The Idea of Constitutional Rights and the Transformation of 
Canadian Constitutional Law, 1930-1960

by

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ABSTRACT

This dissertation argues that the idea of constitutional rights transformed Canadian constitutional law well before the entrenchment of the Canadian Charter of Rights and Freedoms. Specifically, it locates the origins of Canada’s twentieth-century rights revolution in the constitutional thinking of scholars, lawyers, judges, and politicians at mid-century (1930-1960). Drawing on archival documents, personal papers, government reports, parliamentary debates, case law, and legal scholarship, this work traces the constitutional thought and culture that first propelled human rights and fundamental freedoms to the forefront of the Canadian legal imagination. As a work of legal history, it also seeks to revive the dormant spirit of constitutional history that once pervaded the discipline of Canadian constitutional law.

The Introduction situates the chapters that follow within the emerging Canadian historiography of rights. Chapter Two traces the origins of Frank Scott’s advocacy for constitutional rights to the newer constitutional law, an approach to constitutional scholarship sparked by the social and political upheavals of the Depression, and the influence of Roscoe Pound’s sociological
jurisprudence. Chapter Three explores the varied dimensions of the Second World War's influence on the nascent idea of Canadian constitutional rights. In particular, the rapid rise of the wartime administrative state produced a rights discourse that tended to reflect the interests of property while ignoring the civil liberties of unpopular minorities. Chapter Four examines the rise of a politics and scholarship of rights in the years immediately following the war. In response to international rights ideals and continuing domestic rights controversies, scholars and lawyers sought to produce a theory of Canadian constitutional law that could accommodate the addition of judicially-enforced individual rights. If not entirely successful, their efforts nonetheless further reoriented the fundamental tenets of Canadian constitutional law. Chapter Five reveals the influence of Canada’s emerging constitutional culture of rights on the jurisprudence of the Supreme Court of Canada, particularly Justice Ivan Rand and his conception of an implied bill of rights. Together, these chapters demonstrate the confluence of ideology, circumstance, and personality – the constitutional history – that altered the future of Canadian constitutional law.
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Introduction

This dissertation is about the idea of Canadian constitutional rights. It may surprise, disappoint, or elate readers to discover that what follows is not a study of the *Canadian Charter of Rights and Freedoms*.\(^1\) Instead, this dissertation examines three transformative decades between 1930 and 1960 to uncover where the idea of entrenched constitutional rights came from and to explore the ways in which that idea changed the discipline of Canadian constitutional law. Like many constitutional documents, a veneer of myth clings to the *Charter* rendering opaque its origins. Enveloped, as we are, in a culture of rights, the idea of entrenched constitutional rights and freedoms often appears to be the product of inexorable temporal and progressive forces: the “logic of chronology”\(^2\) and the triumph of “the liberal order framework.”\(^3\) While historians and political scientists have done a better job of situating the *Charter* among the conflicting ideals and pragmatic politics of twentieth-century Canada, constitutional scholars have tended to eschew historical concerns for the imperatives of the present. Constitutional history, once the lifeblood of the discipline of constitutional law, has faded into obscurity. This dissertation seeks to revive that historical spirit by revealing the confluence of factors – ideology and circumstance, personality and context – that gave rise to a new idea of

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constitutional rights. The Charter’s entrenchment in 1982 undoubtedly changed Canada, but, as the following chapters reveal, the idea of constitutional rights had already begun to transform Canadian constitutional law.

Canadian legal history has come a long way since R.C.B. Risk surveyed the field a little over thirty years ago and admitted that “we know almost nothing about our legal past.”4 Since Risk’s bleak summary, the discipline of Canadian legal history has undoubtedly thrived.5 Risk himself has contributed much to our understanding of the dynamic history of ideas about federalism in the century following Confederation,6 and certainly a lively debate continues on the ideological nature and origins of what was the British North America Act (BNA Act).7 In addition, the multifarious dimensions of constitutional law have been illuminated by recent works of judicial biography,8 historical case studies,9 and

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8 William Kaplan, Canadian Maverick: The Life of Ivan C. Rand (Toronto: The Osgoode Society for Canadian Legal History, 2009); Philip Girard, Bora Laskin: Bringing Law to Life (Toronto: The Osgoode Society for Canadian Legal History, 2005); Frederick Vaughn, Aggressive in Pursuit: The Life of Justice Emmett Hall (Toronto: The Osgoode Society for Canadian Legal
colonial 10 and regional history. 11 In the hands of contemporary legal historians, Canada’s constitutional history emerges not as a grand narrative of whiggish triumph, but a complex of lived experience, time, and place. Still, despite the vibrancy of the field, legal historical projects addressing the changing nature of constitutional rights have been non-existent.

Social historians have had more to say on the topic. In particular, the emergence of a “Canadian human rights historiography” has traced the impact of social movements on Canada’s twentieth century adoption of a human rights culture. 12 As those accounts have demonstrated, from the 1930s onward, a variety of citizens and organizations in civil society turned to the language of rights to demand inclusion in a political culture which had typically ignored or overridden their interests. In the shadow of the Holocaust and in the light of the Universal

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Declaration of Human Rights, demands for rights – the state’s recognition of a sphere of protected individual autonomy and human dignity – took on added normative weight. The perpetuation of domestic discrimination – in private moments of exclusion or public declamations of racism – also led citizens and equality-seeking groups to employ the language of rights as an ideological tool of resistance and an impetus for societal change.

For their part, political scientists have tended to frame Canada’s modern constitutional history as an “odyssey” of constitutional politics. From this perspective, it is Pierre Trudeau’s “magnificent obsession,” the centrifugal forces of Quebec nationalism, and political machinations among premiers, cabinet ministers, and civil servants that dominate explicatory accounts of the Charter’s origins. Amid the backroom compromises, legal strategies, bluffs, bravado, and earnest debate in the late 1970s and early 1980s, the Constitution Act, 1982 emerges as “the precarious result of a byzantine process in which accidents, personality, skill and sheer will-power were central to the final

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outcome.”¹⁹ As in the social histories of rights, there are valuable insights in these politically-focused accounts about the politics of constitutional change. Lost, however, in the din of social movement activism, the dramatic politics of patriation, and cult of personality that surrounds Trudeau, are the lawyers, scholars, and judges that made the Charter thinkable, and therefore, politically possible. To date, scholars have given us a story of constitutional rights that takes little to no account of constitutional thought, culture, and practice. Law and its practitioners have mysteriously fallen out of our modern constitutional history.

The chapters that follow are not, then, political history, although many politicians appear in its pages. Neither are they social history, although the rights-demands of social movements are frequently invoked. Rather, this dissertation aims to provide a constitutional history – an intellectual history of law which charts the emergence of the idea of constitutional rights.²⁰ Although a constitution is “a formal framework of fundamental law that establishes and regulates the activity of governing,”²¹ it is also a cluster of ideas, norms, aspirations, assumptions, and understandings shared and debated among those subject to its rule. These ideational aspects of constitutional law create space in which diverse constituencies participate in the construction of what scholars have

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termed “constitutional culture.” In other words, a constitution draws meaning not only from what the text commands, but also from what people believe. Taking account of this broader sphere of constitutional culture, this study employs a rich variety of sources often overlooked by constitutional scholars. The idea of constitutional rights can be found not just in the formal decisions of courts, but in the constitutional culture more generally: in scholarship and the personal reflections of academics; political debates and testimony at parliamentary committees; the arguments of lawyers in court, professional journals, and associational meetings; media reports; social movements; and art. This is not to claim that all participate equally in constructing constitutional meaning. To be sure, judges, politicians, scholars, and lawyers wield disproportionate power and influence in the formal and informal discourses of law. Accordingly, for the most part, this study will trace the idea of constitutional rights through the influence of legal elites.

Towerimg (literally and figuratively) above the figures that weave in and out of the pages that follow stands Francis Reginald Scott (1899-1985). Frank Scott’s accomplishments— as a poet, legal scholar, and lawyer range widely across the sometimes intersecting worlds of Canadian art, politics, and law. In literary circles Scott is known for his satirical verse and as a leading figure of Canadian

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modernism. Historians prefer to remember Scott’s presence at the drafting of the Regina Manifesto, his founding of the League for Social Reconstruction, and his leadership behind the scenes of the Co-operative Commonwealth Federation. Legal scholars, for their part, think of Scott as a constitutional scholar and, perhaps most famously, as a constitutional lawyer in the landmark cases *Switzman v. Elbling* and *Roncarelli v. Duplessis*. Ever the poet, always political, and deeply committed to law, the many facets of Scott’s life and work are often inseparable. Still, it is in his capacity as a writer and thinker of constitutional rights that this dissertation is primarily concerned.

As a constitutional scholar, Scott shared the centralist leanings of those legal scholars who came of age during the Depression and Second World War. Believing the Judicial Committee of the Privy Council to have nefariously whittled down federal jurisdiction under the *British North America Act*, Scott consistently championed a constitutional interpretation in keeping with his view of the nationalist imperatives of the constitutional text and modern economy.

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28 *Constitution Act, 1867*, supra note 7.

Scott’s scholarly peers in English-Canada – most notably, W.P.M. Kennedy, Vincent MacDonald, and Bora Laskin – made similar arguments about the mendacity of the Privy Council’s decentralism, the centralist intentions of the constitutional framers, and the necessity of an expanded regulatory state. These constitutional orientations were fashioned from a diverse array of sources: emergent Canadian nationalism, Keynesian economics, and American legal theory principal among them. Blended together, these influences led Canadian legal scholars to call for constitutional change premised on the needs and aspirations of citizens as opposed to the logical abstractions of federalism. Scott applied that new logic and focus to the idea of entrenched constitutional rights.

“To define and protect the rights of individuals,” Scott asserted in 1949, “is a prime purpose of the constitution in a democratic state.” If that claim seems prosaic today, it is largely because of Scott’s – not wholly intentional – success in shifting Canadian constitutional law away from its preoccupations with history, sovereignty, and federalism toward the powerful rhetorical and normative domain of individual rights. For A.H.F. Lefroy, writing at the end of the nineteenth century, there was little doubt that Canada’s constitutional framers had “faithfully followed by preference ... the principles of the British ...
Constitution” in adopting Westminster-style legislatures, responsible government, and the principle of parliamentary supremacy as a constitutional bulwark against tyranny.\(^{32}\) Together, the workings of parliamentary government and rule of law constitutionalism, Lefroy argued, secured “to Canadians as a heritage for ever the precious forms of British liberty.”\(^{33}\) For Canada’s first generation of constitutional scholars further elaboration was not required – Canadian constitutional rights were those of British constitutional law.

Lefroy and his peers acknowledged, of course, that the BNA Act’s division of powers gave rise to salient constitutional differences. It was the written constitution, after all, that had created “One Dominion under the Name of Canada” and distributed legislative powers among the central government and provinces.\(^{34}\) But other than sections 93 and 133, which guaranteed certain minority education and language practices from legislative interference,\(^{35}\) Canada’s constitutional framers avoided limiting the state in the name of individual rights in the American style.\(^{36}\) Tellingly, when Lefroy spoke of constitutional rights he referred to the power of government to legislate. As he


\(^{33}\) Ibid. at lxiv.

\(^{34}\) Constitution Act, 1867, supra note 7.


\(^{36}\) The term “rights” appeared nine times in the original Act, most notably granting provinces jurisdiction over “Property and Civil Rights in the Province.” The exact meaning of that clause produced much debate, but lawyers generally agreed that civil rights denoted private law relations between individuals. Elsewhere, the Act generally employed the term “rights” to distribute governmental power, declaring, for example, the “Right of Canada to assume ... Lands ... for the Defence of the Country” and the “Right of New Brunswick to levy ... Lumber Dues.” Ibid., ss. 92(13), 117, 124. Janet Ajzenstat has recently argued that the BNA Act brims with liberal rights, but they are rights that inhere in the parliamentary process and democracy, rather than from the explicit limitation on government in the name of individual rights and freedoms. See Ajzenstat, supra note 7.
explained, the Constitution was the “charter by which the rights claimed by the Dominion and the Provinces respectively can be determined.”37 Indeed, the occasional glance of American scholars at the “affairs of [its] nearest neighbor,” produced amazement of the “omnipotence of Canadian legislatures,” and the “entire absence of restrictions on the power of the legislature relative to private property and civil rights.”38 As the Privy Council had made abundantly clear, within their respective spheres, the powers of the federal and provincial governments were plenary and supreme.39 “[I]t does not belong to courts of justice to interpolate constitutional restrictions,” Justice Strong explained in an early decision of the Supreme Court of Canada, “their duty being to apply the law, not to make it.”40 Despite eliding the discretion inherent in judicial interpretation, that was as uncontroversial a statement as could be made in Canada’s early constitutional history.

The reality, of course, was more complicated. As Blackstone had made clear, the common law had always protected “the absolute rights of individuals,” among them “the right of personal security, the right of personal liberty, and the right of private property.”41 Such rights were protected not by artificial absolutes, but rather, as Albert Venn Dicey famously explained, by judges operating under

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37 Lefroy, *Legislative Power*, supra note 32 at xvii [my emphasis].
39 *Hodge v. The Queen* (1883), 9 A.C. 117 (PC).
40 *Severn v. The Queen*, [1878] 2 S.C.R. 70 at 103.
the ideological suppositions of the “rule of law.” 42 “There is in the English constitution,” he pointed out, “an absence of those declarations or definitions of rights so dear to foreign constitutionalists.” 43 Working a subtle distinction, Dicey argued that rights in the written model “flow from or are secured by the constitution,” whereas in Britain, “the right to individual liberty is part of the constitution.” 44 Under a common law constitution, Dicey asserted, rights were necessarily relative, partial, and interactive. Such common law constitutionalism rendered rights meaningful and effective – “worth a hundred constitutional articles guaranteeing individual liberty,” 45 Dicey argued – precisely because of their quotidian character, ubiquity, and permanence. Indeed, for John Willis, a pioneer scholar of Canadian administrative law, the problem was not that Canadian constitutional rights were too few and too weak, but rather too many and too strong. Under the “common law ‘Bill of Rights,’” Willis complained, Canadian judges used “rights” to distort the redistributive aims of democratically-enacted legislation. 46 For Willis, notwithstanding the constitutional differences, Canada possessed a Bill of Rights virtually as potent as the United States.

43 Dicey, *Law of the Constitution*, ibid. at 193, 197. See also Dicey’s discussion in “Federal Government” (1885) 1 Law Q. Rev. 80.
44 Dicey, *Law of the Constitution*, ibid. at 197 [my emphasis].
46 See John Willis, “Statutory Interpretation in a Nutshell” (1938) 16 Can. Bar Rev. 1 at 23. See also John Willis, “Administrative Law and the British North America Act” (1939) 53 Hav. L. Rev. 251 at 252, 274-75. Willis criticized, in specific, the judicial presumptions against taking away common law rights, or property without compensation, against barring the subject from the courts, or interfering with the personal liberty of the individual.
Canada’s common law constitution may have been suffused with rights, but they were rights of a particular sort, and certainly not rights for all. Whether in private or public law disputes, Canadian courts distributed entitlement to rights selectively, routinely denying equal treatment to women, workers, Aboriginal peoples, and racialized minorities. Under a hierarchy that protected the rights and freedoms of classical liberty – property and contract above others – courts denied, for example, that private acts of discrimination breached an individual’s “right as a Canadian citizen.” As the Supreme Court notoriously affirmed in Christie v. York: a Montreal tavern “was strictly within its rights” to refuse service to a Black man. As for matters of public law, the workings of federalism occasionally protected certain rights, but in indirect and not altogether reliable ways. Union Colliery Company of British Columbia v. Bryden suggested that federalism could protect rights by limiting the ability of provincial majorities to discriminate against naturalized citizens. Just four years later, however, the Privy Council distinguished its earlier precedent and

47 Distinct histories all, but nonetheless linked by a “liberal model which tended to mark them all out as ‘Other,’ and ... exclude[e] them from the burdens and responsibilities of full individuality.” McKay, supra note 3 at 628. On the unequal application of the law see Constance Backhouse, Petticoats & Prejudice: Women and Law in Nineteenth Century Canada (Toronto: The Osgoode Society for Canadian Legal History, 1991); Lorene Anne Chambers, Married Women and Property Law in Victorian Ontario (Toronto: The Osgoode Society for Canadian Legal History, 1997); Judy Fudge & Eric Tucker, Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948; Sidney L. Harring, White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence (Toronto: The Osgoode Society for Canadian Legal History, 1998); Constance Backhouse, Colour-Coded, supra note 9; Walker, supra note 9.


50 [1899] A.C. 580 [Union Colliery].

upheld racist legislation denying Japanese Canadians the right to vote.\textsuperscript{52} Not long after, the Supreme Court of Canada similarly validated provincial legislation banning “Chinamen” from employing “white women” as a constitutional exercise of provincial jurisdiction over “Property and Civil Rights in the Province.”\textsuperscript{53} “It may be unfortunate,” a Quebec judge remarked in 1939, “that ... legislators find it necessary ... to restrain what some citizens consider his rights or liberties,”\textsuperscript{54} but it was certainly not unconstitutional. Before the 1930s, virtually all would have agreed that Canadian constitutional law was defined by the interaction – and occasional tensions – of parliamentary sovereignty, federalism, and the rule of law.

It is often assumed that Canada’s “rights revolution” began in the postwar period. In fact, as Chapter 2, “Canada’s ‘Newer Constitutional Law,’” demonstrates, the idea of constitutional rights first arose when Frank Scott applied Roscoe Pound’s American legal theory to the workings of Canadian constitutional law. Early in the twentieth century, Pound had enlivened American jurisprudence with a call for a “sociological jurisprudence” – the view of law as a flexible instrument of progressive social change. In ensuing decades, while the American legal realists questioned Pound’s continuing faith in the normative content of law, Canadian constitutional scholars fully embraced Pound’s legalistic

\begin{footnotes}
\item[53] Constitution Act, 1867, supra note 7, s. 92(13); Quong-Wing v. The King, [1914] 49 S.C.R. 440 at 447. Idington J., in dissent, would have found the right to “equality of freedom and opportunity” implicit in the federal government’s jurisdiction over naturalization (at 452).
\item[54] Fineberg v. Taub (1939), 73 C.C.C. 37 at 48 (Que. K.B.) at 48.
\end{footnotes}
faith in what Scott called “the concept of law as social engineering.” Inspired by Pound and reacting against the perceived pathologies of constitutional decentralism, scholarly formalism, and laissez faire economics, a generation of Canadian scholars led by Scott and W.P.M. Kennedy fashioned a new way of writing and thinking about Canadian constitutional law. Their efforts have typically been understood as exemplars of a newfound faith in constitutional centralism, but there was more than a new theory of the division of powers at work. In calling for a nationalist-inspired constitutional law functionally responsive to the needs of citizens, constitutional scholars legitimated the prospects and possibilities of constitutional adaptation and change.

That change was necessary seemed everywhere apparent. In the midst of a dire economic depression, Scott noted the state’s increasing intolerance of left-wing dissent and agitation. What Canada needed, he came to believe, was both economic security afforded by government, and civil liberties protection from government. And so, in a text published in 1935 advocating centralized socialist controls over the economy, Scott called for a constitutional “Bill of Rights” to protect “the individual’s right to freedom of speech, of association, of public meeting, and of the press” from legislative incursion. Scott refined that demand in the decades that followed, but he never wavered from its central premise: “[d]efence against the state and protection by the state are two correlative functions, not contradictory but complementary.” From Scott’s perspective, human rights required socialist state action twinned with constitutional limits

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55 Scott, Essays on the Constitution, supra note 25 at ix.
interpreted by courts enforcing entrenched constitutional rights. Folding concerns about civil liberties and entrenched rights into the Canadian constitutional imagination, Scott began the process of recasting the fundamental tenets of Canadian constitutional thought.

Scott’s constitutional arguments might have languished had not the Second World War elevated the protection of individual rights and freedoms into a rallying cry of international significance. Chapter 3, “Fighting for Freedom,” displays the multiple dimensions of the Second World War’s influence on the idea of constitutional rights. While Canadian politicians extolled the virtues of the “fight for freedom” abroad, the government actively repressed the liberties of unpopular and vulnerable minorities at home. Under the expansive powers of the War Measures Act, the government banned anti-war speech, outlawed dissident political and religious groups, and most notoriously, imprisoned thousands of innocent Japanese Canadians living along British Columbia’s coast. When called upon to review wartime state action, judges, for the most part, framed such restrictions as necessary sacrifices, the costs of security in a time of war. Lawyers and legal scholars, like most Canadians, greeted wartime repression and its judicial sanction with silence. A remarkable debate about constitutional rights and freedoms did arise, however, concerning the increasingly interventionist wartime administrative state. Leading the charge against what he called “bureaucratic dictatorship,”58 Toronto lawyer, Robert Michael Willes Chitty, pressured his colleagues in the Canadian Bar Association to demand American-

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style constitutional rights in order to protect property and legal rights from the state. This chapter explores the central irony that during the war demands for entrenched constitutional rights sounded against a backdrop of overlooked moments of legalized repression and discrimination.

Chapter 4, “Constituting Rights and Freedoms,” examines the broadening appeal of the language of human rights and fundamental freedoms in the years immediately following the war. By the end of the 1940s, the demand for a constitutional bill of rights had become an issue of predominate concern in Canadian politics. Internationally, the United Nations’ Charter and Universal Declaration of Human Rights signalled that individual rights and freedoms would, in theory at least, guide the post-war world. In Canada, a series of parliamentary committees examined the prudence and praxis of entrenching constitutional rights in light of Canada’s international rights commitments. Yet the idea of Canadian constitutional rights remained uncertain, contested, and ambiguous. Although the protean language of rights ensured widespread support at the most abstract level, chasms of disagreement emerged about the constitutional state such rights intended to create. Were constitutional rights socialist or anti-socialist? Were rights absolute, or not? When and in what circumstances could rights be suspended? How would rights interact with the other principles of Canadian constitutional law, especially federalism and parliamentary supremacy? How, in any event, could Canada’s Constitution be amended? For all the lofty international rhetoric, the idea of Canadian constitutional rights was enmeshed in the pragmatic realities and anxieties of Canadian constitutional law.
The aftermath of the Second World War and the descending chill of the Cold War brought several of these issues to the fore. The government’s proposed deportation of Japanese Canadians and its repressive treatment of the Canadian citizens alleged to have transferred state secrets to the Soviet Union forced the legal profession to confront and balance its attachment to individual liberty and legal rights on the one hand, and its concern for state security and wartime constitutionalism on the other. The profession’s divided response revealed the contours of the transition in operation: increasingly, the language of rights and freedoms yielded demands to limit the state to protect the individual. The multifarious politics of rights gave rise to a wave of scholarly attention. In a series of articles at the close of the 1940s, Arthur Lower, Glen How, and Frank Scott aimed to produce and clarify a theory of Canadian constitutional law that could accommodate the addition of written rights. If those efforts did not entirely succeed, they further encouraged the drift of Canadian constitutional thought towards the concerns of entrenched individual rights. In the process, the discipline of Canadian constitutional law itself began to change.

Chapter 5, “Constitutional Conceptions of a Different Order,” explores the ramifications of Canada’s emerging constitutional culture of rights on the jurisprudence of the Supreme Court of Canada. Most law students are at least vaguely familiar with Chief Justice Lyman Duff’s paean to free speech in Reference re Alberta Legislation,\(^{59}\) and Justice Ivan Rand’s robust notions of citizenship in Switzman;\(^{60}\) together, along with Boucher v. The King,\(^{61}\) Winner v. 

\(^{60}\) Supra note 26.
S.M.T. (Eastern) Ltd.,\textsuperscript{62} Saumur v. Quebec,\textsuperscript{63} Chaput v. Romain,\textsuperscript{64} and Roncarelli\textsuperscript{65} these cases have become known for their articulation of what has been termed the implied bill of rights. But as well-known as these decisions are in Canadian constitutional history, the implied bill of rights cases have too often been presented as the singular products of judicial imagination. On the contrary, the implied bill of rights reflects a much broader world of changing ideas about constitutional rights. Tracing the origins of the implied bill of rights through the facta submitted to the Court by lawyers James Ralston, Frank Scott, and Glen How, this chapter reveals the connections between Justices Duff and Rand’s ruminations on rights and the surrounding ideational shifts in Canadian constitutional thought and culture. In doing so, it identifies the medley of intellectual resources that influenced the Supreme Court, emphasizing, in particular, the role of lawyers as conduits of ideas in the making of constitutional law.

As Dennis O’Sullivan explained over a century ago, “[t]he aim of a constitutional history is to give an account of the way in which the people of any country have governed themselves.”\textsuperscript{66} Surely, for better or worse, we find ourselves today governed by conceptions of rights. Whatever perspective we take on our present constitutionalism, we do ourselves little service to regard it as either inevitable or intractable. As David Ibbetson points out, “the whole endeavour of the legal historian ... is the recognition that the law is perpetually in

\textsuperscript{63} [1953] 2 S.C.R. 299.  
\textsuperscript{64} [1955] S.C.R. 834.  
\textsuperscript{65} Supra note 27.  
\textsuperscript{66} D.A. O’Sullivan, Government in Canada: The Principles and Institutions of our Federal and Provincial Constitutions, 2d ed. (Toronto: Carswell, 1887) at 245.
a state of flux: not simply in that its rules are repeatedly being changed but that the intellectual structures linking together those rules are always themselves provisional.”67 Tracing the intellectual structures of rights, this dissertation argues that Canada’s Constitution changed not only because of the momentous happening of the Charter, but because the idea of constitutional rights had made such a transition imaginable in the first place.

Chapter Two: Canada’s ‘Newer Constitutional Law’

Introduction

“[F]or many years constitutional law has been under a shadow,” observed William Paul McClure Kennedy in the 1931 volume of the Canadian Bar Review. For this gloomy assessment, Kennedy blamed “incomparably dull” textbooks crammed with “the minutiae or unrealities of legal or constitutional history” and other such “barren gustations.” Yet Kennedy saw hope for his beloved subject. Times were changing, he insisted, and the “demands of modern life” compelled scholars to view constitutional law from “newer and more urgent angles.” The “older constitutional law,” Kennedy announced, was “being handed over to the historians to make way” for a new, robust, and energized constitutional scholarship. “[N]o one,” he asserted, “can fail to notice the revival of interest and to catch the living notes in the newer constitutional law.”¹

Kennedy offered this note of optimism in a review of three books in British constitutional law, but he might just as well have been describing changes taking place in Canada. In the 1930s, Canada, like Britain, was in the midst of a marked transition in the way that scholars conceived of and wrote about constitutional law. Although Kennedy’s Canadian colleagues generally shared his enthusiasm for the dynamic turn in constitutional scholarship, there is no evidence that any

of them used the expression “newer constitutional law.” Indeed, so far as I can tell, Kennedy never used the expression again either. Nonetheless, the idea of the newer constitutional law warrants resurrecting for the spirit of change it so aptly captures.

Along with Kennedy, the other principal figure responsible for the emergence of the newer constitutional law in Canada was Francis Reginald Scott, poet, activist, and professor of constitutional law at McGill’s Faculty of Law. Although in the early 1930s these men were at notably different stages of their careers – Kennedy near the end and Scott at the beginning – both contributed to the reinterpretation of constitutional law in Canada. They were joined in the endeavour by legal scholars such as Vincent MacDonald at Dalhousie, political scientists such as Norman Rogers at Queen’s, and political economists such as Eugene Forsey at McGill. Collectively, I call these thinkers the scholars of the newer constitutional law, although of course they disagreed amongst themselves on various issues. Scott and Forsey, for example, were avowed socialists, while Kennedy, MacDonald, and Rogers were more moderate liberal centrists. Whatever their political differences, however, these scholars were united in a new approach to thinking and writing about Canadian constitutional law. For several reasons, this small group of public law professors did not include thinkers from French-speaking Quebec. Quebec intellectuals in the 1930s also grappled with issues of constitutional law, but they did so through a prism of Quebec history, nationality, and identity. Articulating their own set of constitutional aspirations and prescriptions, Quebec constitutional scholars such as Léo Pelland at Laval focused on the need for the continued autonomy of provincial governments and
the maintenance of Privy Council appeals. The virtual non-existence of social and professional relations between English- and French-speaking scholars widened the gulf between them. Literally and figuratively, Canada’s constitutional scholars in English Canada and French Canada did not speak to one another.

Today, the scholars of the newer constitutional law are best known for their impassioned criticism of the Privy Council, but this was but one facet of their contribution to the history of Canadian constitutional ideas. The scholars of the newer constitutional law changed not only the tenor of legal criticism, but the fundamental assumptions on which that criticism was based. In the place of the formalist traditions symbolized by the work of A.H.F. Lefroy, the constitutional scholars of the 1930s forged new methods of constitutional analysis drawn from ideas about the social utility of law, and inspired by a new sense of Canadian nationalism. This new approach to constitutional law was part of a wider phenomenon Philip Girard has labelled “legal modernism.” Legal modernists viewed law not as “a historical artifact, a set of fixed principles, or a professional monopoly,” but rather as “a dynamic tool of social organization and social engineering promulgated by the legislature and fine-tuned by the courts.”

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4 Philip Girard, Bora Laskin: Bringing Law to Life (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2005) at 97-98.

5 Ibid.
The newer constitutional law represented the theories of legal modernism applied to Canadian constitutional law. With this novel approach, the scholars of the newer constitutional law questioned Canada’s constitutional connection to Britain, arguing instead for a domestic constitutional law that could functionally address the living experiences of the nation. If necessary change could not be accomplished through the interpretive paradigms of the Privy Council, then appeals to the Privy Council should be abolished. If the constitutional text itself was deficient, then the constitution should be amended. The most significant and lasting contribution of the scholars of the newer constitutional law was the idea that constitutional law could and should progressively transform society. In the process, scholars legitimated the prospects and processes of constitutional change.

In the midst of the changing landscape of Canadian constitutional thought emerged the idea of an entrenched bill of constitutional rights. In Social Planning for Canada, published by the League for Social Reconstruction in 1935, Frank Scott advanced the first scholarly proposal for an entrenched “Bill of Rights” in Canadian history. In many ways, Social Planning for Canada was an odd place to find an argument for individual constitutional rights. In 1935, America’s Lochner era still loomed menacingly across the southern border. As Canadian academics well knew, under Lochner and its precedents, the United States Supreme Court employed constitutional rights and the rhetoric of freedom and liberty to strike

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down progressive labour legislation, most often minimum wage laws. By contrast, *Social Planning for Canada* called unabashedly for the dismantling of capitalism and the establishment of a planned economy and socialist government, albeit by democratic means. Scott was aware of *Lochner* and its disabling legacy in American constitutional law, but never seemed troubled by the tensions between his agenda of progressive state action and his vision of judicially enforced constitutional rights. Ultimately, Scott relied on a faith that Canadian judges would be capable of respecting both democratic socialist initiatives and civil liberties. Scott’s legalism led him to believe that both economic security for the community and freedom for the individual could be harmonized in progressive balance in the rule of constitutional law.

This chapter proceeds in three parts. Part I examines constitutional writing in the early twentieth century, scholarship Kennedy dismissed as the “older constitutional law.” Part II charts the emergence of the newer constitutional law by analyzing its influences and describing its principal features. As we shall see, the newer constitutional law drew its inspiration and content from a medley of sources, above all, ideas of Canadian nationalism and Roscoe Pound’s theories of sociological jurisprudence. Part III turns specifically to Scott’s 1935 proposal for a constitutional Bill of Rights and deals with the paradox of Scott’s call for entrenched constitutional rights in the context of his

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7 The so-called *Lochner* era takes its name from *Lochner v. New York*, 198 U.S. 45 (1905) [*Lochner* cited to U.S.]. *Lochner* was still good law in 1935 when *Social Planning* was published: see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S. Ct. 918 (1936) [*Morehead* cited to U.S.]. Less than a year later, the Court engaged in the famous “switch in time” in *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937) [*West Coast Hotel* cited to U.S.] and upheld the State of Washington’s minimum-wage legislation. For an account of *Lochner’s* role “as a parable or a cautionary tale” in the drafting of the *Canadian Charter of Rights and Freedoms*, see
socialist political agenda. I address these tensions by placing Scott’s thinking on constitutional rights within the broader ideas of the newer constitutional law. In this way, the history of the Canadian Charter of Rights and Freedoms begins in the shifting language and landscape of Canadian constitutional thought.

I. Constitutional Scholarship in the Early Twentieth Century: The “Older Constitutional Law”

From Confederation until the 1920s, Canada’s constitutional scholars were typically lawyers, not professional full-time academics. This was true of the dominant constitutional scholar of the period, Augustus Henry Frazer Lefroy (although in addition to his Toronto law practice, Lefroy also taught Roman Law at the University of Toronto). Whether in books, case comments, or articles, constitutional writers generally aimed their scholarship at the small number of lawyers who litigated or advised on constitutional matters. Since constitutional litigation overwhelmingly involved the legislative division of federal and

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10 In the early twentieth century, articles and case comments appeared in one of two scholarly journals: the Canada Law Journal and the Canadian Law Times. In 1923, these periodicals merged to form the Canadian Bar Review. In Quebec, no scholarly journal existed until the early 1920s; the Revue du Notariat, published since 1898, was largely a trade journal for the province’s notaries. In 1922, the Quebec bar established the Revue du droit, which included the occasional article on constitutional law, although its main focus was private law subjects and the news of the Quebec bench and bar.
provincial powers, it was primarily to the workings of federalism that scholars directed their attention.

Confronted with a division of powers question, most lawyers would have lifted Lefroy’s *The Law of Legislative Power in Canada* from their shelf. Influenced by the British text writers and postulates of legal science of the late nineteenth century, Lefroy’s text claimed to cover “the whole of the law of legislative power” through the exposition of sixty-eight “Leading Propositions.” In striving to present a principled synthesis of constitutional law inductively distilled from judicial decisions, Lefroy embraced the principal assumptions of late nineteenth-century legal thought: namely, that the law could be systemically and comprehensively understood with a detailed analysis of case law. In reviewing the constitutional common law, Lefroy accepted judicial interpretation as authoritative, rational, and apolitical. He analyzed particular constitutional decisions on the basis of whether or not judicial reasoning cohered and

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12 Lefroy, *Legislative Power*, *ibid.* ‘Preface’. Risk argues:

The entire text of *Legislative Power* was an expression of the late nineteenth-century rule of law thought. The undertaking to synthesize, the faith in the meanings embedded in a text, the objectivity of the judicial function, the mutually exclusive and absolute spheres of power, and the distinctions between law and context and values were all familiar elements of English scholarship in the late nineteenth century (Risk, “Lefroy,” *supra* note 9 at 83-84.)
persuaded in accordance with the text’s “true construction.” In doing so, Lefroy approached the decisions of the Privy Council not as texts to be criticized, but as “oracle[s] to be studied and accommodated.” By unconditionally accepting constitutional law’s internal logic, scholars such as Lefroy engaged in analysis that aimed to mirror law’s inward and supposedly neutral gaze.

In these aspects of his legal thinking, Lefroy reflected the pervasive and dominant modes of legal thinking in the late nineteenth-century common law world. In his eyes, the Canadian constitution – though federal like the American – in all other respects “adhered as closely as possible to the British system in preference to that of the United States.” Lefroy stressed that the *British North America Act (BNA Act)*, like its unwritten British counterpart, operated under the principle of parliamentary supremacy – the premise that “good servants ought to be trusted” – rather than an American-style limitation of powers born of “distrust of those who exercise public authority.” But Lefroy’s constitutional thought was also his own, reflecting his adaptation of the principles of British constitutionalism to Canada. Lefroy recognized however that the unwritten

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13 A.H.F. Lefroy, “The Alberta and Great Waterways Railway Case” (1913) 29 Law Q. Rev. 285 [Lefroy, “Great Waterways”]. In that case comment, while characterizing “the decisions of the Privy Council...as having been of the greatest benefit to this country,” Lefroy gently offered that his disagreement was “one purely of the construction of the exclusive power given to provincial legislatures over civil rights...without any regard to any injustice or injury which may be perpetrated by those legislatures in its exercise” at 288. That Lefroy was offering criticism alone was a rarity. He felt it necessary to explain that: “I have carefully studied every reported judgment of the Privy Council upon questions arising out of the provisions of the British North America Act, 1867, relating to the distribution of legislative power...and I have never seen the smallest loophole for criticism...before this last judgment.”

14 Risk, “Lefroy,” supra note 9 at 82.


British principle of parliamentary sovereignty required adaptation to the realities of Canada’s written division of powers. Accordingly, Dicey’s “right to make or unmake any law whatever”18 became, for Lefroy, the right of federal and provincial governments to legislate “in respect of any matter over which it has jurisdiction.”19 “The British North America Act,” Lefroy stated in his first proposition, “is the sole charter by which the rights claimed by the Dominion and the Provinces respectively can be determined.”20 On this view, the BNA Act was a charter of rights for legislatures, not citizens. Within their respective spheres, the powers of the federal and provincial governments were plenary and supreme; as Lefroy stated in his twenty-first proposition, “it is not competent for any Court to pronounce the Act invalid because it may affect injuriously private rights.”21

Unlike Dicey, Lefroy did not cast the judiciary and the rule of law as the protectors of individual civil liberties. In Lefroy’s conception, the legislatures, as representative institutions of the people, assured Canadians of their constitutional rights. For Lefroy, the BNA Act “guard[ed] the liberty of the subject without destroying the freedom of action of the legislature.”22 Lefroy never elaborated upon or theorized the mechanics of this balance, and he did not describe the protected liberties with any specificity, though he would have had in mind historic British liberties such as habeas corpus and various limited

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17 Lefroy, Legislative Power, ibid. at xlv, liv.
18 Dicey, Law of the Constitution, supra note 15 at 38.
19 Lefroy, Legislative Power, supra note 11 at xxii-xxiii. Riddell J. of the Ontario High Court of Justice expressed a similar view in a 1908 decision: “[T]he Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine” Florence Mining Co. v. Cobalt Lake Mining Co. (1908), [1909] 18 O.L.R. 275 at 279 (H.C.J.).
20 Lefroy, Legislative Power, ibid. at xvii.
21 Ibid. at xxii-xxiii.
personal freedoms. Lefroy glided over these issues because he did not view individual liberties and the functioning of legislatures as inherently opposed. As Richard Risk and Robert Vipond have argued, the wresting of responsible government from the executive in the nineteenth century vested Canadian legislatures with tremendous and enduring symbolic authority for a generation of Canadian politicians, judges, scholars, and lawyers. For Lefroy and his contemporaries, “protecting liberty meant fostering robust legislatures that would be able to constrain executive power.” In other words, a democratically elected responsible government, by its very nature, offered all the rights protection a citizen could need.

As we shall see, the scholars of the newer constitutional law challenged a good deal of Lefroy’s constitutional thought. Pride in the Britishness of Canadian constitutional law ceded to a new nationalism that emphasized Canada’s constitutional maturity and independence. The assumption that constitutional

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22 Ibid. at ‘Preface’. Walter S. Scott, by contrast, more readily adopted Dicey’s view that the judiciary protected personal liberties and freedoms through the rule of law. Scott, supra note 11 at 5-6.


decisions were inherently apolitical gave way to the idea that constitutional law and politics were one and the same. Sharp criticism replaced efforts to synthesize and accommodate Privy Council decisions. Finally, scholars undermined the idea that civil liberties were protected by the practices of parliamentary supremacy and responsible government by re-casting legislatures as the potential or actual abusers, not protectors, of individual rights and liberties. All of these ideas would come to exert influence on the emergence and direction of Canadian constitutional thought about entrenched individual rights.

II. The Newer Constitutional Law

A. First Challenges

The first scholarly challenges to Lefroy’s vision of constitutional law emerged in the writings of two Canadian constitutional scholars of the 1920s: W.P.M. Kennedy and Herbert A. Smith. Kennedy immigrated to Canada from Ireland in 1913 and shortly afterwards began teaching history at the University of Toronto.25 Although trained as an ecclesiastical scholar of Elizabethan England and not in any formal sense in law, after his arrival at the University of Toronto, Kennedy acquired a keen interest in Canadian constitutional history. By 1918, he had compiled a text of Canadian constitutional documents and contributed an historical introduction to Lefroy’s updated text, *A Short Treatise on Canadian Legal Thought*.

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Constitutional Law. As the decade progressed, Kennedy increasingly considered himself a legal scholar. By the end of the 1920s, he had moved from the history department to lead an undergraduate program in law, which became, owing to the force of his personality and the extent of his influence, known simply as the Kennedy (or, tellingly possessive, Kennedy’s) School.

In addition to his leading role in developing university-based legal education in Ontario, Kennedy became his generation’s leading constitutional historian, a position secured by the publication in 1922 of The Constitution of Canada: An Introduction to Its Development and Law. Though Kennedy indulged in the occasional moment of whiggish rhetorical flourish – he analogized, for example, “constitutional development” to a “stream of evolution ... reaching inevitably the ocean of constitutional life” – for the most part, he suggested that constitutional law was the product, not of divine creation or inevitable progress, but of historical circumstance. More distinctly, Kennedy imbued his history with a particular national pride unseen in previous Canadian constitutional scholarship. “Canada is a nation,” he asserted, and “the history of Canadian constitutional development must be regarded as one of great

27 Throughout the Kennedy years the law program at the University of Toronto was an undergraduate degree granting no professional status. Graduates of the program were required to subsequently graduate from the two-year program of lectures and articles administered by the Law Society of Upper Canada at Osgoode Hall in order to be entitled to be called to the Bar. For an overview of the history of legal education at the University of Toronto see Girard, supra note 4 at 38-57; C. Ian Kyer & Jerome E. Bickenbach, The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957 (Toronto: University of Toronto Press, 1987) and Martin L. Friedland, The University of Toronto: A History (Toronto: University of Toronto Press, 2002) at 139-143, 306-308, 438-442.
29 Ibid. at vii.
moment.” Kennedy celebrated Canadian constitutionalism, not as a derivative of British theory, but on the basis of its own unique historical experience. Canada, in Kennedy’s eyes, had developed a constitutional model that could offer guidance and inspiration to a troubled world. Responsible government and federalism challenged “the absolute Austinian doctrine of sovereignty,” and provided a model of interdependence and co-ordinate sovereignty worthy of international emulation. Lefroy and his contemporaries had been proud of the BNA Act too, of course, but for different reasons. What Kennedy changed was the reason for the pride: where Lefroy had celebrated Canada’s constitutional Britishness, Kennedy celebrated Canada’s constitutional Canadianness.

If Kennedy’s constitutional history portended an emerging Canadian nationalism, then Herbert A. Smith’s case comment on Toronto Electric Commissioners v. Snider conveyed a sense of the newer constitutional law’s critical spirit. Smith, an English lawyer trained at Oxford, lectured as one of three full-time professors at McGill’s Faculty of Law in the mid-1920s. In his lectures on constitutional law, Smith argued that the federalism decisions of the Privy Council were an example of how constitutional law could adapt to the realities of modern society.

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30 Ibid. at viii.
31 Ibid. at vii. Kennedy elaborated in his conclusion: “[T]he league of nations can grow into an effective reality only if the conception of the exclusive state, discredited by the facts of interdependence, is abandoned also in the practice of statesmanship” (ibid. at 456). See also Risk, “The Many Minds,” supra note 25 and the discussion of Kennedy in Carl Berger, The Writing of Canadian History: Aspects of English-Canadian Historical Writing Since 1900, 2d. ed. (Toronto: University of Toronto Press, 1986) at 40-42.
Council were wandering increasingly astray from the original purpose of the *BNA Act*. His case comment on *Snider* suggested that in reducing the scope of the “peace, order and good government” residuary clause, the Privy Council had given Canada a constitution “the precise opposite of that which our fathers hoped and endeavoured to attain.” Smith blamed the outcome in *Snider* on a rule of statutory interpretation that prevented courts from reviewing the records surrounding the drafting and passage of the *BNA Act* – records that Smith believed clearly evidenced the framers’ desire to grant wide jurisdictional power to the federal government. In Smith’s view, the Privy Council, and in particular Lord Haldane, “unmindful of Canadian history,” perverted the *BNA Act*’s meaning by narrowly interpreting the federal residuary clause, while expanding provincial jurisdiction through an overly generous reading of the provincial “property and civil rights” clause. This attack on the historical myopia and decentralist bias of the Privy Council would become a *cause célèbre* of the newer constitutional law.

