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Between Populism and Juristocracy: The Republicanism of Rainer Knopff

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Abstract

Rainer Knopff's scholarship on Canadian constitutionalism has offered some of the most trenchant criticism of the exercise of judicial review under the Charter, yet his theory has largely been misunderstood (as has that of his frequent co-author F. L. Morton). This article exposes two prominent critiques of Knopff's constitutional writings as straw man arguments and provides a republican account of his constitutional theory. The first straw man argument is that Knopff supports a majoritarian or populist conception of direct democracy. This claim is belied by Knopff's embrace of representative democracy and institutions structured to encourage reflexive deliberation. The second straw man argument is that Knopff is a moral rights skeptic. Knopff's rights skepticism is a legal skepticism about the determinacy of many rights that is merely a function of his inclusive legal positivism. The article concludes by reflecting on the republican lessons that Knopff's constitutional scholarship continues to offer, including how holding legislatures responsible for settling reasonable disagreements about legally indeterminate Charter rights might help counteract the twin threats of populism and juristocracy.

Résumé

Les travaux de Rainer Knopff sur le constitutionnalisme canadien se sont prêtés à quelques-unes des critiques les plus tranchantes de l'exercice du contrôle judiciaire en vertu de la Charte, mais sa théorie a été largement incomprise (tout comme celle de son coauteur habituel, F.L. Morton). Cet article étale deux critiques dominantes des écrits constitutionnels de Knopff en les tenant pour des arguments fallacieux et fournit une description républicaine de sa théorie constitutionnelle. Le premier faux argument est que Knopff soutient une conception majoritaire ou populiste de la démocratie directe. Cette affirmation est démentie par l'adhésion de Knopff à la démocratie représentative. Le deuxième argument sans fondement veut que Knopff se montre sceptique à l'égard des droits moraux. Le scepticisme de Knopff en matière de droits n'est pas d'ordre moral, mais traduit plutôt une défiance positiviste envers le caractère juridique déterminant de nombreux droits. L'article se termine par une réflexion sur la façon dont le fait de tenir le pouvoir législatif responsable du règlement de désaccords raisonnables sur les droits juridiquement indéterminés de la Charte pourrait aider à contrer les menaces jumelles du populisme et de la juristocratie.

Keywords: Rainer Knopff; Charter rights; republicanism; inclusive legal positivism; F. L. Morton

Mots-clés : Rainer Knopff; droits reconnus par la Charte; républicanisme; positivisme juridique inclusif; F.L. Morton

For Rainer.

Over the course of his career, Rainer Knopff has had the dubious honour of seeing many effigies of his arguments stuffed into academic journals and books. It is to his credit as a scholar that his general response to such misrepresentations has been to patiently explain the disparity between the problematic views attributed to him and the arguments he truly espouses. This article will outline and critique two prominent straw man arguments made against Knopff. The first holds that he, along with his frequent co-author F. L. Morton, supports a raw majoritarian or populist conception of democracy.[1] This proves to be untrue, as Knopff is, in fact, a strong supporter of a republican concept of representative democracy. The second straw man argument holds that Knopff is a moral rights skeptic. While Knopff is indeed a rights skeptic, his is a kind of *legal* skepticism regarding the determinacy of Charter rights subject to reasonable moral disagreement. On this reading, Knopff is better characterized as a kind of inclusive legal positivist. The article concludes by remarking on the way that understanding the republican commitments of Knopff's project sheds light on the twin threats that populism and juristocracy pose to Canadian constitutionalism. It also reviews how recent arguments about conceptualizing legislation as setting the scope "limits" on Charter rights could help counteract these threats.

1. Knopff the Straw Populist

Knopff and his co-author F. L. Morton have been misread as supporting raw majoritarian populism and denigrating the role of the judiciary in protecting the rights of citizens. On a more charitable and wider reading of Knopff's oeuvre, it becomes clear that he supports a traditional republican form of constitutional government, featuring both responsive representative assemblies and a judiciary that protects the "core" of the determinate rights guaranteed by a bill of rights. This section will review and refute some of the problematic yet prominent arguments that have characterized Knopff as being in favour of a majoritarian-populist conception of democracy.

In order to understand the manner in which Knopff (as well as his co-author) has been mischaracterized, it is necessary to briefly outline some of his most significant contributions to the study of Canadian constitutional politics. Knopff's first book, *Human Rights and Social Technology*, laid much of the philosophical groundwork for his approach to Canadian constitutionalism and judicial politics (Knopff, 1989). *Human Rights and Social Technology* contained Knopff's basic critique of the "new war on discrimination" using the "social technology" of human rights, including the equality rights of section 15 of the still young 1982 Charter of Rights and Freedoms (Knopff, 1989: 13). Knopff outlined his fear that attempts to thwart inequalities using rights instruments would, at the same stroke, threaten to "whittle away the private domain in favour of increasing public authority" in the name of promoting social equality, even as it shifts powers "to relatively

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unaccountable administrative, judicial, and quasi-judicial" and away from democratic institutions (19). The book planted the seeds of Knopff's critique of the judicialization of democratic disagreement. Knopff argued that attempts to have courts reconstruct a more socially equal world using the Charter would inevitably entangle them in judicial "policy determinations" where "judges substitute their view of reasonableness for that of the legislature" (170). Knopff's first book remains relevant today, particularly given recent disputes about the meaning of "substantive equality" in the Supreme Court's section 15 Charter jurisprudence (*Fraser v. Canada*, 2020). In his next book, *Charter Politics*, he joined F. L. Morton to continue developing his thinking about rights disagreements across a wider spectrum of case studies (Knopff and Morton, 1992). *Charter Politics* was written as a kind of "dialogue," engaging students and scholars with the arguments of proponents for and critics of "activist" judicial review under the Charter (ix). This second book expanded Knopff's earlier focus on equality rights to discuss the impact of the Charter on political disagreements about federal integration, abortion, prisoner disenfranchisement and electoral apportionment (8–10). It also began to explore the thesis that intervenors and special interest groups were contributing to and profiting from the expansion of judicial power in key areas of political disagreement (193–96).

