judiciary.

Chapter One

A number of constitutional scholars, both lawyers and political scientists, have canvassed and criticized the contribution of Rainer Knopff and F.L. Morton to the debate over the legitimacy of judicial review of the Charter.[1] At the same time, few, if any of these academic critics analyze the particular portrait Knopff and Morton offer of the legal doctrine of parliamentary sovereignty.[2] Knopff and Morton use the scholarship of 19th century English constitutionalist A.V. Dicey as a proxy for Canada's pre-Charter constitutional tradition. In their interpretation of Dicey, Knopff and Morton suggest that he was sceptical of judicial rights

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[1] A sample includes Thomas Bateman, "Crashing the Party: A Review of F.L. Morton and Rainer Knopff's *The Charter Revolution and the Court* Party" (2001) 33 *University of British Columbia Law Review* 859; Alexandra Dobrowolsky, "The Charter and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents" in David Schneiderman and Kate Sutherland, eds. *Charting the Consequences: the Impact of the Charter of Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997); Robin Elliot, "'The Charter Revolution and the Court Party': Sound Critical Analysis or Blinkered Political Polemic?" (2002) 35 *University of British Columbia Law Review* 271; Didi Herman, "It's Your Party (and I'll Cry If I Want To): Thinking About Law and Social Change" (1994) 9 *Canadian Journal of Law and Society* 181; Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal and Kingston: McGill-Queen's University Press, 2002), chapter 2; Richard Sigurdson, "Left- and Right-Wing Charterphobia In Canada: A Critique of the Critics" *International Journal of Canadian Studies* 7:8 (Spring 1993); Lorraine Weinrib, "The Activist Court" *Policy Options* 20:3 (1999).

[2] The reason may simply be that legal scholars lack interest in responding to colleagues who offer arguments which draw from the legal doctrine of parliamentary sovereignty because they do not take seriously any plea to "turn back the clock to a constitutional garden of Eden that we have regrettably let slip through our fingers by sins such as eating the forbidden fruit of the Charter." Alan Cairns, "The Constitutional World We Have Lost" in Douglas Williams, ed. *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, 1995), 98. Legal scholars may view such arguments as nostalgic coping mechanisms which allow critics of judicial review of the Charter to maintain a sense of personal continuity with a comfortable past. I do not agree with this sanguine interpretation, but they are common enough. See for example, Patricia Hughes, "Judicial Independence: Contemporary Pressures and Appropriate Responses" (2001) 80 *Canadian Bar Review* 181.

protection and that Dicey had faith that parliamentarians would not violate them;[3] indeed, this view of Dicey has not been critically scrutinized either by legal scholars or by political scientists. This may be due, in part, to the fact that Knopff and Morton's claims regarding Dicey, and Dicey's suitability as a proxy for pre-Charter academic opinion regarding rights protection, are widely shared within the political science and legal academic communities.[4] Knopff and Morton's work is, however, criticized quite frequently for its simplistic democratic theory, for its failure to recognize the judicial discretion which lies at the heart of constitutional interpretation, and for its conservative ideological bent.[5] Although it is difficult to deny the last accusation (and I do not attempt to do so in this dissertation), a plausible argument can be made that Knopff and Morton are neither shallow democratic theorists nor naïve theorists of constitutional interpretation.

In this chapter some of the main lines of argument in Knopff and Morton's constitutional analysis will be identified, and then a more detailed examination of

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[3] Such a view of Dicey is shared by Janet Hiebert. See her "New Constitutional Ideas: Can New Parliamentary Models of Rights Protection Resist Judicial Dominance When Interpreting Rights" (2004) 82 *Texas Law Review* 1963.

[4] See for example Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* xxx:4 (December 1997); Anne Bayefsky "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" *Political Studies* xxxi (1983); Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" 29 *Osgoode Hall Law Journal* 215; Lorraine E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6 *Review of Constitutional Studies* 119; Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 *University of Toronto Faculty Law Review* 136.

[5] Miriam Smith points out each of these failings. See her "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" *Canadian Journal of Political Science* xxxv:1 (March 2002); See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc., 2001), 69, 74.

their view of constitutional interpretation will be presented. In turn, some of the secondary literature on Knopff and Morton's constitutional scholarship will be surveyed with an eye to identifying the extent to which such work has misinterpreted Knopff and Morton's arguments. Finally Knopff and Morton's portrait of A.V. Dicey's understanding of the judicial role in rights protection associated with the doctrine of parliamentary sovereignty will be presented. The question of the validity of Knopff and Morton's interpretation of Dicey's views on parliamentary sovereignty will be picked up again in chapter four where Dicey's own exposition of the legal doctrine of parliamentary sovereignty will be examined in greater detail. In the next two chapters (two and three), some hypotheses will be offered to explain the consistency with which Knopff and Morton have been misinterpreted by their critics. Putting aside the possibility of wilful misrepresentation for partisan gain, it is possible that the reason has to do with the fact that Knopff and Morton praise the doctrine of parliamentary sovereignty. Knopff and Morton's critics associate the doctrine with a majoritarian democratic theory and an inadequate theory of constitutional interpretation. Because Knopff and Morton discuss and defend the doctrine of parliamentary sovereignty, particularly its perceived minimal role for the judiciary in protecting rights, it is tempting for their critics to condemn them for holding the understanding of democracy and constitutional interpretation which is frequently associated with the doctrine of parliamentary sovereignty. In this chapter, however, the focus will remain squarely on Knopff and Morton.

Knopff and Morton's work introduced

For more than two decades, University of Calgary political scientists Rainer Knopff and F.L. (Ted) Morton have been developing a comprehensive framework through which to criticize academic commentary on the contemporary practice of judicial review of the Charter. Indeed, Knopff and Morton argue that judges should interpret Charter rights while keeping in mind the classical liberal principles of formal equality and limited government. These principles are, after all, the very foundation of liberal constitutionalism, in Knopff and Morton's view. On this understanding of liberal constitutionalism, the judiciary can play an integral role in constraining government, but only on the condition that the values and principles guiding its work are classical liberal principles of good government. Knopff and Morton are clearly increasingly dissatisfied with the way in which the Supreme Court has interpreted the Charter, and with the policy consequences of that interpretation. This is because the Court has failed, in their view, to be guided by classical liberal values and principles. Knopff and Morton's interpretation of Canada's constitutional tradition, with its focus on confidence in parliamentary rights protection and scepticism of judicial protection of rights should, I argue, be understood in this context.

In their early collaborative work from the early to mid-1980s, Knopff and Morton argued that the Charter represents a practical compromise between those who believe that the federal Bill of Rights was a failure because judges

steeped in the legal doctrine of parliamentary sovereignty were unwilling to use the Bill's potential to invalidate rights-violating federal statutes,[6] and those more sceptical of a greater judicial role in the protection of rights.[7] At this time, Knopff and Morton readily acknowledged that vague and broadly worded Charter clauses, along with a lack of precedents to guide Charter interpretation, ensure that the judiciary has considerable discretion in filling out the meaning of constitutional rights;[8] nevertheless, they were still cautiously hopeful that judges would ascribe meaning to the Charter consistent with classical liberal notions of constitutionalism based on traditional civil liberties and the negative state.[9] In the later 1980s, however, Knopff and Morton came to believe that left-liberal law

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[6] Walter Tarnopolsky is an example of a law professor holding just such a view. See his "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law & Contemporary Problems* 169. For a contrasting sceptical view, see Douglas A. Schmeiser, "The Case Against the Entrenchment of a Bill of Rights" (1973) 1 *Dalhousie Law Journal* 15.

[7] Rainer Knopff and F.L. Morton, "Judicial Statesmanship and the Charter of Rights and Freedoms" in F.L. Morton, ed. *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1987). Sections one, the reasonable limitations clause, and sections 33, the notwithstanding clause, provide the evidence of a compromise because they clauses present, in Knopff and Morton's view, a willingness to accept judicial review of a bill of rights *and* limits on the power of judges to influence public policy which may affect rights (1987: 328). For another example of a moderate view, see F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* xx:I (March 1987).

[8] Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds. *Constitutionalism, Citizenship and Society* (Toronto: University of Toronto Press, 1985).

[9] It was only when it became clear that this was not happening that Knopff and Morton began to identify the liberal principles which should have guided the judiciary in its interpretation of the Charter. See for example "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics" in Janet Ajzenstat, ed. *Canadian Constitutionalism: 1791-1991* (Ottawa: Study of Parliament Group, 1992). These principles are criticized effectively in Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 *Canadian Journal of Women and the Law* 184.

professors were influencing judges to adopt meanings that clearly deviate from classical liberal principles. At this time, Knopff and Morton tried their hand at influencing judges directly with an article on constitutional interpretation published in an important constitutional law journal.[10] Here Knopff and Morton gently reminded the bench that its receptiveness to legal academics' concerns regarding previous judicial reticence in applying the Bill of Rights should not come at the cost of neglect of the tenets of liberal constitutionalism.

Soon after publishing this article, Knopff and Morton appeared to give up trying to influence judicial practice from inside the legal academy and turned instead to the education of political scientists with their 1992 textbook *Charter Politics*.[11] In this thorough and thoughtful examination of Canadian constitutional politics and court-executive/legislative institutional dynamics, Knopff and Morton focussed on minimizing the policy influence of judicial interpretations of the Charter. In particular, they defended the argument, familiar in the US under the label "co-ordinate construction,"[12] that acceptance of judicial review of the

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[10] F.L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990) 1 *Supreme Court Law Review* (2d) 533. At about the same time, Morton offers an early expression of the concerns he and Knopff have regarding the influence left-leaning law professors appear to exert over the judiciary in another law journal. See his "The Charter Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* 627. For his part, Rainer Knopff laments the way in which the left in Canada has successfully transformed the meaning of liberty so that it entails a healthy dose of social/economic equality. See his *Human Rights and Social Technology* (Ottawa: Carleton University Press, 1989), 9, 19.

[11] (Toronto: Nelson Canada, 1992).

[12] Knopff and Morton cite in this context Christopher Wolfe's, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986); for similar views in Canada, see Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills: Oxford University Press, 2001).

Charter does not necessitate deference on the part of the legislature and executive to the meanings the judiciary ascribes to the Charter. Indeed, Knopff and Morton begin to develop an argument in favour of hiving off the influence which the legal left has had on the practice of judicial review by suggesting that judicial interpretations of the Charter be authoritative only for the litigants in the case, but not for other branches of government.[13] Later in the 1990s (and onwards), Knopff and Morton buttress this position by attacking the evolution of judicial review of the Charter as contrary to Canada's constitutional tradition of representative democracy and judicial restraint.[14] It is Knopff and Morton's use of the doctrine of parliamentary sovereignty to characterize Canada's constitutional tradition which is, ultimately, the focus of this chapter; however, it would be useful first to engage in a slightly more detailed analysis of their views on constitutional interpretation, as well as consider some of the criticism of their views, to provide the proper context for understanding why Knopff and Morton come increasingly to emphasize the discrepancy between contemporary Charter review and Canada's constitutional tradition.

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[13] Knopff and Morton, *Charter Politics*, 197.

[14] See Rainer Knopff, "Populism and the Politics of Rights: The Dual Attack on Representative Democracy" *Canadian Journal of Political Science* xxxi:4 (December 1998); Rainer Knopff and F.L. Morton, "Ghosts and Straw Men: A Comment on Miriam Smith's 'Ghosts of the JCPC'" *Canadian Journal of Political Science* xxxv:1 (March 2002); Rainer Knopff and F.L. Morton, "Does the Charter Hinder Canadians from Becoming a Sovereign People" in Joseph F. Fletcher ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter H. Russell* (Toronto: University of Toronto Press, 1999); F.L. Morton, "Canada's Judge Bork: Has the Counter-Revolution Begun?" (1996) 6 *Constitutional Forum* 121.

Knopff and Morton, the Charter revolution and constitutional interpretation

Knopff and Morton's general assessment of judicial review of the Charter is neatly summed up in their 2000 book *The Charter Revolution and the Court Party.*[15] In this book they claim that the Canadian public policy process has been "judicialized, legalized and conducted in the vernacular of rights talk to a greater extent than ever before."[16] This change in the policy process signals a revolutionary rise in the "prominence in Canadian public life of both a policymaking institution (the judiciary) and its partisans (the Court Party)."[17] Knopff and Morton express great concern about the impact of this "prominence" on Canadians' ability to maintain the "correct" understanding of judicial review of a bill of rights. This understanding holds that judicial review is a "conserving force"[18] which protects the classical liberal principles of negative liberty, formal equality, protection of property and limited government. This concern is warranted, in Knopff and Morton's view, because of the relative success of a small elite group of social interest representatives who not only refuse to limit judicial review to this "traditional" purpose but have managed, in fact, to change the function of judicial review to that of an "instrument of social reform."[19]

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[15] (Peterborough: Broadview Press, 2000).

[16] Ibid., 21.

[17] Ibid., 24.

[18] Ibid., 41.

[19] Ibid.

This small elite group, which Knopff and Morton label the "Court Party," includes feminists, civil libertarians, and other groups advancing substantive equality, postmaterialist values and minority-language rights. While this Court Party is condemned for promoting the use of government authority to try to produce equality of economic condition and social status,[20] Knopff and Morton prefer to emphasize their concerns that Court Party groups "seek to constitutionalize policy preferences that could not easily be achieved through the legislative process."[21] Moreover, the use of Charter litigation as the primary means of achieving policy objectives "casts a shadow over the more traditional arenas of electoral, legislative and administrative politics."[22] This concern regarding the eclipse of electoral politics should not, however, be interpreted as a simple appeal to pursue the rejuvenation of institutions which are able to implement the "will" of the people as a simple legislative majority. In fact, Knopff and Morton are sympathetic to the argument that judicial review of the Charter is an appropriate limitation on government by legislative majority as long as the purpose served by rights protection and judicial review is correctly understood to impede any deviation by governments from the imperatives of classical liberal

[20] Ibid., 18.

[21] Ibid., 25.

[22] Ibid., 13.

principles. After all, the very purpose of rights is to make possible the tempering of majoritarianism with liberal principles.[23]

In this vein, when Knopff and Morton argue that the use of the Charter to circumvent legislative and administrative processes is "deeply and fundamentally undemocratic,"[24] they are not suggesting that judicial review is undemocratic merely because it is "non-majoritarian." Instead Knopff and Morton are referring to the diminution of the important role that representative executives and legislatures play in moderating the "habits and temperament" of policy actors to render them consistent with liberal principles and so consistent with representative democracy.[25] Evidence of this may be found, for example, in their sympathy for the view that the point of representation is to "filter, elevate, and moderate public opinion, rather than simply mirror it in its unrefined and often passionate state."[26] This concern is particularly important to Knopff and Morton in that they believe that the process of Charter litigation encourages Court Party "extremists" to inflate the moral worth of their otherwise unpopular policy demands by wrapping them in the mantle of non-negotiable constitutional

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[23] Morton and Knopff, "Permanence and Change," 539. Here is the full quotation: "One must immediately acknowledge that the undemocratic character of judicial activism cannot be a decisive argument against it. After all, the very purpose of rights is to limit democratic majoritarianism. Constitutionally entrenched rights—indeed, constitutional government as such—indicates that a regime aspires to be not simply a democracy but a self-restrained or liberal democracy, in which majoritarianism is tempered by liberalism." Ibid.

[24] Morton and Knopff, *Charter Revolution*, 149.

[25] Ibid.

[26] Knopff and Morton, *Charter Politics*, 200.

principle rather than "engage in government by discussion."[27] When Court Party groups side-step legislative and administrative processes to achieve their policy objectives, they not only side-step the institutional means of moderating policy through checked and balanced representative-deliberative executives and legislatures, but they also actively encourage a further decline in the view of judicial review of the Charter as a "prudent brake on political change."[28] Judicial review has become, instead, an inappropriate "catalyst for change."[29] It is clear that Knopff and Morton associate the Court Party with this transformation; the remaining question, however, is how exactly such a transformation has occurred.

Knopff and Morton do not lay blame on the Charter itself for the transformation in the way judicial review is understood, though they argue that the Charter revolution is "partly driven by the document."[30] The blame is laid initially on judges who promote "activist" judicial review which, in turn, increases the judicialization of politics. Knopff and Morton define activism as judicial "readiness to veto policies of other branches of government"[31] and add that it "designates opposition to the policies and actions of other branches of government."[32] Judicial activism signals a policy orientation in which judges are

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[27] Morton and Knopff, *Charter Revolution*, 158.

[28] Ibid., 41.

[29] Ibid.

[30] ibid., 21.

[31] Ibid., 15.

[32] Ibid.

willing to use the Charter to prevent executives and legislatures from making or implementing law or policy, or perhaps even changing law or policy to make it conform to the Charter. Knopff and Morton make the gist of this policy orientation clearer when they define the opposite of judicial activism in their 1992 book *Charter Politics*: judicial restraint is "a judicial disposition to find room within the constitution for the policies of democratically accountable decision makers."[33] This disposition to give executives and legislatures the "benefit of the doubt" is contrasted, in turn, with a judiciary which adopts a "suspicious frame of mind" with respect to the policy goals of other political institutions.[34]

Knopff and Morton declare activist judges "the most prominent leaders of the Charter revolution,"[35] but they do not argue that the judicial inclination or disposition associated with activism is generated from within the judiciary in isolation. In fact, the judiciary is heavily influenced by "academic chroniclers"[36] from the Court Party who have been highly successful in exerting influence on judges' understandings of their role in judicial review of the Charter. Knopff and Morton make the point colourfully when they declare that written constitutions "do not cause revolutions; leaders, elite cadres, and their supporters do."[37] This

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[33] Knopff and Morton, *Charter Politics*, 98.

[34] Ibid., 4.

[35] Morton and Knopff, *Charter Revolution*, 9.

[36] Ibid., 41.

[37] Ibid., 9.

influence is exerted primarily through academic court commentary and the participation of law professors as counsel in Charter litigation. Knopff and Morton argue that the specific mechanism through which academic chroniclers influence judicial dispositions to activism or restraint is the promotion of techniques of constitutional interpretation. Although they are not always precise in making the distinction as Morton indicates, for example, when he talks of the Supreme Court's "activist interpretation" of the Charter,[38] Knopff and Morton generally are careful to separate the question of the judiciary's effect on the policy process (activist or restrained) from the question of the choice of appropriate techniques of constitutional interpretation. While they readily admit that that it need not always be the case, Knopff and Morton associate an interpretivist approach to constitutional interpretation with judicial self-restraint as a policy orientation. This allows Knopff and Morton to defend a "correct" approach to constitutional interpretation without necessarily having to defend its implications for the policy process.

Knopff and Morton accept that judges must choose between different plausible interpretations of constitutional meanings when they adjudicate Charter cases. For example, they are explicit that choice or discretion is involved "at every point in the interpretive exercise."[39] That does not mean, however, that the choice should be left to the judge to make in an arbitrary or subjective fashion;

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[38] Morton, "Canada's Judge Bork," 121.

[39] Knopff and Morton, *Charter Politics*, 2.

Knopff and Morton argue that a judge should interpret constitutional meanings as a liberal "statesman" would. This term of art appears quite frequently in Knopff and Morton's earlier scholarship and serves as a vehicle to assert a classical liberal ideal of adjudication.[40] The judge as "statesman" must adopt a principled approach to constitutional interpretation to avoid degenerating into "an *ad hoc* style of judicial decision making."[41] This means that the judge should adopt an interpretive technique which allows him or her to be able to say that the Court speaks "in the name of principles enshrined in the constitution."[42] At the same time, the judge must face the liberal democratic "dilemma" associated with the reconciliation of classical liberal rights protection with enough deference to majority rule in a legislative setting to avoid eroding the court's legitimacy. As Knopff puts the point, for the "creative task of the statesman" there is "no formula."[43] Knopff and Morton indicate their own position regarding the resolution of the liberal democratic tension when they assert that in a liberal democracy, government is legitimate only on the basis of consent. Consent, however, is not understood here as giving priority to democratic will formation, even in a representative parliamentary setting; it is given "only better to secure natural

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[40] See for example, Rainer Knopff, "Pierre Trudeau and the Problem of Liberal Democratic Statesmanship" *Dalhousie Review* 60:4 (Winter 1980-1); Knopff and Morton, "Judicial Statesmanship"; F.L. Morton, "Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois" in Neil Nevitte and Allan Kornberg, eds. *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985).

[41] Morton, "Group Rights Versus Individual Rights," 73.

[42] Knopff and Morton, "Judicial Statesmanship," 331.

[43] Knopff, "Pierre Trudeau and the Problem," 723.

equality and freedom."[44] As a result, "government remains legitimate only to the extent that it respects this purpose."[45] For judges reviewing the Charter, the implication of Knopff and Morton's liberal democratic statesmanship is quite clear: judges should adopt a self-restrained interpretation of rights as long as government keeps to its legitimate purpose of securing "life, liberty and property."[46] If a government fails to do this, the judge-as-statesman must disregard consent understood as deference to majority rule in favour of consent understood as government consistent with liberal principles.

In any case, a principled approach to constitutional interpretation begins with the search for guidance in the plain meaning of the text of the Charter right in question. In Knopff and Morton's view, only if the text is ambiguous should judges look elsewhere for interpretive guidance; because the text is only rarely unambiguous, judges will have to look elsewhere for guidance quite frequently. If the text is ambiguous, Knopff and Morton argue, judges should consult "the intention of the law's framers."[47] In turn, if such intention is "unclear or ambiguous" Knopff and Morton instruct judges to consult the "well-established or traditional understandings of the relevant legal language."[48] Knopff and Morton

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[44] Knopff and Morton, "Nation-Building," 328.

[45] Ibid.

[46] Morton, "Group Rights Versus Individual Rights," 81. Morton argues here that such a narrowly defined purpose for government sits only uneasily with the Canadian "political experience" but he does not back away from the characterization.

[47] Morton and Knopff, *Charter Revolution*, 40.

[48] Ibid.

call this approach to constitutional interpretation "interpretivist" because the term signals a desire on the part of the judge who uses it to harness his or her interpretation to a set of Charter meanings which can plausibly be argued to have been "discovered" in the text, framers' original intention, or traditional understanding rather than in the judges' subjective disposition. Noninterpretivism, on the other hand, signals a more "creative" judicial disposition to ignore interpretations of Charter rights which can reasonably be ascribed to the text, original intent or traditional understanding in favour of the judges' own predilections regarding the purpose the right is supposed to serve.[49]

While Knopff and Morton distinguish clearly between constitutional interpretivism and noninterpretivism in their work, they also point out that the dichotomy refers less to a distinction between "discovery" and "creation" of constitutional meanings than it does to a different "level of generality or abstraction" at which the original intention of the Charters' framers is to be pitched. Interpretivists, on this view, prefer "more particular or concrete intentions, and noninterpretivists insist...on a greater level of abstraction."[50] The problem with the abstraction of noninterpretivism or "purposive analysis" is that it cannot provide concrete guidance to judges other than possibly to grant them

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[49] Knopff and Morton, *Charter Politics*, 109-10.

[50] Ibid., 115.

permission to push constitutional meanings away from "existing traditions" as they see fit.[51]

Knopff and Morton clearly prefer the guidance of particular or concrete intentions because they are already certain of the content of the principles by which judges should be guided when they interpret the Charter. Since Knopff and Morton accept that the constitutional text alone cannot be determinative because language "can be read to suit either side in a battle of conflicting principles,"[52] and the same is true of the framers' original intention which can be equally "murky"[53] or "slippery,"[54] the real work of their approach to constitutional interpretation is to be done by the judicial interpretation of traditional understandings. Thus, when Knopff and Morton declare that the Charter's text, original intent, or traditional understanding should be interpreted by judges to provide "determinative guidance in distinguishing constitutional powers and rights,"[55] they are saying, ultimately, that traditional understandings should provide the determinative guidance for judges in interpreting Charter rights. These traditional understandings, in turn, are logical derivations of their understanding of the substantive principles of classical liberalism rather than the principles that Canadians just happen to have held at the time the Charter was

[51] Ibid., 131.

[52] Ibid., 150.

[53] Ibid., 130.

[54] Morton and Knopff, *Charter Revolution*, 41.

[55] Knopff and Morton, *Charter Politics*, 115.

created. Importantly, classical liberal principles also offer Knopff and Morton the criteria with which to assess the quality of Charter interpretation and the degree to which the resulting balance of activism and restraint meets the imperatives of liberal statesmanship. It is important to note that liberal statesmanship, as Knopff and Morton understand it, does not require an inflexible commitment to classical liberal principles as the basis of constitutionalism in Canada. Inflexibility, after all, denies the need to navigate the liberal democratic tension: "the very idea of constitutionalism implies permanence and thus limits upon flexibility. Indeed permanence and change are the two inseparable sides of the constitutional coin, and sensible principles of interpretation maintain a healthy balance between them."[56] At the same time, because Knopff and Morton clearly connect legitimate government with consent defined in terms of classical liberal principles, there are clear constraints on the breadth of judicial flexibility in legitimate Charter interpretation.

Academic criticism of Knopff and Morton

Academic critics of Knopff and Morton's work are quick to condemn their supposedly simplistic view of democracy and their under-theorized assessment of the nature of constitutional adjudication. Miriam Smith, for example, argues that Knopff and Morton's scholarship leaves the impression that "democracy is a straightforward and uncontested concept that refers to the seemingly simple fact

[56] Morton and Knopff, "Permanence and Change," 545.

that democratically elected governments will act in a way that reflects the will of the majority."[57] Peter Leslie shares this view, declaring that a "full refutation" of Knopff and Morton's thesis would require that critics challenge the conception of democracy underlying their work and argue instead that "democracy has less to do with political process than with social outcomes."[58] Similarly, Peter Hogg declares Knopff and Morton's scholarship to be based on an "impoverished definition of democracy."[59]

Bruce Ryder agrees with Smith, Leslie and Hogg but adds that Knopff and Morton "put forward a critique of judicial power that essentially uses parliamentary sovereignty as a base line."[60] In the same vein, Kent Roach connects his estimation of Knopff and Morton's understanding of democracy with his estimation of parliamentary sovereignty when he denies that "democracy depends on legislative supremacy."[61] In their defence, Knopff and Morton deny that they are "simple majoritarians" and even side with their critics in noting the "importance of protecting individual and minority rights against majoritarian

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[57] Miriam Smith, "Ghosts of the Judicial Committee," 15.

[58] Peter Leslie, "Review of Morton and Knopff, *The Charter Revolution and the Court Party*" *Canadian Public Policy* xxvii:1 (2001), 123.

[59] Peter W. Hogg, "The *Charter* Revolution: Is it Undemocratic?" (2001) 12 *Constitutional Forum* 1, 9.

[60] Bruce Ryder, "Unavoidable Judicial Power and Inevitable Charter Controversy" (2001) 14 *Supreme Court Law Review* (2d) 289, 291.

[61] Kent Roach, "The Myths of Judicial Activism" (2001) 14 *Supreme Court Law Review* (2d) 297, 298.

excess."[62] While it is by no means difficult, as the previous section of this chapter shows, to find evidence in their work to support Knopff and Morton's rejection that they are simple majoritarians,[63] it is more difficult to explain why they are so consistently accused of holding a simplistic majoritarian notion of democracy. Ryder and Roach offer a clue when they associate their estimation of Knopff and Morton's view of democracy with the doctrine of parliamentary sovereignty. Ryder and Roach notice that Knopff and Morton integrate a positive assessment of the doctrine of parliamentary sovereignty into their constitutional scholarship. In turn, Ryder and Roach condemn Knopff and Morton for praising a doctrine which is assumed to be linked, necessarily, to a majoritarian understanding of democracy. Similar problems exist with the scholarly criticism of Knopff and Morton's understanding of constitutional adjudication.

Political scientists and legal scholars both accuse Knopff and Morton of failing adequately to deal with the reality of constitutional adjudication. Alexandra Dobrowolsky, for example, argues that Knopff and Morton demand the impossible of judges, that they "follow the letter of the law...and not consider any 'abstract' tangents in the form of values or social issues."[64] Miriam Smith shares this view in criticizing Knopff and Morton for failing to notice that no other political scientist "seriously believes that what judges do is beyond politics, or that judicial

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[62] Knopff and Morton, "Ghosts and Straw Men," 33.

[63] For examples, refer to Knopff, "Populism and the Politics of Rights"; and Knopff and Morton, "Judicial Statesmanship"; Morton and Knopff".

[64] Dobrowolsky, "The Charter and Mainstream Political Science," 324.

decision making is now, or ever was, a simple matter of correctly interpreting the text of a constitutional law."[65] In the same vein, James Kelly and Michael Murphy offer a more detailed challenge to Knopff and Morton for offering an approach to constitutional interpretation which is unable successfully to measure up to scrutiny. First, Kelly and Murphy argue that "original intent" is an incoherent and inconsistent doctrine which should be rejected.[66] This is because the doctrine aims at achieving a level of certainty in judicial interpretation of Charter meanings which is impossible to achieve. In particular, the epistemological difficulties judges face in trying to ascertain the actual "original intent" of the constitution's framers renders the doctrine unable to achieve the high level of determinacy supposedly demanded of it by Knopff and Morton. If judges cannot ascertain the "original intent" of the constitution's framers, then the doctrine cannot constrain judicial discretion. Elsewhere Kelly puts the point this way: "This call for the Court to bind itself to original understanding is problematic largely because the Charter skeptics have not satisfactorily demonstrated what the framers' intent in constructing the Charter was."[67]

Robin Elliot offers a number of similar criticisms but adds the accusation that Knopff and Morton fail to indicate how judges should proceed in interpreting

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[65] Smith, "Ghosts of the Judicial Committee," 20-1.

[66] James Kelly and Michael Murphy, ""Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16 *Canadian Journal of Law and Society* 3, 4 and 11.

[67] James Kelly, "The Supreme Court of Canada and the Complexity of Judicial Activism," in Patrick James et al., eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2002), 100.

the Charter if, say, the Charter meanings derived from original intent (assuming for the moment that they were ascertainable) were to conflict with either a plain reading of the text or with traditional understandings.[68] Without clear guidance in dealing with such conflicts, Elliot implies, Knopff and Morton's interpretivist technique is useless. As with their response to Smith in regards to their understanding of democracy, Knopff and Morton defend themselves against accusations that they fail to acknowledge the discretion at the heart of constitutional adjudication.[69] In like manner, it is relatively straightforward to show that these criticisms of Knopff and Morton miss the mark because they ignore the degree to which Knopff and Morton themselves factor into their work the explicit recognition of the relevance of such considerations.

Perhaps most striking in the literature critical of Knopff and Morton's scholarship is that many academics who have dissected their work make a point of identifying how Knopff and Morton's constitutional scholarship is rooted in either social conservatism or right-wing political ideology.[70] Some scholars even imply that the very structure of their constitutional scholarship is driven by an ideological agenda. Peter Leslie, for example, notes the "polemical quality"[71] of *The Charter Revolution and the Court Party*. Elliot adds that the same book "has

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[68] Elliot, "The Charter Revolution and the Court Party," 296.

[69] Knopff and Morton, "Ghosts and Straw Men."

[70] See for example, Dobrowolsky, "The Charter and Mainstream Political Science"; Elliot, "The Charter Revolution and the Court Party"; Sigurdson, "Left- and Right-Wing Charterphobia"; Smith, "Ghosts of the Judicial Committee"; Weinrib, "The Activist Court."

[71] Leslie, "Review of *The Charter Revolution and the Court Party*," 123.

clearly been influenced by their neo-conservative ideological commitments."[72] Elliot goes on to call the book a "blinkered political polemic" which is "the product of an ideologically driven determination on the part of the authors to cast the *Charter* in the worst possible light."[73] Similarly, Richard Sigurdson implies he is stating the obvious when he announces that Knopff and Morton's work "should be identified as a Charter critique from the political right.[74]

Interestingly, Sigurdson goes on to argue that Knopff and Morton prefer an interpretivist approach to constitutional adjudication precisely because it will "impede radical policy initiatives."[75] Dobrowosky offers a similar analysis of the impetus of their work when she declares that Knopff and Morton offer an approach to constitutional adjudication which is motivated by "concern" regarding the progress made by social interest representatives which struggle to attain their policy goals on "judicial terrain."[76] She declares that Knopff and Morton's "intent is to constrict the sites of political struggle for collective actors by rigidly defining political and judicial functions and thereby limiting access to these spheres."[77]

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[72] Elliot, "The Charter Revolution and the Court Party," 271-2.

[73] Ibid., 327.

[74] Sigurdson, "Left- and Right-Wing Charterphobia," 103.

[75] Ibid., 104.

[76] Dobrowolsky, "The Charter and Mainstream Political Science," 324.

[77] Ibid.

Dobrowolsky goes on to say that Knopff and Morton "yearn" for a more traditional understanding of the political system.[78] Lorraine Weinrib echoes this sentiment when she suggests that scholarship accusing judges of activism is the "expression of deep anguish by the stakeholders of a world view in demise."[79] Patricia Hughes comes to the same conclusion regarding the underlying rationale for Knopff and Morton's work: "It's hard to avoid the thought that the counterbalancing of majority decision making underlies the objection of some critics to the enhancement of the court's jurisdiction: they bemoan in reality less the increase in the court's power than the perceived loss of their own power or centrality to policy-making."[80] Elsewhere Hughes adds that one cannot ignore the "crucial connection between contemporary attacks on the judiciary and resistance to the constitutional changes which underlie citizens' appeals to the judiciary."[81]

Even sympathetic critic Tom Bateman asserts that Knopff and Morton, in a sense, express the "frustration of adherents of a political position whom the world has passed by."[82] Unlike Hughes, however, Bateman echoes Knopff and Morton's views in holding that the Charter revolution "can be seen as evidence of

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[78] Ibid., 325.

[79] Weinrib, "The Activist Court," 30.

[80] Patricia Hughes "Section 33 of the *Charter*: what's the problem, anyway? (or, why a feminist thinks section 33 does matter)" (2000) 49 *University of New Brunswick Law Journal* 169, 171.

[81] Patricia Hughes, "Judicial Independence: Contemporary Pressures and Appropriate Responses" (2001) 80 *Canadian Bar Review* 181, 183.

[82] Bateman, "Crashing the Party," 868.

long-term historical decline, an unnatural, malignant radicalization of an earlier doctrine of natural rights, a decline rooted in the very forces of modernity."[83] Gwen Brodsky and Shelagh Day offer the assertion that "classical constitutionalism" cannot serve as the basis of "an adequate theory of constitutional interpretation in Canada in our time."[84] They go on to suggest that the view of government as "exclusively an oppressor and not an important actor in providing social benefits and remedying inequalities between groups does not reflect the history of Canadian political institutions."[85]

The critique of Knopff and Morton which focuses on their ideological commitments and the possible implications of those commitments for the content and style of their constitutional scholarship cannot be dismissed in the same way that attacks on their democratic theory or understanding of adjudication can be. In fact, this focus is an important, even central element of their scholarship. Knopff and Morton themselves recognize as much: "Whether one likes the Charter will depend in part on whether one thinks judicial power is likely to further one's political agenda."[86] Moreover, a proper evaluation of the Charter depends on "more overtly political calculations about the way judges are most likely to

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[83] Ibid., 868-9.

[84] Brodsky and Day, "Beyond the Social and Economic Rights Debate," 205.

[85] Ibid.

[86] Knopff and Morton, *Charter Politics*, 8.

exercise their power."[87] In Knopff and Morton's view, then, the suggestion that their scholarship is consistent with their ideological preferences is obvious. This is not to say, however, that Knopff and Morton would concede that their critique of judicial review of the Charter is insincere just because it would lead to policy outcomes they would prefer: "The fact that an argument coincides with one's interest may make one more inclined to adopt it but does not in itself impugn the validity of the argument; nor does it preclude genuine attachment to the argument in its own right, quite apart from its tendency to support one's interest."[88]

More recently, Knopff and Morton have pointed out that "[t]he attacks on the court now come from the right where they used to come from the left"[89] and go on to argue that because consistency is a virtue in constitutional scholarship, "[i]t is no good for those on the right to praise judicial activism then and deplore it now, or for those on the left to deplore it then and praise it now. Either judicial activism is justified in both eras or in neither."[90] Because Knopff and Morton praise judicial self-restraint in the Charter era, such statements imply that they are committing themselves to praising self-restraint in the pre-Charter era as well. At the same time, Knopff and Morton argue that the Charter represents a

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[87] Ibid., 234.

[88] Knopff and Morton "Nation-Building," 137.

[89] Knopff and Morton, "Ghosts and Straw Men," 32.

[90] Ibid.

revolutionary break with Canada's pre-Charter constitutional tradition. Because the evidence of this revolution in the present is judicial activism, again, Knopff and Morton are committing themselves to finding judicial self-restraint in Canada's pre-Charter constitutional tradition.

Morton's work provides an example of the possible influence of shifting judgements of judicial practice under the Charter on portraits of Canada's constitutional tradition.[91] In 1987 Morton argued that the Charter "contains elements of both continuity and change with Canada's political tradition."[92] For this reason, interpretations of that tradition "become a matter of emphasis."[93] In 1994, however, he argued that the Supreme Court's jurisprudence represents a sharp break with our Anglo-Canadian legal tradition of parliamentary supremacy and judicial self-restraint.[94] Clearly, by 1994 Morton's emphasis had shifted to the element of change in Canada's constitutional tradition. Later Morton heaps praise on Alberta Court of Appeals judge McClung's decision in *Vriend v. Alberta*[95] for his attempt to "resuscitate our 'constitutional heritage' by recalling the 700 years of political struggle and sacrifice required to construct, plank by plank, the

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[91] This is a central point in much of Alan Cairns' constitutional scholarship from the 1990s. See in particular his "Author's Introduction: Whose side is the Past On?" in *Reconfigurations.*

[92] Morton, "The Political Impact of the Charter," 31.

[93] Ibid., 33.

[94] F.L. Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992" in Curtis Cook, ed. *Constitutional Predicament: Canada After the Referendum* (Montreal and Kingston: McGill-Queen's University Press), 1994, 137.

[95] (1996) 132 D.L.R. (4th) 595.

institutions of parliamentary democracy and responsible government."[96] McClung claims in his decision that this heritage is being "eroded" by "ideologically determined" judges who are both sceptical of legislatures and willing to legislate in their stead.[97] Morton calls McClung's assertions a "noble attempt at judicial statesmanship,"[98] and goes on to suggest that "[a] country that forgets its past endangers its future."[99] In the context of Morton's assertion that the Charter need not have but, in fact, does represent a sharp break in Canada's constitutional tradition, it would seem that Morton sees in McClung's decision an opportunity to shore up the damage wrought on Charter interpretation by judges who have been encouraged by the Court Party to ignore or forget our "heritage."

Indeed, recalling Knopff and Morton's views on judicial statesmanship, it would seem that McClung is being praised for criticizing his professional colleagues for their judicial activism and for offering a reminder to Canadians of the imperatives of our constitutional heritage which we ought not forget. This view is reinforced by Knopff's claim that judicial statesmanship has an educative or rhetorical dimension;[100] this means that judicial statesmanship is tasked not only with addressing the liberal democratic tension in adjudicating constitutional cases, but also with actively reminding Canadians what the implications of that

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[96] Morton, "Canada's Judge Bork," 124.

[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] Knopff, "Pierre Trudeau and the Problem of," 720.

tension are and require of us. In turn, there is no need to limit the statesman role to the judge alone; a case could, indeed, be made that Knopff and Morton, in fact, see themselves as statesmen performing a function similar to the one they expect judges to perform. For example, Morton declares the importance of reclaiming the Charter as a "foundational document for the practice and preservation of liberal democracy in Canada."[101] This task is not impossible, Morton argues, since "Canada has a liberal democratic tradition to fall back on."[102] The key is to publicize this tradition. Whether or not this portrait is, indeed, accurate is a question which has not been addressed in any detail by Knopff and Morton's academic critics.

Knopff and Morton on parliamentary sovereignty

While the legal doctrine of parliamentary sovereignty clearly holds that Parliament can make any law whatever, and that judges lack the authority to challenge the validity of properly enacted statutes, scholars are left to extrapolate the implications of the doctrine for adjudication and for the balance of courts and legislatures. In Knopff and Morton's view, early liberal democratic constitutionalists in the UK "put little faith in judicially enforceable bills of rights—

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[101] F.L. Morton, "The Charter of Rights: Myth and Reality" in William Gairdiner, ed., *Against Liberalism: Essays in Search of Freedom, Virtue and Order* (Toronto: Stoddart), 55.

[102] Ibid.

and for good reason."[103] Consistent with this view, Knopff and Morton argue that the 19th century British theorist of parliamentary sovereignty, A.V. Dicey, believes that "parliamentary sovereignty was the key to protecting rights—rather than the main threat to rights, as is now generally assumed—because the sovereignty of parliament embodies the principle of checks and balances."[104] To this account, which they draw in large part from a single article by Janet Ajzenstat,[105] Knopff and Morton add that institutional checks and balances form the essence of parliamentary government, and that the most important of these checks is "the freedom of the opposition parties to criticize and expose government violations of the people's rights."[106] In turn, Knopff and Morton agree with Ajzenstat that Dicey exhibited Whig confidence in the natural rights tradition, "and the power of reasoned debate to apply this tradition to the affairs of state."[107] In linking Dicey to confidence in the natural rights tradition as manifest in parliamentary debate, Knopff and Morton imply that Canada's pre-Charter constitutional tradition should be understood to be similarly linked to the application by parliamentarians of "permanent rights rooted in permanent human nature"[108] to the affairs of government. These rights, in turn, are limited to classical liberal rights. Knopff

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[103] Knopff and Morton, "Does the Charter Hinder Canadians," 278.

