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Foreword

It is with great pleasure that we present the newest special issue of Politicus Journal, on the theme of rights and social justice. This piece is put forward in addition to our regular Volume and our forthcoming special issue on international environmental politics. We are especially proud of the hard work from all the contributors, editors, and team at Politicus who put such exceptional work into this publication at an especially difficult time. This publication would not have been possible without Andrew Nguyen who provided us with our theme on rights and justice and was able to provide valuable insight into why this theme is important to discuss and bring visibility to, especially in the discipline of political studies.

To provide some context on rights and justice we will paraphrase Andrew Nguyen's words on rights and justice and how this was contextualized in these pieces: This volume comes is the midst of a pandemic which has challenged, exacerbated and demonstrated the immense injustices present in our world. For many, these injustices have been possible to ignore, disregard, or undervalue, however global realities such as Black Lives Matter protests, disproportionate deaths in senior care homes from COVID-19, increases in poverty and homelessness, attention drawn to systemic racism, and increased recognition of non-binary identities have made these previously less visible issues far more apparent. The ideas, arguments, and perspectives provided in the following works represent a culmination of these systemic injustices and aim to shed light on why we have arrived in a place of inequality, what can be done, and provide much needed exposure to underrepresented issues.

We encourage all our readers to approach our provided topics with an open mind and consider the value of adding these emerging discussions to the field of political studies but also to our everyday lives. We want to specifically thank the Academic Commission of the Arts & Science Undergraduate Society for the resources and mobility they have granted us. We share this success with our Editorial Board members, marketing team, and interns who have worked tirelessly and creatively to ensure this volume is a success. We also want to reiterate our thanks to Andrew Nguyen for providing us with the opportunity to work with him and our contributors on this special issue. Lastly, to those who have contributed, thank you for joining us and for all your hard work. It is difficult, at the best of times, to take on a peer review process and your ability to do with such success during a pandemic is a statement to your character and perseverance. We are incredibly proud to showcase your outstanding work.

Sincere thanks,

Claire Chilton & Rhianna Hamilton
Politicus Co-Editors-in-Chief, 2020-2021

Democratic Process, American Politics and Donald Trump: An Analysis of Social Media's Role in Defending the Freedom of Expression

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Introduction

In May 2020, Twitter executives confronted President Donald Trump on principles of voter suppression by adding addendums and fact-check links to his posts about mail-in voting (Isaac and Kang 2020). Meanwhile, Facebook, another social media tycoon that held similar rules around voter suppression, had refused to intervene in the same posts that Mr. Trump published on its platform. Facebook maintained that "private companies should not be in the position of judging posts or arbiters of truth" (2020). Consequently, the contrasting views of the two companies sparked debates about social media's role in a democracy, including its responsibility to defend the right to free expression. However, is social media in the position of judging individuals' posts and acting as "arbiters of truth" to forward the democratic process?

This essay will argue that it is justified for social media companies to judge information posted on their platforms because this will advance the principles of free expression and democratic values by promoting equal access to communicative opportunities. This essay will begin by looking at important literature in the field and evaluating the democratic value of free speech. Then, this essay will introduce two categories of expressions and their democratic implications in the context of the United States politics and the Trump Administration. It will argue that political propaganda impedes the principles of free expression and exploits communicative resources because of social media's inaction. It will then be argued that social media protects the principles of free expression by allocating more communicative resources to individuals that are disadvantaged during the communicative process. Finally, this essay will consider some challenges faced by social media platforms, such as balancing between individuals' right to privacy and making fair judgments. To conclude, this essay will emphasize the social value of the free expression and that social media's role in promoting free speech to advance democratic deliberation.

Literature Review: The Democratic Value of Free Speech and Its Principles

The freedom to express is seen as a fundamental principle of modern democracies. The nineteenth-century philosopher John Stuart Mill famously defended free speech because he deemed it a necessary condition for intellectual development, social progress, and, most importantly, individuality (Mill 2011, Chapter 2). To protect independent individual opinion, the "freedom of thought and discussion" should be utilized as an instrument against "political despotism" and "censorship" (Chapter 2). He argued that there should be a free flow of ideas in the public sphere, where

the truth will "emerge from a free and open exchange of ideas" (Moon 2000, 13). Here, Mill set his premise on the assumption that individuals agree on certain standards of rationality and respect among participants in the public discourse (Haworth 1998, 28). Mill's arguments have wielded enormous influence till this day. Scholars share the belief that free expression preserves the diversity of opinions for the benefit of democracy. The following paragraphs will introduce Timothy Zick and Richard Moon's evaluation of Mill's discussion on free expression and illustrate how free speech advances democratic processes.

In his book First Amendment in the Trump Era, Zick extends Mill's arguments on free speech in a more recent context and demonstrates the value of the free expression in the modern-day "public forum" – where cyber-places and social media act as new communicative spaces for the exchange of ideas. Zick focuses specifically on a public place and its relationship to dissent and democracy in Chapter Four, where he highlights the need for the First Amendment to apply in "breathing space" – rules that expand opportunities for expression concerning matters of public concern – for effective dissent and public discourse (Zick 2019, 90). Although digital spaces (such as Twitter and Facebook) are not sufficient replacements for traditional public forums (ex. parks, streets, and public squares), they are nevertheless significant to "modern speech, press and associational activities" (88). With the recognition that speakers and assemblies have a right to access public forum has been critical to American democracy, and the Supreme Court's rule that social media and the internet comprise a "modern public square" for democratic debates, social media must preserve a culture of dissent (75). In other words, social media and the internet function in a way that allows individuals to exchange opinions freely with each other and with the government to shape a healthy, working democracy.

Zick's valuation on how dissent and diversity of can be promoted by social media echoes Mill's point on avoiding "censorship" and "political despotism." Mill feared that without the freedom to express, individuals will be subjected to the "tyranny of the majority" and consequently, "protection against the tyranny of opinion and feeling" is essential to a functioning society (Mill 2011, Chapter 2). In the context of social media and the internet, Zick furthers Mill's argument by showing how online platforms can be used to preserve the minority opinion and feelings. Therefore, building on Mill's assertion, Zick strengthens the connection between freedom to express and democratic principles.

While agreeing that freedom of expression is crucial to the operation of democratic government, Richard Moon examines the relationship between free expression and democracy in a different light. Focusing less on the outcomes of public debate, such as dissent and different opinions, Moon stresses that freedom of expression is an instrument for actualizing the responsibility of citizens for the "governance of their community" in public discussion and deliberation (Moon 2000, 18). To a large extent, participation in public discourse in of itself helps with the realization of individuality

and makes individuals compassionate towards the opinions of others or the public interest. The value of democracy in public discussion emerges when members of the self-governing community "seek common understandings and work towards shared goals through the exchange of views" (18). Therefore, free expression contributes to democracy by educating citizens with the notion of "common good" rather than with the "satisfaction of personal preferences," leading to both the realization of individuality and social progress (18).

Based on this observation, Moon continues to shape his argument on individuals' participation in public discussion. Moon brings forward his social interpretation of Mill's argument on the principles of free speech, contending that "any account of the value of freedom of expression must recognize the complexity of human agency and the diverse forms of human engagement in community" (Moon 2000, 9). Moon argues that human agency is manifested in all of Mill's arguments and can be seen as the key idea that incapsulates Mill's claims on free expression. For instance, Moon points out that Mill's valuation of truth rests on how it is acknowledged and achieved by human agents and rational, individual members of the community (12). It is also realized through reasoning and collective deliberation, where "the sharing of ideas and information among community members" occurs (12). Thus, freedom of expression should be defended because it is a fair way to decide social questions, rather than how it generates truth (13). Similarly, Moon argues that the individuality/autonomy that Mill worshiped can only be realized when individuals emerge as a "conscious and feeling person," with the ability to "participate in collective governance" and a "capacity to think, judge and give direction to one's life" (21). This individual realization applies to both the speaker and the listener, who cultivate a communicative relationship and ties their interests together (26). In return, this communicative relationship allows the individual agency to emerge and flourish "in the joint activity of creating meaning" (26). It is worth noting that to Moon, the communicative relationship is neither "speaker" nor "listener" centered because the interests of the speaker and the listener should be regarded as equal (26).

As such, Moon encourages his audience to "acknowledge the overall value of communication in society" and "recognizes the fact that effective communication is frequently resource dependent" (Bilingsley 2004, 888). The argument of democratic deliberation has advantages over the marketplace of ideas interpretation of free speech as the existing distribution of communicative power is not equal, and those with economic or political resources often assert more voice in public discourse (Moon 2000, 13). Addressing inequalities in communicative power, democratic deliberation advances both individual and collective participation during free expression, so that human preferences and choices can be properly formed in public discourse (14).

Moon's social argument has shifted political scientists' understanding of the protection of freedom of expression through highlighting the "distributive dimensions of expression" (Macklem 2001, 140). Although Moon has received compliments for his social perspective, scholars point out that Moon's argument is incomplete in justifying the state's role in the relationship of communication between human agents. Jamie Cameron argues that Moon's proposal to "define freedom of expression in relational terms rests on an

assumption of equality between the speaker and listener," while failing to fully develop his "alternative conception based on a relationship of communication and access to communicative opportunities" objective (Cameron 2002, 446). It is a challenge for Moon to "promote access to communicative opportunities" by "eliminating inequalities in access to communicative resources" (445). As a result, Moon shows an intense focus on the analysis of the relationship of communication and flaws of an individualist conception of free expression but presents a relatively weak and underdeveloped argument on the practical application of his social conception of free expression in a democracy (446). Thus, Cameron is dissatisfied with the way Moon incorporates the social conception of the freedom "into the analytical structure" that will help determine the reasonableness of the state's regulation on and understanding of free speech (443).

Admittedly, there is a gap in Moon's argument on how effective free expression ought to allow the complexity of human agency to emerge in communicative interactions and recognize the diverse forms of human engagement in the community. However, Moon's social conception of the freedom to express offers a new angle for understanding the defense of free speech. While Zick is concerned about protecting different ideas and opinions for democratic operations, Moon contends that human participation in the communicative process improves the goal of democracy and highlights the desirable outcome of a common good. The essay has demonstrated the value of the free expression in public forums to democratic progress. In an attempt to fill the gap in Moon's theory, this essay will further demonstrate how social media, as a communicative resource itself, can help promote access to communicative opportunities by reviewing and judging the content of the discussion and by enhancing the human agency in communicative interactions.

Manipulation and Intervention: Political Propaganda

Social media is becoming increasingly important in our political life. With its incomparable influence in public discourse, social media introduces a new shift in the power relation between politicians and editorial media (Enli 2017, 52). For instance, as social media evolves to become more omnipresent between the 2008 and 2016 United States (US) presidential election cycle, political campaigns begin to develop strategic online platforms for greater attention – Trump had 17.6 million followers on Twitter and The New York Times had merely 1.2 million online-only subscribers in the last quarter of 2016 (52). Studies show the linkage between attention and power of social movements on social media organizing, such as the Black Lives Matter movement that gained traction by advocating their mission online (Zhang et al. 2018, 3163). Thus, the level of engagement and interaction between individuals and political entities on social media platforms largely determines the power that either party holds, especially to advance their personal or ideological interests. However, this decentralized structure of the online exchange of ideas can be easily abused by state actors who have greater access to

communicative resources. Using the example of foreign political propaganda in the 2016 US presidential campaign, this section illustrates that human agency is eroded if social media companies merely passively provide a platform for public discussion without considering the political content posted on it.

The Unusual Presidential Election

The 2016 US presidential election was anything but traditional. Social media, a public space that was meant for fair political debates and democratic deliberation on electing the most competent government official, was dangerously appropriated. The Chief Integration and Innovation Officer for President Obama's 2012 and 2016 campaigns, Michael Slaby, summarized that "the 2016 cycle has been categorized by unprecedented unpredictability, not as much from the perspective of technology disruption, but a wholesale shift in the norms of campaign communications," where "history, logic and even fact themselves appeared not to matter" (Schill and Hendricks 2018, 3). Trump's primary digital director Brad Parscale made a precise point: "Facebook and Twitter were the reason we won this thing. Twitter for Mr. Trump. And Facebook for fundraising" (3).

With its powerful impact on domestic politics in mind, the idea that social media is weaponized and used by foreign actors to spread hyper-partisan content and propaganda is extremely alarming (Bastos and Farkas 2019, 1). In their study, Marco Bastos and Johan Farkas examined the weaponization of social media platforms and inspected 826 Twitter accounts and 6,377 tweets created by the Kremlin-linked Internet Research Agency (IRA) in St. Petersburg. They found that the decentralized structure of social media platforms enabled both public deliberation and the dissemination of propaganda (2). Authoritarian states attempted to intervene in the presidential election as large-scale actors with a strategic plan and a targeted population, who are unaware of the manipulation (2). Propagandists were able to seize "a wealth of opportunities" offered by social media platforms to coordinate and organize disinformation campaigns (2). The IRA, for instance, had employees work 12-hour shifts and expected them to manage at least six Facebook profiles and 10 Twitter accounts. These fake accounts (that were regarded as individuals by authentic social media users) produced a minimum of three Facebook posts and fifty tweets a day (3). The main objective of these accounts was to create confusion, polarized opinions, and conspiratorial content, so that disorder and distrust would emerge behind enemy lines (11).

The "emerging form of political manipulation and control" that "constitute a difficult object of analysis," as Bastos and Farkas noted, is facilitated by "scant and often non-existing data, largely held by social media corporations that hesitate to provide external oversight to their data, while offering extensive anonymity for content producers and poorly handling abusive content" (2). Activities and engagement on social media had become the key determinant in public discourse, driving the national conversation as the primary communication channel between individuals. However, it was precisely because of social media's indifference towards these political conversations that violates principles of the freedom to express and amplifies the unequal access to communicative opportunities.

Violation of the Principles of Free Expression

The IRA has attempted to abuse online platforms as an intermediary for the free exchange of thoughts and ideas. There are many discussions on the outcomes of this

form of expression on social media, however, this essay will apply the principles of free speech proposed by Richard Moon. According to Moon, the foreign actor IRA violates Americans' right to free speech because it denies and erodes the human agency that emerges from communicative interactions. One of the most important features of political propaganda is that propagandists intend to manipulate and limit an individual's ability to "rationally assess the claims made" and the "implications of action on those claims (Moon 2000, 83)." Propagandists achieve their goal when individuals blindly follow their claims and construction of the debate. In the 2016 US presidential campaign, the IRA collected data on a general conservative audience and pushed particular themes to the extreme. The use of hashtags such as "#MAGA, #ISIS" and "#WakeUpAmerica" had contributed to the polarization of bi-partisan political discourse during the campaign, and online "sock puppet" identities were constructed to impersonate different types of legitimate users (Howard et al. 2019, 25). These inflammatory expressions had potentially contributed to the success of Trump's campaign because they were able to manipulate its audience and rationalize their original beliefs. Twitter, on the other hand, had provided samples of full discussions and opportunities to long retweet chains that repeat the same information, resulting in a certain degree of dominance by the IRA fake accounts in a public space (Hall, Tinati and Jennings 2018, 22). Individuals who originally held conservative views could be "persuaded" or overwhelmed by such claims without conducting independent deliberation, thus failing to realize individuality that is key to the human agency during the participation of political discourse.