Morton and Knopff's most popular and controversial book is likely *The Charter Revolution and the Court Party* (Morton and Knopff, 2000). The book capitalized on the groundwork of *Human Rights and Social Technology* and *Charter Politics* and pushed Knopff's thinking more prominently into the public sphere. The book argued that Canadian judicial power has been augmented in the wake of the 1982 Charter of Rights and Freedoms by the ascendency of social interest groups that are labelled the "Court Party." These groups vary and conflict in their interests but are united by "a shared commitment to the project of empowering the courts, although not to the exclusion of more traditional political strategies" (86). The Court Party refers to a coalition of overlapping interests consisting of "(1) national unity advocates, (2) civil libertarians, (3) equality seekers, (4) social engineers, (5) postmaterialists" (59). These interests, while occasionally at odds with one another, generally worked in concert to argue for an expansive interpretation beyond the text of the Charter and "the systematic, policy-oriented use of judicial power" (84). The book argued that the Canadian state and judiciary play key reciprocal roles in supporting this expansion of judicial power. The empirical thrust of the book is thus to track the relationship between the rise of the Court Party and the expansion of judicial power. The normative thrust of the book decried the "Charter Revolution" as "deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy" (149).

The academic and political reaction to the book was to characterize its empirical thrust as a critique of the independence and integrity of the judiciary. The normative thrust was painted as a populist attack on the democratic legitimacy of judicial review under the Charter. Academically, the empirical argument of the book was read by scholars such as Kent Roach and Miriam Smith as claiming that the judiciary had been captured by a coterie of left interests constituting the Court Party (Roach, 2001: 75–77; Smith, 2002). This claim was considered "partisan" and problematic in that it apparently ignored right-wing interest groups, the disagreement

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endemic between the Court Party interest groups, and the fact that such interest groups "do not rely on the Court for their power" but also influence legislatures (Roach, 2001: 76). Roach wrote that Morton and Knopff claimed that "the Court Party is part of a 'revolt of the elites' in which a left-leaning state-supported knowledge class in law schools and beyond imposes its agenda for 'life-style issues' on an unwilling majority" (2001: 76, quoting Morton and Knopff, 1996). In a related critique that was published in the pages of this journal, Smith somewhat intemperately argued that Morton and Knopff's book subscribed to the "dewy-eyed misrepresentation" of "the traditional view that the courts defend beleaguered minorities from the trampling feed of the intolerant majority" (2002: 22). She further claimed that Morton and Knopff's empirical thesis rested too much on legal cases and failed to learn lessons from earlier Canadian political scientists, such as J. R. Mallory and Alan Cairns, in focusing on "dynamic relations between political institutions and society over time" (7). In Smith's view, a proper "sociologically grounded approach" suggests that Morton and Knopff's claims about minority groups enabling judicial power to thwart majoritarian democracy was really just misdescribing "the court's responsiveness to both social change and public opinion" (22).

Morton and Knopff's normative thesis regarding the anti-democratic quality of judicial review under the Charter was academically criticized as a populist-cum-majoritarian attack on judicial review *tout court*. Smith coupled a normative argument with her empirical critique of *The Charter Revolution and the Court Party* by claiming that Morton and Knopff held a "non-theorized" concept of democracy "that refers to the seemingly simple fact that democratically elected governments will act in a way that reflects the will of the majority" (2002: 15). Roach stated that "Morton and Knopff's criticism of judicial activism depends on a minimization, if not outright rejection, of the rights of minorities and an acceptance of a majoritarian understanding of democracy" (Roach, 2001: 76). Wayne MacKay attributed to Morton and Knopff's writing the idea that democracy is "the mere expression of a simple majority will" and contrasted this conception of democracy with the Supreme Court of Canada's definition in the 1998 *Reference re Secession of Quebec* (MacKay, 2001: 42). In that case, the Court defined democracy as "continuous process of discussion" involving federalism, the rule of law and the recognition of minority voices (*Reference re Secession of Quebec*, 1998). Mackay argued that judicial review under that Charter forms an integral part of this democratic process of discussion, which protects minority voices and is "not as antithetical [to democracy] as Professors Morton and Knopff suggest" (2001: 47).

Politically, Morton and Knopff's empirical and normative arguments were linked to public opposition to perceived judicial activism. The book was released in the context of rising concern on the part of political parties and the media regarding the threat of "judicial activism" (Roach, 2001: 83–89). More specifically, in the wake of the book's publication, members of the judiciary appeared to respond to the empirical claims of the book, seemingly interpreting its claim to be that the courts had been captured by special interest groups. Shortly after the book's publication, the *National Post* interviewed Chief Justice Beverley McLachlin, Justice Michel Bastarache and Justice John Major, explicitly citing Morton and Knopff's alleged claim that "the court has been 'hijacked' by interest groups" (Chwialkowska, 2000). Chief Justice McLachlin responded that "any suggestion that the court has

been hijacked by interest groups is totally false" (Chwialkowska, 2000). Justice Major "dismissed the notion of 'hijacking,'" asking "how does this 'hijacking' happen? That's what I'd like them to tell us" (Chwialkowska, 2000). From such responses, it is clear that some members of the judiciary took Morton and Knopff's argument to be claiming that the courts had been captured by special interest groups.

As a part of their response to rising concerns regarding judicial activism and their relationship to special interest groups, members of the judiciary went on to publish and publicly lecture on the democratic role of the judiciary and the Charter. In a similar vein to Roach's, Smith's and MacKay's criticisms of Morton and Knopff's normative arguments, Chief Justice McLachlin critiqued the idea of representative democracy lacking a bill of rights and judicial review as "naked populism" (McLachlin, 1999: 42).[2] In order to avoid such populism, a democracy must be clad with a judicially enforceable bill of rights. And, in her view, there is no democratic tension between the majoritarian decision making of elected legislatures and the decisions of unelected judges. The judicial enforcement of Charter rights is simply a matter of limiting majoritarian decision making regarding "certain basic norms" in the interest of protecting vulnerable minorities and individuals (McLachlin, 1999: 42). In a later piece, she critiqued "the image of the judicial cowboy riding amok through the carefully planted legislative garden" as "just that, an image, and a distorted one at that. The judge is more of a gardener, shaping and nurturing plants so that they grow as intended, occasionally pulling out a weed that offends the plan on which the garden is based. Unlike politicians, judges do not have agendas" (McLachlin, 2003).

Members of the judiciary responded to normative critiques of judicial review, such as that of Morton and Knopff, by underlining the need for adjudication to enforce the pre-commitments of the Constitution's garden plan in order to protect against "naked populism." This naked populism is said to characterize supposedly undemocratic polities that lack a bill of rights enabling the judicial nullification of statutes (for example, in this view New Zealand's lack of strong-form judicial review renders it undemocratic and populist).