[104] Ibid., 280.

[105] See her "Reconciling Parliament and Rights."

[106] Ibid., 281.

[107] Ibid.

[108] Morton and Knopff, "Permanence and Change," 541.

and Morton make no bones about the "Madisonian" element in their own scholarship.[109] For example, they quote 18th century American constitutionalist James Madison who says that government is the "greatest of all reflections on human nature."[110] The implication of this Madisonian view is that the "ineradicably asocial, even anti-social side"[111] of human nature places clear constraints on the legitimate purpose of government. For Madisonians, the anti-social side of human nature must be tamed by separated powers, a strict separation of state and society, and limited government. Knopff goes so far as to argue that 19th century Canadian constitutionalists, and here he implies Dicey as well, are Madisonian in their attention to the importance of guiding the faction rooted in human nature into "moderating institutional channels."[112] Knopff adds that the Madisonian element in Canadian constitutionalists encourages them to

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[109] James Kelly and Michael Murphy identify the significance of this "Madisonian" element in their "Confronting Judicial Supremacy." Kelly and Murphy point out that "One of the most crucial insights motivating this Madisonian Framework is the reliance on institutional structures rather than human virtue as the primary safeguard against the abuse of political power." Ibid., 7. They go on to suggest that for Madison, "The prevention of tyranny is too important of a goal to be entrusted *solely* or even primarily to non-structural provisions such as the self-restraint of constitutional actors. Institutional structures must be capable of compensating for any potential imperfections in human nature." Ibid. Kelly and Murphy intend these statements as criticisms of Knopff and Morton's focus on judicial self-restraint in the policy process. They miss their mark because Knopff and Morton, in fact, share this view. See also John Ferejohn, "Madisonian Separation of Powers" in Samuel Kernell, ed. *James Madison: The Theory and Practice of Republican Government* (Stanford: Stanford University Press), 2003.

[110] Morton and Knopff, *Charter Revolution*, 75.

[111] Ibid., 74.

[112] Knopff, "Populism and the Politics of Rights," 694.

"create inter-institutional checks and balances that pit ambition against ambition."[113]

In addressing the proper configuration of checks and balances within a parliamentary system of government, Knopff and Morton emphasize the absence of a dominant role for the judiciary in protecting rights. In Canada's constitutional tradition, they argue, "rights are best protected by the system of responsible government not by the courts."[114] Morton makes the point equally clear: "The tradition of parliamentary supremacy relegates the courts to a secondary role."[115] Knopff and Morton draw from the doctrine of parliamentary sovereignty an ideal of judicial behaviour which they associate with "traditional judicial conservatism,"[116] and "a textually oriented form of judicial reasoning."[117] Historically, Knopff and Morton argue, judges in Canada did not allow themselves "to go beyond the actual text of a statute in interpreting its meaning."[118] Indeed, judges used to be "steeped in the black-letter law tradition of parliamentary supremacy and legal positivism."[119] Knopff and Morton imply that such an ideal of judicial practice was, in fact, effective in reinforcing judges' disposition to restraint

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[113] Ibid.

[114] Knopff and Morton, *Charter Politics*, 199.

[115] Morton, "The Political Impact of the Charter," 40.

[116] Knopff and Morton, "Nation-Building," 158.

[117] Ibid., 165.

[118] Ibid., 167.

[119] Ibid.

prior to the Charter. The judicial restraint demanded by that tradition, however, has been eroded not by the Charter itself, but by the influence of the Court Party on the judiciary in the Charter era.

In this context, Knopff and Morton take the view that Canada's "long tradition of parliamentary supremacy" has been replaced with a constitutional regime that is now verging on "judicial supremacy."[120] Illuminating their negative view of this development, Knopff and Morton assert that judges have "abandoned the deference and self-restraint that characterized their pre-Charter jurisprudence and become more active players in the political process"; they have rejected the "self-discipline" that comes with adherence to the doctrine of parliamentary sovereignty.[121] In Knopff and Morton's estimation, judicial self-restraint is required by the doctrine of parliamentary sovereignty because the doctrine requires judges to concede that that the moral authority of legislation is grounded in popular consent[122] which is the hallmark of the parliamentary process.[123]

Elsewhere Morton argues that an increasing lack of faith in the legislative process is the companion of judicial activism under the Charter: "Today, there is a perception that constitutional questions are too important to be left with

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[120] Morton and Knopff, *Charter Revolution*, 13.

[121] Ibid.

[122] Popular consent, it should be remembered, is not synonymous with the actual views of a majority of Canadians if such views deviate from classical liberal principles.

[123] Knopff and Morton, "Nation-Building," 157.

politicians."[124] Morton contrasts this with the "instinctive confidence" Canadians used to have in the parliamentary process.[125] In this same vein, Morton contrasts the "optimistic perspective" of Supreme Court judges who embody the "new confidence in judges as the arbitrators of Canada's fundamental constitutional norms" with the now displaced "skeptical" perspective, "dominant in Canadian legal and political culture prior to the 1980s."[126] Indeed, Knopff and Morton imply that Dicey's own "confidence" in the quality of the rights protection offered by the parliamentary process influences his doctrine of parliamentary sovereignty. Morton reminds us that while the doctrine appears to be "unlimited" in the scope it gives to parliamentarians to violate the "fundamental freedoms of Englishman," Dicey himself "made it clear that the political conventions of self-restraint and fair-play, reinforced by public opinion" have prevented their egregious violation.[127] Morton reiterates this point by affirming that Dicey preferred the "flexibility" of resting "primary responsibility for the preservation of liberty in an elected, accountable, representative legislature such as Parliament."[128] Elsewhere Knopff and Morton praise Dicey's status as one of "liberal democracy's early constitutionalists" who believed that "representative democracy, not judicialized

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[124] F.L. Morton, ed. *Law, Politics, and the Judicial Process in Canada*, 3rd ed. (Calgary: University of Calgary Press, 2002), 493.

[125] Ibid.

[126] Morton, *Law, Politics and the Judicial Process*, 3rd ed., 573.

[127] Ibid., 479.

[128] Ibid.

politics, is mainly how a sovereign people should protect rights."[129] We are led to believe, then, that Dicey's doctrine of parliamentary sovereignty is linked closely to Dicey's own confidence in the ability and willingness of parliamentarians to protect rights. We are also led to believe that Dicey holds a sceptical view of judges as defenders of fundamental rights. On this view, parliamentary sovereignty implies a self-restrained judicial approach limited merely to interpreting the text of the constitution or the "original intent" of the law's framers.

There is nothing particularly remarkable about Knopff and Morton mapping the "terrain" of contemporary judicial politics and public opinion in terms of "confidence" or "skepticism/pessimism" regarding the role parliamentarians or judges should play in protecting fundamental rights. Indeed, Knopff and Morton often use such emotive evocations in their own assessment of judicial power. For example, they freely admit that they are "not terribly optimistic" that the conditions under which they believe judicial politics might "improve the system of checks and balances"[130] can be realized in a policy environment infused with Court Party post-materialist values. Considering the extent of their differences regarding their judgements of the adequacy of judicial practice under the Charter, however, it is perhaps more surprising that Anne Bayefsky's view of the significance of Dicey's doctrine of parliamentary sovereignty is broadly consistent with the account presented by Knopff and Morton themselves. This view is also easily placed into

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[129] Morton and Knopff, *Charter Revolution*, 151.

[130] Knopff and Morton, "Ghosts and Straw Men," 33.

the framework of confidence or pessimism regarding the potential for parliamentarians or judges to protect fundamental rights.

Shortly after the introduction of the Charter, Anne Bayefsky penned a plea for judges to transcend the assumptions, attitudes and principles associated with parliamentary sovereignty. On this view, such a shift was necessary before judges would be willing to make the most of the "invitation" of the Charter to adopt a new and predominant role in the protection of fundamental rights.[131] Bayefsky shares with many contemporary Charter supporters the view that without judicially supervised protection of fundamental rights, expanded notions of human rights associated with the Charter are at perpetual risk of being undermined by socially conservative parliamentary majorities. Lorraine Weinrib puts the point this way: "traditional values...need no special protection...because they enjoy adequate security in the workings of popularly elected, majoritarian institutions."[132] Bayefsky shares Weinrib's concerns and implores judges in the Charter era to reject the implications of the doctrine of parliamentary sovereignty in order to activate their role as a needed "impediment to the implementation of transitory prejudices."[133]

Like Knopff and Morton, Bayefsky identifies the doctrine of parliamentary sovereignty with the "fundamental tenets of the Canadian constitution," and

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[131] Bayefsky, "Parliamentary Sovereignty and Human Rights."

[132] Weinrib, "Paradigm Lost?," 123.

[133] Bayefsky, "Parliamentary Sovereignty and Human Rights," 242, 253.

proceeds to interpret Dicey's views as if they represented the pre-Charter constitutional tradition. Bayefsky suggests that parliamentary sovereignty has two implications for the protection of human rights, both of which are drawn from the doctrine's legal positivist premises.[134] First, law has no "necessary content" and so there is no legal requirement that law "serve to protect human rights."[135] Second, the courts are assumed to be unable legitimately to "interpret a law inimical to the security of human rights so as to avoid its clear intent."[136] For these reasons, "emphasis in the protection of human rights is not placed on the judicial role" but rather on the parliamentary "majority": "Faith with respect to human rights protection is placed in the workings of democracy" and in the "power of numbers."[137] In effect, then, Bayefsky agrees with Knopff and Morton that Dicey had faith in the parliamentary process, believing that judges were obliged to interpret law according to the clear intent of Parliament. Also with Knopff and Morton, Bayefsky imputes to Dicey a "distrust of the judicial function."[138] In Bayefsky's view, a consequence of Dicey's "general concern to keep power with legislatures rather than with courts" was to ascribe to judges only a "peripheral role" in the protection of fundamental rights.[139] Dicey's doctrine

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[134] Ibid., 240, ft. 9.

[135] Ibid., 241.

[136] Ibid.

[137] Ibid.

[138] Ibid.

[139] Ibid.

of parliamentary sovereignty, then, is interpreted by Bayefsky as a way for her to identify concerns regarding the minimal role judges have in protecting rights in a parliamentary regime. Like Knopff and Morton, Bayefsky implies that Dicey's doctrine of parliamentary sovereignty is a manifestation of faith in the ability of the parliamentary process to protect fundamental rights, and of skepticism regarding such a role for judges. In turn, if judges deviate from their role as, to paraphrase Montesquieu, the mouths that pronounce the words of the law, they pass "beyond the bounds set by the doctrine of parliamentary sovereignty."[140] In short, the doctrine of parliamentary sovereignty requires that judges, in interpreting constitutional text, ensure that the views of legislators prevail over those of judges. Such is the "confident" interpretation of Dicey's doctrine of parliamentary sovereignty.

Walter Tarnopolsky points out that, under the doctrine of parliamentary sovereignty, "the courts do not have the right to invalidate an Act of Parliament on the grounds of its arbitrariness, or its alleged contravention of civil liberties."[141] Patrick Macklem et al. add that "Parliament could, in effect, make statutes about whatever it wished, in whatever terms it wished, and the courts were obliged to enforce its dictates."[142] Paul Weiler, for his part, explains why this doctrine should

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[140] Ibid., 243.

[141] Walter Tarnopolsky, "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971) 17 *McGill Law Journal* 437, 438.

[142] Patrick Macklem, R.C.B. Risk, C.J. Rogerson, K.E. Swinton, L.E. Weinrib and J.D. Whyte, eds. *Canadian Constitutional Law* Vol. I (Toronto: E. Montgomery, 1994), 4.

not strike fear in civil libertarians: under the doctrine of parliamentary sovereignty, individual rights are preserved, but they are preserved by the "self-restraint of the political branches of government."[143] None of these legal scholars' assertions is logically inconsistent with Knopff and Morton's claim that Dicey, and by extension Canada's pre-Charter constitutional tradition, is associated with faith in parliamentary rights protection and scepticism regarding judicial involvement in rights protection. Indeed these declarations of the doctrine of parliamentary sovereignty would appear to make good sense of Knopff and Morton's assertion that parliamentary sovereignty is properly accompanied by a "textually oriented form of judicial reasoning."[144] After all, if judges lack the authority to invalidate statutes for violating civil liberties, then they must limit themselves to applying the law. Knopff and Morton leave us with the impression that this understanding of the judicial task is typically associated with judicial restraint.

There is no necessary connection, however, between the doctrine of parliamentary sovereignty and judicial restraint. Indeed, the doctrine of parliamentary sovereignty need not deny to judges the discretion to *apply* statutes as they see fit. In fact, for Canadian legal scholars writing before the Charter era, the doctrine of parliamentary sovereignty does not prohibit judges from taking an activist role in adjudicating cases if a statute requiring

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[143] Paul Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 *University of Michigan Journal of Law Reform* 51, 68.

[144] Knopff and Morton, "Nation-Building," 165.

interpretation affects civil liberties.[145] Caesar Wright makes this point clear when he notes that "it is well to remember that despite our theory of the sovereignty of Parliament, a statute will have only the effect that a court may say it should."[146] Tarnopolsky, in turn, argues that judges may alter the policy effects of statutes without undermining the doctrine of parliamentary sovereignty. After noting that the doctrine of parliamentary sovereignty can protect only those civil liberties which Parliament chooses not to abrogate by clearly worded legislation,[147] Tarnopolsky goes on to point out that the "absolute" authority of Parliament to violate rights under the doctrine of parliamentary sovereignty is, in fact, mitigated in part by the "interpretive principles employed by the courts."[148] These interpretive principles include the "restrictive interpretive principle and the power allocation principle."[149] These principles operate as "presumptions in favour of

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[145] This point is well developed in a contemporary context by T.R.S. Allan. See for example, his *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001); and "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) 63:3 *Cambridge Law Journal* 685. For a critique of Allan see Thomas Poole, "Dogmatic Liberalism: T.R.S. Allan and the Common Law Constitution" (2002) 65 *Modern Law Review* 463; and "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 *Oxford Journal of Legal Studies* 435.

[146] Caesar Wright, "Foreward" in Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956), viii.

[147] This point implies that if a statute affecting civil liberties is not clear in its intent to alter liberties already protected by the common law, the judges have a duty to apply the statute so as to minimize the "damage" to the liberty. See Tarnopolsky, "The Historical and Constitutional Context of the Proposed Charter," 172.

[148] Ibid., 171.

[149] Ibid., 172.

legislative interpretations that are least restrictive of fundamental rights."[150] Judges can use them to mitigate, in cases where a statute's wording can permit a plausible argument that it is ambiguous, the negative effect of a statute on an individual's civil liberties by either narrowing its meaning or by declaring the statute *ultra vires* on federalism grounds.

Particularly intriguing is that Tarnopolsky defends this judicial practice in terms of Canadian constitutional principle. He argues that, in fact, Canada's constitutional tradition consists of not just parliamentary sovereignty but also the principle of the rule of law.[151] In Tarnopolsky's view, the rule of law implies common law protection of those civil liberties which are not explicitly abrogated by statute, but it also authorizes the judiciary to use common law principles to interpret statutes to minimize the negative effect of statutes on civil liberties.[152] Importantly, these interpretive techniques will lead to judicial restraint only if the executive or legislature did not intend to abrogate the right. Otherwise the judicial effort to mitigate the law or executive action's negative effect on civil liberties would constitute an example of judicial activism.

In fact, Morton is well aware of the interpretive principles identified by Tarnopolsky (he refers to them as interpretive avoidance and power

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[150] Ibid.

[151] Ibid., 171.

[152] Ibid., 172. Tarnopolsky also identifies the rule of law with the principle that a citizen has the right to do anything not prohibited by law, and the corollary that government agents can act only under the authority of a law. Ibid.

allocation);[153] nevertheless, these principles do not find a central place in Knopff and Morton's more general understanding of the doctrine of parliamentary sovereignty.[154]

Conclusion

In this chapter some of the main lines of argument in Knopff and Morton's constitutional analysis were presented in the context of their increasing dissatisfaction with the activist evolution of judicial interpretation of the Charter. It was argued that Knopff and Morton's critique of Charter review is not so much that the practice is anti-majoritarian, but that judges have failed to interpret the meaning and significance of the Charter with reference to classical liberal principles of government. In turn, the critical response of constitutional scholars to Knopff and Morton's work was reviewed to show the extent to which they have been misinterpreted as simplistic majoritarian democrats who fail to recognize that judicial discretion is inherent in the process of constitutional interpretation. While Knopff and Morton's critics have been keen to point out the ideological conservatism underlying their constitutional analysis, these critics have not

[153] Morton, *Law, Politics and the Judicial Process*, 3rd ed., 480-2.

[154] The broader implications of a greater emphasis on the rule of law as a fundamental constitutional principle are addressed in Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 *Canadian Bar Review* 67; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 *Queen's Law Journal* 389; Warren Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 *Supreme Court Law Review* (2d) 197; and Mark Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 *University of Toronto Law Journal* 91.

considered the possible relationship between this ideological conservatism and the extent to which Knopff and Morton emphasize judicial restraint as a key aspect of the doctrine of parliamentary sovereignty as Canada's pre-Charter constitutional tradition.[155] In fact, Knopff and Morton's critics have simply ignored that portrait. Finally, Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty was presented to highlight both its focus on judicial deference to parliamentary rights protection and its consistency with other elaborations of the significance of the doctrine for rights protection.

While it is true that the doctrine of parliamentary sovereignty prohibits judges from invalidating properly formulated statutes, this does not prohibit, in principle, a central role for judges in protecting rights through the use of the interpretive principles of restrictive interpretation and power allocation. In fact, Dicey himself recognized and accepted, even praised, the judicial use of these principles. He reconciled their use with the doctrine of parliamentary sovereignty in such a way as to emphasize the central role of the judiciary in rights protection. This point will be developed in chapter four.

The fact that Knopff and Morton do not emphasize these interpretive principles, and the central role they might play in protecting rights under the doctrine of parliamentary sovereignty, in their interpretation of the doctrine of parliamentary sovereignty may, indeed, be explained by their view that the

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[155] Lorraine Weinrib and Peter Leslie, however, have indicated an awareness of this connection. See Weinrib, "The Activist Court"; and Leslie, "Review of Morton and Knopff, *The Charter Revolution*".

judiciary in Canada has been co-opted by the Court Party. Knopff and Morton are committed to the argument that the Charter signals a revolutionary break with Canada's constitutional tradition.[156] An interpretation which downplays the role played by the judiciary in protecting rights under the doctrine of parliamentary sovereignty sharpens the contrast to judicial review of entrenched rights under the Charter.

It was argued in this chapter that Knopff and Morton have been criticized, mistakenly, for holding views regarding democratic theory and constitutional interpretation which constitutional scholars typically associate with the doctrine of parliamentary sovereignty. In the next two chapters, the extent to which the doctrine of parliamentary sovereignty is freighted with accusations of a faulty democratic foundation (chapter two) and a faulty approach to statutory interpretation (chapter three) will be explored. If it is true that legal scholars associate the doctrine of parliamentary sovereignty with these limitations, it is easier to understand the lack of interest in testing the claims made in the name of the doctrine by Knopff and Morton.

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[156] This argument in most thoroughly defended in their *The Charter Revolution and the Court Party.*

Chapter Two

Canadian legal scholars and political scientists have begun increasingly to defend judicial review of the Charter against attack by critics who are said to argue that activist judges are undermining democratic government in Canada. In general, this defence of judicial review of the Charter takes the form of an emphasis on the non-majoritarian character of democracy in Canada, which is said easily to justify judicial supervision of Charter values. The work of critics such as Rainer Knopff and F.L. Morton who have, over the course of two decades, developed a systematic critique of judicial activism under the Charter,[1] has received a great deal of critical scrutiny by constitutional scholars.[2] Nevertheless, Knopff and Morton's work has attracted the attention of students of the constitution as a vehicle through which to defend the democratic credentials

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[1] Rainer Knopff and F.L. Morton, "Judicial Statesmanship and the Charter of Rights and Freedoms" in F.L. Morton, ed. *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1987); "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds. *Constitutionalism, Citizenship and Society* (Toronto: University of Toronto Press, 1985); F.L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990) 1 *Supreme Court Law Review* (2d) 533; *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

[2] See for example, Thomas Bateman, "Crashing the Party: A Review of F.L. Morton and Rainer Knopff's *The Charter Revolution and the Court* Party" (2001) 33 *University of British Columbia Law Review* 859; Alexandra Dobrowolsky, "The Charter and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents" in David Schneiderman and Kate Sutherland, eds. *Charting the Consequences: the Impact of the Charter of Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997); Didi Herman, "It's Your Party (and I'll Cry If I Want To): Thinking About Law and Social Change" (1994) 9 *Canadian Journal of Law and Society* 181; Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal and Kingston: McGill-Queen's University Press, 2002), chapter 2; Richard Sigurdson, "Left- and Right-Wing Charterphobia In Canada: A Critique of the Critics" *International Journal of Canadian Studies* 7:8 (Spring 1993); Lorraine Weinrib, "The Activist Court" *Policy Options* 20:3 (1999).

of judicial review of the Charter rather than to engage Knopff and Morton's arguments regarding the significance of the doctrine of parliamentary sovereignty as a democratic element of constitutionalism in Canada.[3] Despite the fact that Knopff and Morton's works have received substantial critical attention, their interpretation of the doctrine of parliamentary sovereignty has not been subjected to critical scrutiny. This chapter will offer the first of two possible explanations for this neglect. Highlighting this neglect is all the more important because Knopff and Morton's interpretation of parliamentary sovereignty is an integral element of their critique of contemporary judicial activism as was argued in chapter one.

Canadian legal scholars in particular tend to debate the legitimacy of judicial review of the Charter is influenced by the conceptual framework popularized by mid-20th American legal scholar Alexander Bickel. This chapter will explore this framework In this framework in which judges are cautioned that the practice of judicial review of an entrenched bill of rights risks the accusation of illegitimacy because it is counter-majoritarian. The effect of this framework on Charter debate has been to spur legal scholars to defend judicial review of the Charter by arguing that the practice is democratic despite being counter-majoritarian. This argument is based on the view that democracy in the Charter era entails more than legislative majority rule. It also requires judicial protection

[3] Two of the most comprehensive critiques of Knopff and Morton, one by a legal scholar the other by a political scientist are Robin Elliot, "'The Charter Revolution and the Court Party': Sound Critical Analysis of Blinkered Political Polemic?" (2002) 35 *University of British Columbia Law Review* 271 and Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" *Canadian Journal of Political Science* xxxv:1 (March 2002).

for individual and minority rights. Indeed, the tendency of the debate over the legitimacy of judicial review, which emphasizes that democracy in the Charter era extends beyond majority rule, is to include the view that democracy-as-majority-rule characterizes the pre-Charter era. Because a majoritarian theory of democracy is assumed to underlie the doctrine of parliamentary sovereignty, the doctrine is simply ignored as offering anything to say about rights protection.

This chapter will begin by showing that Canadian legal scholars and political scientists tend to associate parliamentary sovereignty with a majoritarian theory of democracy. Then, the claim that judicial review-as-counter-majoritarian has influenced debate over the legitimacy of judicial review in Canada will be defended. In turn, it will be pointed out that the origins of American concerns regarding the counter-majoritarian character of judicial review show that it is not a perennial concern; the implication of this is that Canadians need not assume, automatically, that judicial review requires a defence of its counter-majoritarian character. Finally, an example of a thoroughly worked out democratic defence of judicial review under the Charter will be examined to illustrate that the assumption that the doctrine of parliamentary sovereignty necessarily goes hand in hand with a majoritarian theory of democracy can lead to the view that the doctrine of parliamentary sovereignty is incapable of protecting rights.

Parliamentary sovereignty and majoritarian democracy

As a legal doctrine, parliamentary sovereignty establishes the rule that Parliament can make or unmake any law whatever; there are no limits to legislative power.[4] From this doctrine, Peter Hogg goes on to suggest, "[i]t follows, of course, that the courts have no power to deny the force of law to any statute enacted by the parliament."[5] Walter Tarnopolsky adds that any concerns judges might have regarding protection for fundamental rights and freedoms are "placed beyond the competence of the courts. Consequently, Parliament possesses the absolute right to restrict civil liberties by legislation; the Rule of Law principle protects only those civil liberties not already abridged by Parliament."[6]

Robert Yalden draws from the doctrine the implication that "in a representative democracy, the views of a popularly elected legislature must prevail over those of an appointed judiciary."[7] Robin Elliot agrees, pointing out that the doctrine "creates the impression that the courts are merely passive

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[4] Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), 197.

[5] Ibid. See also Patrick Macklem, R.C.B. Risk, C.J. Rogerson, K.E. Swinton, L.E. Weinrib and J.D. Whyte, eds. *Canadian Constitutional Law* Vol. I (Toronto: Emond Montgomery, 1994), 4; Douglas A. Schmeiser, *Civil Liberties in Canada* (Don Mills: Oxford University Press, 1964), 11; John D. Whyte, Legality and Legitimacy: The Problem of Judicial Review Legislation" (1987) 12 *Queen's Law Journal* 1, 11.

[6] Walter Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44:3 *Law & Contemporary Problems* 169, 171; see also "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971) 17 *McGill Law Journal* 437, 438-9.

[7] Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 *University of Toronto Faculty Law Review* 136, 141-2.

actors in the process of determining what the law is"[8] but that this makes sense since "it is Parliament's view that must ultimately prevail."[9]

Indeed, Yalden and Elliot are not alone in implying that the absence of judicial review of an entrenched bill of rights in Canada, prior to 1982, is explained by the close connection between the doctrine of parliamentary sovereignty and a majoritarian "theory" of democracy based on faith in legislative majority rule.[10] Indeed, if Canadians in the pre-Charter era were committed to a majoritarian theory of democracy, so the argument goes, it is clear why the doctrine of parliamentary sovereignty prohibits judges from challenging the validity of statutes, even those statutes which violate rights. Indeed, if the doctrine of parliamentary sovereignty can be justified as the logical corollary of faith in representative collective self-government, as Janet Hiebert puts the point,[11] then it makes sense that judges lack a theoretical role in protecting rights

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[8] Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 *Osgoode Hall Law Journal* 215, 231.

[9] Ibid., 234.

[10] See for example Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" *Political Studies* xxxi (1983); Patricia Hughes, "Section 33 of the *Charter*: what's the problem, anyway? (or, why a feminist thinks section 33 does matter" (2000) 49 *University of New Brunswick Law Journal* 169; Tsvi Kahana, "Constitutional Cosiness and Legislative Activism" (2005) 55 *University of Toronto Law Journal* 129; Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699. See also Reginald Whitaker, "Democracy and the Canadian Constitution" in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 248.

[11] See Janet Hiebert "New Constitutional Ideas: Can New Parliamentary Models of Rights Protection Resist Judicial Dominance When Interpreting Rights" (2004) 82 *Texas Law Review* 1963, 1964. While Hiebert has argued repeatedly that, contrary to the view the rights are secure only with a judicially supervised entrenched bill of rights, parliamentary rights protection can be an

under the doctrine.[12] At the same time, however, it also becomes clear that judicial review of the Charter, in this context, must be defended against attack from critics who argue that it is illegitimate because it contradicts a normative commitment to a majoritarian theory of democracy.[13]

In this chapter I argue that this majoritarian theory of democracy is not a working theory of democracy at all. Instead it is merely a shorthand way for Charter supporters to condemn the doctrine of parliamentary sovereignty for offering no secure protection for rights because the doctrine does not permit judicial review of an entrenched bill of rights. In turn, this shorthand implies that the doctrine of parliamentary sovereignty is illegitimate because it is infused with a narrow and inadequate understanding of democracy.

Law professor Patricia Hughes makes this clear when she asserts that a written constitution with a judicially supervised bill of rights "serves as a counterbalance to the majoritarian nature of the legislatures."[14] Anne Bayefsky,

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integral part of a constitutional regime. See also her "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" *British Journal of Political Science* 35 (2005), 235.

[12] Douglas A. Schmeiser notes that under the legal doctrine of parliamentary sovereignty "it is for Parliament, not the Courts, to determine matters of public policy and convenience, and the Courts are not to sit in judgement over Parliament's decisions." See his *Civil Liberties in Canada*, 7. Paul Weiler adds that, under the doctrine, rights are preserved by the self-restraint of the political branch of government. See his "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 *University of Michigan Journal of Law Reform* 51, 68.

[13] Robert Martin provides a recent example of just this kind of attack in his *The Most Dangerous Branch: how the Supreme Court of Canada has undermined our law and our democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003). In this book Martin argues that "Many Canadians appear to believe that the sole point of constitutional government is the protection of human rights. It is conveniently forgotten that self-government is also a human right." Ibid., 178.

[14] Patricia Hughes, "Section 33 of the *Charter*," 171.

for her part, argues succinctly that, under the doctrine of parliamentary sovereignty, faith is placed in "the workings of democracy" rather than the judicial process for the protection of individual or minority rights.[15] Bayefsky, in turn, defines democracy as merely "the power of numbers."[16] Elaborating on this theme, Lorraine Weinrib adds that this means individual and group rights are not really secure at all under the doctrine of parliamentary sovereignty. She argues that rights are not safe under the doctrine because they are "dependent on the good will, self-restraint, and sensitivity of majoritarian, temporarily elected governments."[17] Changing the focus slightly from the connection between parliamentary sovereignty and rights protection back to the connection between parliamentary sovereignty and democracy, Kent Roach argues that parliamentary sovereignty is, indeed, associated with a majoritarian theory of democracy but we

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[15] Bayefsky, "Parliamentary Sovereignty and Human Rights," 241.

[16] Ibid.

[17] Lorraine Weinrib, "The Supreme Court in the Age of Rights," 705. Mark Tushnet shares the view that politicians under the doctrine of parliamentary sovereignty are "unconstrained by anything other than the cultural presuppositions embedded in a majority's will." See his "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries" (2003) 38 *Wake Forest Law Review* 813, 813. In Canada, political scientists Janet Hiebert and James Kelly have taken up the question of the role executives and legislatures actually play in protecting rights. See for example Janet L. Hiebert, *Charter Conflicts*; "Interpreting a Bill of Rights"; "New Constitutional Ideas"; 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); and "Guarding the Constitution: Parliamentary and Judicial Roles Under the Charter of Rights and Freedoms" in J. Peter Meekison, Hamish Telford and Harvey Lazar, eds. *Canada: The State of the Federation, 2002* (Montreal and Kingston: McGill Queen's University Press, 2004).

need not feel constrained by such a limited understanding.[18] Even if parliamentary sovereignty goes hand in hand with a majoritarian theory of democracy, on this view, we need not conclude that the addition of an entrenched bill of rights to the Canadian Constitution undermines or otherwise jeopardizes the democratic legitimacy of the judicial role in rights protection. All that is required to show that judicial review of the Charter is democratic is that our understanding of democracy is broader than majority rule. This view, that judicial review of the Charter must be considered undemocratic only if democracy is narrowly defined as legislative majority rule, is widely shared by political scientists,[19] law professors,[20] and even Supreme Court Justices.[21]

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[18] Kent Roach, "The Myths of Judicial Activism" (2001) 14 *Supreme Court Law Review* (2d) 297, 298.

[19] See Raymond Bazowski, "For the Love of Justice? Judicial Review in Canada and the United States" in Stephen Newman, ed. *Constitutional Politics in Canada and the United States* (Albany: State University of New York Press, 2004); Hiebert, *Charter Conflicts*; Sigurdson, "Left- and Right-Wing Charterphobia"; James B. Kelly and Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16 Canadian Journal of Law and Society 3; Miriam Smith, "Ghosts of the Judicial Committee." This view is also shared by Knopff and Morton who argue that "Constitutionally entrenched rights—indeed, constitutional government as such—indicates that a regime aspires to be not simply a democracy but a self-restrained or liberal democracy, in which majoritarianism is tempered by liberalism. This is the ultimate justification for judicial review of legislation on the basis of an entrenched bill of rights." See F.L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution," 539.

[20] Patricia Hughes, "The Enhanced Power of the Judiciary and Democracy," text for talk at the University of Waterloo, March 18, 1999,
<< http://www.arts.uwaterloo.ca/ECON/needhdata/hughes.html >> Accessed Feb 7, 2003; "Section 33 of the *Charter*." See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* Toronto: Irwin Law Inc., 2001.

[21] See for example the decision of Justice Iacobucci in *Vriend v. Alberta* [1998] 1 S.C.R. 493, para. 143 where he argues that "it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy"; and the unanimous decision in *Reference Re: Secession of Quebec* [1998] 2 S.C.R. 217, para. 76 where the Court

This chapter will explain why legal scholars appear so quick to pin a majoritarian theory of democracy on the doctrine of parliamentary sovereignty. It has already been argued that some legal scholars imply that a majoritarian theory of democracy explains the absence of a theoretical role for judges in protecting rights under the doctrine of parliamentary sovereignty. Nevertheless, legal scholars do not appear to be interested in explaining the presence or longevity of parliamentary sovereignty; instead, they offer normative critiques of judicial review of the Charter and so it is to this body of critiques that one looks for an explanation of the ready association between a majoritarian theory of democracy and the doctrine of parliamentary sovereignty.

The explanation lies in the tendency of Canadian legal scholars to mimic the terms of American debate over the legitimacy of judicial review. These terms focus on the "counter-majoritarian difficulty"[22] made famous by American legal scholar Alexander Bickel. American public law scholar Mark Graber reports that theoretical and descriptive studies of the Supreme Court in the United States usually start from the premise that judicial review is a "deviant institution in a democratic society" and proceeds to note that judicial review runs the risk of being attacked as illegitimate in a democracy where elected politicians should

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says "Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy...is richer."

[22] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

decide rights matters.[23] Canadian legal scholars have adopted this approach to justifying judicial review of the Charter.[24] In short, legal scholars appear to have assumed that if judicial review of the Charter must be defended in counter-majoritarian terms, then, as a matter of logical necessity, parliamentary sovereignty must be infused with a majoritarian theory of democracy.[25]

The Charter and the counter-majoritarian difficulty

In her assessment of the Canadian debate over the legitimacy of judicial review of the Charter, Janet Hiebert points out that scholars argue over the proper role of the judiciary by assessing judicial review for its consistency with "principles of

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[23] Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary" *Studies in Political Development* 7 (Spring 1993), 35. In fact, Graber does not accept that the countermajoritarian difficulty as an accurate representation of the context in which judges find themselves when they engage in judicial review: "'The countermajoritarian' difficulty does not provide an adequate starting point for thinking about an institution that typically makes policies only in response to legislative stalemates and invitations. Scholars might more profitably think about judicial review as presenting 'the nonmajoritarian difficulty' when the real controversy is between different members of the dominant national coalition, or 'the clashing majority difficulty' when the real controversy is between lawmaking majorities of different governing institutions." Ibid., 37. The classic statement of this is from Robert Dahl: it is "unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite." See his "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* 6 (1957), 295.

[24] See for example, Allan Hutchinson, "The Rule of Law Revisited: Democracy and the Courts" in David Dyzenhaus, ed. *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999); Kent Roach, *The Supreme Court on Trial.* For a more sceptical view of the coherence of a democratic defence of judicial review under the Charter see Frederick C. DeCoste, "The Separation of State Powers in Liberal Polity: *Vriend v. Alberta*" (1999) 44 *McGill Law Journal* 231; Robert E. Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 *McGill Law Journal* 1; and Andrew Petter, "Twenty Years of Charter Justification" (2003) 52 *University of New Brunswick Law Journal* 187.

[25] Patrick Monahan has cautioned against using American literature on the legitimacy of judicial review in his *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* Toronto: Carswell, 1987, 32.

democratic governance."[26] In Hiebert's view, "supporters and critics of the Charter delineate versions of the appropriate judicial role that correspond with their particular democratic claims."[27] A similar assertion, but one with a slightly stronger causal claim, is offered by Raymond Bazowski when he argues that scholarly concerns regarding judicial review are "typically funded by democratic considerations."[28] In the same vein, Patricia Hughes argues that doubts about the legitimacy of judicial review of the Charter stem from "a misunderstanding about the nature of democracy."[29] For Hughes, the heart of ideological debate about judicial review is about the "nature" of democracy.[30] Without a doubt Hiebert, Bazowski and Hughes are right to identify the centrality of democratic claims and considerations in the Canadian debate over the legitimacy of judicial review.[31] At the same time, however, legal scholars appear to lack a general interest in exploring how democratic institutions actually work even as they participate in debate over the democratic legitimacy of judicial review.[32]

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[26] Hiebert, *Charter Conflicts*, 21.

[27] Ibid.

[28] Bazowski, "For the Love of Justice?," 223.

[29] Hughes, "The Enhanced Power of the Judiciary," 1.

[30] Patricia Hughes, "Judicial Independence: Contemporary Pressures and Appropriate Responses" (2001) 80 *Canadian Bar Review* 181, 197.

[31] But note Sujit Choudhry and Robert Howse who claim in their "Constitutional Theory and the *Quebec Secession Reference*" (2000) xiii *Canadian Journal of Law and Jurisprudence* 143, that Canadians have failed to engage in systematic reflection on the relationship between constitutional adjudication and democratic politics. Ibid., 145.

[32] Lorraine Weinrib is an obvious example in this regard. For recent examples see "Canada's Charter of Rights: Paradigm Lost?" (2002) 6 *Review of Constitutional Studies* 119; and "The

Moreover, there appears to be relatively little interest among legal scholars in developing a justification or condemnation of judicial review on the basis of how judges actually operate as a political institution.[33] This general lack of interest in grappling with the contours of democratic theory and practice in the process of justifying judicial review is even more pronounced when legal scholars contrast the contemporary role of judges in protecting rights to that of judges in the pre-Charter period.[34] Here legal scholars appear simply to adopt a conceptual framework consistent with the one made famous by American legal scholar Alexander Bickel in the 1960s.[35] As Canadian legal scholars deploy this

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Canadian Charter's Transformative Aspirations" (2003) 19 *Supreme Court Law Review* (2d) 17. Exceptions include Sujit Choudhry and Claire Hunter's "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 *McGill Law Journal* 525; and Tsvi Kahana where he makes a modest attempt to introduce social scientific evidence into his analysis of Parliament. See his "Constitutional Cosiness and Legislative Activism," 146.

[33] Political scientists are more willing to address the empirical dimensions of such debate without necessarily contributing normative arguments regarding the legitimacy of judicial review on the basis of such work. See for example, Matthew Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions" *Canadian Journal of Political Science* 37:1 (March 2004); Hiebert, *Charter Conflicts*; Kelly, "Bureaucratic Activism and the *Charter*"; and Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1994).

[34] This is quite a dramatic contrast to law professors and political scientists from previous generations who seemed to pay more attention to how institutions actually work: see for example, Peter H. Russell, "A Democratic Approach to Civil Liberties" (1969) 19 *University of Toronto Law Journal* 109; Douglas A. Schmeiser, "The Case Against the Entrenchment of a Bill of Rights" (1973) 1 *Dalhousie Law Journal* 15; and Donald Smiley, "Courts, Legislatures, and the Protection of Human Rights" in Martin L. Friedland, ed. *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975).

[35] Legal historians are an exception to this tendency. For the pre-Charter period, see R.C.B. Risk, "Here Be Cold and Tygers: a map of statutory interpretation in Canada in the 1920s and 1930s" (2000) 63 *Saskatchewan Law Review* 196; and "Volume 1 of the Journal: A Tribute and a Belated Review" (1987) 37 *University of Toronto Law Journal* 193. See also R. Blake Brown, R. Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) 9 *Dalhousie Journal of Legal Studies* 36; "Realism, Federalism, and Statutory

framework today, democracy in the pre-Charter era is simply equated with legislative majority rule. In fact, legal scholars tend to look no further than to the doctrine of parliamentary sovereignty for all the evidence they need to argue that Canada, prior to the Charter, was a majoritarian democracy.[36] This leaves legal scholars free to justify judicial review of the Charter as a welcome counter-weight to this supposedly under-developed and inadequate form of democracy in which rights were threatened by legislative majority will rather than protected by judicial review of an entrenched bill of rights.

For example, critical legal scholar Alan Hutchinson posits that, historically, Canadians constitutional scholars have tended to equate democracy with majority rule.[37] This view of democracy is based on a principled commitment to the value of self-government, and this commitment manifests itself in a "procedural ideal."[38] This procedural ideal emphasizes governance by legislative majority, and views electoral accountability as the only legitimate check on the production of law and policy. Hutchinson argues that decision making based on reasoned debate, for example, could provide a constraint on the creation of unjust law in this ideal, but such a qualification of the procedural ideal is but "an

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Interpretation During the 1930s: The Significance of *Home Oil Distributers v A.G. (B.C.)*" (2001) 59 *University of Toronto Faculty of Law Review* 1.

[36] Anne Bayefsky, "Parliamentary Sovereignty and Human Rights," 241; Robin Elliot, "Rethinking Manner and Form," 223; Robert Yalden, "Deference and Coherence in Administrative Law," 141-2.

[37] Hutchinson, "The Rule of Law Revisited," 205.

[38] Ibid., 202.

optional extra."[39] He goes on to assert that Canadians' historic equation of democracy with the combination of legislative majority rule and the ballot box means that our justifications of judicial review have tended to be consistent with Bickel's denial of democratic legitimacy to any institution of government other than a legislature in which elected politicians determine law and policy.[40] In Hutchinson's estimation, underlying Bickel's concern regarding the legitimacy of judicial review is the premise that the "political decisions of the legislature are democratic and in need of no further justification by simple virtue of the fact that they are the product of an elected assembly."[41] The difficulty for Bickel is that legislative decisions are "presumptively democratic", but "judicial opinions are presumptively undemocratic because they are made by unelected officials."[42] Hutchinson's own view is clear: any theory of democracy which automatically

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[39] Ibid., 202. In the 1920s, by contrast, German legal theorist Carl Schmitt suggested that reasoned debate is not an optional extra but rather integral to parliamentary government as a procedural ideal. See his *The Crisis of Parliamentary Democracy* (Cambridge: MIT Press, 1985 [1926]).