Therefore, political propaganda infringes upon the core to free speech and aims at eliminating the human agency, even if propagandists had created communicative interactions with its audience. This renders political participation ineffective and subjects listeners to the manipulation of a foreign power. In this context, social media companies are justified in providing additional fact-checked information to the source of political posts to protect the principles of free expression.

Unequal Access to Communicative Opportunities

In his objection to Moon's argument, Cameron claims that participants do not have equal opportunities to access communicative resources. This partly breaches individuals' right to free speech and the protection of the freedom to express. As can be seen from the prevalence of propaganda in the 2016 presidential election, the IRA as a foreign state actor viciously exploited resources provided by social media platforms. For instance, the IRA fake accounts were created back in 2013 but were only activated during the presidential election campaigns (Bastos and Farkas 2019, 2). It is likely that the IRA created Twitter accounts in bulk and repurposed "to meet the needs of specific campaigns" (11). Results also suggest fundamentally different operations tailored by the IRA to achieve strategic political outcomes (11). Moreover, the way that the IRA connects these accounts and forms a number of coherent communities of interaction further exacerbates the chances for

individuals' voices to be heard (Howard et al. 2019, 25). As a result, these fake accounts take up the "breathing space" of free expression, gain more communicative power by attracting more attention via numerous accounts and impose manipulative "majority" opinions on real, legitimate individuals, whose ability to advance their arguments and make an impact is now hindered on the public discussion forum. Individuals were involuntarily affected by the IRA's operation and social media platforms' indifferent attitudes towards such manipulation.

However, fairness and equal access to communicative resources can be guaranteed if social media companies review these accounts, providing "external oversight" to their posts and handle inappropriate content with care. Foreign political propaganda and intervention such as the ones conducted by the IRA had impinged on individuals' freedom to express from intervention. This results from social media companies' assumption that as merely public forums, they successfully protect the freedom of expression by providing a platform for individuals to communicate, which would eliminate obstacles to the free speech of individuals. With the example of political propaganda during the 2016 presidential election, this essay has proven that such platforms allow political propaganda to erode the human agency that emerged in free expression and are unfair to individuals who possess fewer opportunities to engage in communicative interactions. That said, social media has the ability to repurpose its platform and judge posts for public reference, encouraging individual self-realization by help promoting communicative justice.

Government Officials, Communicative Resources and Misinformation

Following the argument above, this part of the essay will return to President Trump's controversial tweet that shapes the makings of this debate (about social media companies, their responsibility to review posts, and the freedom of expression). This section will demonstrate social media's capacity to allocate communicative opportunities and promote equal participation in public discourse when authoritative/influential individuals abuse the principles of free speech.

The Trump Phenomenon: Misinformation in the Digital Age

When it comes to freedom of expression, the case of government officials is fundamentally different from that of other less influential individuals in politics. Swire et al. looks into the data behind political misinformation and its connection with the level of political support and comes up with the conclusion that the veracity as a prerequisite for supporting political candidates is often ignored by voters or listeners (Swire et al. 2017, 18). That is, politicians, presidential candidates in particular, have the privilege of expressing their opinions based on no evidence, but still enjoy a great amount of support from their audience. This phenomenon is problematic for the following reasons. As Moon mentioned, the value of free expression is that it leads to democratic deliberation where individuals communicate and interact to achieve the common good. Admittedly, there could still be individual realization in the communication between politicians and their supporters because they exchange opinions (informed supporters continue to offer their endorsement when misinformation takes place). These participants in public discourse do not strive to produce rational outcomes as an educated collective. It is then crucial for democracy, that politicians who bear the responsibility to lead civil societies, use public

forums wisely.

Unfortunately, this is not the case with President Trump. As an opening, this paper described the mail-in voting controversy that happened recently. President Trump infamously practiced similar tactics throughout his political career. On July 27th, 2020, Trump retweeted a viral video that was discredited by Facebook for pushing "false information about cures and treatments for COVID-19" (Papenfuss 2020). The video falsely claimed that hydroxychloroquine, a malaria drug touted by Trump, was a cure for the ongoing pandemic (Papenfuss 2020). The president's action was viewed as an attempt to promote the drug and would result in serious public health consequences if this advice was taken by his audience. In another incident, President Trump tweeted that "when the looting begins, the shooting begins" and asserted his determination on quelling the nationwide protests over George Floyd, whose death sparked a global campaign against racism and racial inequality (Dwoskin 2020). Amid a sensitive and deeply divisive political environment, this comment was generally regarded as an incitement speech that misled the public and created greater conflicts in America democracy. As a consequence, President Trump misappropriated social media as a public forum for free speech and used his considerable influence to mislead supporters toward confusion and distrust.

Enhancement of the Principles of Free Expression

Based on Moon's social understanding of free expression, misinformation by politicians and influential figures does not violate principles of the freedom to express. When politicians (as speakers) express their opinions (authentic or questionable) on social media platforms, they engage with the audience and foster a communicative relationship. For instance, the exchange of opinions between politicians and citizens on social media constitutes a communicative-interactive relationship. President Trump and his supporters exchange ideas in the comment section provided by Twitter, a public space where communication and interactions happen. Therefore, politicians do not inflict on principles of free speech when using social media to promote false information for political interests.

However, in this case, the utility of free speech is crippled and is counterproductive to advance democratic process. The element of human agency, or self-deliberation/ realization, is weakened. Misinformation itself produces negative outcomes for democratic discussions. Rather than creating a positive public space for intellectual debates, the spread of misinformation disrupts a productive democratic culture, ultimately generating confusion and distrust in the society. As mentioned earlier, the purpose of free expression is to help advance the democratic process. Thus, to prevent counterproductive outcomes produced by free speech, social media is justified to help improve online communicative space by giving more momentum to the principles of free speech. That is, social media can help enhance human agency (individuality) by providing additional factual information to facilitate individual judgments on politicians' posts. For instance, instead of removing President Trump's post on

mail-in voting, Twitter attaches a fact-check addendum and offers its judgment that the tweet had "violated its civic integrity policy," which "bars users from manipulating or interfering in elections or other civic processes (McCarthy 2020)." On Trump's potentially inflammatory speech, Twitter "put a warning label over the tweet, flagging it as violent content that broke the company's policies" (Dwoskin 2020)" For Trump's supporters, the additional information prompts them to pay greater attention to the importance to assess his messages critically, regenerating a focus on self-realization and rational evaluation.

Unequal Access to Communicative Opportunities

As much as there are interactions and human agency between the communicative relationship of President Trump and his audience, President Trump possesses much more communicative opportunities than average individuals. Consequently, the misinformation on his platform will be more influential than legitimate research results. As mentioned previously, Trump was able to reach more audiences than the renowned American newspaper New York Times back in 2016, when he was only a candidate in the US presidential campaign. As of the summer of 2020, President Trump has attracted 85.5 million followers on Twitter, while the traditional source of credible news such as the New York Times had 6 million digital subscribers with 47.1 million followers on Twitter (Scire 2020). If we consider the important role that social media has in shaping the public discussion, it is clear to see how President Trump has greater communicative power based on the number of people that he potentially influences. There is a hierarchy in the participation process, where President Trump's voice can easily be heard and discussed via his tweets, while traditionally more credible sources are relatively disadvantaged in reaching their audience.

Nonetheless, it is justified for social media companies to address this imbalance in communicative power, which promotes greater access to communicative opportunities for individuals who have more legitimate research findings. For instance, when President Trump tweets about mail-in voting, Twitter gives voice to researchers who verifies the validity of mail-in voting ballot by attaching a fact-check link to his tweet. This balances power-relationship between politically influential figures such as Trump and other individuals who participate in the public forum. Thus, judgments from social media seek to promote equal access to communicative opportunities.

Concerns on Censorship

This paper has contended that it is justified for social media to judge individual posts to further democratic process by protecting the right to free speech. However, this thesis should not be conflated with an argument for internet censorship. Opponents will potentially dismiss the purpose of this paper by claiming that judging individual posts constitutes internet censorship, which by nature is directly opposed to freedom of expression. The following paragraphs will argue against the opposing statement by showing that judging individual posts cannot be seen as internet censorship.

The action of judging individual posts, tracking and providing additional information to these posts, does not align with actions that constitute "censorship." The verb censor, by definition, means "to remove the parts of a book, film/movie, etc. that are considered to be offensive, immoral or a political threat" (Turnbull et al. 2010, 234). As we enter the digital age, "internet censorship" becomes a

new field of inter-disciplinary study. While scholars have not been able to come up with a consensus on a universal definition for this phrase, one of the first characterizations define internet censorship as "refusing users access to certain web pages without the cooperation of the content provider, the hosting provider and the owner of the client machine being used to access these pages" (Aceto and Pescapé 2015, 383). In association with social media firms, censorship refers to suppressing the publication of contents. For instance, Facebook calls its unposted thoughts "self-censorship," where a user starts writing a status, comment or other update but does not actually post it due to the company's deletion of the message (Sorensen 2016, 146). Thus, the link between judging posts and removing them once and for all is questionable.
The action of judging individual posts by caution its audience about its content does not prevent the audience from accessing the originating information contained in posts, and speakers can still be heard when the message is delivered by publishing their posts. This action, therefore, does not constitute "internet censorship." Moreover, as mentioned in previous cases, this paper argues that political propaganda violates the principles of free speech, and that misinformation does not apply the principles of free speech productively in a democracy. Whether it is justified for social media companies to censor its content is a separate topic from what is being discussed in this paper.

Social Media, Free Expression and Challenges

As an intermediary between speakers and listeners in the public discourse, social media can help uphold principles of the freedom to express and allocate communicative opportunities wisely to promote access to participation. However, there are two major challenges that must be addressed: protecting the privacy of individual users and ensuring the fairness of the redistribution of communicative resources.

In the political propaganda section, this paper argues that the active inspection of social media will help prevent foreign actors from impeaching the domestic freedom to express and occupying excessive communicative resources. However, this requires social media companies to judge individual posts by collecting or publishing at least part of its users' data, which will be equally essential to justifying companies' supervision on the content of social media posts. To address this concern, social media corporations should choose to protect their users' personal information and argue for the right to privacy as well. For instance, Bastos and Farkas' point out, political manipulation is difficult to evaluate because social media corporations refuse to provide "external oversight" to their data and offer "extensive anonymity for content producers" (Bastos and Farkas 2019, 1). Finding the right balance between the right to privacy and the right to the freedom of expression poses a problem for social media in performing its role in the public discourse.

In the misinformation section, this paper argues that social media's judgments on politicians' posts will help enhance the benefits of free expression by balancing the communicative power between the more-

influential and the less-influential. However, social media cannot stay impartial in deciding whose participation to improve or how to guarantee equal communicative resources for different communities. For instance, Zuckerberg argued that private companies should not be in the position of becoming "arbiters of truth" (Isaac and Kang 2020). After all, social media companies are no more superior than actual participants in public forums. Admittedly, it is difficult for social media companies to offer fair judgments in the public discourse. However, it is critical that they do so in order to uphold democratic deliberations and to ensure that citizens are able to differentiate between factual and non-factual information. This requires substantive fact-checking operations and thoughtful considerations behind the scenes to make sure that both the speaker and the audience's right to free speech are protected. For example, Twitter chose to add fact-checking addendums to its users' posts rather than blocking President Trump's post. While considering the audience's interests in viewing the post, Twitter does not violate President Trump's right to express himself freely.

Conclusion

Applying Richard Moon's social interpretation on the principles of the freedom to express, this essay had shown how additional information from social media platforms can help advance free speech and promote equal access to communicative resources. This essay had argued that it is because of the current inaction of social media that allowed political propaganda to thrive on the public forum, which results in an infringement on domestic participants' right to free expression. Although online interactions between influential speakers and their listeners do not necessarily violate the principles of free speech, it is unjust due to the nature of misinformation and the unequal distribution of communicative power/resources. The freedom to express is a key democratic practice. It is productive individual participation in public forums that lead to effective democratic deliberation, which will forward social and intellectual progress in the democracy. Admittedly, social media companies will face challenges if they take up the responsibility to actively defend the freedom to express. Nonetheless, in an increasingly digitalized world, the role of social media will only be more complicated, and the challenges will need to be addressed sooner or later. Hence, to protect the freedom to express and push forward democratic progress, it is justified for social media companies to take actions and begin to implement appropriate content moderation policies.

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Examining Waldron's Case Against Judicial Review through the Lens of the Dialogue Theory

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Introduction

There has always been debate regarding the legitimacy of government exercising power through the legislative, executive, and judicial branches. In 1982, the Canadian governments incorporated the Charter of Rights and Freedoms into its constitution under Prime Minister Pierre Trudeau. Since then, the Supreme Court of Canada (SCC) has attracted significant academic attention. Snow and Harding (2015) have identified these studies as having three distinct "waves", including theoretical prediction of social transformation, legitimacy debates, and comparative research situating Canada's case within a larger global project (451-52). This paper will focus on the second wave and its discussion around the growing influence of the SCC's judicial power on policy outcomes, specifically concerning rights. Judicial review is not a new phenomenon in Canadian legal history, but the Charter has enabled judges to interpret and uphold various rights now entrenched in the Constitution. Whether the SCC dictates policy agendas and rules over the Parliament remains contentious on both normative and empirical levels.

As one of the world's leading legal philosophers, Jeremy Waldron largely cites evidence from the United States to set the case against judicial review, which raises interesting questions in the Canadian context. For example, Peter Hogg and Alison Bushell have developed the "dialogue theory" to characterize the interaction between the judiciary and legislature with possibilities of legislative reversal, modification, and avoidance, which are unique to the institutional structure of the Canadian government. This paper then aims to pick up on this debate and seeks to answer to what extent the dialogue theory addresses Waldron's concerns about judicial review. It will be argued that the dialogue theory is incapable of dismantling Waldron's case against judicial review because this theory's reasoning itself is largely contested and judicial supremacy has permeated the Canadian legal system. This paper begins with a brief literature review to outline the major points of contention regarding the legitimacy of judicial review in Canada and attempt to situate Waldron's argument in this debate. Then, it utilizes Waldron's four assumptions as the criteria to assess Canada as a case study. In this section of the paper, the dialogue theory is examined for both outcome- and process-related reasons as distinguished by Waldron to justify or attack judicial review. In the end, a few insights are offered to address the direction for future research on similar topics.

Literature Review

The proponents and critics of judicial review diverge from each other in the legitimacy debate due to their perceived conceptual issues with democracy. Supporters argue that the increased judicial power as a result of constitutionalism helps the already disadvantaged minority groups gain more influence in the policymaking process. This argument stems from the broader legitimacy debate and is not necessarily unique to the circumstances in Canada. For example, American scholar Ronald Dworkin (1995) argues that mere majoritarianism does not constitute democracy because it does not convey legitimacy (2). He endorses a "communal" conception of democracy rather than "statistical" because a majority of people favouring one decision rather than another does not in itself justify the coercion of the minority. Dworkin believes that democracy requires all citizens to participate in political decision-making as free moral agents and that all citizens are treated with equal concern in this process (4-5). Along similar lines, Lorraine Weinrib (2001) argues that the Canadian Charter's formulation lends itself to democratic legitimacy, as the widest array of interests, especially from the politically powerless groups, are being represented. These groups simply demanded "inclusion" to be the equal subject of Canadian public life, together with all their counterparts (83-84). For Weinrib, the opponents of judicial activism appear to be some social conservatives whose underlying commitment is to maintain "an unchanging and unchangeable political order", but the Charter was designed for the very purpose of transforming the Canadian legal system (80-81). In contrast, critics like Morton and Knopff reject the establishment of a constitutional rights regime because they insist such judicial activism is inherently undemocratic. In one of their most influential works, Morton and Knopff (2000) verify the existence of a so-called "Charter revolution", and express concerns towards the "Court Party". They claim that neither the judiciary nor the Charter itself should be alone responsible for the rights revolution in Canada while some interest groups push these institutions as much as being led by them, which creates a new power structure in society. Contrary to the claims of some proponents, the judiciary is not vastly different from the legislature for being a partisan institution after all (24-29). Morton and Knopff argue that this judicialization of politics promoted by the Court Party essentially erodes both the process and spirit of liberal democracy in which diverse groups attempt to compromise and join each other to form a governing majority (149).