How accurate and persuasive are the arguments levelled against Morton and Knopff's claim that interest groups have helped increase judicial power in an undemocratic fashion? Not only is the claim that Morton and Knopff argue that the court has been hijacked by special interest groups false, but the caricature of them as populist-cum-majoritarian democrats opposed to judicial review is an uncharitable distortion of their normative arguments. This should be immediately evident from the tension between these two positions. If Morton and Knopff held that judicial review under the Charter was problematic because the judiciary has been hijacked by special interest groups, then this would indicate that they would be amenable to judicial review under different empirical conditions. Yet the academic and popular perception of their arguments attributes this claim to their work while also maintaining the view that they are hostile in principle to the very idea of judicial review on majoritarian grounds. Attributing these contradictory views to Morton and Knopff demonstrates uncharitable reading on the part of their critics. The continuing use of these views as bugbears in the public writings and lectures of members of the judiciary, even without direct reference to Morton and Knopff, may help prove the usefulness and ubiquity of straw man arguments.

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Morton and Knopff do not argue that the Canadian judiciary has been hijacked but rather that special interest groups have helped to enhance judicial power by litigating and intervening in Charter cases. They specifically point to the distinction between their argument and the claim that the courts have been hijacked, or captured, by special interest groups constituting what they call the Court Party: "Explaining why the Court Party is attracted to judicial power and how it has contributed to the growth of that power, as this book tries to do, is one thing. Determining the precise extent to which the Court Party has, to use Mallory's term, 'captured' the courts is quite another, and must be reserved to another occasion" (Morton and Knopff, 2000: 86).

The empirical argument of the book is not, as Roach claimed, that a coterie of "postmaterialist elites on the left" have "disproportionate access to and influence on the Court" but rather that the strategic influence of interest groups has contributed to the growing power of the judiciary (2001: 145). It seems reasonable, reflecting on the 20 years since the publication of their book, to revise the particular interest groups that constitute the Court Party, potentially tracking the growing influence of civil libertarian organizations such as the Canadian Constitution Foundation, but these groups may be doing as much to enable the expansion of judicial power as the Court Party of yesteryear. As Morton and Knopff pointed out in their response to Smith's empirical critique, their attention to the interest groups constituting the Court Party belied the criticism that they myopically focused on legal cases at the expense of "extra-judicial influences" (Knopff and Morton, 2002: 39).

If Morton and Knopff thought that the judiciary had been hijacked by the Court Party, they would not have written that "while many of the Court Party constituencies would have gained prominence in the absence of the Charter, the opposite is not true. Without a Court Party, the Charter and the courts would not have attained their current political significance" (Morton and Knopff, 2000: 59). Unlike the hijacking narrative, this view fits Morton and Knopff's argument that explicit state funding for special interests groups, including the Official Languages Program and the Court Challenges Program, has helped politically enable the Court Party to elevate judicial power (87–105). The hijacking narrative is also belied by Morton and Knopff's conclusion that cross-pressured factions across political parties in Canadian legislatures have often empowered the courts where rights issues cut "across the normal lines of partisan cleavage and divides a government caucus" (162). The idea that special interest groups are hijacking courts is incompatible with the claim that the very conditions allowing special interest groups to increase judicial power are sponsored and exacerbated by legislative politics. Critics failed to understand the true empirical thrust of Morton and Knopff's book, which in retrospect took on a Canadian version of Keith Whittington's more recent thesis that the power of the US Supreme Court is often constructed, sometimes even invited, by the strategic environment created by the decisions of political actors (Whittington, 2007). Whereas Smith's "sociological approach" posits "a more unidirectional position" where courts and presumably all state institutions simply end up being shaped by the societal force of changing public opinion, Morton and Knopff's empirical thesis is sensitive to the causal effect of institutional variables such as cross-pressured party factions on judicial power (Knopff and Morton, 2002: 34).

Let us turn to the normative mischaracterization of Morton and Knopff's book. Morton and Knopff do not argue for a populist-cum-majoritarian conception of democracy. In the concluding chapter of *The Charter Revolution and the Court Party*, they forcefully argue for a traditional republican conception of representative democracy that is not, in principle, at odds with judicial review. Instead of attacking judicial review in principle, they contrast representative democracy with both populist and rights-based judicialized politics. Before turning to how their defence of republican democracy relates to the critics' claim that they attack judicial review as such, I should first briefly outline what I mean by a "republican" conception of democracy.[3] To simplify a great deal: republican political thought consists of three core ideas. The first idea is that the equal freedom of citizens is the central concern of the state and that freedom should be conceived of as non-domination—not living under the arbitrary power of another (Pettit, 2012: 5). The second idea is that the best way to guarantee the equal freedom of citizens is through the division of powers in representative institutions with distinct functions—into what the republican tradition calls the "mixed constitution" (Pettit, 2012: 5). The separation of powers and responsive representative institutions will protect citizens from living under the harmful power of others by granting equal control over government institutions and preventing their domination by either majority or minority factions. Electorally responsive representative institutions allow for public deliberation so that institutional decisions are both collectively rational and individually responsive (Pettit, 2012: 192–94).[4] Representative institutions also feature safeguards that protect against the domination and corruptions of democratic institutions by either majority or minority factions. Majoritarian elections and institutional rules encourage powerful factions to compromise and ally with minority factions while also preventing the control of institutions by minority elites. In other words, it protects against both the "tyranny of the majority" and the "tyranny of the minority." The third core republican idea is that institutions are not sufficient to guard against threats to the equal freedom of citizens and as such require a virtuous contestatory citizenry (Pettit, 2012: 5).

How does Morton and Knopff's defence of representative government and their normative critique of the Charter Revolution relate to republicanism? They defend representative government by arguing that majoritarian populism—what they call "pure democracy" or democracy without representatives and constitutional restrictions—disrespects the danger of factions and disregards "the moderating aggregation of many factions into decent governing majorities" (Morton and Knopff, 2000: 152). They contrast representative democracy with juristocracy or the growth of judicial power, arguing that like populism, judicialized politics allows political actors to circumvent regular legislative processes in the hopes of being favoured by the judiciary (Morton and Knopff, 2000: 154). Populists look to referenda and recall mechanisms to increase the risk of the tyranny of the majority/dominant factional coalitions. Rights-based political actors look to the courts to overturn or subvert ordinary legislation, thereby increasing the risk of the tyranny of the minority. In these arguments, Morton and Knopff are clearly concerned with the equal influence of citizens over political decisions, the checking and moderating of factions by means of democratic representation, and the virtuous attitudes of citizens respecting one another's good faith disagreements about rights while remaining suspicious about the possible corruption of their institutions.