The scholars of the newer constitutional law readily embraced Smith’s views on the *BNA Act*’s centralizing purpose, but they were also prepared to advance their arguments on both legal and policy grounds. Indeed, their willingness to engage with law as policy and politics became a defining feature of the newer constitutional law. Smith’s case comment gestured in this direction by highlighting a gap between “the practice of our courts in the nineteenth century”

35 Smith, supra note 32 at 433-34.
and the political needs of the twentieth.\textsuperscript{37} This chasm drew repeated attention from the scholars of the newer constitutional law. Smith, who returned to Britain to continue his academic career at the University of London, did not remain in Canada long enough to see his views flourish. His legacy remained, however, not only in the ideas he articulated in his \textit{Snider} comment, but through the imprint he left on one of his students, F.R. Scott. “I had the good fortune,” Scott later reminisced, “as a young student in the McGill Law Faculty, to be introduced to constitutional law by the late H.A. Smith …. It was he who taught me to see the problems which the Act of 1867 was intended to remedy.”\textsuperscript{38} After Scott took Smith’s place on the McGill faculty in 1928, he continued Smith’s critical engagement with the constitutional decisions of the Privy Council, but incorporated into this analysis an unwavering Canadian nationalism, a belief in constitutional law as politics, and a faith in the progressive possibilities of constitutional reform.

\textbf{B. A New Nationalism}

In keeping with the national pride he had articulated in \textit{The Constitution of Canada}, Kennedy confidently asserted to an American audience in 1931 that Canada’s constitutional law possessed “a Canadian purpose, a Canadian instinct, [and] a Canadian destiny.”\textsuperscript{39} In the decade after the publication of his

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\item \textsuperscript{37} \textit{Ibid.} at 432.
\item \textsuperscript{39} Kennedy delivered the Fred Morgan Kirby Lectures at Lafayette College published as \textit{Some Aspects of the Theories and Workings of Constitutional Law} (New York: Macmillan, 1932) at 132-33 [Kennedy, \textit{Aspects}].
\end{itemize}
constitutional history, political developments confirmed and deepened Kennedy’s sense of Canada’s constitutional independence. In 1924, James Shaver Woodsworth, a Labour Member of Parliament for Winnipeg and later founder and leader of the Co-operative Commonwealth Federation (“CCF”), began a long campaign for Canada to possess the power to amend its own constitution. These powers were necessary, Woodsworth argued, not only because the constitution required amending, but also because Canada had “grown up.” Legally, however, Canada remained an adolescent – subordinate both in international affairs and in certain domestic matters to the Imperial Parliament. The Governor General’s continuing power, and by extension Britain’s, became national issues in the 1926 “King-Byng” dispute, when Governor General Lord Byng refused Prime Minister Mackenzie King’s request to dissolve the House of Commons and call an election. Other Commonwealth nations, notably Ireland and South Africa, felt similar nationalist tendencies straining the strings that tied them to the Empire. At the Imperial Conference of 1926, the Balfour Declaration recognized these nationalist sentiments by asserting that Canada and certain

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40 *House of Commons Debates*, 160 (20 March 1924) at 508.
41 Canada’s independent signature on the Treaty of Versailles in 1919, and its refusal to send military assistance to Britain in the 1922 “Chanak Incident,” however, were considered indications of its increasing independence. See Robert MacGregor Dawson, *The Development of Dominion Status 1900-1936* (Hamden, Conn.: Archon Books, 1965) at 3-4, 178-194, 234-246.
other Dominions were “autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any respect of their domestic or external affairs.” The Declaration’s principled statement of autonomy was legally entrenched four years later in the Statute of Westminster.

Despite these steps towards independence, Canada’s political leaders remained reticent to embrace full constitutional control of the nation, largely because the federal and provincial governments had failed to agree on a domestic amending formula in the negotiations leading to the passage of the Statute of Westminster. As a result, Canada specifically requested that the power to amend the BNA Act continue to vest solely in the British Parliament. The constitutional status quo, however, failed to satisfy the scholars of the newer constitutional law. John Wesley Dafoe, editor of the influential Winnipeg Free Press, lamented: “Canada is unique among the countries of the world in being encased in a straight-jacket constitution made over sixty years ago from which

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46 Disagreements between the federal and provincial governments emerged over whether Confederation was a “compact” requiring all (or some) of its parties to ascent to any amendment of its terms, or whether the federal government alone possessed the power to amend the constitution: see generally, James Ross Hurley, Amending Canada’s Constitution: History, Processes, Problems and Prospects (Ottawa: Canada Communications Group, 1996).
47 Statute of Westminster, supra note 45, s. 7(1) provided that: “Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.”
there is no possibility of escape.”48 Norman Rogers, a politics professor at Queen’s (and later Liberal cabinet minister), framed the power to amend one’s constitution as a question of national identity. “It is essential that an amendment procedure should be adopted in the near future,” he argued, “which will... make it possible for the will of the Canadian people to prevail in the conscious development of their own Constitution.”49 While sentiments of this kind were common among constitutional scholars in the 1930s, details of what an amending formula might entail were less forthcoming. Typical in this regard was Dafoe’s offering that Canada required a “simple and easily workable machinery by which changes could be made in our constitution as the need for them arises.”50 If opaque on the details, scholars were clear on the principle that Canada, as a mature nation, was ready to define her own aspirations and control her own constitutional destiny.

A parallel nationalism simultaneously occurred in the arts as Canadian painters and poets explicitly challenged the British traditions that had largely dominated the Canadian cultural imagination. In 1920, the same year that he co-founded the Group of Seven, Arthur Lismer declared Canada “unwritten,

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49 Norman Rogers, “The Compact Theory of Confederation” (1931) 9 Can. Bar Rev. 395 at 417. In 1935, Rogers was elected to Parliament and became King’s minister of labour and, later, minister of defence.
unpainted, unsung.” Lismer and his colleagues sought to remedy this condition with their magisterial evocations of the Canadian Shield, its towering pines “[s]eeking the light” and cold blue waters “rippled where the currents are.”

Poets too – Frank Scott a leader among them – felt a longing to define and celebrate Canada on its own terms and for its own merits. Inspired by the refreshingly bold Canada they saw captured on modern canvases, in 1925 Scott and A.J.M. Smith founded the literary magazine *The McGill Fortnightly Review* to give voice to the nationalism of Canada’s young poets. Part of this process of defining the young nation, both its artists and poets believed, required the casting off of British traditions. It was time to reject “second hand living in European hand-me-downs,” argued Lawren Harris in 1928. “Canadian literature – if there be such a thing – is overburdened with dead traditions and outworn forms,” echoed Scott and Smith. “We are a pitiful extension of the Victorians,” they

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51 Quoted in W.H. New, *A History of Canadian Literature* (New York: New Amsterdam, 1989) at 144. It was a convenient, if erroneous, view for a young artist.


continued. “If a living, native literature is to arise we must discover our own souls”. 56

Ironically, the journey to discover the inner Canada, though it seemed to require abandoning Britain, involved an eager acceptance of ideas emanating from the United States. Whereas constitutional scholarship in the early twentieth century had celebrated Canada’s Britishness and rejected comparisons with the United States, many scholars of the newer constitutional law asserted the reverse. By 1935, Dafoe could speak of the relationship between Canada and the United States as one of “kindred nations” while listing their points of convergence – language, geography, culture, economics, and political interests.57 Six years later, Scott noted the “common historical origins,” “common plan or purpose,” and “parallel roads” of Canada and the United States.58 More importantly for Scott, this increasing integration included “intellectual cooperation and communication” typified by “exchanges of university teachers and students,…the visits of friends and business acquaintances, the flow of books, magazines,

56 Scott & Smith, ibid. at 90. Scott most famously pilloried Canada’s Victorian sensibilities in his satirical masterpiece, “The Canadian Authors Meet,” in which he caricatured the Canadian Authors’ Association: “Expansive puppets percolate self-unction/ Beneath a portrait of the Prince of Wales,” he observed after attending a CAA meetings in 1927. “Their zeal for God and King, their earnest thought,” devolving into such weighty questions as “Shall we go round the mulberry bush, or shall/ We gather at the river, or shall we/ Appoint a Poet Laureate this fall;/ Or shall we have another cup of tea?” (Scott, The Collected Poems, supra note 52 at 248).

Scott’s rejection of Victorian idealism is also noteworthy because he had been an anglophile during his childhood, adolescence, and early adulthood, and especially during his years studying at Oxford (1920-23) on a Rhodes Scholarship. When Scott returned, he admitted finding Canada “ill-kempt and dull, as though it had been all drawn out and got thin in the process” (Djwa, supra note 53 at 66). As the 1920s progressed, however, Scott attributed the sorry state of Canadian political and cultural life to Canada’s dependence on Britain. Canada could be great, Scott believed, if Canadians had faith in their own nation and its capacities.


58 F.R. Scott, Canada and the United States (Boston: World Peace Foundation, 1941) at 9, 32.
moving pictures and radio programs, [which] all account for a growing 
intercommunication of ideas.” Scott attributed this shift directly to the growth 
of the “Canadian national feeling.” In his estimation, “Canadians have matured 
to the point where they no longer fear the loss of their identity on the American 
continent.”

Scott’s account of the flow of ideas (though perhaps more one-sided than 
he suggested) certainly described the influence of American ideas in Canadian 
legal thinking in the 1930s. Cecil “Caesar” Wright had been influential in this 
regard by pursuing his graduate legal training in 1926, not at Oxford or 
Cambridge as had been the norm in central Canada, but at Harvard. His 
Harvard experience forever enamoured Wright to the quality of American legal 
scholarship, and when he assumed the editorship of the Canadian Bar Review in 
1935, Wright specifically encouraged the publication of articles by American 
authors. Canadian constitutional scholars were among those academics taking 
increasing note of American legal literature. This is not to say that the scholars of 
the newer constitutional law ignored contemporary British scholarship. The 
public law scholarship of Harold Laski, Ivor Jennings, and William Robson, all of 
the London School of Economics, continued to be read and cited, but the great

59 Ibid. at 51.
60 F.R. Scott, Canada Today: A Study of Her National Interests and National Policy, 2d ed. 
(London: Oxford University Press, 1939) at 86 [Scott, Canada Today].
61 Ibid. at 87. Arguably, the second half of the twentieth century proved Scott wrong.
62 When he returned, Wright encouraged talented graduates like Bora Laskin to follow in his 
footsteps (see Jerome E. Bickenbach and Clifford Ian Kyer, “The Harvardization of Caesar 
Wright” (1983) 33 U.T.L.J. 162; Girard supra note 4, c. 4. Wright, however, was not the first to 
venture to Harvard. A number of Dalhousians had attended Harvard earlier in the century 
including Sidney Smith and Horace Read. On the connection between Dalhousie and Harvard see 
John Willis, A History of Dalhousie Law School (Toronto: University of Toronto Press, 1979) at 
31, 82-84 [Willis, Dalhousie]. Ivan Rand, a fellow Maritimer, received his law degree from 
Harvard in 1912.
British scholars of the late nineteenth century like Anson, Bagehot, and Dicey were read with less reverence and cited with less frequency. As part of Canada’s nationalist project, Canadian constitutional scholarship deliberately turned away from the historic British wellspring of legal thought. Into this vacuum flowed American legal literatures, and in particular, the writings and ideas of Roscoe Pound.

C. Roscoe Pound and Sociological Jurisprudence in Canada

The amorphous nature of ideas makes it difficult to identify with precision the medley of intellectual influences in Canada’s newer constitutional law. The task is complicated further by the fact that legal scholars in the 1930s did not rigorously cite the ideas and writings of other authors. Nevertheless, Kennedy and Scott’s constitutional writings of the 1930s reveal the often implicit, though no less profound, influence of Roscoe Pound and his theory of sociological jurisprudence.

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63 Kyer & Bickenbach, supra note 27 at 139.
Roscoe Pound towered over American legal theory for much of the first three decades of the twentieth century. Although he had received his Ph.D. in botany, Pound discovered his true love in legal theory. In a series of influential law review articles written early in the century, Pound rejected what he termed “mechanical jurisprudence” – the deductive application of abstract formal rules to the study and practice of law. In its place, he called for “sociological jurisprudence” – the view of law as a “jurisprudence of ends” emphasizing law’s ability to achieve or retard progressive social change. Pound viewed law as an organic and evolutionary entity, defined by change and adaptation as much as stasis and continuity. “[T]he legal order must be flexible as well as stable,” he argued. “It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability.” Pound’s work reverberated across American legal theory, challenging the era of classical legal thought and “fashioning an American jurisprudence for the twentieth century.”

By the early 1930s, however, a new group of American legal theorists styled the legal realists whispered privately (and occasionally publicly) that

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Pound and his ideas had stalled or, worse still, drifted into conservatism.\textsuperscript{70} Iconoclastic thinkers such as Karl Llewellyn and Jerome Frank criticized Pound for his continuing belief in the normative content and structure of the common law. The study of law, the realists posited, revealed “the limitations of rules, of precepts, of \textit{words}.”\textsuperscript{71} Law should be studied as a social science, they argued, by collecting and analyzing quantifiable data. The study of law must focus on the way law actually works not the way it says or thinks it works. Most controversially, the realists suggested that judges ruled, not by adherence to reason or legal precepts, but according to a constellation of psychological features, including whim and bias, and, Jerome Frank is claimed to have quipped, what they had for breakfast. Pound, for his part, criticized realism’s normative vacuity: “a science of law must be something more than a descriptive inventory,” he retorted. “After the actualities of the legal order have been observed and recorded, it remains to do something with them.”\textsuperscript{72} Whatever the force of these jurisprudential storms in the United States, by and large winds did not carry them across the border into Canada. With the important exception of John Willis and his work on administrative law,\textsuperscript{73} legal realism did not deeply


\textsuperscript{71} Llewellyn, \textit{ibid.} at 435 [emphasis in original].

\textsuperscript{72} Roscoe Pound, “The Call for a Realist Jurisprudence” (1930-31) 44 Harv. L. Rev. 697 at 697.

infiltrate Canadian constitutional scholarship, at least in the 1930s. Rather, it was
Pound’s sociological jurisprudence and his deep faith in law that had the greatest
influence on the emergence of the newer constitutional law.

Reminiscing about his legal education in the 1930s, Bora Laskin noted that
it had been Kennedy, that “charismatic Irishman,” who had introduced him “to
the riches of American legal scholarship, to Holmes and Brandeis and Cardozo, to
Pound and Frankfurter, to the American realists, to Morris Cohen and Jerome
Frank.”74 Admittedly, the divide between Pound and his realist interlocutors was
not sharp, but a faith in the intrinsic value of law *qua* law did distinguish Pound
from his realist critics. By and large, Kennedy and Scott shared Pound’s faith and
tended to shy away from the sharper edges of the realist project. 75 By the early
1930s, Kennedy had branched out from constitutional history and was tackling
broader topics in contemporary constitutional law and theory. In a series of
published lectures on public law delivered at Lafayette University in 1931,
Kennedy did more than flatter his American audience when he noted that
Pound’s works “are read and studied...not merely because of their learning and
brilliant suggestiveness, but because they contain the promise of legal progress

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75 For this reason, I think that Risk and Brown mislabel Scott and Kennedy as realists (see Risk,
“The Many Minds,” *supra* note 25 at 313; R. Blake Brown, “The Canadian Legal Realists and
Administrative Law Scholarship, 1930-1941” (2000) 9 Dal. J. Leg. Stud. 36; R. Blake Brown,
amid the complex social problems of present-day life.” Kennedy argued that constitutional law in Canada had begun to reflect a “social point of view,” though he admitted that the law remained “still far out of tune with the complex civilization of a modern state.” In his lectures, Kennedy widely adopted Pound’s language, peppering his remarks with references to the “socialization of law,” the “social point of view,” and a “sociological jurisprudence.” More than just a repetition of language, however, Kennedy had absorbed Pound’s broader theory of law that social progress could be achieved in constitutional law if lawyers, judges, and legal thinkers broke free from abstract and rigid analysis and approached law instead as “a functional service, an instrument of society.”

Scott’s constitutional writings in the 1930s display a similar set of assumptions about the intended functionalism of constitutional law. Although Scott infrequently referenced Pound, in his Essays on the Constitution published at the end of his career, he openly acknowledged Pound’s abiding influence on his constitutional thought. Scott explained that in the 1930s, “I was greatly attracted to the concept of law as social engineering being then advanced by the great American jurist, Roscoe Pound.” Scott continued that “the state is a

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77 Kenney, Aspects, ibid. at 20, 22.

78 Ibid. at 20, 22, 23. Risk points out that Harold Laski initially coined the phrase “socialization of law” (Risk, “The Many Minds,” supra note 25 at 330, n. 53.

79 Kennedy, Aspects, ibid. at 22.

80 A fleeting reference to Pound can be found in a short article Scott wrote in 1933 for The Alarm Clock, a student publication at McGill (see “The Future of the Legal Profession” in F.R. Scott, A New Endeavour: Selected Political Essays, Letters, and Addresses, ed. Michiel Horn (Toronto: University of Toronto Press, 1986) at 13 [Scott, A New Endeavour].

81 Scott, Essays, supra note 38 at ix. In noting this passage, William Lederman has gone so far as to describe Scott as the “Canadian disciple of Roscoe Pound”: “F.R. Scott and Constitutional Law” in Djwa & Macdonald, supra note 53 at 117, 120.
work of art that is never finished. Law thus takes its place, in its theory and practice, among man’s highest and most creative activities.”\textsuperscript{82} Pound’s work resonated so profoundly with Scott because both thinkers, though they were prepared to challenge various orthodoxies of legal thinking, proceeded from a position of deep legalism. Both Pound and Scott believed in law and in the capacity (though not always the practice) of lawyers, judges and lawmakers to employ law for progressive ends. Indeed, in the above passage we see how Scott’s view of constitutional law emerges as a faith in the transformative power – indeed the beauty, art, and possibility – of law.

D. The Politics of Constitutional Law

For the most part, Canadian legal education in the 1930s remained, as it had for decades, a relatively modest enterprise, comprising ten small law schools employing fewer than fifty full-time professors teaching fewer than one thousand students.\textsuperscript{83} As a result of small faculty sizes – usually three or four full-time professors – the teaching was limited by time and space (there were no magnetic tape recorders). The curriculum was also limited by the number of faculty members, so not all topics could be covered.

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\textsuperscript{82} Scott, Essays, ibid.

\textsuperscript{83} Canada’s law schools were based at the Universities of Dalhousie, New Brunswick, Laval, Montréal, McGill, Toronto, Manitoba, Saskatchewan, and Alberta. In Ontario, The Law Society of Upper Canada maintained its monopoly on admission to the bar through its law school at Osgoode Hall; the University of Toronto law program was not recognized by the society until its re-organization under Caesar Wright in 1957. In British Columbia, the Law Society of British Columbia supervised legal education in Victoria and Vancouver (see generally Committee on Legal Education of the Canadian Bar Association, “Legal Education” (1933) 11 Can. Bar Rev. 475; Maxwell Cohen, “Condition of Legal Education in Canada” (1950) 28 Can. Bar Rev. 267). On the history of pre-war legal education in Canada, see John P.S. McLaren, “The History of Legal Education in Common Law Canada” in Legal Education in Canada, R.J. Matas & D.J. McCawley, eds. (Montreal: Federation of Law Societies of Canada, 1987) 111; Wesley Pue, “Common Law Legal Education in Canada’s Age of Light, Soap and Water” (1996) 23 Man. L. J. 654; David Bell, Legal Education in New Brunswick: A History (Fredericton: University of New Brunswick, 1992); David Howse, “The Origin and Demise of Legal Education in Quebec (or Hercules Bound)” (1989) 38 U.N.B.L.J. 127; Macdonald, “National Law Program,” supra note 34; Peter Sibenik, “Doorkeepers: Legal Education in the Territories and Alberta, 1885-1928” (1990) 13 Dal. L. J. 419; Kyer & Bickenbach, supra note 27; Willis, Dalhousie, supra note 62; and Wesley Pue, Law
professors per school – professors were expected to teach a diverse array of legal subjects and tackle all the grading and administrative tasks that an academic position entailed. In addition, practitioners continued to outnumber full-time faculty in law schools and provincial bar societies continued to exert pressure, and often direct control, over law school curricula. Given these conditions, it is not surprising that legal historian John McLaren has characterized legal education in the 1930s as one of “dormant” intellectual potential. Yet these circumstances did not, especially in the field of public law, translate into a paucity of legal imagination. In ways that differed markedly from Lefroy and his generation, Canada’s public law scholars of the 1930s increasingly thought of themselves, not simply as instructors of lawyers, but as legal scholars with a mandate to engage in legal criticism from social and political perspectives.

This shift in the self-image of legal scholars took place within a larger “intellectual revolution” in which Canadian academics embraced the view that they could and should participate in public life outside the cloistered walls of the university. Scholars in the emerging disciplines of the social sciences, in particular, assumed that the complexity of modern industrial society “demanded not only a much enlarged state but also a new expertise in running the nation.”

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*School: The Story of Legal Education in British Columbia* (Vancouver: University of British Columbia Faculty of Law, 1995).

84 McLaren, *ibid.* at 126-27.


Unlike Lefroy, who had assumed that the “whole” of constitutional law could be captured in a synthesis of division of powers cases, Kennedy and Scott saw constitutional law everywhere around them. They saw constitutionalism in the functioning of government, in the dynamics of the economy, in the relations between citizens and the state, and in the lived experiences of Canadians. In this way, the scholars of the newer constitutional law broke down the barrier that Lefroy and earlier thinkers had steadfastly maintained between constitutional law and politics.

For the scholars of the newer constitutional law, constitutional law was politics, and politics was constitutional law. This duality meant that constitutional scholars could and should take account of political realities and speak to contemporary political issues. It was not enough to criticize. If modernity required the re-building of the state and the re-thinking of the constitution, then the scholars of the newer constitutional law were needed as intellectuals and teachers, but also as activists and political thinkers. This understanding of constitutional law legitimated, indeed demanded, the political activities of legal scholars. “Let us not become legal monks,” Pound had famously counselled.87 The scholars of the newer constitutional law were only too glad to abandon the monastery.

That reform – economic, political, constitutional – was desperately needed appeared beyond obvious to most scholars. Looking back, Scott remembered the 1930s as “the most traumatic of the decades into which my life has been naturally

87 “Law in Books and Law in Action” (1910) 44 Am. L. Rev. 12 at 36.
Following the stock market crash of 1929 and the precipitous decline of the American economy, Canadian agricultural, commodity, and natural resource prices plummeted as demand faltered. Unemployment levels rose sharply in cities while drought devastated the prairies. In the absence of meaningful welfare support from either the federal or provincial government, local charities cobbled together what meager assistance they could provide. The images of the 1930s that left indelible marks on Scott and his contemporaries were “the shelters and soup kitchens ... the humiliation of breadwinners who could no longer provide for their families.” The ravages of poverty were not the only dispiriting signs of crisis. Police routinely broke up meetings of unemployed workers – in particular those of the Communist Party of Canada – detaining and deporting foreign-born attendees. Although the ubiquity of society’s failings haunted intellectuals, the prospect of social and economic transformation lent the work of scholars a sense of both urgency and excitement. As Scott expressed in his poem “Overture”: “This is an hour / Of new beginnings, concepts warring for power, / Decay of systems – the tissue of art is torn / With overtures of an era being born”.


Social Planning, supra note 6 at vi.

See F.R. Scott, Letter to the Editor, The [Montreal] Gazette (3 February 1931), reprinted in Scott, A New Endeavour, supra note 80 at 3, 4, 14 [Scott, Letter to the Editor]. See Scott’s critique of such deportation practices in Case Comment on Wade v. Egan (1936) 14 Can. Bar Rev. 62, reprinted in Scott, Essays, supra note 38 at 76; see also Scott’s poem, “Social Notes I, 1931”: “This young Polish peasant, / Enticed to Canada by a CPR advertisement / Of a glorified western homestead, / Spent the best years of his life / And every cent of his savings / Trying to make a living from Canadian soil. / Finally broken by the slump in wheat / He drifted to the city, spent six months in a lousy refuge, / Got involved in a Communist demonstration, / And is now being deported by the Canadian government. / This will teach these foreign reds / The sort of country they’ve come to” (Scott, The Collected Poems, supra note 52 at 66-67).

J. King Gordon, a friend of Scott’s and professor of Christian
Ethics at United Theological College in Montreal, agreed that “[t]he old orthodoxies were unravelling. The sacred cows were out of their pasture .... And there was the search for new answers – not one answer, many answers from the poets and painters and professors and lawyers and students and business people and even the politicians.”92 Given their belief that law was a site, perhaps the key site, of social engineering and transformation, the scholars of the newer constitutional law felt compelled to add their voices to the calls for reform.

Scott’s increasingly concrete constitutional and political convictions led him to a host of extra-scholarly activity. In addition to his teaching and publishing, in the 1930s Scott participated in newly formed discussion groups and think tanks such as the Canadian Institute of International Affairs, the League for Social Reconstruction, and the Canadian Political Science Association. In these groups, Scott repeated and refined arguments found in his scholarly work: Canada was an independent nation; a planned economy and welfare state were necessary to limit the unfairness and waste inherent in capitalism; and individual civil liberties were increasingly vulnerable at the hands of legislatures. Movement in these circles ultimately drew Scott into contact, and then friendship, with the “prophet” of the Canadian left, J.S. Woodsworth.93 While

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93 Kenneth McNaught, A Prophet in Politics: A Biography of J.S. Woodsworth (Toronto: University of Toronto Press, 2001) at 328. Woodsworth appears to have first met Scott at some point in the mid-1920s, possibly through Scott’s father, Archdeacon F.G. Scott. F.R. Scott’s relationship with Woodsworth was cemented after Woodsworth addressed a meeting of the McGill Labour Club in 1927 (see Djwa, supra note 53 at 109-11, 431). Woodsworth, in turn, drew Scott deeper into left-wing politics. Impressed by Scott’s role in the organization of the League for Social Reconstruction, Woodsworth asked Scott and others in the LSR to assist in the drafting of
Woodsworth influenced the leftward drift of Scott’s politics, Scott guided Woodsworth in constitutional matters. Despite his longstanding interest in the constitution, Woodsworth turned to Scott, among others, to help him refine and develop his ideas concerning the prospects of constitutional change.94 In a 1935 address to the House of Commons, Woodsworth, after liberally quoting Scott, again stressed the necessity of amending “this antiquated constitution of ours” and moved for the appointment of a special committee “to study and report on the best method by which the British North America Act may be amended.”95 When the motion passed unanimously, Vincent MacDonald hoped that Parliament had finally grasped the fact that the constitution was “not aptly framed to enable Canadian governments properly to grapple with current

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94 House of Commons Debates, 160 (20 March 1924) at 511 (Hon. James S. Woodsworth). As early as 1924, Woodsworth had argued in the House of Commons that “the old-time constitutional provisions are quite inadequate to meet the needs of the present” and stressed the need for the domestic power to amend the BNA Act: House of Commons Debates, 160 (20 March 1924). See also similar arguments made by Woodsworth in 1925 and 1927: House of Commons Debates, 165 (18 February 1925) at 303; House of Commons Debates, 175 (9 March 1927) at 1039. For examples of Scott’s constitutional advice to Woodsworth see Library and Archives Canada [LAC], Scott Papers, MG 30, D211, Vol. 15, Reel H-1273, (Scott to Woodsworth, 1 February 1935, and 21 February 1935). Along with Scott, Woodsworth also relied on Norman Rogers, Brooke Claxton and Eugene Forsey for constitutional advice: House of Commons Debates, 188 (11 May 1931) at 1472-73; see also House of Commons Debates, 203 (28 January 1935) at 219 (Hon. James S. Woodsworth). I disagree with Allen Mills’s suggestion that Woodsworth gave to Scott the idea of entrenched rights. Woodworth did not propose the entrenchment of minority rights until he had specifically turned to Scott and other scholars in formulating his 1931 motion. In any event, Woodworth never called for the creation of new constitutional rights; he simply sought further protection for the existing minority rights provisions (see Allen Mills, Fool for Christ: The Political Thought of JS Woodsworth (Toronto: University of Toronto Press, 1991) at 204, 256; Allen Mills, “Of Charters and Justice: The Social Thought of F.R. Scott, 1930-1985” (1997-98) 32 Journal of Canadian Studies 44 at 45 [Mills, “Charters and Justice”]. As Angus MacInnis said in a letter to Scott, “Mr. Woodworth has more respect for your judgement than that of any other man in the Dominion.” LAC, Scott Papers, MG 30, D211, Vol. 15, Reel H-1273 (MacInnis to Scott, 1 February 1937).

problems...in the way which a changed political philosophy requires.” Through Woodsworth and the C.C.F., Scott’s constitutional ideas could be found not only in scholarly journals, but also in the pages of Hansard and the chambers of Parliament.

Not everyone welcomed the increased public presence of Canadian intellectuals. In some cases, university administrators, newspaper editors, and political figures frowned on public expression from professors, especially when deemed radically socialist or anti-British. Scott’s academic career, among others, was jeopardized because his public comments and political affiliations rankled university officials and influential members of Montreal’s business establishment. Nevertheless, despite the career pressures to remain silent, opportunities to publish articles or comments on constitutional law were rapidly increasing. The appearance of new scholarly journals – the Kennedy-edited University of Toronto Law Journal and the Canadian Journal of Economic and Political Science – encouraged Canadian scholars to express themselves and

96 Vincent C. MacDonald, “Judicial Interpretation of the Canadian Constitution” (1935-36) 1 U.T.L.J. 260 at 260 [MacDonald, “Judicial Interpretation”]. MacDonald went on to suggest that drastic constitutional change might be unnecessary since the federal power “has been borne along on a flowing tide of returning vitality which, if sustained, may yet give Canada the constitution which it was intended to have” (ibid. at 276). In this regard MacDonald cited Proprietary Articles Trade Association v. Canada (A.G.), [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.); Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C.); Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.); British Coal Corporation v. The King, [1935] A.C. 500, [1935] 3 D.L.R. 401 (P.C.). This argument was picked up by government officials in the hearings set up pursuant to Woodsworth’s motion; they argued that this “swing of the judicial pendulum” (MacDonald, “Judicial Interpretation” at 276) meant that constitutional amendments were not, in fact, necessary (see Canada, Special Committee on British North America Act, Proceedings and Evidence and Report (Ottawa: King’s Printer, 1935) at 3-4, 7).

97 See generally Michiel Horn, Academic Freedom in Canada: A History (Toronto: University of Toronto Press, 2000). As Scott and his co-authors pointed out in their introduction to the re-issue of Social Planning, “many a respectable member of the establishment [believed] that professors should stay in their classrooms and not interfere in politics...” (Social Planning, supra note 6 at vi). Prime Minister Bennett certainly looked down on the contributions of this new generation of
refine their ideas on the contemporary constitutional issues they found pressing. The Canadian Bar Review, for its part, continued to carry generally at least one article per volume on constitutional matters. As well, wider-interest publications such as the Queen’s Quarterly and the leftist Canadian Forum increasingly devoted attention to the subject of constitutional law. In the pages of these journals, the scholars of the newer constitutional law criticized the BNA Act and its judicial interpretation with an intensity previously unseen in Canadian legal writing. The rhetoric was different too: the measured tone of scholarly analysis was often replaced with trenchant criticism edged with sarcasm or laced with outrage.

More substantively, the newer constitutional law’s analytic methodologies differed from those of the previous generation of constitutional scholarship. Whereas Lefroy had engaged in internal criticism, the scholars of the newer constitutional law held constitutional interpretation and the constitutional text itself up to a broad array of external criteria. This is not to say that scholars like Scott and Kennedy did not have ideas about the proper construction of the text – they obviously did. But they often derived their ideas on constitutional interpretation from circumstances external to the text itself. Certainly, the scholars of the newer constitutional law echoed Smith’s claims in his Snider comment that the framers’ of the BNA Act had intended the federal government scholars. “Do you think I want a lot of long-haired professors telling me what to do?” he asked his minister of trade and commerce in 1931 (Horn, League, supra note 6 at 49).

to be vested with legislative powers both wide and deep. But the scholars of the newer constitutional law were just as likely to turn to contemporary circumstances to argue that constitutional interpretation needed to take account of the social, economic, and political realities of a changed and changing world. These arguments born of functionalism flowed naturally from Pound’s view that law should change to achieve socially desirable results. A functional constitutional law capable of achieving widespread social change entailed a porous divide between law and politics. As Kennedy noted, “social and economic policy is in reality a part of constitutional law.”

The full force of external constitutional criticism became apparent when the Privy Council struck down most of Prime Minister Bennett’s New Deal in 1937. In January 1935, in the dying days of his unpopular government, Bennett announced in a series of radio broadcasts a package of legislation that “thrust the state more boldly into the regulatory arena than ever before.” The statutes

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100 Kennedy, *Aspects*, supra note 39 at 93. In this 1931 address to Kennedy’s Law Club at the University of Toronto, Cecil A. Wright extolled the virtues of what he called “an extra-legal approach to law.” Reflecting the influence of Pound’s teachings, Wright argued that “[t]he end of law must always be found outside the law itself, and as our opinions of that end change, so must change the content of the law” (“An Extra-Legal Approach to Law” (1932) 10 Can. Bar Rev. 1). Wright learned his Pound from the man himself having taken Dean Pound’s famous Jurisprudence Seminar while studying at Harvard in 1926.


comprising the New Deal sought to criminalize anti-competitive practices, provide credit protection to insolvent farmers, create a national marketing regime, set industrial minimum wages and maximum hours of work, and establish a system of unemployment and social insurance. The opposition Liberals stated that they supported the legislation in principle but doubted its constitutionality, and demanded that the government refer the matter to the Supreme Court. The Conservatives did not get that chance. When King’s Liberals were returned to office in October 1935, they quickly referred Canada’s New Deal to the Court for a ruling on its constitutionality. The Court released its divided decisions striking down most of the legislation in June 1936. The Privy Council, after the inevitable appeals, found virtually all of the legislation unconstitutional. In striking down the legislation, Lord Atkin admonished

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103 Scott, whose high hopes for the CCF were dashed in the election (they won only seven seats), channelled his disappointment in verse: “There is nothing like hard times/ For teaching people to think./ By a decisive vote/ After discussing all the issues/ They have turned out the Conservatives/ And put back the Liberals” (“Social Notes II, 1935” in Scott, The Collected Poems, supra note 52 at 73).


Canadian legislators in an infamous turn of phrase: “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.”

The Privy Council’s decisions unleashed unprecedented levels of vitriol among the scholars of the newer constitutional law. The critical spirit that had begun in earnest with Smith’s case comment in Snider reached fever pitch. Those hoping for a progressive interpretation of the constitution were living in a “vain world of delusion,” wrote Kennedy in a special section of the Canadian Bar Review devoted to the decisions. The jurisdictional power of the federal government was “gone with the winds....It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used....this is the law and it killeth.” “At long last,” Kennedy continued, “we can criticize [the BNA Act] as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship.” Here, with characteristic flourish, Kennedy expressed the multiple dimensions of the newer constitutional law: a Canadian nationalism that rejected constitutional “ancestors” paired with political criticism grounded in contemporary events. Vanished entirely was Lefroy’s venerable regard for the “the loyal wisdom of British statesmen” and the internal probing of the text’s true meaning. For his part, Scott echoed

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106 Labour Conventions Case, ibid. at 354.
109 Lefroy, Legislative Power, supra note 11, Preface.
Kennedy’s position that the time had come to abandon hopes for a progressive interpretation at the hands of a distant court. Scott argued that it was necessary to focus on amending the *BNA Act* and abolishing appeals to the Privy Council. “The Privy Council is and always will be a thoroughly unsatisfactory court of appeal for Canada in constitutional matters,” Scott argued, “its members are too remote, too little trained in our law, too casually selected, and have too short a tenure.”

Canadian politicians were listening. In the aftermath of the Privy Council decisions, Charles Cahan, a Conservative MP from Montreal and former secretary of state, looked to both Scott and Kennedy for arguments he could use to defend his bill to abolish appeals to the Privy Council. There was something of the newer constitutional law then, in spirit and rhetoric, when Cahan argued that the Privy Council had “so amended and redrafted the original constitution and so clothed it in fantastic conceptions of their own, that it bears the grotesque features of a jack-o’-lantern.” Cognizant of the resentment building towards the Privy Council, the Liberals proceeded cautiously, referring Cahan’s bill to the Supreme Court for an opinion on its constitutionality. The Court upheld the

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111 Letter from Charles Cahan to Frank Scott (11, 18 February 1938); letter from Frank Scott to Charles Cahan (17 February 1938): LAC, Scott Papers, MG 30, D211, Vol. 5, Reel H-1216. Saywell reports on the correspondence that passed between Kennedy and Cahan in Saywell, supra note 33 at 406.

112 *House of Commons Debates* (8 April 1938) at 2155-57.
bill\textsuperscript{113} and, after a delay due to the war, so did the Privy Council.\textsuperscript{114} In a further
effort to address the negative reaction to the Privy Council decisions striking
down the New Deal legislation, the Liberals also created the Royal Commission
on Dominion-Provincial Relations (better known as the Rowell-Sirois
Commission) to propose solutions to the constitutional barriers encountered in
dealing with the Depression.\textsuperscript{115} As well, the Senate struck its own committee to
examine the pre-Confederation records and report on the framers’ true
intentions.\textsuperscript{116}

The scholars of the newer constitutional law had become more than voices
in an ivory tower. The ideas animating the newer constitutional law – that
Canada was ready to define its own constitutional future and that constitutional
change was necessary to deal with the economic crisis – resonated not only in
academic circles but also, as the 1930s wore on, in political ones as well. Scholars
felt a sense of urgency in expressing themselves, not only because of the depth of
the perceived constitutional crisis, but also because they believed that they could

\textsuperscript{113} Ontario (A.G.) v. Canada (A.G.), [1940] S.C.R. 49 (sub nom. Reference Re Privy Council
Appeals (S.C.C.), \textit{ibid.}
\textsuperscript{115} The Rowell-Sirois Report, issued in May 1940, called for comprehensive amendments to the
Constitution, including explicit federal jurisdiction over unemployment and old age pensions. See Canada, \textit{Report of the Royal Commission on Dominion-Provincial Relations} (Ottawa: Queen’s Printer, 1940) (Chairs: Newton W. Rowell, Joseph Sirois) [Rowell-Sirois Report]; Barry Ferguson & Robert Wardhaugh, “Impossible Conditions of Inequality: John Dafoe, the Rowell-Sirois Royal
\textsuperscript{116} The Senate’s O’Connor Report, named after its author William F. O’Connor, argued that the
framers of the \textit{BNA Act} had envisioned a robust federal power with provincial jurisdiction limited
to merely local or municipal matters. The Report called for a declaratory statute to be passed that
would instruct the Privy Council to interpret the \textit{BNA Act} in light of these findings. See \textit{Report to the Honourable the Speaker of the Senate relating to the enactment of the British North America Act, 1867...} (Ottawa: Queen’s Printer, 1939). O’Connor shortened the argument in “Property and
Civil Rights in the Province” (1940) 18 Can. Bar Rev. 331. See also V. Evan Gray’s criticism of the
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and should participate in the direction of constitutional change. Although their contributions could be, and often were, dismissed as woolly-headed or, worse, as radical, there were also political figures like Woodsworth and Cahan eager to incorporate the ideas of the newer constitutional law into their political rhetoric and platforms. In breaking through the barriers – both intellectual and professional – that divided constitutional law from politics, the scholars of the newer constitutional law exerted an unprecedented level of influence on the emerging shape and tone of Canadian constitutional discourse.

E. Civil Liberties and Constitutional Law

Civil liberties concerns were a less visible, but ultimately crucial, feature of the newer constitutional law. Although Kennedy had very little to say about civil liberties in his constitutional scholarship, Scott was another matter. Like his colleagues, Scott directed a good deal of his energy towards arguing for a re-balanced federalism and criticizing the Privy Council’s decentralist reading of the constitution. However, his vision of constitutional law also explicitly incorporated the state’s treatment of individual citizens. Casting his eye on how the federal and provincial governments were responding to pockets of social and political agitation, Scott did not like what he saw. As the economic malaise gripping Canada wore on, workers and intellectuals in larger cities like Montreal, Toronto, Winnipeg, and Vancouver gathered with increasing numbers and frequency, searching for alternative, sometimes radical, solutions to unemployment and poverty. Federal, provincial, and municipal governments, as well as local police and the RCMP watched such developments with a mix of suspicion and anxiety.
As Scott later admitted, the suppression of political dissent in Montreal opened his eyes to “aspects of Canadian life of which I had been totally unaware. This strengthened my interest in civil liberties, providing many examples of the need to enlarge and protect them.”  After the Montreal police had dispersed a number of meetings of Communists in the early 1930s, The Gazette published a letter from Scott complaining of the “high-handed” and “illegal” use of force by the police. “[C]ommunism is no more criminal than liberalism or socialism,” Scott reminded readers. The letter, which Scott signed as Associate Professor of Constitutional and Federal Law, signalled Scott’s entry into the public sphere as a civil libertarian and constitutional critic, and implicitly tied the subjects one to the other.

To Scott, it became increasingly clear that the state intended to actively suppress any criticism challenging the legitimacy of capitalism and liberal democracy. In the summer of 1931, the RCMP, under instructions from the Ontario government and with approval from Ottawa, arrested eight members of the Communist Party of Canada under section 98 of the Criminal Code. Section 98 criminalized any organization or association that advocated or defended the use of “force, violence or physical injury” to bring about “governmental, industrial or economic change” and conviction could result in up to twenty years in prison. In a series of articles published in Canadian Forum and Queen’s

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117 Scott, A New Endeavour, supra note 80 at x-xi.
118 Scott, Letter to the Editor, supra note 90 at 3-4.
119 Not surprisingly, the McGill administration was less than enamoured. Scott soon found himself in the office of McGill’s Principal, Sir Arthur Currie, promising to use his job title with greater discretion in the future (Djwa supra note 53 at 130-31).
120 R.S.C. 1927, c. 36, s. 98. The section began as an order-in-council under the War Measures Act and was added to the Criminal Code in the wake of the Winnipeg General Strike.
Quarterly, Scott criticized the arrest and subsequent trial and conviction of Tim Buck and the other Toronto Communists.\textsuperscript{121} Scott attacked the conviction on the conventional legal grounds that there was “no evidence of any reliable sort to show that the [Communist Party of Canada] had ever committed any overt act of violence within Canada.”\textsuperscript{122} But he went on to frame the broader issue as a constitutional deficiency. Scott asserted that the conviction of the eight communists led “many Canadians to ask themselves for the first time just what our British traditions of freedom of speech and association really mean, if anything.”\textsuperscript{123} At the very least, he concluded, section 98 “should rid our radicals forever of the obsolete idea that under the Canadian constitution the personal liberties of the subjects give the subject personal liberty.”\textsuperscript{124} For Scott, the liberties of the subjects were only as valuable as the results they achieved in securing personal liberty. In this respect, as in others, he found the BNA Act wanting.

Scott was not alone in his condemnation of section 98. Woodsworth had long campaigned for its removal, and the Regina Manifesto, the CCF blueprint that Scott had assisted in drafting, called for it to “be wiped off the statute book.”\textsuperscript{125} By the early 1930s, even King and the Opposition Liberals had declared their distaste for provision, and after re-gaining office in 1935, King kept his


\textsuperscript{122} Scott, “Trial,” ibid. at 516

\textsuperscript{123} Ibid. at 512.

\textsuperscript{124} Scott, “Communists, Senators,” supra note 121 at 9.
campaign promise and repealed section 98. The repeal, however, did little to quiet the concerns of Scott and other like-minded civil libertarian intellectuals, such as Eugene Forsey and Frank Underhill about the state of civil liberties protections in Canada. Month after month in the pages of Canadian Forum, Scott, Forsey and Underhill signalled alarm at the deprivation of basic political liberties such as freedom of speech and assembly, particularly at the hands of the Quebec government. Scott went so far as to suggest Quebec was “illuminated by touches of fascism,” describing the systemic suppression of free speech in that province as “ruthless and persistent.”