[40] Such a position is consistent Christopher Manfredi's defence of constitutional-interpretive legitimacy based on the intentions of a legislative super-majority, verified by successful constitutional amendment, to bind future generations. See his *Judicial Review and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills: Oxford University Press, 2001), chapter 2.

[41] Hutchinson, "Rule of Law Revisited," 202. Joel Bakan offers a similar assertion when he argues that any suggestion that judges defer to the policy decisions of democratically elected bodies "presumes that priority should be given to the democratic process over all other values." See his *Just Rights: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 39. See also David Dyzenhaus' discussion of formalism in administrative in "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's Law Journal* 445.

[42] Ibid.

denies legitimacy to judicial review of the Charter is "seriously flawed,"[43] even "crude."[44]

In contrast to his concern regarding the widespread assumption that democracy is but a procedural ideal with no necessary value content, Hutchinson declares that democracy has an elaborate "substantive dimension"[45] which is neglected, even threatened, when it is reduced to mere majority rule. This substantive dimension is made up of democratic values other than self-government[46]—e.g. equality, dignity, justice, and respect for minorities[47]—which could be undermined by the legislative process (even if it is functioning properly). After all, Hutchinson assumes, there is no guarantee that a legislative majority will protect the substantive dimension of democracy,[48] particularly respect for

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[43] ibid., 206.

[44] Ibid., 209.

[45] Ibid., 205.

[46] Note that some Charter critics are sceptical of attempts to emphasize values other than self-government in any list of fundamental democratic values because it might lead to an even greater (and problematic) role for judicial supervision of the political process. Robert Martin argues along these lines in *The Most Dangerous Branch*, 178; F.L. Morton offers a similar assessment in his "The Politics of Rights: What Canadians Should Know about the American Bill of Rights" in Marian McKenna, ed. *The Canadian and American Constitution in Comparative Perspective* (Calgary: University of Calgary Press, 1993), where he quotes G.K. Chesterton: "What is the good of telling a community that it has every right except the freedom to make laws? The liberty to make laws is what constitutes a free people." Ibid., 130.

[47] In this context Hutchinson cites Dickson's list of democratic values which he associates with section one limitations analysis in *R. v. Oakes* [1986] 1 S.C.R. 103: "to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." Hutchinson, "Rule of Law Revisited," 205.

[48] Patricia Hughes offers a conception of democracy similar to Hutchinson's. Hughes argues that a correct understanding of democracy "permits access to the determination of civic entitlements

minorities.[49] In this context, judicial review could be justified as part of a constitutional system of rights protection which is designed to protect or facilitate important democratic values including but not limited to self-government.[50] Democracy becomes not just majority rule, but majority rule prohibited (by judges engaging in judicial review of the Charter) from undermining the broad array of democratic values.[51] This is why Hutchinson condemns Bickel for his supposed scepticism regarding the very possibility of justifying judicial review as democratic. In Hutchinson's view, it is only because Bickel defines democracy as majority rule that he is led to deny that judicial review can be legitimate in democratic terms. This is the crux of the dilemma of Bickel's famous counter-majoritarian difficulty: judicial review must be justified as democratic, but the practice is inherently counter-majoritarian making such a justification problematic.

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at different points in the process" and is "designed to balance the limits of so-called majority rule." See "Judicial Independence," 197.

[49] Hutchinson, "Rule of Law Revisited," 206. Legal scholar Wayne MacKay argues that a "majoritarian" definition of democracy "is not in accordance with the more nuanced versions of democracy in which respect for minority interests, as well as attention to majority will is vital." See his "The Legislature, The Executive and the Courts: The Delicate Balance of Power of Who is Running This Country Anyway?" (2001) 24 *Dalhousie Law Journal* 37, 42.

[50] Legal theorist Frederick DeCoste denies that constitutional values other than self-government are democratic values at all: "By using liberal values to impart democratic legitimacy to judicial review, the argument confuses political liberalism with democratic practice." See his "The Separation of State Powers," 239.

[51] Hutchinson, "Rule of Law Revisited," 207. This line of argument clearly is reminiscent of American legal theorist J.H. Ely's *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

In his response to the Bickel pickle,[52] then, Hutchinson points out that Bickel "has little to say about what values are important to democracy other than unthinking regard for majoritarian processes."[53] At the same time, once it is accepted that democracy has a substantive dimension of values including but not limited to majority rule, "the justification for judicial action must also be viewed in substantive as well as formal terms."[54] Since Hutchinson clearly accepts the argument that democracy has a substantive dimension, he is compelled by his own argument to offer a justification for judicial review which accounts for judges' role in relation to this dimension. After offering the reminder that "under any Bickelian-inspired account, legislatures are free and clear in their (dis) regard for substantive values of democracy,"[55] Hutchinson argues that judicial review can be justified in democratic terms because, again, democratic values are not limited to self-government. Even if judicial review of the Charter winds up compromising self-government, it may still be justifiable as democratic because judicial review is the primary constitutional mechanism for preventing legislatures from undermining other democratic values.[56] In short, Hutchinson argues that

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[52] Hutchinson entitles the section of the chapter in which he discusses Bickel "Of Bickels and Pickles." Ibid., 201. I adopt this usage in referring to the counter-majoritarian difficulty as the Bickel pickle because it emphasizes that it is a dilemma particular to a contingent set of political and intellectual circumstances peculiar to Bickel. This will be discussed further in the next section.

[53] Ibid., 209.

[54] Ibid., 209.

[55] Ibid., 206.

[56] Legal scholar Peter Hogg denies that judicial review of the Charter requires this kind of justification because there is solid textual support in the wording of sections 24 and 52 of the

judicial review should prevent democratically elected legislatures from making statutes or accepting executive decisions which are unjust, even if the legislative process itself is just.[57] Despite the fact that Hutchinson argues that "no theory can reconcile judicial review with majority rule"[58] he rejects the view that judicial review cannot be justified as democratic. The key is the recognition that democracy is more complex than majority rule alone.

This kind of response to the Bickel pickle, I argue, finds its way frequently into contemporary debate over the legitimacy of judicial review of the Charter.[59] Moreover, as I will show when I examine Lorraine Weinrib's democratic defence of judicial review of the Charter, any response to the Bickel pickle which expands the very meaning of democracy to include important values in addition to self-government—manifested as legislative majority rule—can produce the assumption that the perceived absence of a significant theoretical role for judges in rights protection in the pre-Charter era is due to the majoritarian democratic theory which justifies the doctrine of parliamentary sovereignty. This is exactly what Weinrib does in her democratic defence of the Charter. Before addressing

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Charter for the practice: Peter Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall Law Journal* 87.

[57] Hutchinson, "Rule of Law Revisited," 207.

[58] Ibid., 208.

[59] There are significant opponents of the view that democracy is complex in this way. In addition to DeCoste, Robert Hawkins and Robert Martin argue that judicial review is inherently anti-democratic in the sense that judicial review is a liberal practice of rights protection against the state which "constrains the democratic element" of legislative majority rule. See their "Democracy, Judging and Bertha Wilson," 7. For Hawkins and Martin democracy and liberalism cannot be reconciled, thus "Liberal democracy has institutionalized a permanent and irreconcilable contradiction." Ibid., 4.

her argument, I offer a brief examination of Bickel's counter-majoritarian difficulty to make it clearer why there is good reason to be sceptical of the claims legal scholars tend to make regarding the necessary connection between a majoritarian theory of democracy and the doctrine of parliamentary sovereignty.

Bickel and the context of justification of judicial review

Robert Hawkins and Robert Martin argue that there is an inherent tension between liberalism and democracy, between rights against the state and majority rule. In their view this tension lies "at the heart of the debates over the proper role of judges within a democracy and over both the desirability and the limits of judicial review."[60] For Hawkins and Martin, the Bickel pickle is simply a manifestation of the institutionalization of the tension between liberalism and democracy which is an inherent feature of all liberal democracies.[61] Dennis Baker and Rainer Knopff agree that scholars who defend judicial power and Charter rights will "inevitably" grapple with the Bickel pickle.[62] In a similar vein, Matthew Hennigar argues that political scientists' interest in the impact of judicial review on public policy is a reflection of their "long-standing concern" with the Bickel

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[60] Hawkins and Martin, "Democracy, Judging and Bertha Wilson," 4. The view the democracy and liberalism are perennially in tension is shared by Norberto Bobbio, *Liberalism and Democracy*, M. Ryle and Kate Soper, trans. (London: Verso, 1990); and C.B. Macpherson, *The Real World of Democracy* (Oxford: Clarendon Press, 1966).

[61] Ibid., 4. Hawkins and Martin criticize Bickel's choice of the term counter-majoritarian to describe judicial review because this obscures its anti-democratic character. Ibid., 5.

[62] Dennis Baker and Rainer Knopff "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 21 *Windsor Yearbook of Access to Justice* 347, 347.

pickle.[63] In contrast to such views of the unavoidability of the counter-majoritarian difficulty, American legal historian Barry Friedman argues that, in fact, it is "not some timeless problem grounded in immutable truths."[64] Rather it represents a "matter of immediate constitutional politics dressed up as theory."[65] In Friedman's view, Bickel was simply arguing for, and justifying, jurisprudential outcomes he favoured "within the limits of an intellectual structure handed down to him by his teachers."[66] This intellectual structure was one in which the argument that judicial review was democratic had only recently become unavoidable to American debate over the legitimacy of judicial review.[67]

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[63] Hennigar, "Expanding the 'Dialogue' Debate," 3, 16.

[64] Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five" (2002) 112 *Yale Law Journal* 152, 156.

[65] Ibid., 159. Friedman declares his intention in researching the countermajoritarian difficulty in American legal history is to "historicize the problem of judicial review so that we can see that the countermajoritarian difficulty that obsesses the legal academy is not some timeless problem grounded in immutable truths. Rather it represents—as it almost always has—a need to justify present-day political preferences in light of an inherited intellectual tradition. Seen in that light, the academy ought to be able to free itself from the rhetorical grasp of the countermajoritarian difficulty and devote itself to a constitutional theory that is less immediately political, and more enduring." Ibid., 156-7. See also Johnathan O'Neill, "*Marbury v Mason* at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review" (2002) 65 *Modern Law Review* 792; Edward A. Purcell, Jr. "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory" *American Historical Review* 75:2 (December 1969).

[66] Ibid., 159.

[67] See Morton Horwitz's "Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism" (1993) 107 *Harvard Law Review* 30, in which he argues that democracy became a central legitimating concept in American constitutional law only in the 1940s when it became part of the rhetoric of America's difference from Nazism or Communism. Ibid., 57-8. In Horwitz's view, the other main appeal of "democracy" in constitutional debate at this time "was to justify radical limitations on judicial power." Ibid., 62. This last point will be developed in the next paragraphs.

Bickel wrote at a time when liberal-minded American academics were increasingly supportive of the civil rights decisions of a liberal-minded Supreme Court under Chief Justice Warren. As with his like-minded colleagues, Bickel sought to justify the work of the Court. Such an endeavour, however, was a marked turn from the gist of existing liberal scholarship. Liberal legal scholars had been taught by an older generation of Populist-Progressives including Hand, Thayer, Frankfurter, Holmes and Brandeis that judicial review was to be condemned as counter-majoritarian, as tending to challenge the will of electorally accountable legislative majorities. Indeed, these scholars and judges were sceptical of the benefit of judicial review because it had frustrated early progressive legislation.[68] In Friedman's view, it was precisely this scepticism which fostered, or at least reinforced, the Populist-Progressive attack on judicial review as counter-majoritarian.[69]

Bickel himself indicates the influence of his teachers and captures the mood of these legal scholars when he asserts that judicial review "is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."[70] In this vein, after citing Justice Learned Hand's famous quip

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[68] Friedman, "The Birth of An Academic Obsession," 160. Friedman offers a comprehensive analysis of this era in his "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*" (2001) *New York University Law Review* 1383.

[69] Ibid., 217.

[70] Bickel, *The Least Dangerous Branch*, 20.

that "it would be most irksome to be ruled by a bevy of Platonic guardians"[71] Bickel goes on to elaborate on Hand's dismissal of judicial review as the embodiment of just this kind of irksome rule: morally supportable government is possible only on the basis of popular consent, and "the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account."[72] This early twentieth-century Populist-Progressive rhetorical tactic of condemning judicial review as counter-majoritarian, however, had become a problem for Bickel who was sympathetic to the policy preferences of his teachers, but chose to defend a Supreme Court which was making decisions he could not but support. The irony of this situation is not lost on Canadian academics who have examined this era of American legal history. F.L. Morton, for example, points out that while American progressives attacked judicial review of the bill of rights as anti-majoritarian, today's progressives "are the most enthusiastic defenders of the most anti-majoritarian institution in the Constitution—judicial review."[73]

It is Bickel's book *The Least Dangerous Branch*, written in 1962, which is the source of his famous articulation of the "counter-majoritarian difficulty" (the Bickel pickle). Because Canadian legal scholars can give the impression that

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[71] Ibid.

[72] ibid.

[73] F.L. Morton, "The Politics of Rights," 126, 129. For an insightful explanation of the institutional dynamics which can produce such historical ironies, see Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism'" in Lawrence C. Dodd and Calvin Jillson, eds. *The Dynamics of American Politics: Approaches and Interpretations* (Boulder: Westview Press, 1994).

Bickel *opposes* judicial review because it was counter-majoritarian, it is important to begin even a brief examination of Bickel's argument by pointing out that quite the opposite is the case. Bickel argues that judicial review is an important practice of government and that it represents an institutional choice which must be justified "in our own time."[74] But what, wondered Bickel, are the "elements of the choice"?[75] After all, without direct textual support for judicial review in the American constitution, the only elements scholars can draw from to justify the practice are constitutional "vapours."[76] At the very least, in Bickel's view, the defence of judicial review must take into account the fact that the practice had been condemned for decades by scholars who attacked it as counter-majoritarian.

Without question, Bickel argues that the "root difficulty" facing the justification of judicial review is that it is seen as a "counter-majoritarian force in our system."[77] Indeed there are, as Bickel recognizes, "various ways of sliding over this ineluctable reality."[78] For example, Chief Justice Marshall offers the classic argument that judicial review enforces limited government on behalf of the American people; for Bickel, however, such abstractions only obscure the fact that judicial review "thwarts the will of representatives of the actual people of the

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[74] Bickel, *The Least Dangerous Branch*, 16.

[75] Ibid.

[76] ibid., 1.

[77] Ibid., 16.

[78] Ibid., 16.

here and now."[79] Central to Bickel's argument is the view, shared by his Populist-Progressive teachers, that since democratically elected legislatures cannot reverse a Supreme Court decision in a constitutional case, "judicial review is a deviant institution in the American democracy."[80] As Friedman points out, the argument that judicial review is a "deviant" institution is a relic of Populist-Progressive attitudes towards the practice. Bickel himself appears to recognize this when he notes that the counter-majoritarian difficulty facing the justification of judicial review cannot be traced to the fact that American legislatures are necessarily majoritarian and praised as such by scholars; in fact he accepts that legislatures are not particularly majoritarian. Policy, concedes Bickel, is the product of coalitions of powerful minorities within the various institutions of government.[81] Like his Populist-Progressive teachers, however, Bickel insists that elections are a crucial device of government accountability. Indeed, "nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process."[82] Importantly, despite this clear focus on the importance of the ballot box in ensuring political accountability, Bickel discusses the counter-majoritarian difficulty only as part of an outline of the "chief doubts that must be met if the doctrine of judicial review is to be justified on

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[79] Ibid., 17.

[80] Ibid., 18.

[81] Ibid., 18-9.

[82] Ibid., 19.

principle."[83] Bickel's book is not, in fact, a book on democratic theory, and the Bickel pickle is not necessarily, as Canadian legal scholars seem to assume, a definitive universal statement of North American democracy at mid-century.

That Bickel's argument is directed at justifying judicial review in the context of the absence of clear textual warrants for the practice, and of the Populist-Progressive attack on judicial finality in constitutional adjudication, might give Canadians reason to question the sense of importing this framework for use in contemporary debate over the legitimacy of the Charter. After all, not only is there general consensus among legal scholars that the Charter itself authorizes judicial review,[84] but the notwithstanding power appears also to mitigate the full force of Bickel's concerns regarding judicial finality in constitutional interpretation.[85] More importantly, if the counter-majoritarian difficulty, as Bickel describes it, is a manifestation of Bickel's "anxiety"[86] over his ability to offer a persuasive justification of judicial review at a time when Populist-Progressive legal scholars' condemnation of the practice as counter-majoritarian still held

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[83] Ibid., 23.

[84] Even a critic of judicial activism such as Robert Martin accepts that judicial review is authorized, if implicitly by the Charter. For example, Martin argues that section 52(1) of the Charter, which declares any law not consistent with the provisions of the Constitution to be "of no force or effect," "does not, in so many words, directly authorize judicial review"; nevertheless, Martin argues, some agent must declare whether a law is consistent with the Constitution or not. Martin, *The Most Dangerous Branch*, 6. That agent is "inevitably" the judiciary. Ibid.

[85] Legal theorist Mark Tushnet would deny that section 33 absolves us of this concern though he does so for practical not theoretical reasons. See his "Judicial Activism or Restraint in a Section 33 World" (2002) 52 *University of Toronto Law Journal* 89.

[86] Friedman, "Birth of an Academic Obsession," 160.

sway, Canadians might well begin to ask whether "majoritarian" democratic theory is, in fact, a necessary corollary of the doctrine of parliamentary sovereignty in the pre-Charter period. What is needed to confirm this is the combination of careful inquiry into the democratic character of the practice of parliamentary government, and careful inquiry into the democratic theory actually offered by constitutional scholars to critique parliamentary government in the pre-Charter period. Legal scholars do not offer this type of confirmation. This is particularly the case with respect to legal scholarship which contrasts the Charter to the doctrine of parliamentary sovereignty.

Weinrib, the Charter and democracy

University of Toronto law professor Lorraine Weinrib offers a systematic democratic and normative defence of the Charter which is premised on the position that the Charter must be understood, as she believes the Supreme Court to have understood it, "as a radical transformation of our legal system."[87] Weinrib's democratic defence of the Charter is worth exploring in some detail for at least three reasons of increasing significance. First, because Weinrib has developed her argument over a wide range of significant Canadian legal

[87] Lorraine Weinrib, "Appointing Judges to the Supreme Court of Canada in the Charter Era: A Study of Institutional Function and Design" in *Appointing Judges: Philosophy, Politics and Practice*, Papers Presented to the Ontario Law Reform Commission (Toronto: The Commission, 1991), 111.

periodicals including the Canadian Bar Review,[88] Review of Constitutional Studies,[89] and the Supreme Court Law Review,[90] as well as before an international audience,[91] her work has a broad reach within the legal academy and so deserves careful attention. Second, Weinrib is one of only a few contemporary legal scholars in Canada who writes about the relationship between the Charter and the doctrine of parliamentary sovereignty in the context of the democratic defence of judicial review. Finally, Weinrib's work, I believe, offers an elaborate and systematic normative reconstruction of the Supreme Court's views regarding the democratic foundation of the Court in the Charter era, and regarding the relationship between the Charter and parliamentary sovereignty.

There are two significant aspects of her argument which should be identified immediately. First, Weinrib's commitment to interpreting the significance of the Charter as a radical transformation of the legal system predisposes her to expect a similar radical transformation in the democratic justification of the legal system, particularly as it pertains to the judicial role in rights protection. The tangible implication of this predisposition is that Weinrib implies that the shift from the doctrine of parliamentary sovereignty to judicial

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[88] Weinrib, "The Supreme Court in the Age of Rights."

[89] Weinrib, "Canada's Charter of Rights: Paradigm Lost?"

[90] Weinrib, "The Canadian Charter's Transformative Aspirations."

[91] Lorraine Eisenstat Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) 33 *Israel Law Review* 13.

review of the Charter is associated with a similar radical shift in democratic theory. I argue that Weinrib's democratic defence of the Charter assumes, needlessly, that parliamentary sovereignty is justifiable only in terms of the same majoritarian theory of democracy which serves as the whipping boy of legal scholars stuck within the terms of the Bickel pickle. In response to the Bickel pickle, as I have argued, contemporary Canadian legal scholars offer understandings of Canadian democracy which are presented in support of the claim that judicial review of the Charter is legitimate in democratic terms; there is little reason, however, to assume without verification that the pre-Charter democratic theory underlying Canadian judicial review was majoritarian in the way Weinrib suggests.

Second, Weinrib offers her democratic defence of the Charter from a point of view internal to the legal system.[92] This means that Weinrib takes the point of view of the judge whose task it is to work the Charter; her democratic defence of the Charter is meant to encourage judges to recognize that judicial review of the Charter is not undemocratic and that they can (and should) ignore Charter critics who, in Weinrib's estimation, attack judicial review as democratically illegitimate.[93]

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[92] Weinrib, "Appointing Judges," 111.

[93] Lorraine Weinrib, "The Charter Critics: Strangers in a Strange Land" in *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Canadian Institute for the Administration of Justice: Les Editions Themis), 1999, 250-2.

Weinrib exemplifies this point of view in her work when she declares her general scholarly objective to be the identification of the legal system's "normative self-understanding."[94] If this objective is re-worded without the anthropomorphic tinge, it could be said that Weinrib wants to offer the normative understanding of the legal system which judges should adopt when they adjudicate cases under the Charter.[95] Because Weinrib is concerned that contemporary attacks on the democratic legitimacy of the Charter have increased the willingness of judges to uphold law deemed in violation of Charter rights (via section one),[96] her articulation of the normative self-understanding of the legal system is offered in terms of its democratic credentials. This defence portrays democratic theory and practice prior to the Charter as majoritarian, and democracy in the Charter era as a radical break from, and response to, the limitations of this majoritarian theory of democracy. The tangible implication of adopting the point of view of the legal system, however, is that Weinrib interprets democratic theory and practice from the point of view of the logic of legal doctrine. This means that the "guidance" regarding the proper judicial role offered by the doctrine of parliamentary sovereignty is adopted as a theory of democracy

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[94] Lorraine Weinrib, "Constitutional Conceptions and Constitutional Comparativism" Vicki C. Jackson and Mark Tushnet, eds. *Defining the Field of Comparative Constitutional Law* (Westport: Praeger, 2002), 14; Weinrib, "The Supreme Court of Canada in the Age of Rights," 700.

[95] Certainly this view can make sense of the fact that Weinrib devotes considerable attention to the way in which judges ought to deal with legal arguments under sections 1 and 33. For example, see Lorraine Weinrib "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Supreme Court Law Review* 469; and "Learning to Live With the Override" (1990) 35 *McGill Law Journal* 541.

[96] This is the theme of Weinrib's "Canada's Charter of Rights: Paradigm Lost?"

which justifies the doctrine. In my view, this fusion of legal and political theory goes unnoticed by Canadian legal scholars because they are accustomed to defining pre-Charter democratic theory strictly in terms of legislative majority rule in the process of identifying an appropriate democratic response to the Bickel pickle.

Lorraine Weinrib appears not to doubt the need to offer and bolster a democratic defence of the Charter; in fact, she walks an intellectual path similar to the one Hutchinson does in his response to the Bickel pickle. Weinrib argues that the Charter can be defended as part of a model of rights protection which is an "intensification"[97] of democracy.[98] Like Hutchinson, Weinrib argues that the introduction of the Charter enhances democratic "engagement" by expanding it "beyond majority rule at the ballot box and in the legislative chamber."[99] For Weinrib, democracy in the Charter era is more than the "one-dimensional"[100] process ideal she, like Hutchinson, assumes was typical of the democratic theory underlying pre-Charter judicial practice. Democracy proper, in Weinrib's view, is

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[97] Weinrib, "Constitutional Conceptions," 21.

[98] I have already mentioned DeCoste, Hawkins and Martin as legal scholars who deny that democracy should be so easily identified with liberalism. See DeCoste, "The Separation of State Powers"; and Robert E. Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson." American political Scientist Keith Whittington mentions Jeremy Waldron as a notable proponent of the view that democracy shares the same "assumptions" as constitutionalism or liberalism more broadly. See Keith Whittington, "'An Indispensable Feature'? Constitutionalism and Judicial Review" (2002) 6 *New York University Journal of Law and Public Policy* 21, 22.

[99] Weinrib, "Constitutional Conception," 21.

[100] Weinrib, "The Supreme Court in the Age of Rights," 745-6.

constitutional democracy.[101] Here, the majoritarian legislative process is respected "but not as an end in itself."[102] Weinrib argues that the "highest commitment" in constitutional democracy is not to a process ideal of majoritarian democracy but to the "enduring norms" of liberal democracy.[103]

These norms, moreover, underlie the rights guarantees identified in the text of the Charter.[104] As Weinrib puts the point, Charter rights "crystallize the foundational norms of our political tradition."[105] It is these norms underlying rights rather than self-government via legislative majority rule which, in Weinrib's assessment, constitute the foundational norms of our political tradition. For this reason, the "central premise" of majoritarian democracy, that the legislative majority shapes law "according to its preference and self-image, yields to a more

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[101] Constitutional democracy here refers, at the least, to an independent judiciary reviewing an entrenched bill of rights. Her student Tsvi Kahana offers a sustained argument of the implications of this understanding for the use of the Charter's notwithstanding clause in his "Understanding the Notwithstanding Mechanism" 52 *University of Toronto Law Journal* 221. Stephen Gardbaum examines rights protection in Canada, the UK and New Zealand to explore the thesis that constitutionalism need not depend on judicial review of an entrenched bill of rights. See Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 *American Journal of Comparative Law* 707, Janet Hiebert is engaged in a similar project. See for example her "Interpreting a Bill of Rights."

[102] Weinrib, "Canada's Rights Revolution," 24.

[103] Ibid. This is why Janet Hiebert calls Weinrib an advocate of fundamental rights. See Hiebert's *Charter Conflicts*, chapter 2.

[104] Patrick Monahan engages in a similar analysis, but with the aim of using judicial review of the Charter to promote citizen participation in politics rather than the liberal value of the inherent dignity of the person. Monahan argues that best interpretation of the Charter, the interpretation which makes sense of the document as a whole, gives primacy to democracy and community. See his See his *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), 102.

[105] Weinrib, "Canada's Constitutional Revolution," 24.

pervasive and extensive idea of self-government."[106] This is why Weinrib argues that the Charter, while a limitation on majority-rule, "does not impair democracy but constitutes its full realization."[107] In effect Weinrib expands the meaning of democracy from self-government via legislative majority rule to include judicial review of Charter rights as a way to ensure that judges understand their central role in maintaining "the continuity of democracy, not just as an empty shell, but as self-government by free and equal citizens."[108] As Weinrib puts the point: in the Charter era "Democracy, as self-government, reflected the sovereignty of the people, not the sovereignty of government over the people."[109] The sovereignty of the people, however, depends on judicial review of the Charter rather than on direct participation or legislative majority rule to protect the enduring norms of liberal democracy.[110]

The way in which Weinrib defines the enduring norms of liberal democracy is quite different from the way Charter critics such as Hawkins and Martin do. They emphasize the tension between the liberal practice of judicial supervision of rights against the state and the democratic practice of legislative majority rule when they discuss the norms of liberal democracy.[111] Weinrib, on the other hand,

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[106] Ibid., 22.

[107] Ibid., 13.

[108] Weinrib, "The Supreme Court in the Age of Rights," 718.

[109] Ibid.

[110] Ibid., 701.

[111] Hawkins and Martin, "Democracy, Judging, and Bertha Wilson," 7.

asserts that the core norm of liberal democracy is an abstract ideal of equal human dignity. From this norm Weinrib draws the imperative for all state actors to "treat each person over whom it holds power as an end, not a means, and to respect his or her full and equal humanity and opportunity for self-fulfillment."[112] To be sure, Weinrib argues that there are, indeed, other enduring norms of liberal democracy which are implied by reference to human dignity. These include autonomy,[113] equal citizenship,[114] fairness,[115] and liberty;[116] all of them, however, are understood to offer a similar abstract imperative for state actors.

As Weinrib understands it, then, constitutional democracy realizes a substantive conception of democracy by ensuring, via judicial review, that laws emanating from the legislative process remain consistent with these enduring norms. Central to this substantive conception of democracy is the rejection of "a simple majoritarian idea of democratic rule."[117] Judicial review of constitutional rights guarantees replaces representative government as the preferred way to protect the "basic structure of constitutional democracy."[118] This basic structure,

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[112] Weinrib, "Constitutional Conceptions," 15.

[113] Weinrib, "Canada's Constitutional Revolution," 14.

[114] Lorraine Weinrib, "'Do Justice to Us!' Jews and the Constitution of Canada." in Daniel J. Elazar et al., eds. *Not Written In Stone: Jews, Constitutions, and Constitutionalism in Canada* (Ottawa: University of Ottawa Press, 2003), 17.

[115] Ibid., 22.

[116] Weinrib, "The Supreme Court in the Age of Rights," 701.

[117] Ibid., 704.

[118] Ibid.

moreover, consists of legislative majority rule but more fundamentally the enduring norms of liberal democracy. In fact, Weinrib calls the enduring norms of liberal democracy the basis of the democratic polity itself.[119] This makes it clearer why Weinrib asserts that judicial review of Charter rights, far from undermining democracy, actually realizes it.[120] Judicial review of the Charter is an integral institutional dimension of the democratic polity because the Charter crystallizes the enduring norms of liberal democracy which themselves are the basis for calling the Canadian polity democratic. At the same time, judges are the "special guardians"[121] of the Charter because the enduring norms of liberal democracy are legal norms;[122] they are properly developed and protected by judges alone.

In contrast to her satisfaction with the integral connection between constitutional democracy and the enduring norms of liberal democracy, Weinrib expresses grave concern regarding parliamentary sovereignty as a legal doctrine. Particularly troubling is the fact that the doctrine offers no guarantee that statutes will be consistent with the enduring norms of liberal democracy: in "any system of legislative sovereignty, these norms ultimately yield...to legislation clearly embodying other priorities and preferences."[123] Judges alone

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[119] Weinrib, "Canada's Charter of Rights: Paradigm Lost?," 127.

[120] Ibid., 129-30.

[121] Weinrib, "Constitutional Conceptions," 16.

[122] Weinrib, "Appointing Judges," 124.

[123] Weinrib, "Canada's Rights Revolution," 16.

(rather than in cooperation with legislators and non-state actors) identify the enduring norms of liberal democracy,[124] but parliamentary sovereignty does not authorize judges to invalidate statutes which undermine these norms. There is no good reason, however, for Weinrib to assume that judges alone are the source of enduring norms of liberal democracy.[125] More important for purposes here, there is no reason for Weinrib to assume that a theory of democracy associated with the doctrine of parliamentary sovereignty necessarily lacks assurances that statutes will be consistent with such enduring norms.[126] It is possible, for example, to argue that parliamentary government has, or can have, an institutional structure which ensures that statutes will not undermine the enduring norms of liberal democracy.[127] Even granting the possibility that judges do not

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[124] Weinrib argues that only judges develop the enduring norms of liberal democracy as they adjudicate cases under common and administrative law, and engage in statutory interpretation. See her "The Supreme Court in the Age of Rights," 709.

[125] Referring to judicial review of the Charter, political scientist Janet Hiebert argues that we need to ask the question why "the fact that a political community has decided in favour of rights as a critical standard for evaluating the merits of legislation, necessarily commit[s us] to accepting only judicial perspectives on how to resolve rights claims." See Janet Hiebert, "Parliament and Rights" in Tom Campbell et al., eds. *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003), 234. Hiebert declares that there is, for example, "no guarantee that judicial opinion will necessarily be more supportive of rights" than the opinion of parliamentarians. See *Charter Conflicts,* 29. For this reason Hiebert argues, contra Weinrib, that "abandoning reliance on Parliament's judgment on issues of rights" is irresponsible. Hiebert, "Parliament and Rights," 231.

[126] Political scientist Christopher Manfredi argues that it is would be wrong to suggest that legislators are unlikely to make law consistent with enduring norms of liberal democracy. Such an assumption, in turn, "involves a misunderstanding of the constitutional role of legislatures and courts in liberal constitutional theory. There is nothing in that theory that assigns the task of constitutional interpretation exclusively to courts: legislatures also have an important role to play." Manfredi, *Judicial Power*, 24.

[127] Political scientist Janet Ajzenstat offers just this kind of assessment of parliamentary democracy. For example see her *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal and Kingston: McGill-Queen's University Press, 2003). See also

have a monopoly on the articulation of enduring norms of liberal democracy,[128] Weinrib appears to assume that the inability of judges to invalidate statutes under the doctrine of parliamentary sovereignty is justified by a majoritarian democratic theory which offers no assurance that law will be consistent with the enduring norms of liberal democracy.

For example, Weinrib argues that proponents of parliamentary sovereignty are also committed to the "supremacy of the well-functioning, ordinary and majoritarian political institutions, based on the legitimacy derived from their representative character and their accountability to the people."[129] Weinrib then translates this political commitment into the terms of the legal doctrine with the result being that proponents of parliamentary sovereignty are declared to believe that "elected representatives had to be free to embody *any* moral, social or political values in law."[130] The only "benchmark applicable to public policy" for proponents of parliamentary sovereignty then becomes the "ordinary majoritarian

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Rainer Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson Canada, 1992), chapter 8 for a discussion of institutional checks and balances in a parliamentary regime.

[128] Legal scholar Jacob Ziegel offers this response to Weinrib after she suggested to a parliamentary committee that judges should control the appointments process of the Supreme Court: "I'm not one of those people who believe that legally trained people have a monopoly of wisdom when it comes to constitutional matters. I think a well-trained, intelligent person—for example, political scientists—can evaluate and deal as effectively with constitutional questions as many lawyers. In fact, in listening, I often learn much more from, dare I say it, my political science colleagues than I sometimes do from my legal colleagues." Testimony before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 37 Parl., 3rd Secession, Tuesday March 23, 2004.

[129] Weinrib, "The Canadian Charter's Transformative Aspirations," 18.

[130] Ibid., 18. Emphasis added.

machinery."[131] What kind of benchmark does Weinrib argue this ordinary majoritarian machinery provides? In Weinrib's view, legislative majority rule is expansive and unrestrained in its satisfaction of the most "intense" preferences of the majority of legislators.[132] Majority rule cannot, by itself, offer a principled benchmark integrally related to the core values of liberal democracy because it is associated, unproblematically, with irrational legislative will. This is why Weinrib is so concerned about the implications for rights protection of the doctrine of parliamentary sovereignty: she links the legal doctrine to a majoritarian theory of democracy which she assumes leaves no conceptual room for the possibility that the legislative process can itself be principled. For Weinrib, the ordinary majoritarian machinery is a forum for the expression of irrational preferences; it is not, and cannot be, a forum of reasoned decision making.[133]

Weinrib argues that there is, nevertheless, a value-based dimension to the public policy benchmark offered by the ordinary majoritarian legislative machinery. This benchmark, however, is not tied to any particular set of fundamental moral, social or political values which must be embodied in statutes. Moreover, the value dimension of majoritarian democracy cannot be located in institutional checks or reasoned debate, for example, because Weinrib simply

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[131] Ibid.

[132] Weinrib, "Canada's Charter of Rights: Paradigm Lost?," 129.

[133] Legal theorist Mark Tushnet has begun to examine the conditions under which legislative debate addressing the consistency of law with enduring norms of liberal democracy actually influences the content of statutes. See Mark Tushnet, "Non-Judicial Review" in Tom Campbell et al. eds. *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003).

ignores the possibility that the output of the ordinary majoritarian machinery can be rendered principled through the use of such mechanisms. In Weinrib's view, a majoritarian theory of democracy explicitly prioritizes the legislative process, but only as the means through which the irrational preferences of legislative will are imposed on citizens through legislation.

Although Weinrib's normative reconstruction of majoritarian democratic theory posits that the process ideal has no content, she also argues that a majoritarian theory of democracy sustains a practical commitment to the traditional social, economic and cultural values held by the majority of legislators (and presumably electors). Again, this is because Weinrib posits no mechanism within the system which can moderate irrational legislative will. Legislative will can only be the sum of the strongest preferences of legislators, which are accumulated though the "majoritarian metric."[134] In turn, this metric allows the legislative majority to "ignore the complaints of minorities and politically weak constituencies even as to the breach of fundamental principles of liberal democracy."[135] As Weinrib articulates the point, traditional cultural values, as well as policy considerations of "expediency, efficiency and cost containment,"[136]

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[134] Weinrib, "The Canadian Charter's Transformative Aspirations," 27.

[135] Ibid.

[136] Weinrib, "Canada's Charter of Rights: Paradigm Lost?," 130.

need no special protection since "they enjoy adequate security in the workings of popularly elected, majoritarian institutions that control policy-making."[137]

Weinrib does not deny that statutes might, in fact, be consistent with the enduring norms of liberal democracy; however the connection between statute and enduring norm of liberal democracy is purely contingent. If such norms find their way into statute form, it is only due to the "goodwill, self-restraint and sensitivity of majoritarian, temporarily elected governments."[138] At the same time, democracy as a process ideal offers no assurance against "the majority's ignorance, stereotypes, prejudice or ill will."[139] Ultimately, this is because, in Weinrib's view, governments "appeal to emotions rather than reason."[140] As a result, the "free-ranging, law-making power" of governments, which Weinrib associates with the majoritarian theory of democracy, includes the authority to "make laws free of the substantive constitutional norms that underpin liberal democracy."[141] Since governments and legislatures appeal to emotion rather than reason, it would be inappropriate, in Weinrib's view, to believe that governments are likely to make laws consistent with such norms.

As I have been arguing, Weinrib translates the authority which governments have to propose legislation free of the substantive constitutional

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[137] Ibid., 157-8.

[138] Weinrib, "The Supreme Court in the Age of Rights," 705.

[139] Weinrib, "Canada's Rights Revolution," 26-7.

[140] Ibid., 23.

[141] Ibid., 38.

norms of liberal democracy under the doctrine of parliamentary sovereignty into a democratic theory in which statutes are simply assumed to lack consistency with such norms. Summing up her analysis of majoritarian democracy from the point of view of constitutional democracy, Weinrib herself makes it clear that this is exactly the implication she wants to draw from the majoritarian theory of democracy. She finds it "strange" that Canadians would tolerate a majoritarian theory of democracy which permits governments to legislate "free of the restraints of political justice."[142] Indeed, following this assessment we might ask, with Weinrib, why we should trust legislators who hold a short term mandate in a majoritarian institution to make laws consistent with the enduring norms of liberal democracy?[143]

Weinrib's answer is that we cannot. Her democratic defence of the Charter simply denies that the theory of democracy associated with parliamentary sovereignty is capable of making contact with the enduring norms of liberal democracy. Canadian legal scholars, accustomed to defending the Charter as democratic by denying that majoritarian democracy is an adequate theory of democracy, are only too ready to accept the conclusion that parliamentary sovereignty has been justified by a faulty majoritarian theory of democracy. If the Charter signals a shift from parliamentary sovereignty to constitutional

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[142] Ibid., 41.

[143] Ibid.

supremacy, the only appropriate response is to rid constitutional debate of the inadequate majoritarian theory of democracy.

Conclusion

This chapter began the task of explaining why Knopff and Morton's version of parliamentary sovereignty has been ignored. It was argued that the debate over the legitimacy of judicial review of the Charter has been influenced by a framework consistent with (if not influenced by) Alexander Bickel's counter-majoritarian difficulty. Rather than meet this "difficulty" by arguing that Charter review is, in fact, consistent with a majoritarian theory of democracy, legal scholars have tended to argue that the meaning of democracy in Canada is perfectly capable of justifying judicial review because democracy means more than majority rule.

This counter-majoritarian framework has encouraged legal scholars to assume that the doctrine of parliamentary sovereignty is justified by a majoritarian theory of democracy. Lorraine Weinrib's democratic justification of judicial review of the Charter was examined because it exemplifies the argument that the doctrine of parliamentary sovereignty offers no substantial protection for rights. Weinrib associates the doctrine with a majoritarian theory of democracy which she contrasts unfavourably to the Charter's new theory of constitutional democracy based on judicial review of entrenched rights. The effect of this approach to justifying judicial review of the Charter is that it reinforces the view

that the doctrine of parliamentary sovereignty offers, ultimately, no protection for rights at all. This is reason enough, perhaps, for many legal scholars to ignore the doctrine.

The next chapter will explore another reason why legal scholars might ignore the doctrine of parliamentary sovereignty even though it continues to play a significant role in the debate over the legitimacy of judicial review. It will be argued that legal scholars have linked the doctrine of parliamentary sovereignty so closely to a widely discredited theory of legal interpretation that the baby of the doctrine may have been thrown out with the bathwater of the discredited theory of interpretation.

Chapter Three

In this chapter another dimension of the reception of parliamentary sovereignty by Canadian legal scholars will be examined. Rainer Knopff and F.L. Morton's interpretation of the doctrine of parliamentary sovereignty has not been thoroughly analyzed by legal scholars and it will be argued that this might be due partly to the fact that the doctrine of parliamentary sovereignty is frequently, but needlessly, associated with a discredited approach to statutory interpretation.[1] Critical legal scholar Richard Devlin, for example, has consistently argued that the approach to statutory interpretation legal scholars typically associate with the doctrine of parliamentary sovereignty cannot withstand critical scrutiny. As a result legal scholars may reject parliamentary sovereignty as a credible legal doctrine. If this position is shared by the community of legal academics—"critical" or not—it could indeed affect its willingness to take seriously anyone who continues to discuss the doctrine in favourable terms as Knopff and Morton do.