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Their concerns, in other words, are entirely in line with the three core ideas of traditional republican political thought: freedom from domination, the mixed constitution and the contestatory citizenry. Populism is a threat to the equal freedom of individuals because it threatens the tyranny of the majority: the unequal influence of the many, even the plurality, over the vulnerable few. Majoritarian populism can also be harnessed by coalitional factions and authoritarian leaders (Müller, 2016: 32–40). The threat in these cases comes from factions that twist democratic institutions to illegitimately exclude or persecute other groups and individuals. Juristocracy is a threat to the equal freedom of individuals because it threatens the tyranny of the minority: the unequal influence of the few. The threat in this case come from judges, who grant the varied and sometimes conflicting groups constituting the Court Party unequal influence over issues subject to reasonable disagreement. Representative democracy involves a mixed constitution that separates power and allows for deliberation and the replacement of "majority rule with minorities rule; that is, with majority coalitions of diverse minorities" (Morton and Knopff, 2000: 152). Morton and Knopff thus favour a mixed constitution featuring checks and balances (for example, the Senate and an independent judiciary) on representative majority decision making carried out by coalitions of minorities (152–53). This is consistent with their earlier arguments for checks and balances in *Charter Politics* (1992: 10). In their view, this form of mixed constitution is necessary not only in order for citizens to be equally free from the arbitrary interference of factions but also because it fosters a civil republican citizenry. Their concern that "partisan opponents, in short, must nevertheless be seen as fellow citizens who might be future democratic allies" expresses their take on what constitutes a healthy contestatory citizenry. Citizens who buy into the populist or juristocratic conceptions of democracy will not only disrespect the decisions of representative institutions but also the ability of their fellow citizens to engage in good-faith, reasonable disagreements about rights and public policy (Waldron, 2016: 207–9). Morton and Knopff's arguments thus flesh out a defence of representative democracy using the three core ideas of republican thought.

To prove Morton and Knopff are populists, critics often cite their claim that the Charter Revolution is undemocratic "not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy" (Morton and Knopff, 2000: 149). As noted above, critics such as Roach and MacKay took this statement to indicate that Morton and Knopff disapprove of any institutions standing in the way of majoritarian decision making. In order to illuminate how this reading of Morton and Knopff clashes with their true republican commitments, I will review an example MacKay uses to refute their understanding of democracy.

MacKay uses the Supreme Court case of *R. v. Latimer* (2001) to demonstrate that Morton and Knopff's majoritarian view of democracy is problematic (MacKay, 2001: 43). The case involved a Saskatchewan farmer who killed his disabled daughter in what was referred to by some as a "mercy killing" (*R. v. Latimer*, 2001). MacKay notes that while, at the time, potentially 75 per cent of Canadians supported mercy killing and thought Mr. Latimer should receive clemency of some kind, there were also those who thought that granting Mr. Latimer clemency would devalue the lives of the disabled (2001: 43). The Court upheld the mandatory

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minimum sentencing law, imprisoning Mr. Latimer for 10 years. MacKay argues that the decision "would likely be seen by Morton and Knopff as thereby vindicating the interests of the disabled lobby, even in the face of a strong majority sentiment to be more lenient with Mr. Latimer" (43). Thus, for MacKay, rather than buckle to majoritarian pressure, "the Supreme Court of Canada, applying a view of "enhanced democracy" that balances the competing rights in society, upheld the right to life in Canadian society for all its members, including the disabled" (43).

However, this is exactly the kind of judicial review that Morton and Knopff find unproblematic; yet MacKay implies that they should disapprove of it on populist grounds. Morton and Knopff distinguish between the judicial review of laws for compliance with the determinate "core" meaning of rights and their "peripheral" indeterminate meaning (2000: 35). The judicial enforcement of the determinate core meaning of rights is not undemocratic because it simply enforces a pre-commitment that was democratically negotiated in the past (see Knopff, 2003). For Morton and Knopff, judicial respect for traditional understandings of core meanings and the original intention of statutes and rights form inadequate protections against the expansion of judicial discretion (2000: 24–52). Yet they clearly approve of cases where judges defer to legislatures concerning policy matters intertwined with the contestable and indeterminate peripheral meaning of rights.

In *Latimer*, the Supreme Court declined to read Mr. Latimer's sentencing as a violation of what Morton and Knopff might call the peripheral and therefore contestable meaning of his section 12 Charter freedom from cruel and unusual punishment (*R v. Latimer*, 2001: para. 6). Instead, the Court upheld the Criminal Code, which is subject to amendment by parliamentary statute. Morton and Knopff could very well object to a counterfactual Supreme Court decision in the case, but they could only object to *Latimer* by embracing a populist conception of democracy where all institutional decisions should be made according to popular sentiment and polling. Of course, their republican commitment to the delayed judgment and deliberation of representative democracy stands opposed to any such conception of democracy. MacKay thus joins Chief Justice McLachlin in equating representative democracy to naked populism—at least in his misreading of Morton and Knopff.

The foregoing analysis of *Latimer* should aptly demonstrate that Morton and Knopff are not opposed to judicial review in principle but rather to the contingent way it has developed in the post-Charter Canadian context. For Morton and Knopff, judicial review that enforces the determinate meaning of legislation or rights is clearly not outside the pale of reasonable republican institutional arrangements. They object to the expansion of judicial power to the periphery of rights meanings and the increasingly important role played by legally indeterminate yet morally absolutist "rights talk" in ordinary political discourse. This discussion of core and peripheral rights brings us to a second way in which Knopff has been misread—as a moral rights skeptic.

2. Knopff the Straw "Moral Rights Skeptic"

In the previous section, I discussed the misreading of Morton and Knopff as populists and some of their basic republican commitments. In this section, I will

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consider the misreading of Knopff's wider oeuvre as embracing a kind of moral skepticism regarding rights. Knopff is indeed a rights skeptic, but only insofar as rights discourse and the judicialized politics that accompany it encourage the "theocratic temptation" or the "monist" belief that rights "constitute the horizon, rather than the subject, of politics" (Knopff, 1998: 683–705). Knopff's skepticism about the legal determinacy of rights and his concern for rights monism inform his republican critique of juristocracy—that is, the increasing judicial domination over political questions that implicate rights. While many of Knopff's critics have misread his understanding of rights, the most theoretically interesting misreading comes in the otherwise careful and intriguing work of W. J. Waluchow (2007: 155–63). Waluchow argues that Morton and Knopff object to judicial review and the Charter because they are skeptical about the objectivity of moral reasoning and the possibility of "right answers" regarding rights (155). Unfortunately, this reading does not adequately engage Knopff's thinking about rights discourse and judicial review.