The situation in Quebec worsened after the election of Maurice Duplessis and his newly formed party, the Union nationale, in August 1936. In 1937, Duplessis enacted the infamous “Padlock Act,” which outlawed the printing, publishing, or distribution of any material propagating “Communism or Bolshevism” or the possession or occupation of a dwelling used to propagate these theories. The Act gave the attorney-general (a position Duplessis held in addition to premier) the authority to padlock any house for up to a year on suspicion that an occupant was in contravention of the Act. As Forsey noted in


127 F.R. Scott, “The Unholy Trinity in Quebec Politics, in Scott, _A New Endeavour_, supra note 80 at 15. Scott later came to believe that the fascist designation was unfair. He knew it was a bold thing to say in 1934 since he published the article under J.E. Keith, his pseudonym: “The Fascist Province” _Canadian Forum_ 14:163 (April 1934) 251. See also “Quebec Fascists Show Their Hand,” Editorial, _Canadian Forum_ 16:191 (December 1936) 8; Eugene Forsey, “Quebec on the Road to Fascism” _Canadian Forum_ 17:203 (December 1937) 298.
one of his many published critiques, “the Act gives the Attorney-General practically a free hand to suppress any opinions he may happen to dislike.” In its first eighteen months of operation, the government padlocked ten houses and confiscated over fifty thousand newspapers, nearly forty thousand books, and thousands of circulars and pamphlets. Although Quebec’s Padlock Act garnered national attention, political dissent was being targeted and suppressed in all Canadian provinces. Scott listed a litany of abuses: “men and women thrown in gaol simply for making speeches; peaceful meetings broken up by the police; street parades prohibited or dispersed; demonstrators arrested and deported after secret trials before administrative tribunals.” The individual liberties of the Canadian citizen, he noted, “have suddenly been discovered to have very definite and unexpected limits.”

Despite Scott’s frustration with endemic abuses of state power, he struggled to provide constructive solutions to a problem he increasingly regarded as inevitable in a system of parliamentary supremacy. Scott was already convinced of the need to redistribute legislative power from the provinces to the federal government to allow for national regulation of the economy, but he hardly wanted to wipe clean the foundations of Canadian constitutional law. In his 1934 pamphlet, Social Reconstruction and the BNA Act, Scott asked, “Can we build a

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128 Act Respecting Communistic Propaganda, S.Q. 1937, c. 11.
130 Scott, “Freedom of Speech,” supra note 121 at 60.
new society without destroying the constitution?"\textsuperscript{132} For two reasons, he believed the answer had to be yes. First, Scott aimed to convince readers that a Canadian socialist government could operate within the confines of the existing constitutional structure and was therefore less radical than its critics suggested. Second, Scott valued the retention of a constitutional system of parliamentary supremacy because it allowed democratically elected governments to re-shape the economy without undue hindrance from conservative courts, as had been the American experience under their Bill of Rights. He noted that entrenched rights under the American Constitution had “frequently been invoked to prevent much needed social legislation. Canada knows of no such limitations.”\textsuperscript{133} Scott, then, was caught in the tension between valuing the flexibility of the existing constitutional order to accommodate socialist reforms, while at the same time acknowledging that the unchecked power of legislatures did not sufficiently protect the liberties of vulnerable citizens. In \textit{Social Planning for Canada}, Scott attempted, for the first time, to address this tension with a concrete proposal for constitutional reform.

\textsuperscript{131} \textit{Ibid.}
\textsuperscript{132} Scott, \textit{Social Reconstruction}, \textit{supra} note 95, outside cover.
\textsuperscript{133} \textit{Ibid.} at 4.
III. A Constitutional Bill of Rights for Canada

*Social Planning for Canada* and the group that authored it, the League for Social Reconstruction, had their genesis in a hike up a New England mountain in the summer of 1931. The occasion was the annual meeting of the Institute of Politics at Williams College in Williamstown, Massachusetts. Scott accompanied the dean of McGill’s Faculty of Law, Percy Corbett, to the conference, and there met and befriended Frank Underhill, the provocative University of Toronto historian and frequent contributor to *Canadian Forum*. Upon the conference’s completion, the trio of Canadian academics gathered for a bracing excursion in the nearby mountains. By the time they had reached the summit of Mount Greylock – so the creation myth explained – Scott and Underhill had agreed to establish a national organization of intellectuals in the mould of Britain’s Fabian Society. When they returned home to their respective cities, Scott and Underhill enlisted like-minded colleagues and friends and began the process of drafting a principled statement of purpose. By the spring of 1932, the group had a name (the League for Social Reconstruction (“LSR”)), a constitution, and (in the spirit of the times) a manifesto. Reflecting the leftist politics of its members, the LSR Manifesto called for public ownership of industry, economic regulation by government, social legislation, increased taxation, and amendment of the

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135 Scott hated the league’s cumbersome name and pleaded with Underhill to “devote an evening to heavy drinking in the hope of achieving an inspiration” (Letter from F.R. Scott to Frank Underhill (12 February 1932) cited in Michiel Horn, “F.R. Scott, the Great Depression, and the League for Social Reconstruction” in Djwa & Macdonald, *supra* note 53 at 74). As Horn points out, “either the spirits or the spirit failed” (*ibid.*). In French the name translated even more awkwardly as *La Ligue de Réconstruction sociale* or *La Ligue pour la Réorganisation de la Société*. See also Horn, *League, supra* note 6 at 26-27, 58, 219-20.
constitutional division of powers.\textsuperscript{136} Its principles announced, the LSR turned its attention to its first project: producing a book to guide Canada on its journey towards the “new social order.”\textsuperscript{137}

Several years in the researching and writing, Social Planning for Canada finally appeared in September 1935. The multi-authored text was earnest in tone, ambitious in scale and, as Scott later conceded, “cumbersome and rather disjointed.”\textsuperscript{138} It comprised over five hundred pages organized in twenty-two chapters setting out and justifying the LSR’s political, economic, and social programme.\textsuperscript{139} The text, like the LSR itself, combined “a Christian sense of morality with a high modernist faith in the rational and scientific possibilities of social planning.”\textsuperscript{140} Scott, with some assistance from Underhill, drafted chapter twenty-one: “Parliament and the Constitution.”\textsuperscript{141} In it, Scott merged the various aspects of his thinking about constitutional law by combining his federalism critique with his concern for civil liberties. At the same time, the LSR’s mandate to place concrete ideas in the public sphere encouraged Scott to be constructive and specific, to move beyond criticism and outline a practicable constitutional proposal. In so doing, Scott walked a fine line: assuring readers that a socialist

\begin{footnotesize}
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\item \textsuperscript{136} The LSR Manifesto is reprinted in Horn, \textit{League, ibid.} at 219-20.
\item \textsuperscript{137} \textit{Social Planning, supra} note 6 at x.
\item \textsuperscript{138} F.R. Scott, “A Decade of the League for Social Reconstruction” in Scott, \textit{A New Endeavour, supra} note 80 at 56.
\item \textsuperscript{139} Woodsworth opined in his foreword that Canada was “fortunate indeed to have among its ‘intellectuals’ so many who are grappling seriously and fearlessly with our practical problems” (\textit{Social Planning, supra} note 6 at v). Sales of the first 1,500 copies of the text sparked interest in the LSR and its membership ranks swelled. Momentarily flushed with cash from book sales and memberships, the LSR purchased and saved the struggling \textit{Canadian Forum}. See generally Horn, \textit{League, supra} note 6 at 54, 69, and 129-33.
government could operate within existing constitutional structures, while also proposing alterations to the basic principles underlying Canadian constitutional law. He paradoxically exalted in the democratic possibilities of parliamentary supremacy while simultaneously undermining the normative authority of legislatures to govern unconstrained by the strictures of written rights.

As in his LSR pamphlet published the year before, Scott stressed that the BNA Act did not “rivet a particular economic system upon the backs of the Canadian people.”\(^\text{142}\) Rather, the constitution, he argued, was “a mere political framework” capable of countenancing any manner of legislative agenda, even a socialist one.\(^\text{143}\) “All the economic changes necessary for the creation of a cooperative commonwealth in Canada,” Scott predicted, “could be effected by adjustments in the distribution of powers without involving any change in the essential qualities of the federal scheme such as responsible government, federalism or minority rights.”\(^\text{144}\) Scott also pointed to the changing nature of the state itself: the decreasing importance of parliament, the concentration of power in cabinet, and the increased presence of administrative tribunals. All of these trends, he argued, would continue “whether the government in office happens to be Conservative or Liberal or Socialist.”\(^\text{145}\) Most importantly, Scott stressed that, unlike the American Constitution which “appears to make impossible any effective economic reform,” the BNA Act, defined by the supremacy of parliament, enabled legislators to “do anything.”\(^\text{146}\)

\(^{142}\) Social Planning, supra note 6 at 501.

\(^{143}\) Ibid.

\(^{144}\) Ibid. at 502.

\(^{145}\) Ibid. at 492-93.

\(^{146}\) Ibid. at 502.
rights of property. There is no ‘due process’ clause,” Scott noted. “What laws the people want they can legally get by the political process of securing a bare majority in the appropriate parliaments.”

Scott followed this overview of the theory of parliamentary sovereignty with a proposal for the constitutional entrenchment of individual civil liberties. In so doing, he paradoxically moved Canada closer to an American constitutional model he had earlier condemned. Scott proposed that in order to ensure the protection of the BNA Act’s existing education, religious and language rights, these “minority rights” should be entrenched “in such a way that they cannot be touched by the more flexible process of amendment suited to other subjects.”

In effect, minority rights should be “rendered inviolable,” not unlike the American constitutional practice. Up to this point, Scott simply repeated constitutional arguments he had helped Woodsworth to craft in 1931. But Scott went further. If minority rights could be protected as fundamental rights and placed beyond the power of legislative scrutiny, why not civil liberties as well? Scott argued that Canadians might well pay equal respect to the individual’s right to freedom of speech, of association, of public meeting, and of the

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147 Ibid. at 502-503. Scott’s belief that a Canadian socialist government was within easy constitutional grasp evidenced a certain naïveté. As the striking down of the New Deal legislation would make clear, the judiciary was capable of disabling legislative interference with the economy within a division of powers framework. See also Reference Re Alberta Statutes, [1938] S.C.R. 100 at 119, (sub nom. Reference Re Alberta Legislation) [1938] 2 D.L.R. 81, in which the Court invalidated three bills of Alberta’s Social Credit government that attempted a “radical reorganization” of the economy.

148 Social Planning, ibid. at 508. These rights were entrenched in BNA Act, ss. 93, 133. This extra protection was necessary because, Scott argued, the Senate should be abolished and the power to amend the division of powers should vest solely in the federal government.

149 As in Woodsworth’s 1931 amendment proposal, Scott sought to address concerns that the loss of the Senate and a federally controlled amending power would make the BNA Act’s minority rights vulnerable to repeal. See House of Commons Debates 188, (11 May 1931) at 1466 (Hon. James S. Woodsworth).
press. An entrenched Bill of Rights clause in the B.N.A. Act would do much to check the present drive against civil liberties – a drive which in Canada is promoted by men who pay lip-service to liberty at the very moment they are legislating it out of existence.¹⁵⁰

While pages earlier Scott had taken pains to stress the value and necessity of preserving parliamentary supremacy, in proposing the entrenchment of civil liberties he recast legislators as fundamentally untrustworthy. The individual, Scott implied, required the protection of constitutional law. What Canada needed were written rights, a “Bill of Rights,” that would direct judges to limit legislatures to protect the activities of individual citizens.

Notably absent from Scott’s list were economic rights or equality rights. He specifically avoided the former because property rights and due process had been employed by the United States Supreme Court during the Lochner era to strike down progressive labour and employment laws.¹⁵¹ Interestingly, Scott never interpreted Lochner as a systemic indictment of judicial review like many realist critics. Scott conceded that judges were capable of interpreting law incorrectly, but he believed that necessity, scholarly criticism, and reason would bring courts to the proper interpretation. For all his socialism, Scott retained an essentially conservative faith in the processes of common law reasoning and of the legal system more generally. Further, written rights appealed to Scott’s proclivity for legal order and dovetailed nicely with his faith in economic

¹⁵⁰ Social Planning, supra note 6 at 508.
¹⁵¹ From 1897 to 1937, the United States Supreme Court routinely employed the rhetoric of rights, liberties and freedoms under the Fifth and Fourteenth Amendments to strike down federal and state labour and employment laws (see e.g. Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427 (1897); Lochner, supra note 7; Adair v. United States, 208 U.S. 161, 28 S. Ct. 277 (1908); Coppage v. Kansas (State of), 236 U.S. 1, 35 S. Ct. 240 (1915); Adkins v. Children’s Hospital, 261 U.S. 525, 43 S. Ct. 394 (1923); Morehead, supra note 7. The Court famously reversed itself in West Coast Hotel, supra note 7.
planning. Written rights were, in effect, planned rights. Just as the economy would benefit from legislative planning and expert oversight, so too would democratic rights. The experts were, in the case of constitutional rights, not bureaucrats but judges. As for equality rights, at this point, Scott simply did not conceive of constitutional rights as encompassing ideas about human dignity or the right not to be discriminated against on the basis of personal characteristics. As we shall see, Scott’s ideas of human rights expanded in the decades that followed.

How can we account for the tension in Scott’s proposal between his regard for the flexibility of parliamentary democracy and his commitment to constitutional judicial review? How does one square Scott’s view of judges as “reactionary” with his faith in their ability to protect civil liberties? One view is that Scott’s proposal fragments under scrutiny, a reflection perhaps of the fact that Scott aimed his proposal not at fellow scholars, but at a general audience. Arguably, he intended to inspire the public with the possibilities of a socialist government at the expense of theoretical rigour. As Roderick Macdonald allows, “[a]lthough a man of ideas, F.R. Scott was not of a particularly theoretical cast of mind.” If this tension cannot be entirely resolved, it can nevertheless be explained when placed within the context of the thinking of newer constitutional law.

Scott drew his constitutional aspirations from a blend of principle and politics. Like his fellow scholars of the newer constitutional law, Scott called for

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152 See Mills, “Charters and Justice,” supra note 94 at 47.
153 Ibid. at 504.
constitutional change, not simply because of perceived fissures in constitutional logic, but because of a crisis of urban poverty and unemployment, rural bankruptcy and dislocation, and government suppression of political dissent. In this respect, he proposed the entrenchment of those liberties he saw particularly under threat in the 1930s. But his call for entrenched constitutional rights also reflected the nationalism of the newer constitutional law in the sense that it implicitly assumed Canada’s right to chart its own constitutional future.\(^{155}\) Scott, an ardent nationalist, sought to embody Canada in constitutional law as much as he strove to capture its qualities in his poetry. Scott did not fear constitutional change; he welcomed it as a necessary component of nation building. His mission in both its artistic and legal dimensions was for Canada to assert itself, to respect British tradition but not remain beholden to it. Scott was prepared to turn away from the unwritten model of British constitutional civil liberties protections in favour of incorporating elements of the American “Bill of Rights” model.

More subtly, Scott drew on the ideas, initiated by Pound and taken up in the scholarship of the newer constitutional law, that constitutional law should be essentially functional in orientation. Law, in other words, should serve the interests of society, not the other way around. This perspective imbued constitutional law with deep normative potential. Constitutional law, Scott, Kennedy, and other scholars of the newer constitutional law believed, must do


\(^{155}\) Scott did, initially, suggest that retaining appeals to the Privy Council would be helpful since “English judges are probably more advanced in their social philosophy than Canadian judges, having had a longer experience with state control” (Social Planning, supra note 6 at 504). He abandoned this argument after the Supreme Court issued its decisions striking down the New Deal legislation (see Scott, “Consequences,” supra note 110 at 494).
more than structure government; it must enable the functions of the modern
state. The content and scope of those functions could themselves be debated, but
for Scott they included a federal government capable of administering a planned
economy and redistributing wealth while also protecting the underlying liberties
necessary for robust democratic participation. In Scott’s view, constitutional law
could best protect democracy’s need for freedom of speech, assembly, and the
press through the medium of entrenched rights.

Although Scott’s call for an entrenchment of constitutional rights drew its
inspiration from the newer constitutional law, it was also, in other respects, a
departure from it. Kennedy, for example, considered constitutional rights to be
regressive instruments of the older, not newer, constitutional law. Kennedy
claimed that individual rights and their “emphatic claim” were “hangover[s] from
[an] older conception of natural law.”156 Similarly, in Willis’s estimation,
constitutional rights – be they explicit or implicit – formed part of an “antiquated
ideal constitution” that sacrificed the public good for the false idol of individual
rights.157 For both Kennedy and Willis, individual rights retarded the growth of
the modern administrative state and limited the effective redistribution of wealth
in society. The new state, they believed, unified public interests and should not be
regressively atomized by rights.158 Scott’s socialism led him to a similar
conception of the public good, but he always blended into his socialism a place

156 Kennedy, Aspects, supra note 39 at 5.
157 Willis, “Three Approaches,” supra note 73 at 60. See also Willis, “Statute Interpretation,”
supra note 73; John Willis, “Administrative Law and the British North America Act” (1939) 53
Harv. L. Rev. 251 at 273, 281.
158 On the influence of the new liberalism to thinking about rights see Ferguson, supra note 85 at
237–38.
for certain individual rights. Again, these were rights that Scott saw as particularly vulnerable at the hands of legislatures in the 1930s; experience suggested that the state could not be trusted to protect all forms of speech and political dissent. Scott’s constitutional proposal in *Social Planning for Canada* reflected his unique intellectual mix of socialism, liberalism and legalism. In seeking economic security for the community and individual rights for the citizen, Scott distanced himself from some of his scholarly colleagues by insisting that individual rights were a necessary, though not sufficient, component of modern constitutional design.

*Social Planning for Canada* caused only a minor ripple when it appeared in 1935. Predictably, left-leaning reviewers praised its good sense, those on the centre questioned its naivete, and right-wing critics attacked its dogmatic thinking. Over the ensuing seventy years, the text has largely faded into obscurity. Yet Scott’s call for the constitutional entrenchment of civil liberties signalled an historic moment in Canadian constitutional thought. In beginning to reframe the idea of constitutional rights, Scott took the first steps in a rights revolution that would ultimately transform Canadian constitutional law.

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159 Interestingly, one of the books that Scott credited with his political awakening, R.H. Tawney’s *The Acquisitive Society* is essentially an indictment of individual rights. “[I]f society is to be healthy,” Tawney argues, “men must regard themselves, not primarily, as the owners of rights, but as the trustees for the discharge of functions and the instruments of social purpose.” R.H. Tawney, *The Acquisitive Society* (London: Collins, 1961) [originally published in 1921] at 30. On Scott’s regard for Tawney see Scott, *A New Endeavour*, supra note 80 at ix.

160 See Horn, *League supra* note 6 at 68–70.
Conclusion

Of course, Scott did not formulate his constitutional theories in a vacuum. He drew his inspiration and many of his ideas from the scholars and scholarship of Canada’s newer constitutional law. Kennedy marked a new era in Canadian constitutional thought when he infused his constitutional history with a new nationalism. For Kennedy, and the Canadian constitutional scholars that followed his lead, Canada was a mature nation ready to define its own constitutional destiny. The newer constitutional law was born in the 1930s when this nationalism paired with the functional turn in Canadian legal thought. Drawing on insights developed by Roscoe Pound earlier in the century, constitutional scholars in Canada proceeded from the assumption that constitutional law could and should enable the functioning of the modern state. The precise contours of state machinery could be debated, but general consensus existed among intellectuals that the state had a responsibility to regulate the economy and provide social welfare to those in need. To the extent that the prevailing judicial interpretation of the *BNA Act* resisted these developments, courts, and if necessary, the constitutional text itself, were to be sharply criticized.

Criticism, in turn, gave way to creative proposals for change. In the 1930s, constitutional scholars were not content to breathe only the rarefied air of the ivory tower. Inspired by upheavals of social and economic crisis, and fuelled by the sense that scholars should contribute to public life, a handful of law professors voiced the ideas of the newer constitutional law to a wider audience of Canadians. Indeed, Scott delved so far into extra-scholarly activities that he is
often remembered today more as an activist and lawyer than as a constitutional scholar. Rather than stark divisions, however, continuity and convergence exist in the various diverse facets of Scott’s life and work. Wherever Scott travelled, he took the constitutional scholar with him.

Nowhere is this convergence more apparent than in his call for constitutional rights in the LSR’s *Social Planning for Canada*. In seeking to fashion a political, social, and economic programme defined, at least in part, by constitutional renewal and the protection of individual rights, Scott drew on the normative underpinnings of the newer constitutional law and its legitimation of constitutional adaptation and change. Certainly, Scott’s call for judicially enforced constitutional rights is also a story of time and place, of personality and circumstance. But, in addition, this important moment in Canadian constitutional history reveals itself to be a story of legal thinking and constitutional thought. It is a story of ideas, as much as anything else.

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161 But see Walter Tarnopolsky’s effort to place Scott’s civil liberties work in the context of his contribution to constitutional thought: “Frank Scott – Civil Libertarian” (1981-82) 27 McGill L.J. 14, reprinted in slightly altered form in Djwa & Macdonald, *supra* note 53 at 133.
Chapter Three: Fighting for Freedom

Introduction

Both in private and public, William Lyon Mackenzie King portrayed the Second World War as a “fight for freedom.” In the early days of September 1939, he confided to his diary that the impending crisis linked him to his grandfather, William Lyon Mackenzie, and his quest for parliamentary reform in the Rebellion of 1837. “I feel it is all part of the same struggle,” King wrote, “the struggle for the freedom of mankind.”\(^1\) In the special sessions of Parliament preceding Canada’s declaration of war, he put the matter no less starkly. “The people of Germany,” he advised the House of Commons, have been “enslaved by … a dictatorship.”

Canada, he asserted, with its “deep-lying instinct for freedom” and “constitutional rights and liberties,” must raise arms to defend Britain and France, “which to-day have laid their all upon the altar of service and sacrifice in the cause of freedom.”\(^2\) Whether to fortify his own resolve, quell opposition, or rally the nation, King entwined the aims of the war and the rights and freedoms of Canadian constitutional law.

Paradoxically perhaps, Canadian parliamentarians also readily agreed that the fight for freedom abroad required the suppression of constitutional liberties at home. Under the virtually unlimited authority of the *War Measures Act*

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\(^1\) Diary of Mackenzie King (3 September 1939), online: <http://king.collectionscanada.ca>. See also King’s speech “Canada and the Fight for Freedom” in the anthology of his collected wartime speeches *Canada and the Fight for Freedom* (Toronto: MacMillan, 1944) 1.

\(^2\) *House of Commons Debates* (8 September 1939) at 19. United in war, Conservative Robert James Manion, leader of the Opposition, agreed that “this is a war for the preservation of human liberty….we are fighting for democracy, for liberty of person, liberty of speech and assembly, liberties which we in Canada enjoy.” *House of Commons Debates* (8 September 1939) at 13. Even
the government enacted the *Defence of Canada Regulations* (Defence Regulations), enabling the executive to legally intern enemy aliens, censor speech, ban groups, confiscate property, and arrest and detain individuals without charge or trial. In justifying the extremity of those measures, the government and the judiciary reasoned that curtailing the civil liberties of speech, thought, religion, and association was necessary to win the war and, ultimately, to preserve the very liberties constrained. From the perspective of power and privilege, constitutional rights served as both the prize and cost of war.

One might have thought that the celebration of constitutional freedom coupled with the stark deprivation of domestic civil liberties would have drawn greater comment from Canada’s legal scholars. Although pockets of opposition did emerge among the groups targeted for prosecution – Communists, Jehovah’s Witnesses, and Japanese Canadians – as well as from sympathetic civil liberties groups, a handful of lawyers, and some politicians in the CCF, the reaction of Canada’s public law scholars is notable largely for its silence. Why? One of the principal reasons was that the constitutional preoccupations of the 1930s – nationalism, federalism, functionalism, nationalism, and the legitimation of the administrative state – continued to dominate scholars’ attention despite the changing constitutional conditions precipitated by the onset of war. Fixated on these continuing constitutional dilemmas, Canada’s public law scholars often wrote about constitutional law as if there were no war at all. In any event, the constitutional changes taking place, including a massive centralization of

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in opposing Canada’s participation in the war, J.S. Woodsworth acknowledged that “our British institutions of real liberty” had made his dissent possible (at 47).

3 R.S.C. 1927, c. 206.
constitutional power, were precisely those called for during the Depression. Frank Scott, for example, recognized the “constitutional revolution”\(^4\) taking place, but defended the onset of federal centralization, administrative expansion, and economic planning as necessitated by the changing functions of government. But as the war wore on and the crisis deepened, Scott began to search for new constitutional norms that might assist re-building a shattered world. In the ruins of war, amidst the horrors of the Holocaust, Scott and others began to take seriously the concept of constitutional equality.

This chapter details wartime conceptions of Canadian constitutional law. I begin with an examination of the *Defence Regulations*, the civil liberties they curtailed, and the judicial justification in doing so. I then turn to the divergent reactions of legal scholars and lawyers to the constitutional aspects of war. Of the latter, Robert Michael Willes Chitty presents as a leading voice in the legal profession’s rule of law battle against the expanding administrative state. For Chitty, wartime executive control amounted to nothing short of unconstitutional bureaucratic dictatorship. At the same time, Canada’s administrative scholars led by John Willis emerge as equally vociferous defenders of the changing nature of constitutional governance. In the discursive melee between proponents and opponents of the wartime state, both sides claimed to have the rights of constitutional law on their side, despite the fact that neither paid much attention to those vulnerable groups and individuals whose civil liberties were being actively sacrificed in the name of war.

I. “This is war!”

Recent literature has framed the history of “Canadian freedom in wartime” as a story of “repression and resistance.” These accounts emphasize, in particular, the emergence of civil liberties groups in Montreal, Toronto, Winnipeg, and Vancouver criticizing the Defence Regulations as unscrupulous abuses of government power. In focusing on the appearance and activities of these activists, historians have tended to overlook the mainstream wartime discourse among Canadian lawyers, judges, politicians, and scholars on the nature of rights, freedoms, and constitutional law. Indeed, what is remarkable about constitutional thought during the war is the pronounced absence of civil liberties concerns. Although civil liberties had emerged as a peripheral aspect of the newer constitutional law, its position was not so integrated in the discipline’s self-understanding so as to withstand a crisis perceived to threaten the foundations of the state itself. During the war, new issues of security and old issues of federalism dominated Canadian constitutional thought, while civil liberties concerns faded dimly into the background.

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Canadian Law and Politics (Toronto: University of Toronto Press, 1977) at 143 [Scott, “Constitutional Adaptations”].

a. **The Defence of Canada Regulations**

Despite his deepest hopes that war might be avoided, Mackenzie King awoke on 1 September 1939 to the dispiriting news that Germany had invaded Poland. In the emergency cabinet meeting that morning, Justice Minister and Acting Secretary of State, Ernest Lapointe proclaimed an apprehended state of war, invoking the WMA\(^6\) and transferring virtually unlimited legislative authority to the federal cabinet. The Act specifically placed “censorship and the control and suppression of publications,” “arrest, detention, exclusion and deportation,” “trading, exportation, importation, production and manufacture,” and “appropriation, control, forfeiture and disposition of property” within executive control.\(^7\) The constitutionality of the Act had previously been placed beyond doubt by the Judicial Committee of the Privy Council in case law arising out of the First World War. In *Front Frances Pulp and Power Co. v. Manitoba Free Press*, the Privy Council upheld the Act’s broad transfer of power and wide scope for executive discretion, noting that times of war afforded the executive “considerable freedom” to determine the appropriate measures required.\(^8\)

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\(^6\) *Supra* note 3. Section 3 broadly provided that “[t]he Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may...deem necessary or advisable for the security, defence, peace, order and welfare of Canada.” For a list of the orders-in-council passed in the lead up to war see *Proclamations and Orders in Council*, Vol. 1 (Ottawa: King’s Printer, 1940), which includes the *Order in Council authorizing Proclamation concerning existence of apprehended war*, P.C. 2477 at 19. Despite being proclaimed on 1 September, the apprehended state of war was backdated to 25 August 1939 to capture certain military purchases that had already been made. For a history of the Act, see F.M. Greenwood, “The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance” in W.W. Pue & B. Wright, eds., *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 291.

\(^7\) *Supra* note 3, s. 3.

\(^8\) *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (1923) A.C. 695 at 705 [*Fort Frances*]. See also *Re Grey* [1918] 57 S.C.R. 150 at 166 [*Re Grey*], per Fitzpatrick, C.J.: “It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with...
committee put it in the lead up to war, the Act conferred “upon the Executive ample authority to take pretty well whatever action might be found to be necessary to meet the exigencies of war.”

Among the first orders passed by King’s government under the WMA’s broad powers were the Defence Regulations. Directed primarily to issues of domestic security, the Defence Regulations authorized the executive to intern enemy aliens, censor speech, outlaw groups, and arrest and detain individuals without charge or trial. Based largely on the Defence of Canada Order of the First World War (itself a derivative of British legislation), the regulations had been prepared by the Committee on Emergency Legislation the previous year and approved by Cabinet, King later admitted, “almost unread and unconsidered.”

Nor did Parliament examine them in the special sessions of Parliament preceding Canada’s declaration of war on 10 September 1939. As a result, virtually without scrutiny or debate, the “most serious restrictions upon the civil liberties of Canadians since Confederation” became law.

The Defence Regulations outlawed virtually all forms of anti-war dissent. Regulation 15 enabled the Secretary of State to censor publications which “would or might be prejudicial to the safety of the State or the efficient prosecution of the

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9 Interdepartmental Committee on Emergency Legislation, Report (Ottawa: King’s Printer, 1939).

10 PC 2483, (3 September 1939), Proclamations and Orders in Council (Ottawa: King’s Printer, 1940) at 27. The regulations themselves were published separately as Canada, Defence of Canada Regulations (Ottawa: King’s Printer, 1939). The Defence Regulations were amended throughout the war and additional consolidations published in 1940, 1941, and 1942.

war.” Regulation 39 and 39A prohibited statements or documents “intended or likely to cause disaffection to His Majesty or to interfere with His Majesty’s forces,” “prejudice the recruiting, training, discipline, or administration of any of His Majesty’s forces,” or “which would or might be prejudicial to the safety of the state or the efficient prosecution of the war.” Regulation 39C (added in 1940) declared a number of organizations illegal, including the Communist Party of Canada and, months later, the Jehovah’s Witnesses, both of which had questioned Canada’s participation in the war. Regulation 21 authorized the Minister of Justice to order the detention of any person to prevent him or her “from acting in any manner prejudicial to the public safety or the safety of the State.” The regulation further specified – for the purposes of negating applications for *habeas corpus* – that “any person ... detained ... [shall] be deemed to be in legal custody.” Detentions under regulation 21 could be challenged, not to the courts, but to an advisory committee appointed by the Minister. In effect, regulation 21 removed the common law requirement of *actus reus*, reversed the presumption of innocence, and circumvented the possibility of judicial review. In practice, the government could indefinitely jail suspects with no charge or trial, as a preventative measure. The common law, as detainees would discover, offered little assistance.

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12 Cook, *supra* note 5 at 38.

13 The regulations presumed, “in the absence of proof to the contrary,” that an individual was a member of an illegal organization if he or she “attended meetings of an illegal organization,” “spoke publicly in advocacy of an illegal organization,” or “distributed literature of an illegal organization.” PC 2363, 8 June 1940, Canada, *Proclamations and Orders in Council*, vol. 2 (Ottawa: King’s Printer, 1940) at 108-09. The Jehovah’s Witnesses were added on 4 July 1940: PC 2943. See the discussion in Parliament at *House of Commons Debates* (4 July 1940) at 1319.

14 The committee’s rulings, however, did not bind the government and Lapointe admitted to Parliament that its recommendations for release were not always followed. *House of Commons Debates* (3 March 1941) at 1218.
By the end of the war, the government had interned over two thousand individuals, fined thousands of others, banned hundreds of newspapers and periodicals, and seized thousands of pamphlets. The vast majority of such cases never came before the courts. Prosecutions under regulations 15 and 39 proceeded almost entirely by way of summary conviction before police magistrates or justices of the peace, with only a few exceptional cases trickling into appeal courts. As one contemporary critic complained, “trials are conducted in the same manner as prosecution of minor traffic offences, rights of appeal are restricted and the accused cannot elect trial by jury.” Summary convictions also meant that few decisions were written in case reports. By and large, Canada’s wartime crusade against domestic dissent took place in the administrative structures of wartime government.

While the government interned hundreds of fascists, war dissenters, and pacifists under regulation 21, it was “reds” that the RCMP considered the greatest danger to national security. As its Commissioner, Stuart T. Wood explained:

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15 Lambertson, supra note 5 at 69. For the history of internment in wartime Britain see A.W.B. Simpson, In the Highest Degree Odious: Detentions Without Trial in Wartime Britain (Oxford: Clarendon Press, 1992.)
16 Regulation 63(2) stipulated: “Where no specific penalty is provided, such person shall be liable on summary conviction to a fine not exceeding five hundred dollars, or to imprisonment for a term not exceeding twelve months, or to both fine and imprisonment.”
17 F.A. Brewin, “Civil Liberties in Canada During Wartime” (1940-42) Bill of Rights Rev. 112 at 117.
18 In the most spectacular example, the government interned Montreal Mayor Camillien Houde for more than three years for criticizing national registration. Four months after his release in August 1944, Montrealers re-elected him mayor. On the targeting of Germans and, later, Italians see R. Whitacker and G.S. Kealey, “A War on Ethnicity? The RCMP and Internment” and L.B. Liberati, “The Internment of Italian Canadians” in F. Iacovetta, R. Perin & A. Principe, Enemies Within: Italian and Other Internees in Canada and Abroad (Toronto: University of Toronto Press, 2000) [Enemies Within]. On the presence of fascist thought in Canada at the start of the war see M. Robin, Shades of Right: Nativist and Fascist Politics in Canada, 1920-1940 (Toronto: University of Toronto Press, 1991).
It is not the nazi nor the fascist but the radical who constitutes our most troublesome problem. Whereas the enemy alien is usually recognizable and easily rendered innocuous by clear-cut laws applicable to his cause, your ‘red’ has the protection of citizenship, his foreign master is not officially an enemy and, unless he blunders into the open and provides proof of his guilt, he is much more difficult to suppress.19

The Defence Regulations offered the RCMP wide latitude in fulfilling its long-standing mission to eradicate communist activity in Canada. To that end, Canada’s national police force shut down the Communist newspapers, Clarté and Clarion, in the first months of war, and then hundreds of other leftist newspapers and periodicals in the months that followed.20 By the spring of 1940, the government had also banned the Communist Party of Canada (CPC), among a host of other left-wing, often ethnic, organizations.21 In the wake of the ban, local police and the RCMP easily convicted individuals under regulation 39 for belonging to an illegal organization or distributing the literature of a banned group. Such was the fate of Douglas Stewart, sentenced to two years in prison for acting as the business manager of Clarion; Wilfred Ravenor, sentenced to one year for managing a book store stocked with communist literature; and Lillian

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20 Whitaker, ibid. at 141. See e.g. Yasny v. Lapointe (1940), 74 Can. C.C. 29 (Man. C.A.) [Yasny].

21 PC 2363, 8 June 1940, Canada, Proclamations and Orders in Council, vol. 2 (Ottawa: King’s Printer, 1940) at 108-109. Other banned groups included the Young Communist League, the League for Peace and Democracy, the Finnish Organization of Canada, the Russian Workers and Farmers Club, the Croatian Cultural Association, the Hungarian Workers Club, the Polish Peoples Association, the Canadian Ukrainian Youth Federation, and the Ukrainian Labour Farmer Temple Association. Later amendments added a number of allegedly fascist Italian groups, among others.
Cooper, sentenced to six months for possessing a handful of communist pamphlets.\(^{22}\)

Among the cases that did attract attention was that of J.A. ‘Pat’ Sullivan, the communist leader of the Canadian Seamen’s Union. As Sullivan recalled, in June 1940 the RCMP took him into custody for what he was told would be an hour of questioning. That hour became nearly two years of detention at the internment camp at Petawawa, Ontario.\(^{23}\) During that time, his union hired “renegade” labour lawyer, Jacob Lawrence Cohen, to seek his release.\(^{24}\) Sullivan’s case illustrated the futility of the gesture. In *Ex parte Sullivan*, the Ontario Supreme Court rejected the application finding that the *Defence Regulations* “having the force of law under the provisions of the *War Measures Act*” precluded entirely the ancient writ.\(^{25}\) The only avenue open to detainees, the

\(^{22}\) *R. v. Stewart* (1940), 73 Can. C.C. 141 (Ont. C.A.) [*Stewart*]; *R. v. Ravenor* (1941), 75 Can. C.C. 294 (B.C. Co. Ct.) [*Ravenor*]; *R. v. Cooper* (1941), 76 Can. C.C. 277 (B.C.S.C.). Countless other convictions went unreported, but were no less punishing to the accused. Excavating those records goes beyond the scope of this project, but some unreported examples can be gleaned from the “Civil Liberties” column of *Canadian Forum* and other contemporary sources. One notable case involved Dr. Samuel Levine, a Fellow of the University of Toronto, sentenced to six months in jail, then interned, and then fired from his job, when police discovered “two well-known Communist leaders of Toronto were rooming at his house” (Lester H. Phillips, “Canada’s Internal Security” (1946) Canadian Journal of Ec. and Poli. Sci. 18 at 24).

\(^{23}\) J.A. Sullivan, *Red Sails on the Great Lakes* (Toronto: MacMillan, 1955) at 71. The other camps were located at Kanaskis, Alberta, and Fredericton, New Brunswick. In the normal course, the Minister of Justice – Lapointe, and after his death late in 1941, Louis St. Laurent – issued detention orders on the basis of RCMP recommendations. King privately worried that the RCMP were overzealous in their communist paranoia, and he expressed concern that Lapointe fell too easily under the force’s influence. Lapointe’s biographer confirms King’s suspicion, noting that with the onset of war, Lapointe “seemed to adopt Commissioner Wood’s repressive anti-subversion measures without question.” See Betcherman, *supra* note 11 at 296, and J.L. Granastein, *A Man of Influence: Norman A. Robertson and Canadian Statecraft 1929-68* (Toronto: Deneau Publishers, 1981) at 83-84. See also Whitaker, *supra* note 19 at 145.


\(^{25}\) *Sullivan, ibid.* at 76. Cohen next sought Sullivan’s release under the appeal procedures of regulation 22.
Court held, was the appeal process to the ministerial committee under regulation 22. Freedom from internment eventually came to Sullivan, not by law, but by politics. In the spring of 1942, the government released Sullivan and most of the other interned communists, the Soviet Union having become, for the moment, an ally and not an enemy.

The shifting alliances of war offered no similar hope for Jehovah's Witnesses. Although relatively few in number at the outset of war – perhaps three thousand adherents – the Witnesses earned the enmity of governments, particularly in Quebec and Ontario, for distributing anti-Catholic religious literature on street corners and on doorsteps. In response, Quebec church and government leaders, the RCMP, and members of Mitchell Hepburn’s Ontario government pressed Lapointe to ban Jehovah's Witness under the Defence Regulations. For the federal Liberal government, there was little to lose in banning an unpopular group opposed to the war, and much to gain in political capital, especially in Quebec. After adding Jehovah's Witnesses to the proscribed list on 4 July 1940, the government prosecuted hundreds of Witnesses for distribution of literature “intended or likely to cause disaffection to His Majesty” or for membership in an illegal organization under regulation 39. As William Kaplan describes, “[m]en and women were being sent to jail for meeting in

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27 Ibid. at 54-66.
28 PC 2943, 4 July 1940, Canada, Proclamations and Orders in Council, vol. 2 (Ottawa: King’s Printer, 1940). See also House of Commons Debates (4 July 1940) at 1319. As with communists, most prosecutions ended in conviction with few cases finding their way into appeal courts and fewer still into the pages of case reports. For an example of one of the few reported cases see R. v. Bickert et. al. (1941), Can. C.C. 154 (B.C.S.C.) [Bickert]. The Watch Tower Society, the corporate arm of the Jehovah's Witnesses, hired Cohen to defend many of the accused. Flush with a $5,000
private homes and studying the Bible.”  

Witnesses, for their part, openly courted arrest believing that conviction only increased opportunities to proselytize. By 1942, with the war turning to the Allies favour, prosecutions of Witnesses waned. With increasing opposition to the ban, the government removed the prohibition against the religion in the fall of 1943, although the affiliated corporate organizations remained outlawed. Conceptions of religious and expressive freedoms played some role in marshalling opposition to the government’s treatment of Witnesses, but those considerations were wholly absent from the reported decisions under the Defence Regulations. During the war, as with Communists, Jehovah’s Witnesses found few resources within law to challenge their legalized repression.


Canada’s wartime constitutional mindset is revealed most starkly in the few reported decisions involving the Defence Regulations. In justifying the widespread infringement of civil liberties, judges almost universally emphasized the principle of parliamentary supremacy and characterized the suppression of rights and liberties as necessary given the dire nature of the crisis facing the nation. Rather than casting the issue as a sharp dichotomy between freedom and retainer, Cohen traversed Ontario defending Witnesses (see MacDowell, supra note 24 at 155-160).

29 Kaplan, State and Salvation, supra note 26 at xi.
30 As Witness literature explained: “A Witness leaves a booklet at a door, and is arrested, tried, and imprisoned. Fifty or more people listen to his defense in court. Fifty or more talk with him when in prison, and thousands read about it in the newspaper. In this way Jehovah’s name and the acts of His witnesses are carried to many.” Quoted in ibid. at 72.
security, judges collapsed the concepts, arguing that given the inherently flexible nature of the constitution in time of war, freedom must be abridged to protect freedom. If that logic displayed a beguiling circularity, it was not one subject to the condemnation, approbation, or scrutiny of lawyers or legal scholars. The legal community overwhelmingly shared in the view that the crisis of war required civil liberties to give way. Nor was the disproportionate burden being felt by particular groups and citizens – Communists, Jehovah’s Witnesses, and Japanese Canadians – scrutinized or even acknowledged. Constitutional scholars, for a host of reasons to be explored, never really challenged wartime constitutional thinking about civil liberties either. In this respect, both the practice and ideology of Canadian constitutional law failed to offer the means to resist the repressive anxieties of a nation at war.

In interpreting and enforcing the *Defence Regulations*, courts across the country proceeded from the understanding that in war, constitutional law required the state to protect itself without judicial interference. As F. Murray Greenwood’s work on the pre-Confederation period has demonstrated, displays of judicial loyalty to the state in times of crisis had deep roots in Canadian constitutional history and practice. During the First World War, Ontario’s High Court held that war,

is not a time when a prisoner is to have the benefit of the doubt, it is a time when, in all things great and small, the country must have every possible advantage; a time when it must be the general safety

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31 Greenwood characterizes some of his period’s judges as “Baconian” in the sense that they adhered to the judicial model of supplication – “lions under the throne” – idealized by James’ I’s attorney general, Sir Frances Bacon. See *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: The Osgoode Society, 1993) at 28.
first in all things always; until the final victory is won; even though individuals may suffer meanwhile.\textsuperscript{32}

Faced with a crisis perceived to threaten the foundations of the state itself, judges, during the century’s second great conflict located within constitutional law not the norms to protect civil liberties, but a common law history and a context that further justified their repression.

The Manitoba Court of Appeal’s observation that war subverted the traditional relationship between legislatures and courts typified the judicial approach to the \textit{Defence Regulations}. In \textit{Yansy v. Lapointe}, the appellants sought to overturn an order of the Acting Secretary of State under the censorship provisions of regulation 15 closing their Russian-language Winnipeg newspaper, “Kanadsky Gudok” (Canadian Whistle).\textsuperscript{33} Manuel Yasny, Harry Okulevich, and Samuel Kauzoff challenged the order on the basis that the Minister himself had not been “satisfied” (in the language of regulation 15) as to the allegedly “subversive and pro-nazi” nature of the publication, but had relied solely on information supplied by the RCMP. The Majority’s ruling involved just the sort of interpretation administrative scholars had been pining for. Whether a particular administrative action taken under the regulations had been “right or wrong is not open to consideration,” Dennistoun J. concluded.\textsuperscript{34} It was unrealistic to expect the Minister to “take initial cognizance of every act that may be done in Canada and which the Regulations is intended to prevent.”\textsuperscript{35} Moreover,

\textsuperscript{32} \textit{Re Beranek}, (1915) 33 O.R. 139 at 141 (H.C.).
\textsuperscript{33} \textit{Yasny}, supra note 20. See also D.M. Gordon’s case comment on the “necessary evil” of “the legislature’s intention to confer drastic powers”: (1940) 18 Can. Bar Rev. 732 at 735-36.
\textsuperscript{34} \textit{Yasny}, \textit{ibid.} at 30.
\textsuperscript{35} \textit{Ibid.} at 32. His colleagues agreed, holding that “ministerial action within the statute is not subject to inquiry in the Courts as to precedent steps” (at 36).
In time of peace, the civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press, are entrusted to the Courts. In war time, this may be changed. Parliament may take from the Courts their judicial discretion and substitute for it the autocracy of bureaucrats.\textsuperscript{36} Simply put, in war “the common law rights, and the ordinary prerogatives of the Courts of Justice, may be set aside by the High Court of Parliament.”\textsuperscript{37} If in peace the judiciary protected the liberties of the citizen against the state, in war, the judiciary shielded the state from the rights claims of citizens. Alone in dissent, Trueman, J.A. argued that “the Court cannot fail in the performance of its duty because of the anxiety and tension of the present time.”\textsuperscript{38} But where Trueman saw continuity in the judicial role, his colleagues saw a sharp divide between constitutional law in war or peace.