Different conceptions of democracy fundamentally lead to different opinions regarding who should make the final decision when it comes to public policies involving rights. There is a distinction between parliamentary supremacy, judicial supremacy, and constitutional supremacy. It would be fair to make a generalization that most opponents of judicial review advocate for parliamentary supremacy, but judicial supremacy is not always viewed as most favourable by either side. For example, Christopher Manfredi (2001) presents a paradox embedded in liberal constitutionalism, which is to enhance the government's capacity and state power through institutional constraints (xii). If judicial review is an indispensable key element of liberal constitutionalism, and political power is limited only by a constitution whose meaning is defined by courts , then judicial power itself is no longer constrained by any constitutional limit. Manfredi thinks that constitutional supremacy does not automatically imply judicial supremacy, and unlimited judicial enforcement of individual

liberty may paradoxically destroy citizens' most important right to self-government (21).

Hogg and Bushell (1997) take a stance in between and hold a relatively optimistic view in this debate, but their dialogue theory has generated its own academic debate. They argue to an extent that the policy outcome after judicial review could be a collective decision reached by both the judiciary and legislature. They characterize the relationship between these two branches of government as a dialogue because judicial decisions are open to legislative reversal, modification, or avoidance in Canada. After a law is struck down by the court on Charter grounds, the legislature can enact a new law that respects Charter values and meanwhile still accomplishes the social and economic policy objectives that the judicial decision has impeded (79-80). This theory indeed makes some compelling arguments, but the critics of judicial review do not seem to be convinced. Morton (2001) contests the definition of "dialogue" and argues that mere obedience to court orders should not count as "dialogue", but rather resembles a judicial "monologue" (111-12). The interaction between the judiciary and legislature in policy-making is much more complex, and judicial decisions often entail unexpected political consequences (114-16). Similar to Morton's rejection, Manfredi and Kelly (1999) question the empirical demonstration of the dialogue metaphor as asserted by Hogg and Bushell, but also highlight a few normative issues. They contend that the dialogue theory is still not sufficient to justify any policy distortion as a result of judicial review (522). Most importantly, this theory is flawed because it is based on an assumption that the judiciary has a monopoly over the correct interpretation of the Charter; in other words, the assumption that judicial supremacy always prevails. This would be against the intention of conducting a dialogue between two equal parties (523-24).

The literature review provided here is not intended to be comprehensive, as only the major authors whose works are relevant to this paper's scope are referenced here. Waldron's argument has gained prominence in this paper because he identifies the essential points at issue for this debate. In one of his most influential papers, "The Core of the Case Against Judicial Review", Waldron (2006) presents his case on the normative level because he thinks that support for judicial review reflects support for particular court decisions, and a compelling normative argument could set up the foundation for further discussion of whether judicial activism should be regarded as an exception to this normative tendency (1351-52). There is no doubt that Waldron sides with the critics of judicial review. He argues that judicial review does not necessarily better protect rights than the legislature does, meanwhile it is democratically illegitimate (1375-76). The following section of the paper closely examines Waldron's argument with respect to his assumptions, definition, and reasoning. The dialogue theory developed by Hogg and Bushell will be tested as a potential solution to Waldron's puzzle.

Case Study: Canada and the Dialogue Theory

Waldron's Four assumptions

Waldron has made it clear that his argument against judicial review is not uncondi-

tional but depends on certain institutional and political features of modern liberal democracies (1353). That being said, if any of these conditions fail, the argument may not hold. However, this does not suggest that any or all liberal democracies will happen to fall under the category that he describes. Waldron admits that his argument might appear to be problematic in application, but he insists its validity on its own terms (1360). Therefore, any compliance or dissimilarity between these assumptions and the case study will not be the main focus of this paper, but to serve as a complement to the normative reasoning.

The first assumption that Waldron's argument is premised on is that democratic institutions are in "reasonably good working order", including a representative legislature elected based on of universal adult suffrage. The key to this assumption is responsible deliberation and political equality (1361-62). As recognized by Waldron, these institutions do not have to be perfectly reflective of the ideal, so the Canadian model satisfies this requirement despite certain minor flaws. Canada has a fair and transparent electoral process as one of the world's leading liberal democracies. Since a number of reforms were successfully implemented over the last century, women, ethnic minorities, and Indigenous peoples in Canada have now been enfranchised to vote in elections, and no identifiable social group is still excluded from the electoral process due to arbitrary reasons. Some might argue that deliberation indeed takes place in all levels of legislative chambers, but it is largely constrained within party discipline due to Canada's single member plurality voting system. This is an unfortunate outcome of this particular electoral system, but it does not hinder the legislature from being responsive to public opinion and interest.

Meanwhile, Waldron assumes that judicial institutions, also in reasonably good working order, are established on a non-representative basis to hear lawsuits, settle disputes, and uphold the rule of law. For Waldron, the judiciary differs from the legislature because it is insulated from electoral accountability and political pressures so that it could best perform its duties (1363-64). In Canada, the SCC justices are appointed by the governor general based on the advice of the prime minister. At first glance, this appointment procedure ensures that the judiciary is politically independent from the legislature, but it remains questionable whether it is completely shielded from political influence, especially if Morton and Knopff's criticism of the Court Party is taken into consideration. Morton and Knopff argue that courts would not have attained their current political significance in Canada without the influence of the Court Party (59). For the purpose of this paper, it will be acknowledged that court decisions may not be issued in a political vacuum, but courts may still carry out their functions according to legal principles.

Furthermore, Waldron's argument requires a society where the majority of its members and officials are committed to individual and minority rights. This does not have to contradict their belief in majoritarian rule as a general principle for politics. It simply means that members of the society have a general consensus to respect individual and minority rights to the extent that an official legal document of rights has been adopted (1364-65). While Waldron leaves the types of these legal documents open, the Charter has gone a step further because it is entrenched in the Canadian Constitution. While this trait is particularly interesting when it comes to the discussion of constitutionalism, it does not significantly affect the validity of Waldron's reasoning.

Therefore, it would be reasonable to infer that Canadian society satisfies this requirement. Whether it is in the political arena or through mass media, Canadians keep their own and other's views on rights under constant consideration and engage in lively debate. Even if people disagree about what rights there should be or to what extent they should be exercised, a general recognition of rights as being valuable would be enough to demonstrate their commitment. As Waldron explains, the debate over judicial review should not be understood as a confrontation between defenders and opponents of rights, but rather a confrontation between different views of rights (1366). This reflects his view that, rather than outcome-related reasons concerned with what rights are actually achieved, process-related reasons as embodied in normative arguments offer more value for discussion. This point will be elaborated on in more detail later in this paper.

In addition to the third assumption of a consensual commitment to rights, Waldron specifies that these members of the society do in fact hold persisting and substantial disagreement in good faith about what this commitment amounts to and what implications there are, including the judges. Waldron explains that different conceptions of a right do not by any means undermine people's sincere adherence to it; in other words, this assumption does not interfere with the third assumption mentioned above (1366-68). Moreover, Waldron adds that an official legal document of rights should have a bearing on how such disagreement is to be resolved, but it does not sufficiently determine a resolution beyond reasonable disputes by itself (1368-69). This is the case in Canada. The majority of landmark Charter cases have been subject to heated debates among the public as well as in both the legislature and the judiciary. Although the Charter has listed the rights protected under the Constitution, the SCC's interpretation of these rights sometimes not only fails to settle these disputes, but also fuels cleavages in society. As will be discussed further in this paper, disagreement over Charter interpretation is a distraction which can be boiled down to a disagreement over different conceptions of rights, which is the reason why Waldron would set the case against judicial review.

Strong vs. Weak Judicial Review

After assessing Canada according to Waldron's four assumptions, it can be concluded that Canada qualifies as a nation that fits his criteria, and is appropriate to verify his argument. It is important to note that Waldron's opposition to judicial review mainly targets strong review. As defined by Waldron, a strong form of judicial review ensures that courts have the authority to decline the application of a statute, to modify its effect, or even to entirely strike it down, if it does not comply with individual rights (1354). By contrast, in a system of weak judicial review, courts may only scrutinize the legislation for its conformity to individual rights and issue declarations of incompatibility with no binding legal effect (1355-56). Waldron singles out Canada as an intermediate case by referring to Section 33, the notwithstanding clause, as a mechanism for the legislature to defy judicial review decisions. Practically, this provision has been rarely invoked, and as such, Waldron disregards this formal availability of override and counts Canada as having a strong judicial review in-

stead (1356-57). This paper raises the question of whether the dialogue theory can effectively challenge this categorization and whether it consequently provides additional legitimacy in support of judicial review in Canada.

The dialogue theory may have intended to defend judicial review in Canada as a weak-form review, but the fact that judicial review fundamentally shapes the policy agenda of the legislative process either with or without litigation essentially undermines its legitimacy. Hogg and Bushell have emphasized the possibility of a judicial decision being reversed, modified, and avoided by the legislature, and they argue that the SCC often does offer a suggestion as to how this law could be modified in order to solve its unconstitutionality when it is being struck down (80). Surveying a total of sixty-five cases in which a law was struck down by the court, they find that 80% of them have been followed by "legislative sequels" (97). In their opinion, the SCC's function through judicial review is to bring up Charter rights concerns to the legislative agenda, but the policy outcomes nevertheless are always self-conscious decisions of the legislature, which makes them democratic as a result. Legislations can indeed be struck down by the court, but this is not the end if the legislature can enact new ones in response. Striking down a law then seems to serve more of a suggestive function in this scenario. However, as Manfredi and Kelly have pointed out, the dialogue theory would be insufficient to justify judicial review because policy distortion often occurs before the dialogue even takes place. Under the constant threat that the legislation could be potentially struck down by the court, legislators might intentionally choose policies that are less effective but more easily defensible to avoid future challenges (552). This shows that the suggestive effect of judicial review might have gone beyond the aftermath of judicial decisions and might have even set the stage for democratic deliberation in the first place. This does not constitute a part of the dialogue theory as envisioned by Hogg and Bushell, so the policy deviance from its original intent cannot be justified by the theory accordingly.

As much as the dialogue theory itself is being contested, judicial review in Canada is always legally binding even if the legislature fails or refuses to respond to its decisions, which still makes it a strong review in the end. Section 24 of the Charter (1982) grants the court authority to enforce guaranteed rights and freedoms, and Section 33 outlines the only possible exception to operate the unconstitutional law notwithstanding the Charter provisions, which is to expressly declare it in an act of the legislature. These two sections have together paved the way for judicial supremacy in Canada. After a law is struck down by the court, the legislature only has two options: to accept this decision and repeal the law, or to amend this law and defer to the court ruling. In the former of these two scenarios, the law will remain in no force or effect following the legislature's inaction to respond to the court ruling, which could be a result of the legislature failing to balance all the interests and reach a consensus. As for the latter, if the legislature still seeks to achieve its intended policy objectives, it has no choice but to amend the means by which they are achieved so that the law can be compatible with the Charter. Since it has been difficult to establish fully justifiable grounds to invoke Section 33 of the Charter, thus why it has been rarely used, judicial decisions usually stand regardless of legislative sequels. This shows that judicial review in Canada is not merely a suggestion from the judicial branch of the government, but rather forced upon the legislature.

In recent years, newly emerging scholarly work has confirmed this trend. Emmett Macfarlane (2012) develops an empirical framework to assess whether and how the dialogue operates in practice. He argues that neither the legislature nor the court should have the final say all the time in order for the dialogue theory to be considered the middle ground between parliamentary supremacy and judicial supremacy (43). However, among a total of 69 instances in which the SCC declared a law to be unconstitutional by the end of 2009, 33% of the time the legislature offered no response, and 38% of the time legislative enactments simply adhered to the SCC's rulings without demonstrating a clear intent to modify, avoid, or reverse the SCC's decisions (43-48). Since genuine dialogue rarely occurs in Canada, Grégoire Webber (2009) claims that the dialogue theory's potential, which lies in its challenge to judicial supremacy over constitutional interpretation, is largely unfulfilled (446). Structural features of the Constitution, which seemingly guarantee a weak form of judicial review, do not in and of themselves constitute a dialogue, which requires a mutual commitment to the sharing of responsibility in constitutional interpretation through its political culture (457). Cases such as Carter v. Canada (Attorney General) (2015) are generally viewed as an outlier because of the government's insistence on a coordinated construction approach to equally participate in constitutional interpretation with the court in the succeeding policy processes (Nicolaides and Hennigar 2018). Although this approach aligns closely with the "genuine" dialogue as envisioned by Macfarlane and Webber, the fact that such cases shift the focus of the debate over rights to constitutional interpretation might still concern Waldron for outcome-related reasons below.

Outcome- and Process-Related Reasons

The core of Waldron's case against judicial review lies in the distinction between outcome-related reasons and process-related reasons. Waldron argues that, since members of the society are committed to rights but also disagree about rights, a means for settlement is needed to provide a basis for common action (1369). Such a decision-procedure should reflect a theory of legitimacy that both sides of the debate share in order to reconcile their moral disagreement (1371). Simply put, instead of making a fuss over the truth about rights, a legitimate decision-procedure seems to be more tangible and effective in settling rights-related disputes. This argument itself has already revealed Waldron's process-oriented thinking before he moves on to claim that focusing on outcome-related reasons is likely to exacerbate the controversy. Selecting a procedure which yields a particular set of rights in favour of one side can hardly command the allegiance of the other, so procedures which enable people to get at the truth about rights, whatever it might be, should be selected instead (1373).

According to Waldron, outcome-related reasons at best render inconclusive results in support of the case for or against judicial review, which means that the judiciary does not necessarily protect rights better than the legislature does. Since the dialogue theory has failed to establish judicial review as a form of weak review, post-review policy outcomes in Canada are forged by the court in a sense. One

of Waldron's outcome-related reasons against judicial review is that theories of interpretation could distract judges' attention from the discussion of moral issues, which does not guarantee to provide a satisfactory account of rights at issue and therefore undermines the quality of policy outcomes (1381). Since the Charter came into being, the SCC has received a mix of support and criticism in terms of how it has interpreted the Charter and the rights embedded in it. Canadian judges often resort to the "living tree" principle to justify their innovative interpretations that deviate from the textual meaning and original intent of the drafters. This metaphor was first coined by Lord Sankey in Edwards v. Canada (Attorney General), also more commonly known as the Persons Case, in 1929. It was later referenced in Charter cases by the SCC judges, such as Chief Justice Lamer (as in Re B.C. Motor Vehicle Act) and Chief Justice McLachlin (as in Reference re Same-Sex Marriage). This approach has never been short of opposing voices despite its wide application in constitutional interpretation. The living tree principle is just one of the examples to show how judicial interpretation could dominate the primary concern of judicial review and shape the legal landscape in Canada, which is exactly the reason why Waldron would set the case against judicial review.