Waluchow claims that Morton and Knopff's skepticism regarding the Charter and judicial review is partly rooted in the opinion that support for bills of rights and judicial review "stems from a naïve view concerning the possibility of 'objectively right' answers to the moral and otherwise evaluative questions that typically arise in Charter cases" (2007: 155). This naiveté apparently involves a failure to recognize "the undeniable fact of widespread differences of opinion on important moral questions" (156). In order to demonstrate that this is indeed Morton and Knopff's view, Waluchow cites their division of Charter rights into "core" and "peripheral" categories: "How can a society simultaneously agree upon and endlessly dispute its foundational norms? The answer is that our disagreements about the Charter—the questions we actually litigate—involve not the well established core but the indeterminate peripheral meaning of Charter rights. While the core meaning of a right may be widely agreed upon, its outer-limits are inherently contestable" (157).

Waluchow takes Morton and Knopff's claim regarding the indeterminacy of peripheral rights as a key moral premise in their conclusion that many judicial decisions under the Charter amount to exercises of judicial discretion that ratify the subjective policy preference of judges.

For Waluchow, this "argument from disagreement" is problematic not only because he does think there are objective communal moral standards but also because (1) the existence of uncertainty and disagreement is "not identical to indeterminacy, where the latter connotes the absence of a right answer" (2007: 159). He notes that disagreement is endemic to many subjects about which there are still considered to be objective truths. The existence of widespread moral disagreement does not preclude the possibility of moral truth. The argument is also problematic for Waluchow because (2) issues such as slavery demonstrate that there is historical progress in moral affairs, and (3) many moral disputes rest on "ignorance of relevant nonmoral facts," which increases the possibility of thinking of moral disputes in objective terms (159). These arguments against the supposed link between moral skepticism and justifications of judicial review are cogent; however, Waluchow misreads Morton and Knopff's claim. Morton and Knopff do not argue that mere moral disagreement requires us to think that there are no moral "right answers"

to questions concerning rights. Instead, they cite the fact of widespread disagreement regarding peripheral rights as proof that such rights are "inherently contestable" as a matter of law (Morton and Knopff, 2000: 35).

Is there a necessary connection between the contestable construction of a legal right and the view that there are no *morally* "right answers" to the moral questions raised by such a right? Morton and Knopff do not acknowledge such a connection, nor is such a connection plausible to anyone who buys the distinction between positive law and morality. Morton and Knopff's distinction between the core and peripheral aspects of Charter rights leaves open the possibility of morally right answers to legally indeterminate rights. An indeterminate aspect of a Charter right might very well have a moral right answer, but that does not necessarily affect the indeterminate status of the right as a matter of positive law. All Morton and Knopff have argued is that the indeterminate periphery of Charter rights features opaque legal right answers.

Since inclusive legal positivists such as Waluchow countenance the potential legal status of moral principles and precepts, insofar as socially accepted moral right answers legally bear on the resolution of such indeterminate rights, they will simply be more determinate than they would have been absent this connection. Where moral right answers do not legally bear on the resolution to legally indeterminate rights, such rights are contestable and leave room for judges to claim that their own moral right answers resolve the indeterminate meaning. Morton and Knopff argue that judges have used the legal indeterminacy of certain Charter rights to impose their own moral right answers—answers they can choose from among several moral perspectives offered by competing interest groups, without democratic contestation. In his own interesting work, Waluchow has argued that communal moral right answers in fact do, and indeed should, legally help resolve apparently indeterminate rights. Morton and Knopff would merely dispute Waluchow's claim regarding the legal determinacy of such moral right answers, not necessarily their moral determinacy given a consistent metaethic. In other words, there may be moral determinacy for a legal right answer given an individual's commitment to a specific metaethic, but that does not render that prospective legal right answer legally determinate insofar as the law does not instruct its sourcing in the philosophical thicket of metaethics. Metaethics form the philosophical bridge between moral opinion and moral right answers. Without legal guidance with regard to metaethics, the principles espoused in moral opinion stand in an indeterminate relation to the bare text of the law. The only other way to bridge this gap is through the social acceptance of metaethical and ethical principles. On this account, legally relevant moral disagreement signifies legal indeterminacy as a social fact, not the vindication of philosophical non-cognitivism.

Waluchow interprets Morton and Knopff as concluding that judges pursue unbridled "subjective moral preferences" in light of the moral indeterminacy of most Charter rights due to "radical dissensus" and how they "raise issues on which we cannot agree." (Waluchow, 2007: 157). Waluchow's interpretation conflates their claim that Charter rights have a core and peripheral meaning with the metaethical claim that "*moral standards*" have a core and peripheral meaning (2007: 157, emphasis added). Morton and Knopff have not suggested that there is some ultimate core and peripheral meaning of moral standards due to the fact

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of widespread disagreement. Instead they argue that widespread moral disagreement is a factor in the indeterminacy of Charter rights because the legal meaning of such rights touches on moral questions where there is dissensus that is not legally resolved by the right. Such dissensus is treated as a social fact informing the determinacy of the law, not an argument against moral right answers.

The difference between Morton and Knopff's view and Waluchow's can be demonstrated using a simple example of an indeterminate aspect of a Charter right. Waluchow agrees with Morton and Knopff that the positive law's potential sourcing in common moral standards runs out when it comes to "hard cases" of radical moral disagreement (Waluchow, 2007: 228). Morton and Knopff agree with Waluchow that in "easy cases" (or "core cases"), the positive law includes moral standards incorporated into the legal meaning of rights by the text and the conventionally understood moral meanings of its words. The types of cases on which they disagree involve Charter rights that may seem indeterminate due to moral disagreement concerning the moral principles and concepts involved in interpreting the right. A good example of a case involving the apparently indeterminate meaning of a Charter right is the Canadian litigation involving same-sex marriage. Waluchow argues that

> when judicial recognition of same-sex unions is criticized for being against the moral beliefs of Canadians, the reference is almost always to moral opinions. These are moral opinions that, upon reflection, flatly contradict fundamental beliefs, principles, values, and considered judgements that enjoy widespread, if not universal, currency within the community, and they introduce significant evaluative dissonance. They are also opinions that are inconsistent with any reasonable interpretation of the Charter and the many judicial decisions made in its name—and in the name of the people whose fundamental commitments all this represents. (2007: 224–25)