Judicial dispassion, if it is ever possible, is surely especially strained in times of war. As with the rest of the nation, Canadian judges would have followed the plight of the Allies with alternating degrees of pride, anxiety, and grief. Judges interpreting the \textit{Defence Regulations} did so as newspaper headlines and radio broadcasts told of Nazis tearing through Europe, bombs falling on London, and of the tragedies of overseas soldiers. Personal and professional ties linked judges to the thousands of Canadians risking their lives fighting in Europe. If the emotions generated by these circumstances exist between the lines of the \textit{Defence Regulations} jurisprudence, the realities of war were clearly written on the page. This was a “time of great danger and emergency,” the Ontario Supreme Court

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\item \textsuperscript{36} \textit{Ibid.} at 30.
\item \textsuperscript{37} \textit{Ibid.}
\item \textsuperscript{38} \textit{Ibid.} at 32.
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admonished. More explicitly and emphatically still, Ellis J. of the British Columbia County Court curtly stated: “This is war!” A conflict, the Ontario Supreme Court anxiously pointed out, “not only for the democratic way of life but for our very existence.” This sense of fragility and insecurity in the face of emergency reinforced in the judicial mindset the inappropriateness of peacetime constitutional practices.

Accordingly, judges interpreted the Defence Regulations to enable, not constrain, their over-arching purpose to protect the state. On the cusp of war, the Exchequer Court had stressed the necessity of context in interpreting wartime legislation. “When you come to interpret [a]...war measure,” the Court held:

[T]he objects of the same must be held strictly in mind, and such measure must be given a construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measure but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities be swept aside.

40 Ravenor, supra note 22 at 298.  
41 Sullivan, supra note 24 at 75, 77. The Court further pointed out that “subversive activities” brought the realities of war “within the gate.” In another case, a Magistrate similarly noted that “Canada must be considered as itself a theatre of war.” R. v. Coffin, [1940] W.W.W. 592 (Alta. Pol. Co.) [Coffin].  

[I]n a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm.

For citations to Spitz see, Bickert, supra note 28 at 156, Sullivan, supra note 24 at 75, and Burt, supra note 39 at 61. See also the comments of the Quebec Superior Court that it “would hardly be wise to liberate, simply on irregularities, a petitioner who has failed to make any proof of illegality”: Re Carriere (1942), 79 Can. C.C. 329 at 342 (Q.S.C.) [Carriere]. Irregularities did occasionally liberate an accused, see R. v. Maas (1941), 75 Can. C.C. 372 and Attorney-General Manitoba v. Zailig (1941), 76 Can. C.C. 131 (Man. C.A.).
Following similar reasoning – stated or unstated – courts interpreting the
Defence Regulations overlooked more than technicalities. In *R. v. Stewart*, the
Ontario Court of Appeal dispensed with the common law requirement of *mens
rea* entirely. “[I]t is not a defence,” the Court held “to say that what was done was
done in ignorance or without intending any harm.”43 In securing conviction, the
Court wrote, the Crown did not have to “show intention or a guilty mind on the
part of the accused.”44 As the Ontario Supreme Court explained in a case
rejecting an application of *habeas corpus*, “freedom of executive action” required
“that sympathetic construction be given to statutory authorization of delegated
legislation.”45 Put simply, “War could not be carried on according to the
principles of Magna Carta.”46

Several courts explicitly recognized that the *Defence Regulations* limited
individual liberties, but stressed that crisis demanded the sacrifice. For the
Quebec Superior Court, war required “rationing in every form,” including “the
rationing of liberty.”47 Ellis J. noted that “[m]ost, if not all, laws are a restraint,
and a necessary restraint, on personal conduct and liberty. War increases that
restraint.”48 But restraint, other judges stressed, did not mean that rights and

43 *Stewart*, supra note 22 at 145.
Appeal cited *Stewart* in holding that it was appropriate to “infer” “sinister” motives on the part of the
accused in the face of evidence to the contrary.
45 *Sullivan*, supra note 24 at 75, quoting *Ronnfelt v. Phillips* (1918), 35 T.L.R. There were
occasional judicial voices of opposition, but they were exceptional.  *McDonald*, C.J.B.C. protested
that “I, for one, do not conceive it to be my duty, even in wartime, to try to work out some deep-
hidden and ingenious construction which would give to the Regulation that meaning which is the
most disadvantageous to the accused.” His colleagues in the majority convicted: *R. v. Paul* (1943),
46 *Sullivan*, *ibid*.
47 *Carriere*, supra note 42 at 333.
48 *Ravenor*, *supra* note 22 at 299.
liberties had disappeared. “Freedom of speech is not abolished among us,” the Ontario Court of Appeal wrote, “and is restrained only in so far as is deemed necessary for the good in the emergency of war.”49 After all, as the Ontario Supreme Court explained, “opposing ... the objects of the enemy” ultimately ensured preservation of “the freedom and liberties of the citizens of the Dominion.” 50 Constitutional rights and freedoms thus appeared in the judicial interpretation of the Defence Regulations not as strictures of constraint, but rather as evidence of the need for their limitation.

c. “No Japanese from the Rockies to the Sea”

Unlike the repression of Communists and Jehovah’s Witnesses, the government’s removal of Japanese Canadians from their homes, dispossession of their property, and incarceration in prison camps left no legal record in the case reports. The government did not try to conceal its discriminatory conduct; on the contrary, proscribed law enabled the wartime repression of Japanese Canadians. 51 There was nothing new in this: Asians immigrating to Canada had always been subject to legal disabilities and racist treatment at the hands of

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49 Stewart, supra note 22 at 147.
50 Burt, supra note 39 at 59-60. In convicting a dissenter for anti-war comments, a magistrate noted that if “every Britisher held his views he would not have the privilege of questioning even in peace time the things which in my opinion he is prohibited from challenging during the period these Regulations are in force.” Coffin, supra note 41 at 604.
government, whether local, provincial, or national, although tensions ran highest in British Columbia, where the vast majority of Japanese immigrants had settled and where nativist sentiments ran deep. In the wake of Japan’s bombing of Pearl Harbour, Japanese Canadians joined German and Italian Canadians as “enemy aliens.” The shared designation was where the similarity between the government’s treatment of German, Italian, and Japanese Canadians ended.

In the immediate days and weeks following Japan’s entry into the war, a deep fear of further attacks along the west coast shattered the veneer of tolerance the white community extended their Japanese neighbours. In the midst of this panic, the federal government imprisoned dozens of individuals with suspected loyalties to Japan, seized hundreds of fishing boats operated by Japanese Canadians, and closed Japanese language schools and newspapers. In February 1942, the government initiated its more extensive plan of removing all Japanese

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53 During the war, the government required the German and Italian communities in Canada to register and periodically report to the Registrar of Enemy Aliens. Among the collective restrictions imposed were bans on firearms and travel to their home nation: PC 2506 (10 June 1940) Canada, *Proclamations and Orders in Council* (Ottawa: King’s Printer, 1940) at 111. See generally *Enemies Within*, supra note 18 at 82–83, 129 and N. Hillmer, B. Kordan & L. Luucui, eds., *On Guard for Thee: War, Ethnicity, and the Canadian State, 1939-1945* (Ottawa: Canadian Committee for the History of the Second World War, 1988). Undoubtedly, unofficial acts of discrimination against Germans and Italians in Canada were also common. The *Canadian Forum*, for example, reported in the summer of 1940 that “[u]nnaturalized Italians” were “being thrown off relief, refused public contracts and having their store windows smashed.” “Civil Liberties” (1940) 20 Cdn. Forum 103 at 103.
Canadians from the British Columbia coast. To do so, the government amended the *Defence Regulations* to designate the Pacific coast a “protected area” enabling the Minister of Justice to make wide-ranging orders dealing with all persons and property within that zone. Under that authority, the government removed thousands of Japanese Canadians from their homes, sending them first to Hastings Park and then to settlement camps and work projects scattered in the interior of British Columbia and locations further east. For the duration of the war, thousands of Japanese Canadians remained imprisoned while the government liquidated their seized property. The ultimate government objective, as Cabinet Minister, Ian Mackenzie, put it: “No Japanese from the Rockies to the Sea.”

The government’s wartime imprisonment of Japanese Canadians – as with the government’s repressive treatment of Communists and Jehovah’s Witnesses

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55 Such orders could include requiring “any or all persons to leave such protected area;” restricting persons “in respect of their employment or business, their movements or places of residence, their associations or communications with other persons;” prohibiting the possession or use of “any specified articles and to require delivery...of any such specified articles to any Justice of the Peace;” and authorizing “the detention, in such place and under such conditions as he may from time to time direct.” PC 1486, 24 February 1942, as am. by PC 1542, 27 February 1942, *Proclamations and Orders in Council*, vol. 6 (Ottawa: King’s Printer, 1942) at 136, 138. A few days earlier, the American government had authorized a similar removal of Japanese Americans from specified areas. Orders issued pursuant to that authorization were famously upheld as constitutional in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944).
56 PC 469, January 1943. After selling costs were deducted, the proceeds of sale were sent to the original owner, either in a lump sum or, more likely, in small installments if he or she resided in one of the settlement camps. Several individuals challenged the legality of the forced liquidation and when the case was finally heard in 1947, Justice Thorson of the Exchequer Court held that the court did not have jurisdiction over the matter. In July 1947 the government appointed Justice Henry Bird to investigate complaints that property had been sold for less than fair market value. Justice Bird’s 1950 Report recommended a price increase in some housing markets but not for properties sold in Vancouver. In 1988, the Canadian government signed the Japanese-Canadian Redress Agreement which provided $12,000 to the 13,000 affected individuals still living, monies for various community funds, and pardons for any person of Japanese ancestry convicted under the *Defence Regulations*. See *House of Commons Debates* (22 September 1988) at 19499-19501.
– elicited very little response from lawyers or legal scholars. In the spring of 1942, the Financial Post ran a brief article in which eighteen prominent Canadians – political figures, church leaders, and academics – were asked: “What Ought to Be Done With Our Japanese?” Frank Scott alone urged that “we must not let war hysteria ... lead us to ill-advised and undemocratic treatment of Canadian-born Japanese.” 58 Until the issue of mass deportation and expatriation to Japan became a controversial public issue in 1944, 59 Scott’s brief caution represented the high water mark of the legal profession’s engagement with the government’s policy of dispossession, imprisonment, and dispersal. The roots of this failure to engage with the civil liberties consequences of war lie in a number of causes, some related to the pervasive culture of insecurity fostered by the crisis of war, and others owing to the realities of parliamentary supremacy and the particularities of Canadian constitutional thought and culture. Lawyers and legal scholars did engage in debates about rights and freedoms during the war, but those discussions had nothing to do with Communists, Jehovah’s Witnesses, or Japanese Canadians.

57 Quoted in Lambertson, supra note 5 at 112.
58 Even Scott implicitly condoned the discriminatory conduct of those Japanese Canadians born in Japan: Financial Post (21 March 1942) 3. Two others expressed ambivalence while fifteen favoured immediate expulsion from British Columbia, if not the country.
II. Dictatorship or Democracy?: Competing Conceptions of Constitutional Liberty


At its 27 January 1940 meeting, the Ontario Section of the Canadian Bar Association noted with distress the “insidious encroachments on the simple fundamental rights of the individuals,” worrying further that “rights necessarily suspended in wartime may be lost for good.”\(^{60}\) The assembled lawyers were not referring to the *Defence Regulations*. Observing that “this country is now engaged in a war to preserve the rights of the individual,” the CBA members vowed to fight their own war against the “menace of bureaucracy.”\(^{61}\) It was a threat they saw everywhere around them, but particularly in those administrative statutes – mostly taxation regimes – creating administrative bodies to implement legislation and, in the first instance, adjudicate potential disputes. Notwithstanding the fact that these statutes allowed appeal of such decisions to judges, the lawyers broadly characterized such administrative activity as a “denial of access to the Courts,” and an infringement of “the personal liberties and property rights of the subject.”\(^{62}\) These were the battle lines of constitutional thought drawn by lawyers during the war. It was a war in which the civil liberties abuses of the *Defence Regulations* figured only marginally in the heated rhetoric.

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\(^{60}\) “Midwinter Meeting, Ontario Section Canadian Bar Association” (1939-40) 9 *Fortnightly L.J.* 215 at 215 [“Midwinter Meeting”].

\(^{61}\) *Ibid*.

about rights, freedoms, and constitutional law in the relations between citizen and state.

One of the principal protagonists leading the charge against the wartime entrenchment of “bureaucratic dictatorship” was Robert Michael Willes Chitty, Toronto lawyer, and editor of the *Fortnightly Law Journal*. In twice monthly columns throughout the war, Chitty railed forcefully and repetitiously against “the nefarious workings of ... tyranny under which government, law, and justice masquerade in this era of bureaucracy run riot.”

Chitty targeted all manner of wartime federal regulations, rarely with specificity but always with disdain. He frequently highlighted the irony that “while fighting men toil towards victory and defeat of dictatorships on the battle fronts of the world, our politicians at home have assured the victory of dictatorship at home.” For Chitty, the enemies at home – “would-be Hitlerism in our own government,” “incipient totalitarianism,” “puppet tyrants” – were simply lesser versions of the one abroad. Worse still, “[w]e are continually being invited to accept administrative tribunals as a *fait accompli*,” Chitty protested.

That is just what the politician wants. It just paves the way for a new batch of boards and commissions who will take away from the Courts that much more power to protect the people from the

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65 R.M.W. Chitty, “Inter Alia: Legislative Fight to Dominate the Courts” (1939-40) 9 Fortnightly L.J. 177 at 177.
66 Chitty, “Totalitarian,” *supra* note 64.
politician’s reign of force. So grew the Nazi regime that has plunged the world into the maelstrom of war.\footnote{R.M.W. Chitty, “Inter Alia: Political War of Attrition on the Courts” (1941-42) 11 Fortnightly L.J. 98 at 98.}

Chitty blamed lawyers for their complacency in allowing the administrative state – “with these octopus arms of bureaucracy” – to entrench itself.\footnote{R.M.W. Chitty, “Inter Alia: Discussion of the Functions of War-time Emergency Boards” (1941-42) 11 Fortnightly L.J. 209 at 209.} He cajoled lawyers to reclaim their historic role as “the guardians of liberty under the rule of law” and “the chosen champions of civil rights.”\footnote{Also, R.M.W. Chitty, “Inter Alia: The Shortcomings of the Profession as the Guardian of Liberty” (1942-43) 12 Fortnightly L.J. 81 at 82.} In Chitty’s fight for freedom, lawyers were the soldiers, the expanding wartime administrative state the enemy.

Law was in the Chitty family blood. Michael Chitty’s great-great-grandfather, Joseph Chitty, had authored the renowned treatise on contracts,\footnote{Joseph Chitty, A practical treatise on the law of contracts not under seal, and upon the usual defences to action thereon (London: S. Sweet, 1826), now in its 29th ed. as Chitty on Contracts (London: Sweet & Maxwell, 2004).} and his father achieved modest fame as editor-in-chief of the first edition of *Halsbury’s Laws of England* and Senior Master and King’s Remembrancer.\footnote{Contemporaries remembered Sir Thomas Willes Chitty as “one of the greatest common law lawyers of the day,” Ernest A. Jelf, “Sir Thomas Willes Chitty, Bart., K.C.” (1929) 15 Transactions of the Grotius Society v at v.} Born in 1893, Michael left England as a young man to pursue his legal career in Canada. Chitty family custom entitled the eldest son to pursue a career to the exclusion of his fraternal siblings and, given the six generations of lawyers that preceded him, it came as no surprise when Michael’s older brother, Thomas Henry, chose the profession of law.\footnote{Familial details are found in John Honsberger, “Robert Michael Willes Chitty, Q.C.” (1994) 28 L.S.U.C. Gazette 79 at 82, and the Special Memoriam Issue (1971) 19 Chitty’s L.J. 37-53. The Chitty genealogy is also usefully, if unofficially, traced at www.thepeerage.com. See also the memoirs of Michael’s nephew, Thomas Hinde, *Sir Henry and Sons: A Memoir* (London: Macmillan, 1980) at 7, 21. Sadly, it appears that Sir Henry had “always wanted to be a soldier. But for one hundred years Chittys had been lawyers and his preference was scarcely considered.”} If Michael wanted to have a legal career, he
would have do it somewhere other than England. So, with family connections charting the course, Michael Chitty crossed the Atlantic in 1912 to become a lawyer in Canada. After a pause in his articles to serve in the First World War, Chitty joined John Cartwright, future Chief Justice of Canada, and many other young veterans at the call to the Ontario bar, 20 May 1920.74 The eclectic legal career of Michael Chitty had begun.

When that career ended some fifty years later, Chitty had left an indelible mark on the field of Canadian legal letters. He is probably best remembered today for lending his name to two journals – *Chitty’s Law Journal* and its successor, *Chitty’s Law Journal and Family Law Review*. His career in legal writing began in earnest in 1923 when he joined the staff of the Canada Law Book Company as assistant editor of the *Dominion Law Reports*. Over the next several decades, Chitty served variously as assistant editor of the *Ontario Law Reports*, editor of *Canadian Criminal Cases*, and writer and editor of numerous practice guides, an abridgement of Canadian criminal cases, and several texts on topics ranging from chattel mortgages to motor vehicle liability.75 In 1931, he began his true labour of love: editing and writing for the *Fortnightly Law Journal (FLJ)* – a

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75 See e.g. Robert Michael Willes Chitty: *A Digest of Canadian Case Law: 1920-1925* (Toronto: Canada Law Book, 1926); *Chattel Mortgages and Bills of Sale* (Toronto: Canada Law Book, 1927) (as editor); *Bicknell & Seager’s Division Court Manual* (Toronto: Canada Law Book, 1928) (as editor); *Ontario Annual Practice* (Toronto: Canada Law Book, 1941—); *The Ontario Statute
compendium of bench and bar news, case comments, and short articles directed primarily at the Ontario bar. In addition to all that, Chitty practiced civil litigation in an assortment of small firms before eventually working under his own shingle. Chitty’s legal writing – especially his opinionated and provocative editorializing in the *FLJ* – earned him a certain prominence among his peers, and by 1941 his fellow lawyers had elected him Bencher.76 In both his legal writing and through his position of influence in the profession, Chitty launched his assault against the wartime administrative state.

Chitty viewed most wartime emergency legislation with suspicion if not outright hostility, but reserved his greatest scorn for the array of orders, regulations, and delegated bodies “controlling the economic life of the country.”77 During the war, the federal government, under the oversight of the Department of Munitions and Supply, and its minister, Clarence Decatur (C.D.) Howe, the “absolute monarch of Canadian war production,” established dozens of boards, tribunals, commissions, and Crown Corporations to manage, regulate, and stimulate Canada’s wartime economy.78 Above all others in prominence, scope,

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76 “His editorials might not have passed the editorial board of the Harvard Law Review,” John Arnup conceded, “but his readers were never in any doubt as to what he meant”: Special Memoriam Issue (1971) 19 Chitty’s L.J. 37 at 43. As a Bencher, Chitty led the ultimately losing cause to retain the “vocational training” model of Ontario legal education. Although Chitty agreed that law was a “learned profession,”76 he believed that the learning in question should take place in the workaday world of legal practice. See C. Ian Kyer & Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987) at 139.


78 The government passed legislation creating the Department of Munitions and Supply a week before the war, but did not activate the Department and appoint Howe until April 1940. See *The Department of Munitions and Supply Act*, S.C. 1939 (2nd Sess.), c. 3, as am. The quote describing Howe is from M.H. Hennessy, “The Industrial Front: The Scale and Scope of Canadian Industrial Mobilization during the Second World War” in B. Horn ed., *Forging a Nation: Perspectives on*
and power stood the Wartime Prices and Trade Board (WPTB), the Wartime Industries Control Board, and the National War Labour Board. Between them, these boards and their administrative officers controlled virtually every aspect of the Canadian economy: production, consumption, prices, profits, rents, wages, and salaries. Whether through escalating income taxes, frozen wages, and rationed food, gasoline or other goods, Canadians came to live with the wartime economic controls as part of their everyday lives. Wage and price control “is of the greatest importance to every citizen of Canada,” Mackenzie King explained to the nation, “and of particular importance to every housewife, every worker, and every farmer. It will affect the daily lives of each one of us.” Indeed, as one contemporary commentator noted, orders constraining the construction of carriages and coffins ensured that the WPTB controlled life from cradle to grave.

Chitty questioned the necessity and constitutionality of the entire enterprise. He conceded the prudence of some wartime measures, but complained that the executive’s “usurpation” of powers “went far beyond the necessity of even the war emergency.” Unnecessary, and also unconstitutional,

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79 PC 2516, (3 September 1939), Proclamations and Orders in Council (Ottawa: King’s Printer, 1940) at 40.
80 PC 2715, (24 June 1940), Proclamations and Orders in Council (Ottawa: King’s Printer, 1940) at 129.
81 PC 8253, (24 October 1941), Proclamations and Orders in Council (Ottawa: King’s Printer, 1942) at 1228.
Chitty argued. “[W]hen the war is being used as an excuse for the filching, rightly or wrongly, of civil liberties of every kind,” Chitty wrote, “it seems pertinent to enquire whence all the powers that are being so freely exercised by the Dominion government.” Ignoring the Privy Council’s ruling in *Fort Frances*, Chitty argued that the federal government’s expanded jurisdiction under the emergency branch of the “Peace, Order and Good Government” clause (p.o.g.g.) was confined to its enumerated powers under section 91 of the *British North America Act (BNA Act)*. Chitty found federal legislative authority for some aspects of the wartime administrative state under sections 91(2) (“The Regulation of Trade and Commerce”), 91(7) (“Militia, Military and Naval Service and Defence”), 91(25) (“Naturalization and Aliens”), and 91(27) (“The Criminal Law”), but no authority for the vast areas of economic control involved in “price fixing and rent restriction.” Drawing on the Canadian constitutional theory that linked provincial rights with self-government, Chitty concluded: “If the separation of these powers is not kept reasonably inviolate then the democratic principle innate in the constitution is shattered just as surely as if parliament and legislatures were abolished and a dictatorship set up.”

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86 In *Fort Frances*, supra note 8 at 704, Viscount Haldane held: [T]he wording of ss. 91 and 92 may have laid down a framework under which as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole.
88 Chitty, “Constitutional Aspects,” supra note 77 at 199. In a later column criticizing rental controls, he questioned “why, for instance, the property owner, the landlord, should be put completely at the mercy of the tenant in the interests of the war effort...Besides being an utterly unconstitutional interference by the Dominion with property and civil rights, the question is completely unconnected with the war effort.” R.M.W. Chitty, “Inter Alia: Regimentation in Rent Control and Housing Dictatorships” (1942-43) 12 Fortnightly L.J. 113 at 113.
89 Chitty, “Constitutional Aspects,” *ibid.*
of the bar, Chitty rallied lawyers to fight the “new batch of boards and
commissions” with constitutional challenges.

Anticipating the inevitable litigation, and wanting to put its best case
forward, the federal government referred a set of its wartime regulations to the
Supreme Court for a ruling on their constitutional validity. In its terms of
reference, the government pointed out that although the particular set of
chemical regulations before the Court was narrow, the implications of the case
could not have been broader. The “methods of control” under review, the
government noted, were “identical to that adopted in other fields in connection
with the conduct of the war;” namely orders and regulations under the Defence of
Canada Regulations, the Wartime Prices and Trade Board, the National Labour
Board, and the Foreign Exchange Board.90 In other words, the Chemicals
Reference, the government took pains to point out, would determine the legality
of the entire edifice of the wartime administrative state.

The Supreme Court did not disappoint the government. Despite the able
arguments of amicus curiae – D’Alton Lally McCarthy and John J. Robinette –
that the regulations were unlawful delegations of authority and an abrogation of
the separation of powers between Parliament and Executive, the Court upheld the
regulations in their entirety. In concurring judgments the Court held that since
precedent placed the constitutional validity of the War Measures Act beyond
doubt, “an order in council in conformity with [the Act] may have the effect of an

90 Reference As to the Validity of the Regulations in relation to Chemicals [1943] S.C.R. 1 at 4
[Chemicals Reference]. The particular orders being reviewed were the chemical regulations of 10
July 1941, PC 4996 and certain subsequent orders of the Controller of Chemicals.
Act of Parliament.”91 In addition, Duff C.J.C. reminded that the “duty of the Governor in Council to safeguard the supreme interests of the state” remained paramount.92 If the decision relieved the government, it infuriated Chitty. The Court, he charged, had been “forced to play rubber stamp to the government’s bureaucratic designs on the liberty of the individual.”93

Outside the arena of property rights, Chitty’s concern for civil liberties varied erratically: freedoms of speech, thought, and association ranked well below freedom of contract and commerce in his hierarchy of liberties. He praised, for example, the RCMP for “carrying on a magnificent if wholly unsung fight with wholly inadequate resources” against fascists and communists and advocated hanging “a few of these ringleaders of treason and sedition.”94 Elsewhere, Chitty warned of the danger of dissent and called for harsher sentences for those convicted under the Defence Regulations. His case comment of R. v. Coffin, for example, characterized the pacifist musings of an Albertan school teacher as “heinous” and reproved the magistrate’s “altogether too lenient ... view of the accused’s intentions whose subversiveness appears beyond doubt .... it would have been better to have put him away where he could not spread his treasonable ideas.”95

91 Ibid. at 9 per Duff, C.J.C. Duff cited Fort Frances, supra note 8 and Re Grey, supra note 8 in support of the Act’s constitutionality.
92 Ibid. at 11. Evidencing less comfort with the “sweeping and drastic” delegation of legislative authority from Parliament to Executive, Davis J. nonetheless reached the same conclusion. A “safety valve” he noted, remained: Parliament could amend or repeal the War Measures Act if it so chose (at 26, 27).
95 “Recent Canadian Cases” (1940-41) 10 Fortnightly L.J. 148 at 148; Coffin, supra note 41. The case comments are unattributed but the style and content makes Chitty the likely author. See also
In contrast with his approbation of those regulations that curtailed free speech, Chitty expressed unease with regulations that dispensed with judicial review. He did not doubt the prudence of outlawing communism or the necessity of “making crimes things that are tolerable in peace time,” but internment without trial offended his conception of the rule of law, and aroused his inherent distrust of administrative government. He viewed *habeas corpus* – the right of the court to review all detentions by the state – as sacrosanct because it maintained the historic role of courts and the lawyer in checking the power of the executive.\(^96\) “If they are members of an outlawed organization or if they have been guilty of subversive activity that violates … the Defence of Canada regulations the proper course is to try them and visit them with the appropriate penalties,” he argued.\(^97\) The legal subject, he proclaimed, “is entitled to have his opportunity of showing that his actions are innocent … there seems no justification for taking away the right to trial which is for the protection both of the alleged offender and the public.”\(^98\) Under this rationale, the government’s treatment of Japanese Canadians should have provided Chitty with his clearest example of government interference with property and civil rights. Chitty’s legal principles, however, had racialized limits. The rights of “due trial” he argued,

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should not apply to “alien enemies.” In all his wartime columns criticizing government power, that oblique comment was Chitty’s only reference to the government’s treatment of Japanese Canadians.

b. “The Wisdom of the Past”: the Canadian Bar Association and Civil Liberties

Throughout the war, Chitty implored lawyers in general, and the Canadian Bar Association (CBA) in particular, to join his crusade. Officially formed (after a false start in 1896) in 1915 and incorporated by act of Parliament in 1921, the CBA entered the war years firm in its commitment to “defend the constitutional principles whose history, [and] whose meaning [we] know better than the layman.” In 1941, spurred in part by Chitty’s efforts, the CBA established a Special Committee on Civil Liberties “to deal with the question of the restrictions on civil liberties in the light of the long-standing function of our legal profession as the guardian of liberty under the rule of law.” Ottawa lawyer, Gustave Monette, chaired the main Committee, and Chitty served as chair of both the Ontario subsection and the parallel Committee on Legislation Affecting Civil Liberties. The inspiration for the Civil Liberties Committee stemmed not only from Chitty’s prodding, but also from the CBA’s close relations with the American

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100 An act to incorporate the Canadian Bar Association, S.C. 1921, c. 79.
103 See “Annual Meeting” in Minutes of Proceedings of the Twenty-Sixth Annual Meeting of the Canadian Bar Association (Ottawa: National Printers, 1943) 15 at 53, and “Report of Committee
Bar Association (ABA). The numerous ties between the associations multiplied and tightened during the war.\textsuperscript{104} Among the aspects of the ABA specifically catching the attention of CBA President D.L. McCarthy was their Committee on the Bill of Rights. When the CBA struck its own Civil Liberties Committee in 1941, members explicitly envisioned its “work and scope” to mirror its ABA counterpart.\textsuperscript{105} But if the CBA’s Committee on Civil Liberties revealed American influences at its inception, so too did it carry the imprint of Chitty and his concerns about the administrative state.

The most notable wartime product of the CBA’s Civil Liberties Committee was the report it issued at the CBA’s 1944 Annual Meeting, and subsequently published in the \textit{Canadian Bar Review}.\textsuperscript{106} Most strikingly, the report called for the Canadian entrenchment of an American-style constitutional bill of rights. But the document is also a study in tensions and contradictions – undoubtedly the product of its several authors and uncertain blending of British and American constitutional principles. Throughout lurks Chitty and his effort to define constitutional rights as the domain of righteous lawyers, limited government, and \textit{laissez faire} economics. By his own admission, Chitty’s views had won the day.
Although he earlier lamented that he stood “entirely alone in calling attention to these very obvious dangers of bureaucracy,” at the CBA’s 1944 annual meeting Chitty claimed with satisfaction:

[T]he seed which ... I have in large measure helped to cultivate, has taken root and this Association is now becoming fully alive to the fact that it must play its part in eliminating these abuses of power by bureaucrats [and] autocrats.

Over the course of the war, Chitty’s attack on wartime administration had gone from a personal crusade to an official position of Canada’s national association of lawyers.

In broadest terms, the report pledged support for governmental administrative control during the war in exchange for the dismantling of its administrative capacities when peace had been restored. As a preliminary matter, the report struck a note of deference, stressing that “this Association ought not to do anything that might appear to antagonize, or even directly criticize the principle of full control, during the war, of the citizen, his liberty, property and activities.” Elsewhere, provocative language belied the claim of support, and warned of creeping “dictatorship,” “autocracy,” and “despotism.” “Once hostilities have ceased and an armistice has been signed,” the report served notice, “the nation had better suffer some inconveniences, and restore liberty.”

Restoring liberty, from the Committee’s point of view, entailed a return of the strict

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109 “Report,” supra note 106 at 599.
110 Ibid. See similar language used by Walter S. Johnson, chair of the Quebec subcommittee, in “The Lawyer and Administrative Boards” (1943-44) 3-4 R. du B, 233.
111 “Report,” ibid. at 601.
separation of powers: law-making by legislatures, enforcement by executive, and adjudication by courts. By casting the issue of civil liberties largely as one of relatively abstract constitutional process, the report avoided grappling with the substantive issues raised by the government’s selective curtailment of civil liberties. The report never discussed the *Defence Regulation*’s limits on political and religious expression or association, or the government’s treatment of Japanese Canadians. The result is a civil liberties report replete with references to rights, liberties, and freedoms, but tellingly silent on the harshest civil liberties restrictions of the war.

The Committee worried, however, that elements of the new administrative state would prove difficult to dislodge, especially given the doctrine of parliamentary supremacy and the perceived leftward drift of government. In this respect, the Committee’s Civil Liberties Report went further than Chitty ever had in proposing, not just constitutional arguments, but constitutional change as a means to ensure the return of judicial review and the ideal of the limited state. Invoking “the wisdom of the past,” the report listed seven “essential constitutional landmarks and principles.” 112 The first three touchstones were unsurprising. In citing *The Magna Carta, The Petition of Right* (1628), and *The Bill of Rights* (1689), the report laid claim to uncontroversial features of British – and by extension, Canadian – constitutional law. The report had earlier made clear that Canadians remained British subjects, protected by the Diceyean “Rule of Law ... the guarantee of all essential liberties.” 113 But Britain was no longer the

only constitutional lodestar in the sky. For its final four landmarks, the report turned to the United States’ Bill of Rights, specifically the First, Fourth, Fifth, and Sixth Amendments of the United States Constitution.114

“We wonder if ... Canada,” the authors concluded, “had not better follow the American procedure, and incorporate these rights and liberties of the subject in our own Constitution, for greater guarantee that our democrats will not forget Democracy.”115 The report downplayed the significance of blending American and British constitutional traditions, emphasizing their inherent similarities. Dicey himself had recognized that American institutions “are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England.”116 Still, the adoption of judicially-enforced constitutional rights promised to fundamentally alter at least one foundational principle of British and Canadian constitutional law: the supremacy of Parliament. For all of the report’s attention to the democratic credentials of legislatures, its concluding call for entrenched constitutional rights suggests at least a modicum of suspicion, not only of the growing power of the executive, but of parliamentarians as well.117 The report recognized that unwritten

114 Ibid. at 616,617. The First Amendment concerns the separation of church and state and entrenches freedom of speech, press, and assembly. The Fourth Amendment provides the right “of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment protects against self-incrimination and states that no person may “be deprived of life, liberty or property, without due process of law. The Sixth Amendment entrenches the right to “a speedy and public trial...and to have the assistance of counsel for his defence.” U.S. Const. amend. I, IV, V, VI.

115 “Report,” ibid.


117 The rising popularity of the CCF likely lingered uncomfortably in the minds of some members of the CBA. The war years saw the CCF peak in popularity. Polling the support of nearly 30% of Canadians in 1943, the CCF was, for a brief period, the most popular political party in the country.
constitutional principles would fail to constrain legislative intentions to extend administrative government and increase economic intervention. Protecting the property rights of the future would require more robust constitutional models. R.C.B. Risk and R.C. Vipond have written that “in Canada there was no *Lochner*, much less a *Lochner* era,”\(^\text{118}\) but there was a moment in Canadian constitutional history when Canada’s lawyers yearned for one. During the war, the CBA’s commitment to constitutional change – specifically, the adoption of American-style entrenched written rights – emerged out of a desire to curb the growth of the administrative state and to protect private property. As the American military star continued its wartime ascent, the CBA’s call for entrenched rights demonstrated the increasing receptivity of Canadian legal minds to American ideas, politics, and legal culture. It would not be possible after the war, as it had been before, to ignore the constitutional ideas of the United States of America.

\textbf{c. “The Tide of Popular Rights”: John Willis Defends the Administrative State}

As resolutely as Chitty and the CBA disparaged the wartime administrative state, John Willis and his colleagues defended it. In his administrative law scholarship Willis urged his fellow lawyers and scholars to accept the inevitability, necessity, and prudence of modern administrative government. Willis was not new to the

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fight. As a graduate student at Harvard under the supervision of Felix Frankfurter, Willis had taken on Lord Hewart’s popular claims that administrative government in Britain – the “new despotism” – had dangerously supplanted the venerable traditions of the English common law. In his published thesis, Willis argued that delegated parliamentary powers had a long constitutional pedigree in English governmental history and that, in any event, Hewart’s individualistic conception of constitutional law was dissonant with the modern needs of citizens. “[I]t is no longer enough for [the state] to keep the peace,” Willis suggested, “it must watch over health, education, industry, transport, and many other social interests.” To manage these new obligations, Willis pointed out, Parliament was delegating authority to officials, commissions, and experts to manage the expanding day-to-day affairs of government. As Willis anthropomorphized, “Parliament is the heart, the Civil Service the head and hands, of our government.”

Willis repeated these arguments during a legal career that included stints in private practice and teaching positions at Dalhousie, Osgoode Hall, Toronto, and British Columbia. Born in England, Willis received his education at Winchester and Oxford before attaining an L.L.M. from Harvard. With job

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prospects dim in Britain, Willis ventured to Dalhousie for a short-term teaching contract; what began as a year abroad became the rest of his life. In addition to his teaching, Willis attempted to modify the profession’s view of administrative law through involvement in the CBA. In 1941-42, Willis, along with fellow legal scholars, Frank Scott, John Humphrey, and Fred Cronkite, served on the CBA’s Standing Committee of Administrative Tribunals and Law Reform. Given the coincident positions being taken by Chitty and the Committee on Civil Liberties, it is likely that Willis found his CBA experience frustrating. Finding more like-minded thinkers in the academy – pioneers in administrative law scholarship like James Alexander Corry and Jacob Finkleman – Willis focused his primary attention to defending the administrative state in his writing. In the collected essays of *Canadian Boards at Work* published in 1941, Willis took direct aim at Chitty and Lord Hewart’s other acolytes in the CBA – lawyers fond of “denouncing ‘boards’” as surely as they rejoiced at the “the rule of law.” Willis gave the typical fears of Canadian lawyers short shrift since, to his mind, they pedaled in hypothetical suppositions and mythical shibboleths. The only thing

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121 Willis, *Parliamentary Powers*, ibid. at 171.
122 Risk “Willis,” *supra* note 120 at 271, 278
123 Later in his career, Willis was not shy about expressing his, at best, ambivalent view of lawyers. “I have, all my working life, been torn between admiration and dislike of [lawyers],” Willis reflected. “What I don’t like about lawyers...is the intensely individualistic political philosophy that acting for individuals gives them. In the unceasing conflict between what learned persons call private rights and public interest nearly all lawyers unhesitatingly live up on the side of private right.” J. Willis, “What I Like and What I Don’t Like About Lawyers: A Convocation Address” (1969) 76 Queen’s Quarterly 1 at 3, 7.
125 As Willis put it: the “horrible things [that] might or might not happen if certain officials should take it into their heads to exercise to the full some of the very extraordinary powers that the statutes do in fact give them”: *ibid.* at viii.
that mattered, Willis contended, was a clear-eyed description of “what Canadian boards in fact do.”

Despite Willis’s assertion of objectivity, *Canadian Boards at Work* left little doubt as to its authors’ views, at least insofar as they concerned the growth of the administrative state. For Willis, the winds of history blew resolutely in the sails of administrative government, and he dismissed its legal critics as being deluded by a constitutional understanding of an earlier century. Where critics of the newer constitutional law had charged that modernity required constitutional change, Willis confidently asserted that “our constitution is changing and we expect it to change some more.” The administrative state had arrived without the necessity of constitutional amendment, Willis explained, because the public had demanded it. In his eyes, these foundations lent the administrative state a legitimacy that judicial review could no longer claim. For Willis, there was no going back to the constitutional past regardless of the sound and fury of lawyers. Expressing similar confidence in the inevitability of administrative government, Corry’s opening essay suggested that a new “collectivist ideal” had replaced “the constitutional morality of the *laissez faire* era.” And since these new modes of government were here to stay, Finkleman added in his contribution, “there is little is to be gained by complaining .... The task that lies ahead is to ascertain how the system works and whether it can be brought into accord with the

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126 Ibid.
127 Ibid. [my emphasis].
democratic principle – the will of the people.”129 “We must not allow outworn concepts brightly coloured by our dreams of a golden age that never was stand in the way of progress,” Finkelman concluded in a Willisian turn of phrase.130 For the writers of Canadian Boards at Work, progressive modern democratic government and the administrative state were one and the same.

Yet for all its celebration of the ethos of hard facts and descriptive neutrality, Canadian Boards at Work curiously omits reference to any wartime administrative developments. Although the essays were written before the expansion of economic controls during the latter half of the war, it is remarkable that neither Willis in his Forward, Corry in his Introduction, nor any of the other writers so much as mention the administrative developments brought about by war. Aside from a subsequent article discussing the principle of administrative sub-delegation as raised in the Chemicals Reference,131 Willis’s other published work did not deal with the administrative changes of wartime government either, except for a pithy case comment criticizing the Supreme Court’s narrow interpretation of the government’s postwar emergency powers.132 Willis may have defended this omission on the grounds that what mattered were the permanent features of administrative government, not the temporary bodies necessary only for the extraordinary circumstances of war. Nevertheless, one is

130 Ibid. at 190.
left with the impression that Willis and his colleagues avoided the wartime administrative state because its appearance – haphazard, prolific, and swift – did not fit the more benign thesis that administrative government had emerged slowly, organically, and democratically. In the end, the unwillingness of administrative scholars to engage with the unprecedented transformation of government under the WMA and the emergency legislation that remained in force for the balance of the decade, to say nothing of the civil liberties concerns they raised, can be justly characterized as a significant oversight and major shortcoming.

Willis might have retorted, as he did in an unguarded missive published in the *Canadian Bar Review*, that writing articles was “useless” since lawyers appeared immune to his arguments regardless.133 “The lawyer seems to have two sides to his mind,” he complained, “one of them taking note of what really happens in government which he uses for every day life, and the other unconsciously disregarding the facts of modern government which he uses when he comes to talk law.”134 “The executive today,” Willis wrote,

is the lawyers’ portmanteau word for such institutions as the Department of National Defence, the Wartime Prices and Trade Board, the Ontario Workman’s Compensation Board, the Transport Board of Canada, and all of those bodies [that] have as their single aim the protection against well-organized exploiters of the unorganized mass of poor weaklings like the workman and the consumer.135

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That was as close as Willis came to discussing the wartime administrative state. What the letter makes clear is that Willis defended all administrative aspects of government, whether created for the purposes of war or not. The foundation of his defence lay in Willis’s steadfast conviction that boards and tribunals acted to protect the public interest, and not for the sake of their own power. For Willis, lawyers challenged the authority of administrative government compulsively in defence of the narrow pecuniary interests of their privileged clients. Legal opposition, Willis implied, was as inevitable as it was futile. “The King Canutes of the legal profession,” he predicted, “will not be able to stem the tide of ‘popular rights’ which is now eating away at the shores of ‘private rights’.”

The dangers of majoritarianism implicit in Willis’s conception of the state, and so clearly on display in the government’s wartime treatment of Communists, Jehovah’s Witnesses, and Japanese Canadians never gave Willis pause. Although he accused legal critics of self-interested myopia, Willis’s panacean defence of all government administrative activity revealed blind spots of his own.

d. Constitutional Scholars in Wartime

Willis was not alone in his reticence to discuss the legal implications of war. Canadian legal scholars more generally ignored both the Defence Regulations and the spectacular wartime growth of administrative government, at least in their published work. The 1939-40 volume of the University of Toronto Law

\footnote{Ibid. at 54.}

\footnote{Administrative developments were, however, giving rise to changes in legal education. John Willis had been teaching administrative law at Dalhousie since 1937. Osgoode Hall began offering}
Journal, for example, failed to cite either the WMA or the Defence Regulations in its 1939 “Survey of Canadian Legislation,” noting only that a special session of Parliament had “passed legislation for war purposes.” The Canadian Bar Review took greater notice when cases under the Defence Regulations began to appear in court, but the case comments that appeared were curt, descriptive, and generally uncritical. Neither the University of Toronto Law Journal nor Revue du Barreau nor the Alberta Law Quarterly subjected the Defence Regulations or its jurisprudence to any greater scrutiny. Political scientists, by contrast, seemed more willing to grapple with the impact of war on democratic institutions both in Canada and abroad. Work of similar quality did not appear in any of Canada’s English- or French-language legal periodicals. Images of war did find their way into the pages of law journals, but in the form of reprinted speeches from CBA dinners. These addresses reinforced the idea that lawyers, the historic protectors of liberty, had a singular role to play in ensuring freedom during and after the courses on administrative, tax, and labour law during the war, and Scott added administrative law to his teaching load at McGill in 1946. In January 1943, the Law Society offered to its members a series of lectures on “Wartime Emergency Orders and Administrative Tribunals.” See Risk, “Willis,” supra note 120 at 281; Philip Girard, Bora Laskin: Bringing Law to Life (Toronto: The Osgoode Society for Canadian Legal History, 2005) at 150; and Law Society of Upper Canada, Special Course of Lectures on Wartime Emergency Orders and Administrative Tribunals (Toronto: Carswell, 1943).


That the fight for freedom abroad and at home lay in considerable tension went largely unnoticed. In a brief editorial, Caesar Wright perspicuously noted that

the question for the lawyer – because it is of vital concern to the community whose interests he is sworn to champion – is how best to reconcile the demand for maximum unfettered governmental interference with human liberties, which is called for in the name of efficiency, with the minimum interference with the individual, which is called for in the name of human dignity, or man’s fight for liberty under law.\footnote{142}

But Wright’s intriguing and difficult question – the extent to which the principles of constitutional law should be suspended in war to protect the constitution – went unanswered and, perhaps worse still, unexamined.