On the other hand, process-related reasons in favour of parliamentary supremacy seem apparent to Waldron since he believes in the reasonable fairness and equality offered by the democratic process. While majoritarian rule in the legislature has been criticized by the proponents of judicial review for being arbitrary to minority groups in society, it is undeniably true that it at least provides a viable theory of legitimacy, compared to upholding the judiciary as a counter-majoritarian force (1387-92). Outcome-related reasons have already demonstrated that courts do not offer better reasoning than the legislatures in determining individual rights. If the court's reasoning in textual interpretation and adherence to precedents is valued and viewed as legitimate, rich political deliberation in legislative chambers should have gained more praise (1382-84). All the process-related reasons should equally apply since Canada satisfies Waldron's first assumption of having democratic institutions in reasonably good working order. Unfortunately, the dialogue theory premised on an underlying assumption of judicial supremacy turns out to be a judicial monologue in practice, so it leaves very little room for the legislature to maneuver policy outcomes and prove its value.

Conclusion

This paper presents an innovative perspective of judicial review by using Canada and the dialogue theory as a case study to engage in a hypothetical conversation with Waldron. After considering arguments from both sides, the dialogue theory fails to meaningfully challenge Waldron's case against judicial review. The Canadian liberal democracy possesses both legislative and judicial institutions in reasonably good working order, while members of the Canadian society commit to individual rights but hold disagreement about rights, which satisfies the assumptions of Waldron's argument. Emerging as a potential solution to reconcile the legitimacy debate over judicial review, the dialogue theory has been called into question on both empirical and normative levels. Therefore, it fails to defend judicial review as a weak-form review, and judicial supremacy in constitutional interpretation prevents the legislature from asserting different views in response to judicial decisions. This greatly undermines the legit-

imacy of judicial review since courts are no more qualified than the legislatures in making rights-related decisions.

Canada in itself demonstrates some unique institutional traits, but to what extent these traits justify or challenge the legitimacy of judicial review still requires further examination. Waldron's argument certainly casts some new light on this area of studies, and the Canadian case also contributes to the understanding of Waldron's argument accordingly. In addition to this paper's content and scope, it might be helpful to cite a few more Charter cases in Canada as evidence of support. A closer examination of the underlying principles of these decisions may also help to make a normative judgement regarding the inherent legitimacy of judicial review. Waldron seems to be tolerant of a variety of conceptions of rights, but he also relies on an idealized view of political equality through the mechanism of voting. The dialogue theory is formed through an empirical observation of Charter litigation, so it does not necessarily reveal the nature of the legislative branch. For future inquiries, it would be interesting to explore whether the structure of Canada's democratic institutions imposes any limitations on Waldron's case against judicial review beyond the dialogue theory's scope.

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Respectability Politics and the Rights of Queer and Transgender People: Critiquing an Obsolete System in the 21st Century

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Introduction

For many, the quest for gay rights ended with the advent of marriage equality; yet while the issue monopolized the movement's financial and social resources, it was not the sole item on the LGBTQ advocacy agenda (Rayside 2016, 263-64). In the long protest wave that swept across Europe and North America in the 1960s, few activist movements can claim as great an impact on public policy and popular beliefs as advocates fighting against the social and political marginalization of sexual minorities. This is particularly true in Canada, where the lesbian, gay, bisexual, transgender movement secured major gains from the mid-1980s onward. Although I do not claim that the LGBT movement has eliminated inequity and prejudice based on sexual difference, or that all observers agree on how much has been won, the Canadian case raises important questions. Prioritization of marriage equality caused certain voices within the community, namely queer and transgender people, to be silenced and ignored. This marginalization has not been without material effect with regards to said groups, whose rights claims have been considerably complicated *legally*, and relegated to the 'back burner' *socially*.

This paper will seek to illustrate how the marginalization of queer and trans people —especially those of a racial minority— can in part be attributed to the concept of 'respectability politics' in the LGBTQ rights campaign. In its simplest form, respectability politics espouses the view that minorities who act in a 'respectable' manner will persuade the dominant group to extend the same rights protections to said minority that they extend to themselves. Furthermore, the argument that respectability politics will have to be abandoned in the quest for truly effective queer and trans rights is supported by literature on LGBTQ rights and Black rights advocacy. Naturally, it would be reductive to compare the marginalization of Black people to that of LGBTQ people simply based on their status as historically disadvantaged groups; as such, that is not what this paper argues. Rather, this paper seeks to illustrate that the doctrine of respectability politics —widely applied by the civil rights movement of the 1960s— is extremely similar, if not identical, to strategies deployed in the mainstream LGBTQ rights movement. Through studying the limits of respectability politics for the Black rights movement, we can draw inferences regarding its (in)effectiveness for LGBTQ rights claimants, specifically queer and trans people.

This paper will first discuss the pitfalls of respectability politics with regards to the civil rights movement of the 1960s, specifically the strategy's tendency to silence voices who fall outside a slim 'respectably Black' subgroup. Following this, the historical treatment of Black LGBTQ people within the Black community will help illustrate the link between respectability politics and support of marginalized subgroups. Subsequently, this framework will be applied to the fight for LGBTQ rights, to show how the same phenomenon has occurred within the LGBTQ community (regarding both racism, and trans and queer ideas). Finally, using the concept of homonormativity, this paper will argue that respectability politics is no longer compatible with true queer and trans rights protection, just as it is no longer 'simpatico' with the modern-day Black Lives Matter (BLM) movement.

Section I: Essence of Respectability Politics

Respectability politics, taken to its most base roots, is quite a simple concept: groups who seek rights should present themselves as 'worthy' of respect from the dominant class. If they can prove said worthiness, rights will follow. For the civil rights movement, the doctrine of respectability politics took the form of Black people calling out and eliminating the "bad" traits present in their community (Harris 2014, 33). This strategy was designed to uplift Black people through the elimination of stereotypes of inferiority, and it would be executed through the careful cultivation of the Black citizen as successful, moral, and generally "upright" (Obasogie and Newman 2016, 546). As Obasogie and Newman note, respectability politics is about "incorporation into the hegemonic normativity of whiteness" (2016, 548). We can read this as seeking inclusion in an existing system, without seeking to change pre-existing norms and parameters for what is good or acceptable: this key characteristic is instrumental for our understanding of the limits of respectability politics, as it elegantly sums up what the doctrine can and cannot accomplish.

Proponents of respectability politics would argue that it acts as a vehicle for the deliverance of rights, while uplifting rights claimants in the process. This way of thinking is not some 'antiquated' conception of rights: even President Obama chose to focus more on the respectability of actions rather than the underlying issues that caused them when he said that Black citizens over the years have, at points, "lost our way" (referencing riots and other 'non-respectable acts') (Harris 2014, 37). We must not entirely discount the use of respectability politics, as it has been effective in the past; however, it has only been effective for the portion of Black citizens who were able to mould themselves into a White-approved form, a key issue. The dominant White system during the 1960s rights movement held some fairly exclusionary values, and those values became reflected in what Black citizens had to embody to become 'respectable.' This process included correcting for traits that did not reflect an adequate level of 'civility,' reinforce the notion of the nuclear family, or any number of other social phenomena that reflected a different norm than that of the predominant culture.

Such a preoccupation with countering negative stereotypes resulted in narrow representations that ignored the complexity of Black culture, pushing marginalized groups such as women and LGBTQ people to the periphery (Griffin 2000, 34). While both Black men and women had to edit aspects of themselves to appear respectable, the pressure placed on Black women was particularly intense. This is often illustrated by the extra requirement for Black women to abandon their

natural hairstyles, uphold even higher standards of behaviour than their male counterparts, and to hold important places in organizing the civil rights movement while oftentimes operating in the shadows (Ford 2013, 632). The treatment of Black women would therefore come to mirror the treatment of women in general as the 'subordinate' gender, as respectability politics often required the men to 'take point' in accordance with White European culture.

Here we encounter the core critique of respectability politics: though it was successful as a tool for gaining civil and political rights in the 1960s movement, it failed as a vehicle to address the general subordination of Black people that continues today (Harris 2015, 34).[1] Respectability politics is fundamentally a tool for inclusion in an existing system, rendering it ineffective when attempting to change the terms upon which a system is predicated. In other words, it is ill-suited when the task at hand is changing dominant structures of authority to view 'un-respectable things' as worthy of rights protection, rather than changing those things to match existing rights protections. Of course, the term un-respectable here means not objectively undesirable behavior or identity traits, but rather what is not considered acceptable by the dominant class and institutions.

Cathy Cohen, in her oft-referred to piece surrounding AIDS and marginalization in the Black community, notes that certain members —middle-class, heterosexual men— are taken as markers of the general status (positive or negative) of the entire racial group (1999, 12). Members of the group who experience struggle outside of this relatively privileged subsection, often considered "marginal or a blight on the community," must fight for recognition in Black politics (15). Since these groups are often stigmatized by dominant systems, the Black body politic is forced to choose between legitimacy accorded to them by dominant institutions, or the protection of their vulnerable minorities; this often results in the Black community separating its "respectable" members from its "deficient" members, as Cohen puts it (15).

Cross-cutting issues —those affecting only a specific portion of the Black population, and at an intersection with another part of their identity— were dismissed on one of two grounds: that 'respectable' members of the Black community would not engage in such un-respectable behavior; or that the issue was primarily one belonging to the other part of that group's identity, making it an issue of gender or sexuality rather than of race, for example. (Spence 2019, 194). The rights claims of these secondary groups, also known as subgroups, could not be accommodated by the Black political agenda of respectability because they were not seen as respectable in the eyes of the dominant White system. Choosing to aid their marginalized subgroups would, in effect, destroy the credibility painstakingly established by members of the Black community who were able to mold their identities to White norms. For clarification here, Spence discusses the Black community's relationship with HIV/AIDS: those with the disease were shunned by the Black community because 'respectable' people would not engage in drug use, or have

1 Such subordination exists most visibly in policing, but in other forms as well. For example, the residual effects of redlining and suburban shifts on inner-city living, or differential treatment in education systems.

intercourse with others of the same sex (194). Taking ownership for Black people who engaged in these activities would have harmed the carefully cultivated image of the respectable and upstanding Black citizen, so they were framed primarily as drug users or sexual delinquents, and ignored.

Respectability politics is also predicated on the idea that the 'other' should conform to White ideals, insofar as it requires that rights claimants change themselves to fit into existing dominant frameworks. Arguably, the civil rights movement of the 60s was correct in its approach, as simultaneously challenging both the rights void and the system of White norms under which said rights functioned would have made the movement's existence untenable. Modern-day Black rights movements (BLM) no longer prioritize the notion of respectability and are therefore able to advocate for change outside frameworks of existing systems and institutions, a concept which will be discussed in further detail below.

Section II: LGBTQ People of Colour and Respectability Politics

Although this paper seeks primarily to address trans and queer people of colour, this section has been generalized to reflect the similar treatment gay, lesbian, and bisexual people of colour receive. The literature on the junction between sexuality and race highlights the Black community's historical (un)willingness to publicly back its LGBTQ members. Lewis points out that this difference has resulted in reluctance on the part of the Black community to openly support LGBTQ members of their community in a variety of environments, but especially regarding HIV/AIDS. (2003, 61). On its own this would be unremarkable, most every racial group has at one time or another discriminated against their LGBTQ members. However, the interplay between ideas of linked fate and respectability in the Black community and the according marginalization Black LGBTQ persons face *in addition* to the normal barriers said persons would face from any racial group are interesting. Moore points out that homophobia in the Black community is more prevalent than in the White community, which is often attributed to "older age, lower levels of education, and greater religiosity of [Black people] in research samples" (2010, 317)gay, bisexual, and transgender (LGBT. Moore and others counter this by pointing out that Black people of the same religion and similar education levels as White people were still more likely to have a negative view of homosexuality (Moore, 317)gay, bisexual, and transgender (LGBT, (Lewis 2003, 75). It seems unlikely that Black people are inherently more homophobic than people of other races, so where could a potential explanation lie? It may be possible to link this negative predisposition to the Black community's history of oppression and re-representation of itself to fit White norms.

During the 1960s, attitudes were decidedly anti-gay, meaning any attempt by Black people to present themselves as respectable under the White-dominated system would generate or perpetuate negative attitudes toward LGBTQ people. Bunyasi and Smith note that more recent talk about Black LGBT issues is overwhelmingly silent, and hypothesize that respectability politics as a limiting factor of linked fate ('what is good for me is good for my race') may have something to do with support for LGBTQ and other issues (2019, 192-93). Indeed, the authors point out that Black respondents who highly support respectability politics and linked fate are respectively 18 and 20 per cent less likely to support transgender, gay and lesbian Black people than they would be if they endorsed high linked fate and low respectability politics (205). This suggests an

ongoing linkage between the degree to which a respondent supports respectability politics and their support for secondarily marginalized peoples such as Black members of the LGBTQ community. Pender, Hope, and Riddick further support this when they note that homophobia in the Black community is strongly grounded in racial oppression, as well as power dynamics surrounding Black heterosexual patriarchy (2019, 531).[2]

Additionally, Moore divides her study into age cohorts and finds notable differences in how LGBTQ Black people born in different decades feel about the dynamic between their racial and sexual identities. Those born after 1980 are more willing to express unhappiness with pressure to hide their sexuality than those born in earlier decades, while all groups still hold a strong connection to their Black identity and community; in other words, a sense of linked fate (321) gay, bisexual, and transgender (LGBT. As a whole, civil rights era respectability politics could be acting as a kind of generational trauma, insofar as many members of the Black community may feel that chances of prosperity for their community as a whole are still governed by said doctrine. However, Moore's study may point to Black LGBTQ people slowly exonerating themselves from the cloak of disapproval placed on them by respectability politics. In short, Black LGBTQ persons are gaining more substantive membership in their community because the pall cast over non-heterosexuality by civil rights-era respectability is slowly being lifted. Of course, we must account for variance in opinion due to political ideology, religiosity, and other factors that will create differences of opinion in any racial group; however, it is plausible to draw a linkage between the embrace of BLM's rejection of respectability politics by typically younger people, and the difference in opinion dependent on age that Moore highlights.

Section III: The Abandonment of Respectability Politics Regarding Racial Justice

Given the previous two sections, we can effectively surmise that respectability politics means that groups such as the Black rights movement, historically, have been unwilling to champion the rights of those considered to be on the margins of their community, and whose issues happen to intersect with other marginalized groups. This has real and substantive effects for said marginalized groups, who are oftentimes unable to seek support from any of the larger rights-claiming communities they belong to. Practically, the unique challenges posed by female, LGB, and queer and trans issues or rights are necessarily 'thrown to the curb' by respectability politics to the degree that the doctrine allows support only for 'attainable' (read: 'respectable') rights within the current system. Furthermore, frameworks of respectability remove from the table any talk of systemic reform, something that is required if we are to recognize that the current conception of rights may not serve all racial (sub) groups equally well. It is here that we encounter Black Lives Matter. BLM does not subscribe to respectability politics, as evidenced by its protest and advocacy tactics which embrace emotionally-charged "expressive behaviour" and espouse Black humanity rather

2 . Religiosity also plays a role. Higher levels of religiosity in the Black community may or may not be linked to racial oppression and respectability, but studying this point is beyond the scope of this paper.

than respectability (Tillery 2019, 304), (Harris 2015, 37).