Morton and Knopff might join Bradley Miller (now Justice Bradley Miller) in critiquing Waluchow for failing to offer an account of why it is that same-sex marriage is clearly a determinate "easy case," despite the factual moral disagreement engendered by the belief of some Canadians that it is against their moral principles (Miller, 2007). Miller notes that, "it appears that Waluchow is only able to call same-sex marriage an easy case (where opposition to same-sex marriage is summarily dismissed as 'prejudice' and 'inconsistent with any reasonable interpretation of the Charter and the many judicial decisions made in its name') by not engaging with the relevant principles advanced in the argument by same-sex marriage opponents in any of the Canadian litigation" (2007: 305). In fact, it is odd that Waluchow should consider same-sex marriage such a determinate Charter right given that the Supreme Court of Canada's *Reference re Same-Sex Marriage* (2004) advisory decision refrained from actively following the provincial courts in concluding that the common law concept of marriage as a union between one man and one woman violated section 15 Charter rights to equality. The Court refused to answer the question about how the common law concept of marriage related to section 15. Odder still is that this supposedly determinate right was realized by a majority vote in the federal Parliament, featuring debate that represented

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many reasonable yet discordant moral perspectives on the issue (Canada, *The Civil Marriage Act*, 2005). Why exactly would the Supreme Court invite a minority Parliament to decide the contours of such an apparently determinate Charter right?

The answer is partly that the moral principles that might help settle rights questions such as the status of same-sex marriage under the Charter are often left indeterminate by the legal text. And where there is indeterminate semantic meaning, there is room for both judicial and parliamentary discretion in constructing the meaning of such rights (Whittington, 1999: 5–16).[5] Moral principles can be used in the process of such construction where the text, precedent and convention fail to determine the meaning of rights. For example, in the absence of clear textual guidance by constitutional text, precedent or conventions, the Supreme Court relied on the unwritten principles of federalism, democracy, constitutionalism and the rule of law to conclude that if Quebecers expressed their democratic wish to secede, on a clear question and clear majority, this would result in an obligation on other parties within Confederation to negotiate on the possibility of effecting succession through constitutional amendment procedures (*Reference re Secession of Quebec*, 1998). Yet such unwritten moral principles become sources of legal authority only in the constitutional activity of constitutionally authorized political actors such as the judiciary and legislatures. Widespread disagreement regarding moral principles renders any construction making use of such disputed principles more contestable as determinate law. In this way, judicial and legislative rights constructions can incorporate contested moral principles into the law. However, constitutional actors can also contest the settled legal status of those incorporated principles the further they stand outside the constitutional text and previous constructions. The more an extra-textual moral principle is morally contested, the less determinate its legal justification as a right in relation to the constitutional text and the moral beliefs of a society.

The case of same-sex marriage in Canada found no explicit guidance in the Charter because the constitutional text and previous constructions did not settle the question of what marriage is and ought to be. In order for the Supreme Court to have decided the question of whether the right of same-sex couples to marry was protected by the Charter right to equality, they would have first had to discuss what exactly the institution of marriage is and what the state's interest in it is. The provincial court decisions insufficiently addressed the extent of social disagreement on this question, and the failure of the Ontario Court of Appeal's decision in *Halpern* to suspend its declaration of invalidity while a parliamentary committee conducted national consultations on the issue was arguably quite "contemptuous of the democratic process" (Huscroft, 2004: 257). The social fact of the disagreements voiced in Parliament and provincial legislatures regarding these questions of moral principle meant that there was no way for the Court to decide whether the common law concept violated Charter rights without first making disputed moral conclusions that might render the Charter determinate. It is also crucial to recall that the reference question was put to the court by Prime Minister Paul Martin, effectively seeking to withdraw the contested matter from debate in the House of Commons (Gee and Webber, 2005). By refraining from ruling on whether the traditional view of marriage violated equality rights, the Court pushed the question back on Parliament and implicitly recognized the value of democratic

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participation as a means of making the meaning of equality rights more legally determinate. The point of this example is that the Court's view of the Charter right was limited by a moral disagreement due to its indeterminacy in relation to the text of the law and not the impossibility of a moral right answer.

There is no tension between the idea that the Charter was indeterminate regarding the right to same-sex marriage and the idea that the moral right answer to the question was the legal recognition of the right. If proponents of same-sex marriage were morally "correct" regarding the concept of marriage—and it's worth noting that Knopff himself recognized the moral claims of same-sex couples to domestic partnerships (Knopff, 1999)—this would not change the fact that the Charter is legally indeterminate concerning the moral principle at issue, as the relevant moral principle was not determinate or obvious as a matter of the social fact of moral disagreement. Now we can see that, far from rooting their arguments in moral skepticism, Morton and Knopff may share Waluchow's inclusive legal positivism. When Waluchow argues for the determinate meaning of the Charter with regard to same-sex marriage, he is not claiming that the *moral* right answer should determine the answer to the question regardless of the Canadian state of moral disagreement concerning the question. Instead, he is claiming that together the textual commitments of the Charter and the "fundamental beliefs, principles, values, and considered judgements that enjoy widespread, if not universal, currency within the community" legally ground the right to same-sex marriage (Waluchow, 2007: 224–25). In other words, it is the text and the legally relevant moral commitments of a society that render rights determinate in the processes of constitutional interpretation and construction. Morton and Knopff's response to such claims is a *legal* rights skepticism regarding the semantic determinacy of the text of the Charter as it relates to the fundamental beliefs of Canadians concerning rights subject to reasonable moral disagreement. Knopff's skepticism that the "constitutional text and previous constructions did not settle the question of what marriage is and ought to be" did not preclude him from recognizing domestic partnerships as a moral compromise between proponents of same-sex and traditional marriage (Knopff, 1999: 53–56). And if we grant Knopff's reasonable view that legislatures can help resolve social disagreements about rights, then it follows that Waluchow should approve the Court's decision to allow Parliament to make the right to same-sex marriage more determinate by democratically resolving social disagreement over the issue through the votes of legislators subject to the votes of Canadians. Whether Morton and Knopff draw the line between core and peripheral rights too sharply is a question I will return to in my conclusion, although it's worth noting that there are textual and historical arguments making the interpretive case that substantive ideals of equality are part of the semantic meaning of the section 15 equality rights of the Charter (Hartery, 2019).[6] What I have shown is that Waluchow, as well as Morton and Knopff, draws lines between determinate and indeterminate rights meanings in relation to distinct views of the social fact of moral disagreements relating to constitutional texts.