Why the scholarly neglect? One explanation is that during the war, faculties at Canada’s ten law schools remained small and over-extended by teaching and non-academic work. During the war, two of Canada’s leading constitutional scholars, Kennedy and MacDonald, for example, served as deans of their respective law schools while also actively engaged beyond the usual demands of the classroom, Kennedy as editor of the University of Toronto Law Journal and MacDonald in government war work. MacDonald published only two articles during the war, both straightforward doctrinal analyses.\footnote{143} In one of those articles he pronounced 1939 – a year in which the WMA had been invoked,

\footnote{142} “War and the Legal Profession” (1942) 20 Can. Bar Rev. 616 at 617.
the Defence Regulations enacted, and a state of war declared – “a run-of-mine year” producing “few dramatic or significant decisions in the realm of constitutional law.”\textsuperscript{144} In Kennedy’s only major wartime publication, an overview of the BNA Act and its interpretation in the Cambridge Law Journal, he trod over familiar territory, castigating the Privy Council for a constitutional interpretation that denuded the federal government of legislative power in favour of the provinces.\textsuperscript{145} The article could have been written a decade earlier but for his pessimistic conclusion that Canada’s experience with federalism should serve as a warning to those who believed that the “federal concept” could reconstruct “a disintegrated and shattered world.”\textsuperscript{146} Otherwise, to read the constitutional scholarship produced by Kennedy and MacDonald during the war is to read of the war not at all. One might have expected Frank Scott to have more to say about the wartime impact on civil liberties, but, as we shall see, a combination of personal circumstances and political and intellectual commitments steered his constitutional writings away from the civil liberties concerns that had previously punctuated his constitutional thought.

Another reason why the war and its attendant civil liberties issues figured so little in the scholarly imagination was the persistence of earlier constitutional dilemmas. The release of the O’Connor Report in 1939, and the appearance of the Royal Commission on Dominion-Provincial Relations (Rowell-Sirois) Report and legislation ending appeals to the Privy Council a year later, ensured that the issues of federalism, functionalism, and sovereignty remained at the fore of

\textsuperscript{144} MacDonald, “Constitution,” \textit{ibid.} at 147.

\textsuperscript{145} W.P.M. Kennedy, “The Interpretation of the British North America Act” (1942-44) 8 Cambridge L.J. 146.
wartime constitutional debate. Emergent scholars such as Bora Laskin and Raphael Tuck added analytical rigour, but otherwise repeated the main lines of argument that had been levelled against the Privy Council’s constitutional jurisprudence for a decade. By contrast, French-speaking scholars, especially the forceful arguments presented by Louis-Phillipe Pigeon, continued to defend the Privy Council’s jurisprudence, and to argue that prospective constitutional amendments required the consent of Quebec. By and large, the WMA and the Defence Regulations mattered as constitutional law only to the extent that they impacted the existing balance of federal and provincial power. English-Canadian scholars welcomed extensions of federal power as a much-needed re-assertion of

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146 Ibid. at 160.
147 Report to the Honourable the Speaker of the Senate relating to the enactment of the British North America Act, 1867... (Ottawa: Queen’s Printer, 1939) see also W.F. O’Connor, “Property and Civil Rights in the Province” (1940) 18 Can. Bar Rev. 331; Canada, Royal Commission on Dominion-Provincial Relations, Report, 3 Vols. (Ottawa: Queen’s Printer, 1940); Reference re Privy Council Appeals, [1940] S.C.R. 49.

The perpetually intractable issue of constitutional amendment remained germane as well. In 1940 the federal government had secured unanimous provincial approval for a constitutional amendment granting the federal government legislative jurisdiction over unemployment insurance (British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.), now s. 91(2A) Constitution Act 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C 1985, App. II, No. 5. The Unemployment Insurance Act, 1940, S.C. 1940, c. 44, followed). In speaking to the amendment in Parliament, King carefully noted: “We have avoided the raising of a very critical constitutional question, namely, whether or not in amending the British North America Act, it is absolutely necessary to secure the consent of all provinces” (House of Commons Debates (1940) at 1117-18). In 1943, despite protests from Quebec, the federal government unilaterally amended the Constitution to postpone the constitutionally required readjustment of provincial representation under section 51 (British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)). St Laurent defended the measure in the House by claiming that provinces had no role in amendments relating to federal institutions (House of Commons Debates (1943) 4305-06). The delayed realignment was carried out in 1946 by British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.). The Quebec legislature passed resolutions protesting both amendments, which came to naught. See generally P. Oliver, “Canada, Quebec and Constitutional Amendment” (1999) 49 U.T.L.J. 519 at 533 and J.R. Hurley, Amending Canada’s Constitution: History, Processes, Problems and Prospects (Ottawa: Canada Communications Group, 1996).

federal power, while Quebec intellectuals decried wartime “centralization” as an “unprecedented campaign ... against our province and its autonomy.” The WMA may have temporarily tipped the balance of federalism toward the federal government, but it did not alter entrenched positions within a persistent constitutional debate over the nature of the federation.

The most pointed and direct criticism of the Defence Regulations emerged not from the legal academy, but from the margins of civil society. Unlike Canada’s legal scholars, wartime civil liberties groups placed domestic repression under the Defence Regulations firmly within the rubric of constitutional law. In Montreal, the Communist-led Canadian Civil Liberties Union (CCLU) openly attacked regulations 15, 39, and 39A in the pamphlet, The War and Civil Liberties. In May 1940, the CCLU, in alliance with six other left-wing groups, organized the National Conference for Civil Liberty in Wartime. The conference’s 400 delegates – despite the tensions that surfaced between

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150 “By autonomy,” André Laurendeau explained, “we mean Quebec’s freedom: the province’s right to guide its life according to its needs and interests, the nature of its population, its political constitution, the sacred promises made in 1867.” André Laurendeau, “To Save What Deserves to be Saved” in Ramsay Cook & Michael Behiels, The Essential Laurendeau (Vancouver: Copp Clark, 1976) 108 at 109 [originally published 12 February 1944]. See also André Laurendeau, La crise de la conscription – 1942 (Montreal: Éditions du Jour, 1962).
151 From its founding in 1934, Montreal's communist-dominated Canadian Civil Liberties Union (CCLU) stated that a principal object was “to maintain throughout Canada the rights of free speech, free press, free assembly, and other civil liberties.” “Canadian Civil Liberties Union Provisional Constitution,” 1934, “Civil Liberties 1930-35,” Library and Archives Canada [LAC], Scott Papers, MG 30, D211, Vol. 9, Reel H-1220. Scott had helped to draft the constitution but, although he retained a membership in the CCLU through the 1930s, distanced himself from the communist-led executive.
153 See "Civil Liberties, Constitutional Aspects" and “Civil Liberties Union, Canadian Documents,” Scott Papers, MG 30, D211, Vol. 10, Microfilm Reel H-1222. The other organizing groups included the All-Canadian Congress of Labour, Canadian Civil Liberties Union, League for Social
Communists and moderate progressives – managed to produce a unified statement condemning the wartime deprivation of constitutional rights:

[W]e, the delegates to the National Conference for Civil Liberty in Wartime, maintain that to restrict freedom of criticism and to prevent the expression of policies at variance with those of the Government in power is to destroy the democratic process. It would be a tragedy if, in fighting the war, we found we had lost the things we had been fighting for.

In our opinion the War Measures Act, the Defence of Canada Regulations and the Censorship Regulations deprive the citizens of their constitutional rights and civil liberties, including freedom of speech and assembly, freedom from entry search, seizure and arrest without due process of law, the right to strike, the right to trial and the right to habeas corpus.¹⁵⁴

Not surprisingly perhaps, the press opted to emphasize the conference’s subversive elements, noting that “the R.C.M.P. and the Montreal Police Department’s ‘Red squad’ had the meeting under surveillance.”¹⁵⁵ Tainted throughout the war by association with Communists, the constitutional arguments of Canada’s small civil liberties community went largely unnoticed.

More mainstream voices in left and liberal circles also criticized the Defence Regulations in terms of rights, freedoms, and democracy. In Parliament, M.J. Coldwell and the CCF frequently questioned the scope, content, and administration of the Defence Regulations, characterizing the ministerial power of internment under regulation 21, among others, as “the antithesis of British and

Canadian democracy.” In print, CCF officials, George Grube, a classics professor at the University of Toronto, and Toronto lawyer Andrew Brewin, similarly expressed concern about the potential for abuse under regulation 21. Civil liberties groups in Toronto and Winnipeg – led by Bernard Keble Sandwell and Arthur Lower respectively – also attacked the repressive elements of the Defence Regulations, especially in the early years of war. Using their extensive personal contacts in government, Sandwell and Lower attempted to wield influence directly with policy-makers. In one of his several letters to the Minister of Justice, Lower bluntly complained: “Your entire edifice of arbitrary powers is badly drawn, excessively severe, ambiguous in meaning, un-British in tradition, greatly in excess of current British practice, carelessly and obscurely promulgated.” “[I]t would be tragic indeed,” he chastized in another missive, “were a war that is being fought for freedom abroad to result in the loss of freedom at home.” In a letter to the Prime Minister and the other federal

156 House of Commons Debates (27 February 1941) at 1069. See also the more wide-ranging attack on the Regulations by Tommy Douglas. “We know that ... men are shedding their blood to keep freedom alive,” he argued. “We in this parliament cannot treat lightly our responsibility to see to it in this country of ours that freedom shall not perish from the earth” (House of Commons Debates (3 March 1941) at 1191).

157 Brewin, supra note 17 at 112, 121; G.M.A. Grube, “Freedom and the War” (1939) 19 Can. Forum, “Civil Liberties in War Time” (1940) 20 Can. Forum 106; “Those Defence Regulations” (1940) 20 Can. Forum 304. Aiming his critique principally at the CCF’s political constituency, Grube attacked those aspects of the Regulations that impacted organized labour. Otherwise, he expressed indifference about the treatment of communists, and noted that the “internment of enemy aliens ... is a legitimate and recognized practice which can do no harm and is often necessary, if administered with prudence and good sense” (“Civil Liberties in War Time” (1940) 20 Can. Forum 106 at 107).


159 Lower to Lapointe (27 December 1939), LAC, Scott Papers, MG 30, D211, Vol. 6, Microfilm Reel H-1217.
leaders, Sandwell, among other signatories, urged King not to let the regulations “by vagueness of expression and unwise application, become a means to the unnecessary curtailment of democratic rights.” Insofar as these critiques injected other values – conceptions of rights, freedoms, and democracy – into an otherwise stale or non-existent debate, the CCF and civil liberties groups ventured into territory legal scholars throughout the war refused to tread.

For all the talk of rights and freedoms, however, the critique of the CCF and civil liberties groups ran up against the intractable reality of parliamentary supremacy. It proved relatively easy to repel the attacks of civil liberties critics, as the government frequently did, by retorting that *Defence Regulations* were legitimately enacted law, crucially necessary, and, in any event, temporary. “I am merely doing the work that has been entrusted to me by parliament,” St Laurent retorted. “We have enforced these regulations not to destroy but to protect democracy. We have enforced them to keep and to preserve it.” If pressed, most parliamentary critics would have agreed with the principle of wartime restrictions, but they tended to differ with the government over where to draw the line. In any event, critics themselves failed to apply their calls for civil liberties with principled consistency. Sandwell, for example, supported the government’s ban on Jehovah’s Witnesses, while Lower agreed with the forced

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161 *House of Commons Debates* (27 February 1941) at 1071, 1072. R.B. Hanson, leader of the Conservatives agreed. “[W]e believe in the necessity of restricting the liberty of the subject in time of war,” he added, “we must preserve the safety of the state. In times of peace British justice stands on a different principle” (at 1074).
162 “Jehovah’s Witnesses” *Saturday Night* (26 October 1940).
removal of Japanese Canadians.163 Put simply, critics engaged in a critique that drew on the ideal of rights, but failed to offer a more sustained or consistent theory of rights protection.

III. “Constitutional Revolutions”: Frank Scott’s Wartime Constitutional Thought

Why did Frank Scott, the era’s “leading civil libertarian,”164 not bridge the arguments of civil libertarians and constitutional scholars as he had done in the 1930s? Ironically, Scott’s concern for civil liberties seemed to diminish at the moment of their most serious constraint. If Scott’s wartime writings display less concern for civil liberties than we might have expected, they still reveal his search for the aspirational values that should guide Canada on its project of constitutional change. In the 1930s, Scott had proposed that constitutional functionalism, national independence, and, to a lesser extent, civil liberties protection guide that process. He retained those ideals during the war, but his commitment to political centralism led him to maintain the erroneous binary that provinces repressed rights while the federal government protected them. In this respect, he tended to overlook the extent to which under the WMA and Defence Regulations, the federal government curtailed the civil liberties of freedom of thought, speech, and association as much or more than provinces ever had.

163 “What Ought to Be Done With Our Japanese?” Financial Post (21 March 1942) 3. Lower wrote: “As our national safety is the paramount consideration local interest must everywhere give way. If the Japanese are a danger on the Pacific coast, they should be removed....There is no means of discovering whether they will or will not be a danger until an attack actually occurs. It would therefore seem that the sensible thing to do is to remove them all, as we know too little about them to be able to make safe distinctions between those born in Canada and those born elsewhere.”
Although he recognized that a “constitutional revolution”165 had altered the balance of the federation in favour of the federal government, like Willis, he was not inclined to criticize a wartime constitution that seemed to remedy the very maladies he had been so fervently diagnosing. As well, Scott himself never doubted that the state maintained the constitutional authority to restrict civil rights in order to protect itself.

Scott’s complex reaction to the Second World War provides insight to both the contributions and the silences of his wartime scholarship. His initial response to war was revulsion. As a pacifist he abhorred the violence “Where men as infants break their dearest toys /....To plan sharp death for blind obedient boys.”166 As an isolationist he questioned why Canada should be involved in a European war in which Canada “does not lie in the path or orbit of any aggressor nation.”167 As a nationalist, he feared that war, and specifically conscription, would tear the fragile bonds between Quebec and English-Canada.168 As a constitutionalist, he objected to the government setting Canada on a path to war before Parliament could debate the issue.169 He combined all facets of this

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165 Scott, “Constitutional Adaptations,” supra note 4 at 143.
169 F.R. Scott, “The Constitution and the War” (1939) 19 Can. Forum 243 at 243: “How can a country freely decide through its Parliament what course it should follow in a crisis when, before the people’s elected representatives meet, the Cabinet introduces a host of measures which place the country on a war footing?”
opposition in a letter to Mackenzie King early in 1940, chiding the Prime Minister for negating Parliament’s “freedom to decide what course to follow,” for reverting Canada to a form of “colonialism,” and for risking “our national existence, and the future of the country, in what is basically a European conflict.”\(^{170}\) Scott worked closely with the leadership of the CCF to translate these concerns into a war policy that captured the delicate and difficult balance between criticizing the Liberals and supporting the overall aims of the war against fascism. Although it cost them the support of Woodsworth, their pacifist leader, the CCF settled on a policy that called for sending material assistance to Britain, monitoring civil liberties abuses and war profiteering, and advocated the nationalization of war industry and the implementation of a progressive tax scheme.\(^{171}\) While Scott no doubt approved of the party’s decision to question the scope of the *Defence Regulations*, he did not offer much in the way of analysis or comment on that topic in either his published work or his private advice to the party.\(^{172}\) As the war began, it was the larger canvas of foreign policy and international politics that consumed Scott’s attention.

A sabbatical to Harvard commencing in September 1940 further distanced Scott from the day-to-day realities of civil liberties repression under the *Defence Regulations*. At Harvard, Scott planned to write the definitive work on “the nature and development of the Canadian constitution,” tying the loose ends of his

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\(^{170}\) Scott to King, 2 January 1940, LAC, Scott Papers, MG 30 D21, Vol. 6, Microfilm Reel H-1217.


\(^{172}\) For the CCF’s tactics in challenging the *Defence Regulations* see D. Lewis, “Memorandum on Defence of Canada Regulations and the Censorship Regulations” [n.d.], Scott Papers, MG 30, D211, Vol. 10, Microfilm Reel H-1222.
previous constitutional writings into a coherent whole. But Scott abandoned the work, as his attitude towards the war began to irrevocably shift. It became difficult, and then impossible, for Scott to concentrate on the finer points of Canadian constitutional history as the phony war became a real one, the Nazi war machine tore through Europe, and bombs rained on London. As the violence escalated, Scott no longer saw the war as merely the machinations of capitalism and imperialism, but in more dire terms. “I said to myself,” he later explained, “there won’t be a BNA Act when we are through with this! What am I doing pottering around here?” Putting aside the suddenly parochial concerns of Canadian constitutional law, Scott shifted his intellectual energies to crafting a more universalistic conception of democracy.

Three American publishers turned down the product of those labours, Scott’s “Democratic Manifesto.” Undeterred, he re-worked the material into a chapter in Make This Your Canada: A Review of C.C.F. History and Policy, a book he co-wrote with David Lewis. In his chapter, “The Rebirth of Democracy,” Scott injected the idea of equality into Canadian public law

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173 His work was supported by a Guggenheim Fellowship. “Guggenheim Fellowship 1939-48,” Scott Papers, MG 30 D211, Vol. 16, Microfilm Reel H-1274.
174 Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland & Stewart, 1987) at 194. For a poetic take on the “trivial talk” of academe in times of crisis see “Boston Tea Party 1940” in Scott, *Poems*, supra note 166 at 98. Scott’s changing attitude towards the war is captured most starkly in his poetry. In “Armageddon,” Scott envisions “caterpillars span a thread of our blood / And sewed our flags into the history-quilt” (at 102). As Scott later admitted to his biographer, “[m]y nearly total isolation was based on a false assumption that this was another war like the Kaiser’s war” (at 194).
175 D. Lewis & F. Scott, *Make This Your Canada: A Review of C.C.F. History and Policy* (Toronto: Central Canada Publishing Co., 1943) at v. The book as a whole effectively symbolizes the blending of the ideas of Scott, the LSR, and the CCF. Lewis and Scott had initially conceived of the work as an LSR publication, but as that group wound down it became increasingly clear that study should be about the CCF. As Coldwell explained in his forward, the final product reflected “the philosophy and aims” of the CCF, rather than “a formal party statement” (at v). Throughout the 1930s and 1940s the constitutional ideas of the LSR and the CCF could usually be traced to Frank Scott.
discourse. “[D]emocracy in our time,” he wrote, “must translate into reality the forgotten principle of equality.”¹⁷⁶ That principle, he elaborated, “rests on the basic right and value of every personality,” and consists of “racial equality, equality of the sexes, equality of opportunity and equality before the law;” “all,” he stressed, are “vital conditions of true democracy.”¹⁷⁷ How these principles translated into law, or how they related to the government’s wartime treatment of vulnerable groups and individuals, Scott did not say. Nor did he link these ideas about equality as a normative element of democracy to an earlier discussion in the text calling for a constituent assembly to write the “first truly Canadian constitution ... guaranteeing full protection to minorities and embodying the democratic civil liberties.”¹⁷⁸ Not until after the war would Scott and others fold equality concerns into more specific arguments about the need for entrenched constitutional rights. In 1943, the place of equality within the ideals of constitutional law remained tentative and uncertain.

In the later years of war Scott returned his gaze to the more concrete and familiar constitutional terrain of federalism. The war, he happily observed, had transformed “federal impotence” into “federal omnipotence.”¹⁷⁹ In his eyes, the contrast between wartime administrative economic planning and the unregulated

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¹⁷⁶ Ibid. at 195.
¹⁷⁷ Ibid.
¹⁷⁸ Ibid. at 184.
¹⁷⁹ F.R. Scott, “The Constitution and the Post-War World” in F.R. Scott & A. Brady, eds., Canada After the War: Studies in Political, Social and Economic Policies for Post-War Canada (Toronto: Macmillan, 1943) 60 at 61 [Scott, “Post-War World”]. See also Scott, “Constitutional Adaptations,” supra note 4 at 143. Still, Scott could not help but notice that economic planning had arrived not because of the influence of “sweet reason and academic argument” but rather on account of “the grim necessities of war.” “As so often happens in Canada,” Scott lamented, “we did not make up our mind – events made it up for us.” Quotes from F.R. Scott, “Social Planning and the War” (1940) 20 Canadian Forum 138, reprinted in A New Endeavour: Selected Political
economy of the Depression could not have been sharper. National unemployment of almost thirty per cent had been replaced with near full employment as overseas demand pressed thousands of workers into factories to satisfy the appetites of war for uniforms, weapons, trucks, ships, planes, and steel.\textsuperscript{180} Rising levels of industrial employment swelled union ranks and increased the political power of organized labour. By the end of the war, several provinces and the federal government had enacted legislation compelling employers to recognize unions for the purposes of collective bargaining.\textsuperscript{181} The position of workers and unions in Canadian society had never been stronger. The fear that weighed greatest on Scott’s mind was not that federal power might abuse civil liberties, but that economic planning and labour prosperity might disappear when the war ended. “[I]f this is the way to get more guns,” Scott reasoned, “it is also the way to get more butter.”\textsuperscript{182}

To ensure the continuation of the federal power that made economic planning possible, Scott counselled constitutional amendment. In his 1943


\textsuperscript{180} Looking back on his wartime boyhood in Montreal, Mordecai Richler remembered that, “to look back on the war is to recall the first time our fathers earned a good living. Even as the bombs fell and the ships went down, always elsewhere, our country was bursting out of a depression into a period of hitherto unknown prosperity” (M. Richler, \textit{The Street} (Toronto: McClelland and Stewart, 2002) at 59).


contribution to a collection of essays on postwar planning, Scott called for “a general rewriting of the constitution,” envisioning the exercise as “a creative act which, if successful, would immensely strengthen national unity and consciousness.”¹⁸³ What Canada required, Scott argued, was “one great charter, adopted by representatives of all sections of the Canadian people assembled in constituent convention.”¹⁸⁴ “Out of the effort,” Scott suggested, “would come a clearer perception by Canadians of the nature of their society, of the principles on which it must operate, and of the ends which it is supposed to serve.”¹⁸⁵ For Scott, the principle and ends of constitutional law were clear. A constitution, he argued, must facilitate the creation of a “juster social order.”¹⁸⁶ In essence, this meant a constitutionalized administrative state in which the federal government maintained broad jurisdicitional authority to plan the economy, nationalize industry, and redistribute wealth. Unlike Chitty and the lawyers of the CBA, Scott saw liberty, not restraint, in the provision and proliferation of state action, or, as he preferred to call it, the “changing functions of government.”¹⁸⁷ Through government, Scott believed individual liberty might be made real.

Scott maintained a place for entrenched constitutional rights within this constitutional vision, reiterating, as in his contribution to Social Planning for Canada, the need to constitutionalize “freedom of worship, of speech, of

¹⁸³ Scott, “Post-War World,” supra note 178 at 80.
¹⁸⁴ Ibid.
¹⁸⁵ Ibid. at 81.
association, and of the press.”188 Remarkably, Scott suggested that the reason for entrenchment was that “at present these ... rights are too easily set aside by provincial legislation.”189 Scott never had to face the glaring inconsistencies in his thought because he never acknowledged, in writing at least, the existence of the Defence Regulations, the jurisprudence they generated, or the repression they enabled. This omission did not distinguish Scott from his scholarly colleagues, but it is difficult not to especially lament its absence from his work.

Perhaps Scott avoided dealing with the civil liberties issues raised by the war precisely because they elicited no easy answers. Although Scott typically approached legal matters in absolute terms, the WMA and its powers defied easy condemnation or approbation. He confided to Arthur Lower after the war this sense of ambivalence. “I do not like these extraordinary powers which can be picked off the shelf and applied in emergencies without Parliamentary approval,” he conceded. “On the other hand,” he allowed, “the possible necessity of defending ourselves against organized sabotage is one that cannot lightly be dismissed.”190 In the end, it proved easier for Scott to write abstractly of equality, freedom of speech, thought, and association, than to try and wrestle with the messier realities of domestic wartime repression, to say nothing of the broader difficulty of sorting out the application of constitutional principles in a time of war.

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188 Scott, “Post-War World,” supra note 178 at 82.
189 Ibid.
190 Lower to Scott, 3 April 1946, LAC, Scott Papers, MG 30, D211, Vol. 10, Microfilm Reel H-1222.
Conclusion

Images of freedom abounded in public discourse during the Second World War. Much attention – then and since – has been paid to Franklin Roosevelt’s eloquent invocation of the “Four Freedoms” in his 1941 State of the Union Address, and the subsequent embrace of “freedom from fear and want” as war aims of the Allies. Much less attention has been paid to the varied and contradictory discourses of freedom that took shape in Canada during the war. Mackenzie King tended to cast freedom in ethereal terms: freedom as Christian instinct and spirit. As lawyers, Robert Chitty and members of the CBA Committee on Civil Liberties looked for greater security: freedom in the rule of law, and, if necessary, entrenched constitutional property rights. Judges saw freedom in the repressive measures protecting the safety of the state. Civil liberties groups searched for the freedom of the ancient protections of the common law. John Willis and Frank Scott found freedom in government action and the expanding administrative state. Invariably, these diverse conceptions of freedom came into conflict in a multifarious discourse on the norms of constitutional government in times of war and peace.

For all the talk of freedom, however, for many Canadians during the war it had become an illusion. Fuelled by insecurity and fear, the federal government legalized the suppression of Communists, Jehovah’s Witnesses, and Japanese

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191 Atlantic Charter: 14 August 1941, 55 Stat. 1603, 204 L.N.T.S. 381. Roosevelt’s other two freedoms – freedom of speech and freedom of religion – were deliberately omitted so that the Charter might gain the acceptance of the Soviet Union, which occurred, along with the other European Allies, on 24 September 1941. On Roosevelt’s conception of constitutional freedom generally see Cass R. Sunstein, The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever (New York: Basic Books, 2004).
Canadians, among others, in the name of preserving the state and, by extension it was claimed, the rights and freedoms central to it. A few voices highlighted the irony of fighting for freedom abroad while watching it slip away at home, but those in the legal profession – whether scholars, lawyers, or judges – took little notice of wartime domestic repression. Moreover, the fact that certain groups and individuals bore a disproportionate burden of constraint did not register as a concern either. The paucity of those reactions can be traced to a failure of constitutional law. Although civil liberties had emerged as an important, if peripheral, aspect of constitutional thought during the 1930s, its position was not so secure as to withstand a crisis perceived to threaten the foundations of the state itself.

During the war, new issues of administrative law and old issues of federalism dominated Canadian constitutional thought. Lawyers and scholars had plenty to say about constitutional rights and freedoms, but in the context of a debate about the desirability of the administrative state and the changing functions of government. For the most part, at least among the legal profession, the domestic legal consequences of war went unexplored and unexamined, except insofar as developments touched on matters directly impacting lawyers and their client base. Somewhat removed from the fray, Frank Scott continued to interrogate the normative structures of Canadian constitutional law, but often in abstract. Scott retained his commitment to federal expansion and centralization despite the evidence of wartime repression. Nevertheless, the violence and horror of war indelibly marked his constitutional thought. In equality, Scott unearthed a new constitutional value he hoped would emerge from the ruins of war. In these
respects, Scott foreshadowed the upheavals in Canadian constitutional thought just then on the horizon. The Second World War marked a notable moment in Canadian constitutional history, a time when the rights and freedoms of constitutional law seemed to be everywhere and nowhere all at once.
Chapter Four: Constituting Rights and Freedoms

Introduction

“One of the most important questions before the Canadian public at the moment,” the Canadian Bar Review reported in 1948, “is the question of human rights and fundamental freedoms.”¹ Although talk of rights had been frequent throughout the war, in the latter half of the 1940s, the issue of individual rights assumed unprecedented prominence. From across the Canadian political spectrum, members of Parliament, civil liberties groups, churches, labour unions, and academics demanded that Canada entrench a Canadian bill of rights.²

“Canada needs a bill of rights,” the Winnipeg Free Press asserted shortly after the war had ended, “and should proceed forthwith to write it into the constitution, where it will be safe from attack.”³ This appeal, not just to the ideal of rights, but to written constitutional rights meant that Canada’s entry into the “age of human rights”⁴ would necessarily be a story of constitutional law.

The emergence of the postwar rights revolution has been the subject of increasing scholarly attention. In explaining the rise of an international discourse of human rights, scholars rightly mark the Second World War as a crucial turning

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³ “A Bill of Rights Needed” Winnipeg Free Press (20 October 1945) at 17.
point. Of course, the notion of individual rights had long existed in Anglo-American constitutional thought, whether in the British tradition of civil liberties and the rule of law, or the more explicit enunciation of natural rights in the American Bill of Rights. The Second World War led to renewed emphasis on individual rights among the Allies, as they sought to moralize their military objectives and distinguish themselves from their enemies. In victory, the Allies cemented their commitment to individual rights in the United Nations (UN) Charter, which pledged its signatories to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” Late in 1948, those vague promises found more concrete expression in the Universal Declaration of Human Rights (UDHR). Despite ambivalence at the highest levels of the Canadian government with the international rights project, the UDHR provided rights enthusiasts in Canada with a source of inspiration and a model to emulate.

Yet for all of the international influences, the Canadian debate about postwar rights took shape within a particular domestic context defined by its own political contours, legal controversies, and constitutional thought. This chapter,

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8 W. Schabas, “Canada and the Adoption of the Universal Declaration of Human Rights” (1998) 43 McGill L.J. 403
charts the constitutional dimensions of the immediate postwar bill of rights
debate by focusing on the relationship between the political campaign for
constitutional rights and the efforts of scholars to fashion a theory of Canadian
constitutional law that could accommodate entrenched individual rights. In both
the emerging politics and scholarship of rights, Canadian constitutional law – its
traditions, cultures, ideas, and practices – provided arguments both for and
against the prudence and practicality of placing rights at the centre of Canadian
constitutional law.

I. A Politics of Constitutional Rights

Although John Diefenbaker later claimed the spotlight, the first political
demands for a Canadian bill of rights came from the Co-operative
Commonwealth Federation (CCF). From its inception, the CCF had agitated for a
stronger federal government, not only in terms of its economic capacities, but
also as a protector of civil liberties. By the 1930s, the idea of entrenched
constitutional rights had been adopted by various leftist groups, including Frank
Scott and the League for Social Reconstruction (LSR). When the LSR dwindled
from existence during the war, its members migrated to the CCF (to the extent
they were not there already).9 Scott, for example, became the CCF’s national

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9 As Michiel Horn puts it, “In the party the league lived on.” The League for Social
Reconstruction: Intellectual Origins of the Democratic Left in Canada, 1930-1942 (Toronto:
University of Toronto Press, 1980) at 172.
chair, a position he held from 1942 to 1950.\textsuperscript{10} During his tenure, Scott took a prominent role in the party’s policy formation generally and, not surprisingly, in constitutional matters in particular. During the 1945 federal election campaign, Scott’s view on the need for a constitutional bill of rights became an official position of the CCF. Building on the foundations of Scott’s earlier calls for constitutional rights, the CCF promised, if elected,

\begin{quote}
[t]o incorporate in the constitution a Bill of Rights protecting minority rights, civil and religious liberties, freedom of speech and freedom of assembly; establishing equal treatment before the law to all citizens, irrespective of race, nationality or religious or political beliefs; and providing the necessary democratic powers to eliminate racial discrimination in all its forms.\textsuperscript{11}
\end{quote}

Here, for the first time, the party incorporated equality rights into its call for entrenched civil liberties protection and constitutional change.

Despite disappointing election results in the 1945 election, the CCF continued to press for entrenched constitutional rights in the new Parliament. Citing the UN \textit{Charter} as inspiration, newly elected Winnipeg MP, Alistair Stewart, called on the government to enact “a bill of rights to protect the minorities in this country .... so that our children may grow together in dignity and in grace, with equality and justice, and above all in brotherhood.”\textsuperscript{12} In Saskatchewan, with Scott advising from the background, the provincial CCF government of Tommy Douglas similarly advocated the need for a constitutional


\textsuperscript{11} D. Owen Carrigan, ed., \textit{Canadian Party Platforms 1867-1968} (Toronto: Copp Clark, 1968) at 149. See also \textit{House of Commons Debates} (16 May 1947) 3165 (Hon. Alistair Stewart).

\textsuperscript{12} \textit{House of Commons Debates}, 13 September 1945, at 138. Stewart, married to a Jew, took particular notice of anti-semitism, but he cited as well discrimination faced by Blacks, Poles, Germans, and Ukrainians. Strangely, he did not mention the Japanese.
bill of rights. In the face of continued federal inaction, Douglas’s government began work on provincial legislation which would declare various rights and freedoms and prohibit private acts of discrimination with respect to employment, public services, housing, professional membership, and education. What had begun for the CCF as a political commitment to centralization and the use of the federal disallowance power to protect traditional civil liberties had become a belief in the necessity of entrenched individual rights.

The return of Parliament in the spring of 1946 introduced Canada to a new champion of the bill of rights idea, John George Diefenbaker. As a former defence lawyer and ambitious politician, Diefenbaker’s enthusiasm for entrenched rights emerged from a pragmatic mix of principle and politics. Diefenbaker carried with him abiding respect for the glorious pronouncements of the British Constitution – Magna Carta, The Petition of Right, and the Bill of Rights – which declared the rights of the legal subject and Parliament against the prerogatives of the executive. Diefenbaker viewed the American Bill of Rights in that same tradition of constitutional liberty, and he drew no sharp lines between British and American constitutional ideals. Biographers have also suggested that his status as an outsider – having grown up in the prairies with a Germanic surname – led him to sympathize with vulnerable minorities, and open to more general claims.

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to formal equality.\textsuperscript{15} But Diefenbaker also shrewdly recognized the popular potential in the postwar rights discourse. Skilled politician that he was, he recognized that rights rhetoric provided a moral high ground from which to launch attacks against the governing Liberals. In service of these aims, Diefenbaker met with Stewart to discuss tactics and ideas,\textsuperscript{16} but he had already begun the process of making the campaign for a bill of rights his own.

With Diefenbaker now taking the lead, he used the passage of the first \textit{Canadian Citizenship Act}\textsuperscript{17} as an opportunity to demand the addition of a “Bill of Rights” assuring fundamental freedoms, \textit{habeas corpus}, and the right to counsel.\textsuperscript{18} In the wide-ranging debate that followed, members from every party – including David Croll, a back-bench Liberal – expressed support for Diefenbaker’s bill of rights proposal. Speaking for the CCF, Alistair Stewart affirmed his party’s “faith” in “fundamental human rights” protecting “the dignity and worth of the human person, and ... equal rights for mankind.”\textsuperscript{19} Reflecting the party’s blend of populism and libertarianism, the Social Credit Party called for rights to property and individual autonomy, but also government assistance.\textsuperscript{20} In the same year, Ernest Manning’s Social Credit in Alberta sought to capture a similarly eclectic blend of rights in \textit{The Alberta Bill of Rights Act}.\textsuperscript{21}

Before the Privy Council struck it down as an \textit{ultra vires} attempt to regulate


\textsuperscript{17} S.C. 1946, c. 15.

\textsuperscript{18} \textit{House of Commons Debates} (2 April 1946) at 510-514; (2 May 1946) at 1146.

\textsuperscript{19} \textit{House of Commons Debates} (8 May 1946) at 1340 (Hon. Alistair Stewart).

\textsuperscript{20} \textit{House of Commons Debates} (13 May 1946) at 1472 (Hon. Solon Earl Low).

\textsuperscript{21} S.A. 1946, c. 11.
banking, the Act declared the right to religious worship, expression, assembly, and property, in addition to education, health, retirement, and disability benefits. The Act also established the administrative board to allocate and enforce the distribution of monetary credit. “In the past,” David Croll argued in Parliament, “we have held the theory that the personal liberty of the subject has been fully protected by the British common law and by the Canadian constitution, but now we must face up to realities that the liberty of the subject is not fully protected.”

“At all sides of the house,” Croll announced, “have just started to fight” for “a bill of rights which will be acceptable not only to the members of the house but also to the country at large.”

At its most abstract, the shared language of constitutional rights crossed political divides. As we shall see, when the issues became more concrete – which rights should be entrenched and why – some of the consensus began to give way. Liberals, social democrats, conservatives, and libertarian populists were not all talking about the same thing when they spoke in favour of constitutional rights. The over-arching theme uniting them all, however, was the search for new (or renewed) constitutional norms to guide the postwar state, among them notions of individual liberty, equality, and human dignity. The protean nature of these ideals could shelter any number of views along the continuum of the limited to socialist state, but a belief in the need for constitutional change united these

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22 House of Commons Debates (13 May 1946) at 1473.
23 House of Commons Debates (13 May 1946) at 1474. No stranger to swimming against the tide of his party, Croll had been the first Jewish cabinet minister in Canadian history when he served in the Mitchell Hepburn’s Liberal government in Ontario. Hepburn forced Croll out of cabinet however, when Croll refused to support the government’s handling of the 1937 Chrysler strike, famously stating: “My place is marching with the workers rather than riding with General
otherwise disparate political visions. Resisting those calls for change, the
governing Liberals advocated the maintenance of the constitutional status quo.
But appeal to the inherent rights protections of Canadian constitutional law
proved difficult to sustain in the face of continued uses of wartime executive
power. Two domestic civil liberties controversies, in particular – the Japanese
deporation and the Gouzenko Affair – came to be seen as indictments of wartime
constitutional practice and as indicia of the need for postwar constitutional
change.

a. Parliament’s Freedom: the Japanese Deportation

The unconditional surrender of Germany and Japan in the spring and late
summer of 1945 ended the Second World War, but not from the standpoint of
Canadian constitutional law. Despite the cessation of hostilities, the War
Measures Act (WMA)\(^24\) remained in effect until the end of 1945. Thereafter, The
National Emergency and Transitional Powers Act\(^25\) and attendant legislation
extended the legality of wartime regulations and granted the cabinet
discretionary authority to deal with the on-going “national emergency” until the
end of the decade. Opposition politicians alleged that the Liberals, having grown
accustomed to excessive wartime federal power, continued to govern in peace as
they had in war. The Liberals, for their part, defended the continuation of the

\(^24\) R.S.C. 1927, c. 206.
\(^25\) S.C. 1945, c. 25, as am. by S.C. 1946, c. 60 Unlike the War Measures Act, the new Act’s section 2
stipulated that any new orders must be placed before Parliament. A series of amendments
extended the life of the Act until the spring of 1947. New legislation, The Continuation of
wartime constitution by stressing the importance of “decontrol” – the gradual dismantling of the bureaucracy that had been erected to regulate the economy and war effort. But under the WMA, the Liberals did more than pare back the wartime administrative state. With the expansive powers of the Act still in effect, the Liberals found the constitutional authority to deport Japanese Canadians to Japan.

Undoubtedly, law and politics had failed Japanese Canadians throughout the war. Legally proscribed orders-in-council had authorized their removal, the liquidation of their property, and their detention in housing camps. After the war, the federal government employed similar legal mechanisms to forcibly deport and voluntarily repatriate some four thousand Japanese Canadians to Japan. Other executive orders prohibited Japanese Canadians from returning to coastal British Columbia, or employment in the fishing industry, while election laws continued to disqualify them from voting. This was not just the

continued the operation of select wartime regulations (but not the power to enact new ones) until the spring of 1950.

26 House of Commons Debates (13 May 1946) at 1583; (15 March 1948) at 2205; (7 February 1949) at 317.

27 I use the term “legal” in only a formal sense. For the argument that the rule of law itself can render certain governmental acts “unlegalizable” see David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge: Cambridge University Press, 2006) at 196-220.

28 Over half of that number were naturalized Canadians or had been born in Canada: A.G. Sunahara, The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War (Toronto: Lorimer & Company, 1981) at 143, n. 48.

29 The last of the restrictions against Japanese Canadians was lifted in April 1949. See House of Commons Debates (15 March 1948) at 2217, 2224, 2231, 2232.

30 See The Dominion Elections Act, 1938, S.C. 1938, c. 46, as am. by S.C. 1944, c. 26, s. 5. The federal government had historically incorporated British Columbia’s racial disqualification, but the 1944 amendments ensured that displaced Japanese Canadians continued to be denied the franchise even if they now lived in other provinces. The Privy Council had upheld the constitutionality of British Columbia’s race-based voting ban (on a division of powers challenge) in Cunningham v. Tomey Homma, [1903] A.C. 151. See Provincial Elections Act, R.S.B.C. 1936, c. 84, s. 5, as am. by S.B.C. 1939, c. 16, s. 5. In 1948, the federal government removed the racist disqualification against the Japanese (S.C. 1948, c. 46 s. 6), and British Columbia followed in 1949 (Provincial Elections Act, R.S.B.C. 1948, c. 106, as am. by S.B.C. 1949, c. 19, ss. 2, 3).
“politics of racism,” but the law of racism as well. As Ross Lambertson and Stephanie Bangarth have demonstrated, after the war, opposition to such treatment began to be expressed in a language new to political activism, that of human rights and fundamental freedoms. One of the principal reasons for this appeal to a higher concept of law was the fact that existing constitutional practice both facilitated and sanctioned the Japanese deportation. If the deportation was a product of constitutional law, then, critics reasoned, Canadian constitutional law needed to change.

In the summer of 1944, Prime Minister King announced the broad outlines of the government’s postwar deportation plan. Promising a policy based on the “principles of fairness and justice,” King explained that after the war, “loyal” Japanese Canadians would be permanently settled in central and eastern Canada, “disloyal” Japanese Canadians would be deported to Japan, and any persons wishing to voluntarily return to Japan could do so at the government’s expense. As the war neared its end, government officials toured the detention camps encouraging Japanese Canadians to sign forms indicating a “desire to relinquish my British nationality and to assume the status of a national of Japan” in order to “effect my repatriation to Japan.”

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33 House of Commons Debates (4 August 1944) at 5916-17. In his speech, King also announced the cessation of all future Japanese immigration.
34 A copy of the document was published as “Threat to Canadian Liberty” Winnipeg Free Press (6 October 1945) at 17. In many cases, the term repatriation was disingenuous since thousands of
September 1945, nearly ten thousand people had signed (or had signed on their behalf in the cases of wives and minors) repatriation forms. Controversy ensued when thousands of the prospective deportees indicated their desire to rescind their requests. Many complained that they had been unduly pressured to sign, while others changed their mind as the prospect of deportation to a devastated country drew near. The issue began to attract attention in the liberal press in the fall of 1945 and became the principal concern for the Co-operative Committee on Japanese Canadians (CCJC), an ad hoc advocacy group originally established to assist Japanese Canadians re-settle outside British Columbia.35 Seeking to stem the growing tide of opposition to deportation, the Liberals proposed what they thought was a compromise.

With some of the last orders passed under the WMA, the government divided those that had signed repatriation forms into four categories. Japanese nationals would be deported regardless. Naturalized British subjects could remain in Canada if they had revoked their repatriation request prior to Japan’s official surrender, 2 September, 1945.36 Those born in Canada received the most lenient treatment: they could rescind their deportation request at any point before receiving their official deportation orders. A final category consisting of wives and children under sixteen had no choice at all, they would be deported

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36 Since the legal power to deport citizens remained a point of legal uncertainty, a subsequent order stipulated that naturalized persons being deported would cease to be either British subjects or Canadian nationals: P.C. 7356 (15 December 1945), Statutory Orders and Regulations 1945, Vol. IV (Ottawa, King’s Printer, 1946) 365.
alongside their husbands or fathers. From the government’s perspective, the principle of state sovereignty in general, and the WMA in particular, authorized the deportation of aliens and citizens alike. In addition, the Supreme Court of Canada’s decision in the *Chemicals Reference* had broadly confirmed that executive orders passed under the federal emergency power possessed the legitimacy and constitutionality of any act of Parliament. In response, editorialists in the *Winnipeg Free Press* and the *Globe and Mail* characterized the deportation as a violation of the rights implicit in constitutional law, while the CCJC argued that the proposed deportation contravened the human rights articulated in the UN *Charter*. Emboldened by the rhetoric of rights, the CCJC proposed to challenge the constitutionality of the deportation in court.

But if the modern language of human rights figured prominently in the political campaign against deportation, it was older notions of constitutional liberty that grounded the legal claim. To make its case, the CCJC retained prominent civil liberties activist, F. Andrew Brewin, and noted litigator, John Robert Cartwright. The CCJC had initially proposed to bring an action in the Ontario courts, but desiring a speedy and definitive answer, the federal government agreed to refer the deportation orders directly to the Supreme Court.