It will be argued that scholars who draw from the theory of legal positivism to identify the approach to statutory interpretation required by the doctrine of parliamentary sovereignty are wrong to assume that legal positivism requires the approach to statutory interpretation commonly associated with the doctrine. Inadequate attention has been paid to the fact that legal positivism is primarily a

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[1] Legal theorist Brian Leiter offers a very instructive argument about the relationship between legal positivism and the realist critique of adjudication in his "Legal Realism and Legal Positivism" *Ethics* 111 (January 2001).

theory which stipulates the sources of valid law; in turn, legal positivism need not be associated with any particular approach to statutory interpretation. These largely neglected dimensions of legal positivism are not rendered irrelevant by the veracity of critical legal scholars' attacks on the approach to statutory interpretation normally associated with legal positivism. This means that even though legal positivism and the doctrine of parliamentary sovereignty do indeed go hand in hand, this is not reason enough to dismiss the doctrine.

After addressing the association legal scholars assert between legal positivism and the doctrine of parliamentary sovereignty, the chapter will proceed to elaborate on the critical legal scholars' critique of statutory interpretation as presented by Richard Devlin. While admittedly valid as far as it goes, Devlin's critique will be criticized for missing the institutional significance of legal positivism for the doctrine of parliamentary sovereignty.

Parliamentary sovereignty, legal positivism and statutory interpretation

The doctrine of parliamentary sovereignty in the debate over the legitimacy of judicial review is significant to Canadian constitutional scholars because it supposedly denies to the judiciary the authority to challenge the validity of statutes meeting manner and form requirements.[2] In this debate, the subordinate

[2] Robin Elliot clarifies the debate over whether manner and form limitations on law making are consistent with parliamentary sovereignty in his "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 *Osgoode Hall Law Journal* 215.

role for the judiciary in protecting individuals against statutory rights violations is contrasted sharply, and unfavourably, with the judicial role under an entrenched bill of rights.[3] In A.V. Dicey's classic formulation, judges are obliged to enforce the rule that Parliament has the right to make or rescind any law whatsoever.[4] In his classic statement of parliamentary sovereignty, however, Dicey offers no precise rules to guide statutory interpretation as a corollary of the doctrine. Political scientists and legal scholars commonly tease out of Dicey's formulation of the doctrine of parliamentary sovereignty its supposed implication for the judicial role in adjudication. Quite simply, judges are to interpret the law literally and apply it to resolve specific controversies impartially. For example, Rainer Knopff and F.L. Morton suggest that, under the doctrine, judges refrain from going "beyond the actual text of a statute in interpreting its meaning."[5] Indeed, this view is supported by Sir P.B. Maxwell, a 19th century legal authority on the

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[3] Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" *Political Studies* xxxi (1983); Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699. For exceptions, see Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights" *Canadian Journal of Political Science* xxx:4 (December 1997); Janet Hiebert, "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 *British Journal of Political Science* 235; and Rainer Knopff and F.L. Morton, *The Court Party and the Charter Revolution* Peterborough: Broadview Press, 2000.

[4] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), 40.

[5] Rainer Knopff and F.L. Morton, "Judicial Statesmanship and the Charter of Rights and Freedoms" in F.L. Morton, ed. *Law, Politics and the Judicial Process* (Calgary: University of Calgary Press, 1987), 167. Robin Elliot adds that under the legal doctrine of parliamentary sovereignty, "the courts are merely passive actors in the process of determining what the law is." See his "Rethinking Manner and Form," 231. Alan Cairns suggests that the "overt doctrine" of the courts whether engaging in statutory or constitutional review is to "eschew considerations of policy." See Alan C. Cairns, "The Judicial Committee and its Critics" *Canadian Journal of Political Science* iv (September 1971), 327.

rules of statutory interpretation who argued that "[a] statute is the will of the legislature and the fundamental rule of interpretation to which all others are subordinate, is that a 'statute is to be expounded according to the intent of them that made it'."[6] Maxwell goes on to indicate how the judge is to ascertain that intent of Parliament: "[t]he object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used."[7] If there is one rule, Maxwell sums up, it is that the judge cannot "imply anything in them which is inconsistent with the words expressly used."[8] It this focus on the text alone in gleaning the meaning of a statute to which Knopff and Morton refer when they suggest that judges, prior to the introduction of the Charter, were "steeped in the black-letter law tradition of parliamentary supremacy and legal positivism."[9]

Despite the absence of any specific guidance on the point from Dicey himself, a number of academics share with Knopff and Morton the view that legal positivism is integrally linked to the doctrine of parliamentary sovereignty, and

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[6] P.B. Maxwell, Roy Wilson and Brian Galpin, eds. *Maxwell on the Interpretation of Statutes*, 11th ed. (London: Sweet and Maxwell, Ltd., 1962), 1-2. For contemporary authorities on statutory interpretation, see Gordon Bale, "Parliamentary Debate and Statutory Interpretation" (1995) 74 *Canadian Bar Review* 1; Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight" (1998) 43 *McGill Law Journal* 287; Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); Geoff Hall, "Statutory Interpretation in the Supreme Court of Canada: the Triumph of a Common Law Methodology" (1998) 21 *Advocates Quarterly* 38; Ruth Sullivan, "Statutory Interpretation in a Nutshell" (2003) 82 *Canadian Bar Review* 51.

[7] Ibid., 2.

[8] Ibid.

[9] Knopff and Morton, "Judicial Statesmanship," 167.

that the connection between them addresses the approach to statutory interpretation appropriate to the doctrine. Anne Bayefsky, for example, argues that legal positivism is the philosophical theory underlying parliamentary sovereignty; in her view, it is this doctrine's positivist premise which accounts for the approach to statutory interpretation associated with the doctrine.[10] Lord Irvine of Lairg, former Lord Chancellor of the UK, makes a similar connection when he declares that "the doctrine of parliamentary sovereignty turns the pure theory of legal positivism into legal reality."[11] Ian Greene et al. are even more forthright in connecting the two when they posit that Dicey himself adopted an Austinian strain of legal positivism in his formulation of parliamentary sovereignty.[12]

Bayefsky, Greene et al. and Irvine all elaborate somewhat on the approach to statutory interpretation commonly ascribed to parliamentary sovereignty through its association with legal positivism. Greene et al. imply that Dicey's adoption of legal positivism signals his agreement with the 19th century view that "good legal reasoning had reached such a state of perfection that intelligent, experienced judges who followed the correct procedures would nearly

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[10] Bayefsky, "Parliamentary Sovereignty and Human Rights," 240. This premise is the formalist separation of law and morality.

[11] Lord Irvine of Lairg, "Sovereignty in Comparative Perspective: Constitutionalism in Britain and America" (2001) 76 *New York University Law Review* 1, 11. Here Irvine is identifying the conventional view rather than summing up his own position on the relationship between parliamentary sovereignty and legal positivism.

[12] Ian Greene et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer, 1998), 3.

always arrive at the 'correct' legal answers in their cases."[13] For this reason, imply Greene et al., Dicey would have considered the neutral application of the law to a specific fact situation to be an unproblematic description of adjudication. Irvine adds that the positivist articulation of a legal theory "demanding unqualified judicial loyalty to every Act of Parliament...appears to institutionalize the distinction between, on the one hand, legal validity, and on the other hand, considerations of morality."[14] Certainly Bayefsky agrees that the separation of legal validity from morality is the hallmark of legal positivism. In her view, this separation has specific consequences for the judicial role in rights protection under the doctrine of parliamentary sovereignty. She cites Dicey in defence of her assertion that the positivist premise of parliamentary sovereignty denies to judges any significant role in protecting rights: "There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament."[15] On this view, to suggest that there is such a basis would be to contradict the prescribed role for judges which, again, is simply to interpret statutes literally and apply them impartially.

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[13] Ibid. Legal Historian Richard Risk elaborates on this 19th century view in his "Constitutional Thought in the Late Nineteenth Century" (1990) 20 *Manitoba Law Journal* 196, 200.

[14] Irvine, "Sovereignty in Comparative Perspective," 10.

[15] Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada," 241, Ft. 11 citing Dicey, *The Law of The Constitution*, 10th ed., 62. Bayefsky concedes that under the doctrine judges could have, in fact, interpreted statutes so as to minimize their negative consequences for rights, but she maintains that doing so would have "passed beyond the bounds set by the doctrine of parliamentary sovereignty, since the doctrine relegates judicial involvement in protecting human rights to an incidental function." Ibid., 244.

Legal positivism and the human element

This black-letter approach to statutory interpretation has long been criticized as inappropriate for the task of interpreting Canada's federal Constitution[16] and for masking, under the rhetoric of the search for literal or plain meaning, the judicial creativity "which no formula of interpretation can ever eliminate."[17] While earlier generations of critical legal scholars did not necessarily draw the conclusion from this assertion that the doctrine of parliamentary sovereignty was itself suspect,[18] the same is not the case for a number of contemporary Canadian critical legal scholars.

Canadian critical legal scholars have penned highly critical analyses of the intellectual failing and ideological implications of black letter statutory

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[16] Indeed, the Judicial Committee's interpretation of the *Constitution Act, 1867* as if it were an ordinary statute has been criticized for generations. See for example, F.R. Scott, *Canada Today: A Study of Her National Interests and National Policy* (Toronto: Oxford University Press, 1939); F.C. Cronkite and J.A. Corry, "Recent Government Publications on the B.N.A. Act" *Canadian Journal of Economics and Political Science* 5:4 (November 1939); Herbert A. Smith, "The Residue of Power in Canada" (1926) vii *Canadian Bar Review* 432. For general discussions see Alan Cairns, "The Judicial Committee and Its Critics"; John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, Osgoode Society for Canadian Legal History Series (Toronto: University of Toronto Press, 2002).

[17] J.A. Corry, "The Interpretation of Statutes" in Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), 269. See also R. Blake Brown, "Realism, Federalism, and Statutory Interpretation During the 1930s: the Significance of *Home Oil Distributors v. A.G. (B.C.)*" (2001) 59 *University of Toronto Faculty Law Review* 1; John Willis, "Statue Interpretation in a Nutshell" (1938) xvi *Canadian Bar Review* 1.

[18] Caesar Wright, one time Dean of the University of Toronto Law Faculty expressed exasperation with legal scholars who denied the necessity of "judicial statesmanship" despite the acceptance of the "black-letter" approach to statutory interpretation, but he did not reject the legal doctrine of parliamentary sovereignty as a result. "Foreword" in Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956), viii-ix.

interpretation. Some of this body of criticism is general in orientation,[19] and some, such as scholarship addressing the question of bias and impartiality in Canadian jurisprudence, has been more specific in focus.[20] Of particular relevance is the critical scholarship of Richard Devlin,[21] who explicitly associates the perceived failings of the black letter approach to statutory interpretation with the positivist premise of the doctrine of parliamentary sovereignty. It is this positivist premise which is the object of much of Devlin's scholarly attention.

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[19] Joel Bakan, *Just Words: Social Rights and Charter Wrongs* (Toronto: University of Toronto Press, 1997); William E. Conklin, "The Legal Theory of Horkheimer and Adorno" (1985) 5 *Windsor Yearbook of Access to Justice* 230; Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Durham and London: Duke University Press, 2000); Allan C. Hutchinson, "The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging (or 'Don't Let the Bastaraches Grind You Down')" (2001) 39 *Alberta Law Review* 657; Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Allan C. Hutchinson and Patrick J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) *Stanford Law Review* 199; Andrew Petter, "The Politics of the Charter" (1986) 8 *Supreme Court Law Review* 473; Andrew Petter and Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) *University of British Columbia Law Review* 531.

[20] Richard F. Devlin, "Judging and Diversity: Justice or Just Us?" (1996) 20 *Provincial Judges' Journal* 4; Richard F. Devlin and Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R. v. R.D.S.*" (1999-2000) 31 *Ottawa Law Review* 1; Richard F. Devlin, "We Can't Go On with Suspicious Minds: Judicial Bias and Racialized Perspectives in R. v. R.D.S." (1995) 18 *Dalhousie Law Journal* 408; Patricia Hughes, "A New Direction in Judicial Impartiality? (Case Comm.)" (1998) 9 *National Journal of Constitutional Law* 251. For a critical view of the case see Robert Martin, *The Most Dangerous Branch: how the Supreme Court of Canada has Undermined Our Law and Our Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003), 79-80. For analysis by a political scientist, see Jennifer Smith, "*R. v. R.D.S.*: A Political Science Perspective" (1998) 21 *Dalhousie Law Journal* 236.

[21] Richard F. Devlin, "The Charter and Anglophone Legal Theory" (1997) 4 *Review of Constitutional Studies* 19; "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 *Queen's Law Journal* 161; "Law, Postmodernism and Resistance: Rethinking the Significance of the Irish Hunger Strike" (1994) 14 *Windsor Yearbook of Access to Justice* 3; "Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's 'The Charter and American Theories of Interpretation'" (1988) 26 *Osgoode Hall Law Journal* 1; Richard F. Devlin, A. Wayne MacKay and Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 *Alberta Law Review* 734.

Devlin argues that legal positivism is a theory of law which is driven by a quest to exclude "extrinsic factors" such as considerations of morality from the definition of law. Because, in Devlin's view, "morality inevitably finds its way back into judicial decisions...it would be better to acknowledge this is so rather than falsely deny it."[22] He goes on to argue that legal positivism does not take adequate account of human agency in considering conceptual processes such as the interpretation of law; for this reason, Devlin suggests, it should not be surprising that legal positivists are accused of acting ideologically for trying to isolate law from its social, economic and political contexts.[23]

Key to understanding his critique of black letter interpretation is Devlin's narrow focus on the hypothesis that literal interpretation of statutes is impossible, or at least more problematic than legal scholars have been willing thus far to admit.[24] The gist of Devlin's critique is that legal positivism depends on a literal approach to the interpretation of statutes which gives no theoretical place whatsoever to the unavoidable "human element"[25] in judicial decision making.

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[22] Devlin, "Jurisprudence for Judges," 174.

[23] Ibid., 176.

[24] This position is, of course, widely accepted by critical legal scholars and political scientists alike. See Alexandra Dobrowolsky, "The Charter and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents" in David Schneiderman and Kate Sutherland, eds. *Charting the Consequences: the Impact of the Charter of Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997); Allan Hutchinson, "Guess What, All Judges Are Activists," *Globe and Mail*, 9 January, 2003, A11; Patricia Hughes, "A New Direction in Judicial Impartiality?"

[25] Ibid. The term comes from Greene et al., *Final Appeal*, 1-2. Devlin seems to have adopted it (with citation) after reviewing this book.

Judges cannot interpret statutes literally because their interpretations will always be coloured by unexamined biases related to identity, class and other personal characteristics.[26] Devlin's scholarship is, indeed, almost singularly focussed on declaring the influence of such biases on statutory interpretation. Importantly, Devlin makes no essential distinction between legal positivism and statutory interpretation. After all, the success of legal positivism in separating law from morality, in Devlin's view, depends on the ability of the process of statutory interpretation to leave behind the human element so as to ensure the separation of law and morality.

Devlin quite clearly understands his role as a scholar in radical, even revolutionary terms; his forceful attack on positivist statutory interpretation can plausibly be interpreted as part of this sense of obligation to disrupt what Devlin perceives to be conventional attitudes towards statutory interpretation.[27] He allies his approach with the "critical method" of literary deconstruction and associates it with the right to contest the theory and practice of law making.[28] Indeed, Devlin's approach constitutes an appeal to other scholars, as well as judges, to develop their critical reasoning skills to become more self-reflective. In particular, legal scholars and judges are urged to improve the quality of their thought, scholarship

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[26] Richard F. Devlin, "We Can't Go On with Suspicious Minds."

[27] Allan Hutchinson shares this attitude. See "The Role of Judges In Legal Theory," 663 where Hutchinson declares the need within the legal academy for "critical disenchantment in the name of democratic empowerment."

[28] Devlin, "Law, Postmodernism and Resistance," 10.

and decision making by being more explicit about their prejudgements "be they ontological, political or moral."[29]

This loose method of critique is justified with the argument that it is motivated by a political theory of postmodernism.[30] Devlin separates this theory into two strands: disillusionment with the direction of contemporary politics and society,[31] on the one hand, and, on the other hand, hope that legal education can be part of the process of altering the mindset of mainstream legal scholars (and presumably also those of elites more generally) in the service of a future different from and better than the status quo.[32] It is rarely obvious whether Devlin's critical approach is motivated by the negative or positive strand of his self-described

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[29] Devlin, "The Charter and Anglophone Legal Theory," 34.

[30] J.M. Balkin has called postmodern constitutionalism "the constitutionalism of reactionary judges surrounded by a liberal academy that despises or disregard them, and which is despised and disregarded in turn; postmodern constitutional culture is the culture in which the control of the constitutional lawmaking apparatus is in the hands of the most conservative forces in mainstream life, while constitutional law as practiced in the legal academy has cast itself adrift, whether out of desperation, disgust, or despair and engaged itself in spinning gossamer webs of republicanism, deconstruction, dialogism, feminism or what have you." See J.M. Balkin, "What is a Postmodernist Constitutionalism?" (1992) 90 *Michigan Law Review* 1966. Remarkably, this article is cited by Devlin in "Law, Postmodernism and Resistance," 9. For an analysis of a similar melancholia in Canadian political science, see Peter Aucoin, "Political Science and Democratic Governance" *Canadian Journal of Political Science* xxix: 4 (December 1996).

[31] As Devlin points out to his audience in "Ventriloquism and the Verbal Icon," 16, ft. 4: "I should point out...that my own view is not that the current legislative/parliamentary process is perfect or particularly desirable – Canada is notorious for its elitism and bureaucratic hegemony. The ensuing concerns and critique of the inherently political nature of judicial decision-making is only part of a much larger radical egalitarian democratic challenge to the current centralization of power in contemporary society. In other words, I advocate a plague on both their houses. The democratic answer to 'Big Government' and 'Big Administration' is not to be found in a 'Big Judiciary'."

[32] Richard F. Devlin, "Towards An/Other Legal Education: Some Critical and Tentative Proposals to Confront the Racism of Modern Legal Education" (1989) 38 *University of New Brunswick Law Journal* 89, 103.

postmodern political theory. One might provisionally ascribe the negative strand to the debunking attitude which motivates his analysis, and the positive strand to his efforts to alter the mindset of colleagues within the legal community with repeated reminders to be aware of the human element in interpretation. Whether positive or negative, it is clear that Devlin is not motivated by a desire to engage in political analysis in the sense familiar to political scientists who might equate politics with activity within the institutions of parliamentary government,[33] and political theory with prescriptions regarding institutional change. For Devlin, politics means no more than the fact of interpretive discretion whether in the process of statutory interpretation or in the process of grappling with becoming more aware of one's own pre-given social and political interpretive "mindframe."[34] In this context, Devlin asserts that legal theory which acknowledges and accommodates judicial choice in legal interpretation is self-reflective, while legal theory which fails to acknowledge judicial choice is ideological in the sense of hiding the reality of interpretation.

While there is no doubt that Devlin is aware of societal patterns of domination,[35] he tends to assume that raising awareness about the reality of discretion in statutory interpretation is enough to have a liberating effect on those

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[33] Of course political scientists explore many forms of power and even institutional politics admits of complicated analyses. See for example Mark Bevir, "Foucault and Critique: Deploying Agency Against Autonomy" *Political Theory* 27:1 (February 1999); and "Foucault, Power, and Institutions" *Political Studies* 47:2 (June 1999).

[34] Devlin "Law, Politics and Postmodernism," 14.

[35] Devlin, "Ventriloquism and the Verbal Icon"; "Towards An/Other Legal Education"; Devlin et al, "Reducing the Democratic Deficit."

who are dominated by legal forms. Perhaps typically for a self-ascribed radical postmodernist, politics for Devlin is very much the politics of legal theory.[36]

Despite Devlin's repeated acknowledgement of the influence of numerous scholars and schools of thought associated with postmodernism and deconstruction,[37] it is possible to boil down the lessons he has learned to just one. Devlin is profoundly affected by what he calls "epistemological scepticism."[38] In his work this amounts to a refusal to accept the presence of a gap between legal theory and judicial practice as anything other than evidence of a systematic hoodwinking exercise engaged in by legal scholars who share an interest in preventing the knowledge of the truth of statutory interpretation from being revealed.[39]

Devlin sees legal positivism everywhere in the legal academy; in fact he argues that it has had a profound influence on Canadian legal thought.[40] Legal positivist theorists are said to style themselves scientists who offer an apolitical

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[36] Devlin has written several quite comprehensive reviews of legal theory in Canada. See for example the massive review in "The Charter and Anglophone Legal Theory."

[37] Devlin, "Law, Politics, and Postmodernism," 9, ft. 24.

[38] Ibid., 16.

[39] This contrasts sharply with those public law scholars who take seriously the power of legal theory and doctrine as both independent and dependent variable. In the American literature see in particular, Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making" in Cornell Clayton and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999). See also Rogers M. Smith, "Political Jurisprudence, The 'New Institutionalism' and the Future of Public Law" *American Political Science Review* 82: 1 (Mach 1988).

[40] Richard F. Devlin, "Mapping Legal Theory" (1994) xxxii *Alberta Law Review* 602, 606.

analytical approach to the study of law. Their analyses are directed at the search for "conceptual clarity and order" in legal doctrine.[41] Such pretensions, in Devlin's view, have led to a widespread misunderstanding of the political character of statutory interpretation which is not captured in legal positivist theory. Devlin clearly views it as his scholarly mission to debunk the myths of statutory interpretation and thus make judges and other scholars "understand the pervasive influence of non-legal forces on the judicial task."[42] In spite of his efforts, however, Devlin concedes that the premise of legal positivism—that law is separate from morality—dies hard; in fact, this premise continues to underlie the arguments of "those who agree with Montesquieu that the judge is 'but the mouth which pronounces the words of the law'."[43]

Devlin's self-described "realist" critique of statutory interpretation, on the other hand, is directed toward the integration into legal theory of elements of human agency typically marginalized by legal positivists.[44] Legal realism urges legal scholars to recognize that values have an "unavoidable impact upon legal rules. It argues that formal rules are much less determinative than positivists assume."[45] In Devlin's view, only realists are privy to such conclusions because only they look behind the rules to see what the judges are actually doing as

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[41] Devlin, "Jurisprudence for Judges," 174.

[42] Ibid., 175.

[43] Ibid.

[44] ibid., 176.

[45] Ibid., 177.

opposed to what they say they are doing.[46] Legal positivists, on the other hand, are content simply to claim that judges "find and apply the relevant law."[47] What the academic legal community needs, in Devlin's view, is more critical scholars who will infuse a dose of accuracy into legal theory and doctrine by arguing it to be "inevitably dependent upon juridically significant background assumptions and social visions."[48]

In this context, Devlin, Wayne MacKay and Natasha Kim offer a theoretical agenda for dealing with the realist conclusion that black letter (or positivist) statutory interpretation is impossible. For Devlin et al. the problem with legal positivism as an approach to interpretation is that it winds up a "convenient legal theory for allowing judges to engage in value choices, while appearing to make a mechanical and logical application of the law."[49] At the level of appearances, positivism depends on the view that an impartial and correct judicial choice is ensured because interpretation is "constrained and harnessed"[50] by the law. Devlin finds this view too preposterous to retain.[51] He

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[46] Devlin, "Mapping Legal Theory," 607.

[47] Devlin, "Jurisprudence for Judges," 178.

[48] Devlin, "The Charter and Anglophone Legal Theory," 60.

[49] Devlin, et al., "Reducing the Democratic Deficit," 741.

[50] Ibid., 743.

[51] Miriam Smith suggests that, in fact, this view has already been rejected: "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 constitutional law." See Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council" *Canadian Journal of Political Science* xxxv:1 (March 2002), 20-1.

has devoted considerable attention to criticizing the classical notion of judicial impartiality which he implies is the product of the premise of legal positivism. In conjunction with Diane Pothier, for example, Devlin points that even some Supreme Court of Canada justices no longer believe that judges can be guided by such a notion.[52] Classical impartiality and the related concepts of objectivity and neutrality are dependent on the implausible claim that judges can divest themselves of preconceptions and identities.[53] This ideal of disengagement, in Devlin's view, "is at odds with the inescapable reality that we are social beings, that we are inevitably saturated with relationships and preconceptions."[54] Objectivity and neutrality are ideals, but if they are unknowable or unattainable then we need to change our focus: "instead of forever seeking something that we cannot even know, never mind achieve, should we not deal with that of which we are sure—that we are inevitably partial"?[55] Devlin's new strategy becomes one of minimizing the risks of bias by making judges and legal scholars aware of them. This will not guarantee objectivity or neutrality, but it can provide us with a realistic objective that can generate immediate action.

The strategy of encouraging the reworking of legal doctrine to accommodate a more realistic concept of impartiality is similar to the one taken

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[52] Devlin and Pothier, "Redressing the Imbalances," 17.

[53] Devlin, "Judging and Diversity?," 10.

[54] Ibid., 10.

[55] Ibid,. 20.

by Devlin, MacKay and Kim with respect to statutory interpretation. They offer an alternative approach as an improvement on the positivist approach to statutory interpretation. This new approach accommodates "a more political judicial role in which representation and identity are relevant concepts."[56] Devlin et al. call their new theory "neo-realist" and associate it with a "bungee cord" metaphor to signal the kind of flexible constraint law actually exerts on interpretation. This theory is declared to be new and realistic because it accepts the fact that "judges are political actors"[57] without denying that judges are at least minimally constrained by the practice of legal interpretation.

In practical terms this means that judicial acknowledgement of the discretion inherent in statutory interpretation is encouraged; at the same time, judges are implored to be more sensitive to the imperatives of judging in a democracy.[58] Devlin et al. consider their approach to statutory interpretation an advance over the positivist approach because it admits the unavoidable reality of value choice and discretion even if it is rather vague on the specifics of what democratic norms are, and on how we can ensure that judges actually do live up to the implications of such norms for the judicial role.[59] Such concerns could indeed be mitigated somewhat by the fact that Devlin et al. deny that judges are

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[56] Devlin et al., "Reducing the Democratic Deficit," 745.

[57] Ibid., 745.

[58] Ibid., 746.

[59] It should be noted that Devlin et al.'s neo-realist bungee-cord theory of adjudication is set within a larger analysis of the need for change in the judicial appointments process as part of a re-working of the system of accountability into which judges fit.

utterly unconstrained by legal text. Although Devlin et al. argue that "it is the reader of the text, rather than the words of the text itself, which determines meaning,"[60] Devlin himself does not advocate "anything goes" in interpretation: "There *are* constraints but they are to be located within the self-imposed myopia of the community of interpreters (lawyers) which, in turn, is dependent upon their [sic.] cultural context."[61] This suggests that although the individual judge must choose what interpretation to give to legal text, and that choice is influenced by the human element, the community of legal scholars will act as a brake on "deviant" interpretations because they will be criticized as inconsistent with the conventions of interpretation (no matter how deluded) which are dominant within the legal community.

Devlin et al. suggest that their theory is more modest than the positivist approach to statutory interpretation. Its point is merely to accommodate "a more modern conception of the role of the judge which is more tolerant of elements of subjectivity and discretion."[62] Indeed Devlin et al. consider one of the most significant implications of their neo-realist theory of law to be "the recognition that the role of the judge is a political one which involves making choices between

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[60] Devlin, et al., "Reducing the Democratic Deficit," 748.

[61] Devlin, "Ventriloquism and the Verbal Icon," 11, ft. 39. For a more thorough accounting of the significance of an interpretive community in constraining statutory interpretation see Marc Gold, "The Rhetoric of Constitutional Argumentation" (1985) 35 *University of Toronto Law Journal* 154.

[62] Devlin, et al, "Reducing the Democratic Deficit," 751.

competing ideas, interests, and ideologies in Canada."[63] What is particularly provocative about this neo-realist approach to interpretation, however, is that it has virtually nothing to say about the place of the judiciary in relation to the other institutions of government. This should not surprise. Devlin has clearly staked out positivist interpretation as the object of his critical attention, and he attacks it repeatedly for its failure to deal with the human element. The influence of the negative strain of his motivating postmodernist political theory appears to have led him to neglect the centrality of an institutional rather than adjudicative dimension in his analysis of statutory interpretation.

Legal positivism as statutory interpretation revisited

In 1987, Peter Hogg considered the potential value for Canadians of the contemporary American terms of debate regarding the legitimacy of judicial review of the Charter.[64] Focussing specifically on the concepts of interpretivism and non-interpretivism,[65] Hogg concludes that the American debate has little to

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[63] Ibid., 752.

[64] Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall Law Journal* 87; Patrick Monahan considers this question in *Politics and the Constitution* (Toronto: Carswell, 1987).

[65] In Canada Rainer Knopff and F.L. Morton argue that the difference between these concepts "is not really a dispute between those who accept and those who reject the constitutional text and its original or traditional understandings as crucial guides to constitutional interpretation"; "[t]he real dispute concerns the appropriate level of generality or abstraction at which to state the original understanding, with interpretivists preferring more particular or concrete intentions, and noninterpretivists insisting on a greater level of abstraction." See Rainer Knopff and F.L. Morton, *Charter Politics* Toronto: Nelson, 1992, 115; and Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills: Oxford

offer Canadians; judicial review does not need to be debated in terms of interpretivism and non-interpretivism in Canada because the practice already has textual support in the Charter,[66] as well as a recognized approach to Charter interpretation—purposive analysis—in which a judge "identifies the objects that the legislature wants to achieve in enacting its legislation."[67] What is of interest here, however, is not the thesis of Hogg's argument—that American theories of constitutional interpretation have no bearing on analogous debate in Canada—but rather that in making his argument he asserts a legal positivist premise which does not require the black letter approach to statutory interpretation criticized by Devlin. In fact, Devlin offers a detailed published response to Hogg; in it Devlin provides some evidence that a focus on the theory of legal positivism as an approach to statutory interpretation affects how the doctrine of parliamentary sovereignty is assessed by critical legal scholars.

In Hogg's view, interpretivism is a theory of the legitimacy of judicial review. This theory insists that judicial review of the Charter is justifiable only with

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University Press, 2001). Chris Manfredi addresses constitutional interpretation from the point of view of a liberal constitutionalist legal positivism which focuses on legislative majorities and constitutional supermajorities as the appropriate venue for introducing morals into the constitutional order. See his *Judicial Power and the Charter*, 29-31.

[66] The relevant sections are 52(1) ("The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect"); 24(1) ("Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just under the circumstances"); and 11(d) ("Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent tribunal").

[67] Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 *Canadian Bar Review* 51, 60.

reference to the rights actually mentioned in the text of the constitution. Here "the role of the courts in reviewing legislation should not go beyond the interpretation of the text."[68] Hogg associates a non-interpretivist theory of legitimacy with the concession that the written language of a constitution can be so vague that judges are driven to apply standards not found in the text.[69] Non-interpretivists reject constitutional text as the sole source of authority for the exercise of judicial review; instead, judges engage in legitimate statutory interpretation when they choose a standard found either in their estimation of the foundational values of society[70] or in their own private sense of justice. Indeed Hogg accepts that non-interpretivists might accurately describe the role of non-legal considerations in interpreting statutes, but he argues that it cannot offer an adequate theoretical basis for judicial review.[71] The proper duty of a court is to apply the law impartially. The execution of this duty, however, need not conform to the positivist approach to interpretation Devlin criticizes. After all, Hogg himself concedes that while non-interpretivism may be unacceptable as a theory of judicial review, it might still accurately describe the interpretive process. As a theory of judicial review, interpretivism is not necessarily undermined by Devlin's

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[68] Hogg, "The Charter of Rights," 91.

[69] For a pertinent discussion of forms of argumentation in constitutional adjudication, see Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 *Canadian Bar Review* 67, 71-98; and Marc Gold, "The Rhetoric of Constitutional Interpretation."

[70] Mark Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 *University of Toronto Law Journal* 91.

[71] Hogg, "The Charter of Rights," 92.

critique of positivist statutory interpretation. Hogg declares that the judge's duty, if she is adjudicating a case in which a statute conflicts with the constitution, is to adopt the more fundamental constitutional law as the governing rule.[72] In connecting the theoretical basis for judicial review with the prioritization of fundamental constitutional law over both statute or common law if two laws conflict, Hogg is linking interpretivism to an important dimension of legal positivism which is largely neglected by scholars like Devlin.

Hogg refers to 17th century English constitutional history to show the significance of legal positivism as a theory of the source of valid law. Hogg's point in offering this historical analysis is to bolster the defence of interpretivism as a theory of judicial review in spite of the concession that non-interpretivism might accurately describe the process of statutory interpretation. Even if the judge brings non-legal considerations into the interpretive process, legal positivism still offers an important reminder to judges that they are authorized to challenge the validity of statutes only if they contravene the text of the constitution. Common or international law, for example, on a positivist view, offers no authority for judges to overturn a statute. Even if Devlin is correct to argue that regardless of how interpretation is represented, to use Allan Hutchinson's formulation, it cannot be "the neutral application of objective

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[72] Ibid.

rules,"[73] legal positivism still has an important role to play in identifying the correct hierarchy of sources of valid law for the purposes of legitimate adjudication. Devlin's critique of black letter statutory interpretation need not spell the death of legal positivism because the theory continues to offer a useful reminder that, for example, the common law cannot legitimately be used independently to overturn a statute even if the principles underlying the common law are considered foundational by legal scholars.[74] This message is no less important even if it is the case that common law principles guide the ascription of meaning to statutes in the interpretive process.[75] Devlin et al. are, indeed, aware of this aspect of legal positivism,[76] but they pay virtually no attention to its significance.

Hogg begins his analysis by presenting the legal positivist basis for his criticism of the American interpretivist/non-interpretivist terms of debate. Hogg declares that he does not accept the existence of any legal right—no matter how morally acceptable—that has a source other than the positive law (a view he ascribes to non-interpretivism). Positive law, moreover, is law made by the "law-

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[73] Allan C. Hutchinson, "The Rule of Law Revisited: Democracy and the Courts" in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999), 210.

[74] Elliot, "Organizing Principles of Canada's Constitution," 86-98.

[75] For a helpful discussion of this point see R.C.B. Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 *Saskatchewan Law Review* 195.

[76] Devlin et al., "Reducing the Democratic Deficit," 743.

making" institutions of the state.[77] The law-making institution of the state Hogg has in mind is Parliament, as he makes clearer when he connects this view of positive law-as-statute to the great political contest between Parliament and the Crown in 17th century England. Because Parliament had clearly become politically superior to the other branches of government by 1688, argues Hogg, all conflicts between Parliament and Crown or judiciary were settled in favour of Parliament.[78] It follows, then, that judges had to accept the obligation to "give effect to statutes no matter how preposterous."[79] This obligation, however, does not require judges to deny the human element in statutory interpretation. The more significant obligation here is that any conflict between statute and common law be resolved in favour of the statute. It may be true that the judicial interpretation of a statute cannot conform to the black letter ideal, but to concede this point does not diminish the relevance of the focus on the statute (as opposed to the judges' own sense of public morality) as the object in need of interpretation.[80] Legal positivism here points the way to the proper means of resolution of political conflicts between Parliament and the courts.

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[77] Peter W. Hogg, "On Being a Positivist: A Reply to Professor Vaughan" (1990) 29 *Osgoode Hall Law Journal* 411, 412.

[78] Hogg, "The Charter of Rights," 93.

[79] Ibid.

[80] Conceding this point could, however, rob the judiciary of an ideal which is at least modestly constraining. Robert Martin offers an analogous if slightly inflammatory point in his assessment of former Supreme Court Justice Bertha Wilson's views on impartiality: "Even if one accepts that each human being is inherently biased, the task of judging is evident. Judges must recognize their own subjectivity and their own biases and struggle to put both behind them in the making of

Because Canada is a democratic regime, Hogg argues, only democratically elected legislatures in Canada can legitimately determine the basis on which the validity of statutes can be challenged by the courts. For this reason the constitution, made by democratically accountable law makers, belongs at the top of the hierarchy of sources of valid law. Because a non-interpretivist theory of judicial review could justify giving to judges a veto over legislatures authorized by sources other than the constitution, Hogg declares non-interpretivism "incompatible with democracy."[81] From the point of view of positivist theory, "judicial review must be derived from a constitutional text in order to be legitimate."[82] From the point of view of Devlin's neo-realist approach to statutory interpretation, such a view seems passé and ideological, but from the point of view a theory of the source of valid law, Hogg's point is essential.

Devlin's response to Hogg is severe but misses this dimension entirely. In Devlin's view, Hogg tries to legitimize judicial review, but succeeds only in avoiding the real issue: the politics of legal interpretation.[83] Devlin argues that Hogg is a "text objectivist"[84] who should relinquish his "text fetishism"[85] and

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their decisions." Martin goes on to declare that a "solipsistic view of the world logically denies the possibility of democratic politics." Robert Martin, *The Most Dangerous Branch*, 79.

[81] Hogg, "The Charter of Rights," 94.

[82] Ibid., 100.

[83] Devlin, "Ventriloquism and the Verbal Icon," 5.

[84] Ibid., 6.

[85] Ibid., 1.

confront the relationship between power, law and politics. Hogg is condemned for offering only "positivist rhetoric"[86] which denies that law and jurisprudence are political. Devlin attacks Hogg's "faith in the controlling power of the legal text which he assumes to have some independent, essential existence outside its community of interpreters."[87] In this vein, Hogg's fundamental error is to separate interpreter from text.[88] In Devlin's view, the legal positivist notion of a "determinative text is a chimera, and we are inevitably compelled to recognize that law, like politics, is a matter of conviction and (rhetorical) power."[89] What Hogg actually says about constitutional interpretation, however, contradicts the views that Devlin ascribes to him. Hogg makes clear that his theoretical defence of a focus on constitutional text as the democratic source of authority for judicial review of the Charter does not require the legal positivist interpretivist approach which Devlin attacks in his response.

Hogg himself implies that constitutional text is not self-interpreting when he argues that legislative history of the constitution, precedents, purposive analysis and institutional implication of the text are all aids which are "sufficiently constrained by the terms of the constitution to qualify as interpretation."[90] In

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[86] Ibid., 2.

[87] Ibid., 6.

[88] Ibid., 10.

[89] Ibid., 11.

[90] Hogg, "The Charter of Rights," 113. For more detail see Ruth Sullivan, "Statutory Interpretation in a Nutshell."

Hogg's estimation, although "judicial review is only legitimate if it is based on the text of the constitution, this does not entail a narrow clause-bound approach to the text. On the contrary, use should be made of everything that helps to shed light on the text."[91] This view does not require Hogg to deny the politics of interpretation and, in fact, there is no evidence in this article that he does so; it does, however, demand that the judge maintain contact with the text of the constitution for judicial review to be legitimate. This imperative is linked to the importance of being able to ascribe democratic legitimacy to judicial review, but it is linked to more than this. After all, Hogg explains his refusal to accept any natural law doctrine that authorizes judges to challenge the validity of statutes without reference to the constitution by pointing out that he does not trust judges to reach conclusions on such matters.[92]

Devlin's reaction to Hogg's turn to English constitutional history and the doctrine of parliamentary sovereignty is as dismissive as it is of Hogg's defence of interpretivism as a theory of the legitimacy of judicial review. Consistent with his realist critique of legal positivist statutory interpretation, Devlin argues that Hogg "mistakes appearance for reality."[93] Although the United Kingdom operates on the principle of the sovereignty of parliament, this is "only so on a rhetorical

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[91] Ibid.

[92] ibid., 89.

[93] Devlin, "Ventriloquism and the Verbal Icon," 7. This is a common theme among critical legal scholars. See for example, Hutchinson and Monahan, "Law, Politics and the Critical Legal Scholars," 201.

level";[94] parliamentary sovereignty works only at the level of "what the judges say, not what they do."[95] By focussing only on the politics of adjudication, Devlin ignores Hogg's regard for the institutional politics which he relates to legal positivism and to the doctrine of parliamentary sovereignty.

Devlin argues that judicial "machinations" have restricted the omni-competence of Parliament in the UK.[96] Judges use clandestine techniques such as the manipulation of traditional canons of construction and principles of interpretation to avoid having to admit that their decisions are political.[97] Devlin concludes that the practice of statutory interpretation is nothing but politics "which has been reconstructed and legitimized as innocent and neutral linguistic analysis."[98] Without a doubt Devlin makes an important point here. To the extent that it is true that the human element is an unavoidable dimension of statutory interpretation, it would seem, at least initially, that the legal positivist separation of legal validity from morality cannot be sustained. If judges cannot interpret statutes without introducing values into the process which might be different from

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[94] Ibid., 6.

[95] Ibid., 7.

[96] Ibid.

[97] The classic work on this theme in Canada is John Willis, "Statute Interpretation in Nutshell." For clarification of the common law canons of interpretation, see Gordon Bale, "Parliamentary Debate and Statutory Interpretation"; Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation."

[98] Devlin, "Ventriloquism and the Verbal Icon," 7.

those which are assumed to be incorporated into the statute by democratically elected law makers, legal validity cannot be distinct from morality.

Irvine offers an interesting comment in this context. He was quoted at the beginning of the chapter for his statement that "the doctrine of parliamentary sovereignty turns the pure theory of legal positivism into legal reality."[99] Irvine goes on to argue that, in fact, parliamentary sovereignty only appears to institutionalize the positivistic approach to interpretation.[100] In Irvine's view, "the line which distinguishes adjudication on the *validity* of legislation from questions of *interpretation* is not watertight."[101] It is precisely this practical absence of a clear distinction between legal interpretation and application in the practice of adjudication, notes Irvine, which ensures that judges in a parliamentary regime have an opportunity to protect rights. As was argued at the beginning of the chapter, there is no reason to assume that the doctrine of parliamentary sovereignty requires the form of statutory interpretation criticized by Devlin.