Knopff's legal skepticism regarding the determinacy of Charter rights is complemented by a republican concern for the potential threat that "rights talk" poses to representative democracy. As briefly discussed above, the third core idea of republicanism is the need for a virtuous contestatory citizenry to guard against the

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corruption of institutions. The difficulty Knopff sees with the role that rights play in contemporary democracies concerns their effect on the citizenry's relationship to representative institutions and to their fellow citizens. Knopff is concerned with the way that the rhetoric of rights tempts citizens to succumb to the "theocratic temptation" of "monism" where "rights, in effect, are an expression of the oneness of the people, an agreement by that people as to what is shared by all, and is thus so fundamental as to constitute the horizon, rather than the subject, of politics" (Knopff, 1998: 699). Monism is, in the words of Thomas Flanagan, the "belief in a society without significant conflicts of interests—a society without war (external conflict) or class struggle (internal conflict), without hierarchy and oppression, without poverty and inequality" (1995: 171).

For Knopff, the problem with rights rhetoric is that it ties rights claims to the expression of the undivided and fundamental consensus of the people, thereby encouraging "courtroom partisans" to "present themselves as the true defenders of fundamental rights, of the original consensus, and demonize their opponents as despoilers of all that is true and good" (1998: 700). This perspective invites disdain for the policy-making decisions of ordinary representative politics, which often involve reasonable disagreements between citizens. Converting policy decisions between representatives into rights questions bids the demonization of citizens who disagree with the rights claims of their fellows—along with their representatives. Rights thus polarize the ordinary political process and cast the judicial role of interpreting rights claims as an external force that can "restore the fundamental monistic wholeness of the community, its oneness about truly fundamental matters" (Knopff, 1998: 699). For Knopff, Canadian courts are responsible for spreading this monistic polarization by expanding Charter rights beyond their enumerated terms in relation to their moral "underlying values" and thereby "constitutionalizing everything" (Harding and Knopff, 2013: 159). In this way, rights rhetoric turns reasonable disagreements into uncompromising conflicts. The concern underlying this thought self-consciously echoes James Madison's view that "the cool and deliberate sense of the community ought, in all governments, and actually will, in free government, ultimately prevail over the views of its rulers" (Hamilton et al., 2001: 327). We can now see how the legal indeterminacy of rights can combine with monistic views of the absolute moral answers to rights questions to transform judicial review into the very kind of populist politics Knopff himself was accused of advocating. Where judges interpret Charter rights by circumventing representative legislatures and looking to the truth about the moral principles accepted by the political community, they risk either unequally imposing their own views on disputed moral subjects on their fellow citizens or embracing a populist conception of democracy where institutional decisions should be based on popular sentiment and polling. This is how the threat of juristocracy to representative democracy—the unequal influence of judges over political decision making—can become entangled with the threat of populism.

3. Knopff's Republican Rights

The criticisms portraying Knopff as a majoritarian populist and a radical moral critic of rights are straw man arguments. When the straw is blown away, his

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constitutional theory emerges as a republican critique of judicial review as it has been practised in the post-Charter Canadian context. We can see the coherence of Knopff's concern with an unelected judiciary enforcing rights against representative democratic institutions and the legal indeterminacy of such rights—mired as they are in reasonably contested moral principles. In Knopff's view, the fact that judicially enforced rights are often indeterminate until they have received judicial interpretation renders them arbitrary incursions into the space of democratic debate. This is not due to the anti-democratic nature of judicial review *in principle* but rather because the judicial enforcement of indeterminate rights takes place under anti-republican conditions.

For republicans, the process by which indeterminate rights claims are rendered determinate must involve the equal participation of citizens. Knopff is a critic of populist movements and figures who purport to circumvent the institutional forms by which representative government realizes this norm. Yet he is also a trenchant critic of the way judicial interference threatens this norm in the Canadian context. The Canadian judiciary, as well as advocates of judicial power such as Waluchow, rhetorically claim not only that these indeterminate rights are usually determinate but that courts have the exclusive right as "trustees" to interpret them (*Vriend v. Alberta*, 1998: 564). Of course, there is no constitutional text authorizing this claim to exclusive judicial power over rights (Canada, *Constitution Act*, 1982 s.52; Baker, 2010: 39–41). This, too, is a construction of judicial power incorporating disputed moral principles into the law. And the very willingness of courts to reverse long-standing precedent about Charter rights starkly reveals that many rights questions are neither legally nor morally determinate (*Carter v. Canada*, 2015: para. 44). This is further underlined by the ability of legislatures to impose "reasonable limits" on rights that are justifiable to courts under section 1 of the Charter, as this has the promise of allowing legislatures to ask courts to "clarify" or "reconsider" their disagreements about rights (Knopff et al., 2017: 626–42). But moral dissensus about rights enables courts to use section 1 limits as a chance to engage in "policymaking," and the polarization of rights issues across political parties can force this policy-making role on judges even where "courts are more moderate than the litigants" in their understanding of rights limitations (Morton and Knopff, 2000: 34, 159). The press may also play a role in reinforcing the popular impression that rights are determinate by failing to discuss "limits" on rights, even in cases where the courts focus on the "reasonable limitations" on rights under section 1 (Macfarlane, 2008: 309). For Knopff, the growing power of the judiciary and the indeterminacy of the rights they claim to enforce threaten the ability of Canadians to equally participate in making the rules that govern their lives.

4. Conclusion

In this article, I have not discussed many of the details of Knopff's thinking that help inform his critique of this state of affairs. That would require further discussion of his understanding of the role of the executive vis-à-vis the legislature and the courts, the potential for dialogue between courts and legislatures, and so on. But the republican outlines of Knopff's critique of populism and juristocracy

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emerge once we reject the idea that representative democracy can be equated to naked populism and that the judiciary is always faithfully enforcing the determinate meaning of Charter rights against it.