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39 *Reference As to the Validity of the Regulations in relation to Chemicals [1943]* S.C.R. 1 [Chemicals Reference].  
40 “We Will Regret Racialism” *Winnipeg Free Press* (19 September 1945) at 13; “Have We Shoddy Citizenship?” *Winnipeg Free Press* (28 September 1945) at 11; “Threat to Canadian Liberty” *Winnipeg Free Press* (6 October 1945) at 17; “A Bill of Rights Needed” *Winnipeg Free Press* (20 October 1945) at 17; “Unworthy of Canada” *Globe and Mail* (14 January 1946) at 6. In the mounting rhetoric against the deportation, the *Globe* went so far as to liken the government’s “discriminatory treatment of Canadians of Japanese origin” to “whole deportation, Nazi fashion.”
In preparing for the case, Brewin called upon the constitutional expertise of his friend and CCF colleague, Frank Scott. Relying on the liberalism inherent in the rule of law – what John Willis had castigated as the common law bill of rights – the factum argued that “a statute even in war time should be interpreted in favour of the liberty of the subject.” With that overarching principle in mind, additional arguments challenged the concept of “race” as unenforceably vague, and argued that deportation, by definition, could not apply to citizens. Only the secondary arguments that hinted that the impugned orders contravened unnamed principles of international law suggested reliance upon a concept of higher rights.

Yet an inchoate idea of citizenry rights did emerge when the Supreme Court released its decision in February 1946. Although Chief Justice Rinfret and Justices Kerwin and Taschereau would have found the deportation orders constitutional in their entirety, a heterogeneous majority comprised of Justices Kellock, Estey, Hudson, and Rand struck down the provisions authorizing the expulsion of wives and children. In cursory fashion, Kellock found the orders deficient for failing to disclose why the deportation of wives and children was “necessary or advisable,” while Estey, in an opinion endorsed by Hudson suggested, without elaboration, that the citizenship of the wives and children

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41 Lambertson, *supra* note 2 at 119-123, 140.
44 *Supra* note 38.
45 Ibid.
47 Ibid. at 309.
“entitled [them] to remain in Canada.” The reference to citizenship was telling. Although Parliament was on the cusp of remedying the deficiency, Canadian citizenship remained thinly defined as an aside in the Immigration Act. Colloquially, of course, the idea of Canadian citizenship carried substantive meaning, and opponents of the deportation (Scott included) repeatedly stressed that the government proposed the mass deportation of “Canadian citizens.” In taking up the language of citizenship, Estey configured Japanese Canadians as equal members of the body politic. More than that, he implicitly suggested that such status carried undefined, but substantive, constitutional significance.

Justice Rand went further still, taking the early steps towards a constitutional theory of rights and citizenship that would become famous in the decade that followed. Recognizing that naturalized and natural-born Japanese Canadians possessed “citizenship rights,” Rand reasoned that such rights could not be bounded by race. “I must deal with this case,” he observed, as if, instead of a Canadian national of Japanese origin, I were dealing with that of a natural born Canadian national of English extraction who sympathized with Mosley or a French-Canadian national who supported Pétain or an Irish-Canadian national who thought de Valera’s course justified. The analogy demanded Canadians consider the deportation not simply as the deportation of Japanese, but deportation of a people on the basis of race.

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48 Ibid. at 321–22. Hudson, J. signed on to Estey’s reasoning.
49 Immigration Act, R.S.C. 1927, c. 93, s. 2. See also Naturalization Act, R.S.C. 1927, c. 138 and Canadian Nationals Act, R.S.C. 1927, c. 21.
51 Japanese Reference, supra note 46 at 289.
52 Ibid. at 290. Rand’s references, which did not require explanation to his war-weary audience, were to Oswald Mosely, the leader of Britain’s fascist movement; Phillippe Pétain, the head of state of France’s Vichy regime; and Éamon de Valera, leader of the Irish independence movement.
intimated that citizenship entailed the promise of equality before the law. Beyond that tantalizing *obiter*, Rand did not delve deeper into the normative or substantive qualities of Canadian citizenship, or what role it should play in constitutional interpretation. Instead, in reasoning consonant with the common law constitutionalism advanced in the CCJC’s submissions, Rand held that the deportation of “natural born British subjects” was an act of “unrecognized legal character” and therefore not among the powers authorized by the *WMA*. Yet in constraining government measures even to this limited extent, Rand and the fellow members of the majority offered subtle challenge to the assumption of unchecked executive power in times of war.

On appeal, the Judicial Committee of the Privy Council dispelled the notion that citizenship status or rights had any role to play in judicial review. In upholding the deportation orders in their entirety, the Lords stressed the sovereignty of Parliament, not the rights of individuals. “The interests of the Dominion are to be protected,” the Lords succinctly held, “and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge.” That freedom, the Committee found, included “the making of Orders for deportation of any person whatever be his nationality.” In effect, the Privy Council’s decision in the *Japanese Reference* provided constitutional cover for thousands of other wartime orders passed under the *WMA* and continued under

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The National Emergency Transitional Powers Act. Citing the Privy Council’s decision several years later, even Rand conceded “there is virtually no limitation to the scope of legislative action which Parliament, considering it necessary, may take for the defence of the country.”56 Despite the formal declaration of peace, the reasoning of the Japanese Reference suggested that the wartime constitution remained in full effect.

b. “Safety First in all Things Always”: The Gouzenko Affair

The Canadian spy scandal that became known as the Gouzenko Affair further confirmed the postwar perpetuation of wartime constitutional thought among the government and judiciary. On 5 September 1945, Igor Gouzenko, a twenty-three year-old cipher-clerk employed at the Soviet embassy stuffed his shirt with secret documents and hurried into the Ottawa night in search of political asylum.57 Narrowly avoiding capture by Soviet agents pursuing him, Gouzenko sought refuge with the RCMP. Over the next several months, sequestered at a secret farmhouse outside Toronto, Gouzenko detailed the workings of a Soviet spy network and disclosed the identities of its Canadian operatives, including Fred Rose, a sitting Member of Parliament. Although Gouzenko had personally had no

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55 Ibid. at 590. Ironically, with the passage of time, the federal government lost much of its political will regarding deportation, and plans to carry out the last of the orders were abandoned.
contact with any of the alleged Canadian spies, his documents painted a
disturbing picture of Canadian citizens, mostly civil servants, passing government
secrets – including information on weapons, scientific, economic, and political
data – to Soviet officials. The cold war had begun.

The revelations stunned and frightened the Prime Minister. On hearing
the news, a graven King worried in his diary that the country had become “more
or less honeycombed with communist leaders.”58 Travelling to Washington and
London to personally apprise President Truman and Prime Minister Attlee of the
crisis, King turned to the trusted members of his inner circle – Norman
Robertson, Louis St. Laurent, and C.D. Howe – to issue a secret order-in-council
authorizing the indefinite detention and interrogation of the suspects.59 Initially
placing the suspects under surveillance, the government’s hand was forced when
the American press threatened to break the story in February 1946. At that point,
the government passed a second secret order establishing the Royal Commission
on Espionage to investigate and report on Gouzneko’s allegations.60 Authorized
under the WMA’s successor, The National Emergency and Transitional Powers
Act,61 the Canadian government continued to use emergency powers to legislate
in crisis.

Espionage, 1946-8: A Case Study in the Mobilization of the Canadian Civil Liberties Movement”
(2001) 7 Left History 53.
58 M. King, Secret and Confidential Diary Relating to Russian Espionage Activities (6-10
September 1945), online: <http://king.collectionscanada.ca>.
59 As in the Defence Regulations, the order explicitly precluded applications for habeas corpus by
stipulating that all persons detained under the order shall “be deemed to be in legal custody”: P.C.
6444 (6 October 1945), reprinted in Canada, Report of the Royal Commission to Investigate the
Disclosures of Secret and Confidential Information to Unauthorized Persons (Ottawa: King’s
Printer, 1946) at 649 [Royal Commission Report].
60 P.C. 411 (5 February 1946), reprinted in ibid.
61 Supra note 25.
In the early hours of 15 February 1946, the RCMP raided the homes of the suspects identified in Gouzenko’s documents. Taking into custody a dozen men and women, the RCMP held the suspects in solitary confinement, in cramped, permanently lit cells, and denied them access to legal counsel and, for much of the period, any outside contact. Over the course of several weeks, the government subpoenaed the prisoners to appear as witnesses before the Royal Commission on Espionage. The Royal Commission model had been recommended by Winnipeg lawyer and president of the Canadian Bar Association, Esten Kenneth Williams because, as he explained in a confidential memorandum to King, the Commission would be free to dispense with the “ordinary rules of evidence” as well as the common law right to legal counsel. Knowing such tactics would be controversial, King sought to limit criticism by appointing Robert Taschereau and Roy Lindsay Kellock, two sitting Supreme Court Justices, to chair the Commission, with Williams to serve as chief commission counsel. Defending the Commission in Parliament, King assured his critics that Justices Taschereau and Kellock had been selected on account of their scrupulous regard for “the liberty of the subject.”

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62 P.C. 6444 (6 October 1945), reprinted in Royal Commission Report, supra note 59. For a critique of the prisoners’ conditions see House of Commons Debates (18 March 1946) at 56 (Hon. M.J. Coldwell).
63 Williams to King, 5 December 1945, LAC, Records of the Department of Justice, RG 13, Vol. 2119, 2121.
64 House of Commons Debates (18 March 1946) at 50. Privately, King worried that “a great cry will be raised having had a Commission sit in secret, and men and women arrested and detained under an order-in-council passed really under War Measures powers. I will be held up to the world as the very opposite of a democrat.” Library and Archives of Canada, Diary of William Lyon Mackenzie King, 13 February 1946, online: <http://www.collectionscanada.ca>.
The liberty interests of the subject, however, appeared to be of little concern once the Commission hearings began. Governed by the *Inquiries Act*, the commissioners possessed the statutory authority to refuse legal representation to any witness, a discretion they generally exercised. Several of the suspects complained. “I feel it is not fair to make me testify until I have seen [my lawyer],” Dunford Smith pleaded at the outset of his testimony. “It does not matter what your feeling is,” Kellock curtly replied, “You are here as a witness and the statute provides that you must be sworn.” When Israel Halperin similarly requested “access to legal counsel” to “ascertain my legal rights,” Kellock informed him, “You will have all the legal rights you are entitled to, so you need not worry about that.”

Finding themselves at a legal disadvantage in a number of key respects, suspects were right to worry. In operating much like the preliminary hearing of a criminal trial but without any of the protections afforded by the common law, the Commission treated the “witnesses” as accused shrouded in guilt. Before appearing before the Commission, the suspects had only a vague notion of the case against them. The government offered no opportunity to examine, let alone cross-examine, the Crown’s evidence. Most glaring of all, without legal representation, a discretion they generally exercised. Several of the suspects complained. “I feel it is not fair to make me testify until I have seen [my lawyer],” Dunford Smith pleaded at the outset of his testimony. “It does not matter what your feeling is,” Kellock curtly replied, “You are here as a witness and the statute provides that you must be sworn.” When Israel Halperin similarly requested “access to legal counsel” to “ascertain my legal rights,” Kellock informed him, “You will have all the legal rights you are entitled to, so you need not worry about that.”

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representation, or, in any event, with rushed and inadequate advice, suspects did not know to invoke the protective provisions of the Canada Evidence Act,69 which would have shielded their oral testimony from being used against them in subsequent criminal proceedings. In justifying these measures, Commissioners Kellock and Taschereau coyly conceded that “in some instances we considered it expedient not to accede immediately to the request of a witness for representation.”70 As to the decision not to inform suspects of the Canada Evidence Act, the commissioners, in a telling bit of pedantry, quoted the Latin: “ignorantia juris non excusat” – ignorance of the law is no excuse.71 After all, the law, they reasoned “is not designed to handicap society in its endeavour to protect itself against those of its members who commit offences against it, nor to give advantage to such persons.”72

Indeed, the presumptions of the wartime constitution pervade the Commissioners’ Final Report, released at the conclusion of the hearings. Again turning to Latin, the Kellock and Tashereau quoted the popular wartime dictum: “salus populi suprema lex” – let the good of the people be the supreme law.73 More than simply an affirmation of parliamentary sovereignty, the Commissioners offered the maxim as a justification for the abandonment of legal

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69 Canada Evidence Act, R.S.C. 1927, c. 59, s. 5(2):
   If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him...then although the witness is by reason of this Act...compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place...

70 Royal Commission Report, surpa note 59 at 676.
71 Ibid. at 673.
72 Ibid.
73 Ibid. at 679. See Re Carriere (1942), 79 C.C.C. 329 (Quebec Sup. Ct.).
Undoubtedly, the culpability of many of the witnesses influenced the starkness of the Commissioners’ view. Confronted with impugning documents describing their meetings with Soviet officials, several witnesses admitted guilt. In other cases, however, wartime suspicions led the Kellock and Taschereau Commission to less assured conclusions. In the case of Scott Benning, the Commissioners opined on his guilt despite thin, uncorroborated evidence, and in the face of his protestations of innocence. Instead, the Commissioners based their findings on hearsay, and specious inferences drawn from Benning’s left-wing political views. Resorting to the reverse onus provisions of The Official Secrets Act, the Commissioners concluded that Benning had failed to “establish his innocence.”

Cases built on innuendo and hearsay, however, tended to wilt under the harsher light cast by the procedures and presumptions of the common law criminal trial. In Benning’s ultimate acquittal, for example, the Ontario Court of Appeal held that “not a particle of evidence from anyone” tied the accused to any

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74 To make the claim more explicit still, the Commissioners approvingly quoted the First World War detention case cited in the previous chapter. War, “is not a time when a prisoner is to have the benefit of the doubt; it is a time when, in all things great and small, the country must have every possible advantage; a time when it must be the general safety first in all things always; until the final victory is won; even though individuals may suffer meanwhile”: ibid. at 679, quoting Meredith, C.J.C.P. in Re Beranek, (1915) 33 O.R. 139 at 141 (H.C.).


76 See Royal Commission Report, supra note 59 at 445; ibid. at 322-331.

77 S.C. 1939, c. 49. Indeed, the reverse onus provisions of The Official Secrets Act placed the burden of proof on the accused in a number of respects. Section 3(2) stipulated that any communication of confidential information would be “deemed” to have been “for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.” Section 3(3) provided that any act or attempted act of communication with “an agent of a foreign power” shall be evidence of communication for a prejudicial purpose. Section 3(4) deemed a person to have been in communication with an agent if the name or address of a foreign agent was found in his possession.

78 Royal Commission Report, supra note 59.
of the allegations of espionage. Ultimately, courts acquitted eight of the suspects that had been pronounced guilty by the Royal Commission, and in two other cases the government withdrew the charges. Even where accused walked free, however, courts never questioned the procedures employed by the police or Royal Commission, nor did they engage in a review of the constitutionality of the authorizing orders. There was, after all, little to discuss. The Royal Commission had acted within its statutory mandate and the Japanese Reference had put the constitutionality of the orders beyond dispute. Far from criticism, in the cases where the courts found the accused guilty, the methods of the Royal Commission received explicit approbation. Dismissing complaints that suspects had been denied legal representation, judges blamed the suspects themselves for failing to invoke the Canada Evidence Act. Despite attempts by defence lawyers to characterize the Royal Commission evidence as involuntary and inadmissible, courts held that the Crown was not obliged to prove that statements provided

79 R. v. Benning, [1947-48] 4 C.R. 39 at 47 (Ont. C.A.) [Benning]. In another acquittal the judge is recalled to have proclaimed: “Mr. Poland I am acquitting you not because I have a reasonable doubt about your guilt, but because I am completely satisfied that you are innocent.” At least, that was how his defence counsel remembered it. G. Arthur Martin, “Bernard Cohn Memorial Lecture Delivered at the University of Windsor Law School, January 1992,” in G. Arthur Martin & Joseph W. Irving, G. Arthur Martin: Essays on Aspects of Criminal Practice (Toronto: Carswell, 1997) 4 at 31.

80 Along with Benning and Poland, others acquitted or never tired included Israel Halperin, Matt Nightingale, David Shugar, and Eric George Adams (in whose acquittal I take strange comfort). Nevertheless, clouds of suspicion continued to linger over many of the acquitted. Despite the acquittal of Dr. David Shugar at two separate trials, the federal government terminated his employment and refused to reinstate him. Shugar eventually left Canada and became a leading biophysicist at the University of Warsaw: see Lambertson, “The Gouzenko Affair, Civil Libertarians, and the Shugar Case,” supra note 2 at 143-195. For the reported acquittals see Benning, supra note 79 and R. v. Harris, [1947-48] 4 C.R. 192 (Ont. C.A.). See also the Appendices at the conclusion of the Royal Commission Report, supra note 59 listing the convicted and acquitted.

81 Durnford Smith, the Ontario Court of Appeal noted in upholding his conviction, “was afforded ample opportunity to consult counsel and did so....The wisdom or folly of appellant’s course is immaterial.” R. v. Smith, [1947-48] 4 C.R. 98 at 108 (Ont. C.A.). Quebec’s highest court echoed: “The judge could not impose upon him a protection that he had chosen not to have, no matter
under oath were voluntary. As McDougall J. of Quebec’s highest court explained, in the “throes of war ... the normal and salutary safeguards surrounding the admissibility of evidence against an accused charged with dereliction of his duty as a citizen, are not to be too stringently applied.” “In the transcendent interests of the State,” he concluded, “the Court should not be alert to find reasons or to set up distinctions to protect an individual who deliberately and cynically flouted his obvious duties as a citizen.”

Polls taken during the spring of 1946 suggested that most Canadians agreed. Lamenting the fact that only sixteen percent of Canadians disapproved of the government’s handling of the Gouzenko Affair, Fred Cronkite, Dean of Saskatchewan’s College of Law, despaired that the government’s “definite and unwarranted assault upon civil liberties” had “general, if not overwhelming” public support. Nevertheless, the press continued to hammer the government for its treatment of the spy suspects. Although the Montreal Gazette and Halifax Herald generally supported the government handling of the Affair, articles and editorials in the Winnipeg Free Press, Globe and Mail, Vancouver Sun, Saturday Night, Canadian Forum, Queen’s Quarterly, Maclean’s Magazine, Canadian Bar Review, and Fortnightly Law Journal sharply criticized the government’s treatment of the suspects. While the French-language press largely avoided the

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83 Boyer, supra note 81 at 245.
84 Ibid. at 248.
85 Fifteen percent of that group believed the government had been too lenient: F.C. Cronkite, “Civil Liberties in Canada” (1946) 11 Sask. Bar Rev. 61 at 64, 67.
86 Clément, supra note 57 at 62-64.
issue, readers in English-Canada read frequently about the scandal not simply as a matter of cold war intrigue, but as an issue of constitutional law – the circumvention of “judicial safeguards,” the denial of “civil liberty,” and the abrogation of “constitutional rights.”

“Justice,” the Winnipeg Free Press pointed out, “demands respect for the firm, precise, written securities of freedom.”

As King had predicted, opposition politicians translated the arguments of the press into attacks on the Liberals. Progressive Conservative Leader John Bracken accused the government of resorting to “star chamber methods” in denying “individuals certain rights guaranteed by law,” while the CCF’s leader, M.J. Coldwell, characterized the government’s use of “secret trials” as “totalitarian.”

Even Charles “Chubby” Power, a former Liberal cabinet minister, lamented that the government’s actions portended “the funeral of liberalism.”

Not to be outdone, Diefenbaker called for “a bill of rights” to protect not only “freedom of religion, of speech, of association” but also “freedom from capricious arrest.” After Gouzenko, demands for a bill of rights always included protections for the legal rights of the accused.

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89 *House of Commons Debates* (18 March 1946) at 37, 56. An MP added, “the people of this country will always regret and will never live down the fact that we threw aside and abrogated the rights and liberties of our citizens” at 88 (Hon. Arthur Leroy Smith).

90 *House of Commons Debates* (18 March 1946) at 173.

91 *House of Commons Debates* (21 March 1946) at 137-38.
c. The Joint Committee on Human Rights and Fundamental Freedoms

For their part, the federal Liberals perceived demands for a bill of rights as pure politics. Speaking for the government, Jean Lesage dismissed Diefenbaker’s demands for a bill of rights as “a political move to try to embarrass the government with things of the past.”\textsuperscript{92} Lesage was a fitting choice to deliver the Liberal’s message because of the general antipathy to the idea of a bill of rights in French Canada. As the party with the largest majority of Quebec seats, the Liberals were ever sensitive to the concern that a bill of rights represented yet another centralizing federal policy.\textsuperscript{93} As Quebec’s Royal Commission of Inquiry on Constitutional Problems would demonstrate a decade later, Quebec’s political and intellectual class continued to fixate on the perceived illegitimacy of federal incursions into areas of provincial jurisdiction.\textsuperscript{94} At mid-century, “nationalism,” Pierre Trudeau noted in his famous introduction to \textit{La Grève de l’amiante}, remained “the main focus of almost all French Canadian social thought.”\textsuperscript{95} In that climate, it is not surprising that a federally imposed bill of rights found so little favour in francophone Quebec.

Whatever the political backdrop, the Liberals drew widely on Anglo-Canadian constitutional theory in seeking to forestall the bill of rights debate. A.V. Dicey and his conception of parliamentary sovereignty figured prominently

\textsuperscript{92} \textit{House of Commons Debates} (2 April 1946) at 1308.
\textsuperscript{93} Including the seven members sitting as Independent Liberals, the federal Liberals held fifty-seven of Quebec’s seventy seats in the House of Commons. The Progressive Conservatives had two seats; the CCF, none.
\textsuperscript{94} Quebec, Royal Commission of Inquiry on Constitutional Problems, \textit{Report} (Quebec: Province of Quebec, 1956).
in arguments marshaled against a written bill of rights, but so too did the distinctive attributes of Canadian federalism. In responding to Diefenbaker’s demands for a bill of rights, Paul Martin, secretary of state, pointed out that a bill of rights – whether statutory or constitutional – not only contravened the venerable constitutional theory that Canada had inherited from Britain, but also the BNA Act’s division of powers. Just as Dicey had set out in his classic *Introduction to the Study of Law of the Constitution*, Martin argued that entrenched constitutional or statutory guarantees represented the traditions of foreign places, whereas unwritten rights had “stood the test of time” as “the foundation of our whole legal system.”

Turning to more contemporary and distinctively Canadian constitutional realities, Martin argued that the entrenchment of rights necessarily invaded provincial jurisdiction. In essence, Martin offered two arguments. The first, a beguiling tautology – Canada’s constitutional law could not entrench rights because entrenched rights were not part of Canada’s constitutional law. The second appealed to the capacious and uncertain boundaries of provincial jurisdiction over “property and civil rights” and the jealousy of the provinces in protecting that sphere. The Liberals staunchly defended both positions for the better part of two decades.

Yet with Diefenbaker promising to continue his bill of rights crusade, the debate continued. In the January 1947 Speech from the Throne, the Liberals announced the creation of a Special Joint Committee on Human Rights and Fundamental Freedoms, established, they admitted in private, as a “delaying

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tactic.” Still, the Liberals made no secret of their distaste for entrenched constitutional rights. In advance of the Committee’s hearings, cabinet minister Ian Mackenzie elaborated the Liberal position. Quoting Dicey, Mackenzie lauded the constitutional system which “declares no principle, and defines no rights, but is for practical purposes worth a hundred articles guaranteeing constitutional liberty.” “Liberty is a variable thing,” Mackenzie continued, “in these days of uncertainty” and Canada should be wary of “the impulse to put freedom in a straitjacket by seeking to define it in words.” “Freedom,” Mackenzie continued, “is not a code of man-made laws. Freedom lives and abides and endures in the sprit and the soul of man.” Besides, for Mackenzie, Canada already had “its charters of liberty ... her maritime rights, her prairie rights, her Pacific rights, her Ontario rights, her Quebec rights.” Rights, in other words, were not those of individuals but of regions and provinces. “It is less evident,” Mackenzie concluded, “that ... free Canada, heir to the common law should tamper with her heritage of liberty, by seeking to inscribe in statutes the freedom that is inherently ours.” In essence, Mackenzie and the Liberals asked: why risk the unknowns of constitutional change to secure rights Canada already had? Steeped, as it was, in the constitutional theories of Dicey, Lefroy, Blake, and Mowat, the Liberals misunderstood, or patently ignored, the fact that demands for a bill of

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98 *House of Commons Debates* (16 May 1947) at 3143. See Dicey, *supra* note 96.
99 *House of Commons Debates* (16 May 1947) at 3143, 3146.
100 *House of Commons Debates* (16 May 1947) at 3147.
101 *House of Commons Debates* (16 May 1947) at 3148-49.
rights had nothing to do with the collective aspirations of provincial governments, but had everything to do with the demands of individuals.

In its eight meetings held during the summer of 1947, the Liberal-dominated Special Joint Committee on Human Rights and Fundamental Freedoms – which included bill of rights proponents Diefenbaker, Fulton, Stewart, Roebuck, and Croll – continued to labour under that fundamental impasse. Straining under an ambitiously vague mandate “to consider the question of human rights and fundamental freedoms .... in light of the provisions contained in the Charter of the United Nations” and report on “the legal and constitutional situation in Canada with respect to such rights,” the Committee failed to reach consensus on what a bill of rights meant, or why Canada should adopt one.\textsuperscript{102} For the most part, the Liberals on the Committee continued to answer rights demands with the imperatives of constitutional impossibility. From the outset, the Committee’s broad terms of reference generated conflict and uncertainty among its members. “[T]his committee is going around like a chicken without a head,” an exasperated Stewart complained, “[w]e do not seem to know where we are going.”\textsuperscript{103}

But nowhere was precisely where the Liberals wanted to go. James Lorimer Ilsley, Minister of Justice and the Committee’s co-chair, had made his antipathy for a bill of rights clear. The adoption of a bill of rights, he suggested disapprovingly, would involve a “radical departure” and the “Americanization of

\textsuperscript{102} The twenty-three member committee had fourteen Liberals, five Progressive Conservatives, three CCFers, and one member of the Social Credit Party. House of Commons Debates (16 May 1947) at 3140.
our constitution.” In advance of the Committee’s hearings, Ilsley and his deputy minister, Frederick Percy Varcoe, instructed Department of Justice lawyers to draft memoranda setting out all conceivable arguments against a bill of rights. Varcoe leaned heavily on those arguments in his appearance before the Committee. Canada did not need a bill of rights, he argued, because its “democratic form of government” and “principle of the rule of law” already protected human rights and fundamental freedoms. Moreover, a bill of rights would be unconstitutional since it would contravene the principle of parliamentary sovereignty, and because many of the proposed rights – those of property, education, and health among them – fell within provincial jurisdiction. Finally, with a sly nod to Canada’s emerging sense of constitutional independence, Varcoe opined that entrenching constitutional rights would constitute a “retrograde step” by taking political sovereignty away from Canadian legislators and returning it to the BNA Act – a document under the exclusive control of the British Parliament. According to Varcoe’s testimony, a Canadian bill of rights would be anything but – it would parrot American constitutional design, run against the foundational constitutional principles of federalism and parliamentary sovereignty, and further cement Canada’s constitutional subordination to the Mother Country.

103 Canada, Parliament, Special Joint Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings and Evidence (Ottawa: King’s Printer, 1947) at 50-51 [Minutes of Proceedings, 1947].
104 House of Commons Debates (May 19, 1947) at 3215.
106 Supra note 103 at 67, 84.
107 Ibid. at 134.
At the conclusion of its sessions, the Committee disbanded without substantive progress, agreeing only to recommend meeting again the following year. Seeking a way out of the constitutional quagmire in the interim, Diefenbaker persuaded the Committee to canvass the provincial attorney-generals and the deans of Canada’s laws schools for their opinions on the constitutionality of a bill of rights.108 Tellingly, the provinces responded either not at all, or by curtly affirming that a federal bill of rights invaded their jurisdiction. The CCF government in Saskatchewan alone professed support for the idea, but declined to offer an opinion on whether it would be constitutional.109 Of Canada’s eleven law school deans, only Toronto’s W.P.M. Kennedy, Laval’s Louis-Phillipe Pigeon, and Dalhousie’s Vincent MacDo responded. Fortuitously, the three deans were among Canada’s leading constitutional scholars, although Diefenbaker could not have been pleased with their replies. Together, they shared the view that a federal bill of rights, unilaterally enacted, would be unconstitutional. Kennedy and Pigeon offered the most detailed explanations, agreeing with Varcoe’s view that a bill of rights offended the doctrine of parliamentary sovereignty and invaded provincial jurisdiction. In any event, Kennedy added, “our ‘freedoms’ are well enough protected in the ordinary law.”110 It was just not the federal Liberals, then, aligned against the constitutionality of a bill of rights, but also the mainstream of Canadian political and constitutional thought.

108 Ibid. at 117-118.
109 Alberta, Quebec, Ontario, Manitoba and New Brunswick offered no substantive reply. British Columbia, Nova Scotia, and Prince Edward Island indicated in brief letters that, in their opinion, a bill of rights was unconstitutional: LAC, RG 13, vol. 2646, file 151913.
Having been confirmed in their views, when the Committee reassembled in the summer of 1948, Ilsley and Varcoe more forcefully attacked the constitutionality of a bill of rights. What began as reactive antagonism to the demands of political opponents had developed into a multi-faceted position against constitutional rights entrenchment. In the 1948 sessions, committee members prompted by Varcoe’s testimony, pressed to know the political and legal ramifications of a bill of rights. How, for example, would rights be limited once declared? Would a bill of rights prevent the government from responding to wars and emergencies? Would internment without trial be legal? What about the reverse onus provisions in the *Criminal Code*, or the criminal laws against libel, could they be vulnerable to a rights-based attack? A bill of rights, Varcoe happily agreed, would bring profound change to Canadian law, “convert[ing] what is essentially a political concept into one which is essentially legal.” The result would be a judiciary “tak[ing] the place of the legislature.” More pointedly, Ilsley asked, “Are the battles for liberty of the future to be fought in the courts instead of in legislative halls?”

Neither Diefenbaker nor Stewart, nor any of the other rights proponents on the Committee had answers to these challenging queries. With Varcoe’s testimony dominating the proceedings – the Committee had refused to hear oral submissions from groups in favour of rights

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110 *House of Commons Debates* (9 April 1948) at 2846. See also excerpts reprinted at “The Joint Committee on Human Rights,” *supra* note 1 at 708.


112 *Ibid.* at 188.

entrenchment\textsuperscript{114} – a majority of Committee members concluded in its final report that the consequences of a constitutional bill of rights were both “uncertain” and “undesirable.”\textsuperscript{115}

d. Reactions Against Rights

Although the principles of parliamentary sovereignty and federalism continued to provide the constitutional foundation for Liberal opposition to a bill of rights, increasingly concerns about the content of the rights themselves began to fragment support for the idea. Indeed, the elusive meaning of human rights and fundamental freedoms proved a recurring point of frustration during the Joint Committee’s sessions. As E.R. Hopkins, a legal advisor to the Department of External Affairs explained, “Human rights and fundamental freedoms are concepts which derive from political or moral philosophy. Different meanings may in good faith be attached to the expression by persons of different philosophical understanding.”\textsuperscript{116} To the alarm of some, it became increasingly clear that a different philosophy of rights would be part of the UN’s international bill of rights.\textsuperscript{117} Canadian lawyers reading the \textit{Canadian Bar Review} in 1948

\textsuperscript{114} The committee did accept written submissions calling for entrenched rights from the Canadian Jewish Congress, the Canadian Daily Newspaper Association, the Civil Rights Union, the Committee for a Bill of Rights, and representatives of the Jehovah’s Witness and the Chinese Canadian community.

\textsuperscript{115} Supra note 111 at 209. Recommending only “further study,” the Committee reminded that “observance of these rights and freedoms depends in the last analysis upon the convictions, character and spirit of the people.”

\textsuperscript{116} Ibid. at 24.

found a late-stage draft of the UDHR containing a list of familiar legal and property rights, as well as fundamental freedoms, but also the right to work, social security, education, rest and leisure, and “a standard of living, including food, clothing, housing and medical care.” All rights, the Declaration declared, would be extended “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, property or other status, or national or social origin.” The presence of these unfamiliar rights and broader claims for equality did not escape the attention of Canadian rights proponents or their critics.

Initially, Diefenbaker’s proposed bill of rights had included fundamental freedoms and, as a result of the Gouzenko Affair, the legal rights of the accused. By 1947, Diefenbaker mirrored international developments by adding to his proposed rights, “social freedoms ... assuring educational, property, and social security rights.” The CCF went even further, demanding that “social rights” include a minimum standard of living, physical security in the workplace, pension benefits, and unemployment insurance. The influence of the international rights debates, however, extended far beyond the proposals of politicians. Following on the heels of the controversies surrounding the Japanese deportation and Gouzenko Affair, the adoption of the UDHR in December 1948

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120 House of Commons Debates (16 May 1947) at 3152.

121 House of Commons Debates (16 May 1947) at 3165 (Hon. Alistair Stewart).
inspired a diverse array of groups in Canadian civil society to press the
government for a Canadian bill of rights. Civil liberties groups called for the
entrenchment of constitutional rights, as did the Jehovah's Witnesses, the
Canadian Jewish Congress, the National Council of Women of Canada,
representatives of the Chinese Canadian community, and a number of other
churches, unions, and social organizations.122 Virtually all cited the UN Charter
or UDHR as a touchstone for Canada to emulate.

All of which proved too much for the Social Credit Party, whose members
now denounced both the UN and the domestic “clamour for a bill of rights” as
“the voice of communism.”123 “[T]here are only two classes of people who are
crying for a bill of rights in Canada,” Ernest George Hansell declared in
Parliament, “traitors and dupes.”124 Quebec’s federal Liberals picked up this line
of attack and taunted Diefenbaker for sharing a cause with Communists and
Jehovah’s Witnesses.125 Behind closed doors, St. Laurent worried that the UDHR
articles protecting freedom of thought and expression would be interpreted “as
an undertaking not to discriminate against Communists because of their political
views.”126 Meanwhile, the RCMP counselled that entrenched rights would limit
the government’s ability to deal with the internal communist threat. A bill of

122 Supra note 103 at 112; supra note 111 at 172–73; and the correspondence from the Lumber and
Sawmill Workers’ Union No. 2537 (3 August 1948); the Women’s Institute (12 June 1948); and
the African Methodist Episcopal Church of Toronto (25 August 1949), among others, calling for a
bill of rights at LAC, RG 13, vol. 2643, file 151913. See also LAC, Scott Papers, “Bill of Rights,” MG
See generally MacLennan, supra note 2 at 47–51.
123 House of Commons Debates (12 April 1948) at 2872, 2874 (E.G. Hansell).
124 House of Commons Debates (12 April 1948) at 2872, 2874.
125 House of Commons Debates (12 April 1948) at 2876–77 (Hon. Jean Francois Pouliot). See also
House of Commons Debates (16 April 1948) at 3037 (Hon. Pierre Gauthier).
126 Quoted in Schabas, supra note 8 at 427–28.
rights, the RCMP concluded in a confidential memorandum, “would be either an empty gesture or a serious menace to the security of Canada.”

The CBA held similar reservations and suspicions about the left-leaning tilt of the bill of rights debate. Just as the American Bar Association had influenced the CBA’s support for entrenched rights, now the ABA called upon the CBA to join its crusade against international rights. The ABA’s President, Frank E. Holman, made no secret of his view that “state socialism, if not communism” stood at the heart of the UN’s effort to entrench rights. Holman spent the fall of 1948 campaigning against the Declaration, warning that “so-called” human rights entailed the adoption of an international “New Deal” in “which everything is supplied by a paternalistic government upon an equalized basis.” Among his many meetings on the topic were several with John T. Hackett, President of the CBA. During the war, the CBA’s Civil Liberties Committee had been among the first to call for the entrenchment of

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127 “Memorandum on a Bill of Rights” (12 June 1947), LAC, RG 12, vol. 2646, file 151913.
130 Ibid. As evidence of his claim, Holman quoted John Humphrey’s speech to the American Academy of Political and Social Science in which he had described the impact of international rights as “revolutionary.” “This lecture and its repercussions,” Humphrey later admitted, “dogged me for the rest of my career in the Secretariat” supra note 117 at 46, 60. Despite regretting the comments, he continued long-after to believe in their veracity: see “Human Rights and Authority” (1970) 20 U.T.L.J. 412 at 414.
constitutional rights. But that attachment to rights had been born of the desire to limit state power through rights of due process, property, and the fundamental freedoms. In the emerging postwar conception of rights, it seemed that human rights and fundamental freedoms included duties the state owed to its citizens. Concerned about what such international rights might entail, the CBA urged the Canadian government to delay the adoption of the UDHR. Echoing the position of the ABA, Hackett explained that the Declaration’s “uncompromising” assertion of “the so-called economic and social rights” posed a “danger” to other “fundamental freedoms.” “The fundamental conflict in the world today,” he suggested, “is between collectivism and individualism.” Economic and social rights and their supporters clearly stood on the wrong side of the divide.

The CBA’s views on international rights found resonance at the highest levels of the Canadian government. Indeed, John Humphrey blamed Hackett and the CBA for the federal government’s lackluster support for the UDHR. As William Schabas has demonstrated, St. Laurent and several of his cabinet ministers harboured “substantive opposition to the Declaration,”

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133 “Legal Problems, 1948” supra note 128.
134 “Legal Problems, 1949” supra note 128 at 195. Hackett was also a Progressive Conservative MP, as well as a member of the Special Joint Committee on Human Rights and Fundamental Freedoms.
135 Ibid.
136 Most shocking for Humphrey, Canada abstained from the penultimate vote on the UDHR: Humphrey, supra note 117 at 72. See also Humphrey’s diary entries for 7 and 10 December 1948, A.J. Hobbins, ed., On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights (Montreal: McGill University Libraries, 1994) at 89-91. Humphrey may have overestimated Hackett’s influence, but, as Schabas has pointed out, Hackett did have “the attentive ear of both Pearson and St. Laurent.”: Schabas, supra note 8 at 439.
notwithstanding Canada’s official statements of support.\(^{137}\) At the UDHR final vote at the General Assembly, Lester B. Pearson, then of the Department of Foreign Affairs, stressed that Canada’s support should not be taken “to suggest that we intend to depart from the procedures by which we have built up our own code under our own federal constitution for the protection of human rights.”\(^{138}\) In other words, the federal government made clear that its acceptance of international human rights and fundamental freedoms had not changed its staunch opposition to a domestic bill of similar content.

If the public disagreed with the government’s position, it did not matter at the polls. In the 1949 election, the Liberals under St. Laurent increased their already large majority in the House of Commons.\(^{139}\) St. Laurent’s decisive victory meant increased confidence in the Liberal’s policy towards constitutional change: yes to the search for a domestic amending formula, but no to the addition of a bill of rights.\(^{140}\) Capturing a Canadian constitutional theory that had venerable roots, the new Prime Minister of Canada explained that “the best guarantee of the fundamental provisions of the constitution is to be found in the good sense and fairness of the Canadian people and of those they send to represent them in parliament.”\(^{141}\) Although Diefenbaker protested that the Liberals were “forever

\(^{137}\) Schabas, ibid. at 441.

\(^{138}\) Ibid. at 438.

\(^{139}\) The Liberals won 193 seats, the Conservatives 41, the CCF 13, Social Credit 10, and there were 7 seats held by independents or marginal parties.

\(^{140}\) See House of Commons Debates (16 September 1949) at 19.

hiding behind the constitutional position,”¹⁴² the demand for rights had invariably run up against two dominant realities of Canadian constitutional law: parliamentary supremacy and federalism. Both, the Liberals believed, inherently repelled the adoption of entrenched constitutional rights. On top of that, no consensus existed on what types of rights should be entrenched, or to what end. And, if not disincentive enough, there existed no uncontested method of amending the constitution in the first place.

Constitutional roadblocks encouraged the proponents of rights to engage in more than political advocacy. It was not enough to baldly demand a bill of rights. What was needed, more than anything else, was an idea of constitutional rights, bolstered by an accommodating theory of Canadian constitutional law. Politicians like Diefenbaker and Stewart knew they needed help, and so they turned to academics, Arthur Lower and Frank Scott respectively, to provide deeper arguments to support their views.¹⁴³ These entreaties, as well as the publicity generated by the Japanese deportation, the Gouzenko Affair, as well as the Joint Committee’s hearings and passage of the UDHR, led Lower and Scott to put their thoughts on Canadian constitutional rights into print. Their efforts were joined by William Glen How, a Toronto lawyer, and counsel to Canada’s Jehovah’s Witnesses, and Hugh McDowall Clokie, a political scientist at the University of Manioba. In their articles, Lower, How, and Scott argued for a

¹⁴² House of Commons Debates (9 April 1948) at 2847.
¹⁴³ Pleading to Scott to make an appearance at the Joint Committee on Human Rights and Fundamental Freedoms, Stewart wrote: “Obviously, every attempt is being made to defeat us on various legal pretexts, and I hope that you can come along and blast supreme hell out of them.” Stewart to Scott, (22 June 1948), LAC, Scott Papers, “Bill of Rights 1944-1953” MG 30, D211, Vol. 3, Reel H-1214. Diefenbaker met and corresponded frequently with Lower seeking ideas and arguments relating to bills of rights: Lambertson, supra note 2 at 333.
Canadian Constitution that should, and more importantly, could accommodate written rights, while Clokie challenged those assumptions. Together, these articles deepened the bill of rights debate but, more than that, they began to change way that scholars conceived and wrote about the Constitution itself.

II. A Scholarship of Rights

The emergence of Canada’s first scholarship of rights can be traced to the appearance of four articles over a two-year period in the late 1940s: Lower’s “Some Reflections on a Bill of Rights,”144 Clokie’s “The Preservation of Civil Liberties,”145 How’s “The Case for a Canadian Bill of Rights,”146 and Scott’s “Dominion Jurisdiction Over Human Rights and Fundamental Freedoms.”147 Of course, the lines between political and scholarly demands for Canadian constitutional rights were fluid. Lower, Scott, and How were deeply enmeshed in the political campaign for a Canadian bill of rights: Lower as a civil liberties activist, Scott as national chairman of the CCF, and How as spokesman for the Jehovah’s Witnesses. The political context meant that these authors wrote, not in the interests of objective academic inquiry, but rather expressly intending to

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intervene in the on-going political debates surrounding the entrenchment of rights. These political purposes did not especially benefit the scholarship. Scott, Lower, and How most certainly undertook their inquiries with their conclusions pre-determined. And yet, these articles differed from the demands for rights issuing from the cacophonous political debate, earnest newspaper editorials, and ardent civil liberties meetings. In developing their arguments in writing, Scott, Lower, and How necessarily delved into deeper normative and constitutional dimensions of the bill of rights debate. In doing so, they implicitly and explicitly recast the purpose of Canadian constitutional law as the protection of individual rights and freedoms. In the end, it was the idea of constitutional rights that transcended the politics of the bill of rights debate and re-shaped the foundations of Canadian constitutional law.

In the constitutional texts that still defined the discipline in the mid-1940s, individual rights, if discussed at all, were an after-thought, cursorily examined and derivatively explained. To be sure, on other topics – most notably federalism – scholars like A.H.F. Lefroy and W.P.M. Kennedy produced thoughtful and creative scholarship.

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status of individual rights, Canadian scholars offered little other than a rehash of Dicey’s account of civil liberties protection under the ideological suppositions of the rule of law and the workings of parliamentary sovereignty. As Dicey had explained, the true value of the British concept of unwritten individual rights – “worth a hundred constitutional articles guaranteeing individual liberty” – was the fact that individual rights were not given specific constitutional prominence. The ordinariness of rights, in other words, was a sign of their successful ubiquity. Because “the right to individual liberty is part of the constitution,”150 not as a written absolute but rather in unwritten spirit, Dicey proposed that individual rights necessarily existed in relation to all other important aspects of constitutional rule. Following Dicey, Canadian scholars assumed rights and freedoms naturally inhered in the workings of constitutional government itself – both in the judge-made common law, and in the law-making of democratically accountable legislatures. For Canadian constitutional scholars, these truisms required little elaboration or exploration. The indexes to Lefroy’s treatise on division of powers and Kennedy’s monograph on Canadian constitutional history contained no reference to civil liberties or rights and freedoms. When the Department of Justice lawyers ventured to the parliamentary library to study the bill of rights issue in advance of the hearings of the Special Joint Committee on Human Rights and Fundamental Freedoms, time and again they returned to what Frank Scott called “the Diceyan gospel” and his concept of parliamentary

150 Dicey, supra note 96 at 197.
sovereignty. If for no other reason, the trio of articles by Lower, How, and Scott deserve notice for their implicit rejection of parliamentary supremacy and attention to the constitutional protection of individual rights. This early scholarship of rights also evidences the struggle to square the existing foundations of Canadian constitutionalism with the international and domestic movement to limit legislative authority. Inspired by the same cluster of postwar rights controversies, Lower, How, and Scott aimed to constitutionalize rights by simultaneously advocating and theorizing their inclusion. Doing so required them to address insofar as they could the constitutional dilemmas posed by parliamentary sovereignty and federalism. Before turning to the success of those endeavours, it will be useful to place each article in context.