Anne Bayefsky has identified some of the interpretive techniques, such as administrative review of executive action, strict interpretation of statutes, and federalism power allocation, which judges might use to protect rights in a

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[99] Irvine, "Sovereignty in Comparative Perspective," 11.

[100] Ibid., 20.

[101] Ibid. In the United Kingdom, this point is developed fully by T.R.S. Allan. See for example "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) 63 *Cambridge Law Journal* 685; and "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry" (2002) 61 *Cambridge Law Journal* 87.

parliamentary regime.[102] At the same time, because she accepts that the legal positivist theory of adjudication criticized by Devlin is the necessary corollary of the doctrine of parliamentary sovereignty, she argues that "purposeful use of these techniques would have passed beyond the bounds set by the doctrine of parliamentary sovereignty, since the doctrine relegates judicial involvement in protecting human rights to an incidental function."[103] Putting aside the possibility that the legal positivist theory of statutory interpretation that has been ascribed to parliamentary sovereignty is a caricature, it could be argued that the relevant connection between legal positivism and parliamentary sovereignty is not the legal positivist theory of interpretation criticized by Devlin; rather it is the legal positivist theory of the source of valid law and particularly the proper hierarchy of laws. The important political-institutional dimension of this connection has been generally neglected by Devlin, who sees in the positivist approach to interpretation nothing but a superficial attempt to hide the politics of interpretation.

The politics of legal positivism revisited: legislative intent and legal hierarchy

In the interest of identifying the "hidden" politics of the positivist approach to statutory interpretation, Devlin has spent well over a decade offering the

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[102] Bayefsky, "Parliamentary Sovereignty and Human Rights," 243-4.

[103] Ibid., 244.

reminder that the human element in statutory interpretation denies to the process the certainty and objectivity he assumes is required of in the black letter approach; his neo-realist alternative approach to statutory interpretation acknowledges this fact. At the same time, the neo-realist recognition of the human element in legal interpretation is not matched with serious attention to the role of the judiciary in relation to the other institutions of government. In fact, scholars of law and politics who have taken a research interest in the critical legal studies movement point out similar concerns regarding the absence of attention to the institutional implications of the human element in statutory interpretation. American political theorist John McCormick, for example, has criticized critical legal scholars for failing sufficiently to delineate an adequate "institutional agenda" to ensure progressive rather than regressive policy outcomes once judges exercise their discretion.[104] In McCormick's view, scholars associated with the critical legal studies movement allow their focus on the cultural-interpretive dimension of politics to prevent them from making the clear institutional and jurisprudential prescriptions needed to address real world concerns.[105] McCormick goes so far as to ask why the arguments offered by an earlier generation of critical legal scholars which justified "quite plausible, if not fully

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[104] John P. McCormick, "Three Ways of Thinking 'Critically' about the Law" *American Political Science Review* 93:2 (June 1999), 416. For useful surveys see David Ingram, "The Sirens of Pragmatism Versus the Priests of Proceduralism" in Mitchell Aboulafia et al., *Habermas and Pragmatism* (London: Routledge, 2002); and Edward A. Purcell, Jr. "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory" *American Historical Review* 75:2 (December 1969).

[105] Ibid.

effective, state intervention in the name of social justice are replicated by CLS at the present time in the name of nearly uninstitutionalizable goals."[106] His response is to question whether critical scholars have not perhaps become disillusioned with, or exhausted by, the failure of an earlier generation of legal scholars to achieve emancipation by offering recommendations for doctrinal change in the techniques of statutory interpretation.[107] Considering Devlin's response to Hogg's analysis of the debate over the legitimacy of judicial review, McCormick's concerns do not seem far-fetched.

David Dyzenhaus points out a similar situation with the state of critical legal scholarship in the UK.[108] Reminiscent of Devlin's discussion of the character of the postmodernist political theory which underlies his own critical scholarship, Dyzenhaus identifies both a hopeful and a more negative left style of legal theory—implicitly value-based—which has been adopted by British legal scholars who have become disillusioned with the left's "loss of purchase on control of parliamentary politics and the more general decline in parliament as

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[106] McCormick, "Three Ways of Thinking," 421. For a discussion of this earlier generation in Canada see R.C.B. Risk, "Volume 1 of the Journal: A Tribute and a Belated Review" (1987) 37 *University of Toronto Law Review* 193.

[107] Ruth Sullivan offers a thorough analysis of the various techniques available to judges. See for example, "Statutory Interpretation in a New Nutshell."

[108] David Dyzenhaus, "The Left and the Question of Law" (2004) xvii *Canadian Journal of Law and Jurisprudence* 7. See also "The Genealogy of Legal Positivism" (2004) 24 *Oxford Journal of Legal Studies* 39.

the main engine of politics."[109] While some left-leaning legal scholars promote the reinvigoration of parliamentary government,[110] Dyzenhaus takes issue with those who emphasize the importance of politics without addressing themselves to institutional considerations. These scholars, into whose category Devlin plausibly fits, are identifiable by a "fundamental suspicion of a kind of rationalizing theory which is connected with its critique of judicial review."[111] Such scholars offer a negative style of legal theory which is offered as an "abstract diagnosis of practice"[112] rather than an agenda for reform. In general, such scholars advocate a return to politics without offering any normative understanding of it other than as plea to avoid conventional scholarship and to focus on debunking myths of adjudication.[113]

These observations of McCormick and Dyzenhaus confirm the possibility that the critical legal scholars' critique of the legal positivist approach to statutory interpretation could affect the way academics address the doctrine of parliamentary sovereignty in Canada. It is, indeed, possible that the connection academics make between the positivist approach to interpretation and the

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[109] Dyzenhaus, "The Left and the Question of Law," 7. Dyzenhaus singles out British public law scholar Martin Loughlin as an example of the negative style. See his *Public Law and Political Theory* (Oxford: Oxford University Press, 1992).

[110] See for example, Jeffrey Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism" in Jeffrey Goldsworthy and Tom Campbell, eds. *Legal Interpretation in Democratic Societies* (Burlington: Ashgate, 2002).

[111] Dyzenhaus, "The Left and the Question of Law," 9.

[112] Ibid., 10.

[113] Ibid., 9.

doctrine of parliamentary sovereignty contributes to the lack of interest on the part of legal community in taking either parliamentary sovereignty or the scholars who defend the doctrine seriously. This neglect may be exacerbated by a further lack of interest on the part of critical legal scholars in the institutional dimensions of adjudication.[114]

Devlin's critique of the politics of legal theory amounts to a critique of judges and legal scholars who would deny or obscure the reality of judicial discretion.[115] Dyzenhaus shares with Devlin the view that legal positivism is related to political theory but, unlike Devlin, the theory to which Dyzenhaus relates legal positivism has, in the same way that Hogg's has, a more tangible institutional dimension.[116] Dyzenhaus argues that the best way to understand the significance of legal positivism—and by extension the doctrine of parliamentary sovereignty—is to analyze it in the context of the balance of democratic political institutions into which it fits.[117]

From Devlin's point of view, legal positivism is a cynical effort at scholarly myth making in the service of the status quo, or it is, at best, a mistaken

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[114] For a related discussion see Cass R. Sunstein and Adrian Vermeule, "Interpretation and Institutions" (2003) 101 *Michigan Law Review* 885.

[115] Allan Hutchinson makes this point forcefully in "Don't Let the Bastaraches Grind You Down." Nevertheless, in Canada even the Supreme Court readily acknowledges the human element in statutory interpretation. See *R. v. R.D.S.*, particularly the reasons of L'Heureux-Dubé and MacLachlin.

[116] Rainer Knopff and F.L. Morton explicitly consider the relationship between constitutional interpretation and institutional relationships in *Charter Politics*, Part II.

[117] This is exactly what Peter Hogg does in "The Charter of Rights" in his discussion of the legal consequences of the Glorious Revolution.

assertion that judges can exorcise the human element from their work. Dyzenhaus, on the other hand, is concerned to correct the view[118] of legal positivists—whose work is more focussed on the source of valid law[119]—that their work is practically irrelevant to the resolution of tangible conflicts over the legal duties judges have when they adjudicate cases.[120] Dyzenhaus argues that legal positivists should remember the democratic political morality of that legal theory. This democratic morality requires of judges that they defer to clear expressions of legislative intention in applying a statute.[121]

Dyzenhaus argues that the democratic political task of legal positivism is to keep legislative authority with the democratic legislature.[122] Rather than regard this imperative as an epistemological claim regarding legal interpretation, as Devlin does, the judicial duty to defer to legislative intention should be regarded as a reminder to judges of the democratic priority of the democratic law-making

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[118] It should be pointed out that what Dyzenhaus says about democratic legal positivism is a reconstruction of the view that he believes justifies the *ultra vires* doctrine in administrative law scholarship. Dyzenhaus would not consider himself a democratic positivist. For Dyzenhaus' own position see his "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's Law Journal* 445.

[119] Devlin rejects the legal positivist distinction between law and morality on the basis that the human element in statutory interpretation makes such a distinction untenable. See Devlin, "Jurisprudence for Judges."

[120] David Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security" (2003) 28 *Australian Journal of Legal Studies* 1, 14.

[121] David Dyzenhaus, "Reuniting the Brain: The Democratic Basis of Judicial Review" (1998) 9 *Public Law Review* 98, 107. As Maxwell declares, it is by reference to the words of a statute that the intention of the legislature is to be ascertained. See *Maxwell on the Interpretation of Statutes*, 1-2.

[122] Dyzenhaus, "The Genealogy of Legal Positivism," 45.

institutions of government over the courts which develop the common law. Dyzenhaus asserts that, for democratic reasons, "legislative power should be located in the assembly of the people, and, insofar as this is possible, judges should interpret the law in accordance with the intentions of the legislature as expressed in its statutes."[123] Judges, on this view, "are not supposed to reach beyond the statute to their sense of the democratic values that legitimate statutes in order that they might give expression to those values."[124] Dyzenhaus asserts that the democratic legal positivist's concern regarding the reality of judicial discretion should not be that judges will draw from their own personal principles in interpreting law but that they will draw from the principles of the common law to invalidate statutes.[125]

Dyzenhaus goes on to suggest that the democratic legal positivist "rejects a common law conception of law...because it supposes that one cannot determine what law is without resort to standards of justice and reasonableness whose determination is the special province of lawyers and judges."[126] Because

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[123] Dyzenhaus, "Humpty Dumpty Rules," 22.

[124] Ibid.

[125] Dyzenhaus notes this context that Thomas Hobbes wanted to resolve conflicts between Parliament and the common law courts, which were a source of the civil strife of his day, in favour of the sovereign. Hobbes' sovereign was, of course, not democratic. See "The Genealogy of Legal Positivism," 44.

[126] David Dyzenhaus, "Why Positivism is Authoritarian" (1992) *The American Journal of Jurisprudence* 83, 87. Dyzenhaus is referring to Hobbes here. For an American discussion of the position that the common law is a source of principles of justice, see Gary L. McDowell, "Coke, Corwin and the Constitution: The 'Higher Law Background' Reconsidered" *Review of Politics* 55:3 (Summer 1993). This view is familiar in Canadian Constitutional debate. See for example, Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy,

such an understanding of law could lead to the judicial invalidation of statutes for their inconsistency with common law principles, it must be rejected. The point of the theory then is not that judges overcome or deny the human element in interpretation; rather, it is that the principles of the common law should not be placed above the statute.

In general outline, Dyzenhaus' elaboration of the imperatives of democratic legal positivism is similar to Hogg's. At the same time, however, Dyzenhaus draws the theory closer to the ground staked by Devlin with the suggestion that the democratic aim of legal positivism requires attention to the way in which judges interpret statutes in addition to attending to the appropriate legal hierarchy. Indeed, when Dyzenhaus claims that democratic legal positivism requires that judges "interpret the law in accordance with the intentions of the legislature as expressed in its statutes,"[127] one might easily draw the conclusion that legal positivism is vulnerable to Devlin's critique after all. This conclusion would be mistaken because Dyzenhaus, like Hogg, does not assume that legal interpretation requires the approach which Devlin criticizes.

Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699.

[127] Dyzenhaus, "Humpty Dumpty Rules," 22.

Conclusion

Critical legal scholars criticize the doctrine of parliamentary sovereignty for its association with an implausible approach to statutory interpretation. In this chapter, however, it has been argued that the doctrine does not require the approach to statutory interpretation critical legal scholars associate with it. All that is required is that statutes be raised above the common law in the legal hierarchy; the doctrine requires no particular approach to the interpretation of statutes other than that the statute itself be the object of interpretation.

Without a doubt, the doctrine of parliamentary sovereignty provides clear guidance to a judge who might wish to invalidate a statute. However, the doctrine provides no clear direction to resolve interpretive questions such as whether or not a judge should be prohibited from drawing from common law values and principles in interpreting statutes. Differing responses to such interpretive questions will be explored in the next two chapters.

In this chapter, it was argued that such questions do not have a ready opportunity to be seriously debated in Canada because a number of legal scholars simply dismiss the doctrine of parliamentary sovereignty as a serious object of study. They do so, perhaps, because they reject the approach to statutory interpretation assumed to be its corollary. Critical legal scholars condemn legal positivism for its separation of law and morality without paying adequate attention to the institutional dimension underlying the theory which

answers the question of how conflicts of law between Parliament and the common law courts are to be resolved.

Devlin emphasizes legal positivism's vulnerability to attack for its supposed association with an epistemologically suspect approach to statutory interpretation. This focus, along with his general disregard for the relationship between legal doctrine and political institutions appears to be widespread enough throughout the legal community that the doctrine of parliamentary sovereignty's flexibility regarding statutory interpretation is ignored. The depth of the inability of critical legal scholars to notice or address this may be measured by Devlin's response to Peter Hogg's discussion of the legitimacy of judicial review surveyed in this chapter.

In the next chapter it will be shown that the 19th century English constitutionalist Albert Venn Dicey, the celebrated expositor of the doctrine of parliamentary sovereignty, was acutely aware of the institutional and policy implications of statutory interpretation under the doctrine. Moreover, he did not argue that the approach to statutory interpretation criticized by Devlin was required by parliamentary sovereignty. Nevertheless he did associate his preferred approach to statutory interpretation to a foundational constitutional principle but that principle was the rule of law rather than parliamentary sovereignty.

Chapter Four

The legal doctrine of parliamentary sovereignty plays a significant role in focussing debate over the legitimacy of judicial review of the Charter. Today the doctrine offers a critical standard against which to evaluate judicial review of rights in the Charter era. In Canada, legal scholars looking for an authority to define the doctrine of parliamentary sovereignty are likely to turn to 19th century Oxford legal scholar Albert Venn Dicey, whose exposition of the doctrine has become a classic. The influence of his famous text, *The Law of the Constitution*,[1] may be gleaned from the fact that it went through ten editions, and reprints of the text continue to be published.

When Dicey is cited by Canadian constitutional scholars, it is his definition of parliamentary sovereignty which is most likely to be discussed. This definition, to be sure, has influenced legal opinion in Canada. Walter Tarnopolsky, for example, cites Dicey in declaring the doctrine to mean that Parliament has the right to "make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[2] William Lederman repeats precisely the same quotation and adds another: "The one fundamental dogma of English

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[1] In this chapter I refer to Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959). Ajzenstat uses an identical reprint of the 10th edition published in 1960 and notes that Dicey's text was published first in 1886. This is incorrect: the first edition was published in 1885.

[2] Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966), 67.

constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."[3]

This chapter examines and revises the terms of debate regarding the judicial role in protecting rights under the doctrine of parliamentary sovereignty. Charter critics and supporters alike link the doctrine's supposed legislative "despotism" to a minimal role for the judiciary in protecting rights, because they assume that the doctrine requires that judges defer to parliamentary judgments regarding rights.[4] After all, if judges are prohibited from invalidating statutes which violate rights, then judges cannot have a central role to play in protecting them. Dicey's name is invoked by legal scholars, political scientists and historians alike as a shorthand way to express this very approach to rights protection.[5]

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[3] William R. Lederman, "Characteristics of Constitutional Law" in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981, 6). Thus, within the confines of the division of powers and rights and freedoms listed in the Constitution Acts, the only constraint on legislative power in Canada is the requirement, consistent with the doctrine, that Parliament or a provincial legislature refrain from binding a future Parliament or legislature. Such a constraint need not prohibit a legislature from altering the way in which legislation is promulgated. See Tarnopolsky, *The Canadian Bill of Rights*, 66-98. For the continuing relevance of the doctrine on the bench see *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525.

[4] Compare Lorraine E. Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) 33 Israel Law Review 13 with Robert Ivan Martin, *The Most Dangerous Branch: how the Supreme Court of Canada has undermined our law and our democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003).

[5] Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights" *Canadian Journal of Political Science* xxx:4 (December 1997); Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" *Political Studies* xxxi (1983); Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values." 29 *Osgoode Hall Law Journal* 215; Ross Lamberton, *Repression and Resistance* (Toronto: University of Toronto Press, 2005); Christopher MacLennan, *Toward The Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal and Kingston: McGill-Queen's University Press, 2003); Robert

Rainer Knopff and F.L. Morton use a similar interpretation of Dicey in support of their interpretation of Canada's pre-Charter constitutional tradition. The judicial role which Knopff and Morton associate with the doctrine of parliamentary sovereignty is a restrained one in which judges defer to the policy choices of Parliament and the legislatures by drawing only on statutory text and traditional meanings of rights in adjudicating cases. In this chapter Knopff and Morton's argument will be put to the test. It will be argued that Dicey, the very authority Knopff and Morton refer to as they elaborate upon their interpretation of Canada's pre-Charter constitutional tradition, does not hold the view that judges are obliged to be restrained in the way they suggest. Dicey argues that judges indeed have a duty under the doctrine of parliamentary sovereignty to apply statutes; at the same time, however, the doctrine can and should accommodate a role for judges in using common law principles to interpret statutes to mitigate their negative impact on common law rights. Knopff and Morton imply that Dicey would not defend such an interpretive strategy if to do so were to tamper with the policy effects of statutes. In fact, Dicey recognized and welcomed precisely this role for judges.

Pointing out this aspect of Dicey's exposition of the doctrine of parliamentary sovereignty cannot by itself warrant a change in our understanding of how rights were protected under the doctrine before the Charter. It does, however, require Canadian constitutional scholars to look more carefully at

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Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 *University of Toronto Faculty Law Review* 136.

Canada's pre-Charter constitutional tradition. To begin this project, this chapter will identify the way in which Knopff and Morton describe the doctrine of parliamentary sovereignty and its implication for rights protection. The views of legal scholars on the doctrine will then be canvassed to show the broad similarity between political scientists and legal scholars in their respective understandings of the implication of the doctrine for rights protection prior to the Charter. Then Janet Ajzenstat's interpretation of Dicey will be examined in some detail. Knopff and Morton draw on her work alone to link their understanding of Canada's pre-Charter constitutional tradition to Dicey's views on parliamentary rights protection. Because her interpretation of Dicey has not been critically assessed elsewhere, it will be presented and analyzed here. Finally, Dicey's own scholarship will be examined to assess the fit between his view of the judicial role in protecting rights under the doctrine of parliamentary sovereignty and the views ascribed to him by Canadian constitutional scholars. These scholars agree that Dicey has influenced Canadian jurisprudence. If Dicey's views differ from those ascribed to him, the question emerges whether Canadian constitutional scholars are accurately representing Canada's pre-Charter constitutional tradition. This question will be addressed in the next chapter.

Canada's pre-Charter constitutional tradition and A.V. Dicey

In some of their more recent constitutional scholarship,[6] Rainer Knopff and F.L. Morton draw heavily from Janet Ajzenstat's interpretation[7] of Dicey's *The Law of the Constitution* to provide evidence to bolster their own presentation of Canada's pre-Charter constitutional tradition. As Knopff and Morton encapsulate her argument, numerous early liberal Anglo-American constitutionalists, including Dicey, "put little faith in judicially enforceable bills of rights—and for good reason."[8] On this view, Dicey argued that "parliamentary sovereignty was the key to protecting rights—rather than the main threat to rights, as is now generally assumed—because the sovereign parliament embodies the principle of checks and balances."[9] Knopff and Morton conclude their synopsis of Ajzenstat's argument by pointing out that the essence of parliamentary checks and balances "lay in the freedom of the opposition parties to criticize and expose government violations of the people's rights."[10] Indeed, "Dicey and his generation had great

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[6] Rainer Knopff and F.L. Morton, "Does the Charter Hinder Canadians from Becoming a Sovereign People" in Joseph F. Fletcher ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter H. Russell* (Toronto: University of Toronto Press, 1999); F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

[7] Janet Ajzenstat, "Reconciling Parliament and Rights."

[8] Knopff and Morton, "Sovereign People," 278.

[9] Ibid., 280.

[10] Ibid., 281.

confidence in the efficacy of 'partisan debate' and public deliberation in producing sound public policy—i.e. policy that protects rights."[11]

Interestingly enough, while Knopff and Morton defend a portrait of rights protection in the pre-Charter era based on faith in parliamentary rights protection and scepticism regarding judicial review of an entrenched bill of rights, virtually all of the evidence they produce to show that Dicey himself offers a similar portrait is drawn from a single article penned by Ajzenstat. Remarkably, this rather meagre evidence for the views which Knopff and Morton ascribe to Dicey has not been noted by legal scholars. In this context it should be borne in mind that Ajzenstat's interpretation of Dicey, used by Knopff and Morton as a proxy for Canada's pre-Charter constitutional tradition of rights protection, appears to be consistent with a conventional view of the doctrine of parliamentary sovereignty and its implication for the judicial role in rights protection.[12]

Well before Ajzenstat's article was published in 1997, Knopff and Morton were already arguing that Canada's pre-Charter constitutional tradition is one in

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[11] Ibid.

[12] In fact, Canadian constitutional scholars have long defended a preference for parliamentary rights protection. The question remains, however, whether such views necessarily accompany the legal doctrine of parliamentary sovereignty and whether Dicey himself shares this faith in parliamentary rights protection. If not, when and why did the doctrine become associated with parliamentary rights protection? For defenders of parliamentary rights protection, see Donald Smiley, "Courts, Legislatures, and the Protection of Human Rights" in Martin L. Friedland, ed. *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975). Contemporaries sharing this view include Peter H. Russell, "A Democratic Approach to Civil Liberties" (1969) 19 *University of Toronto Law Journal* 109, and Douglas A. Schmeiser, "The Case Against the Entrenchment of a Bill of Rights" (1973) 1 *Dalhousie Law Journal* 15. For a contrasting view see Walter Tarnopolsky, "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971) 17 *McGill Law Journal* 437 and "The Constitution and Human Rights" in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983).

which "rights are best protected by the system of responsible government not by the courts."[13] Morton makes the point equally clear when he declares that in Canada's tradition of parliamentary government, courts are relegated to a "secondary role"[14] with respect to rights protection. Indeed, the ideal of the judicial role Knopff and Morton draw from the doctrine of parliamentary sovereignty is based on "a textually oriented form of judicial reasoning."[15] Historically, Knopff and Morton argue, judges in Canada did not allow themselves "to go beyond the actual text of a statute in interpreting its meaning."[16] Judges used to be "steeped in the black-letter law tradition of parliamentary supremacy and legal positivism."[17]

This claim appears, indeed, to be corroborated by legal historian Richard Risk who suggests that our "ancestral faith" is that judges determine and implement the "intent of the legislature."[18] Risk elaborates on the doctrine by

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[13] Rainer Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson, 1992), 199.

[14] F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* xx:1 (March 1987).

[15] Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds. *Constitutionalism, Citizenship and Society* (Toronto: University of Toronto Press, 1985), 165.

[16] Ibid.

[17] Ibid.

[18] R.C.B. Risk, "Here Be Cold and Tygers: a Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 *Saskatchewan Law Review* 196, 196. More detailed discussion of the canons of statutory interpretation associated with the doctrine of the sovereignty of parliament can be found in Gordon Bale, "Parliamentary Debate and Statutory Interpretation" (1995) 74:1 Canadian Bar Review 1; Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight" (1998) 43 *McGill Law Journal* 287; Geoff Hall, "Statutory Interpretation in the Supreme Court of Canada: the Triumph of a Common Law Methodology"

recalling the view of 19th century British authority Sir Peter Maxwell: "'Statute law is the will of the Legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used'."[19] In his discussion of the doctrine of parliamentary sovereignty, Peter Hogg offers a straightforward declaration of the significance of such a focus on the statute as the only cognizable will of the legislature: "the courts have no power to deny the force of law to any statute enacted by the legislature."[20] Patrick Monahan adds to this kind of declaration an indication of the possible democratic implication of such "ancestral faith." Monahan argues that in Canada "the role of the courts has been regarded as essentially subordinate; the courts do not make political choices themselves, but merely give legal effect to the political choices made by others."[21] Frederick Vaughan shares the view that the search for the intent of parliament amounts to a form of judicial "deference to the legislature."[22]

(1998) 21 *Advocates Quarterly* 38; Ruth Sullivan, "Statutory Interpretation in a Nutshell" (2003) 82 *Canadian Bar Review* 51.

[19] Ibid.

[20] Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), 197. Hogg does not deny that the courts invalidate statutes considered *ultra vires* the federal division of powers. With the introduction of the Charter in 1982, moreover, Hogg adds that new limitations have been imposed on the authority of Parliament and provincial legislatures to constrict rights; however, because such limitations have their origin in the text of the Charter, rather than the common law, Hogg argues that the legal doctrine of parliamentary sovereignty continues to be relevant: See Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 1997), 269-273.

[21] Patrick Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987), 30.

[22] Frederick Vaughan, "The Use of History in Canadian Constitutional Adjudication" (1989) 12:1 *Dalhousie Law Journal* 59, 66.

Indeed, Canadian legal scholars are more than willing to ascribe a democratic impetus to this "ancestral faith."[23] For example, Robert Yalden suggests that Maxwell's approach to statutory interpretation must be understood in the context of his belief that "in a representative democracy, the views of a popularly elected legislature must prevail over those of an appointed judiciary."[24] Similarly, Robin Elliot argues that parliamentary sovereignty "creates the impression that the courts are merely passive actors in the process of determining what the law is."[25] After all, Elliot goes on to clarify, the doctrine speaks to the relationship between courts and legislatures and "it is Parliament's view that must ultimately prevail."[26] This would certainly appear to clarify the reason why the doctrine, as Walter Tarnopolsky points out, ensures that "[c]oncerns for fundamental rights and freedoms affected by Parliamentary action are placed beyond the competence of the courts."[27] In this vein, Bayefsky argues that "[f]aith with respect to human rights protection is placed in the workings of

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[23] Political scientists share this view as well. Janet Hiebert, for example, calls the Westminster model of rights protection, which emphasizes parliamentary over judicial rights protection, a system of constitutionalism in which the dominant right is that of collective self-government rather than individual rights and freedoms. See her "New Constitutional Ideas: Can New Parliamentary Models of Rights Protection Resist Judicial Dominance When Interpreting Rights?" (2004) 82 *Texas Law Review* 1963, 1964.

[24] Yalden, "Deference and Coherence in Administrative Law," 141-2.

[25] Elliot, "Rethinking Manner and Form," 231.

[26] Ibid, 234.

[27] Walter Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law and Contemporary Problems* 169, 171.

democracy" and in the "power of numbers"[28] rather than in the judiciary. In Bayefsky's view, such an approach to rights protection is a clear indication of "distrust of the judicial function."[29] Such a view, indeed, is consistent with the position of Patrick Macklem et al. who point out that parliamentary democracy is at the heart of our constitutional structure,[30] with the consequence that courts are obliged to enforce Parliament's dictates regardless of the content of the statute (unless division of powers concerns are raised).[31] At the same time, however, Macklem et al. point out that while elected politicians make law, the "ultimate meaning of their actions is assessed by the courts."[32] Bayefsky recognizes the role the judiciary plays in interpreting statutes, but she clarifies that if judges fail to interpret statutes according to the clear views of legislators, judges would pass "beyond the bounds set by the doctrine of parliamentary sovereignty."[33]

Unlike Macklem et al., moreover, Bayefsky associates such a position with Dicey himself.[34] While she is not alone among constitutional scholars in referring to Dicey as a proxy for Canada's pre-Charter constitutional tradition, Canadian

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[28] Anne Bayefsky, "Parliamentary Sovereignty and Human Rights," 241.

[29] Ibid.

[30] Patrick Macklem, R.C.B. Risk, C.J. Rogerson, K.E. Swinton, L.E. Weinrib and J.D. Whyte, eds. *Canadian Constitutional Law* Vol. I (Toronto: Emond Montgomery, 1994), 4.

[31] Ibid.

[32] Ibid.

[33] Bayefsky, "Parliamentary Sovereignty and Human Rights," 243.

[34] Ibid., 241.

constitutional scholars' views of Dicey do not tend to move far from the portrait of the doctrine of parliamentary sovereignty identified above.[35] For example, historian Ross Lamberton argues that Canada's pre-Charter constitutional tradition is "the product of a legal-positivist mindset"[36] which he explicitly links to Dicey. His work is said to have "reflected" the constitutional certainties of the age but also to have "drive[n] them home to several generations of British and colonial lawyers."[37] Lamberton argues that, in Dicey's view, parliamentary sovereignty was "the very keystone of the law of the constitution."[38] The implication of this for rights protection is that "the final decision on any matter involving individual rights and liberties was to be left to Parliament."[39] To emphasize the extent to which this notion of parliamentary rights protection was widespread, Lamberton goes on to add that most Canadian lawyers were "reared in the Diceyan gospel."[40] Lamberton's colleague, historian Christopher MacLennan, similarly labels Dicey a constitutional authority in the pre-Charter era of rights protection[41] and argues that "[f]or many, the supremacy of Parliament

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[35] See for example, Elliot, "Rethinking Manner and Form," 231; Hiebert, "New Constitutional Ideas," 1964.

[36] Ross Lamberton, *Repression and Resistance*, 8.

[37] Ibid.

[38] Ibid. The quotation comes from A.V. Dicey, *The Law of the Constitution*, 10th ed., 209.

[39] Ibid.

[40] Ibid., 319. Lamberton is citing F.R. Scott on this point.

[41] Christopher MacLennan, *Toward The Charter*, 8.

was the greatest guarantor of individual freedom available."[42] In the context of such views of Dicey and of the implication for rights protection generally understood to be the corollary of the doctrine of parliamentary sovereignty, it seems perhaps less remarkable that the extensive use Knopff and Morton's make of Ajzenstat's interpretation of Dicey is received by legal scholars in silence.

Ajzenstat's reconciliation of parliamentary sovereignty and the rule of law

Ajzenstat presents her discussion of Dicey as an extended commentary on his "apparently absurd claim that parliamentary sovereignty secures rights."[43] The two "great principles" of the English[44] constitution, Ajzenstat goes on to suggest, "are said to be mutually reinforcing":[45]

> The rule of law supports parliamentary sovereignty, and parliamentary sovereignty in turn—and this is the crucial point—protects the rule of law, and with it the entire panoply of English rights. Dicey's contention is not the weak one that a de facto bill of rights existed in Britain despite, or alongside, parliamentary sovereignty. It is that rights in the British form of government are secure only where parliament's legislative powers are unlimited.[46]

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[42] Ibid., 9.

[43] Ajzenstat, "Reconciling Parliament and Rights," 645. Chapter XIII of *The Law of the Constitution*, entitled "Relation Between Parliamentary Sovereignty and the Rule of Law" is particularly relevant to Ajzenstat's interpretation.

[44] Dicey consistently uses the narrower adjective *English* in his constitutional scholarship rather than the more accurate *British* preferred by Ajzenstat. I will follow Dicey's usage for the sake of consistency.

[45] Ibid.

[46] Ibid.

Ajzenstat offers this paraphrasing of Dicey as a response to his critics who argue that parliamentary sovereignty and the rule of law are irreconcilable.[47] Rather than show immediately how Dicey himself explicitly reconciles them, Ajzenstat travels in time and space to Canada where she considers Supreme Court Chief Justice Lyman Duff's argument in favour of free speech in the Alberta Press Case.[48] Duff is said to maintain that Parliament must have an interest in protecting the right to free speech "because freedom of political speech is the condition without which parliament cannot operate."[49] Ajzenstat quotes from Duff's decision to fill out the point:

> There can be no controversy that [the institutions of parliament] derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest examination from every point of view of political proposals.[50]

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[47] In addition to the sources Ajzenstat herself cites, legal scholars Allan Hutchinson and Patrick Monahan argue that the two principles cannot be reconciled. See their "Democracy and the Rule of Law" in Allan Hutchinson, eds. *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 99. Legal scholar Martin Loughlin declares this to be a "mainstream" view among scholars of the constitution in the UK. See his *Public Law and Political Theory* (Oxford: Oxford University Press, 1992, 151.

[48] *Reference re Alberta Statutes*, [1938] 2 S.C.R. 100.

[49] Ajzenstat, "Reconciling Parliament and Rights," 651.

[50] Ibid. Two excellent discussions of contemporary parliamentary reform may be found in Peter Aucoin and Lori Turnbull, "The Democratic Deficit: Paul Martin and Parliamentary Reform" *Canadian Public Administration* 46:4 (Winter 2003) and Jennifer Smith, "Democracy and the Canadian House of Commons at the Millennium" *Canadian Public Administration* 42:4 (Winter 1999).

Here Ajzenstat finds the "beginnings of an argument" that parliamentary sovereignty and rights protection are compatible.[51] In her view, a properly functioning parliament depends, at the very least, on free political speech and a free press.[52]

As Ajzenstat clarifies, "Parliament is, or must be, interested in keeping alive at least this one freedom, freedom of political speech, because it is the condition without which parliament cannot operate."[53] In turn, Ajzenstat links this view—ascribed to Duff—to a "long tradition in liberal thought that regards freedom of the press and freedom of speech as the crucial right on which other, perhaps all, civil liberties depend."[54] This "tradition" of free political speech is linked, in turn, to the rule of law when Ajzenstat posits that the former depends on the latter. To be free, debate cannot privilege some arguments over others; all law and policy must be open to debate.[55] The "best" guarantee of the absence of

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[51] Ibid. One may certainly take issue with the suggestion that free public debate (aided by a free press) is the defining practice of parliamentary government. For a striking discussion of this point see Richard Thoma, "Appendix: On the Ideology of Parliamentarism" in Carl Schmitt, Ellen Kennedy, trans. *The Crisis of Parliamentarism* (Cambridge: MIT Press, 1985). Ajzenstat makes no effort to find evidence in Dicey's text that he shares this view that free public debate is the principle and practice which defines parliament, saying only that a parliament which legislates in violation of these rights "would no longer fit Dicey's definition of parliament." Ibid.

[52] If it is the judiciary which is tasked with protecting these fundamental aspects of parliamentary government, it is difficult to see how Ajzenstat's argument here differs from the assertion that judicial review of a bill of rights should be constrained by its representation-reinforcing role. For a Canadian version of this argument made famous by John Ely, see Patrick Monahan, *The Constitution and the Courts*, 1987.

[53] Ajzenstat, "Reconciling Parliament and Rights," 654.

[54] Ibid.

[55] Elsewhere Ajzenstat defends the position that we should (though increasingly we do not) refrain from attacking the institutions of parliamentary government themselves in the same was

privileged arguments in parliamentary debate "lies in the idea that no one is above the law, that is, that no parties or persons are able on the basis of race, origin, creed, [or] birth, to claim privileged status for their demands."[56] Ajzenstat argues that executive dominance provides a much needed check on the legislature because it leaves backbenchers, particularly those from opposition parties, free to criticize the government:

> the ascendancy of the governing party...leaves members of the other parties in the House free to dissent publicly from government policies. The fact that the cabinet is not supported by the House in toto leaves the minority at liberty to carp, deride and complain—while remaining secure, honoured and constitutionally protected.[57]

Ajzenstat sums up her estimation of Dicey's argument by suggesting that "the checks and balances of parliamentary institutions promote and protect competition between parties which restrain the government-of-the-day in the area of rights."[58] Since parliamentary procedure supports rights, it is not absurd

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as law and policy defended or opposed within those institutions. Ajzenstat does not argue that parliamentary government is always free of ideological bias, but she does speak glowingly of "the standard of constitutional neutrality " which was "well-enough established that groups and interests offensive to the majority were tolerated and could even hope in time to persuade the majority." See her "Decline of Procedural Liberalism: The Slippery Slope to Secession" in Joseph Carens, ed. *Is Quebec Nationalism Just? Perspectives from English Canada* (Montreal and Kingston: McGill-Queen's University Press, 1995), 127-8.

[56] Ajzenstat, "Reconciling Parliament and Rights," 654.

[57] Ibid., 656.

[58] Ibid. Ajzenstat suggests that criticism of the limited franchise electing parliaments in the 19th century misses the point that universal suffrage and representation reform are not crucial to parliament's effectiveness. Ibid., 656-7.

to suggest, as Dicey does, that parliamentary sovereignty is compatible with the rule of law.[59]

Ajzenstat offers an incisive theoretical defence of parliamentary rights protection based on the neglected importance of the separation of powers between executive and legislature in a parliamentary system. In turn, this defence of parliamentary rights protection is offered as part of a general discussion of Dicey's reconciliation of parliamentary sovereignty and the rule of law.

Knopff and Morton are only too happy to draw from her intellectual portrait of Dicey to bolster their portrayal of Canada's pre-Charter constitutional tradition; in fact, Ajzenstat makes clear her own view of the connection between Dicey's "confidence in legislative rights guarantees"[60] and Canada's pre-Charter constitutional tradition: "Confidence in political deliberation has been a defining characteristic of Canadian public life from before Confederation."[61] This confidence has been shaken, in Ajzenstat's view, by the introduction of the Charter because it implies that "prior rights protection in this country had been inadequate."[62] Not only do Knopff and Morton adopt her positive assessment of

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[59] Ajzenstat notes an added benefit of parliamentary rights protection which mitigates the tendency associated with Charter litigation constantly to reinterpret and redefine rights. Ibid., 657. Rights invoked in parliamentary debate need not be interpreted or defined which makes it possible to retain a view of rights as having a "foundation in natural law, or in a lasting understanding of human nature." Ibid., 657-8.

[60] Ibid., 660.

[61] Ibid., 662.

[62] Ibid., 660.

Dicey, but they also share with Ajzenstat the view that the Charter is properly associated with a collapse of faith in parliamentary rights protection.[63] Morton, for example, argues that there has been an increase in the lack of faith in the legislative process: "Today, there is a perception that constitutional questions are too important to be left with politicians."[64] Morton contrasts this view with the "instinctive confidence" Canadians used to have in the parliamentary process.[65] In the same vein as Ajzenstat, Morton reminds us that the doctrine of parliamentary sovereignty is "unlimited" in the scope it gives to parliamentarians to violate the "fundamental freedoms of Englishmen."[66] He argues that Dicey himself "made it clear that the political conventions of self-restraint and fair-play, reinforced by public opinion" prevent egregious violations of rights.[67] Morton

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[63] Frederick Vaughan develops this point in chapter 6 of *The Canadian Federalist Experiment* (Montreal and Kingston: McGill-Queen's University Press, 2003); for a more general analysis of the effect of the Charter on governance and constitutional culture see the classic statement of Alan Cairns in *Charter Versus Federalism* (Montreal and Kingston: McGill-Queens University Press, 1992).

[64] F.L. Morton, "Judicial Review and Civil Liberties," in F.L. Morton, ed. *Law, Politics, and the Judicial Process in Canada*, 3rd ed. (Calgary: University of Calgary Press, 2002), 473.

[65] Ibid., 493.

[66] Ibid., 479.

[67] Ibid. It should be pointed out that Morton's defence of the quality of parliamentary rights protection is somewhat more attentive to its basis in political culture. Rainer Knopff, on the other hand, follows Ajzenstat more closely in his greater emphasis on the primacy of institutions in a properly functioning parliamentary system. Compare F.L. Morton, "Judicial Activism in Comparative Perspective" in Kenneth M. Holland, ed. *Judicial Activism in the Context of Popular Sovereignty: The French Experience* (Basingstoke: Macmillan, 1991) and "The Charter of Rights: Myth and Reality" in William D. Gairdiner, ed. *After Liberalism: Essays in Search of Freedom, Virtue, and Order* (Toronto: Stoddart Publishing Co. Ltd., 1998) with Rainer Knopff, "Populism and the Politics of Rights: The Dual Attack on Representative Democracy" *Canadian Journal of Political Science* xxxi:4 (December 1998). Together, however, Knopff and Morton follow Ajzenstat's focus on the separation of powers in a parliamentary system.

reiterates this point when he affirms Dicey's preference for the "flexibility" of resting "primary responsibility for the preservation of liberty in an elected, accountable, representative legislature such as Parliament."[68]

Following Ajzenstat, Knopff and Morton argue that Dicey's doctrine of parliamentary sovereignty is intimately linked to his confidence in the ability and willingness of parliamentarians to protect rights. However, they take this view a step further by drawing implications for the judicial role in rights protection that are implied by this confidence. In her assessment of *The Law of the Constitution*, Ajzenstat ignores virtually all that Dicey says about judges and the effect of their role in the adjudication of legal disputes on the way parliamentary sovereignty might be reconciled with rights.[69] Indeed, Ajzenstat defends her assessment with the claim that, with Dicey's help, she intends to keep the focus on parliament in her assessment.[70] Knopff and Morton, on the other hand, posit that if parliamentary rights protection is properly linked to faith in parliamentarians and in the separation of powers in a parliamentary system, then parliamentary rights protection should also be associated with a decided scepticism towards the view

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[68] Ibid., 479.