If there is one difficulty with this critique, it is that it unveils the rhetoric of judicial decision making while rhetorically conceding its anti-republican conception of rights. In my defence of Knopff against the charge that he is a moral rights skeptic, I reconstructed his position using the idea of rights in relation to moral principles. This was done to demonstrate that Knopff is skeptical of the legal determinacy of such moral principles rather than the possibility of moral right answers. However, it seems clear from his critique of the monistic quality of rights discourse that he thinks most rights language involves false claims about the determinate scope of rights, such that they have an "uncompromisable" effect on democratic discourse (Knopff, 1998: 702). In addition, as noted above, Knopff also frequently refers to judicial and legislative decision making in areas thought to involve Charter rights as "policymaking" (Morton and Knopff, 2000: 34). Together these observations could be taken to indicate that Knopff is hostile to the idea that legislative and judicial decision making can be understood as constructing the indeterminate meaning of Charter rights. This gives the impression not only that the judiciary should get its nose out of policy areas impinging on Charter rights but that legislatures should similarly ignore the potential rights concerns raised by legislation.

The problem with this language is that it gives in to the very rights rhetoric that Knopff criticizes. For example, Ronald Dworkin, perhaps one of the most famous advocates of the judicial enforcement of bills of rights, distinguishes the idea of a legislature as a "forum of policy" from the idea of a court as a "forum of principle" (1985: chap. 2; 1977: chap. 4). For Dworkin, "arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole" (1977: 82). In contrast, "arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right" (Dworkin, 1977: 82). Simplifying somewhat, Dworkin argued that unelected judges are more capable of evaluating arguments of principle and that legislatures are concerned with arguments of policy. When Knopff refers to legislative and judicial decisions as "policymaking," he seems to cast all decisions that involve indeterminate rights as "arguments of policy." This leaves the judiciary with the task of enforcing core or determinate rights in relation to "arguments of principle."

Does Knopff want to end up in the same camp as Dworkin? Surely not. Not only would this run against Knopff's positivist view of the legal significance of moral disagreement, it would also undermine his republican defence of representative government as the proper forum for handling indeterminate rights claims. A charitable reading of Knopff's sometimes uncharitable critics reveals that his complaints about rights discourse may have served as scarecrows indicating a populist understanding of democracy and a moral skepticism regarding rights. Yet if we examine these scarecrows more carefully, we can see that his complaints are more often than not targeting the specific radical form of rights discourse encouraged by the judiciary and special interest groups. It is only this overheated monistic conception of rights that Knopff opposes, and it is this conception of rights that he attempts to correct by using the mundane word *policy*. In this, he echoes other scholars, such as Janet Hiebert, who correctly share his opposition to monistic rights talk

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but mistakenly cede the language of rights to cases where compromises and negotiations about the limits of rights are impossible because the "core" of rights are at stake (Hiebert, 2002: 55–56). Recent work by scholars such as Grégoire Webber has shown that rejecting the opposition between legislative "policy" and judicial "rights" could help overcome the monistic nature of rights talk by emphasizing the legislature's responsibility for specifying the limits on the scope of indeterminate rights (Webber et al., 2018).

Knopff's republican concerns would be well served if the Canadian judiciary and legislatures conceived of more rights issues as contestable constructions of the indeterminate *limitations* on rights, rather than as either matters of policy or rights. Supreme Court Justices Côté and Brown recently took a step in this direction by pointing out that it makes little sense to orient section 1 "reasonable limitations" on rights as "infringements" of Charter rights because many rights require "legislative specification" (*Frank v. Canada*, 2019: para. 113). The federal Parliament has taken the potentially complementary step of requiring the minister of justice to issue statements on "the effects of the Bill on the rights and freedoms [of the *Charter*]." (Canada, *The Department of Justice Act*, 2018: 4.2(1)). The explanatory statement on the bill requiring Charter statements expressed a view similar to Côté and Brown's concerning section 1 limits by stating that "the Charter will be violated only where a limit is not demonstrably justifiable in a free and democratic society" (Canada, House of Commons, Charter Statement Bill C-51, 2017). This implies that limitations on rights are not simply a matter of policy trumping rights but rather legislated understandings of Charter rights (Webber et al., 2018). This view might be challenged as underestimating the way populism can turn legislatures toward the discourse of policy trumping rights (Kelly, 2020), but the point is that reorienting legislative and judicial discourse toward the construction of rights could help sharpen Knopff's double-edged case against both populism and juristocracy. The more that legislatures are held responsible for constructing and deliberating about the scope of Charter rights, the less acceptable it will be for populist representatives to cite policy interests as reasons for "infringing" or "overriding" rights. The more that courts are held responsible for developing clear rules about the scope of rights, as well as consistently invalidating laws that violate the limits of rights, the less acceptable it will be for courts to engage in undemocratic policy making that devalues enumerated rights by assessing justifications for their "infringement" (Sigalet, 2020). It may be that these developments could help move Canadian political culture away from the monist understanding of rights that Knopff criticizes and toward the view that Charter rights and their limitations are very much the shared subject of judicial and legislative responsibility.

Of course, truly creating a democratically reasonable rights culture is at least partly contingent on the virtuous souls of the citizenry. When the judiciary ceases to function as what Knopff's teacher Walter Berns called "statesmen-teachers," or what Ralph Lerner called "republican schoolmasters," it is up to citizens and their representatives to become autodidacts (Berns, 1987: 241). It would serve every constitutional autodidact well to learn republican lessons from the writings of Rainer Knopff—the teacher, that is; not the effigy.

Notes

1 While many of the arguments of this article draw on the co-authored work of Rainer Knopff and F. L. Morton, it focuses on Knopff's work in order to explain how his overall oeuvre has been unfairly treated in the field of Canadian public law. The article seeks to vindicate F. L. Morton alongside Knopff where it discusses their co-authored work, but a consideration of how Morton's single-authored scholarship relates to the criticisms discussed in this article lies beyond its scope. Morton's work is in all likelihood defensible along similar lines, and the author in no way wishes to diminish Morton's own considerable contributions to the field.
2 This piece was obviously published before Morton and Knopff's book, but it can still be thought of as responding in part to their earlier publications. In addition, McLachlin went on to repeat many of her claims, with a heightened concern for the influence of interest groups on the court no doubt shaped by Morton and Knopff.
3 This is not the first article to draw republican theory into the analysis of Canadian public law (see, for example, Kong, 2014; Schertzer, 2016; Sigalet, 2019).
4 They allow democratic institutions to circumvent the "discursive dilemma."
5 Here I rely on Keith Whittington's influential distinction between constitutional interpretation and construction. Interpreting the meaning of rights involves discovering the determinate meaning inhering in the text of a bill of rights. Constructing the meaning of rights involves specifying the meaning left indeterminate by the text of a bill of rights (Whittington, 1999).
6 Such textual/historical arguments might very well have justified the judicial invalidation of the common law understanding of marriage under the "core" meaning of section 15.

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