Additionally, Black Lives Matter makes a point of advocating for Black people previously left on the outskirts of rights movements, including women, queer, and trans people (Furman et al. 2018, 36). This is possible because the BLM movement —unlike its historical brethren— no longer seeks to obtain rights under a White-dominated system: it seeks to change the system to make the appropriate rights possible. For this reason, Black Lives Matter will never be compatible with respectability politics. As discussed above, Obasogie and Newman note how respectability politics are rooted in the notion that gaining the respect of dominant institutions will result in rights acquisition for Black people, meaning the strategy is designed around conformity rather than broad social reform as a rights vehicle (2016, 548). Since respectability is designed around individual actors and 'betterment,' systemic reform is conveniently not something its framework is capable of addressing. BLM counters this by supporting the notion that "all Black lives matter," rather than only those whose actions reflect "predefined norms of civility," civility referring to what is 'respectable' (553). This reinforces the notion that the Black rights movement has reached and surpassed the limit of what respectability politics can offer: if the goal of BLM is the promotion of rights for classically 'un-respectable' subgroups, then a different strategy is required.

The newfound uselessness of respectability to the Black Lives Matter movement is also reflected in their stance on policing and police reform. BLM seeks not to persuade vulnerable Black people to 'act better' in interactions with dominant systems, but to change how dominant systems interact with Black people. Respectability politics does nothing when seeking systemic change because it is predicated on the assumption that the system is correct. Richardson, in a study that interviewed several Black Lives Matter founders, concludes that the participants welcomed and advocated for "many varieties of Blackness" as opposed to the monolithic singular identity model employed in previous decades (2019, 209). This paper is neither advocating for systemic change nor arguing against it, as it is beyond the scope here to analyze whether new systems are required, or if existing ones can be modified; it is true, however, that some queer and trans rights do not fit within current frameworks, as discussed below. This allows the Black Lives Matter movement to advocate for, using Cohen's terminology, cross-cutting issues that the doctrine of respectability would have rendered irrelevant. BLM is able to advocate for Black people who are LGBTQ, who are women, or who find themselves at the intersection of Blackness and any other subgroup or marginalized identity. In abandoning respectability politics, BLM may thereby advocate for strong systemic change for both its most, and least visible members. This stands in stark contrast to the view that individuals should change *themselves*, such that they may be compatible with existing rights frameworks.

Section IV: Queer & Trans Challenges Regarding the Gay Community

Situating Queer & Trans Issues Relative to the Larger Movement

This section of the paper will endeavour to show how comparisons can be drawn between the Black rights movement and its classically marginalized subgroups, and the LGBTQ rights movement and its marginalized subgroups with regards to the politics of respectability and its detrimental impacts. Additionally, this section will suggest that —as is the case for BLM— respectability politics has

outlived its usefulness for the LGBTQ rights movement as it seeks rights that will properly represent its queer and trans members, rather than a monolithic representation of such groups that ignores the true diversity of the movement.

Important for clarification and also to set the stage here: 'queer' is not used in this paper as an umbrella term for the movement, but rather to represent ideas running counter to dominant social norms, thereby "[resisting] and [rejecting] the very categories of sex, gender, and sexual orientation that [are] used by the mainstream LGBT movement as a basis from which to gain recognition and legal rights" (Bernstein and Taylor 2013, 13). With regards to agenda-setting, this places those in the LGBTQ community who support queer ideas at odds with those who support marriage or homonormativity, resulting in disagreement regarding the use of the movement's finite amount of resources. There is seldom unanimous agreement as to the direction that should be taken when in uncharted territory, and the LGBTQ movement is no exception. Additionally, when there is internal debate, one or more subgroups will often 'win' said debate, at the direct expense of one or more others: in this case, queer and trans subgroups 'lost.'[3]

We have seen this in the development of queer and trans rights, which have indisputably lagged behind those of lesbian and gay rights. No one factor is solely responsible for this, but this section will seek to outline how respectability politics, as it has marginalized certain racialized subgroups, has had the same effect on certain LGBTQ subgroups. Both Daum and Rosenblum point out that the prioritization of same-sex marriage had the effect of minimizing trans and queer rights as an agenda item but also by nature: same-sex marriage is a flawed base from which to build trans and queer rights because said rights are not necessarily compatible with the existing heterosexually-defined system (2017, 354), (1994, 95). Furthermore, the marriage equality movement focused on rights parity for all, regardless of sexual orientation; this strategy does not serve queer legal needs, as they cannot be properly incorporated into the existing system, since protecting such rights requires acknowledgement that some rights must be directed at a more specific subgroup such as queer and trans people in this instance (Rosenblum 1994, 95). It is important to note here that the rights milestones achieved by the marriage equality movement are not in and of themselves bad, as they do represent a sizeable leap in same-sex rights. The core issue is that they made the development of queer and trans rights more complicated, in part due to the legal and social strategy required by the movement at large.

Additionally, George notes that LGBTQ rights advocates attempted to emulate this 'sexuality-blind' system in the trans rights campaign. Using the example of bathroom access, George highlights the fact that emphasizing how transgender individuals are similar to their heterosexual or cisgender counterparts effectively reinforces notions of the gender binary, and conveys that the LGBTQ movement supports said binary (2019, 581). In the wake of marriage equality, opponents of LGBT rights refocused their attention, making transgender rights their main target. To persuade voters to maintain gender identity

3 This phenomenon is also discussed above in the context of the civil rights movement and respectability.

antidiscrimination protections, LGBT rights campaigns presented trans identity in a specific, but limited, way. These campaigns emphasized gender-conforming transgender individuals-those who adhere to male and female stereotypes-and thereby implicitly reinforced the gender binary. Although LGBT advocates have largely succeeded in their efforts to preserve LGBT rights, their messaging may undermine the movement's broader litigation strategy and subject nonbinary members of the transgender community to greater discrimination and persecution. The trans rights framing choices thus raise questions about how the LGBT movement's advocacy decisions blur the lines between success and failure, advancement and retrenchment. To explain this tension, this Article details the history of marriage equality campaign strategies, drawing on primary source campaign materials to identify how and why LGBT rights groups applied those frames to trans rights, as well as the consequences of those framing choices. This Article then analyzes the motivations behind social movements' framing decisions more broadly to argue for an alternative approach to trans rights advocacy. Framing trans rights is a significant issue that extends far beyond whether a specific city or state maintains or eliminates its gender identity protections. Although framing in an electoral campaign may seem far removed from the work of courts, legislatures, and administrative agencies, this Article demonstrates how porous the boundaries are, such that the frames of the former have a substantial impact on the latter. Drawing on the scholarly literature on acoustic separation, popular constitutionalism, and slippery slopes, this Article explains why LGBT state and local ballot measure contests cannot be separated from the movement's broader strategies. It therefore demonstrates that electoral frames are integral to legal advocacy writ large. This leaves out trans people who may not wish to subscribe to such norms and relocates the source of their marginalization from society at large to the community that is allegedly there to protect them, a form of the secondary marginalization Cohen speaks of (1999, 70). Many steps considered positive for the marriage equality movement would be considered largely unhelpful to the trans and queer movements.

Furthermore, we know that there is racism within the LGBTQ community. Giwa and Greensmith point out that as a product of creating social change, the LGBTQ movement became falsely homogenized; this resulted in the dominance of White voices in the movement, and continuing racial oppression (2012, 163). O'Brien alludes to this when she discusses how wealthy White donors viewed trans people as "extremely poor, black, and incarcerated," though she does not discuss the topic at length (2019, 595). Since it was often wealthy White donors fuelling legal battles, their policy preferences likely would have had a pervasive impact on the nature of cases being litigated. Furthermore, racism in the LGBTQ community exists in all socioeconomic classes: Furman et al. note that trans and queer people of colour are seen as "loud, aggressive and disruptive" while their White counterparts are taken seriously and given priority (2018, 38).

Additionally, we cannot ignore the influence race has on agenda-setting: White voices have historically dominated LGBTQ discourse (Furman et al. 2018, 35). Therefore, the dominant voices in the movement do not not face the systems of racism and oppression the likes of which are encountered regularly by non-White members of the LGBTQ community. This has the effect of 'whitewashing' the movement and further reinforcing the dominance of White voices. Black communities are marginalized on a racial basis, but have historically been dominant on a sexual one

(they have been seen and presented as a heterosexual group, for reasons of respectability); LGBTQ communities have been oversimplified with a similar sense of false unity, insofar as they prioritize visibility of gay White members to the exclusion of racialized and other sexually diverse members (Morrison 2013, 34). Therefore, the compound effects of subordination based on race and sexuality creates a situation where people who find themselves at the intersection of such identities may not be able to seek support from either 'dominant' group. Thus, the secondary marginalization faced by racialized queer and trans people — as a function of being a minority on multiple fronts— is doubly severe.

We must also take into account the fact that same-sex marriage mirrors opposite-sex marriage, while queer and trans rights occupy an entirely separate envelope. Therefore, marriage issues are arguably easier to fight for than trans and queer rights. Bernstein and Taylor note that same-sex marriage allows for the normalization of "'good' gays," those who accept same-sex marriage, to the immediate detriment of "'bad' gays," those who prefer alternate systems (2013, 13). This is analogous to LGBTQ people who are viewed as 're-spectable,' and 'un-respectable' by dominant systems. In this case, the dominant system is heterosexual, though as noted above it is also composed primarily of White voices, generating a racial component.

Differences in Marriage and Trans Rights Campaigns

In Canada, the same-sex marriage battle was fought first and foremost through litigation under the auspices of section 15 of the Charter. Kirkup points out that the trans rights campaign had not even attempted the 'analogous grounds' argument until 2014 (2018, 379). Kirkup also notes that trans people did not enjoy the financial support that their marriage-seeking counterparts did, essentially taking large-scale litigation off the table and forcing them to engage instead with human rights tribunals (389-90). It seems that the LGBTQ community, so willing to support the fight for marriage equality, suddenly found their pockets devoid of any change to donate to their transgender counterparts. Interestingly, Rayside notes that Egale Canada did experience a significant drop in funding after the end of the marriage equality fight (2016, 267). In the long protest wave that swept across Europe and North America in the 1960s, few activist movements can claim as great an impact on public policy and popular beliefs as advocates fighting against the social and political marginalization of sexual minorities. This is particularly true in Canada, where the lesbian, gay, bisexual, transgender movement secured major gains from the mid-1980s onward. Although I do not claim that the LGBT movement has eliminated inequity and prejudice based on sexual difference, or that all observers agree on how much has been won, the Canadian case raises important questions about what happens. This would suggest a de-prioritization of non-marriage issues such as queer and trans rights, or a lack of understanding within the movement that LGBTQ rights encompassed more than those of same-sex homonormative couples, at the very least. When trans rights issues have gone to court, they portray a specific subset of the trans population that conforms to a binary gender, meaning that the needs of

those who are gender nonconforming will not be adequately served (George 2019, 608). In the wake of marriage equality, opponents of LGBT rights refocused their attention, making transgender rights their main target. To persuade voters to maintain gender identity antidiscrimination protections, LGBT rights campaigns presented trans identity in a specific, but limited, way. These campaigns emphasized gender-conforming transgender individuals-those who adhere to male and female stereotypes-and thereby implicitly reinforced the gender binary. Although LGBT advocates have largely succeeded in their efforts to preserve LGBT rights, their messaging may undermine the movement's broader litigation strategy and subject nonbinary members of the transgender community to greater discrimination and persecution. The trans rights framing choices thus raise questions about how the LGBT movement's advocacy decisions blur the lines between success and failure, advancement and retrenchment. To explain this tension, this Article details the history of marriage equality campaign strategies, drawing on primary source campaign materials to identify how and why LGBT rights groups applied those frames to trans rights, as well as the consequences of those framing choices. This Article then analyzes the motivations behind social movements' framing decisions more broadly to argue for an alternative approach to trans rights advocacy. Framing trans rights is a significant issue that extends far beyond whether a specific city or state maintains or eliminates its gender identity protections. Although framing in an electoral campaign may seem far removed from the work of courts, legislatures, and administrative agencies, this Article demonstrates how porous the boundaries are, such that the frames of the former have a substantial impact on the latter. Drawing on the scholarly literature on acoustic separation, popular constitutionalism, and slippery slopes, this Article explains why LGBT state and local ballot measure contests cannot be separated from the movement's broader strategies. It therefore demonstrates that electoral frames are integral to legal advocacy writ large. Such an approach may have been effective for marriage equality given its comparatively simple goal; however, the same strategy is less effective when advocating for the more complicated rights necessitated by trans and queer needs.

Here we can partially blame the nature of litigation, which is such that it essentializes certain people or characteristics, and marginalizes others (Rosenblum 1994, 85). An assumption this paper makes, though data would likely agree, is that proponents of queer ideas are a minority within the LGBTQ movement —or at least a subgroup with less sway than others— and as such have less agenda-setting power. If O'Brien's findings can be generalized, this would also help explain why queer and trans issues were deprioritized: she notes that affluent White gay men would donate to ESPA according to the issues they valued, and typically, the only form of discrimination said men faced was the inability to legally marry (2019, 595). So, in conjunction with the kind of cases presented to the court, the essentialization and marginalization inherent to litigation enshrined White values such as marriage, and marginalized queer and trans issues as well as perspectives from non-White LGBTQ people.

Essentialization of certain characteristics to the detriment of others in the legal system is not an abstract concept: several high-profile LGBTQ rights cases in the United States situate marriage and respectability, among other values, as vital to the function of LGBTQ rights (Baia 2018, 1043). One could argue whether or not the LGBTQ movement deliberately took a course of action that would

marginalize its queer and trans members; however, it is true that equal protection discourse necessitates extension to discriminated-against claimants the same rights afforded to the dominant class (Daum 2017, 358). In other words, the rights-claiming system is such that it is far simpler to plead for existing rights than it is to argue for the creation of new ones that may cover 'un-respectable' ground. It therefore seems natural —though detrimental for secondarily-marginalized members such as queer and trans claimants— for the LGBTQ rights movement to have taken the 'path of least resistance' by advocating primarily for marriage rights (read: rights that the dominant class would find respectable). Queer and trans rights, similarly to the rights of secondarily-marginalized groups during the civil rights movement, were set aside by the mainstream movement as an acceptable cost of victory on other fronts.