After the war, the publication of *Colony to Nation: A History of Canada* confirmed Arthur Lower’s reputation as English Canada’s leading national historian. But Lower always fancied himself as more than a cloistered academic, an ambition he satiated through his involvement in the Winnipeg Civil Liberties Association, the Canadian Institute of International Affairs, and in

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151 F.R. Scott, *Civil Liberties & Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 12. See e.g. the memoranda collected at RG 13, vol. 2643, file 151913. Peter Oliver has described Dicey’s influence as “a sort of intellectual Empire of its own .... embedding those traditional, orthodox and absolutist theoretical understandings regarding parliamentary sovereignty in the minds of generations of readers, both in Britain and in the Empire at large”: Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005) at 56, 60.

frequent political commentary. A classical liberal, Lower championed “free men, a free society, a free environment” while evidencing an inherent distrust for “leviathan, whether in church or state.”\textsuperscript{153} Those values found expression in Lower’s commitment to the idea of an entrenched bill of rights, a view he first articulated in co-authored submissions to the Rowell-Sirois Commission in the late 1930s.\textsuperscript{154} Like other civil liberties activists whose ideals were forged by the Depression, Lower initially believed that entrenched rights were needed to curb the regressive politics of parochial provincial governments. The Second World War and the Gouzenko Affair irrevocably altered this view. In his 1947 article, “Some Reflections on a Bill of Rights,” Lower revisited his earlier focus on provincial governments and extended his arguments to the federal Executive and Parliament. Federal legislation such as the \textit{War Measures Act}, \textit{Official Secrets Act}, and \textit{Inquiries Act} “constitute for Canada,” Lower suggested, “the blueprints of dictatorship.”\textsuperscript{155} To protect against this “new despotism,”\textsuperscript{156} Lower demanded the adoption of a Canadian bill of constitutional rights.

The next year, lawyers reading the \textit{Canadian Bar Review} encountered a similar argument in Glen How’s “The Case for a Canadian Bill of Rights.”\textsuperscript{157} A young lawyer, not yet thirty, How wrote about constitutional rights from his perspective as lead counsel to Canada’s Jehovah’s Witnesses, and as an adherent


\textsuperscript{154} Lower drafted the brief along with Winnipeg lawyers J.B. Coyne and R.O. MacFarlane: Native Sons of Canada, \textit{Brief Submitted to Royal Commission on Federal-Provincial Relations} (1938) [unpublished, copy at Robarts Library, University of Toronto] at 25-26.

\textsuperscript{155} Lower, “Some Reflections,” supra note 144 at 217. The \textit{Fortnightly Law Journal} was a fitting home for Lower’s argument – Chitty would have applauded its tone and content.

\textsuperscript{156} \textit{Ibid.} at 236.
of the faith. Since his call to the Bar in 1943, How had devoted his practice to defending his co-religionists prosecuted under the Defence Regulations and, after the repeal of the sect’s ban in 1943, other criminal and quasi-criminal charges. For How and other Witnesses, a constitutional bill represented more than an abstract theory. In the face of repeated persecution by the state, entrenched rights offered a practical constitutional mechanism from which tangible legal protections might flow.

How’s enthusiasm for an entrenched bill of constitutional rights stemmed directly from the influence of Hayden Covington, the sect’s New York-based lead counsel. Covington had used the religious and expressive freedoms of the American Bill of Rights to great effect in protecting American Witnesses during the Second World War; not surprisingly, Covington believed similar constitutional protections would prove useful in their legal battles in Canada. Beginning with his article extolling the virtues of the American Bill of Rights in Canadian Bar Review, Covington and How began a concerted effort to bring certain American constitutional rights to Canada. Following Covington’s lead, How article began as a written submission to the Special Joint Committee on Human Rights and Fundamental Freedoms advocating the entrenchment of a Canadian bill of rights. How’s article signalled the start of a much larger

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458 Biographical details are gleaned from the transcripts of How’s interviews with the Osgoode Society for Legal History, Archives Ontario, 1998, C81 [How Interview].


460 William Kaplan has observed that Covington, in particular, was responsible for directing many of the legal campaigns in Canada: “The Supreme Court of Canada and the Protection of Minority Dissent: The Case of the Jehovah's Witnesses” (1990) 39 U.N.B.L.J. 65 at 78.
campaign for entrenched rights which included voluminous petitions to
Parliament and dozens of articles in Witness literature calling for entrenched
constitutional rights.\textsuperscript{162} Aiming to appeal to mainstream lawyers in his \textit{Review}
article, How omitted personal references to his religion or their broader political
agenda. Instead, he made his case for a Canadian bill of rights by appealing
broadly to the importance of individual civil liberties, and by highlighting their
vulnerability under current constitutional practice.

No less committed to the idea of entrenched constitutional rights was
Frank Scott. In his many guises – as national chairman of the CCF, as civil
liberties activist, and as constitutional scholar – Scott had frequently professed
support for adding a bill of rights to the Canadian Constitution. Widely regarded
as the leading expert on the issue, many – including Alistair Stewart, Andrew
Brewin, B.K. Sandwell, as well as Lower and How themselves – privately pressed
Scott for advice and strategies in the political fight for a bill of rights.\textsuperscript{163} With his
1949 article, “Dominion Jurisdiction Over Human Rights and Fundamental
 Freedoms,”\textsuperscript{164} Scott consolidated and expanded on his long-held views. The
confident assertions he sprinkled throughout the article reflected not only his
status in the field, but also his capacity for blunt and partial advocacy. Scott wrote

\textsuperscript{162} The CCF presented Parliament with petitions with over a million signatories on the Witnesses
behalf in 1947 and 1949: see \textit{House of Commons Debates} (18 June 1947) at 4278 and (9 February
1949) at 371. For a collection of Witness writings on the need for a bill of rights see e.g. “Magna
Carta Myth” \textit{Awake} (18 January 1948) and “Canada’s Need for a Written Bill of Rights” [n.d.]
\textsuperscript{164} Scott, “Dominion Jurisdiction,” \textit{supra} note 147. Scott’s article became the basis for his
submission to the Senate’s Special Committee on Human Rights and Fundamental Freedoms the
following year.
not only as a scholar, but also as a seasoned political advisor. Nonetheless, Scott’s constitutional expertise did set him apart from his peers and allowed him to tackle with greater facility and felicity the constitutional arguments stalling the demand for a constitutional bill of rights. Noting the surge of interest in “the basic ideas underlying the Canadian constitution,” Scott set out to discover a foundation of individual rights.

Putting aside the personal and political context that suffused this early scholarship of rights, it is worth highlighting the ideas – partial and inchoate though they may have been – that define the articles’ contribution to the history of Canadian constitutional thought. Largely neglecting the issues raised by federalism, Lower and How focused their attention on discrediting the doctrine of parliamentary sovereignty. They did so by framing the right to legislate as the right to repress individual rights. Under the doctrine of “unlimited power,” How explained, “[a] tyrannical or short-sighted legislature could destroy every vestige of liberty and the courts would be powerless to give relief.” “There is nothing,” he continued, not the “unwritten British Constitution” nor its putative “rights,” “to prevent any legislature, municipal council, magistrate or other public authority from denying fundamental freedoms.” The real issue was not the

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165 Indeed, in accepting the article for publication, the Bar Review’s editor, G.V.V. Nicholls, complained that “you seem to be discussing not so much the legal or constitutional question of ‘Dominion Jurisdiction over Fundamental Freedoms and Human Rights’ but advocating what in your opinion the Dominion should do with its jurisdiction.” Letter, Nicholls to Scott (28 April 1949), LAC, Scott Papers, MG 30, D211, Vol. 2, Reel H-1213.
166 Scott, “Dominion Jurisdiction,” supra note 147 at 209.
167 On the federalism issue, Lower assumed without elaboration that certain rights “must be under the custody of the Dominion.” How said even less but promised to return to the jurisdictional question in a later article, a pledge he did not fulfill: Lower, “Some Reflections,” supra note 144 at 235; How, “Canadian Bill of Rights,” supra note 146 at 760.
168 How, “Canadian Bill of Rights,” ibid. at 760, 763.
169 Ibid. at 794.
specific rights controversies themselves. How implied, but rather their suggestion of a systemic constitutional flaw, one that rendered the individual inherently and perpetually vulnerable to legislative tyranny.

Lower aimed at a similar message, but from a slightly different perspective. He accepted that parliamentary sovereignty might work as a rights-protecting model in Britain, but only, he stressed, because of the “independent judgment” and “instinctive feelings” fostered among an “old and mature community.”170 Canada, in Lower’s eyes, presented the opposite: a heterogeneous young nation easily swayed to support authoritarian government in times of crisis, as Canada’s civil liberties record during the Second World War and Gouzenko Affair attested. At least part of Lower’s disdain for Canadian political culture stemmed from an unstated concern about immigration, only gestured at in his complaint that “the sense of freedom of our people” had recently “weakened.”171 In other writings he was less circumspect, noting that the “practices of mass immigration” had brought “strangers into the house” to the detriment of the body politic.172 For Lower, entrenched rights provided the means to counter a public insufficiently attuned or predisposed to threats to individual liberties posed by government. Under the doctrine of parliamentary sovereignty, Lower concluded, individual rights and freedoms would remain vulnerable to the capricious whims of voters and the repressive designs of the Executive.

170 Lower, “Some Reflections,” supra note 144 at 216. In another flourish, however, Lower pointed out that unlimited legislative power was the governance model preferred by the Nazis and Soviets.
171 Ibid.
172 Lower, My First Seventy-Five Years, supra note 153 at 165.
A second line of attack by Lower and How and amplified by Scott, concentrated on the extent to which parliamentary sovereignty defined Canadian constitutional law in the first place. Lower and How made their case by stressing the ways in which constitutional limitations had always defined constitutional theory and practice in the Atlantic world.\textsuperscript{173} Dipping into the well of British and American constitutional history, they argued that the express articulation of rights had a long and distinguished legal pedigree. A modern bill of rights, they argued, would merely extend that historic practice.\textsuperscript{174} Adapting that insight, Scott pointed out that the BNA Act’s “specific limitations” qualified Canada’s constitutional adoption of the British doctrine of parliamentary supremacy from the outset.\textsuperscript{175} It was simply not the case that Canadian legislatures could legislate as they pleased – they were limited and circumscribed in several ways by the written Constitution whether through the BNA Act’s division of powers, or the provisions entrenching minority language and education rights. Moreover, a history of colonial supervision had entrenched in Canada the constitutional practice of judicial review. Under that system, courts, not legislatures, policed the boundaries of Canadian constitutional law. “Added together,” Scott argued, Canada’s existing constitutional limitations “make the beginnings of a Bill of


\textsuperscript{175} Scott, “Dominion Jurisdiction,” \textit{supra} note 147 at 212.
Rights.” Accordingly, “the addition of a formal Bill of Rights to the constitution, to extend the protections that now exist,” he concluded, “would in no way change the nature of the constitution.” Entrenched constitutional rights, Lower, How, and Scott argued, already formed part of the essential architecture of Canadian constitutional law. A constitutional bill of rights would solidify foundations already laid.

As Scott recognized, accepting that a bill of rights was theoretically consonant with federalism still begged the question of whether a federally imposed bill of rights invaded provincial jurisdiction. The Liberals in Parliament, the lawyers in the Department of Justice, the provincial attorney-generals, and the deans of Canada’s law schools had all agreed that it would. In Scott’s view, those objections emerged from the same impoverished vision of federal jurisdiction he had opposed during the Depression. If the malady remained the same, so did the cure – an expansive conception of federal power in accordance with the framers’ original intentions. Whether under its explicit authority over the territories, federal employees, and criminal law, or under the implied powers of the residuary clause, Scott listed over fifty areas in which the federal government had the “undeniable” authority to legislate in relation to human rights and fundamental freedoms. Scott’s analysis is noteworthy because, unlike others in the debate, he traced and categorized constitutional jurisdiction

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176 Ibid. at 213. Scott pointed to, for example, sections 133, 93, 20, 50, 51, and 99 as protecting “a fundamental freedom, and every one is a limitation on the sovereignty of either the Dominion Parliament or the provincial legislatures, or both.”

177 Ibid. at 214. Scott had been developing this argument for a number of years, arguing as early as 1946 at a joint meeting of civil liberties groups that he had organized, that Canada already contained a bill of rights in the existing restrictions imposed by the BNA Act. See LAC, Scott Papers (Civil Liberties Meeting December 1946).
in relation to human rights, even if his analysis bore the hallmarks of an exaggerated view of federal jurisdiction. As in his other constitutional writings, Scott envisioned a re-balanced federalism with power decidedly emanating from the centre.

But Scott was also a constitutional pragmatist, and his bill of rights proposals were less radical than his opponents assumed. It is notable, for example, that Scott never envisioned social and economic rights forming part of a justiciable bill of rights. For all his socialism, he basically remained a bill of rights conservative. As in the classic Anglo-American tradition, Scott viewed a constitutional bill of rights as “a shield for defence,” devoted to protecting individuals from the state in the exercise of their fundamental freedoms and legal rights.179 This is not to say that Scott had abandoned his political commitment to greater social and economic equality. “Freedom,” he recognized, “is not just a static thing to be defended by a Bill of Rights .... There is need also for a sword for attack.”180 But for Scott, that sword need not, indeed should not, be constitutionally empowered. Instead he favoured what he called “an expanding programme of action,” human rights legislation following the Saskatchewan model passed by the federal government and provinces according to the limits imposed by the division of powers.181 For Scott, the positive rights to work, education, housing, health, and social security should serve as political objectives within the control of legislatures, not courts. Scott did not deny that such rights qualified as human rights, only that human rights and constitutional rights need

178 Scott, “Dominion Jurisdiction,” ibid. at 221.
179 Ibid. at 241.
180 Ibid. at 241.
not be synonymous. Such an approach reflected Scott’s traditional conception of judicial review, and his fear of Lochnerism, but it also attempted to answer the allegation that an expansive bill of rights would intrude on provincial jurisdiction.

Which is not to say that Lower, How, and Scott had addressed all of the constitutional objections to the entrenchment of a bill of rights. None of the authors, for example, adequately dealt with the concern that rights-based judicial review would dramatically extend judicial power. In passing, Scott acknowledged the “inescapable effect” of shifting “the burden of defining the protected rights from our elected representatives to our nominated judges,” but professed ambivalence as to the result.¹⁸² Neither did the authors suggest whether such judicially enforced rights should be absolute or limited, and if the latter, how? Finally, although Scott sketched in detail the multiple grounds of federal jurisdiction, neither he nor the others dealt with the issue of constitutional amendment, an issue with its own uncertainties, dilemmas, and political tensions.¹⁸³ For all the emphasis on “practical”¹⁸⁴ advice, the scholarship of rights remained vague on how a constitutional bill of rights might actually work in practice, and how it might come to exist in the first place.

In some ways, Hugh McDowall Clokie provided a more searching inquiry into the nature of a constitutional bill of rights in his article published in the

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¹⁸¹ Ibid. at 241.
¹⁸² “Ultimately,” he wrote, “the question narrows down to a choice between a faith in the courts and a faith in legislatures. History has shown that either may become the enemy of freedom.” Ibid. at 214-15.
Canadian Journal of Economics and Political Science. Clokie, a professor at the University of Manitoba and a pioneer in the emerging field of Canadian political science, paid considerable attention throughout his career to the study of Canadian constitutionalism. Exemplifying a division between disciplines that has persisted with remarkable stubbornness to the present, Clokie complained that lawyers burdened constitutional study with a legalistic solipsism unduly focused on judges. He proposed, by contrast, that Canada’s “tangled web of constitutionalism” spanned convention as much as law, legislatures as well as courts. Unlike his peers in law, Clokie never assumed the necessity or prudence of judicial review. Liberty in the modern state, he argued, existed “less in law than in adequate political processes and machinery by which conflicting interests can be adjusted.” Balancing rights, not declaring them in “grandiloquent terms,” offered the key to securing “constitutional liberty.” Bills of rights, the natural rights theory from which they sprang, and the legalistic judicial minds that interpreted them, he concluded, could never effectively reconcile the “rival liberties” and “contradictory sets of freedoms” that defined modern political life.

Clokie did not doubt that unchecked executive power

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185 Clokie, “Preservation,” supra note 145.
188 Clokie, “Basic Problems,” supra note 186 at 839.
190 Ibid. at 215, 228.
191 Ibid. at 214.
operating under the legitimacy of emergency power posed grave threat to civil liberties, but he parted company with the advocates of bills of rights over what processes most effectively circumscribed that power and protected individuals. Lawyers, he believed, too easily looked to the courts. Clokie, the political scientist, looked to politics.

Whatever their differences, the articles by Clokie, Scott, How, and Lower placed individual liberties at the heart of Canadian constitutional law. Scott announced this pivotal assumption in the opening line of his article. “To define and protect the rights of individuals,” he asserted, “is a prime purpose of the constitution in a democratic state.” Less explicitly, Lower and How proceeded from the same understanding. Clokie, writing in opposition to entrenched constitutional rights, similarly focused on the “intimate relation subsisting between civil liberty and constitutionalism.” In the postwar scholarship of rights, individual civil liberties had moved from the neglected margins to the centre of Canadian constitutional thought. As R.C.B. Risk and others have shown, there had been rich and varied debates about Canadian constitutional law and liberty since Confederation. But after the war, the tenor of those debates shifted, individual civil liberties had become human rights and fundamental freedoms, and debates about constitutional change focused, not on changes to federalism or the growth of administrative law, but on the addition of a bill of rights. This was part of a larger transition in understanding about the purposes of constitutional law and the values that lay at its heart. Concerns about federalism,

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if never displaced, were joined by a new set of constitutional priorities. What the
politics of rights had first signaled, the scholarship of rights more deeply
entrenched. The locus of attention in Canadian constitutional thought shifted
from the rights and freedoms of government to those of individuals, and from the
appropriate relationship between levels of government, to that between state and
citizen.

By 1950 it was no longer possible to write or think about Canadian
constitutional law without reference to individual rights and freedoms, a change
captured in successive editions of James Alexander Corry’s Democratic
Government and Politics. Alex Corry, introduced in the previous chapter, had
begun his career teaching public law at the Saskatchewan Law School and was
among the contributors to the early writing and teaching of Canadian
administrative law. In 1936, he switched disciplines and universities, taking a
position as Hardy Professor of Political Science at Queen’s. There, Corry’s
teaching and research shifted to liberalism and democratic theory. In 1947, he
wrote a text essentially comparing the institutions of the democratic West with
those of the Soviet East. In his chapter on Constitutions, Corry sketched the
broad features of American and British constitutionalism before turning his
attention to Canada. “The Canadian constitution is modeled on that of Britain
and needs no extended comment at this point,” he summarily observed. It was

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196 James Alexander Corry, Democratic Government and Politics (Toronto: University of Toronto Press, 1947) at 27.
true that federalism and a few “special guarantees of minority rights in education and language” limited the “unqualified supremacy of the British Parliament,” but otherwise, Corry explained, Canadian constitutional law reflected its British origins in eschewing “bill of rights or fundamental guarantees of individual liberties such as are found in the United States.” A later chapter on judicial review stressed the conflict between the “individualism” of the common law and modern administrative government, but otherwise, Corry’s account of Canadian constitutionalism could have been written by A.H.F. Lefroy and his contemporaries a half-century earlier.

The second edition of Democratic Government and Politics appearing in 1951 prominently displayed a changed landscape of Canadian constitutional thought. Citing the escalating tensions of the cold war as cause to “sharpen the contrast between modern democracy and modern dictatorship,” Corry expanded his discussion on the “Ideals of Government” and added a new chapter devoted to the constitutional protection of civil liberties. In contrast to the “Fascist regime in Italy, the Nazi scourge in Germany, and the Communist system in Russia,” Corry identified the preeminent ideal of democratic government as “releasing the potentialities of individual personality on the widest possible scale.” For Corry, dictatorships offended this principle in both theory and practice through the unchecked power of the state in asserting “the unqualified pre-eminence of

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197 Ibid. at 28. Corry devoted a later chapter to federalism and highlighted the then familiar conflict between the decentralist bent of the Privy Council’s jurisprudence and the otherwise centralizing forces in Canada’s political economy (at 362-380).
198 James Alexander Corry, Democratic Government and Politics, 2d ed. (Toronto: University of Toronto Press, 1951) at vi.
199 Ibid. at 32.
society over the individual.” Democratic “[g]overnment,” he posited in comparison, “must be limited by a law higher than any commands it makes.”

“[T]he best way to accomplish this,” Corry explained, “is to establish a fundamental law which defines the organs of government, prescribes how they shall function, and outlines the basic relationships between government and the private citizen.” As he elaborated in his chapter on civil liberties, protections for “fundamental freedoms” provided a key feature of such constitutionalism. Acknowledging that Britain admirably protected such freedoms under the common law, Corry nonetheless noted that “a number of disturbing incidents in recent years” – including the Japanese deportation and Gouzenko Affair – made him less sanguine about the situation in Canada. Noting that Canadian civil liberties “remain, as in Britain, at the mercy of the appropriate legislature,” Corry counselled that Canada, like the United States, should adopt a constitutional bill of rights.

Corry did not cite or reference the scholarship of rights but its ideas are clearly evident in his analysis. Like Lower, Corry argued that Canada lacked the “homogeneity of the British people” to make common law protections truly adequate. Following Scott, he stressed that “the negative approach to civil liberties is not enough,” and positive rights, though not properly constitutional, were necessary policy goals in the modern state. Finally, with references to the

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200 Ibid. at 48.
201 Ibid. at 38.
202 Ibid. at 37.
203 Ibid. at 437.
204 Ibid. at 460, 463.
205 Ibid. at 462.
206 Ibid. at 465-67.
UDHR and the United States, Corry signalled that debates about the content of
Canadian constitutional law would take place in the context of international
norms about individual rights and freedoms and in the ever-lengthening shadow
of America. Canadian constitutional law was no longer exclusively a story
about federalism, the rule of law, and parliamentary supremacy. In the second-
half of the twentieth century, Canadian constitutional law would revolve around
limits of power in the name of individual rights and freedoms.

Conclusion

Just as the scholarship of rights drew inspiration and impetus from political
debates, the ideas expressed by Scott, in particular, found their way back into
Canadian politics. Although the Liberals continued to oppose a bill of rights in
the House of Commons, Scott’s arguments did find favour with certain Liberals in
the Senate. From the Upper Chamber, Arthur Roebuck – a former Ontario
 cabinet minister and labour lawyer – led his colleagues in establishing a Special
Committee on Human Rights and Fundamental Freedoms in 1950. Unlike the
earlier Joint Committees (on which Roebuck had also served), the Senate
Committee heard from several bill of rights proponents during its hearings,
including the Association for Civil Liberties, the National Council of Women of
Canada, and the National Council of Jewish Women of Canada. Setting the
tone early, the Senate Committee heard testimony in its opening session from

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207 Ibid. at 463.
208 Debates of the Senate (20 March 1950) at 97.
209 See The Senate of Canada, Proceedings of the Special Committee on Human Rights and
Fundamental Freedoms (Ottawa: King’s Printer, 1950) at 32.
Frank Scott and King Gordon speaking on behalf of John Humphrey and the United Nations Human Rights Division. Among the Senators, Scott found a receptive audience for his claims about the need for, and constitutionality of, a constitutional bill of rights.210

Lavishing Scott’s earlier writings with praise and lauding his presentation as a “masterpiece,” Roebuck hardly needed convincing.211 “I am a liberal,” Roebuck proclaimed during the debate leading to the Committee’s creation, and “[t]he first principle of liberalism is respect for the rights of the individual.”212 His colleagues were similarly disposed. In their final report, they recommended that human rights and fundamental freedoms be written “into the Canadian Constitution, so that they may be administered in our courts, and so that they may become binding and obligatory alike upon individuals and upon governments.” Appreciating the constitutional difficulties inherent in such entrenchment, the Committee also recommended that, “as an interim measure,” the federal government adopt “a declaration of human rights to be strictly limited to its own legislative jurisdiction.”213 In their findings, the Senate implicitly confirmed what Scott emphasized in his testimony and what the scholarship of rights had begun to make clear. The issue of individual rights had become a dominant issue in Canadian politics and law alike.

Rights proponents had hoped that the Senate’s conclusions would inspire the government to action. On 8 May 1951, Scott and nearly two hundred others

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210 Ibid. at 15-31.
211 Ibid. at 1-2, 26.
212 Debates of the Senate (20 March 1950) at 97.
met with Prime Minister St Laurent and members of his cabinet to petition the government for a constitutional bill of rights. Members came away disheartened when the meeting failed to alter the well-entrenched position of St Laurent and his government. That political disappointment masked the importance of the transition in the making. The silences that had marked the wartime record of civil liberties abuses had been replaced by a constitutional discourse that emphasized individual rights and freedoms. What began as reactions against the continued use of executive emergency power in the Japanese deportation and Gouzenko Affair became a new way of thinking about the rights and freedoms of Canadian constitutional law.

213 See Debates of the Senate (20 March 1950) at 95; The Senate of Canada, Report of the Special Committee on Human Rights and Fundamental Freedoms (Ottawa: King’s Printers, 1950) at 589.
Chapter Five: “Constitutional Conceptions of a Different Order”

An astute observer would have noticed something different when the justices of the Supreme Court of Canada entered the courtroom in their fur-trimmed scarlet robes on 27 March 1950 to hear arguments in Welch v. The King.¹ Certainly, the setting itself would have seemed new. In 1946 the Court had abandoned its cramped quarters and taken up permanent residence in the recently constructed courthouse further west on Wellington Street, but it was not until 1949 that designers had put the finishing touches on the edifice’s ornate wood-panelled courtroom.² It was not just the surroundings that had changed. The Court began life with six judges in 1875, with a seventh added in 1927. In Welch, for the first time, nine Supreme Court judges entered the courtroom to hear and decide a case.³ A more profound change was less visible. Along with increasing the size of the bench, amendments to the Supreme Court Act had finally severed that “ancient link of empire” and ended appeals to the Privy Council.⁴ At mid-century, seventy-five years after its creation, the Supreme Court of Canada was, for the first time, supreme.

¹[1950] S.C.R. 412 [Welch]. Welch was, in fact, a re-hearing. The Court requested counsel return to present arguments on the legality of a Court of Appeal quashing a conviction without ordering a new trial.
³The amendments further stipulated that at least three judges must be appointed from the province of Quebec. An Act to Amend the Supreme Court Act, S.C. 1949, c. 37, s. 1, amending R.S.C. 1927, c. 35.
⁴Vincent C. MacDonald, “The Privy Council and the Canadian Constitution” (1951) 29 Can. Bar Rev. 1021 at 1036-37. The amended Supreme Court Act stated: “the judgment of the Court shall, in all cases, be final and conclusive.” An Act to Amend the Supreme Court Act, ibid., s. 3. Note however that cases initiated before the amended Act came into force preserved their rights to appeal to the Privy Council.
Imploring the Court to embrace “the spirit of its new status” and discover a distinctive “soul,” Bora Laskin pressed its justices to cast off the “shadow of the Privy Council.”5 “Empiricism not dogmatism, imagination rather than literalness,” Laskin counselled, especially in the field of constitutional law.6 If the Supreme Court did not always live up to his lofty expectations in the years that followed, the constitutional jurisprudence of Justice Ivan Cleveland Rand provided Laskin with some measure of hope.7 Weaving a constitutional theory of rights and centralized federalism which became known as the “implied bill of rights,”8 Rand took up Laskin’s challenge to reorient the fundamental tenets of Canadian constitutional law away from the distribution of governmental powers and towards the citizens subject to its laws. For Laskin, the liberated Supreme Court found its “spirit” and “soul” in Rand’s new approach to Canadian constitutional law, one that mirrored the aspirations of Frank Scott and the other scholars of the newer constitutional law.

6 Laskin, “Final Court,” ibid. at 1076. The Supreme Court’s new status drew wide comment from politicians and lawyers alike. In Parliament, the minister of justice and prime minister heralded the “historic” occasion as a further step in Canada’s constitutional evolution towards autonomous self-rule. Striking a more cautious note, the opposition Progressive Conservatives adopted the position of the Canadian Bar Association and urged the Supreme Court to continue to be bound by the Privy Council’s precedents: House of Commons Debates (20 September 1949) at 75; (23 September 1949) at 189-199.
7 By the close of the 1950s, Laskin lauded Rand as “the greatest expositor of a democratic public law which Canada has known.” Bora Laskin, “An Inquiry into the Diefenbaker Bill of Rights” (1959) 37 Canadian Bar Rev. 77 at 124.
8 Although Rand never used the term, his many admirers christened these efforts the “implied bill of rights.” F. Andrew Brewin, “Case and Comment: Constitutional Law – Quebec Padlock Act – Communism and Bolshevism – Criminal Law – A Bill of Rights Implicit in the B.N.A. Act” (1957) 35 Can. Bar Rev. 554 at 557 [Brewin, “A Bill of Rights Implicit”). Brewin’s case comment was the first, to my knowledge, use the expression “implicit” or “partial bill of rights” to describe the theory. A decade later, the term “implied bill of rights” had become standard: Dale Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1966-67) 12 McGill L.J. 497 [Gibson, “Constitutional Amendment”].
The implied bill of rights cases still occupy a prominent place in Canadian constitutional law. A mainstay of law school casebooks, the cases themselves – generally understood to include some combination of Reference re Alberta Legislation,9 Boucher v. The King,10 Winner v. S.M.T. (Eastern) Ltd.,11 Saumur v. Quebec,12 Chaput v. Romain,13 Switzman v. Elbling,14 and Roncarelli v. Duplessis15 – have been framed as a thematic and temporal bridge spanning Canada’s formative federalist battles and post-Charter obsession with rights. Recently, scholars have looked to the implied bill of rights cases to unearth the evolutionary antecedents of the liberal norms that define the Supreme Court’s modern constitutional jurisprudence.16 Given their prominence in the Canadian constitutional imagination, relatively little has been done to situate the implied bill of rights cases within the period’s broader shifts in Canadian constitutional thought.17 Perhaps not surprisingly, Canada’s social and political historians of

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17 But see Weinrib, ibid. at 710-720; William Kaplan, State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights (Toronto: University of Toronto Press, 1989) [Kaplan,
rights have generally avoided the cases – preferring to steer clear of the rarified world of black letter constitutional law. The result is a lacunae generated by legal scholars engaging the implied bill of rights, if at all, from contemporary perspectives, and historians offering a history of rights without discussing constitutional jurisprudence or scholarship. This chapter aims to fill that gap.

The idea of implied rights did not spring from the minds of Lyman Duff and Ivan Rand alone. Like the newer constitutional law, and the politics and scholarship of rights which preceded it, the implied bill of rights was a product and producer of changing ideas about the role and function of Canadian constitutional law. Beginning with Chief Justice Duff’s and Justice Cannon’s famous judgments in Reference re Alberta Legislation, this chapter traces the intellectual influences of the implied bill of rights. As in Rand’s jurisprudence of the 1950s, lawyers emerge as crucial figures in placing ideas from the broader world of Canadian constitutional thought and culture before the Court. In this way, the implied bill of rights jurisprudence emerges as reciprocal and reflective of a changing world of ideas about constitutional rights. After the intervention of the Second World War when, as we have seen, the dictates of the wartime constitution dominated, a series of cases argued by Glen How and Frank Scott

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compelled a newly empowered Supreme Court to confront the place of individual rights in Canadian constitutional law. Facing demands for a constitutional law that protected individual rights, Rand drew on a medley of American and Canadian constitutional ideas to craft a theory of constitutional citizenship marked by liberal individualism, nationalism, and limited constitutionalism. The fact that those ideas never commanded the allegiance of a majority of the Court, that they sputtered into judicial irrelevance – “a mere curiosity ... unsound in the eyes of most Canadian lawyers and judges” \(^{20}\) – was true only in the short-term. Where the implied bill of rights initially failed as constitutional law, it ultimately succeeded as an idea of Canadian constitutional thought.

I. \textit{Reference re Alberta Legislation and the Newer Constitutional Law}

\textit{Reference re Alberta Legislation} is among the most celebrated decisions of the Supreme Court of Canada. From the moment the Court handed down its judgment in the late winter of 1938, the reasons of Chief Justice Duff and Justice Cannon, in particular, drew “widespread satisfaction and acclaim ... throughout the Dominion.” \(^{21}\) Duff’s and Cannon’s spirited defence of free expression and parliamentary democracy have since been cited in the House of Commons and

\(^{19}\) \textit{Alberta Legislation, supra} note 9.

\(^{20}\) Gibson, “Constitutional Vibes,” \textit{supra} note 16 at 52.

\(^{21}\) Charles Morse, “Alberta and the Supreme Court” (1938) 16 Can. Bar Rev. 215 at 215. In his chatty \textit{Canadian Bar Review} column, Morse notes “On the day of its pronouncement it became a lively subject of discussion in the clubs and on the streets; indeed, never before to our knowledge has the value and importance of the Supreme Court as an instrument of government been brought home so forcibly to the mind of the patriotic citizen who likes to think of Canada as a compact federal State rather than as a loose aggregation of provinces persistently asserting what they claim to be their constitutional rights.” Perhaps not surprisingly, the decision also drew “shouts of
referenced in hundreds of cases.\textsuperscript{22} Yet despite the attention the case has garnered then and since, the sudden appearance of liberal democratic theory in a division of powers decision has never been adequately explained. Certainly, Duff and Cannon bear responsibility for the rhetorical flourishes that earned their reasons canonical status in Canadian law, but the central ideas expressed in their reasons – the emphasis on central constitutional powers protecting parliamentary institutions and their underpinning liberal rights from provincial infringement – emerged from arguments presented by lawyers challenging the legislation. In this way, the implied bill of rights began in the crucible of constitutional politics and thought of the newer constitutional law.

Among the many calls for political and social change stirred by the Depression, the desire for constitutional change loomed large. As we have seen, the 1930s experienced an explosion of scholarly, political, and popular engagement with Canada’s perceived constitutional failures. Amidst a growing chorus calling for an end to appeals to the Privy Council and a more robust interpretation of federal power lurked a search for the norms upon which a distinctly Canadian constitutional law might be based. Demands for centralization were obviously central to much of the period’s constitutional politics and thought, but calls for constitutional rights – whether explicitly by entrenchment in a bill of rights, or implicitly by judicial recognition and

\textsuperscript{22} House of Commons Debates (12 April 1948) at 2856 (Hon. G. Diefenbaker); the Supreme Court alone has referenced the case dozens of times. Recently McLachlin C.J.C. cited the case as standing for the proposition that “[t]he right of the people to discuss and debate ideas forms the very foundation of democracy.” Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827 at para. 12.
interpretation – provided countervailing constraints to demands for expanding federal power. Beginning with Frank Scott and the League for Social Reconstruction’s call for individual constitutional rights in 1935, the idea of a Canadian constitutional bill of rights quickly spread in socialist and Communist circles. At the Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Commission) hearings at the end of the decade, Commissioners heard no less than three demands for some form of entrenched constitutional rights.

Submissions by James Bowes Coyne, Arthur Lower, and Ronald Oliver MacFarlane, on behalf of the Native Sons of Canada, went furthest in integrating demands for a constitutional bill of rights into a broader theory of Canadian constitutional law. Lower was undoubtedly the driving force behind the arguments, with minor contributions from Coyne, a prominent member of the Winnipeg Bar and future judge, and MacFarlane, a professor of history at the University of Manitoba. Proceeding under the central assumptions of the newer constitutional law – particularly its nationalistic preference for strong central

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24 The League for Women’s Rights of the Province of Quebec demanded a constitutional amendment protecting “the exercise of any political rights” on the basis of sex. Quebec did not grant women the right to vote in provincial elections until 1940. The League for Women’s Rights, Brief Presented to The Royal Commission on Dominion-Provincial Relations [unpublished, April 1938]. Offering a more wide-ranging proposal, Tim Buck, on behalf of the Communist Party of Canada, called for a “Canadian Bill of Rights” to protect “economic, social and cultural equality” for “the French-Canadian people,” “freedom of speech, press, assembly and religion,” “the right of labor [sic] to organize,” and voting rights based on an “unrestricted franchise.” Communist Party of Canada, Toward Democratic Unity for Canada: Submission of the Dominion Committee, Communist Party of Canada, to the Royal Commission on Dominion-Provincial Relations [unpublished, n.d.].
25 Because the Commission refused to hear from individuals, Lower and his co-authors briefly attached themselves to the Native Sons of Canada, a patriotic social club. Lower presented the brief to the Commission in Winnipeg on 8 December 1938. A sign of cozier times, the day ended with several members of the Commission drinking the night away at Lower’s house: Lower to Pickersgill, 12 December 1937, Queen’s University Archives [QUA], Lower Papers, Box 1, File A9,
authority – Lower and his colleagues sought to simultaneously centralize and liberalize Canadian constitutional law.

In approaching the Constitution from the perspective of citizens and their rights, Coyne, Lower, and MacFarlane prefigured a Canadian constitutional law with the rights of individuals as its dominant concern. Like so many of the other constitutional writers of the period, Lower, Coyne, and MacFarlane cast Confederation as a “transcend[ent]” moment of creation, but they were among the first to emphasize that the BNA Act crafted not just a nation, but “a new brand of citizenship.”

“[T]he citizen of Canada,” they declared, “has rights and duties by reason of the fact that he [sic] is a citizen, rights that cannot … be stopped or curtailed by provincial boundaries.”

They conceded that “[f]ederalism is a diversity in unity,” but stressed that nationhood demanded “essential unity in general matters,” including the attributes of citizenship.

These they drew from classical liberal thought – freedom of commerce, trade, mobility, religion, and expression, augmented by a cluster of political rights. Such rights, they argued, were required to fulfill the implicit needs of British-style parliamentary democracy.

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26 The Native Sons of Canada, ibid. at 6-8. The view of federalism advanced is what R.C.B. Risk has called the “model of nation”: see “On the Road to Oz,” supra note 18 at 405, 406.
27 The Native Sons of Canada, ibid. at 10. “[E]very inhabitant of this country who is born or naturalized here is a Canadian. He is not a ‘Quebecer’ or a ‘Saskatchewaner’ … Each is a Canadian citizen … whether he lives in the Magdalene Islands, Manitoulin or Manitoba” (at 7, 8).
28 Ibid. at 10.
29 “This country was founded,” they confidently asserted, “in the full flood of the British conception of liberty[,] the spirit of individual freedom … was the accepted foundation of the state.” Ibid. at 15, 16-18, 26-27.
30 Ibid. at 10, 19, 14-15. The precise status and content of constitutional citizenship remained hazy. While the authors stressed that constitutional authority in relation to citizenship lay under exclusive federal control, they also claimed that, as implicit constitutional features, only a constitutional amendment could alter them. This may have been a distinction without a
Depression, what propelled the analysis was a loss of confidence in the capacities of provincial legislatures to protect cherished British constitutional rights. “The spirit of the times has now changed,” Lower, Coyne, and MacFarlane argued, “and experience has shown that the liberties of the subject are no longer completely safe in the legislative hands of the province.”

In other words, unwritten traditions no longer sufficed: Canada needed entrenched constitutional rights to protect its citizens.

Lower’s trenchant capture of this idea drew considerable attention and much enthusiasm. His presentation received national press coverage, and the Winnipeg Free Press exalted the collaboration as a “brilliant exposition of the case for giving the Canadian parliament full sovereignty and making it the guardian of civil rights.”

Sparked by the glowing press accounts, Lower fielded nearly a dozen requests for a copy of his brief. The authors’ well-placed contacts in government also ensured that their arguments found their way into the Prime Minister’s Office, and into the hands of James Layton Ralston, the former (and

difference since the authors placed the unilateral power of constitutional amendment in federal hands.

31 Ibid. at 17.
32 “Native Sons Favor Abolishing Appeals to Privy Council” The Ottawa Evening Citizen (9 December 1937) 8; J.B.M., “Confederation Clinic, 1867-1937” Winnipeg Free Press (9 December 1937) 15 at 15. Praising Lower as an “able and studious constitutional expert,” the editors predicted that his brief might appear “50 years hence in a book of documents on the Canadian constitution.”
33 Requests flooded in from a diverse array of groups and individuals including the United Farmers of Manitoba, City of Moose Jaw, Attorney General of Manitoba, Canadian Chamber of Commerce, Canadian Institute of International Affairs, the Winnipeg Electric Company, Frank Underhill, Alexander Brady, and Jack Pickersgill. See QUA, Lower Papers, Box 1, File A9. The brief “seems to have aroused so much interest,” Lower reported to N.W. Rowell, “that the organization has made arrangements to have it printed.” Indeed, the appearance was so successful that the Native Sons of Canada organized a banquet and dance at the Fort Garry Hotel to honour Lower and his co-authors. See Lower Papers, Box 12, File B74.
soon to be again) Minister of National Defence. Away from politics momentarily, Ralston had returned to his Montreal-based law practice. When the constitutional arguments of Coyne, Lower, and MacFarlane crossed his desk in December 1938, he was preparing arguments in Reference re Alberta Legislation.

As it had two years earlier in the New Deal cases, in Reference re Alberta Legislation the Supreme Court encountered a constitutional reference case laden with politics. Following the theories of an obscure British economist, Major C.H. Douglas, William “Bible Bill” Aberhart rode to power in Alberta on a monetary policy promising the delivery of monthly government dividends to all Albertans. After a halting start, the government began to put in place the rudiments of that system toward the end of 1937. An unimpressed federal government directed the Governor General to disallow the social credit initiatives as invasions of federal jurisdiction. Undeterred, Aberhart’s government responded with further legislation distributing credit, taxing banks, and

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34 Lower had close friendships with two important members of Mackenzie King’s inner circle, Jack Pickersgill and Loring Christie. Pickersgill passed Lower’s brief to Christie and urged him to draft a memorandum to King responding to is arguments. See Pickersgill to Lower, 31 December 1931, QUA, Lower Papers, Box 1, File A9. On the Christie memo see MacLennan, supra note 18 at 32. It was J.B. Coyne who passed the brief along to Ralston.


36 See G.V. La Forest, Disallowance and Reservation of Provincial Legislation (Ottawa: Department of Justice, 1965) at 78-79.
regulating the press. Notoriously, An Act to Ensure the Publication of Accurate News and Information – the “Press Bill,” as it was known – required Alberta’s newspapers to publish government statements, and disclose the names and addresses of its writers, editorialists, or unnamed sources. Breaches of the Act were punishable with fines of up to one thousand dollars, or an order suspending the paper’s operation. As the party’s director of public relations, A.J. Allnutt, explained: “Alberta has made up its mind to control its own credit, and the control of the news, and the control of credit are concentric. That is to say, if you control one, you control the other.” Less certain, Alberta’s Lieutenant-Governor reserved all three bills for the constitutional review of the Governor General. In that moment, the novel economics and politics of Social Credit became a dispute of constitutional law.

To placate Aberhart, Mackenzie King agreed to send a reference case to the Supreme Court for an opinion on the constitutionality of the power of reservation and disallowance, and the bills themselves. On the first issue, the Court, with

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37 Namely, An Act to Amend and Consolidate the Credit of Alberta Regulation Act (Bill 8); An Act Respecting the Taxation of Banks (Bill 1); and An Act to ensure the Publication of Accurate News and Information (Bill 9).
38 An Act to Ensure the Publication of Accurate News and Information, ss. 3, 4. If bankers, financiers, and money barons were the principal targets of Social Credit’s attacks, the press was not far behind. The Calgary Herald, in particular, had been a relentless and “scornful opponent” of the premier and their editorials and cartoons had “more than once drove him to the breaking point.” See John A. Irving, “The Evolution of the Social Credit Movement” (1948) 14 Canadian Journal of Economics and Poli. Sci. 321 at 332; Gibson, “Bible Bill,” supra note 35 at 201.
39 Keeping alive the Press Bill’s unenviable tradition, recently Colin Mayes, a Conservative Member of Parliament, mused in a newspaper column that “[m]aybe it is time that we hauled off in handcuffs reporters that fabricate stories, or twist information.” He later retracted the view. See “Conservative MP retracts remarks about jailing media” The Globe and Mail (1 April 2006) A8.
40 Sections 55 and 90 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C 1985, App. II, No. 5 [Constitution Act, 1867], entitle the Lieutenant Governor to declare “that he
relative brevity – although with five overlapping sets of reasons – affirmed the constitutional power of the Lieutenant-Governor and Governor General to reserve and disallow legislation.41 Had the matter ended there, the episode might have amounted to little more than a footnote in Canadian constitutional history. In its companion judgment dealing with the constitutionality of the bills themselves, however, Chief Justice Duff and Justice Cannon offered “[o]ne of the most original and provocative contributions ever made to Canadian constitutional law”42 and began what became known as the implied bill of rights.