[69] Ajzenstat mentions Dicey's view that the preservation of English rights depends on the common law and that "there can be no security for rights without the courts" but the point is not developed. See "Reconciling Rights and Parliament," 646.

[70] Ibid., 648. The effect of Ajzenstat's failure to address any views Dicey might have regarding adjudication and rights protection may be seen in Janet Hiebert's work where she cites Ajzenstat's interpretation of Dicey as an example of a proponent of parliamentary sovereignty who does not address the possible role played by adjudication in protecting rights. See Hiebert, "New Constitutional Ideas," 1964.

that judges can or should act as defenders of fundamental rights. While legal scholars might disagree with the normative validity of such an interpretation of Canada's pre-Charter constitutional tradition,[71] they refute neither the accuracy of such an interpretation nor the ascription of such views to Dicey.

Dicey's reconciliation of parliamentary sovereignty and the rule of law

In a retrospective introduction to the eighth edition of his *Introduction to the Study of the Law of the Constitution*, penned thirty years after writing the original manuscript in 1884,[72] Dicey declares that his "sole object" in writing his text is to illustrate and explain the three "leading characteristics" of the existing constitution of England: the sovereignty of parliament, the rule of law and the conventions of the Constitution.[73] His contemporary critics are far more willing to ascribe more complex motives for the project than this, but Dicey himself recognizes that his analysis of the three leading characteristics of the English Constitution was

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[71] For an example of such a judgement of Canada's pre-Charter constitutional tradition, see Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699. Such a judgement continues to affect constitutional debate as seen in discussion of the notwithstanding clause. Compare Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004) 23 *Supreme Court Law Review* (2d) 135 and Barbara Billingsley, "The *Charter*'s 'Sleeping Giant'" (2002) 21 *Windsor Yearbook of Access to Justice* 331 with Janet Hiebert, "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" (2004) 23 *Supreme Court Law Review* (2d) 169 and Peter H. Russell, "Standing Up For Notwithstanding" (1991) 29 *Alberta Law Review* 293.

[72] "Introduction," *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1926). This introduction was written and first published in 1914; the original was written in 1884 and published in 1885. The *Law of the Constitution* has gone through ten editions. In this chapter I quote from the 10th edition published in 1959.

[73] Ibid., xvii.

conditioned by immediate, perhaps even unacknowledged, contemporary preoccupations. In his defence of this conditioning, Dicey concedes that "[i]t is impossible,...(nor perhaps would it be desirable were it possible), to prevent a writer's survey of the past from exhibiting or betraying his anticipation of the future."[74]

Putting aside for the time being Knopff and Morton's implicit ascription to Dicey of confidence in legislative rights protection and a sceptical attitude regarding judicial involvement in rights protection, Anglo-American legal scholars and historians have placed Dicey and his *Law of the Constitution* into an intellectual, socio-economic, legal-theoretic or biographical context to shed light on the meaning and significance of his work. Importantly, Ajzenstat makes almost no effort to engage this work, most of which was published and readily available before her own assessment of Dicey's arguments. Knopff and Morton, in turn, simply adopt Ajzenstat's assessment of Dicey as their own to bolster their interpretation of Canada's pre-Charter constitutional tradition. In Ajzenstat's defence, in her book length study of the political thought of Lord Durham,[75] published almost a decade prior to her article on Dicey, she makes no bones about her relative lack of interest in the historian's approach to the study of political thought. She offers historical facts and Durham's own view of them only to develop an "understanding of the theoretical assumptions and arguments

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[74] Ibid., xviii.

[75] Janet Ajzenstat, *The Political Thought of Lord Durham* (Montreal and Kingston: McGill-Queen's University Press, 1988).

informing his observations."[76] What is of primary interest to Ajzenstat is the way in which a thinker "tackles questions of timeless interest"[77] so that we may derive a "general understanding of political matters."[78] As a self-described "student of political philosophy",[79] Ajzenstat shows a repeated interest in reviving "the old confidence"[80] in the institutions of parliamentary government, properly interpreted as manifesting the separation of powers between executive and legislature, as a means of maintaining political freedom.[81] In light of her declared approach to the study of Durham, it is not far fetched to suggest that Ajzenstat assesses Dicey's reconciliation of parliamentary sovereignty and the rule of law as yet another

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[76] Ibid., ix.

[77] Ibid.

[78] Ibid., x. Jeremy Rayner has dissected and criticized Ajzenstat's ahistorical approach to the study of political thought in "The Very Idea of Canadian Political Thought: In Defence of Historicism" *Journal of Canadian Studies* 26:2 (Summer 1991); Robert Meynell offers a similar assessment in "Our Neo-New Contextualists: Continentalist Sedition in the Realm of Canadian Political Thought: The New Myths of *Canada's Origins*" unpublished manuscript, University of Ottawa, April 1999.

[79] Ibid., xiii.

[80] Ajzenstat, *Once and Future Canadian Democracy,* 88.

[81] See Janet Ajzenstat, "Comment: The Separation of Powers in 1867" *Canadian Journal of Political Science* xx:1 (March 1987); "Confederation Without Tears, Without Fears, Without Canada: Chilly Climate Historiography" (1996) 3 *Review of Constitutional Studies* 350; "The Conservatism of the Canadian Founders" William D. Gairdiner ed., *After Liberalism: Essays in Search of Freedom, Virtue, and Order* (Toronto: Stoddart Publishing Co. Ltd., 1998); "The Constitutionalism of Etienne Parent and Joseph Howe" in Janet Ajzenstat ed., *Canadian Constitutionalism 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992); "Constitution-Making and the Myth of the People" in Curtis Cook ed., *Constitutional Predicament: Canada After the Referendum of 1992* (Montreal and Kingston: McGill-Queen's University Press, 1994); "Decline of Procedural Liberalism"; "Modern Mixed Government: A Liberal Defence of Inequality" *Canadian Journal of Political Science* xviii:1(March 1985); *The Once and Future Canadian Democracy*; "Two Forms of Democracy: A Response to Mendelsohn's 'Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" *Canadian Journal of Political Science* xxxiii:3 (September 2000); and with Peter J. Smith, "Canada's Origins: The New Debate" *National History* 1:2 (Spring 1997).

contribution to this revival. Whether her interpretation of Dicey is plausible is a question which cannot be answered without grappling with secondary literature not explicitly addressed by Ajzenstat herself.

Dicey himself certainly offers preliminary support for There is certainly evidence in Dicey's work to support Ajzenstat's assessment. He calls parliamentary sovereignty the "dominant characteristic of our political institutions,"[82] and a number of scholars, including Knopff and Morton, take this to signal his faith in parliamentary institutions and scepticism regarding a judicial role in rights protection. For British constitutional scholar Michael Foley, Dicey's assertion of parliamentary sovereignty as the dominant characteristic of British political institutions is an indication of his confidence (however mistaken) in a Victorian middle class "liberal consensus"[83] on minimal government involvement in society and economy as well as parliamentary protection for civil liberties. Foley suggests that Dicey was certain that parliamentarians would not take advantage of the absence of legal restraint on parliament's ability to "exert power arbitrarily though law";[84] his doctrine of parliamentary sovereignty "bears witness to his acceptance of a political constitution."[85] For Foley, this term is meant to suggest a political culture of self-restraint and commitment to the "liberal

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[82] Dicey, "Introduction," *Law of the Constitution*, 8th ed., 1926, xviii.

[83] Michael Foley, *The Politics of the British Constitution* (Manchester: Manchester University Press, 1999), 29.

[84] Ibid., 28.

[85] Ibid., 36.

consensus." Paul Romney agrees, adding that Dicey's confidence in parliamentary rights protection seems to rely on his belief that the English elite in parliament "disliked arbitrary power"[86] and that this dislike, in turn, is evidence of the "legal habits" of mind which form a central English "trait of national character."[87] Australian legal scholar Jeffrey Goldsworthy shares this view and ascribes it to the 19th century English constitution more generally, adding that it "has always relied on representation, together with 'checks and balances' internal to the legislative process."[88] For her part, British critical legal scholar Carol Harlow links this interpretation of the 19th century English constitution with Dicey and suggests that his view forms the "'background theory'"[89] of the English constitution. From this background theory Harlow draws an interpretation of Dicey as holding a "positivist" view of law which not only places the statute at the

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[86] Paul Romney, "Very Late Loyalist Fantasies: Nostalgic Tory History and the Rule of Law in Upper Canada" in Wesley Pue and Barry Wright, eds. *Canadian Perspectives on Law and Society: Issues in Law and History* (Ottawa: Carleton University Press, 1988), 130.

[87] Ibid., 130.

[88] Jeffrey Goldsworthy, "Legislative Sovereignty and the Rule of Law" in Tom Campbell et al., eds. *Scepticism and Human Rights* (Oxford: Oxford University Press, 2001), 77. Rivka Weill challenges this "Diceyan" orthodoxy which accepts parliamentary sovereignty as Dicey's view regarding the dominant characteristic of the English constitution. To this orthodoxy Weill contrasts an interpretation of Dicey as a strong proponent of popular sovereignty. See her "Dicey was Not Diceyan" (2003) 62:2 *Cambridge Law Journal* 474, 475. Weill uses Dicey's advocacy of the referendum as evidence that he wanted to make the people the legal sovereign.

[89] Carol Harlow, "Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?" *Political Studies* 48 (2000), 356. See also her "Power From the People? Representation and Constitutional Theory" Patrick McAuslan and John F. McEldowney, eds. *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution* (London: Sweet & Maxwell, 1985).

top of the legal hierarchy but also denies to judges discretion and a "policy-making function."[90]

Indeed, Dicey argues that Parliament—Queen, Lords, and Commons "acting together"—had the right to "make or unmake any law whatever," and "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[91] While Dicey declares this to be the dominant characteristic of English political institutions, he also notes that it is a doctrine offered from a "legal point of view."[92] When Dicey refers to Parliament, then, he is referring to what the English lawyer, rather than the member of parliament, understands (or ought to understand) by the term. When Dicey clarifies the relationship between parliamentary sovereignty and the rule of law, he points out that the commands of parliament "can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation. The will of Parliament can be expressed only through an Act of Parliament."[93] Thus while parliamentary sovereignty may be the dominant characteristic of English political institutions, from the legal point of view, the significance of this is that parliament must express its will only through statute rather than through motion, resolution or

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[90] Ibid., 357.

[91] Dicey, *The Law of the Constitution*, 10th ed., 39-40.

[92] Dicey, "Introduction" *The Law of the Constitution*, 8th ed., xviii.

[93] Dicey, *The Law of the Constitution*, 10th ed., 407.

order-in-council. Dicey is crystal clear on this point: ensuring that parliament's "will" is expressed only though statute "is no mere matter of form; it has the most important practical effects."[94]

Dicey's doctrine of parliamentary sovereignty identifies the principle that parliament speaks (or should speak) "only through an Act of Parliament," but it has the effect of "greatly increase[ing] the authority of the judges."[95] This is because "[a] bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment."[96] This means that a judge will ignore any resolution of the Lords or Commons as well as legislative debate as a guide to statutory interpretation.[97] "All this, Dicey concedes, "which seems natural enough to the English lawyer...no doubt often does give a certain narrowness to the judicial construction of statutes."[98]

At the same time, as Dicey has made clear, it also "contributes greatly...to the authority of the judges."[99] It is this increase in the authority of the judges, which is the result of Parliament expressing its will in statutes which come under

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[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Ibid., 407-8.

[98] Ibid., 408.

[99] Ibid.

the supervision of judiciary, that ensures the supremacy of the law. It is not, as Ajzenstat suggests, primarily parliamentary debate that produces this result. But what does Dicey mean by the supremacy of the law? Dicey makes this clearer when he proceeds to consider how the supremacy of law "necessitates the exercise of Parliamentary sovereignty."[100]

Dicey notes that the executive is constantly hampered by judges who apply common law prohibitions to its discretionary action.[101] He goes on to suggest that "the government can escape only by obtaining from Parliament the discretionary authority which is denied the Crown by the law of the land."[102] In other words, because the courts "must prevent, and will prevent at any rate where personal liberty is concerned, the exercise by the government of any sort of discretionary power,"[103] the executive must exercise arbitrary powers "under Act of Parliament" which, again, "places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts."[104] Just to make sure that point is not lost, Dicey goes on to declare that the executive's powers, conferred by statute,

> are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by

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[100] Ibid., 411.

[101] Ibid.

[102] It is clear here that Dicey is referring to the common law when he uses the term "the law of the land."

[103] Dicey, *The Law of the Constitution*, 10th ed., 412.

[104] Ibid., 413.

> the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[105]

Dicey concludes his discussion of the relationship between parliamentary sovereignty and the rule of law by offering a reminder that "Parliamentary sovereignty has favoured the rule of law and the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a "spirit of legality."[106] This way of reconciling the two principles, though contrary to Ajzenstat's interpretation, is indeed, clarified further by Dicey himself when he declares at the end of *The Law of the Constitution* that "If the sovereignty of Parliament gives the form, the supremacy of the law of the land gives the substance of our constitution."[107]

Despite the fact that he includes parliamentary sovereignty, the rule of law and conventions in his definition of constitutional law,[108] it is the rule of law which is, for Dicey, the "distinctive characteristic" of the English constitution.[109] He

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[105] Ibid., 414.

[106] Ibid.

[107] Ibid., 471.

[108] Ibid., 23.

[109] Dicey, "Introduction" *The Law of the Constitution*, 8th ed., xxxviii.

declares that the rule of law (or supremacy of the law of the land) consists of legal rights and duties which are determined by common law courts alone and prescribes punishment only for engaging in conduct forbidden by law.[110] In turn, the rule of law signifies the "security given under the English constitution to the rights of individuals";[111] the source of the constitution is the "judicial decisions determining the rights of private persons in particular cases brought before the courts."[112] The English constitution, then, "is a judge-made constitution"[113] and its principles are "inductions or generalizations based upon particular decisions pronounced by the courts as to the rights of given individuals."[114] Dicey claims to be neither critic nor eulogist of the English constitution but rather its "expounder."[115] He declares it his duty simply to "state what are the principles of law which actually and at present day exist in England";[116] however, he gives some indication that his is, in fact, a normative project. Dicey challenges his contemporaries for denying that the English constitution is a matter of law rather

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[110] Ibid.

[111] Dicey, *The Law of the Constitution,* 10th ed., 184.

[112] Ibid., 195.

[113] Ibid., 196.

[114] Ibid., 198.

[115] Ibid., 6.

[116] Ibid., 14-5.

than political ethics,[117] and he expresses good natured envy when he notes the relative ease with which American scholars of their constitution demarcate their field:

> Their task as commentators on the constitution was in kind exactly similar to the task of commenting on any other branch of jurisprudence. The American lawyer has to ascertain the meaning of the articles of the constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and by the conclusions to be deduced from a careful study of judicial decisions. The task, in short, which lay before the great American commentators was the explanation of a definite legal document in accordance with the received canons of legal interpretation. Their work, difficult as it might prove, was work of the kind to which lawyers are accustomed, and could be achieved by the use of ordinary legal methods.[118]

In this context, Dicey notes that the English lawyer is not as fortunate as the American because the English cannot comment on their constitution without first declaring what the constitution is.[119] *The Law of the Constitution* addresses precisely this definitional obligation, but Dicey does more than simply identify the principles of the English constitution captured by the rule of law and then relate them to parliamentary sovereignty and constitutional conventions.[120] He engages

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[117] Ibid., 22. For example Dicey suggested that though the constitution looks like a hodge podge of customs, when looked at from a legal point of view, it turns out to be based on the law of the land, on the common law. See Ibid., 471.

[118] Ibid., 5.

[119] Ibid., 6.

[120] Dicey defines conventions as "rules for determining the mode in which the discretionary powers of the Crown ought to be exercised." Ibid., 422-3. Conventions, in turn, ensure that, "in the long run," parliament or the government gives effect to the political sovereign: the majority of the electorate. Ibid., 429. As with government and parliament, however, conventions are, in Dicey

in this project of interpreting the English constitution, as Americans do, "in accordance with the received canons of legal interpretation." As has already been indicated, this means that Dicey makes every effort to place the common law at the centre of his explanation of the English Constitution. After all, Dicey argues that the rule of law is the "true foundation on which the polity rests."[121] This point should be kept in mind when analyzing the way in which Dicey understood the relationship between parliamentary sovereignty and the rule of law.

Again, according to Dicey, a key implication of the doctrine of parliamentary sovereignty is that the "will of Parliament can be expressed only through an Act of Parliament."[122] The significance of this emphasis on the importance of the expression of Parliament's "will" in statute form is better understood if it is borne in mind that Dicey is profoundly concerned about the increasing tendency of 19th century British governments to delegate legislative authority to administrative tribunals and agencies.[123] This concerns Dicey for at

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view, indirectly supervised by the courts as the breach of a convention "will almost immediately bring the offender into conflict with the courts and the law of the land." Ibid., 446. For a discussion of constitutional conventions in Canada which emphasizes their service as a critical morality of the constitution, see Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Don Mills: Oxford University Press, 1991).

[121] Dicey, *The Law of the Constitution*, 10th ed., 407.

[122] Ibid.

[123] Henry Parris argues that "Dicey's career as a political partisan is of greatest relevance to an understanding of his thought." See his "The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised" *Historical Journal* 3:1 (1960), 18. For further biographical detail see Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina University Press, 1980).

least two reasons. First, such delegations were made by governments in the name of increasing the degree of intervention into the private sphere. Dicey is suspicious of government activity for any but the most limited of ends;[124] he believes that most government intervention results in the "socialism" and "collectivism" that undermined individual initiative.[125] More importantly, the use of executive decrees and delegated legislation to facilitate government intervention into the private sphere had the potential to remove such activities from the supervision of the ordinary courts. This would have been of serious concern to Dicey because he put great faith in the judges of the ordinary courts to protect fundamental rights to individual liberty, property and contract through the application of laissez-faire liberal common law principles to legal disputes.[126] As H.W. Arthurs points out, "Dicey appreciated that to give the last word to the ordinary courts in the evaluation of administrative action was also to accord their

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[124] Hutchinson and Monahan suggest that Dicey went to great pains to "check the runaway development of a collectivistically-inclined bureaucracy." See their "Democracy and the Rule of Law," 105.

[125] Bernard Hibbitts, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23:1 *Anglo-American Law Journal* 1, 9, 12-4, 18. An alternative view is offered by Trowbridge Ford, *Albert Venn Dicey: The Man and His Times* (Chichester: Barry Rose Publishers Ltd., 1985), 142-3 and chapter 7. Ford agrees that *The Law of the Constitution* is a polemical text but argues instead that Dicey's preoccupation was the "threat" of Irish self-government under the auspices of Crown prerogative. In effect, Trowbridge argues, "Dicey was encouraging the determination of the most controversial political and religious questions through the operation of the rule of law."

[126] John A. Rohr, "Dicey's Ghost and Administrative Law" *Administration and Society* 34:1 (March 2002). Rohr argues that "[a]though the principle of parliamentary sovereignty precluded British courts from declaring acts of parliament unconstitutional, Dicey looked to the independence of the judiciary as a practical way to reconcile the restraint on government implicit in the rule of law with the dangers of abuse implicit in parliamentary sovereignty itself." Ibid., 9-10.

distinctive legal values priority over other values, including government effectiveness."[127]

Dicey's concerns regarding the removal of executive activities from the supervision of the ordinary courts may explain why his text provides the ordinary common law courts with a doctrine which would at once consolidate and legitimize their superior position, as well as that of the common law, "in the face of governments that might seek to challenge them."[128] The supremacy of the rule of law was just such a doctrine. As Dicey himself asserted, "the supremacy of the law of the land means in the last resort the right of the judges to control the executive government."[129] David Schneiderman affirms this point when he notes that Dicey hopes that the common law would play a role in "stemming the transition toward socialism."[130]

Dicey's emphasis on the doctrine of the sovereignty of parliament as a *legal* doctrine, then, bolsters the centrality of judicially protected common law rights in the constitution. In this vein, Bernard Hibbitts argues that Dicey's

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[127] H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall Law Journal* 1, 28.

[128] Hibbitts, "The Politics of Principle," 22. Julia Stapleton, "Dicey and His Legacy" *History of Political Thought* xvi:2 (Summer 1995), 239. Stapleton asserts that Dicey believed that "judicial legislation' constituted the authentic guardian of English liberty, in contrast to the burgeoning 'parliamentary legislation' of recent years that was undertaken in the vain hope of social regeneration."

[129] Dicey, *The Law of the Constitution*, 10th ed., 472. Importantly, following this quotation Dicey declares "the *separation des pouvoirs* means, as construed by Frenchmen, the right of government to control the judges." Ibid.

[130] David Schneiderman, "Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the Local Prohibition Case" (1996) 41 *McGill Law Journal* 411, 431.

doctrine of parliamentary sovereignty must be understood in the context of the late 19th century common lawyer's tradition of distrust of government power. In Hibbit's estimation, "[t]he legal expression of Parliament's will, the statute, was contemptuously regarded as a clumsy interloper in the orderly development" of the common law."[131] Moreover, his growing "distrust of parliamentary democracy" meant that Dicey's emphasis on the sovereignty of parliament had to be squared with his view that "trusting in a democratic Parliament alone was a recipe not for progress and prosperity, but for political disaster."[132] If Dicey openly proclaims the sovereignty of parliament to be the "dominant characteristic" of the British constitution,[133] then one might wonder whether his acceptance of the doctrine is a pessimistic concession to a political reality he fears but sees as inevitable. Certainly if Dicey is taken at his word when he declares his aim in writing *The Law of the Constitution* is "neither to attack nor to defend the constitution, but to explain its laws,"[134] one might make this conclusion.

Returning, however, to Dicey's claim that "Parliament speaks only through an Act of Parliament,"[135] it is worth noting that he clarifies its significance by contrasting the command of Parliament, which must take the form of "formal and

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[131] Hibbitts, "The Politics of Principle," 11.

[132] Ibid, 14-5. This point is well developed in Vernon Bogdanor, "Dicey and the Reform of the Constitution" (1985) *Public Law* 652.

[133] Dicey, *The Law of the Constitution*, 10th ed., 39.

[134] Ibid., 3.

[135] Ibid., 407.

deliberate legislation," to the decree of the "despotic monarch," whose actions lay outside the supervision of the ordinary courts. Because parliamentary sovereignty implies government by Act rather than by decree, Dicey notes, we can be assured that government policy "immediately becomes subject to judicial interpretation."[136] Dicey's doctrine of parliamentary sovereignty can plausibly be interpreted as resulting in the funnelling of the impact of government intervention on private rights into statute form as a way to ensure that government policy remain under the supervision of judges in the ordinary courts. This point is made clear when Dicey asserts that "[p]owers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges."[137] In fact, in his *Law and Opinion*,[138] first published in 1905, Dicey admits approvingly that the words of an Act often "derive nearly all their real significance from the sense put upon them by the Courts."[139]

It is clear that the approach to statutory interpretation Dicey expects judges to employ centres initially on the text of the statute. Again, to repeat, English judges, as a matter of course, "have always refused, in principle at least,

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[136] Ibid.

[137] ibid., 413.

[138] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, 2nd ed. (London: Macmillian, 1962).

[139] Ibid., 362.

to interpret an Act of Parliament otherwise than by reference to the words of the enactment."[140] One cannot, however, draw from this claim the conclusion that judges are to focus on the words of the Act in order to heed the actual views of legislators or public opinion as a guide to interpretation. Dicey affirms this proposition when he suggests that judges "know nothing about any will of the people except insofar as that will is expressed by an Act of Parliament.[141] Dicey accepts that judges control the ascription of meaning to statutes when legal disputes arise, but he also openly concedes that judges often interpret statutes in a way which "would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments."[142]

Here Dicey indicates that judges frequently give statutes meanings different from those which parliamentarians would give them. In fact, Dicey appears to have prescribed that judges focus on the words of a statute in interpreting its meaning precisely *because* he believes judges would bring to the task "the general spirit of the common law."[143] With this spirit comes the concomitant "conservative disposition" of the magistrate who is "more likely to be biassed by professional habits and feelings than by the popular sentiment of the

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[140] Dicey, *The Law of the Constitution*, 10th ed., 407.

[141] Ibid., 73. This admission is consistent with a long-standing general prohibition on the examination of legislative history in ascertaining the intent of parliament in statutory interpretation. See Beaulac, "Parliamentary Debates in Statutory Interpretation."

[142] Ibid., 413-4.

[143] Ibid., 413.

hour."[144] Without a doubt, Dicey accepts that the approach to statutory interpretation judges should adopt is appropriately "guided by professional opinions and ways of thinking which are...independent of and possibly opposed to the general tone of public opinion."[145]

In fact, Dicey suggests that judges have a responsibility to act as "legislators" when they interpret statutes. Dicey identified the very act of interpreting statutes to be an act of judicial "law-making."[146] Dicey uses the term to mean that judges were to apply the "well-known legal principles" of the common law to the "solution of given cases."[147] By using the term "legislator," Dicey does not appear to intend to suggest the presence of the kind of judicial discretion implied by contemporary scholars of critical legal studies and law and policy more generally. Instead, Dicey means only to concede that judges, as they use the clearly defined "general spirit of the common law" to interpret the meaning of statutes, tend to "represent the convictions of an earlier era" rather than "the ideas represented by parliamentary legislation."[148] Thus, the act of judicial law making is to preserve the laissez faire liberal principles of the common law even if doing so means altering the policy effect of the statutes being interpreted.

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[144] Dicey, *Law and Opinion*, 2nd ed., 364.

[145] Ibid., 363.

[146] Ibid, 488.

[147] Ibid., 364.

[148] Ibid., 369.

Dicey does not shy away from confronting the potential contradiction between his exposition of the doctrine of the sovereignty of parliament and his use of the term "judicial legislator." He argues that no contradiction exists because English judges "do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges."[149] This concession, however, does not mean that Dicey expects judges to play no role in determining the policy effects of statutes. Although judges could not "set a statute aside," Dicey freely accepts that they may "by a process of interpretation, indirectly limit or possibly extend the operation of a statute."[150] In fact, Dicey criticizes the courts for not always exercising "sound logic and good sense" to ensure that a "sound principle" of the common law cover a case "to which it was never meant to apply." For Dicey, this is symptomatic of the fact that judges "have felt themselves less at liberty, in modern times at least, with regard to the interpretation of statutes." For Dicey, the disturbing consequence of such feelings on the part of the judiciary is that they are "apt to pay more attention to the words than to the spirit of an Act of Parliament."[151] This spirit, of course, is to be drawn from the principles of the common law and not the increasingly "collectivist" values of parliamentarians.[152]

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[149] Dicey, *The Law of the Constitution*, 10th ed., 60.

[150] Dicey, *Law and Opinion*, 2nd ed., 488.

[151] Ibid., 489.

[152] Risk, "Here Be Cold and Tygers," 197.

Dicey quickly disposes of another potential challenge to his exposition of the doctrine of parliamentary sovereignty coming from supporters of Blackstone who suppose that a statute contrary to fundamental moral principles is invalid.[153] Such claims, Dicey asserts, lack "legal basis."[154] Judges have no authority under the principles of the British constitution to challenge the validity of properly enacted statutes. Again, however, this is not the end of the matter. In fact, Dicey was willing to offer a "very qualified interpretation" of Blackstone's claim:

> [J]udges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality...and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality.[155]

Again we can see the extent to which Dicey "did not intend judges to be...self-effacing" within his doctrine of parliamentary sovereignty.[156]

In his discussion of contemporary American constitutional scholarship, Dicey, again, notes that American scholars interpret their constitutional document using an approach that is "exactly similar" to the approach prescribed by the "received canons of legal interpretation" in America. This approach, moreover, is

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[153] Blackstone may not have meant to suggest that judges could declare statutes contrary to the dictates of private or public morality *legally* invalid. For an interesting discussion see Mark D. Walters, "The Common Law Constitution in Canada: return of *lex non scripta* as Fundamental Law" (2001) 51 *University of Toronto Law Journal* 91.

[154] Dicey, *The Law of the Constitution*, 10th ed., 62.

[155] Ibid., 62-3.

[156] Arthurs, "Rethinking Administrative Law," 15.

familiar to all Anglo-American common lawyers. Here judges are to be guided by the rules of grammar, knowledge of the common law, the historical context, and by the conclusions to be deduced from a careful study of judicial decisions. In short, statutory interpretation, whether "constitutional" in the American sense or not, "was the explanation of a definitive legal document in accordance with the received canons of legal interpretation."[157]

For Dicey these canons, it would seem, were to guide judges to an interpretation of statutes which ensures that their meaning remains within the boundaries set by traditional common law understandings of fundamental rights regardless of the actual intent of parliamentarians. Bernard Hibbitts offers an eloquent synopsis of this interpretation when he calls the whole of Dicey's constitutional scholarship "a plea that England's democratized Parliament cease and desist in the first place from meddling with England's fundamental political, economic and social structure and disturbing the essential values which underlay that."[158]

In his *Law and Opinion*, Dicey explained that parliamentary sovereignty, in the hands of "bold reformers" was "an instrument well adapted for the establishment of democratic despotism."[159] When parliament became "the representative not of the middle classes but of all householders; parliamentary

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[157] Dicey, *The Law of the Constitution*, 10th ed., 5.

[158] Hibbitts, "The Politics of Principle," 27.

[159] Dicey, *Law and Opinion*, 2nd ed., 306.

sovereignty came to mean, in the last resort, the unrestricted power of wage-earners."[160] Thus, "English collectivists...inherited from their utilitarian predecessors a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited for the carrying out of socialistic experiments."[161] While such experiments are of grave concern to Dicey, he recognizes that the omnipotence of parliament is, in fact, the legal doctrine that accurately captures the state of the common law in the mid 1880s. Rather than deny the reality of the doctrine of parliamentary sovereignty, Dicey simply emphasizes the role that judges properly play in ensuring that it does not undermine the rule of law.

Consistent with parliamentary sovereignty, Dicey notes that "[t]rue indeed it is that the function of an English Court is primarily to decide in accordance with legal principles any particular case which comes before it. It is the interpreter, not the maker of a law."[162] Yet Dicey does not stop there. He goes on to declare that with "equal verbal correctness" it may be said that interpretation (whether performed by judges or by text writers) makes new law.[163] In discussing law making, Dicey argues that "[t]he Courts or the judges, when acting as legislators, are of course influenced by the beliefs and feelings of their time, and are guided

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[160] Ibid., 310.

[161] Ibid.

[162] Ibid., 361.

[163] Ibid., ft. 2.

to a considerable extent by the dominant current of public opinion."[164] But while "swayed by the prevailing beliefs of a particular time, they are also guided by professional opinions and ways of thinking which are, to a certain extent, independent of and possibly opposed to the general tone of public opinion."[165] In fact, the "ideas of expediency or policy accepted by the Courts may differ considerably form the ideas which, at a given time, having acquired predominant influence among the general public, guide parliamentary legislation."[166] For this reason, then, statutes themselves, "though manifestly the work of Parliament, often receive more than half their meaning from judicial decisions."[167]

Conclusion

Despite the view, common among Canadian constitutional scholars, that Dicey is confident in parliamentary rights protection the opposite case can plausibly be argued. Dicey is not only clearly sceptical of parliamentary rights protection and confident in judges as guardians of the rule of law, but he also expects judges to play an active role in defending the principles underlying the rule of law.[168] Dicey

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[164] Ibid., 363,

[165] ibid., 364.

[166] Ibid., 367.

[167] Ibid., 486.

[168] British constitutional scholar T.R.S. Allan has done a great deal to call attention to this aspect of Dicey's work. See his *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001). For a recent statement which emphasizes the role of judicial interpretation of statutes in protecting fundamental rights, see Allan's "Legislative Supremacy and

does not propose that judges adopt a restrained posture in relation to Parliament; judicial deference to the will of parliament signals only that judges must interpret the words of a statute in their efforts to protect fundamental common law rights.[169] Instead, it can be argued that Dicey emphasizes the centrality to the English constitution of the legal doctrine of parliamentary sovereignty to ensure that parliamentary activity will take the form of statutes and therefore fall under the supervision of the courts. In turn, Dicey expects judicial interpretation of statutes to mitigate the attacks on common law principles (the rule of law) which he sees becoming more frequent at the turn of the 20th century.

In the interpretation of Dicey offered here, judicial interpretation of statutes is the central mechanism for the preservation of the rule of law which, in turn, forms the basis of the English constitution. This interpretation is a necessary corrective to the Diceyan orthodoxy which Knopff and Morton use to portray Canada's pre-Charter constitutional tradition for two reasons. First, the interpretation offered in this chapter shows the extent to which it is possible to offer a plausible, but very different interpretation of the way Dicey reconciled parliamentary sovereignty and the rule of law from the one offered by Ajzenstat and adopted by Knopff and Morton. Dicey himself seems to offer a lesson dramatically different from confident support for parliamentary rights protection. To the extent that a plausible interpretation and explanation of Dicey's argument

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Legislative Intention: Interpretation, Meaning and Authority" (2004) 63:3 *Cambridge Law Journal* 685.

[169] "The Courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they cannot set a statute aside." Dicey, *Law and Opinion*, 2nd ed., 488.

in *The Law of the Constitution* has been offered in this chapter, we might do well to question the portrait of Canada's pre-Charter constitutional tradition offered by Knopff and Morton. They tease from the doctrine of parliamentary sovereignty a deferential role for judges; Dicey's argument indicates that the doctrine need not be associated with a single judicial prescription to defer to the policy orientation of parliament or legislatures. Furthermore, Dicey's argument does not require that he be condemned for holding a naïve view regarding the absence of politics from statutory interpretation. Dicey held no such view.

Despite the lack of evidence in Dicey's work that he had faith in parliamentary rights protection, it would be hasty to conclude a similar absence of faith among Canadian constitutional scholars. The doctrine of parliamentary sovereignty need not be associated with judicial restraint and scepticism regarding judicial involvement in rights protection; at the same time, however, there is evidence of just such attitudes among constitutional scholars in Canada in the pre-Charter era. The next chapter will examine the circumstances under which legal scholars might shift their emphasis from common law protections for civil liberties under the rule of law to a defence of parliamentary rights protection. Precisely such a shift occurred in Canada during the Depression. The next chapter will examine and explain the emergence of scholarly support for this emerging faith in parliamentary rights protection and increasing scepticism regarding the role of the judiciary in protecting rights under the doctrine of parliamentary sovereignty.

Chapter Five

In the contemporary debate regarding the legitimacy of judicial review of the Charter,[1] Canadian constitutional scholars invoke the doctrine of parliamentary sovereignty to capture a supposed tendency on the part of the judiciary to defer to the policy agenda of democratically elected parliamentarians when adjudicating cases in the pre-Charter era.[2] Within this contemporary debate, scholars would not be surprised to see law professors Patrick Macklem et al. note that, prior to 1982, the doctrine of parliamentary sovereignty ensured that within the confines of the federal division of powers laid out in the *Constitution Act, 1867* "Parliament could, in effect, makes statutes about whatever it wished,

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[1] Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights" *Canadian Journal of Political Science* xxx:4 (December 1997); Anne Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" *Political Studies* xxxi (1983); Rainer Knopff and F.L. Morton, "Does the Charter Hinder Canadians from Becoming a Sovereign People" in Joseph F. Fletcher ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter H. Russell* (Toronto: University of Toronto Press, 1999); Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699.

[2] As was indicated in chapter one, Rainer Knopff and F.L. Morton define judicial deference or restraint as a "judicial disposition to find room within the constitution for the policies of democratically accountable decision makers." This disposition to give executives and legislatures the "benefit of the doubt" is contrasted, in turn, with a judiciary which adopts a "suspicious frame of mind" with respect to the policy goals of other political institutions. See their *Charter Politics* (Toronto: Nelson, 1992), 98, 4. Knopff and Morton suggest that judges, under the doctrine of parliamentary sovereignty, do not allow themselves "to go beyond the actual text of a statute in interpreting its meaning." This, Knopff and Morton argue, is due to the fact that judges in the pre-Charter era are "steeped in the black-letter law tradition of parliamentary supremacy and legal positivism." Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds. *Constitutionalism, Citizenship and Society* (Toronto: University of Toronto Press, 1985), 167. From this assessment of the restrained policy role for judiciary in the pre-Charter era, Knopff and Morton draw a contrast to contemporary judicial activism in Charter review which they then use to suggest that judicial review has unfortunately deviated from our pre-Charter constitutional tradition.

in whatever terms it wished, and the courts were obliged to enforce its dictates."[3] Indeed, such an encapsulation of the significance of the doctrine of parliamentary sovereignty addresses the core of the legal doctrine which is to deny to judges the authority to invalidate statues. In turn, it would hardly be remarkable to point out, as Macklem et al. do, that parliamentary sovereignty denies to judges the authority to circumscribe the application of statutes.[4] After all, one might argue, if judges were to claim this authority, they would fail to accept that they are obliged to enforce Parliament's dictates and so would effectively reject the doctrine.

It was during the Great Depression that it became particularly clear to Canadian constitutional scholars that the doctrine of parliamentary sovereignty offers no guarantee that judges will not modify or circumscribe the application of statutes.[5] In this chapter it will be shown that the Canadian constitutional

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[3] Patrick Macklem, R.C.B. Risk, C.J. Rogerson, K.E. Swinton, L.E. Weinrib and J.D. Whyte, eds. *Canadian Constitutional Law* Vol. I (Toronto: Emond Montgomery, 1994), 4. Douglas A. Schmeiser offers a similar definition: "Generally speaking, the traditional theory has been that the Canadian Parliament and the provincial legislatures are absolutely supreme in their respective spheres, and that there is no restriction on the type of legislation which each may enact." See his *Civil Liberties in Canada* (Don Mills: Oxford University Press, 1964), 11. Peter Hogg notes that the legal doctrine of parliamentary sovereignty requires that Parliament can make or unmake any law whatever; there are no limits to legislative power. From this definition, Hogg concludes that "[i]t follows, of course, that the courts have no power to deny the force of law to any statute enacted by the parliament." See his *Constitutional Law of Canada* (Toronto: Carswell, 1977), 197.

[4] Ibid.

[5] See for example J.A. Corry "The Interpretation of Statutes" Appendix I in Elmer A. Driedger, *Construction of Statutes* 2nd ed. (Toronto: Butterworths, 1983) (this article was written in 1936); James R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" *Canadian Journal of Economics and Political Science* 10:2 (May 1944); F.R. Scott, "Administrative Law: 1923-1947" (1948) xxvi *Canadian Bar Review* 268; and John Willis, "Three Approaches to Administrative Law" (1935) 1 *University of Toronto Law Journal* 53. For a survey of scholarship during this period, see R.C.B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984) 9 *Dalhousie Law Journal* 31; and Risk, "Volume 1 of the Journal: A Tribute and a Belated Review" (1987) 37 *University of Toronto Law Journal* 193.

scholars in the Depression era who demanded that judges avoid modifying or circumscribing the application of statutes did not, in fact, argue that the failure of judges to do as they prescribed is a rejection of the doctrine of parliamentary sovereignty.[6] Nevertheless they criticized judges' reluctance to apply statutes as Parliament or the legislatures intended them to be applied because that reluctance obstructed the successful implementation of the new interventionist policy agenda of federal and provincial governments.[7]

In turn, Depression era constitutional scholars recognized that if, in the first half century of Confederation, it appeared as if the judiciary in Canada deferred to the policy agenda of parliamentarians, it was only because that policy agenda did not interfere with the principles underlying the common law.[8] When, during the Depression, parliamentarians began to pass legislation that deviated from these principles, or that exempted the political executive from the

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[6] Corry, "The Interpretation of Statutes," 273.

[7] For a discussion of the *laissez-faire* ideology underlying the assumptions regarding government in 19th century Canada see Bryce Weber, "The Public and the Ideological Character of the Division of Powers in Sections 91 and 92 of the Constitution Act of 1867" *Journal of Canadian Studies* 26:2 (Summer 1991). For a survey of changes in that ideology and its impact on government activity, see Barry Ferguson, *Remaking Liberalism: the Intellectual Legacy of Adam Shortt, O.D. Skelton, W.C. Clark and W.A. Macintosh, 1980-1925* (Montreal and Kingston: McGill-Queen's University Press, 1993); and Douglas Owram, *The Government Generation: Canadian Intellectuals and the State, 1900-1945* (Toronto: University of Toronto Press, 1986). For the judicial response to these changes in federalism review, see David Schneiderman, "Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the Local Prohibition Case" (1996) 41 *McGill Law Journal* 411.

[8] The most significant of these principles include formal equality, individual liberty, respect for private property and limited government. F.L. Morton and Rainer Knopff discuss these principles in the context of a description of Canada's pre-Charter constitutional tradition in "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics" Janet Ajzenstat, ed. *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1991).

supervision of common law courts, the judiciary continued to draw from common law principles and techniques of statutory interpretation to apply statutes. As legal scholars sympathetic to the new interventionist policy agenda of parliamentarians came to notice that the judiciary was obstructing the implementation of government policy by interpreting statutes as if they continued to be supported by common law principles, they began to criticize the judiciary for its activism.