The nature of queer and trans rights as falling outside the bounds of existing frameworks of law and respectability provides a partial explanation as to why they were not included in the original push for LGBTQ rights. Given the sense of false unity attributed to the movement by the dominance of White gay, and possibly affluent, voices, it is no surprise that issues important to this cohort were prioritized over issues important to those who did not fit the same description or want the same things. Furthermore, we must remember that a legal victory for one group or agenda may create a negative impact for others, given the nature of the law as a rather complicated web, wherein changes to one area may reshape another (George 2019, 622). In the wake of marriage equality, opponents of LGBT rights refocused their attention, making transgender rights their main target. To persuade voters to maintain gender identity antidiscrimination protections, LGBT rights campaigns presented trans identity in a specific, but limited, way. These campaigns emphasized gender-conforming transgender individuals-those who adhere to male and female stereotypes-and thereby implicitly reinforced the gender binary. Although LGBT advocates have largely succeeded in their efforts to preserve LGBT rights, their messaging may undermine the movement's broader litigation strategy and subject nonbinary members of the transgender community to greater discrimination and persecution. The trans rights framing choices thus raise questions about how the LGBT movement's advocacy decisions blur the lines between success and failure, advancement and retrenchment. To explain this tension, this Article details the history of marriage equality campaign strategies, drawing on primary source campaign materials to identify how and why LGBT rights groups applied those frames to trans rights, as well as the consequences of those framing choices. This Article then analyzes the motivations behind social movements' framing decisions more broadly to argue for an alternative approach to trans rights advocacy. Framing trans rights is a significant issue that extends far beyond whether a specific city or state maintains or eliminates its gender identity protections. Although framing in an electoral campaign may seem far removed from the work of courts, legislatures, and administrative agencies, this Article demonstrates how porous the boundaries are, such that the frames of the former have a substantial impact on the latter. Drawing on the scholarly

literature on acoustic separation, popular constitutionalism, and slippery slopes, this Article explains why LGBT state and local ballot measure contests cannot be separated from the movement's broader strategies. It therefore demonstrates that electoral frames are integral to legal advocacy writ large. Thus, the fight for mainstream gay rights in the courts made a similar approach difficult for trans and queer rights-claimants: the narrow and specific strategy necessitated by litigation encapsulated LGBTQ rights as those desired by dominant voices, thus making it harder to expand such rights to better include trans and queer ideas, or even those falling only slightly outside the norm.

Section V: Homonormativity and Respectability: Use and Limits

A central factor of secondary marginalization in the LGBTQ community —certainly in conjunction with, but perhaps even more so than race— is homonormativity. Lisa Duggan labels homonormativity as a way of thinking that does not express dissent with heteronormative institutions, but rather supports their ongoing existence and conformity to their frameworks by the LGBTQ community (2002, 179). In this way, homonormativity represents a repackaging of respectability politics. The homonormative strategy pursued by the marriage equality movement of seeking inclusion in the (until recently) heterosexual institution of marriage, rather than advocating for acceptance of differences fits itself perfectly into the framework of respectability politics (Matsick and Conley 2015, 410-11). The problem is that support of homonormativity and the gender binary readily enables assimilation of some LGBTQ people into the dominant society, while relegating those who do not fit said ideals to a deprioritized state without the social, legal, or economic benefits rights protection would otherwise accord them (Daum 2017, 363).

Stryker explains homonormativity as the idea that "homosexual community norms marginalized other kinds of sex/gender/sexuality difference" (2008, 147). Stryker's statement is similar to what Cohen labels as secondary marginalization: Cohen provides for scenarios where certain more privileged marginal group members are allowed within dominant institutions, while others with slightly different group identities continue to be excluded, or are presented with a refusal to modify said institutions to their needs (Cohen 1999, 70). In the same way that Black norms surrounding respectability pushed those unwilling or unable to meet this criterion to the periphery, homonormativity allows the 'mainstream' image of homosexuals to sideline other more differential ideas around gender or sexuality, including trans and queer people.

Therefore, we can begin to see how homonormativity combined with the politics of respectability can result in secondary marginalization of queer and trans voices within the LGBTQ community; similarly to how women, sexual minorities, and other subgroups were secondarily marginalized during the civil rights movement. Furthermore, queer and trans people of colour will face additional barriers in the LGBTQ community due to their non-homonormative sexual or gender ideals and a racial identity that cannot be reconciled with the dominant White normativity within the LGBTQ community.

Homonormativity and respectability politics both stem from an underlying assumption of deference to the dominant system, and maintenance of the status quo (Duggan 2002, 179) (Obasogie and Newman 2016, 548). Being that they are built on the same foundation, both doctrines inevitably result in secondary marginalization: subgroups classified

as 'un-respectable' or 'bad gays' will be cast away from the mainstream, their needs unable to be neatly packaged into existing legal and societal frameworks. Given this connection, new doors open regarding comparisons between the civil rights movement's explicit use of respectability politics, and the LGBTQ community's use of homonormativity and prioritizing of White male voices, an implicit use of respectability politics. By abandoning doctrines of respectability in a similar fashion as the Black Lives Matter movement, the LGBTQ rights movement could better advocate for trans and queer rights in forms that do not oversimplify or inadequately serve the community.

Conclusions

It would be fair to say that queer and trans rights —especially those falling outside the gender binary— cannot be adequately accommodated within the existing heterosexual binary system of rights, societal norms, and laws. Historically, such rights have been meted out only to assimilationist members of the LGBTQ movement who sought the 'respectable' option of marriage recognition, even though this created a false "monolithic" gay identity and had detrimental effects on transgender and queer rights claims (Daum 2017, 362). The same structure of marginalization is mirrored in the civil rights movement that occurred in the 60s, and modern organizations such as Black Lives Matter have been able to advocate for previously marginalized groups by patently abandoning notions of respectability (Richardson 2019, 209).

Represented here is a more radical rights conception; one wherein the system changes to accommodate the rights of previously marginalized individuals and groups, rather than said marginalized people altering or covering up their identities to fit into existing rights frameworks. The modern-day LGBTQ movement could benefit from such a conception of rights for its secondarily-marginalized members; one that uplifts the most vulnerable, rather than repressing them. Indeed, given the link this paper has endeavoured to make between respectability politics and support for people with an intersecting trans or queer and racialized identity, abandonment of the doctrine should be considered vital to the life and prosperity of said LGBTQ individuals. These doubly marginalized people are especially vulnerable to the harms done to them by doctrines of respectability, from one or several of their overarching communities.

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Canada's Charter: A Balancing Act

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Introduction

The influence of a constitutional bill of rights in Canada has garnered significant scholarly attention toward the newfound active role of the Canadian judiciary. As many have rightly noted, the constitutional entrenchment of the Charter of Rights and Freedoms in 1982 resulted in the radical re-alignment of Canada's highest court as an active law-making institution (see Bork, 2003; Hogg, 2011; Morton and Knopff, 2013). Expanding the court's political involvement threatens to disrupt the distinct and complementary relationship between the Canadian legislature and judiciary. This paper sets out to answer the question of whether the Charter effectively mediates between parliamentary sovereignty and judicial supremacy. As will be demonstrated, public attitudes toward the judiciary have materialized favourably due to the Charter's balance between the judiciary and the legislature and the increased dialogue it has the capacity of generating. Until now, the merits of the guarantee of a constitutionally prescribed right have attracted both praise and criticism concerning the relationship between the legislature and the judiciary.

First, the academic literature regarding support for the judiciary will be examined and the mediating function that the Charter serves will be explained. Following this, the foundations of the Charter's legitimacy will be discussed by identifying whether its legitimacy supports its mediating role. Finally, it will be argued that the Notwithstanding Clause is a necessary component of the Charter's function and a case will be made for its more frequent use. Until now, support for the court and the merits of the Charter have been discussed separately in the literature. This paper will find that the Charter mediates effectively between judicial overreach and majoritarian parliamentary rule. It will be argued that this balance would be more effective without Section 33's required Sunset Clause provision, one that requires the revisiting of statutes that invoke the Notwithstanding Clause after five years. Understanding the ability of the Charter to adequately mediate between judicial supremacy and parliamentary sovereignty is important to understanding which institution has the greatest influence on access to rights guarantees. If the courts have greater influence in this regard, is Canada's political system undemocratic in its neglect of the interests of the majority? If the legislature is more influential, how are minority and multicultural interests promoted by the Charter accounted for in practice? This paper seeks to answer these questions by engaging with the scholarly literature to demonstrate that the Charter favours neither extreme.

Rights dialogue has revolved around what seems to be two uncompromising views: the perceived undemocratic nature of the Charter on the one hand, and the court's adoption of greater law-making responsibilities on the other. That the Canadian Charter of Rights and Freedoms lends itself to neither view is promoted in this paper and is consistent with the work of Peter Russell and others (Leeson et al., 2000). Political and social mobilization

following *R v Carter* [1] and *Bill C-16* [2] in Canada has begun to call into question the jurisdictional limits that each branch should exercise. In light of the blurring of Canadian institutional jurisdiction, this paper will identify whether public support for the court is reinforced by the Charter's apparent mediating role. Suffice it to say that for now, the Charter's function serves as a check on both the legislature and the judiciary. In the absence of the Charter, rights are not immune from legislative amendment and are therefore not guaranteed. The Charter offers a unique case study of judicial legitimacy because of its novelty and wide appeal. The term novelty is used here to highlight the evolving and contemporary nature of Canadian constitutionalism. It will be important to note as well that the terms judiciary and courts will be used interchangeably throughout this paper and that legitimacy and support will be understood as democratic and popular views of the judiciary, respectively.

Support for the Court

Considerations of public support for the courts in Canada is most strongly articulated by Fletcher and Howe who looked at Canadian attitudes in two cases, a decade apart. Granted, their time-series study is not very recent (1987-1999), yet it provides a sufficient perspective into public perceptions of the judiciary before, and in response to, its new active role in rights adjudication. Moreover, their research is strongly supported by the likes of Hiebert, Hausseger, and Riddell who have written more recently. Howe and Fletcher observed two separate studies conducted twelve years apart to determine whether critiques of the courts are supported by the citizenry. They studied whether public opinion is consistent with the idea that law-making should be part of the judiciary's role (Howe and Fletcher 2001, 255). They found that awareness of the Charter among Canadians is very high and that among those who are aware of it, 80 percent view it favourably (2001, 257). A majority of Canadians also believed that the courts should be the final arbiter of rights (Fletcher and Howe 2001, 260). Therefore, the courts are not necessarily counter-majoritarian as some have suggested (see Morton and Knopff, 2013). In fact, Charter rights, broadly speaking, offer strong rights guarantees for minority interests which might otherwise be overlooked by reliance on parliamentary sovereignty (Hogg 2011, 4). For now, it is important to note that Fletcher and Howe argue that support for the court by the citizenry is mixed between those who desire a greater political role for it and those who do not. When asked if they would prefer the courts to determine controversial issues, Canadians tended to be split, a finding that reflects more unfavourably than in several other countries Fletcher and Howe compared (2001, 269).

The analysis Howe and Fletcher conducted is consistent with the two forms of support for the judiciary present in Canada: diffuse support and specific support. The distinction between the two follows from Robert Dahl's assertion in 1957 that American courts were both legal and political institutions (1957, 279). David Easton coined the term "diffuse support" as a source of goodwill toward the courts (understood as general atti-

1 R. v. Carter, [1982] 1 S.C.R. 938.

2 An Act to Amend the Human Rights Act and the Criminal Code, SC 2017, c. 13.

tudes), and the term "specific support" which relates to the attitudes generated from a particular Supreme Court decision (1975). The Charter's contribution to diffuse support for the judiciary depends on its ability to mediate between parliamentary sovereignty and judicial supremacy. Should the Charter promote either of these roles more favourably than the other, the Charter's intentions of guaranteeing constitutionally protected individual and collective rights would be undermined.

Although the Charter's contribution to support for the judiciary is still underrepresented in the literature, Fletcher and Howe presented results of a study that indicated that diffuse support for the courts in Canada is wide-ranging and multi-faceted (2002, 270). Until the Supreme Court decision in *R v Morgentaler*[3], there was little interest to be had regarding the Charter's political role. The relative inactivity of the courts in the policy-setting arena prior to *Morgentaler* demonstrated the traditional role of the judiciary. For six years, the courts functioned under the enshrined Charter without significant legislative implications. Although attempts were made in parliament to address *Morgentaler*, no legal restrictions on abortion came of them. The legislature's willingness to respond to judicial rulings is a feature of the relationship between both branches that continues to be observed today. As the Charter continues to inform legal decisions and legislative policy, the merits of its function ought to reflect its ability to mediate between majoritarian and activist political agendas.

Rather than adopt a policy role, the courts should continue to exercise judicial review of legislation and balance the majoritarian tendencies of parliamentary governance. The legislature's policy response should reflect the legitimate rights guarantees offered by the Charter and the courts. As Petter and Hutchinson argue, the shared values of the Charter are quite broad in their written presentation and are not strict in their interpretation (1989, 546). Consequently, while the courts maintain an ability to counteract potential majoritarian interests sought by the legislature, elected representatives are free to exercise their liberty in policymaking insofar as the courts are unlikely to view a judicial review as worth their while.

Charter Legitimacy

Annabelle Lever, a political theorist at the University of Geneva, asserts that "if elections are imperfect means to democratic representation, the same applies to democratic norms of accountability" (2009, 811). The merit of a democratic institution is not solely justified by the presence of its legitimate foundation but rather by its democratic function in practice. Correspondingly, Andrew Petter and Allan Hutchinson make the distinction that the problem of interpretation does not concern who should do it, but rather how it ought to be done (1989, 533). Addressing how the Charter should be interpreted concerns policy implications that the judiciary itself can impose on the Canadian public by virtue of the legislature's role in the enforcement of those decisions.

The system of parliamentary sovereignty on which Canadian governance was established became restricted in 1982. Legislative powers were essentially commissioned to the courts for use at their discretion (Hutchinson and Petter 1989, 532). Notably, the Charter was instituted by legislators and therefore was not publicly perceived as a form of judicial encroachment on the legislature's jurisdiction. Ted Morton and Rainer Knopff offer an opposing view of the impact of the Charter on Canadian democracy by arguing that the

3 R v Morgentaler, [1988] 1 S.C.R. 30

Charter is anti-majoritarian and diminishes the significance of representative democracy (2013, 149). In many respects, the Charter has encouraged greater dialogue to take place and has accounted for the deficiencies of the legislature's majoritarian function.

The judiciary's inability to enforce its rulings through statutory means already limits its ability to influence the policy landscape. The legislature must explicitly renounce court decisions if it wishes to promote policies, which leaves it at odds with the courts (Roach 2001, 532). We can expect that public opinion will view the court favourably when its decisions follow logically from the Charter's established protections. Conversely, the legislature is capable of doing interpretive work but is held to greater scrutiny than it would in the absence of the Charter's constitutionally enshrined rights. Further empirical research is warranted to determine the level of influence the Charter has on Canadian public opinion.

More relevant to the caution exercised by Morton and Knopff, Kent Roach argues that judges are also limited in their capacity to interpret the constitution because of their strict adherence to the Charter (2013, 532). The opposite is true in the United States where support for a decision is more heavily linked to partisanship than to the constitution's democratic foundations (Gibson 2007). Additionally, public discourse in the United States about the politicisation of the Supreme Court bench is exacerbated by preferences of judicial interpretation which have served to undermine the legitimacy of the constitution itself, and consequently that of the court. For instance, many Americans regard the Second Amendment as a safeguard on their individual liberties while others view it as a threat to their collective safety. Judicial interpretation is more clearly divided south of the border where justices themselves (i.e. Gorsuch, Sotomayor, Scalia) make known their preferred interpretive method; some have favoured a conservative approach to textual and original meaning interpretations while others have favoured structuralism and more contemporary interpretive methods (Alderman and Pickard 2016, 185). The Charter has had the inverse effect. The novelty of the document has offered credibility to its provisions and has dissuaded the discourse present in the United States from permeating the activities of the Canadian judiciary.

The absence of the Charter would require the legislature to rely on its previously enacted *Canadian Bill of Rights* (1960) to inform its policy commitments regarding individual rights. Problematically, the former *Bill of Rights* would guide legislative policy without the Charter's safeguard of a constitutional amendment process. According to Emmet MacFarlane, constitutionally entrenched rights are important to individuals and groups because they allow them to "transcend simple majoritarian preferences" and protect Canadians from "unwarranted government power" (2008, 324). Moreover, taking into consideration Morton and Knopff's concerns that legislative sovereignty is being eroded by the Charter, the *Canadian Bill of Rights* (which fell rapidly into disuse) provides a historical example of the restrictions with which the legislature must contend.

The key features of the Charter contin-

ue to "improve, sharpen and prolong the dialogue" that has characterised the relationship between the legislature and the Supreme Court (Roach 2001, 533). The late Dean of Osgoode Hall Law School, Peter W. Hogg, writing in 2002, argued that the claim that the Charter is undemocratic "cannot be sustained" (2011, 8) and that Morton and Knopff underappreciated the significant contribution of the dialogue that resulted from the "Court Party" and the "Charter Revolution" (Hogg, 2011, 2). They refer to the former as the organizations, judges, and activists promoting the active courts while the latter refers to Canada's rapid transformation from parliamentary sovereignty to judicial supremacy (Morton and Knopff, 2013). Though the extent to which both of these phenomena are present post-Charter is largely undisputed, the consequences of the Charter are the most relevant consideration regarding the Charter's mediating influence between an active judiciary and a majoritarian interested legislature. Although Skogstad agrees with the general critique that Morton and Knopff have of the courts, she concedes that Canadians maintain the legislature to be the primary mechanism by which they achieve their collective goals (2003, 968).

The critique that parliamentary sovereignty has been eroded fails to recognize the progression of dialogue that has occurred since 1982. It is unclear that the legislative branch would have had a greater role in the rights arena had a substitute for the *Canadian Bill of Rights* not been constitutionally enshrined.

Necessitating Section 33?

The paper now turns its attention to the underappreciated qualities of the Charter's Notwithstanding Clause. It is argued that despite the Notwithstanding Clause's limited use, Canada's political system has been devoid of a transition to judicial supremacy due to the Charter's Section 33. For all its critiques, the Notwithstanding Clause appeases concerns that the Charter promotes a politically active court. The clause fits well into the Canadian framework as it bridges an otherwise heightened focus on the supremacy of either the courts or the legislature (Newman 2017, 4).

On one hand, it enables the legislature to approve or dissent from court decisions. Newman shows that after *R v Carter*, the government in the House of Commons responded with looser protections for doctor-assisted death than was granted by the Supreme Court and that the revised legislation was not subject to judicial review (2017, 17). On the other hand, the reluctance of legislators to use Section 33 has been beneficial for the judiciary because it has implied that the courts' rulings are appropriate.

Those who suggest that the legislators would be unconstrained in the absence of the Notwithstanding Clause neglect to appreciate that regional motivations influenced the inclusion of the clause into the Charter. Premiers were very active in pursuing the clause so that Canadian federalism would be supported by a guarantee of regional autonomy (Newman 2017). In fact, it was particularly Premiers from the western provinces who pursued the inclusion of the clause as it would promote parliamentary sovereignty for matters from within their provincial jurisdictions. Additionally, the clause allows provinces to recuse themselves from court decisions that conflict considerably with their regional interests (Snow 2005, 2). Consequently, Quebec has resorted to Section 33 more frequently than any other province.

David Snow offers the best review of possible explanations of the reluctance to use

the Notwithstanding Clause: judicial success, government agency, public opinion, and path dependence. He argues that the "path dependence" model is the most compelling explanation. "Judicial success" suggests that legislatures have not used the clause because the courts have been on the right track. "Government agency" implies that the clause has not been used frequently because of the will of individual governments not to invoke it. Snow argues that both of these are inconsistent with how the clause has been used. He cites that in the case of *R v Sharpe*[4], despite strong support from government MPs to invoke it, the clause was not used (2005, 4). In other words, the clause has been discussed more often than it has been implemented. Therefore, governments have seriously contemplated its use and have not, on the whole, believed courts to be on the right track.

The argument termed "public opinion" contends that defending the use of the Notwithstanding Clause becomes very difficult when the public perceives Section 33 to be beyond the scope of democratic politics. Snow agrees that a lack of empirical evidence for public support of Section 33 is available (2005, 6). The most compelling argument Snow offers is the "path dependence" model. It alleges that "the Quebec government's contentious use of Section 33 began the process of eroding the legitimacy of the Notwithstanding Clause, a process which has been subsequently reinforced by successive Prime Ministers" (Snow 2005, 12). The assertion that the "public opinion" model is not satisfactory for explaining the reluctance of legislatures to use the Notwithstanding Clause is not directly addressed by Snow and seems to be more relevant than he lets on.

In numerous instances of Section 33's use, the government's timing appears to be politically motivated. If it is true that public opinion views the use of the clause negatively, it would help to explain many past applications of the clause. In Alberta, the Notwithstanding Clause was used by Premier Klein during a period of tremendous support for his government which was followed by an impressive margin of victory in the subsequent election. Saskatchewan invoked the clause in their bill related to public funding of Catholic schools. The timing of this action was shortly after the start of Premier Moe's tenure. Likewise, Doug Ford also acted at the beginning of his term. This strategy is advantageous because the electorate is less likely to make negative judgements about politicians when they seek re-election since voters will be less likely to recall decisions occurring early in their term at the voting booth four years later. Premier Ford threatened the use of the Notwithstanding Clause in 2018 as soon as his term had begun to restrict the size of the Toronto City Council. Similarly, Coalition Avenir Quebec used the clause in their first six months of being elected in 2019. New Brunswick's only use of the clause occurred in the first fifteen months of a four-year term. While these situations do not indicate conclusively that public opinion is significant, Snow's conclusion that the "path dependence" model is best suited to explain the observations may be influenced, even if indirectly, by some interest in the response of public opinion.

If Snow is correct that the demonization

4 R v Sharpe, [2001] 1 S.C.R. 45

of the clause by Mulroney, Chretien, and other Prime Ministers has led to the reluctance of legislatures to use it, the same can be undone. Consider that Snow specifically argued that the case of *Ford v Quebec*[5] set the tone for its disuse (Snow 2005, 1). In *Ford v Quebec*, the court ruled against the province's bill that would restrict all public signage from being written in any language other than French. The provincial government proceeded to invoke the Notwithstanding Clause, an action that was viewed favourably in Quebec, but not so in the rest of Canada (Russell 2007). Dwight Newman believes the Notwithstanding Clause is perfect for Canada because it retains the sovereignty of parliament while promoting dialogue (2017, 4) and argues that legislators "should not have so much reluctance to use it as seems to have been common" (2017, 16). Conversely, others have argued that a bill of rights is incompatible with Britain's parliamentary sovereignty (Leeson et al., 2000). This ignores the fact that Canada had a statutory bill of rights in the mid-twentieth century and that legislators became very active in the pursuit of the Charter's Notwithstanding Clause. Additionally, American critics such as Robert Bork fail to appreciate the Charter's balance between provincial autonomy and national unity. Bork views the Charter as a judicial slippery slope that will serve to undermine the separation of the judiciary from the legislature, which he argues will open the courts to future lobbying efforts, a view he believes will undermine the judiciary entirely (2003, 75).

Having described the Notwithstanding Clause as a limit on the possibility of judicial supremacy, it is acknowledged that greater efforts could be made to ensure that the division between the legislative and judicial branches remains stable in the future. The five-year reassessment of the Notwithstanding Clause's use under Section 33(3) should be removed for the simple reason that it undermines the legislative freedom that Section 33 affords to parliament. If the clause is to return to the legislature some of the power that the Charter has taken away, it must uphold and promote the majoritarian function of the parliamentary system. Currently, statutes that invoke the clause must be revisited five years after its implementation. The bureaucratic effort required to revisit these decisions may be a significant deterrent to the clause's more frequent use by legislators.

5 Ford v Quebec, 1988 2 SCR 712, 54 DLR (4th) 577.

Conclusion and Discussion

This paper set out to address whether the Charter acts as a mediating agent between the legislature and the judiciary and whether the Charter legitimizes or undermines either's role. Although some academics have discussed the effects of specific and diffuse support in Canada, few have attempted to explain their joint effect. The Charter has served as a source of diffuse support for the courts because of its novelty and broad application. Unlike the Supreme Court of the United States, public attitudes toward the courts in Canada are not influenced by interpretive distinctions arising from the age of its constitutional protections and the influences of its partisan motivations. The former *Canadian Bill of Rights* passed in 1960 loosely guided rights discourse in Canada before the Charter. It was argued that rights not constitutionally entrenched served neither the interests of the institutions that adjudicate them nor those whom they seek to protect. This is evidenced by the rapid disuse of the *Canadian Bill of Rights* (1960).

To ensure that the Charter does not tend too far in the direction of judicial supremacy, the Notwithstanding Clause has provided a

useful medium in rights arbitration that allows legislators to override judicial decisions when they are perceived to be inconsistent with democratic interests. If the clause has been demonized by Prime Ministers, it is safe to assume that public opinion is influenced by its use. Public conditioning toward the positive function of Section 33 is required if its use is to persist. Although it is unlikely to be either a priority or feasible, the five-year reassessment of a statute that invokes the Notwithstanding Clause is antithetical to the function Section 33 serves in preserving a balance between parliamentary sovereignty judicial supremacy. The uncompromising outcomes of judicial overreach into political activity and a majoritarian ruled parliamentary system are mediated by the Canadian Charter of Rights and Freedoms and its inclusion of the Notwithstanding Clause. Further research should look at the impact of the five-year limit on the clauses' use to determine whether it has influenced legislators' decisions to invoke it and consequently, whether its removal would invite greater rights dialogue in Canada.

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Section 35 and the Settler Constitutional Order's Impediment to the Decolonization of Indigenous Rights

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Introduction

Section 35 of the *Constitution Act, 1982*, one of the three components of the Constitution relating to Indigenous and treaty rights, is a provision that recognizes the existing rights of Indigenous peoples at the time of the Act and entrenches them into the Constitution. The purpose of this provision has been interpreted by the Supreme Court to be "to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty" (Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004). This term, reconciliation, has been used by the Government of Canada to describe the ongoing process of repairing and revitalizing the relationship between Canada and Indigenous peoples and is often used in the context of decolonization. However, section 35 has done little in addressing the more consequential aspects of decolonization, including issues of self-governance and sovereignty, and instead only continues to pose an obstacle to decolonization.

This paper will present the case that the Canadian judicial system is a significant hindrance to decolonization due to its unwillingness to acknowledge Indigenous legal sovereignty as equally legitimate. Specifically, the imposition of section 35 on Indigenous peoples and Indigenous rights poses an impediment to decolonization in that it subjugates Indigenous legal understandings to a second-tier or even non-existent status, restricts Indigenous rights by controlling the arenas in which Indigenous peoples are allowed to exercise self-determination, and does not provide Indigenous peoples with any meaningful level of sovereignty. In these three closely linked ways, the inclusion of section 35 in the Canadian Constitution, while providing protections for a select number of Indigenous rights that have been read into the provision, ultimately does not meet the standards required by decolonization.

Decolonization for the purposes of this paper is understood as the "process of revealing and dismantling colonialist power in all its forms, [including] dismantling the hidden aspects of those institutional and cultural forces that had maintained the colonialist power and that remain even after political independence is achieved" (Ashcroft, Tiffin, and Griffiths 2000, 52). Notably, this definition includes two key ideas, the dismantling of both institutional and cultural forces as well as the achievement of political independence. Emberley (2007, 20-21) expands on this working definition by examining which institutions are included in the forces needing to be dismantled, proposing that indeed the family and other non-institutional structures may well be sites requiring decolonization. In this way, decolonization can

be either specific to particular institutions or all-encompassing.

However, decolonization is far from a clear process and there is notable disagreement on the most ideal or efficient path to achieve it, which can be seen in the reconciliation versus resurgence debate. What differentiates the approaches is whether they accept the continued imposition of the structure of settler society on Indigenous peoples. "Reconciliation generally accepts the imposed settler constitutional order but not as given" (Mills 2018, 145), agreeing that reform is necessary, while "resurgence generally rejects the entire settler constitutional framework as part of an ongoing colonial relationship" (Mills 2018, 144). As will be argued in this paper, the decolonization of Canada cannot be successful so long as section 35 and the Constitution as a whole continue to be imposed on Indigenous peoples. Rather, it is only through a resurgence that releases Indigenous peoples from the restrictions and authority of Canadian settler law that decolonization can occur.

To frame the argument, it is beneficial to have an understanding of the concept of sovereignty, which is a term that has been used loosely in much of the literature on Indigenous rights to describe substantially different ideas. In his review of the impact of section 35 on Indigenous sovereignty, Webber (2015, 77-85) outlines four conceptualizations of the term: sovereignty as the originating source of law, the final power of decision, the status as a state in international law, and the unified and rationalized order of law. For this discussion, it is the concepts of sovereignty as the originating source of one's own law and of sovereignty as the ultimate authority of decision-making power that are of interest, as these are the areas most heatedly debated in Canadian-Indigenous relations and Indigenous rights.

It is from this foundation that the rest of this paper will examine the relationship between Canada's judicial system, primarily through section 35 of the *Constitution Act, 1982*, and the Indigenous peoples affected by it and present the case that this provision, along with the constitutional order from which it comes, is a significant obstacle to the process of decolonization.

Irreconcilable Legal Traditions

Canada's judiciary, having descended from the two traditions of British common law and French civil law, is a bijural system. However, a third, though in itself diverse and expansive, legal tradition exists. Indigenous legal traditions existed prior to European colonization and continue to be practiced today. This is not to say that Indigenous law is neglected wholesale in Canadian society. "Indigenous law and treaties, along with other constitutional practices, conventions, and customs can be found in many places throughout Canada, demonstrating the active nature of Indigenous peoples' participation in Canada's constitutional order, behind, against, and beyond the written documents" (Borrows 2016, 109). Nonetheless, the issue of section 35's resistance to decolonization (and that of the Constitution more broadly) is seen in its interaction with Indigenous law.

For many living within settler society, the notion of fundamentally disparate legal understandings can be difficult to grasp, with "colonial patterns of thought and behavior [having] been so prevalent for so long that many believe they are part of the natural order of things" (Woo 2011, 45). With both federal and provincial legislation written in the language of one of the two settler legal systems and ultimately judged by a judiciary working under a constitutional framework based on setter

legal traditions, Canadian citizens are undeniably bound by Canadian settler law. While not an issue for those who chose to immigrate to Canada and thus decided to live within settler society, Indigenous peoples were not presented with this choice and had settler law forcibly and violently imposed onto them.

Early in the history of Upper Canada, the application of English law to Indigenous people was not the self-evident notion that it is today. The *Shawanakiskie* case of 1822*,* in which an Indigenous person killed another Indigenous person, "shows that some colonial judges were prepared to accept the qualified immunity of indigenous people from colonial British law because their distinct, indigenous laws should determine matters internal to their communities" (Yarrow 2010, 94). However, the charge included in trial judge Campbell's report to the grand jury made "a clear statement of Campbell's territorial conceptualization of the jurisdiction of colonial courts over the conduct of indigenous people" (Yarrow 2010, 93). Ultimately, rather than affording Indigenous peoples their own laws, judicial authorities "drew on an artificially coherent and idealized version of the common law that denied the possibility of a local, indigenous law" (Yarrow 2010, 86). What followed was the creation of a structure of governance that 'reformed' Indigenous people or disposed of them entirely, as was done by subjecting First Nations to the Indian Act and by using treaties to convert Indigenous territories into Canadian jurisdictions, in the pursuit of a 'logic of elimination' that saw the dissolution of Indigenous sovereignty and the movement of Indigenous affairs into settler courts (Spitzer 2019, 526-9).