Indeed, when Canadian constitutional scholars noticed that judges were applying statutes delegating legislative authority to executive bodies in such a way as to undermine the policy goals of Parliament and the legislatures, these scholars argued that judges should *become* restrained and apply statutes so as to ensure that the government's public policy goals be attained.[9] Such arguments are inexplicable if it is assumed that the doctrine of parliamentary sovereignty depends on judicial restraint.[10]

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[9] See in particular, J. A. Corry "The Problem of Delegated Legislation" Review of John Willis, *The Parliamentary Powers of English Government Departments* Cambridge: Harvard University Press, 1933, (1934) 1 *Canadian Bar Review* 60. See also his "Administrative Law in Canada" Papers and Proceedings, 5th Annual Meeting of the Canadian Political Science Association, 1933; "Inquest on the Administrative Process" *Canadian Journal of Economics and Political Science* 8:1 (February 1942); "The Genesis and Nature of Boards" in John Willis, ed. *Canadian Boards at Work* (Toronto: Macmillan Co., 1941); "Statutory Powers" in J.A. Corry et al., eds. *Legal Essays in Honour of Arthur Moxon* (Toronto: University of Toronto Press, 1953).

[10] Miriam Smith recognizes that the ideological underpinning of scholarly attacks on the courts have reversed since the Depression-era when such attacks came from the left. Morton recognizes this ideological reversal and argues that the left has since backed off its attacks on the courts because of its "waning confidence in the process of democratic self-government." In response to Smith's defence of judicial activism, Knopff and Morton argue that "it is no good for those on the left to deplore it then and praise it now. Either judicial activism is justified in both eras or in neither." Smith, "Ghosts of the Judicial Committee," 6; F.L. Morton, "The Politics of Rights: What Canadians Should Know About the American Bill of Rights" in Marian McKenna, ed. *The Canadian and American Constitution in Comparative Perspective* (Calgary: University of

Legal scholar turned political scientist J. Alex Corry[11] was particularly adept at noting and assessing the significance for the judicial role under the doctrine of parliamentary sovereignty of the divergence of values between parliamentarians and the judiciary.[12] As governments began to delegate legislative authority to administrative bodies tasked with the implementation of public policy reflecting new values which deviated from common law principles, Corry argued that the judiciary had to change its approach to statutory interpretation to accommodate the emerging administrative state.

To be sure, a number of Canadian legal scholars and political scientists today do not accept as unproblematic the association of the doctrine of parliamentary sovereignty with judicial restraint. This is due partly to the recognition of the descriptive inaccuracy of the view that judges simply and

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Calgary Press, 1993), 128; Rainer Knopff and F.L. Morton, "Ghosts and Straw Men: A Comment on Miriam Smith's 'Ghosts of the Judicial Committee of the Privy Council" *Canadian Journal of Political Science* xxxv:1 (March 2002), 32. As this chapter will make clear, because the legal doctrine of parliamentary sovereignty can accommodate both judicial activism and restraint, it would be a mistake to assume that anyone who defends the doctrine necessarily defends judicial restraint.

[11] The secondary legal literature on Corry includes R.C.B. Risk, "Here Be Cold and Tygers: a map of statutory interpretation in Canada in the 1920s and 1930s" (2000) 63 *Saskatchewan Law Review* 196; and "Volume 1 of the Journal." See also R. Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) 9 *Dalhousie Journal of Legal Studies* 36; and "Realism, Federalism, and Statutory Interpretation During the 1930s: The Significance of *Home Oil Distributers v A.G. (B.C.)*" (2001) 59 *University of Toronto Faculty of Law Review* 1. For a helpful contextualization of Corry's scholarship, see Owram, *The Government Generation.*

[12] Karen Orren and Stephen Skowronek explore the relationship between values and institutions and its implications for long term changes in public policy in "Beyond the Iconography of Order: Notes for a 'New Institutionalism'" in Lawrence C. Dodd and Calvin Jillson, eds. *The Dynamics of American Politics: Approaches and Interpretations* (Boulder: Westview Press, 1994).

unproblematically "find and apply the relevant law."[13] Critical legal scholar Richard Devlin, for example, argues that such a black-letter conception of adjudication, which seems to deny judicial discretion, should be rejected because it is "inevitably dependent upon juridically significant background assumptions and social visions."[14] As was shown in the last chapter, however, 19th century English constitutional scholar Albert Venn Dicey was also well aware of the influence of background assumptions and social visions on the process of adjudication. Dicey argued explicitly that judges were inclined by their socio-economic background and training to interpret statues so as to minimize their detrimental effect on common law rights.[15] Importantly, he did not view such inclinations as a problem for the doctrine of parliamentary sovereignty.[16] For

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[13] Richard F. Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 *Queen's Law Journal* 161, 178. Political scientist Miriam Smith criticizes legal scholars who might continue to hold to this view of adjudication: "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 constitutional law." See her "Ghosts of the Judicial Committee," 20-1. Canadian legal scholars have long drawn from this insight to explain how judges might protect rights under the legal doctrine of parliamentary sovereignty. For example, Frank Scott recognizes that a while judge's duty is simply to declare the law as it is, discretion is wide permitting judges to "lean to the side of liberty." See his *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959).

[14] Richard F. Devlin, "The *Charter* and Anglophone Legal Theory" (1997) iv Review of Constitutional Studies 19, 60. Allan Hutchinson argues that regardless of the way in which adjudication is portrayed, it cannot be the "the neutral application of objective rules." See his "The Rule of Law Revisited: Democracy and the Courts" in David Dyzenhaus, ed. *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999), 210.

[15] Dicey notes that common law judges are "swayed by the prevailing beliefs of a particular time, but are also guided by professional opinions and ways of thinking which are, to a certain extent, independent of and possibly opposed to the general tone of public opinion." Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, 2nd ed. (London: Macmillian, 1962), 364.

[16] Dicey argues that under the legal doctrine of parliamentary sovereignty, the "will of parliament can be expressed only through an act of parliament" and that this is no mere formality; it has a

Dicey, the legal doctrine does not require judges to be faithful to the policy agenda of governments when statutes are interpreted; the doctrine does not require the prescription of judicial restraint.[17]

Contemporary Canadian constitutional scholars have long noted that judges use common law canons of statutory interpretation[18] to minimize the negative effect of statutes on common law rights,[19] but they have tended to imply that the ascription of meaning to a statute which differs from the meaning

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practical effect including "greatly increase[ing] the authority of the judges." In turn Dicey argues that a bill which passes into statute "immediately becomes subject to judicial interpretation" which will ensure that its application is given "a certain narrowness." Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), 407-8.

[17] Such a position depends, in part, on the plausibility of the claim that the judicial interpretation of statutes which alters the policy outcome intended by those who made it does not constitute an instance of invalidation. Without condemning the fact, Dicey argued that the judiciary is "the interpreter not the maker of a law" under the legal doctrine of parliamentary sovereignty but that with "equal verbal correctness" it can be noted that judicial interpretation "makes new law." See *Law and Opinion*, 2nd ed., 361, ft. 2. T.R.S. Allan notes that the legal doctrine of parliamentary sovereignty is "confined by judicial appraisal of the reasons that inform and explain [an] Act"; judges "properly qualify its meaning and application." See his "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) 63 *Cambridge Law Journal* 685, 689.

[18] Stéphane Beaulac identifies these canons as the literal rule, "which gives effect to the plain words of the statute and requires that they be read in their ordinary sense"; the golden rule, "which permits departure form the literal meaning when it creates an absurd result or some inconsistency with legislative intent"; and the mischief rule, "which focuses on the defect in the law addressed by the statute, and applies the meaning that best remedies the problem." See his "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 *McGill Law Journal* 287, 308-9. See also Gordon Bale, "Parliamentary and Statutory Interpretation" (1995) 74 *Canadian Bar Review* 1; and Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 *McGill Law Journal* 51.

[19] In practice judges use the canons to choose interpretations of statutes which either minimize their negative effect on common law rights or to support a declaration of *ultra vires.* Bayefsky, "Parliamentary Sovereignty and Human Rights"; Christopher MacLennan, *Toward The Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal and Kingston: McGill-Queen's University Press, 2003); F.L. Morton, "Judicial Review and Civil Liberties," in F.L. Morton, ed. *Law, Politics, and the Judicial Process in Canada*, 3rd ed. (Calgary: University of Calgary Press, 2002); Walter Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law & Contemporary Problems* 169; John Willis, "Statutory Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 1.

intended by Parliament or a legislature is inconsistent with the doctrine of parliamentary sovereignty. For example, law professor Anne Bayefsky declares that "purposeful use of these techniques would have passed beyond the bounds set by the doctrine of parliamentary sovereignty, since the doctrine relegates judicial involvement in protecting human rights to an incidental function."[20] Caesar Wright agrees, pointing out that, under the doctrine, "a statute will have only the effect that a court may say it should", but that this is "*despite* our theory of the sovereignty of Parliament."[21]

In this vein, Knopff and Morton suggest that the judicial role associated with the doctrine of parliamentary sovereignty is a restrained one in which judges defer to the policy agenda of parliamentarians by simply applying the law. To justify the association of the doctrine of parliamentary sovereignty with judicial restraint, Knopff and Morton draw from Janet Ajzenstat's interpretation of Dicey. First Knopff and Morton argue that, in Dicey's view, "parliamentary sovereignty was the key to protecting rights—rather than the main threat to rights, as is now generally assumed—because the sovereign parliament embodies the principle of checks and balances."[22] Knopff and Morton then go on to declare that "Dicey and his generation had great confidence in the efficacy of 'partisan debate' and public

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[20] Bayefsky, "Parliamentary Sovereignty and Human Rights," 244.

[21] Caesar Wright, "Foreword" in Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956), 8, emphasis added.

[22] Knopff and Morton, "Sovereign People," 280.

deliberation in producing sound public policy—i.e. policy that protects rights."[23] To conclude the point, Knopff and Morton suggest that "[f]or most of its history, liberal-democratic constitutionalism has depended for the protection of rights mainly on properly constructed representative institutions and the 'government by discussion' that they promote."[24]

As was argued in the last chapter, this interpretation of Dicey may well justify judicial deference to the policy choices of democratically elected parliamentarians but it does not capture the arguments regarding the judicial role in rights protection that Dicey actually offers in his classic text *The Law of the Constitution.* Dicey argues that judges should adopt interpretations of statutes which will minimize as much as possible their interference with common law rights. This way of reconciling the legal sovereignty of parliament and the rule of law defends an active role for the judiciary in protecting common law rights but it also shows clearly that Dicey did not object to judges challenging the policy objectives of Parliament. In fact, for much of the 20th century, the Canadian judiciary in the pre-Charter era appears to have reconciled the two constitutional principles of parliamentary sovereignty and the rule of law in the same way that Dicey did.[25] When Ajzenstat misconstrues the role that Dicey gave to the

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[23] Ibid., 281.

[24] Ibid.

[25] For discussion of the continuing Diceyan basis of Canadian judges' reconciliation of parliamentary sovereignty and the rule of law see H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall Law Journal* 1; Beverley McLachlin, "The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-9) 12 *Canadian*

judiciary and the common law in the reconciliation of the doctrine of parliamentary sovereignty and the rule of law, she may also misconstrue the self-understanding of the judiciary in the pre-Charter era.

After a brief clarification of the way in which this reconciliation was understood by Dicey to affect judicial application of statutes implementing the administrative state, the chapter will then assess Corry's response to this effect in the Canadian context. An examination of Corry's arguments identifies the difficulty with identifying the doctrine of parliamentary sovereignty too closely with judicial restraint.

Dicey, the rule of law and droit administratif

Despite the fact that A.V. Dicey is perhaps most frequently associated with the doctrine of parliamentary sovereignty in Canadian constitutional debate, his classic exposition of that doctrine is matched by the attention he gave in his *Law of the Constitution* to the constitutional principle of the rule of law. Dicey defines the principle as requiring agents of the government to act only through and under the authority of a law, as well as prohibiting punishment except for breaking laws which are supervised by the common law courts. In his elaboration of the principle, Dicey included the view that rights defined in the common law form part

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Journal of Administrative Law and Practice 171; Marc Ribeiro, *Limiting Arbitrary Power: the Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004), chapter 2. For a challenge to this consensus, see David Mullan, "The Supreme Court of Canada and Tribunals—Deference to the Administrative Process: A Recent Phenomenon or a Return to Basics?" (2001) 80 *Supreme Court Law Review* 399, part VI.

of the foundation of the English constitution.[26] It is not without significance that Dicey frequently discussed the rule of law in the context of a discussion of French *droit administratif*. In this section, it will be argued that Dicey's concerns regarding judicial attitudes of deference to the policy agenda of the government, which he believed underpinned French *droit administratif*, helps to clarify his understanding of the rule of law. This focus also makes clearer the ideological background of Dicey's own views on the role of statutory interpretation in reconciling parliamentary sovereignty and the rule of law.

The 19th century British legal scholar—Sir P.B. Maxwell—offers a clear and authoritative statement of the approach to statutory interpretation typically associated by legal scholars with the doctrine of parliamentary sovereignty: a statute is the "will of the legislature" and so the most basic rule of statutory interpretation is that a "statute is to be expounded according to the intent of them that made it."[27] The search for the intent of the legislature, in turn, is to be limited to the search for the intention conveyed—explicitly or implicitly—by the words of the statute.[28]

Contemporary legal scholar Geoff Hall points out that the justification of this or any other approach to statutory interpretation is always grounded in an

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[26] Albert Venn Dicey, "Introduction" in *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis: Liberty*Classics*, 1982), lv.

[27] Maxwell, Roy Wilson and Brian Galpin, eds. *Maxwell on the Interpretation of Statutes*, 11th ed. (London: Sweet and Maxwell, Ltd., 1962), 1-2.

[28] Ibid., 2.

implicit theory regarding the relationship between courts and legislatures. This is because the process of interpreting statutes "constitutes the point at which the courts must confront and ascribe meaning to a product of the legislature whose meaning is contested."[29] This point is not missed by Canadian constitutional scholars who are more than willing to suggest, for example, that the rationale for Dicey prioritizing the search for the plain or literal meaning of a statute is to "keep power with legislatures rather than courts."[30] Robert Yalden suggests that Maxwell's approach to statutory interpretation must be understood in the context of his belief that "in a representative democracy, the views of a popularly elected legislature must prevail over those of an appointed judiciary."[31] Robin Elliot confirms this view when he argues that the doctrine of parliamentary sovereignty speaks to the relationship between courts and legislatures, and "it is Parliament's view that must ultimately prevail."[32] In turn, Canadian constitutional scholars declare this preference for legislatures over courts to be the product of a belief that "rights are best protected by the system of responsible government not by the courts."[33]

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[29] Geoff Hall, "Statutory Interpretation in the Supreme Court of Canada: the triumph of a common law methodology" (1998) 21 *Advocates Quarterly* 38, 44.

[30] Bayefsky, "Parliamentary Sovereignty and Human Rights," 241.

[31] Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 *University of Toronto Faculty Law Review* 136, 141-2.

[32] Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 *Osgoode Hall Law Journal* 215, 234.

[33] Knopff and Morton, *Charter Politics*, 199.

While Dicey adopted an approach to statutory interpretation consistent with Maxwell's exposition, this does not mean that he had faith in Parliamentarians. In fact, Dicey was quite pessimistic that the government, supported by an elected and representative legislature, would protect the civil liberties that the English are accustomed to enjoying.[34] When Dicey defined parliamentary sovereignty as Crown, Lords and Commons working together, the effect of this way of describing the doctrine was to emphasize that the political executive should act only under the authority of a statute.[35] In turn, Dicey clearly argued that in the English constitution statutes properly come under the supervision of judges of the common law courts; judges, thus, are assured of the opportunity to interpret statutes in such a way as to mitigate any damage done to traditional common law rights.[36] Although judges did not have the authority to "set a statute aside"[37] they could, "by a process of interpretation, indirectly limit or

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[34] On this point see in particular Bernard Hibbitts, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23 *Anglo-American Law Journal* 1. See also Vernon Bogdanor, "Dicey and the Reform of the Constitution" (1985) *Public Law* 652; and Arthurs, "Rethinking Administrative Law." Dicey declared that the legal doctrine of parliamentary sovereignty, matched with a Parliamentary majority of "bold reformers" "was an instrument well adapted for the establishment of democratic despotism." See his *Law and Opinion*, 2nd ed., 305-6.

[35] As Dicey puts the point, "the commands of Parliament (consisting as it does of the Queen, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation. The will of Parliament can be expressed only through an Act of Parliament." See his, *Introduction to Law of the Constitution*, 10th ed., 407.

[36] Canadian legal historian Richard Risk clarifies this point when he asserts that in Dicey and Maxwell's day, statutes were interpreted with reference to the values and principles of the common law, particularly their focus on the defence of property and individual liberty; "This was the distinctive bite of this period, not any faith in the plain meaning of words." See his "Here Be Cold and Tygers," 197.

[37] Dicey, *Law and Opinion*, 2nd ed., 488.

possibly extend the operation of a statute."[38] For Dicey, judicial control over the meanings ascribed to statutes gave some security to common law rights under threat from governments wishing to violate them. If, as Dicey argued, "ideas of expediency or policy accepted by the Courts may differ considerably from the ideas which, at a given time, have acquired predominant influence among the general public, guide parliamentary legislation,"[39] then the doctrine of parliamentary sovereignty need not exclude a role for judges in tempering the negative effects of public policy on common law rights.

Contemporary British constitutional scholar Trevor Allan highlights this aspect of Dicey's work. Drawing from Dicey's *Law of the Constitution*, Allan argues that under the doctrine of parliamentary sovereignty, Parliament is unquestionably the supreme law maker; at the same time, however, courts are always the final arbiter of law in particular cases.[40] The significance of this point is that even if judges lack the authority to invalidate properly enacted statutes, the interpretation and application of statutes in particular cases falls to the judiciary. Moreover, "since it is only in relation to specific cases, in all their detail, that we can truly ascertain the legislative 'intention'...there is ample opportunity

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[38] Ibid.

[39] Dicey, *Law of the Constitution*, 10th ed., 367.

[40] Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 3.

for the courts to fulfil the protective role that the rule of law accords them."[41] Allan is simply rearticulating Dicey's argument that the doctrine of parliamentary sovereignty denies to judges the authority to render statutes invalid—even if they abrogate civil liberties—but the rule of law demands that judges interpret statutes so as to minimize their interference with the civil liberties protected by the common law.[42]

In Allan's view, the reason constitutional scholars tend to miss this central aspect of Dicey's work is that they "identify parliamentary intention with a governmental objective."[43] Indeed, one need not question Maxwell's claim that judges under the doctrine of parliamentary sovereignty are obliged to seek out the will of Parliament to wonder whether this will is better identified with a

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[41] Ibid., 13-4.

[42] For a contemporary discussion of debate on the rule of law in the UK, see Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) *Public Law* 467. For a provocative discussion of American literature, see William Scheuerman, "The Rule of Law and the Welfare State: Toward a New Synthesis" *Politics and Society* 22:2 (June 1994).

[43] T.R.S. Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?" (2002) 61 *Cambridge Law Journal* 87, 107. Political scientists James Kelly and Michael Murphy follow this path when they argue that any defence of text-based statutory interpretation suffers from insuperable epistemological pretensions which make the approach suspect at best. See their "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence," (2001) 16 *Canadian Journal of Law and Society* 3. Political scientist Frederick Vaughan provides another variation of the identification of parliamentary intention and government objective when he associates the judicial search for intent with the search for the historical intention of Parliament. See his "The Use of History in Canadian Constitutional Adjudication" (1989) 12 *Dalhousie Law Journal* 59, 60. Michael Stephens suggests that the Supreme Court's reference to "framers' intentions" as a source of authority for interpreting the Charter is drawn not from historical evidence of what the framers' intentions actually were but instead tend to be inferences from the Charter's text of what that intention must have been. While this view is closer to Dicey, Stephens then proceeds to argue that this tendency of the Court is consistent with the search for "factually established authorial intent." See his "Fidelity to Fundamental Justice: An Original Construction of Section 7 of the *Canadian Charter of Rights and Freedoms*" (2002) 13 *National Journal of Constitutional Law* 183, 201.

governmental objective or with common law principles and values.[44] For Dicey the answer is clear: the will of Parliament is expressed in statutory text, but it is the principles of the common law and not a specific government objective which should guide its interpretation. It is important to keep this in mind when grappling with the significance of Dicey's discussion of the principles of the English constitution.

To his critics who declared two of the English constitution's foundational principles to be "countervailing forces,"[45] Dicey counters that it is both possible and necessary to reconcile the legal sovereignty of parliament with the rule of law. Dicey famously defined the rule of law as including the absolute supremacy of regular law over arbitrary or discretionary executive power or prerogative, the equal subjection of both private citizens and agents of the government to common law courts, and finally the common law source of the determination of the authority of the Crown and its servants.[46] In Dicey's view, the preservation of the rule or supremacy of law requires that executive action be exercised under the authority of statute (rather than prerogative) to ensure that it falls under the

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[44] Much debate on judicial review of executive action in the UK revolves around this very question. See in particular T.R.S. Allan, "The Constitutional Foundations of Judicial Review"; and Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 *Cambridge Law Journal* 122. See also T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 *Oxford Journal of Legal Studies* 563, and the response from Paul Craig, "Common Law, Shared Power and Judicial Review (2004) 24 *Oxford Journal of Legal Studies* 237.

[45] Dicey, *Law of the Constitution*, 10th ed., 406.

[46] Dicey, *Introduction to the Law of the Constitution*, 8th ed. (Indianapolis: Liberty*Classics*, 1982), 120-1.

supervision of the judiciary.[47] The effect of this reconciliation of the doctrine of parliamentary sovereignty and the rule of law is to increase the influence of the judiciary over the policy agenda of governments.[48] As Dicey pithily puts the point, "[i]f the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the content of [the English] constitution."[49] The English constitution, on this view, is organized in such a way as to ensure that judges can guard against arbitrary action on the part of government and can ensure that statutes are applied in such a way as to minimize their detrimental effect on common law rights.[50] That Dicey considered judicial supervision of all institutions of government to be the central feature of the English constitution[51] is perhaps

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[47] Dicey, *Law of the Constitution*, 10th ed., 411.

[48] This is not necessarily to say that Dicey treated his exposition of the principles of the English constitution as a political manifesto. Sir Ivor Jennings suggests that Dicey was not trying to write a partisan text even if his Whig principles "peeped out" of his exposition. See Ivor Jennings, "In Praise of Dicey: 1885-1935" *Public Administration* xiii:1 (January 1935). For a good recent discussion of the relationship between Jennings and Dicey see K.D. Ewing, "*The Law and the Constitution*: Manifesto of the Progressive Party" (2004) *67 Modern Law Review* 734. Henry Parris, on the other hand, suggests not only that "Dicey's career as a political partisan is of the greatest relevance to an understanding of his thought," but that his work is well understood as a denunciation of political opponents. See his "The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised" *Historical Journal* 3:1 (1960), 18.

[49] Ibid., 471.

[50] John A. Rohr supports this view when he argues that "[a]though the principle of parliamentary sovereignty precluded British courts from declaring acts of parliament unconstitutional, Dicey looked to the independence of the judiciary as a practical way to reconcile the restraint on government implicit in the rule of law with the dangers of abuse implicit in parliamentary sovereignty itself." See his "Dicey's Ghost and Administrative Law" *Administration and Society* 34:1 (March 2002), 9-10.

[51] Dicey argues that the common law is not only the "true foundation on which the polity rests" but that the rule of law entails the "supremacy throughout all our institutions of the ordinary law of the land." Dicey, *Law of the Constituiton*, 10th ed., 471.

most obvious when he contrasts the English rule of law with French *droit administratif.*[52]

In Dicey's view, French *droit administratif* "rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law."[53] Nevertheless, it warrants examination by English lawyers because it highlights the "full meaning of that absolute supremacy of the ordinary law of the land—a foreign critic might say of that intense legalism—which we have found to be a salient feature of English institutions."[54]

Droit administratif, as Dicey described it, rests on two doctrines. The first is that the rights, privileges and prerogatives of the government are "determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another."[55] The second is the emphasis among the French on the constitutional separation of powers which prevents "government, the legislature, and the Courts from encroaching upon one another's province."[56] Dicey argued that both doctrines had their source in the conviction that judges

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[52] It is not necessary for purposes here to determine whether or not Dicey was correct in his views on the existence or status of administrative law in the UK or France. For thorough critiques of Dicey on this score see H.W. Arthurs, *'Without the Law' Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985); and W.I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959).

[53] Dicey, *Law of the Constitution*, 8th ed., Liberty*Classics*, 213. Dicey even argues that the English constitutional vocabulary lacks an equivalent for the French expression *droit administratif.* He goes on to suggest that "the want of a name arises at bottom from our non-recognition of the thing itself." Ibid., 215.

[54] Ibid., 214.

[55] Ibid., 219.

[56] Ibid.

"must never be allowed to hamper the action of the government."[57] Indeed, it is precisely this conviction which poses a threat to the rule of law. For example, in England the doctrine of the separation of powers ensures that the judiciary remain independent of the executive and therefore free from executive domination. This does not mean, however, that the judiciary has no role to play in supervising the Crown and its servants. The French, on the other hand, understand the doctrine of the separation of powers to include both judicial independence and the freedom of government officials from the supervision of the ordinary Courts.[58] For Dicey, such a position is intolerable because it leaves the government free to determine the scope of its own authority. In England, the determination of such questions falls to the judges of the common law courts who are, in Dicey's estimation, the "proper authorities to define the limits of their own jurisdiction."[59]

What concerns Dicey about *droit administratif* is not so much that the French government and its servants will fail to aim at or do justice; it is that the government's notion of justice is "not likely to be exactly the same as the that entertained by judicial or common law Courts."[60] When Dicey praises English judges for avoiding "too easy acquiescence...in the actual authority of any *de*

[57] Ibid., 221. Dicey laments the fact that Napoleon, for example, "displayed towards the ordinary judges the sentiment of contemptuous suspicion embodied in revolutionary legislation" and viewed the judiciary as "the *enemies* of the servants of the State." Ibid., 222-3.

[58] Ibid., 220.

[59] Ibid., 224.

[60] Ibid., 231.

facto government,"[61] he implies that the judiciary's proper role is to defend the notion of justice drawn from the principles of the common law rather than the notion of justice drawn from the policy agenda of an elected government.[62]

While times have changed since Dicey wrote, with administrative law becoming an integral and accepted part of public law in both the United Kingdom and Canada, debate continues regarding the degree of deference which judges should give to administrative tribunals and regulatory boards regarding their determination of the law.[63] Driving resistance to judicial deference in this regard is the same Diceyan concern that encouraging common law judges to relinquish their hold on the supervision of executive agencies might threaten the common law values and principles judges are supposed to protect. At the same time, in contemporary debate the policy implications of this Diceyan concern can be easily submerged in discussion of the technicalities of administrative law doctrine. For constitutional scholars of the Depression era, however, the question

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[61] Ibid., 237.

[62] In the context of the emergence of administrative and regulatory agencies and tribunals at the time Dicey wrote disapprovingly of Bacon's "celebrated dictum that the judges, though they be 'lions,' yet should be 'lions under the throne." Dicey calls this dictum a "curious anticipation of the maxim formulated by French revolutionary statesmanship that the judges are under no circumstances to disturb the action of the administration." Such a dictum is to be deplored because its consequence is to exempt administrative action from judicial "cognisance." Ibid., 243.

[63] For Canadian debate see, David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's Law Journal* 445. For debate in the UK refer to T.R.S. Allan, "Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction" (2003) *Public Law* 429; Paul Craig, "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *Public Law* 92; and Christopher Forsyth and Mark Elliott, "The Legitimacy of Judicial Review" (2003) *Public Law* 286.

of which values judges should draw from in interpreting statutes authorizing executive action was faced head-on.

The emergence of collectivist values and the rise of the executive

It is precisely the discrepancy between the notion of justice underlying the policy agenda of Parliament and the legislatures and the notion of justice underlying the principles of the common law which provides the impetus for the constitutional scholarship of J. Alex Corry. Over a long career stretching from the 1930s to the 1970s, Corry built the case that the values and principles underlying the policy choices of governments have moved away from the values and principles underlying the common law. In turn, the new "collectivist" policy agenda of governments, which originated in the Depression era, required a dramatic increase in the delegation of statutory authority to the political executive which is the only institution of government with the expertise needed successfully to implement the new public policy. Because he recognized that the judiciary continued its role as the guardian of the rule of law as Dicey understood it, Corry urged judges not to obstruct the implementation of the new collectivist policy agenda as they adjudicated conflicts arising over the rise of the administrative state.

Limiting the scope for action of the political executive (the government) and holding it accountable are, indeed, central aims of the 19th century English constitution. Nevertheless, writing immediately after the end of the Second

World War, Corry and his colleague J.E. Hodgetts urge a new generation of students to recognize that "[t]he essence of government is an executive. The legislature and judiciary are merely the instruments for keeping it responsible."[64] This point is not meant to deprecate either the legislature or the judiciary; their role as check on the government is, indeed, "vital for constitutionalism."[65] Still, it is a consistent theme of Corry's scholarship to place the government front and centre in an analysis of the constitution.

Such a focus is clear, for example, in Corry's discussion of the growth of government activities since Confederation prepared for the Royal Commission on Dominion-Provincial Relations in 1939.[66] Here Corry invokes the figure of Locke to offer a stylized portrait of the configuration of institutions which emerged after the Glorious Revolution to make the aim of limited government effective. The technique chosen by Locke to impose his philosophy of limited government on political life depended on locating both the authority to make law and the authority to offer a final interpretation of law in institutions external to the government.[67] Because Parliament was representative of people who themselves want limited government, it served admirably as the proper law-making institution external to the government. The common law courts, marked

[64] J.A. Corry and J.E. Hodgetts, *Democratic Government and Politics*, 3rd ed. (Toronto: University of Toronto, 1959), 148. Their text was originally published in 1946.

[65] Ibid., 149.

[66] J.A. Corry, *The Growth of Government Activities Since Confederation*, A Study Prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa: Queen's Printers, 1939).

[67] Ibid., 9.

by a tradition of "tenderness for the rights of Englishmen and of hostility to the Crown,"[68] were similarly obvious allies in the project of maintaining limited government. Corry is quick to point out, however, that while Canadians inherited this technique from the British, its rationale depends on "close adherence to the philosophy of limited government."[69]

In this stylized system, and in the context of responsible government in which the political executive is selected from and responsible to the legislature, government regulation must take statute form to prevent it from acting tyrannically. In turn, because legislatures tend to be under the control of governments backed with disciplined legislative majorities, legislatures should be authorized to make only statutes of general application so that governments will be prevented from using legislation to impose privileges or obligations on selected persons or groups.

Governments, in turn, are supervised by the common law courts in cases of dispute to make sure that political executives act only under the authority of a statute, and that government officials obey the same body of common law as private citizens. This is the core of the rule of law in this stylized system. Central to this way of delineating the rule of law is the judiciary's authority to apply statutes to ensure that, for practical purposes, it remains the body which "sets the

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[68] Ibid.

[69] Ibid.

measure of the law."[70] After all, Corry notes, this measure is set by "he who gives the ultimate declaration of meaning"[71] and in Canada's common law system, it is the judges who determine the meaning of the law in the process of applying it. Elsewhere Corry puts a gloss on this stylized system when he indicates that 19th century admirers of the British constitution "counted it an ideal world where the forces of government were limited in their activity by general rules of conduct enacted or countenanced by a representative legislature and forced to observe those limits by the jealous interference of independent courts of justice."[72]

Corry does not offer this stylized historical account for antiquarian reasons. Later in his career he points out that he is interested in English constitutional history "only for the light it throws on the present."[73] Indeed, this self-assessment is borne out in his study for the Royal Commission where the account just presented introduces an analysis of causes and trends in the growth of government activities in Canada as well as the relationship of such trends to changes in the machinery of government. Corry argued that such changes were necessary to accommodate the sense, emerging during the Depression decade, that the state should be an "instrument of social adjustment and control."[74] While

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[70] Ibid.

[71] Ibid.

[72] J.A. Corry, "Administrative Law in Canada" Papers and Proceedings of the Fifth Annual Meeting of the Canadian Political Science Association, Vol. 5 (May 1933), 191.

[73] J.A. Corry, *The Power of the Law* Massey Lectures, 11th series (Toronto: CBC Learning Systems, 1971), 7.

[74] Corry, *Growth of Government Activities*, ii.

he allied himself with this emerging sense of the proper role for the state, Corry argued that the judiciary did not share this sympathy, particularly with regards to the choice of means at the disposal of legislatures to accommodate the new role for the state.

Corry argued that 1867, the year of Confederation, was the high water mark for the influence of *laissez faire* in the UK.[75] At that time, the economy was generally understood to be "self-adjusting in a narrow sense, but made no provision for social adjustment"[76] for those who suffered under it. When those who felt the ill effects of a free economy secured the franchise, "they laid these problems of social adjustment on the doorstep of the political authority."[77] In a new country such as Canada, Corry argued, there was never a "fear of or prejudice against state action as such" because "the state is saddled with positive duties of helping people to help themselves."[78] Such duties included the organization of large-scale capital inflow and national development. Still, Canadians possessed a healthy dose of that "self-reliant individualism"[79] which postponed, in conjunction with late industrialization and the diffusion of

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[75] Ibid., 1.

[76] Ibid., 3.

[77] Ibid.

[78] Ibid., 4.

[79] Ibid., 5.

responsibility which is the mark of federalism, any serious attempt at state regulation until the 20th century.

In Corry's view, the stylized system mentioned above worked well to restrain government prior to the 20th century, yet the system was "bound to be subject to much qualification and revision if and when it becomes desirable for the state to assume many 'positive' functions, in addition to the 'negative' ones."[80] The main reason for the need for qualification and revision of this system was that Parliament is not well suited to the provision of detailed and rapidly changing public policy of the type that came to be common as the 20th century progressed. As a result, Parliament came increasingly to provide only the broad outlines of public policy in legislation, before delegating the details of framing and enacting rules and regulations to executive bodies tasked with enforcing the policy.[81] Indeed, such administrative bodies provide evidence of the "increasing importance of the executive in the work of government."[82] In turn, the legal expression of the emerging importance of such administrative bodies was the statutory authorization for government officials to exercise discretion to implement the government's policy. The delegation of such authority to the executive was, Corry argued, a dramatic deviation from the stylized system he presented: "instead of imposing rules upon the executive", the delegation of

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[80] Ibid., 10.

[81] Ibid., 11. For a similar analysis of developments in the UK, see Harold Laski, "Growth of Public Administration Discretion" *Public Administration* 1 (1923).

[82] Corry, "Administrative Law in Canada," 190.

authority to the executive "emancipates it, in some measure, from the restraint of rule."[83] Although Corry supported such developments, he did so cautiously noting that "it would be a mistake to think that the growth of administrative discretion is not attended with serious dangers"[84] associated with the freeing of the government from traditional common law restraints. At the same time, however, "political and economic events will force parliamentary constitutions to accommodate themselves to an increasing measure of administrative discretion."[85]

For Corry, a revolution in the values underlying the new public policy purposes of government required a revolution in the methods of government.[86] The resulting increase in delegated legislation was "the response to inherent necessity rather than the fruit of bureaucratic ambition";[87] with hindsight, Corry called it a "response to, almost a reflex of, rapid, unsettling social change."[88] Because, in Corry's estimation, there was no reasonable expectation of "routing the forces responsible for these developments or altering their general lines of advance,"[89] the only adequate response was to accept the new machinery of

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[83] Ibid.

[84] Corry, *Growth of Government Activities*, 15.

[85] Corry, "Administrative Law in Canada," 190.

[86] Corry, "The Problem of Delegated Legislation," 60.

[87] Ibid.

[88] Corry, *The Power of the Law*, 17.

[89] Corry, "The Problem of Delegated Legislation," 62.

government and make sure that it evolved accountably so that legislatures and government "preside over social change" as the "best hope of avoiding still worse evils."[90] Representative legislatures, Corry hoped, were more likely, at least, to keep law making "in some kind of touch with the community sense of right than any other agency."[91] In Corry's view, the reason for harnessing the administrative state to at least minimal supervision by representative legislatures was to make sure that law was altered only "following a clearly defined process: open debate through three readings which exposes the whole project to the public view."[92] Corry's focus here was on process: one might disagree with the action taken by an administrative body, but one can, potentially, find out what happened "because it has to run the gauntlet of public discussion."[93]

Despite the importance of this supervisory role for Parliament, Corry argued that legislatures are ill-suited to the task of "realizing the new programme."[94] Parliament cannot prescribe the detailed steps that need to be taken to achieve desired government objectives in a complex and inadequately understood policy environment.[95] This is a job for experts who can devote

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[90] Corry, *The Power of the Law*, 17.

[91] Ibid.

[92] Ibid., 33.

[93] Ibid.

[94] Corry, "Administrative Law in Canada," 192.

[95] Corry, *Growth of Government Activities*, 10.

themselves to the tasks of governance even when Parliament is not sitting.[96] Legislatures are not alone in facing limitations in their ability to respond to new and positive purposes of government; judges of the common law, in Corry's view, faced limitations of their own. Judges had long scrutinized executive officials and "stood ready to call them to account under these new legislative ventures."[97] The new public policy of the emerging positive state, however, "cut across vested rights and the long-cherished dogmas of common law."[98] Still, judges continued to settle disputes over statutory challenges to liberties formerly guaranteed by the common law, and did so "in accordance with a settled procedure and fixed rules of law and interpretation applied in the light of the judge's political theories."[99] These political theories, in turn, stemmed from common law principles based on inherited assumptions from the "age of individualism."[100]

In Corry's view, the common law was "a catalogue of the rights of individuals"[101] which was closely linked to the dogmas of freedom of contract and the sanctity of property. The emphasis of the common law, in short, was on

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[96] Ibid.

[97] Corry, "Administrative Law in Canada," 192.

[98] Ibid.

[99] Ibid.

[100] Ibid. Richard Risk provides a helpful synopsis of these assumptions which include the formal equality and autonomy of individuals (including legal entities such as the state), a separation of public and private spheres of activity with the common law providing the "bright sharp lines" dividing public from private. See R.C.B. Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 *Manitoba Law Journal* 496.

[101] Ibid., 192-3.

private right and not social need;[102] yet Corry was very attuned to the importance of addressing social need.

John Willis, a contemporary of Corry, also recognized that administrative law—the law addressing statutory discretion—was the focal point of constitutional controversy. Willis argued that the purpose of the discretionary powers of government officials delegated by statute "is the fulfilment of a social philosophy which sets public welfare above private rights."[103] Such statutes, however, tended to be strictly construed by being placed "against the background of a common law whose assumptions are directly opposed to those of modern legislation."[104] Echoing Corry, Willis noted that the common law says much about private rights but only little about public duties.[105]

In Willis' view, while no right is so fundamental that it cannot be taken away by Parliament, judges presumed that no legislature would "take away property without compensation, or interfere with the liberty of the subject, or bar his access to the courts."[106] This was a problem, however, in an era in which legislatures were doing precisely this. Taken together, Willis argued, these presumptions "constitute an ideal constitution in the minds of the judges" which does much to "nullify the effect of statutes which emphasize not the rights of the

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[102] Ibid.

[103] Willis, "Three Approaches to Administrative Law," 59.

[104] Ibid., 60.

[105] Ibid.

[106] Ibid.

subject but the claims of the statute upon him."[107] Indeed, Willis pointed out that judges had not forgotten "the part which their predecessors took in the struggle between king and commons: as men they are uncompromisingly hostile to the executive."[108] Yet times were changing. As Canadian legal historian Blake Brown argues "The Depression created immense social pressure on legal thought to conform to the new economic and social realities."[109]

Like Willis, James Mallory recognized the "critical hostility" with which judges met legislative efforts to develop the administrative state: judges "cannot, of course, override a statute, but since the Revolution Settlement British judges have been activated by an acute suspicion of the motives of both the executive and the legislature and have conceived it their duty to confine the application of statute law to cases where its meaning could not be mistaken."[110]

Canadian lawyer and constitutional scholar Frank Scott shared this focus of his colleagues. In this vein, Scott pointed out a significant difference of view among lawyers and judges on one side with teachers and scholars on the other. While the former stress the dangers posed to liberty of the emergence and proliferation of administrative bodies, the latter point out, instead, the importance of the new functions of government and the need for faster and more expert

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[107] Ibid.

[108] Ibid., 61.

[109] Brown, "Realism, Federalism, and Statutory Interpretation During the 1930s," 6.

[110] Mallory, "The Courts and the Sovereignty of the Canadian Parliament," 167.

procedures than those provided by the courts.[111] Indeed, Scott saw a "form of battle between the courts and the legislatures...with the academic writers siding, on the whole, with the purposes of the legislature."[112] He considered the difference of view to be related, ultimately, to the debate between "those who would conserve the old and those who welcome the new."[113] Importantly, however, "the courts remain masters of the legislature to this extent, that no statute establishing an administrative agency can escape judicial scrutiny designed to see that it fits into the general framework of the constitution."[114] Scott recognized here that the judiciary was inclined to interpret statutes delegating law-making authority to the executive so as to minimize the extent to which administrative bodies could interfere with private rights.

Scott clearly found this unacceptable: "[l]egislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[115] He went on to suggest that "[i]t is not the function of the courts to control government policy, even if, one might add, that policy be to set up new administrative tribunals. Judges must not substitute their notions of social purpose for those of the legislature; indeed, they are there to see that the policy

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[111] Scott, "Administrative Law: 1923-1947," 270.

[112] Ibid., 271.

[113] Ibid.

[114] Ibid., 274.