If the process of decolonization entails the dismantling of colonialist power along with the institutional forces that support this power, then it is evident that setter law ought to be of prime concern. Thus, it is in the conflicting paradigms of Indigenous legal traditions and those of the Western settler state that decolonization would need to take place, as current Canadian law remains colonial in nature. Should decolonization be successful, we can expect that Indigenous peoples be afforded the sovereignty taken from them at the time of European colonization and since then. In line with Webber's identification of the originating source of law as one understanding of sovereignty, this aspect of Indigenous sovereignty can only be realized once Indigenous peoples have control over their own laws, based on their distinct legal understandings.

The importance of this type of sovereignty can be seen in examples in which Western and Indigenous perspectives differ. While not the sole difference in outlook and understanding, the contrast in Western and Indigenous perspectives on land and property is illustrative of a wider irreconcilability. Early in the British colonial project on the land that now comprises the United States and Canada, even when some Indigenous populations were converted to Christianity, many Indigenous individuals continued to hold the belief that "the living are mere trustees who cannot sell the land… [and that] the very origins of their peoples are so physically and spiritually tied to the landscape that selling the land would be like selling their ancestors' graves" (Woo 2011, 58). Indigenous cultural and legal traditions "reflect Indigenous peoples' collective understandings of creation and the roles of individu-

als within creation and within the community" (Minnawaanagogiizhigook (Dawnis Kennedy) 2007, 175) and thus are fundamental factors in their conceptualization of self-determination.

While there has been some limited flexibility towards a reconciliation of these conflicting legal understandings, such as in the case of *Delgamuukw*, this only further proves the divide. One of the precedents set in *Delgamuukw* involves the question of what may be considered admissible evidence in cases involving Indigenous issues and resolves that Indigenous oral histories, songs, and other cultural artifacts must be taken into account as equal to Western written documentation (Delgamuukw v. British Columbia 1997, paragraph 80). However, Chief Justice Lamer notes that such "accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure'" (Delgamuukw v. British Columbia 1997, paragraph 82), thus ensuring that the reconciliation of the two traditions can never fundamentally alter that of the settler state. Some reconciliation may indeed be possible, but complete reconciliation that leads to a Canadian legal system that is no longer primarily a product of its colonial past is bound to fail when the hearing of and ruling on cases relating to Indigenous rights is engaged in from a fundamentally non-Indigenous, settler-colonial framework.

Section 35, despite affording Indigenous peoples greater protections than had previously been afforded to them, remains part of a colonizing institution imposed on Indigenous peoples. It, along with the entirety of Canada's judicial system, is inherently in conflict with Indigenous approaches, denies sovereignty based on the source of one's law, and ultimately leaves little space to address decolonization within Canada's courts.

Restriction in the Scope of Indigenous Rights

The restriction and control of Indigenous rights have long been the implicit and oftentimes explicit goal of the Crown and the Government of Canada. The Constitution, including section 35, through its purview over which arenas Indigenous peoples are allowed to exercise self-determination, presents an obstacle to decolonization. By acting as the context in which Indigenous rights must be debated before the law, Canada's legal order has been able to set the boundaries of acceptable discussion as well as the baseline assumptions from which any decisions are made. Aside from being an infringement on sovereignty, it also acts as a restriction on rights claims and self-determination.

The impact of section 35 on setting the scope for which Indigenous rights are affirmed and protected provides helpful contextualization for the larger issue. With section 35's affirmation of Indigenous rights and treaty rights, Indigenous issues are viewed by the courts through jurisprudence that is "preoccupied with the recognition of Aboriginal title to land, the nature and incidents of that title, how Aboriginal title must be proven, regulated, or extinguished, and the possibility of Indigenous peoples holding lesser rights to resources (chiefly hunting and fishing rights)" (Webber 2015, 64). In this way, section 35 essentially narrows the rights-based litigation that may be put to the courts.

As noted earlier in the discussion of the differences between Western settler and Indigenous perspectives, land, and property rights has been one of the most visible areas in which colonialism has taken a toll on Indigenous ways. One example of this is how legislation fused together the concept of land

and territory through the creation of reserves each with "a 'band council' with regulatory powers that strictly follow the Western principle of territoriality since they are enforceable upon all individuals located within the reserve and since they do not extend beyond it" (Otis 2007, 146). Not only did this act to confine Indigenous populations to relatively small scraps of land, imposing Western ideas of property on seized lands, but it also colonized traditional understandings of land. As might be expected, Indigenous peoples consistently opposed these denials of their freedom and autonomy and "have long withstood government assertions of authority over them by avoiding, attacking, and refusing to recognize Crown land claims and the Crown's assertion of sovereignty" (Borrows 2016, 107). Despite this, the Crown held that it had sovereignty and thus legitimacy over them and their rights.

The restriction of rights is demonstrable in the direct effects of section 35 on the lives of Indigenous peoples in two cases heard before the Supreme Court. In *R v Sparrow*, the Court established that Indigenous peoples had a right to fish for food, due to it having been conducted prior to colonization, and that it fell under the scope and protection of section 35 (Brown 2019, 6). However, in *Van Der Peet*, the Court ruled that there was no Indigenous right to market the fish, as this had not been a traditional practice (Brown 2019, 6). In this way, section 35 was used as an instrument of the judiciary in defining what was and what was not a legitimate rights claim.

As argued by McNeil (2010, 161) in his assessment of Indigenous land rights, the content of rights like the right to fish are derived from the source of that right. If the right to fish was under the determination of Indigenous peoples themselves, and thus in line with "indigenous laws or normative customs, the dimensions of the right would be defined by those laws and customs" (McNeil 2010, 161). However, if such rights are to be framed in settler understandings of "common law title, then it would be a right encompassed by (but not separate from) the broader right of exclusive occupation, possession, enjoyment, and use of the land that flowed from that title" (McNeil 2010, 161). As the content of rights is directly linked to the source of these rights, the placement of Indigenous rights within the settler legal framework of the Constitution mandates that Indigenous rights be conceptualized in terms of settler logic, even when certain non-settler carve-outs are made with reference to prior occupation or activity. This is inherently counter to Indigenous sovereignty, as it demands Indigenous rights issues be contextualized and restricted by settler systems rather than being founded in Indigenous ones.

Ultimately, section 35's direct impact on Indigenous rights is that of a restriction by the settler rather than wholesale protection. Although it serves well to enshrine some unenumerated rights into the Constitution, it leaves these at the interpretation and behest of the Supreme Court – a non-Indigenous, settler institution that has used section 35 to rule over the rights of Indigenous peoples. In line with the earlier discussed decision in *Delgamuukw*, which accepted accommodation of Indigenous peoples so long as that "accommodation [is] done in a manner which does not strain 'the Canadian legal and constitutional structure'" (Delgamuukw v. British Columbia 1997,

paragraph 82), it could be argued that what is being protected through section 35 is the settler order, by bringing Indigenous rights within the restrictions of the state. Such a system in which Indigenous rights can be restricted by non-Indigenous institutions does not correspond with decolonization's calls to dismantle colonialist power.

Sovereignty and Final Authority

The third way in which the imposition of law, in the form of legislation and provisions like section 35, is antithetical to the process of decolonization is in its inherent elimination of Indigenous sovereignty through the enforcement of settler sovereignty. Not only is this the case when viewing sovereignty through the lens of having oneself be the source of the law but also when defining sovereignty as having the ultimate authority on the law.

From the beginning of colonization, despite "Indigenous peoples [having] strongly defended their legal and political autonomy" (Webber 2015, 66), the Crown's assertion of its sovereignty over them has been one of final authority. While the *Royal Proclamation of 1763* acknowledges a British policy of respect for Indigenous peoples to live on traditional lands, "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown" (R v. Sparrow 1990). Rather than meaningfully challenge this claim, "Canadian courts have always tended to take Crown sovereignty for granted… [and] since Crown sovereignty is the basis for their own authority, to deny the one would be to give up the other" (McNeil 2018, 300). On this very fundamental level, the Crown's sovereignty is what bestows the judiciary with its power. Any decisions on matters concerning Indigenous peoples are inherently a declaration of the Court's (and thus the Crown's) authority over Indigenous peoples.

Thus, it is important to acknowledge the way in which the Court justifies its authority over Indigenous peoples. As evident by the vast number of cases litigated before the courts, the judicial history of sovereignty is complex and the legal reasoning for the Crown's authority has evolved over the centuries. Original conceptualizations upheld "the legal fiction that the continent, though peopled by numerous Indigenous peoples, was *terra nullius* insofar as de jure sovereignty was concerned" (McNeil 2018, 297). However, recent decisions have relied on an understanding that Indigenous peoples indeed held pre-existing sovereignty, as seen in *Haida Nation v. British Columbia*, and that British de facto sovereignty over the land only became legitimate de jure through the treaty process (McNeil 2018, 302).

Additionally, there are several competing conceptualizations of the view of the Crown-Indigenous relationship. Many Indigenous peoples assert that treaties have created a nation-to-nation relationship with mutual acknowledgment of sovereignty and jurisdiction (McNeil 2018, 304).

Another understanding of the relationship is that it is a fiduciary relationship between the Crown and Indigenous peoples, bringing with it duties of consultation and accommodation (Bryant 2015, 231). Section 35, covering Indigenous rights and treaty rights that include Aboriginal title, constitutionalized this understanding. However, the Supreme Court has ruled that Aboriginal title is not absolute and thus "may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments" (Delgamuukw v. British Columbia 1997, paragraph 160) if deemed justified. The fiduciary relationship merely means that "there

is always a duty of consultation [and] whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified" (Delgamuukw v. British Columbia 1997, paragraph 168). Due to the Supreme Court's articulation of this fiduciary relationship, while consultation is a duty, it falls short of Indigenous sovereignty, instead safeguarding the abilities of government to not accept the recommendations of consulted Indigenous groups and to infringe on Aboriginal title. Importantly, this understanding of the Crown-Indigenous relationship allows for the Crown to intervene even in the limited areas it has explicitly designated as being in the domain of Indigenous peoples.

While section 35 improved the protection of a number of Indigenous rights, as noted in the example of protections for fishing rights, some First Nations feared it would "[force] their *de facto* inclusion into Canadian society without their consent" (Borrows 2016, 122). This fear has been realized. Not only does section 35's inclusion of Indigenous peoples in the Constitution fail to deliver a majority of the rights advocated for Indigenous peoples, notably their inherent rights to self-government (Borrows 2016, 123), it has reaffirmed the Crown's earlier declaration of authority in the Royal Proclamation of 1763.

This violates the understanding of sovereignty as being one's own ultimate authority. Indigenous peoples, rather than being able to structure their society according to their traditional laws, customs, and beliefs, have been forced to contextualize their lives within the settler's paradigms. This is evident in the push for greater autonomy in the form of self-government, which was and has been the central aim of Indigenous leaders ever since the 1980s constitutional conferences that would define the content of section 35 rights (Webber 2015, 66). In this way, not only were Indigenous advocates appealing to the ultimate authority of the Government of Canada (and thus the Crown), but they were forced to "[adopt] the language of property itself because it had the best chance of being accepted" (Webber 2015, 66). As evidenced by the use of litigation before the Supreme Court and engagement in constitutional conferences, Indigenous rights have always been at the behest of settler institutions of state power and neither articulated in the language of Indigenous law nor before Indigenous authorities.

However, decolonization entails some degree of sovereignty. Whether it requires the sovereignty of being the originating source of one's own law or sovereignty as the ultimate authority of power, it is difficult to comprehend the way in which a judicial system predicated on the subjugation of Indigenous rights under colonial law and that guarantees neither manner of sovereignty would fit within the scope of a decolonized society.

In line with both self-determination and the notion of sovereignty being one's own origin for law is the idea of self-authorization. Self-authorization entails an Indigenous people's ability to decide for themselves which actions they will take and which actions are permissible. It is the "grounding of governmental authority in one's own institutions and traditions" (Webber 2015, 82) and is the right "simply to exercise their jurisdictions without waiting for Canadian institutions to recognize

their authority through treaty or legislation" (Webber 2015, 82). So long as Indigenous peoples are required to frame appeals for additional rights in the terms of the colonizer and so long as they are restricted to seeking rights within the confined scope allowed by the settler legal framework, in the Constitution and courts, then decolonization from settler institutions appears impossible.

Conclusion

This paper has argued that the inclusion of Indigenous peoples within Canadian law, which has been constitutionalized and thus only been further ingrained in the fabric of Canadian society by section 35 of the *Constitution Act, 1982*, is antithetical to the process of decolonization. Decolonization necessitates the dismantling of colonialist power in both institutions and wider political culture, as this is an authority that lacks legitimacy in the eyes of Indigenous peoples that "had no role in creating [its] legal systems, did not consent to their application in this context and were entirely outside their scope" (McNeil 2018, 304). Nonetheless, the colonialist power of Canadian setter society has been maintained through legislation like the Indian Act and provisions like section 35.

Given that the application of Canadian law is done within the judicial branch of the settler state in the name of the colonial Crown using non-Indigenous language and legal traditions, the reconciliation of decolonization that involves Indigenous sovereignty and that somehow remains under the purview of Canadian law appears irreconcilable. Indeed, both Indigenous and Crown authority cannot be supreme within the same jurisdiction. Thus, Indigenous sovereignty and the sovereignty of the Canadian Crown are in conflict. As articulated by Webber, the possibility that Canada accepts Indigenous people's unilateral and ultimate decision-making power to determine the structure of their relationship with Canada or acknowledge an Indigenous final legal authority is highly improbable (2015, 78).

This appears to raise more questions than it solves, as it indicates that this form of decolonization – one which allows for Indigenous sovereignty over the law, being both the origin of and final authority on law – cannot be reached through reconciliation. Reconciliation accepts the imposed settler structure but seeks to reform or even transform it from within the system. How Indigenous peoples can seek a return to the complete sovereignty they enjoyed prior to colonization while working within the settler system and appealing to another authority is futile. Instead, a return to traditional sovereignty and thus decolonization requires resurgence that rejects the framework imposed on Indigenous peoples, in part by section 35. Ultimately, only dismantling the Constitution's imposed application to Indigenous peoples will allow for the manifestation of decolonization.

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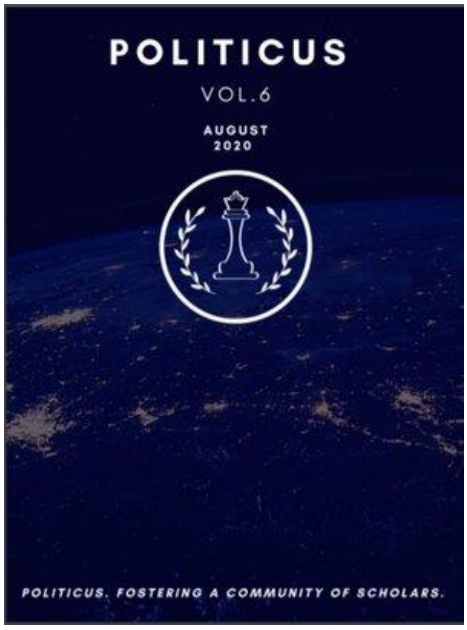

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