[115] Ibid., 276.

of parliament is carried out, not that it is altered or frustrated."[116] In Scott's view, it is one thing for judges to control excess of jurisdiction or abuse of power but it is quite another for them to attempt to influence or limit national policy.[117] The line separating the two, of course, is thin but "[t]he courts have shown that policy concepts do engage them."[118]

In any case, Corry was receptive to the idea that administrative bodies, rather than common law courts, be able to adjudicate their own disputes. Tribunals with a staff of specialists and a specially tailored procedure are more likely to resolve disputes "in close sympathy"[119] with the public policy purpose of the statutory delegation of discretion than are judges of the common law courts who tend to be "in the dark as to the social policy of the legislature, which the official is trying to enforce."[120] Moreover, as Scott indicates, judges are often "actively moved by considerations of policy different from those that moved the legislature."[121] Indeed, Corry questioned whether judges might not keep themselves intentionally in the dark regarding the policy considerations underlying the work of administrative bodies. When they interpret the statutes

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[116] Ibid., 277.

[117] Ibid. For a discussion of Scott's own efforts to ensure that civil liberties be adequately protected in Canada, see Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto : McClelland and Stewart, 1987).

[118] Ibid.

[119] Corry, "Administrative law in Canada," 193.

[120] Corry, *Growth of Government Activities*, 12.

[121] Scott, *Civil Liberties and Canadian Federalism*, 50.

delegating authority to executive agencies, judges, Corry feared, obstruct the successful implementation of the legislature's policy. At the same time, Corry argued that the "broad object and purpose" of legislative delegations of statutory authority is a matter of "general knowledge."[122] Judges would have ready access to knowledge of these purposes, Corry implies, were they inclined to look for them.

Corry's most fully developed expression of the public policy purposes which he claimed were a matter of general knowledge is found in *Democratic Government and Politics*. Here Corry and Hodgetts declared the "Democratic Ultimate" to be respect for individual personality.[123] This public policy purpose was the product of an examination of the beliefs which they believed supported and justified democratic government, not just in Canada but in Western industrialized democracies in general. Because the core common value of these democracies was, they argued, individual liberty, they are best described within the framework of a "liberal democratic ideal."[124] In Corry and Hodgett's view, the reconciliation of the apparently contradictory values of individual freedom, social order and social equality was one of the "perennial and never-ending tasks of democratic politics."[125] Importantly, reconciliation was only possible at all

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[122] J.A. Corry, *Law and Policy* The W.M. Martin Lectures, 1957 (Toronto: Clarke, Irwin & Co. Ltd., 1959), 49.

[123] Corry and Hodgetts, *Democratic Government and Politics*, 23.

[124] Ibid., 24.

[125] Ibid.

because the ends, values and purposes supported in democratic society were not considered of equal worth. Some were considered instruments for the achievement of higher values: "Thus we believe in freedom and social equality, not for themselves alone but rather because they are both needed in varying proportion to create the best environment for the development of individual personality."[126] Clashes of freedom and social equality could thus be resolved in the name of the higher purpose of "the full and rich development of individual personality."[127]

Corry and Hodgetts went on to argue that the ideals of democratic government must be widely shared lest they lose their very identity as democratic ideals; respect for individual personality, however, was an ideal which they believe has widespread support among Canadians. This, for Corry and Hodgetts was the "*ultimate for politics*":[128] "the fundamental goal of democratic politics is the securing of the conditions needed for the realization of individual personalities."[129] They went on to suggest that "[t]he claims of personality provide the criterion for testing the validity of all other ideals in the political sphere."[130] Interestingly enough, it seems that Corry and Hodgetts believed that respect for

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[126] Ibid., 25.

[127] Ibid.

[128] Ibid., 26. Emphasis in original.

[129] Ibid., 27.

[130] Ibid., 29.

individual personality was a substantial enough concept that it could guide judicial interpretation of statutes through the maze of administrative bodies, agencies and tribunals in such a way that the purposes served by the administrative state would not be undermined by the judiciary.

Collectivist values, parliamentary sovereignty and literal interpretation

In a 1939 comment on the way in which the Judicial Committee of the Privy Council interpreted the *British North America Act, 1867*,[131] Corry pointed out that the approach it used to construe Canada's Constitution is the same as the one used to interpret ordinary British statutes.[132] Despite the significance for Canadians of the way in which the Act was interpreted, "[o]ne would have to search far to find a more confused portion of the English law and an attempt to

[131] In *Bank of Toronto v. Lambe* [1887] 12 A.C. 575, the Judicial Committee indicates its adoption of the ordinary methods of statutory interpretation in ascribing meaning to the *BNA Act*. Indeed, the Judicial Committee's interpretation of the *Constitution Act, 1867* as if it were an ordinary statute, has been criticized by generations of scholars who demanded that the JCPC adopt an approach to interpretation which befit the status of the Act as Canada's federal Constitution. See for example, F.R. Scott, *Canada Today: A Study of Her National Interests and National Policy* (Toronto: Oxford University Press, 1939); Herbert A. Smith, "The Residue of Power in Canada" (1926) vii *Canadian Bar Review* 432. For general discussions see Alan C. Cairns, "The Judicial Committee and Its Critics"; John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, Osgoode Society for Canadian Legal History Series (Toronto: University of Toronto Press, 2002).

[132] Douglas Verney clarifies this point by noting that the JCPC did not exercise judicial review of the Act; rather "it acted on behalf of the Crown: and it was subject to the ultimate authority of the British Parliament—in conformity with the doctrine of parliamentary supremacy. It practiced the same judicial interpretation that ordinary English courts adopted in dealing with the question of whether local governments were acting *ultra vires*." See his *Three Civilizations, Two Cultures, One State: Canada's Political Traditions* (Durham: Duke University Press, 1986), 150.

describe it accurately is almost impossible."[133] His colleague John Willis agreed, urging scholars to be wary of the use of Maxwell's maxim to guess the meaning a court will attach to a statute which had not yet been passed on by a court; the canons of statutory interpretation, in Willis' view, failed to constrain the interpretive exercise because they were inconsistent.[134] Contemporary legal scholar Stéphane Beaulac identifies the same canons after noting, with Willis, that the orthodoxy in statutory interpretation at common law "is founded on three pillars aimed at ascertaining legislative intent."[135] First, the literal or plain meaning rule gives effect to the plain words of the statute which are to be read "in their ordinary sense."[136] Second, the golden rule accepts departures from literal meaning when to do otherwise would result in an inconsistency or absurd meaning. Finally, the mischief rule "focuses on the defect in the law addressed by the statute, and applies the meaning that best remedies the problem."[137]

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[133] J.A. Corry, "Decisions of the Judicial Committee, 1930-9" *Canadian Journal of Economics and Political Science* 5:4 (November 1939), 511. David Schneiderman explores the almost completely uncharted territory of Diceyan assumptions regarding the rule of law and the preservation of common law principles on the interpretation of the *Constitution Act, 1867* in his "A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century" *Law and History Review* 16:3 (Fall 1998) and Scheiderman, "Constitutional Interpretation In An Age of Anxiety." See also J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954); and Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

[134] Willis, "Statutory Interpretation in a Nutshell," 1.

[135] Beaulac, "Parliamentary Debates in Statutory Interpretation," 308.

[136] Ibid., 308-9.

[137] Ibid., 309. The mischief rule has its origin in *Heydon's Case* [1584], Co. Rep. 7a, 76 E.R. 637.

Beaulac readily admits that statutory interpretation is a subjective exercise yet the doctrine guiding the practice holds the basic rule to be that the intention of Parliament is found only with reference to the "four corners of the act."[138]

In a slightly more critical vein, Ruth Sullivan suggests that these rules are "open-ended and inconsistent with one another, [so] they are incapable of determining the outcome in statutory interpretation disputes."[139] Judges say they apply the rules of interpretation, but, in fact, "outcomes are determined by the politics and arbitrary preference of the presiding judge."[140] In fact Willis and Corry held similar views. Willis acknowledged that the plain meaning or literal rule was the basic rule of statutory interpretation, but goes on to note that its "theoretical acceptance" by judges will not automatically result in a predictable decision.[141] When Willis urged scholars not to be misled by "pious judicial references to 'the intent of the Legislature'," [142] he did so because he believed this expression, in fact, offered an avenue for judges to consult the social policy behind the Act as construed by the presiding judge; adherence to the literal rule is just "polite notice" that the court "is about to speculate as to what *it* thinks is the social policy behind the Act."[143] Corry noted the same phenomenon in constitutional

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[138] Ibid.

[139] Sullivan, "Statutory Interpretation in a New Nutshell," 53.

[140] Ibid.

[141] Willis, "Statutory Interpretation in a Nutshell," 2.

[142] Ibid., 3.

[143] Ibid., 4.

interpretation; he went on to suggest that "real crux" of discussion of the abolition of appeals to the JCPC addressed the adequacy of the Judicial Committee's policy preferences.[144]

Corry was well aware that the literal rule and other canons of interpretation failed to constrain judicial discretion. He noted that judges were not compelled by the doctrine of parliamentary sovereignty to accept a particular meaning; their views on policy influence the meaning ascribed to a statute.[145] In fact, the literal interpretation of statutes was not required by the doctrine of parliamentary sovereignty: the doctrine, Corry argued, "would not be shaken in any way if the courts should throw off the spell of literalness and then, by virtue of a legislative fiat or judicial indulgence, proceed, where necessary, to examine the objective *data* which will reveal the aim and object of the legislators."[146] If the search for the will of parliament cannot avoid the influence of judicial subjectivity even though judges search for it with reference only to the words of a statute, then, Corry urged, judges should be encouraged to search out the purposes

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[144] Corry, "Decisions of the Judicial Committee," 512. Frustration with the policy preferences of the Judicial Committee in this regard seems to lie underneath the arguments of H. McD. Clokie that "judicial interpretation is not the final mode of ascertaining the meaning of the constitution and...to rely on it exclusively is both constitutionally disastrous and politically confusing." See his "Judicial Review, Federalism, and the Canadian Constitution" *Canadian Journal of Economics and Political Science* 8:4 (November 1942), 542. Other critics, like Frank Scott, tended slightly more moderately to urge the Judicial Committee to stop neglecting the "clear intentions of the Fathers" in interpreting the Act. See for example, "The Special Nature of Canadian Federalism" in F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), 189.

[145] Corry, "The Interpretation of Statutes," 254.

[146] Ibid., 273.

served in making the statute in the first place. It would be instructive to turn to Corry's own exposition of the doctrine of parliamentary sovereignty to clarify further why Corry believed this to be an important task successfully to execute.

The sovereign, Corry wrote, is not defined formally as the Crown, Lords and Commons acting together, as it was for Dicey, but rather a "representative legislature which speaks for the community."[147] Corry went on to declare that the community's faith in political democracy implies that laws are considered binding only "because they emanate from the will of the legislature."[148] This is why, in Corry's view, the doctrine of parliamentary sovereignty is justified in prohibiting judges from challenging the validity of properly formulated statutes: in a representative parliamentary democracy, the sole source of legitimate law is Parliament; thus, the duty of the judiciary is simply to apply the law in the case of dispute over its application. For Corry, such an understanding, indeed, implied that the approach to statutory interpretation associated with the doctrine of parliamentary sovereignty was "inevitably preoccupied with the intention of Parliament."[149] Since the "imperative character of law" depends on it being

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[147] J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954) xxxii *Canadian Bar Review* 624, 625. Though written in 1954, Corry's discussion of parliamentary sovereignty in this article may reasonably be ascribed to Corry's Depression-era views because he used this analysis as the introduction to the reprint of his 1936 views on parliamentary sovereignty and statutory interpretation included in Driedger's classic text on statutory interpretation, *Construction of Statutes*. The origins of Corry's analysis of parliamentary sovereignty in the Depression era is important because his presentation of the doctrine may have been influenced by his concern regarding judicial obstruction of the legislative response to the crisis.

[148] Ibid.

[149] Ibid.

attributable to the actual "will and intention of Parliament"[150] in a liberal democracy, legitimate statutory interpretation must focus the judicial mind on discovering what that will is.

Here it becomes obvious that Corry, unlike Dicey, accepted and defended the democratic legitimacy of parliamentary government and so he associated the judicial duty to apply the "will and intention of Parliament" with the broad policy agenda of a democratically elected government rather than more narrowly with the mere words of a statute. In turn, because Corry associated the intention of parliament with a government intention rather than with text of a statute to be interpreted with reference to the principles of the common law, it should not be surprising that Corry argued that courts cannot "assert the Rule of Law against Parliament."[151] In Corry's view, the maintenance of the rule of law fell not to the common law courts as it did for Dicey but to Parliament and the electorate.[152] This point was obscured by Dicey who argued that the doctrine of parliamentary sovereignty and the rule of law were "mutually supporting principles."[153] Corry argued that Dicey may have been right in his day, but he was right for the wrong reasons: "The real reason why the two principles did not clash in the 19th century

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[150] Ibid.

[151] J.A. Corry, "The Prospects for the Rule of Law" in W.J. Stankiwicz, ed. *Crisis in British Government: The Need For Reform* (Toronto: Collier-Macmillan Canada Ltd., 1967), 8. This chapter was first published in the *Canadian Journal of Economics and Political Science* in 1955.

[152] Ibid.

[153] Ibid., 9.

was that both Parliament and the courts were manned by, and responded to the values of, the same dominant social class most of whose members saw eye to eye on the issues of individual freedom and private right."[154] Corry did not equivocate in offering his own position regarding the reconciliation of the two principles in the case where there was a conflict of values between Parliament and legislatures on the one hand, and courts on the other: "But, of course, the Rule of Law is subordinate to the sovereignty of Parliament."[155] This meant that Corry would not allow the constitutional principle of the rule of law to justify judicial interference with the policy agenda of governments, even if the judicial duty to apply the will and intention of Parliament under the doctrine of parliamentary sovereignty did not itself prescribe judicial activism or restraint.

Indeed, despite his assertion that our "dominant theory of law requires us to find sanction for a new law in the will of the legislature,"[156] Corry viewed the "will of the legislature" as a fiction: there is *no* "unified intention of its members."[157] The common law canons of statutory interpretation allow judges to grapple with this fact by using "the words deliberately and formally adopted by a majority in Parliament as embodying the will and intention of Parliament."[158] The canons, however, cannot extinguish the influence of the "personality" of the

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[154] Ibid.

[155] Ibid.

[156] Corry, "The Use of Legislative History," 637.

[157] Ibid., 625.

[158] Ibid.

judge whose "political and constitutional theories" determine the meaning ascribed to a statute.[159] Literal interpretation of the words of a statute cannot, by itself, provide an "automatic solution"[160] to an interpretive conflict because "words do not have clear, fixed and unalterable meanings."[161] In this context, then, "lack of sympathy"[162] with the policy aims of contemporary governments gave judges an indirect way to neglect such aims as irrelevant to the interpretative exercise.

As Corry pointed out, intellectual and then political "[a]ssaults on *laissez faire* began early in the 20th century with the emphasis in political aim shifting from freedom to equality, or more correctly, to the substantial reduction of inequality through use of the power of the state."[163] Various regulatory and welfare policies were a manifestation of the new interventionist or "collectivist" political aims of Canadian governments, and, again, Corry put his intellectual support behind their attempts to achieve the reduction of social and economic inequality through the use of the tools of the administrative state.

As judges continued to obstruct the emergence of the administrative state in Canada by drawing from laissez faire common law principles in interpreting statutes, Corry solidified his view that "consciously or unconsciously, law is

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[159] J.A. Corry, "Recent Views on the Statute Law Problem" (1936) 1 *Saskatchewan Bar Review* 25, 26; see also Corry, "Interpretation of Statutes," 252.

[160] Corry, "Interpretation of Statutes," 254-5.

[161] Corry, "The Use of Legislative History," 626.

[162] Corry, "Administrative Law in Canada," 193.

[163] J.A. Corry, *The Changing Conditions of Politics* Alan B. Plaunt Memorial Lecture (Toronto: University of Toronto Press, 1963), 15.

always the handmaiden of a policy, always serving the objects of a particular political and social regime, whether the latter be fully established or merely in the making."[164] In light of this, Corry argued that judges should refrain from drawing upon the principles of the common law in interpreting the "expressed intent"[165] of Parliament or a legislature. After all,

> [t]hese rules were developed to interpret statutory changes in the Common Law in an age which was agreed on the primacy of individual rights. Today, the great bulk of statutes have to do with the creation or modification of administrative machinery designed to protect certain paramount public interests. The world will not wait while we misconstrue these provisions by placing them against a background of the Common Law instead of reading them in the light of the social and economic life with which they deal.[166]

Corry made the point succinctly when he urged judges to treat statutes as a means to an end, with the end "determined by the social forces which brought it about and not by choice of the judge."[167] Though the actual intention of the legislature is a fiction, in Corry's view "the purpose or object of the legislature is very real."[168] Statutes are always passed in order to serve a purpose, and it should be the duty of judges to seek that purpose out in the process of interpreting statutes. Perhaps constitutional scholars today have lost confidence in the ease of ascertaining the general social purposes that lie behind legislation.

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[164] Corry, *Law and Policy*, 10.

[165] Corry, "Decisions of the Judicial Committee," 511.

[166] Corry, "The Problem of Delegated Legislation," 64.

[167] Corry, "Interpretation of Statutes," 255.

[168] Ibid.

For Corry, however, such purposes were obvious and could be found by judicial inquiry into the social context of the statute, and by the "common knowledge of those who give close attention to public affairs."[169]

Conclusion

The question of whether judges should consider the public policy purposes underlying statutes requiring interpretation is not readily answered with reference to Maxwell's maxim that a statute is the "will of Parliament" and so should be "expounded according to the intent of them that made it."[170] The challenge to this approach, which declares that the epistemological problems regarding the search for legislative intent make that search futile,[171] can be sidestepped with the recognition that the will or intent of Parliament refers only to the text of the statute not the actual intentions of parliamentarians. In turn, as Risk points out, the "distinctive bite" of this textual focus is "not any faith in the plain meaning of words";[172] rather, it was the use of the values and principles of the common law as interpretive guidance.

This focus on common law values and principles in the process of interpreting and applying statutes is a consequence of a particular way of

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[169] Corry, "The Use of Legislative History," 627.

[170] Maxwell, *Maxwell on the Interpretation of Statutes*, 11th ed., 1-2.

[171] This criticism is fully developed by James Kelly and Michael Murphy in their "Confronting Judicial Supremacy."

[172] Risk, "Here By Cold and Tygers," 197.

reconciling the legal doctrine of parliamentary sovereignty and the rule of law. This Dicyean reconciliation ensured that the rule of law would not be undermined even if judges were prohibited by the doctrine of parliamentary sovereignty from invalidating statutes that might seek to do precisely that.

In this chapter it was argued that such a reconciliation of constitutional principles could be sustained only as long as parliamentarians and judges shared basic values and principles. As the values dominant among parliamentarians began to diverge from common law values during the Depression, it became more obvious that judicial control over the application of statutes threatened the successful implementation of the new policy agenda of elected governments. Corry recognized that the doctrine of parliamentary sovereignty does not itself prescribe judicial restraint; Dicey's reconciliation of the doctrine with the rule of law would lead to judicial restraint only as long as parliamentarians and judges shared the same values regarding legitimate public policy objectives and the scope of government.

Because Corry clearly supported the policy agenda of Parliament and the provincial legislatures, he refused to accept Dicey's reconciliation of the doctrine of parliamentary sovereignty and the rule of law. In turn, Corry urged judges to look to the purposes underlying legislation rather than to the values and principles of the common law in applying statues. Only in this way would activist judges stop interfering with the development of the administrative state which was implementing the new collectivist values. Whether or not the doctrine of

parliamentary sovereignty will result in judicial activism or restraint is not a question which the doctrine itself can answer. If constitutional scholars argue, as Corry did, that judges should consult the public policy purposes underlying statutes, they do not do so because the legal doctrines dictate this response but because they support the policy implications of that choice.

Conclusion

Who cares about the *theory* of parliamentary sovereignty? Donald Smiley asks this question in his 1969 Presidential Address to the Canadian Political Science Association where he makes the point that constitutional theory tends to be overshadowed in Canada by practical considerations about the effectiveness of different approaches to rights protection.[1] Today, political scientists continue to explore the effectiveness of rights protection under the Charter while still attending to existing institutional mechanisms for executive and legislative review of law and policy for consistency with rights.[2] At the same time, the theory of parliamentary sovereignty plays an important rhetorical role in academic

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[1] Here Smiley contrasts litigation of rights conflicts under a constitutionally entrenched bill of rights to an "issue-by-issue consideration of civil liberties by the elected politicians." Cited in Ian Greene, "The Myths of Legislative and Constitutional Supremacy" in David Shugarman and Reginald Whitaker, eds. *Federalism and Political Community: Essays in Honour of Donald Smiley* (Peterborough: Broadview Press, 1989), 267-8. For Smiley's defence of his preference for the latter approach, see his "Courts, Legislatures, and the Protection of Human Rights" in Martin L. Friedland, ed. *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975). Contemporaries sharing this view include Peter H. Russell, "A Democratic Approach to Civil Liberties" (1969) 19 *University of Toronto Law Journal* 109, and Douglas A. Schmeiser, "The Case Against the Entrenchment of a Bill of Rights" (1973) 1 *Dalhousie Law Journal* 15. For a contrasting view see Walter Tarnopolsky, "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971) 17 *McGill Law Journal* 437 and "The Constitution and Human Rights" in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983).

[2] See for example, Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal-Kingston: McGill-Queen's University Press, 2002); "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 *British Journal of Political Science* 235; "New Constitutional Ideas: Can New Parliamentary Models of Rights Protection Resist Judicial Dominance When Interpreting Rights" (2004) 82 *Texas Law Review* 1963; 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); "Guarding the Constitution: Parliamentary and Judicial Roles Under the Charter of Rights and Freedoms" in J. Peter Meekison, Hamish Telford and Harvey Lazar, eds. *Canada: The State of the Federation, 2002* (Montreal and Kingston: McGill Queen's University Press, 2004).

constitutional debate over the legitimacy of judicial review of the Charter. This dissertation has focussed on the way in which the doctrine of parliamentary sovereignty is described and the role it plays in constitutional debate over the legitimacy of judicial review of the Charter.

The analysis of the doctrine of parliamentary sovereignty and its significance for rights protection in the pre-Charter era, presented in this dissertation, bears on a number of issues of importance to contemporary students of the Canadian constitution. Contemporary constitutional scholars have tended to write about the doctrine as if it resolved, almost by definition, key legal and political questions of constitutional significance. As has been shown in this dissertation, this is not the case.

The question of the relationship between law and politics—central to contemporary constitutional debate regarding the politics of federalism and Charter review—was by no means absent from debate addressing the doctrine of parliamentary sovereignty in the pre-Charter era. The question of the proper role of the judiciary in rights protection—at issue in contemporary attacks on judicial activism and on the undemocratic character of judicial review of the Charter—is not a contemporary issue alone. Scholarly concern regarding the central role of the judiciary in protecting fundamental rights, and regarding judicial obstruction of legislative policy agendas, pre-dates the Charter by generations. As this dissertation highlights, Canadian constitutional scholars have long grappled with the difficult question of the implication of a particular relationship between the

judiciary and legislatures for the protection or advancement of fundamental values. Constitutional scholars have long been aware that a consensus among judges and parliamentarians regarding the definition of fundamental values cannot be counted on and have wrestled with the implications of this divergence of values for democracy and the public policy process. This dissertation clarifies the point that academic debate regarding the doctrine of parliamentary sovereignty and its significance for rights protection in the pre-Charter era broached many of the same issues which concern contemporary constitutional scholars.

In chapter one the main lines of argument in Knopff and Morton's constitutional analysis were presented in the context of their increasing dissatisfaction with the activist evolution of judicial interpretation of the Charter. Knopff and Morton emphasize the contrast between contemporary Charter review and judicial restraint under the doctrine of parliamentary sovereignty. They argue that, under the doctrine, judges defer to the policy choices of parliamentarians and that the doctrine of parliamentary sovereignty is premised on faith in parliamentary rights protection and scepticism regarding a central role for the judiciary in protecting rights. While Knopff and Morton's critics have been quick to attack their constitutional analysis, Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty has not undergone similar critical scrutiny.

Knopff and Morton have been condemned by a number of their critics for holding an outdated majoritarian view of democratic politics and for arguing that judicial application of the law can avoid the exercise of judicial discretion. Interestingly enough, legal scholars tend to associate similar criticisms with the doctrine of parliamentary sovereignty. Perhaps the very fact that Knopff and Morton discuss the significance of the doctrine of parliamentary sovereignty for the judicial role in rights protection is enough for their critics to lump Knopff and Morton with views which are assumed to be associated with the doctrine of parliamentary sovereignty.

Knopff and Morton's critique of Charter review, however, is not primarily anti-majoritarian. Nor do they criticize judges by holding them to an epistemologically suspect standard of constitutional adjudication. They argue instead that judges have failed to interpret the meaning and significance of the Charter with reference to classical liberal principles of government. Only if the judiciary were to accept that the Charter is properly associated with such principles would Knopff and Morton accept Charter review as legitimate. Critics of Knopff and Morton have been better at pointing out the ideological conservatism of their constitutional analysis but critics' neglect of Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty prevents them from addressing the possible relationship between that interpretation and Knopff and Morton's argument that activist Charter review is a dramatic instance of

discontinuity with judicial restraint under the doctrine of parliamentary sovereignty.

The doctrine of parliamentary sovereignty, as described by Knopff and Morton, is clearly associated with an attitude of faith in parliamentary rights protection and of scepticism that judges should play a leading role in protecting individual and group rights by supervising an entrenched bill of rights. That this interpretation has not been scrutinized by Canadian constitutional scholars may be due, in part, to the influence on contemporary Canadian constitutional scholars of Alexander Bickel's counter-majoritarian framework for justifying judicial review. Indeed, this framework encourages legal scholars to assume that the absence of judicial review of an entrenched bill of rights is explained by faith in majoritarian democracy. Lorraine Weinrib's non-majoritarian democratic justification of judicial review of the Charter exemplifies the view that the doctrine of parliamentary sovereignty offers no substantial protection for rights because the doctrine is not only justified on the basis of majoritarian democracy but gives the judiciary no significant role in protecting rights. Indeed, Weinrib contrasts the doctrine of parliamentary sovereignty unfavourably with a new theory of constitutional democracy centred on judicial review of the Charter. Such an argument reinforces the view that the doctrine of parliamentary sovereignty offers, ultimately, no protection for rights at all because of its association with majoritarian democracy. For critics of Knopff and Morton, this is reason enough,

perhaps, to ignore their interpretation of the doctrine of parliamentary sovereignty.

In addition to its association with a majoritarian theory of democracy broadly condemned by constitutional scholars, Knopff and Morton's interpretation of the doctrine of parliamentary sovereignty may also be ignored because parliamentary sovereignty is frequently linked to a widely discredited theory of legal interpretation. Critical legal scholars criticize the doctrine of parliamentary sovereignty for its association with an implausible literal approach to statutory interpretation even though the doctrine does not require the approach to statutory interpretation critical legal scholars associate it with. In fact, all that is required of the doctrine of parliamentary sovereignty is that statutes be raised above the common law in the legal hierarchy; the doctrine requires no specific approach to the interpretation of statutes. Indeed, Critical legal scholars such as Richard Devlin condemn the association of the doctrine of parliamentary sovereignty with the theory of legal positivism for its separation of law and morals without paying adequate attention to the institutional dimension underlying the theory which answers the question of how conflicts of law between Parliament and the common law courts are to be resolved.

To be sure, Albert Venn Dicey, the celebrated expositor of the doctrine of parliamentary sovereignty, was acutely aware of the institutional and policy implications of statutory interpretation under the doctrine. Moreover, he did not argue that the approach to statutory interpretation criticized by Devlin was

required by parliamentary sovereignty. Nevertheless he did associate his preferred approach to statutory interpretation to a foundational principle of the English constitution; that principle was the rule of law.

Despite the view, common among Canadian constitutional scholars, that Dicey was confident in parliamentary rights protection, the opposite case can plausibly be argued. Dicey was not only clearly sceptical of parliamentary rights protection and confident in judges as guardians of the rule of law, but he also expected judges to play an active role in defending the principles underlying the rule of law. Dicey emphasized the centrality to the English constitution of the doctrine of parliamentary sovereignty to ensure that parliamentary and government activity would take statute form and therefore fall under the supervision of the courts. In turn, Dicey expected judicial interpretation of statutes to mitigate the attacks on common law principles which he saw becoming more frequent at the turn of the 20th century.

In the interpretation of Dicey offered in this dissertation, judicial application of statutes is the central constitutional mechanism for the judicial protection of fundamental common law rights under the English constitution. Indeed, this interpretation is a necessary corrective to the Diceyan orthodoxy which Knopff and Morton use to portray Canada's pre-Charter constitutional tradition. To the extent that a plausible interpretation and explanation of Dicey's argument in *The Law of the Constitution* has been offered in this dissertation, we would do well to question that portrait.

Despite the lack of evidence in Dicey's work that he had faith in parliamentary rights protection, it would be hasty to conclude a similar absence of faith among Canadian constitutional scholars. The doctrine of parliamentary sovereignty need not be associated with judicial restraint and scepticism regarding judicial involvement in rights protection. Nevertheless, there is evidence of just such an attitude among constitutional scholars in Canada in the pre-Charter era.

As the values dominant among parliamentarians began to diverge from common law values during the Depression, it became more obvious that judicial control over the application of statutes threatened the successful implementation of the new policy agenda of elected governments. Canadian legal scholar and political scientist J. Alex Corry recognized that the doctrine of parliamentary sovereignty does not itself prescribe judicial restraint. Dicey's reconciliation of the doctrine with the rule of law would lead to judicial restraint only as long as parliamentarians and judges shared the same values regarding legitimate public policy objectives and the scope of government.

Because Corry clearly supported the policy agenda of Parliament and the provincial legislatures, he refused to accept Dicey's reconciliation of the doctrine of parliamentary sovereignty and the rule of law. In turn, Corry urged judges to look to the purposes underlying legislation rather than to the values and principles of the common law in applying statues. Only in this way would activist judges stop interfering with the development of the administrative state which

was implementing new and broadly supported collectivist values. Whether or not the doctrine of parliamentary sovereignty would result in judicial activism or restraint is not a question for which the doctrine itself provides an answer. If constitutional scholars argue, as Corry did, that judges should consult the public policy purposes underlying statutes, they do not do so because the legal doctrines dictates this response, but because they support the policy implications of that choice.

Canada's pre-Charter constitutional tradition, then, is not obviously one in which Canadians had faith in parliamentary rights protection. It is thus necessary to adjust the view—common among constitutional scholars—that rights protection was left to parliamentarians before the Charter for the reason that Canadians were sceptical of a key role for the judiciary in rights protection. A key argument of this dissertation has been that the doctrine of parliamentary sovereignty not only facilitates a central role for the judiciary in rights protection, but that Dicey—the frequently cited proxy for Canada's pre-Charter constitutional tradition—celebrated this role. In his reconciliation of fundamental principles of the constitution, Dicey ensured that legislative and executive activity came under the supervision of the judges of the common law courts to ensure that fundamental common law rights would protected as much as they could be by the application of the law in particular cases.

In the Canadian context, the rule of law could justify the use by judges of the technique of interpretive avoidance to choose interpretations of statutes

which minimize conflicts with common law rights, or power allocation to prevent governments and legislatures from infringing common law rights by denying jurisdiction to the order of government which has done so. In Dicey's view, such techniques are not only consistent with the doctrine of parliamentary sovereignty, but judges have a duty to employ them to defend fundamental common law rights. As long as judges do not invalidate statutes there is no inconsistency with the doctrine. This means that judges, on this Diceyan view, could alter the policy objectives of statutes or executive action by tampering with their effects without violating the doctrine of parliamentary sovereignty. While Dicey was clear on this point, Canadian judges in the pre-Charter era appeared less so when confronted with an opportunity to engage in the same common law techniques of statutory interpretation under the 1960 Canadian Bill of Rights.[3]

Peter Hogg argues that a key problem with the Bill, which is still in force, is that it "does not state clearly what its effect is to be on the federal laws which conflict with its provisions."[4] Section 2 of the Bill declares that "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of

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[3] At the time of the introduction of the Charter, a number of law professors were concerned that judges' acceptance of the legal doctrine of parliamentary sovereignty would discourage them from taking advantage of the opportunity to invalidate legislation which violated the Charter. This concern was due to the perceived failure of the judiciary to take advantage of a similar opportunity to render legislation and executive action inoperative under the 1960 Bill of Rights. See F.L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990) 1 *Supreme Court Law Review* (2d) 533, 533-7; Walter Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44:3 *Law & Contemporary Problems* 169, 175.

[4] Peter W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds. *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), 5.

Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe...any of the rights or freedoms herein recognized and declared..." In Hogg's estimation of the problem, "[i]t is not clear from its terms whether the Bill was to be merely a canon of interpretation for doubtful or equivocal language in federal statutes, or whether it was supposed to have overriding force over inconsistent federal statutes."[5]

The latter view, that the Bill should have overriding force, requires consideration of the question of whether Parliament can bind itself into the future with manner and form requirements. On the other hand, the former view of Section 2 of the Bill, which assumes it to be merely a canon of interpretation, need not require a resolution in terms of the legality of manner and form requirements.

Interpreting Section 2 of the Bill as a common law canon of interpretation can, on a Diceyan analysis, still justify having judges render statutes inoperative for their inconsistency with the Bill. The view that Section 2 cannot be so interpreted has focussed on the imperative of the doctrine of parliamentary sovereignty that the judiciary apply statutes according to the will of parliament, an imperative which has been understood to prohibit judges from rendering statutes inoperative under the doctrine.[6] On this view, "[i]t would be a radical departure

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[5] Ibid.

[6] Justice Pigeon made this argument in his minority opinion in the 1970 *Drybones* case. The majority in that case accepted the manner and form argument I sidestep here. For analysis see E.E. Dais, "Judicial Supremacy in Canada in Comparative Perspective: A Critical Analysis of

from this basic British constitutional rule to enact that henceforth the courts are to declare inoperative all enactments that are considered as not in conformity with some legal principles stated in very general language, or rather merely enumerated without any definition."[7]

In fact, the Supreme Court in the 1970 *Drybones* case adopted the position that the Bill authorizes manner and form constraints which permit judges to the render legislation inoperative if it is inconsistent with the Bill.[8] From the Diceyan point of view of the judicial role in protecting rights under the doctrine of parliamentary sovereignty, however, the very term *inoperative* need not mean the same thing as *invalid*. It could be argued that a statute which cannot be interpreted so as to avoid infringing fundamental common law rights under the Bill could be declared inoperative because a declaration of inoperability signals only that the statute cannot be applied as written; it remains a valid statute nonetheless.[9]

The fact that judges may choose not to use such legal semantics to mitigate the negative effect of a statue on fundamental rights cannot be

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Drybones," paper prepared for presentation at the Canadian Political Science Association annual meeting, June 8, 1971, Memorial University, St. John's, Newfoundland.

[7] Ibid., 12, quoting Pigeon in *Drybones*.

[8] There was still ambiguity at the time regarding whether the Court's manner and form argument applied to legislation passed after the Bill.

[9] A similar argument could be used by Quebec judges to enforce section 52 of the Quebec Charter of Human Rights and Freedoms which declares that "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38 [which lists protected rights] except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."

explained by reference to the imperatives of the doctrine of parliamentary sovereignty. Even the argument that the failure to apply a statute as intended by Parliament would contradict the judicial duty to apply the statute according to the will of parliament would not necessarily move a judge. After all, the will of parliament need not refer to the policy objectives of parliamentarians in enacting a bill; it could just as easily refer to the resolution of an ambiguity in the text of a statute in favour of common law rights on the argument that Parliament would never have intentionally willed an infringement of the common law.

As was shown in chapters four and five, the association of the doctrine of parliamentary sovereignty with the judicial duty to apply the statute according to the will of parliament does not necessitate judicial deference to the policy agenda of democratically elected governments. It can just as easily signal a judicial commitment to interpret statutes according to the expectations of good government set by the principles of the common law. The doctrine of parliamentary sovereignty does not itself resolve the issue. Once it becomes clear that, from a Diceyan point of view, the judicial duty to apply the law under the doctrine of parliamentary sovereignty is not distinct from the judiciary's duty to draw from the values and principles of the common law in the process of interpreting statutes, it becomes necessary to recognize that Corry's demand that judges reject these values and principles in favour of the application of statutes consistent with the spirit of governments' policy agenda is a challenge to the judicial role as Dicey understood it.

It is common for political scientists to analyze the judiciary as if it were an institution of government like any other, but it is problematic to trace the source of the judiciary's authority to the constitution as we do for the executive or legislature. Judicial control over the application of statutes, including the *Constitution Act, 1867*, is not authorized by that Act. In turn, despite limited textual warrant for judicial review of the Constitution in sections 52(1) and 24(1) of the Charter, judicial control over the interpretation of the Constitution may well be understood by judges, as it was for Dicey, as having its source, ultimately, in a non-textual and non-conventional source such as a principle of the constitution (the rule of law). This means, at the very least, that if political scientists criticize the Court for failing to adopt a particular approach to constitutional interpretation, they may be neglecting that the judiciary accepts inherent jurisdiction to control that process. This is not to deny that academic debate regarding constitutional interpretation might (or should) affect judicial practice. Still, it remains the case that the judiciary has long maintained control of the way in which it applies statutes whether ordinary or entrenched. It is important to appreciate academic concern regarding the implication of judicial control over the application of statutes for the successful implementation of public policy free of judicial "interference" was as real in the pre-Charter period as it is today.

Knopff and Morton argue that Canada's pre-Charter constitutional tradition is premised on faith in parliamentary rights protection and scepticism regarding judicial involvement in protecting rights. Some of the work of the dissertation has

been to challenge Knopff and Morton's use of Dicey to make this argument but more importantly it has been to contribute one key aspect of an answer to the question of just what Canada's constitutional tradition has been. If we remove general references to Dicey's work and vague generalizations about the doctrine of parliamentary sovereignty from constitutional debate, we might notice that we know less than we think about the evolution of our constitutional tradition understood as an integrated assessment of the relationships between legal doctrine, conceptions of rights, political institutions and economic and social conflicts.

In this dissertation it was argued that Canadian constitutional scholars must be cautious in drawing conclusions regarding the contours of the doctrine of parliamentary sovereignty and its implications for rights protection in the pre-Charter era. This is particularly important if contemporary Charter debate serves as the only guide to the doctrine. In a sense, much of this dissertation consists of a sustained examination of the failings of many contemporary constitutional scholars to give serious attention to the significance of the doctrine for rights protection despite its sporadic appearance in contemporary constitutional scholarship. At the same time, the analysis of parliamentary sovereignty offered in this dissertation raises a number of provocative questions regarding our understanding of the role of the judiciary in protecting rights in a parliamentary democracy with a legal framework based on the English common law.

Canadians have come to assume that to invoke parliamentary sovereignty is to invoke a system of rights protection in which rights are defined and defended by parliamentarians. From the point of view of parliamentary sovereignty as a *legal* doctrine, however, parliamentarians have not played the lead role in protecting rights except insofar as the rights defined by parliamentarians remain within the range of definitions demarcated by the values and principles underlying the common law. The judiciary has long been central to rights considerations in the public policy process in Canada even under the doctrine of parliamentary sovereignty.

This dissertation shows that Canadian constitutional scholars should not allow a disciplinary focus on the Charter to end in neglect of the implications of the doctrine of parliamentary sovereignty for the constitutional balance of courts and legislatures. There is, and will continue to be, a great deal of litigation in which Charter arguments will not be relevant but in which the role of the courts will come into question. As this dissertation indicates, judicial control of the interpretation and application of the law, including statutory bills of rights and other organic or quasi-constitutional laws, has clear constitutional implications. Canadian might even be surprised to see that the courts are more than willing to supervise the content of statutes enacted using the notwithstanding clause, thus ensuring that the judiciary has an indirect role to play in moderating the implications of its use.

More research in the area is needed, but the suggestion that Canada's constitutional tradition is one of parliamentary rights protection, common in contemporary constitutional scholarship, appears to be an interpretation which emerged in response to sustained academic criticism of the role judges played in obstructing the new policy agenda of governments. As governments tried to accommodate new understandings of fundamental rights different from, and perhaps incompatible with, the values of principles underlying the common law, constitutional scholars noticed that the judiciary posed a challenge to the successful implementation of that agenda. The source of academic criticism was, in part, the desire to address the difficult question of how judges should reconcile common law and statute law when the values and principles underlying each diverge. This question had clear public policy implications. Outside of work by a few administrative law scholars, however, we simply do not have an adequate understanding of the way in which scholars and judges have grappled with this question. Careful attention to debate over the concept of the rule of law in Canada might help to fill this gap.

The suggestion that judges in the pre-Charter era may have interfered with the policy agenda of democratically elected governments, and may have done so without shirking the doctrine of parliamentary sovereignty, raises the question of the role played by the judiciary in relation to the development of the 20th century welfare state. In fact, there has been virtually no sustained academic examination of the role of the judiciary in facilitating or interfering with the

development of the welfare state in Canada. As has become clear in this dissertation, we cannot assume that the doctrine of parliamentary sovereignty makes such an inquiry unnecessary. The doctrine leaves judges free to adopt more than one approach to interpreting and applying the law and the choice of approach will influence the degree of judicial activism or restraint in the policy process. In spite of this, we know very little about the extent to which judges chose interpretations which limited the implementation of the welfare state as it was developed in the mid-20th century.

Finally, this dissertation shows that the well-known lesson of critical legal scholarship—that legal doctrine cannot efface the human element from adjudication—must be applied to contemporary constitutional scholarship *about* legal doctrine. Political scientists must be cautious to avoid adopting interpretations of Canada's constitutional tradition uncritically. After all, they are themselves sites of contestation over fundamental values as much as they provide support for contemporary scholars looking for evidence of continuity or discontinuity in legal practice as a way to support or condemn contemporary judicial review of the Charter.

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