As Dale Gibson has observed, lawyers “of the highest calibre” appeared before the Supreme Court in Reference re Alberta Legislation.43 Edmonton lawyer Oliver Mowat Biggar represented Alberta, while Aimé Geoffrion appeared for the Attorney General of Canada, William Norman Tilley for the banks and national media, and James Layton Ralston for Alberta’s newspapers.44 Together, their facta contain the threads of argument Duff and Cannon used to weave their historic judgments.

Geoffrion, Tilley, and Ralston argued that the Press Bill was inextricably linked to Alberta’s other ultra vires social credit legislation and must fall alongside it. In the alternative, they added a secondary argument which provoked Duff’s and Cannon’s famous ruminations: the idea that freedom of the press fell exclusively under federal jurisdiction. Tilley argued that freedom of the press fell

reserves the Bill for the Signification of the Queen’s Pleasure” – a process outlined in section 56 which includes the power “to disallow the Act.”

42 Gibson, “Constitutional Amendment,” supra note 8 at 497.
both under the federal criminal law power, and, as a matter of national
importance, under the federal government’s authority for peace, order, and good
government. Geffrion and his co-counsel echoed both claims, but quoting
Blackstone and Story on the virtues of free expression, added that “democratic
institutions” – “the cardinal object of the British North America Act” – required a
“free press” “to function and to fulfill their great purposes.” These democratic
features, the lawyers argued, were necessarily incorporated into Canadian
constitutional law by the BNA Act’s preamble. But which level of government had
jurisdiction over parliamentary institutions and their attendant rights and
freedoms? Drawing on Viscount Haldane’s theory from Fort Frances Pulp &
Power v. Manitoba Free Press, Geffrion reasoned that, like the federal
government’s emergency powers, jurisdiction over parliamentary institutions
must reside within “that part of the constitution which establishes power in the
state as a whole ... namely, the general or residuary power of the Parliament of

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44 See generally “William Norman Tilley” and “Aimé Geffrion” in David Ricardo Williams, Just
Lawyers: Seven Portraits (Toronto: The Osgoode Society for Canadian Legal History, 1995) 56, 90.
45 SCCA, File no. 6589, Factum of the Canadian Press, Canadian Daily Newspapers Association,
and the Canadian Weekly Newspapers Association, Reference Re Alberta Legislation, at 4-5.
46 Supra note 39 at 75. Although he carved a large sphere for regulation of libels and slander,
Blackstone nonetheless asserted that “The liberty of the press is indeed essential to the nature of a
free state .... To subject the press to the restrictive power of a licensor ... is to subject all freedom
of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all
controversial points in learning, religion and government.” Wayne Morrison, ed., Blackstone’s
emphasized this line of argument in his oral hearing stressing that “[d]emocratic government and
a free press were inseparable.” “Imposition Fatal: Censorship Would Curb System, States
Counsel” Ottawa Evening Citizen (13 January 1938) 1 at 1.
47 [1923] AC 695 (P.C.) [Fort Frances]. In characterizing the peace, order, and good government
clause as essentially an emergency doctrine, Haldane nonetheless relied on Hegel’s theory of the
general will to suggest that situations in which the state was grievously threatened, jurisdictional
authority of a broad nature fell to the federal government from “that part of the constitution
which establishes power in the State as a whole.” See David Schneiderman, “Harold Laski,
Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century”
Canada.”48 Despite the adaptation of Haldane, the elements of Geoffrion’s argument – the resurrection of p.o.g.g., narrow characterization of provincial jurisdiction, and emphasis on constitutional democratic functionalism – mirrored the scholarly demands made by Frank Scott, Vincent MacDonald, W.P.M. Kennedy, and Arthur Lower. They were, in short, the theories of the newer constitutional law applied to the case at hand.

If the arguments presented by Tilley and Geoffrion gestured suggestively to the intellectual currents of the period, Ralston’s written submissions made the connection explicit, specifically citing the Coyne, Lower, and MacFarlane Rowell-Sirois brief. Reproducing significant portions of their argument nearly verbatim, Ralston’s factum called for judicial recognition of “the ‘fundamental rights’ of democratic citizenship.” Such “[i]nherent rights,” he argued, included “personal liberty’, ‘freedom of speech’, ‘freedom of the Press’, and ‘freedom of assembly.’” Echoing Lower’s claim that “the very conception of citizenship under Confederation must ... be uniform throughout the Dominion,” Ralston reasoned that such rights lay beyond provincial jurisdiction.49 In the context of a claim about federalism, Ralston argued that national citizenship necessitated individual rights and freedoms immune from provincial infringement. In oral argument, Ralston echoed Geoffrion’s claims that freedom of discussion and freedom of the

48 Supra note 39 at 78.
49 SCCA, File no. 6589, Factum of the Edmonton Journal, Calgary Herald, Lethbridge Herald, Edmonton Bulletin, Calgary Albertan, Medicine Hat News, and Alberta Division of the Canadian Weekly Newspapers Association, Reference Re Alberta Legislation, at 17. Ralston later thanked Lower for use of the argument. In his memoirs, Lower boasted that “Our brief ... was instrumental in securing an important victory for freedom of the press, an aspect of freedom of speech, and in building up a doctrine on free speech in Canada” Arthur R.M. Lower, My First Seventy-Five Years (Toronto: Macmillan of Canada, 1967) at 212 [Lower, Seventy-Five Years].
press were integral to the functioning of constitutional democracy. The fact that democracy required free speech, he asserted, granted implicit constitutional protection to such rights.

The Supreme Court agreed that Alberta’s three statutes were ultra vires. Notwithstanding the recent New Deal decisions which delineated a wide sphere of provincial jurisdiction over economic matters, the Court had little difficulty concluding that the constitutional authority for credit and banks resided within the federal government’s jurisdiction over trade and commerce, currency, banking, bills of exchange, interest, and legal tender. As for the Press Bill, a majority of the Court – Justices Kerwin, Crocket, and Hudson – recognized that the legislation raised “important constitutional questions” but preferred to declare it beyond provincial competence on narrow grounds. Characterizing the statute as “part of the same legislative plan” already invalidated, the “Press Bill,” Kerwin laconically surmised, “must suffer the fate of the whole.” Writing for himself and Justice Davis, Chief Justice Lyman Poore Duff agreed, but indicated the need for “further observations.” The obiter dictum that followed became “perhaps Duff’s most celebrated judicial statement.”

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50 See “Submits No Case Against 3 Bills of Alberta Government” The Ottawa Evening Citizen (14 January 1938) 2; “Says Press Stand Not Established” Edmonton Journal (14 January 1938) 9.


52 Subsections 91(2), (14), (15), (16), (18), (19), (20) Constitution Act, 1867, supra note 40. Alberta Legislation, supra note 9 at 120, per Duff C.J.C. (Davis J. concurring), at 162-63, per Hudson J.

53 Alberta Legislation, ibid.

54 Ibid., per Kerwin J. (Crockett concurring). Hudson J., separately, held the same.

55 Ibid. at 132.

Accepting the central premise advanced by Geoffrion and Ralston, Duff began his reasons with the observation that the constitution “manifestly contemplate[s]” democratic political institutions. More specifically, since the preamble “shows plainly ... that the constitution ... is to be similar in principle to that of the United Kingdom,” he opined that legislatures must operate in a manner consistent with the workings of British Parliament, namely, “under the influence of public opinion and discussion.” Duff asserted that democratic governments “derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism ... from the freest and fullest analysis and examination from every point of view.” In a felicitous turn of phrase, he characterized the “right of free public discussion of public affairs” as “the breath of life for parliamentary institutions.”

Having set the context, Duff proceeded as he would in any other division of powers case – ascertaining which level of government was authorized to legislate “in relation to” the “Matter” in question. Undoubtedly, the provinces’ capacious jurisdiction over “Property and Civil Rights” and “Matters of a merely local and private Nature” afforded constitutional authority for laws of defamation and sedition as well as regulation of the newspaper industry within the province. But the limit of provincial jurisdiction “is reached”, Duff held, “when the legislation [curtails] the exercise of the right of public discussion” in a manner “substantially [interfering] with the workings of the parliamentary institutions.”

57 Reference re Alberta Legislation, supra note 9 at 133.
58 Ibid.
59 Ibid.
60 Ibid.
61 Constitution Act, 1867, supra note 40, ss. 91, 92.
institutions of Canada.” Accepting Geoffrion’s interpretation of *Fort Frances Pulp & Power*, Duff agreed that the powers necessary to protect the constitution “as a whole” fell exclusively to the federal government. Since authority over the “workings” of legislatures and Parliament – including the expressive freedoms on which Duff held they depend – struck at the heart of constitutional governance, they must, by definition, be “vested in Parliament.”

Despite the tidiness of his reasons, Duff never acknowledged the tension lurking within his constitutional postulates. If the “right of free public discussion” was constitutionally essential to the workings of Parliament, should that fact not equally prevent both levels of government from infringing the ancillary freedom? Likely Duff shared the view of the federal government as less susceptible to the tyrannies of local cabals, but, in any event, the logic of underlying rights abutted uncomfortably the division of powers framework in which it was placed.

In concurring reasons, Cannon preferred to find the constitutional jurisdiction for Canada’s parliamentary institutions and their auxiliary rights in the federal government’s exclusive jurisdiction over criminal law. Like Duff, Cannon viewed the *BNA Act*’s preamble as incorporating the democratic practices of the United Kingdom into the Canadian constitution. And since “[d]emocracy cannot be maintained without its foundation,” he reasoned, the constitution must protect “free public opinion and free discussion throughout the

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62 *Ibid.*, ss. 92(13), (16)
63 *Reference re Alberta Legislation*, supra note 9 at 134.
64 *Supra* note 47.
65 *Reference re Alberta Legislation*, supra note 9 at 133.
nation.”67 Cannon also shared Duff’s view that the provinces could not impair the “fundamental right” of “Canadian citizen[s] ... to express freely his untrammelled opinion about government policies and discuss matters of public concern.”68 Perhaps even more forcefully than Duff, Cannon stressed both the individual and national character of rights entitlement. In repeatedly referring to these rights as inhering to citizens, Cannon framed a national community imbued with individual rights.

As well known as they are, Duff’s and Cannon’s celebrated reasons in Reference re Alberta Legislation have never really been explained. Even Duff’s admiring biographer is at a loss to account for the sudden appearance of liberal democratic theory given his career as a “judicial technocrat, not a judge of broad sweep and vision.”69 At least part of the explanation for their reasoning surely lies in the dim view the justices took of the legislation. They could have joined their colleagues in striking down the Act simply as an extension of the other ultra vires legislation, but clearly felt compelled to strike at the Act in the strongest of terms. Their discomfort with the Press Bill was linked, in these respects, with a thinly veiled concern for Social Credit’s broader economic agenda. Although Duff took pains to stress that the “wisdom” and “practicability” of the laws were not under judicial review, the lawyers challenging the legislation had succeeded in impressing upon the Court the radical nature of Social Credit’s economic

67 Ibid. at 146.
68 Ibid. at 146.
69 Williams, supra note 21 at 277.
policies. References to the *Social Credit Act* as proposing a “radical reorganization” and “new economic order,” as well as characterizations of the Press Bill as “autocratic” and “retrograde” give some indication of Duff’s and Cannon’s antipathies. While Frank Scott enthused about the “hour / Of new beginnings, concepts warring for power,” Duff and Cannon, among other liberal-conservative elites, greeted the prospect of dramatic economic change – be it socialist or populist – with wary circumspection. While their counterparts in the American Supreme Court struggled with whether the right to free speech and association extended to radicals, in *Reference re Alberta Legislation* the Supreme Court of Canada faced the much easier decision to deny elected “radicals” the ability to limit the expressive freedoms of mainstream newspapers.

With the consequences of the New Deal cases still reverberating, it is also worth remembering that the Supreme Court heard *Reference re Alberta Legislation* at a moment of heightened scrutiny of the judiciary. Duff and Cannon would have been aware of the vociferous reaction of Canada’s constitutional scholars to the New Deal cases, and may have hoped that expanding federal constitutional authority to include parliamentary institutions would quiet those voices decrying the decentralist bias of the Supreme Court and Privy Council.

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70 *Alberta Legislation*, supra note 9 at 106, 115. Geoffrion’s factum, in particular, made repeated references to the Social Credit promise to enact a “new economic order” within the province: supra note 39.


alike. If the image of federal authority was not, as Frank Scott would have wished, of a nation emboldened with broad powers of economic authority, it was nonetheless a vision of a national political community possessing constitutional significance. That is to say, in Reference re Alberta Legislation, Duff and Cannon sketched the vague outlines of a liberal democracy unified by parliamentary traditions and the liberal rights of its citizens. Far from a rejection of British constitutionalism, Duff and Cannon took pains to ground their vision in the British constitutional tradition. British philosophers – Blackstone and Mill most prominent among them – had stressed the constitutional significance of a free press, but there was little need for Duff and Cannon to refer to either philosopher directly – their views were simply implied in celebration and defence of “the British system, which is ours.”

But Duff and Cannon also framed their decision within the realm of citizenship, rights, and democracy because that is how lawyers argued the case before them. Geoffrion and Ralston devoted much of their written and oral submissions to framing the issue as one of constitutional rights. They did so, of course, not on account of any grand constitutional vision on their part, but rather because the concept of constitutional rights had both analytic and rhetorical appeal in the context of the dispute at hand. Ralston based his arguments about constitutional rights and citizenship on Lower’s submission to the Rowell-Sirois Commission. Less directly, the broader influences of the newer constitutional law are apparent in the focus on nation, central authority, and constitutional

76 Alberta Legislation, supra note 9 at 145.
functionalism. All of these themes were captured in the advocacy before the Court and, subsequently, in Duff and Cannon’s re-expression of them. In this way, the idea of an implied bill of rights finds its origins, like the politics and scholarship of rights alongside it, less in judicial pronouncements than in changing ideas of Canadian constitutional law.

II. American Influences: Justice Ivan C. Rand and the Implied Bill of Rights

Speaking in February 1960 to an audience of lawyers at the mid-winter meetings of the Canadian Bar Association, Frank Scott observed that “[c]onstitutionally speaking, the 1950s was predominantly the decade of human rights.”77 Scott had more in mind than Diefenbaker’s Canadian Bill of Rights, the federal government’s statutory enactment shortly to become law.78 A series of cases – no doubt well known to his audience: Boucher,79 Saumur,80 Switzman,81 Roncarelli82 – had redefined, Scott argued, Canadian constitutional law. At the centre of that transformative jurisprudence stood Justice Ivan Cleveland Rand;

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78 Just a month before Scott’s address, the Governor General had announced that the bill of rights would be placed before Parliament in the coming session. Over the preceding two years, the draft bill had been much discussed in legal circles including at an Ottawa conference in December 1958 marking the 10th year anniversary of the Universal Declaration of Human Rights. In addition, the Canadian Bar Review devoted an issue to the topic drawing the leading field of Canadian constitutional scholars, including Albert Abel, W.B. Bowker, Bora Laskin, W.R. Lederman, E. McWhinney, Louis Phillipe Pigeon, and Frank Scott. See House of Commons Debates (14 January 1960) at 2; (1958) 37 Canadian Bar Review; and Canadian Bill of Rights, S.C. 1960, c. 44.
79 Supra note 10.
80 Supra note 12.
81 Supra note 14.
82 Supra note 15.
widely regarded then and since as the preeminent “philosopher of Canadian constitutional law.” Among the legacies credited to Rand was the revival of the constitutional theories of Reference re Alberta Legislation. But like Duff’s and Cannon’s earlier reasoning, Rand’s constitutional theory of rights did not descend from the ether. Rather, Rand’s broad conception of federal jurisdiction over the rights and freedoms of citizenship emerged from the collision and interaction of American and Canadian constitutional ideologies presented to the Court by Glen How and Frank Scott.

Undoubtedly, some of the inspiration for the Canadian implied bill of rights was born in Rand’s studies at Harvard Law School. Born in Moncton, New Brunswick in 1884, Rand ventured to Cambridge, Massachusetts to pursue a formal legal education after graduating from Mount Allison University, and spending a summer working in a law office. Years later, Rand still recalled the “rush of feeling” of encountering the fabled buildings and courtyards of Harvard Law School. Although still deeply entrenched in the Langdellian tradition, the Harvard of Rand’s years was not immune to the intellectual currents of either the Progressive Era, or Roscoe Pound’s call for a “sociological jurisprudence.”

83 Edward McWhinney, “The Supreme Court and the Bill of Rights – the Lessons of Comparative Jurisprudence” (1959) 37 Can. Bar Rev. 16 at 36. McWhinney went so far as to anoint Rand “the most outstanding public law judge now sitting in the Commonwealth”.


Indeed, Pound himself joined the Harvard faculty in 1910 while Rand was a student and became an admired influence. Three decades later, Pound wrote to Rand upon his elevation to the Supreme Court and reminded him “that I prophesied great things for you back in 1912." Like Scott, Kennedy, and, to a lesser extent, Laskin, Pound’s sociological jurisprudence left an indelible imprint on Rand’s legal and constitutional thought. He never doubted, for example, the capacity of law to adapt to changing circumstances, or the role of judges in shaping the law to progressive ends. In his judicial career, the prescriptions and aspirations of sociological jurisprudence and, by extension, the newer constitutional law, formed the foundation of his constitutional theory.

Rand emerged from Harvard not only with an affinity for sociological jurisprudence, but with American constitutional idealism more broadly. Throughout his career, and especially in his extra-judicial writing, Rand displayed a keen facility with American constitutional history and case law. At one point he described the American Bill of Rights as “man’s highest attainment in constitutional establishment.” As and old friend recalled, “the legal giants Rand seemed to revere were North Americans – Brandeis and Holmes and Learned Hand.” All of this he imbibed while at Harvard. Brandeis, in particular, seems to have left a lasting influence on Rand. There is no evidence that the two crossed paths while Rand lived in Cambridge, but certainly Brandeis was a visible

87 Pound to Rand, 25 October 1943, quoted in Kaplan, Canadian Maverick, surpa note 84.
and renowned alumni with abiding connections to the Law School.\textsuperscript{91} What is clear is that Rand followed Brandeis’s subsequent judicial career closely, and tacitly absorbed much of his instrumental and metaphysical faith in free speech, among other constitutional values.\textsuperscript{92} Harvard instilled Rand with a life-long admiration for the American constitutional project. Its faith in judicial review, its focus on the individual, and its emphasis on the ideology of rights provided the foundations for Rand’s foray into new thinking about Canadian constitutional law.

It was not only Rand’s receptivity to American constitutional ideas that ensured their integration into the Canadian constitutional jurisprudence of the 1950s. After the war, Canadian Jehovah’s Witnesses adopted the litigation practices of their American brethren, and began to look to the Supreme Court to protect their religious freedoms.\textsuperscript{93} In doing so, they explicitly framed their cases as matters of constitutional rights. With the resumption of the Duplessis era in August 1944, harassment, arrests, and prosecution of Jehovah’s Witnesses returned to Quebec.\textsuperscript{94} The Witnesses, for their part, continued to court arrest, printing 1.5 million copies (a third of them in French) of the pamphlet, \textit{Quebec’s

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\textsuperscript{91} Philippa Strum, \textit{Louis D. Brandeis: Justice for the People} (Cambridge, Mass.: Harvard University Press, 1984) at 397. Having graduated from Harvard (1875-1878), and lectured occasionally there while carrying on his successful law practice in Boston, Brandeis remained closely tied to his alma mater as a prominent fundraiser, member of the Committee of Visitors, and general sounding board during Rand’s time there.
\textsuperscript{93} American Jehovah’s Witnesses had achieved the remarkable distinction of having convinced the American Supreme Court to reverse itself on whether the First Amendment protected the right of schoolchildren to refuse to salute the flag and pledge allegiance: \textit{Minersville School District v. Gobitis}, 310 U.S. 624 (1943) and \textit{West Virginia State Board of Education v. Barnette}, 319 U.S. 624 (1943).
\end{footnotesize}
Burning Hate for God and Christ and Freedom is the Shame of All Canada.\textsuperscript{95} The pamphlet purported to elicit sympathy by describing the “torrential downpour” of “violence and injustices rain[ing] down daily upon Jehovah’s Witnesses in Quebec,”\textsuperscript{96} but inflamed more than soothed with allegations of “Catholic hoodlus” and “French Canadian courts … under priestly thumbs.”\textsuperscript{97} In December 1946, police arrested Aimé Boucher for distributing those words in the town of St. Joseph de Beauce, and charged him with seditious libel.\textsuperscript{98} A jury convicted Boucher, a finding upheld on appeal.\textsuperscript{99} Framing the issue as one of American-inspired constitutional rights to freedom of speech and religion, Boucher and the Jehovah’s Witnesses appealed to the Supreme Court of Canada.

As in the political campaign for a constitutional bill of rights, the New York headquarters of the Watchtower Bible and Tract Society, and Hayden C. Covington, the sect’s leading counsel, directed the Canadian Jehovah’s Witnesses’ litigation strategies from abroad. In Canada, a number of counsel had represented the Witnesses during the war, including J.L. Cohen in Ontario and A.L. Stein in Quebec, but by the late 1940s, the Witnesses had turned over most

\textsuperscript{94} See Kaplan, \textit{State and Salvation,} supra note 17 at 232-33.
\textsuperscript{95} \textit{Ibid.} at 233.
\textsuperscript{96} \textit{Boucher v. The King,} [1949] S.C.R. at para. 50 [\textit{Boucher, 1949}.]
\textsuperscript{97} \textit{Ibid.}
\textsuperscript{98} R.S.C. 1927, c. 36, s. 133, as am. by S.C. 1930, c. 11, s. 2; S.C. 1936, c. 39, s. 4. \textit{Section 133 of the Criminal Code} outlawed the expression of “a seditious intention,” a concept of elusive meaning, but which had generally been defined under the common law as involving:

\begin{quote}
[\textit{A}n intention to bring into hatred or contempt, or to excite disaffection against … the government and constitution … or either House of Parliament, or the administration of justice … or to raise discontent or disaffection amongst His Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.]
\end{quote}

\textit{From Stephen’s Criminal Digest, quoted in Boucher, 1951, supra note 10 at 279.}
\textsuperscript{99} \textit{R. v. Boucher,} (1949) 95 C.C.C. 119.
of their legal affairs to a Toronto lawyer, William Glen How. How, assisted by two Montreal-based counsel, Stein and D.B. Spence, arrived at the Supreme Court to argue *Boucher v. The King* in the spring of 1949. The challenge before them was not only to convince the Court to acquit Boucher of his alleged libel, but to attack the constitutionality of the crime itself. There was little Canadian case law to support their claim about a Canadian constitutional right to free speech. Even Duff’s and Cannon’s *obiter* ruminations on the value of free expression offered little assistance since their ruling placed regulation of speech within the federal domain. Since the statute he challenged was the federal *Criminal Code*, How turned to the more absolute strictures of the American constitutional model. “The principle of freedom of speech, press and of conscience, are the same in Canada as in the United States,” his factum argued, “[t]he only distinction is that they are unwritten here, whereas they are written in the United States. This is a distinction without a difference.” Citing more than a dozen American constitutional decisions including the landmark rulings of Justice Brandeis, How urged the Court to “declare the meaning of the constitution ... in light of [its] many underlying concepts.” But there was another reason American law

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100 Working out of small offices in Toronto, How managed and litigated hundreds of cases involving Jehovah’s Witnesses. Late in 1945, just two years after his call to the Bar, How found himself before the Ontario Court of Appeal unsuccessfully attempting to persuade them that Jehovah’s Witnesses, as ministers of an organized religious denomination, should be exempted from military service (*Greenless v. Attorney-General for Canada*, [1946] O.R. 90-101 (C.A.)). How had more success later that year in *Donald v. The Board of Education for the City of Hamilton*, [1945] O.J. No. 524 (C.A.) in which the Court of Appeal awarded damages against a school board for unlawfully expelling a Jehovah’s Witness student who refused to salute the flag. Retaining John Cartwright, the Board of Education unsuccessfully sought leave to appeal to the Supreme Court, How’s first appearance before the Court and entanglement with Cartwright. He would have many others: Transcript of Oral Interview with William Glen How (9 July 1998) at 96, Archives Ontario [AO], C81 [How, Interview].

101 SCCA, File No. 07531, *Appellant’s Factum, Boucher* at 87.

102 Ibid.
featured so prominently in Boucher’s factum: it had been written by an American constitutional lawyer.

A few weeks before the hearing, How wrote to the Court seeking permission to allow “H.C. Covington ... to appear as associate counsel in the case.” “Mr. Covington,” the letter continued, “is well known in the United States and recognized as an expert on the subject of the Bill of Rights, freedom of the press and allied problems.”¹⁰³ In his terse reply, Chief Justice Rinfret observed that he failed to grasp “how a member of the New York and Texas Bar would be better qualified than a Canadian Counsel to explain to a Canadian Court the nature of our Canadian law.”¹⁰⁴ Still, Rinfret agreed to place the matter before his colleagues. Two days later he informed How that his fellow jurists had been of one mind: there was no need to hear from Mr. Covington. Not easily dissuaded, How wrote again. Stressing the many “international aspects” that would “bear on the argument of the appeal,” How admitted Covington had, in fact, written the factum. There is no record of the Court’s reply, but Covington did not argue the case. He did not have to – his arguments were already fully present.

The Court released its divided Boucher opinion late in December 1949. Chief Justice Rinfret along with Justices Kerwin and Tashereau ordered a new trial on the basis of deficiencies in the trial judge’s jury charge, but affirmed the possibility that a properly-charged jury could find a seditious intent within the pages of Quebec’s Burning Hate. On the issue of freedom of expression, Chief Justice Rinfret noted, as he had forecast in his earlier letter to How, that recourse

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¹⁰³ Letter, W. Glen How to Chief Justice Rinfret, 5 April 1949, SCCA, Court File No. 07531.
¹⁰⁴ Chief Justice Rinfret to W. Glen How, 7 April 1949, SCCA, Court File No. 07531.
to “pronouncements either in Great Britain, [or] the United States” was
“unnecessary.” The Canadian Criminal Code provided “the precise legislation on
the issue,” Rinfret held, and besides, “to interpret freedom as licence is a
dangerous fallacy.” In concurring dissents, Justices Rand and Estey (a fellow
Harvard graduate) took a narrower view of the crime’s essential elements,
emphasizing that a seditious libel must include an intention to “[inflame] the
minds of people into hatred ... in relation to government.” Finding no such
intention amidst the pamphlet’s honest, if “extravagant,” perhaps even
“ludicrous,” claims, Rand and Estey would have acquitted Boucher, but only
Rand took seriously the appellant’s plea to view the issue in the context of
constitutional rights.

American constitutional influences pulsed below the surface of Rand’s
judgment. Whereas Duff and Cannon had promoted free expression as a
necessary conduit of parliamentary democracy, Rand proposed that the
constitutional nature of free speech rested on broader foundations. “Freedom in
thought and speech and disagreement in ideas and beliefs, on every conceivable
subject,” he argued, “are of the essence of our life. The clash of critical discussion
on political, social and religious subjects has too deeply become the stuff of daily
experience to suggest that mere ill-will ... can strike down the latter with
illegality.” “The framework of freedom” and the ideas it “arouse[s]” he

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105 Boucher, 1949, supra note 96 at paras. 32, 34. Justice Kerwin agreed, finding United States
precedents unhelpful (at para. 46).
106 Ibid. at para. 86, per Rand J. (my emphasis).
107 Ibid. at paras. 93 (per Rand J.) and 132 (per Estey J.).
108 Ibid. at para. 85.
continued, “are part of our living.” Undoubtedly Rand viewed free speech as a political value of immense importance, but the metaphysical and individualistic justifications of free speech he quietly borrowed from Louis Brandeis. Although How’s factum had prodded him in this direction, Rand was more than amenable to American constitutional influences. He had long admired Justice Brandeis’s free speech jurisprudence, in particular his famous discussion in Whitney v. California. "Those who won our independence," Brandeis had held some two decades earlier,

believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty.

Rand had elsewhere lauded those words for their “richness of analysis” and “artistry of understanding,” but in Boucher, mindful of his colleagues expressed distaste for American constitutional authorities, Rand expressed his admiration by embracing the theory, but dispensing with the citation.

But Rand’s decision was shaped by more than a fondness for Brandeis. The theories of sociological jurisprudence are everywhere apparent in Boucher. The allusions to “life” and “daily experience” echo not only of Duff’s famous metaphor about freedom of speech as “the breath of life for parliamentary

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109 Ibid.
110 Whitney, supra note 73 at 376. See Rand, “Brandeis,” supra note 92 at 247 in which Rand lauds Brandeis’s analysis for its “richness of analysis” and “artistry of understanding.”
112 Whitney, ibid. at 247.
institutions,” but also W.P.M. Kennedy’s celebration of “the living notes in the newer constitutional law.”113 Like the Pound-influenced scholars of the newer constitutional law, Rand refused to view constitutional law as immutable.114 “[C]onstitutional conceptions of a different order,” he explained, “have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public.”115

With this new way of thinking about the purposes of constitutional government, Rand began to build a theory of Canadian constitutional rights.

Rand’s sociological prescriptions did not go unnoticed. Displaying marked, perhaps foolhardy, determination, How applied to the Court for a re-hearing on the grounds that the divided reasons in Boucher failed to produce a workable definition of seditious libel on which to re-try his client. Emphasizing the still uncertain state of the law – “What is forbidden speech?”116 – How commended Justice Rand’s decision as “a practical integration of the law to the facts of the day. If we are to have a living law it must be so treated.”117 The nervy gambit worked; the Court agreed to hear the appeal again, this time before a full

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114 Andrée Lajoie, among others, has rightly detected the strong influence of sociological jurisprudence on Rand’s constitutional thought. Although Rand shied away from using the term directly, both his extra-judicial writing and his judicial opinions reveal that, although he believed strongly in reasoning from first principles, he recognized that changing circumstances “call[] for new jural conclusions.” Maintaining what William Lederman called a “flexible and sophisticated” conception of precedent, Rand described the process in his own inimitable (and sometimes confounding) style as interpretive sensitivity to “the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.” See Lajoie, supra note 16 at 340; Boucher, 1951, supra note 10 at 286; W.R. Lederman, “Mr. Justice Rand and Canada’s Federal Constitution” (1979/80) 18 U.W.O. L. Rev. 31 at 36; and Reference re Farm Products Marketing Act of Ontario, [1957] S.C.R. 198 at 213.
115 Boucher, 1949, supra note 96 at para. 79.
116 SCCA, File No. 07531, Memorandum of Argument on Special Application for Re-Hearing, Boucher at 38.
complement of nine justices. If the Court’s decision to grant a re-hearing was notable,\(^\text{118}\) then the decision released in December 1950 was unprecedented.\(^\text{119}\) By a 5-4 majority, the Court reversed its original decision and acquitted Boucher.\(^\text{120}\) Now in the majority, Justices Rand and Estey maintained their original views, and were joined by Justices Kellock and Locke. Having changed his mind, Justice Kerwin delivered the swing vote.\(^\text{121}\) Aimé Boucher walked free.

Constitutional commentators greeted the decision with marked enthusiasm, as much for the style of reasoning as the outcome. Bora Laskin hoped it indicated “the spirit of [the Court’s] new status,”\(^\text{122}\) while Andrew Brewin placed Justice Rand’s decision among no less company than “the great

\(^{117}\) Ibid. at 40 [my emphasis].

\(^{118}\) In fact, three other cases during this period also had re-hearings, although at the request of the Court: L’Hopital St. Luc v. Beauchamp, [1950] S.C.R. 1; Dastous and Rose Canned Food Products v. Matthew Wells Co. Ltd., [1950] S.C.R. 261; and Welch, supra note 1.

\(^{119}\) If How had previously tried the patience of some members of the Court, he surely did so again by filing another prolix factum spanning nearly three hundred pages. Again, American case law figured prominently as did appeals to the abstract constitutional values of liberty and equality. At the oral hearing, How (this time appearing alone) took direct aim at Justice Kerwin’s original finding that evidence existed of “an intention on the part of the accused to create public disorder or promote physical force.” As How remembered afterwards, “you could have heard the paint dry ... here was ... this kid cross-examining a Supreme Court judge on his judgment.” Apparently, the Crown did not take the re-hearing seriously enough. When its lead counsel, Antoine Lacourciere, took ill just before the hearing, the Quebec government was content to let Charles Seguin, its Ottawa filing agent, appear on their behalf. In How’s retelling, “they didn’t ask for an adjournment or send anybody else, they just said, ‘the Jehovah’s Witnesses are a bunch of nuts, don’t bother.... [A]ll [Seguin] ever did was file papers and rent a hotel suite for the in-coming counsel. He was not a barrister, didn’t pretend to be, but they sent old Charlie up to argue this thing. He knew nothing about the case.” See Boucher, 1949, supra note 96 at paras. 45, 47; How Interview, supra note 100, (16 September 1998) at 133; SCCA, File No. 07531, Appellant’s Factum on Re-hearing.

\(^{120}\) As before, Chief Justice Rinfret and Justice Tashereau called for a new trial; joining them were Justices Cartwright and Fauteux. Justices Cartwright and Fauteux agreed with the new majority that ill-will in and of itself was insufficient to ground a claim in seditious libel. However, they would have ordered a new trial on the basis of available evidence of another possible definition of seditious libel – the “intention to bring into hatred or contempt, or to excite disaffection, against the administration of justice.” Boucher, 1951, supra note 10 at 333.

\(^{121}\) “Since the distribution of my reasons in this appeal,” Kellock admitted, “I have been persuaded that the order suggested by me is not the proper one to make.” “Whatever else might be said about the contents of the pamphlet,” he conceded, “there is not in it ... any evidence upon which a jury ... could find the appellant guilty of the crime with which he was charged.” Boucher, ibid. at
legal judgments of history.” As a strong proponent of a constitutional bill of rights, Brewin was obviously pleased by Rand’s robust conception of freedom of speech, but his case comment also applauded the majority’s flexible approach to precedent, the recognition that “new conceptions of government calls for new jural conclusions.” In short, Brewin read the majority and minority as parting company, not so much on the protection of civil liberties, but on the application of the tenets of sociological jurisprudence. What Brewin admired most about Boucher was what he assumed it revealed about the future of Supreme Court jurisprudence: “boldness in approach to authority, a scholarship in research and expression (aided no doubt by the arguments of counsel) and a sensitiveness to basic principles of law and democracy.” For his part, Frank Scott commended How “on a splendid victory.” Mostly, Laskin, Brewin, and Scott hoped that Boucher was a sign of a Court emboldened by its new status, and attentive to the constitutional changes they championed.

Rand continued his engagement with American constitutional ideas in Winner v. S.M.T. (Eastern). In that case, the Supreme Court denied New Brunswick’s constitutional authority to prohibit an out-of-province bus company from “embusing and debusing” passengers within the province. Joining the majority of his colleagues in finding passenger bus service a federal undertaking

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122 Laskin, ibid.
124 Ibid. at 200.
125 Ibid. at 202.
127 Winner, supra note 11 at 931.
128 Ibid.
under section 92(10)(a), Justice Rand nonetheless took the unprovoked opportunity to opine more broadly on the nature of the Canadian constitution. “The first and fundamental accomplishment of the constitutional Act,” Rand asserted, “was the creation of a single political organization ... the basic postulate of which was the institution of a Canadian citizenship.” For Rand, citizenship – its “rights and duties, the correlatives of allegiance and protection” – lay at the heart of modern democratic constitutionalism. Given its “national” character and significance, Rand reasoned, Canadian citizenship and its constitutive elements (in this instance the liberty to use public highways and the right to work) must, by definition, fall outside provincial jurisdictional scope.

As others have noted, Rand’s “rights of the Canadian citizen concept” bore more than passing resemblance to the moribund American constitutional privileges and immunities doctrine famously championed in dissent in *The Slaughter-House Cases*. On the basis of the Fourteenth Amendment’s guarantee that “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,” Justice Field had unsuccessfully argued for “the right to pursue a lawful employment ... without restraint other than such as equally affects all persons.” Without prompting from counsel or concurrence from colleagues, Rand found a similar set of

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129 *Constitution Act, 1867*, supra note 40.
130 *Winner*, supra note 11 at 918. Justice Estey agreed. “[T]here is but one Canadian citizenship,” he held, “and, throughout, the *British North America Act* contemplates that citizens ... shall enjoy the freedom of passage throughout the Dominion” (at 935).
constitutional protections within Canadian constitutional law. Essentially, Rand employed the constitutional limitations supplied by federalism to grant citizens certain rights – in this case economic and mobility liberties – against provincial interference. But, again, Rand was after more than American constitutional mimicry. With his evolving emphasis on citizenship, Rand aimed to shift the subject of constitutional discourse from allocations of governmental power to the legislated impacts of power on individuals. Citizenship allowed him to offer a subtle, but powerful, challenge to the orthodoxies of federalism analysis.

Brandishing Rand’s decisions in *Boucher* and *Winner*, How and the Jehovah’s Witnesses returned to the Supreme Court to challenge the constitutionality of a Quebec City bylaw which forbade distribution of written materials without permission from the chief of police. In *Saumur v. City of Quebec*, How proposed, for the first time, that Canadian constitutional rights could render a law unconstitutional.135 Submitting another voluminous factum and appendices of nearly one thousand pages, How posed the novel argument that neither the provincial nor federal government could infringe the constitutional right to freedom of expression and religion.136 If, in the alternative, such freedoms could be constrained, How proposed that only the federal government was authorized to do so. In addition, How relied on a pre-Confederation enactment of the Province of Canada which protected “the free exercise and enjoyment of Religious Profession and Worship.”137 Wielding the

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134 *The Slaughter-House Cases*, ibid.
135 *Saumur*, supra note 12 at 356.
136 SCCA, Court File No. 7899, *Appellant’s Supplementary Factum and Appendix, Saumur*.
137 14-15 Vict. C. 175. Quebec had passed similar legislation, *The Freedom of Worship Act*, R.S.Q. 1941, c. 307, but How was reluctant to rely upon it, since to do so would seemingly concede that a
religious protections of that Act in combination with his constitutional arguments, How pressed the Court to declare the Quebec City by-law “ultra vires, unconstitutional, illegal, null and void and be quashed and set aside for all legal purposes.”

Again, the Supreme Court grappled with the relevance of American constitutional sources. How pressed the Court to adopt American constitutional practices and theories because the natural rights principles on which they were based “trace back to the English common law as enunciated by Blackstone.”

Ignoring notions of parliamentary supremacy, How argued that natural rights and their absolute limitations on state authority united British, American, as well as Canadian constitutionalism. Baldly stated and under-theorized, such a view was unlikely to win over a majority of the Court, and the divided judgment released in 1953 revealed a majority still impatient with How’s American-derived arguments. “[A]u Canada,” Chief Justice Rinfret reminded,

contrairement à ce qui est aux États-Unis, le people n’a pas abdiqué le pouvoir de légiférer en la matière, et que le cadre dans lequel peut s’exercer la liberté que nous connaissons est susceptible d’être modifié par l’autorité legislative compétente.

“We have not a Bill of Rights such as is contained in the United States Constitution,” Justice Kerwin added, “and decisions on that part of the latter are
of no assistance.” But raising the issue facilitated Rand’s ability to write in the language of rights. As much as his colleagues denied the force of American constitutional arguments, the constitutional claims of Canadian Jehovah’s Witnesses insisted that the matter of legislated repression be addressed in constitutional terms, not only those derived from federalism, but Canada’s underlying constitutional rights as well.

In his reasons, Rand again avoided directly citing American case law, but in declaring Quebec City’s bylaw invalid, he continued to adumbrate a theory of constitutional rights that borrowed heavily from American constitutional law. “[F]reedom of speech, religion and the inviolability of the person,” Justice Rand explained, “are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.” Working a fine distinction, Rand suggested that the consequences of such freedoms could be limited by positive law, but that the freedoms themselves – with “only minor exceptions” – could not. Implicitly, Rand accepted How’s argument that a core sphere of freedom lay beyond the constitutional jurisdiction of either level government. Rand, however, avoided dealing with the transformative implications of that theory by deciding the case on more narrow grounds. Explaining that both religious and expressive freedoms – as matters of national history, dimension, and concern – generally fell under federal jurisdiction, Rand declared Quebec’s bylaw

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141 Ibid. at 324.
142 Ibid. at 329.
143 Ibid.
insufficiently “definite and precise” to qualify as provincial.\textsuperscript{144} As a result, Rand found the legislation \textit{ultra vires}.

The \textit{Saumur} decision exposed the fractures dividing the 1950s Supreme Court. The Court’s seven separate judgments defy easy synthesis – even judges agreeing with one another felt compelled to write their own subtly distinct reasons.\textsuperscript{145} Justices Kellock, Estey, Locke, and Kerwin joined Rand in finding the bylaw invalid, but a majority refused to accept the view of federal jurisdiction over religious and expressive freedoms.\textsuperscript{146} Part of this surely had to do with an aversion to the American constitutionalism Rand’s colleagues detected in his reasoning. Another reason may have been that the state of Rand’s constitutional theorizing in \textit{Saumur} remained inchoate or, at the very least, unpersuasive to judicial minds for whom parliamentary supremacy and federalism remained the defining features of Canadian constitutional law. To succeed, the implied bill of rights had to be more than simply judicial adoption of the American Bill of Rights.

\textsuperscript{144} Ibid. at 330.
\textsuperscript{145} “The layman may be pardoned if the situation passes his comprehension,” Laskin observed dryly. Bora Laskin, “Our Civil Liberties: The Role of the Supreme Court” (1954-55) 61 Queen’s Quarterly 455 at 468.
\textsuperscript{146} Kellock, Estey, and Locke joined Rand in finding that interference with expressive freedoms generally lay beyond provincial competence. Justice Kerwin, however, relied exclusively on the Province of Canada’s pre-Confederation statute which protected “the free exercise and enjoyment of Religious Profession and Worship” to rule Quebec’s bylaw invalid. He and the dissenting judges therefore formed a majority in finding provincial jurisdiction under s. 92(13) for matters related to religious and expressive freedoms. As a result, the victory for the Jehovah’s Witnesses was short-lived. Quebec quickly amended its \textit{Freedom of Worship Act} to outlaw the communication of “abusive or insulting attacks against the ... religious beliefs of any portion of the population of the Province.” See \textit{An Act respecting freedom of worship and maintenance of good order}, S.Q. 1953-54, c. 15, s. 2, amending R.S.Q. 1941, c. 307. The Supreme Court upheld the Court of Appeal’s dismissal of the Jehovah’s Witnesses constitutional challenge on the grounds that Quebec civil procedure did not allow for a declaratory action in the absence of a personal interest in the dispute: \textit{Saumur v. Quebec}, [1964] S.C.R. 252. See also Kaplan, \textit{State and Salvation}, supra note 17 at 243-44.
Scholars have always assumed but never deeply traced the influence of American constitutional law on Rand’s constitutional thought. Undoubtedly, Rand’s American Harvard experience predisposed him to American constitutional theories in general and those of Justice Brandeis in particular. American ideas appealed to him not only because he encountered them as a law student, but also because they resonated with a broader political theory grounded in individualism, liberalism, and a substantive conception of the rule of law. But Rand’s predispositions would not, in and of themselves, have produced the ideas that became the implied bill of rights. Rand required constitutional cases to construct his theory and, perhaps too, a litigant pushing the Court to embrace American constitutionalism. While a majority of the Supreme Court rejected such overtures, Rand took up the Jehovah’s Witnesses invitation to articulate the foundational norms of Canadian constitutionalism. Yet Rand clearly adapted, as much as he adopted, American constitutional ideas in proposing that Canadian constitutional law could be defined by theories of citizenship, original freedoms, and responsive and expanding federal jurisdiction. As much as he drew from American theories of constitutional rights, he also borrowed from Pound’s theories of sociological jurisprudence to justify the sense that “constitutional conceptions of a different order” called for interpretive constitutional change. In other words, Rand’s theories of implied constitutional rights necessarily involved American constitutional ideas playing out in a Canadian constitutional context.

\[147\] Boucher, 1949, supra note 96 at para. 79.
III. “Inside and Under”: Rights in the Canadian Context

As Pierre Legrand reminds us, foreign legal ideas – whether in the concrete form of rules, or in the more amorphous state of ideology – take domestic shape in ways particular to the legal context and culture of that jurisdiction.148 In the case of the implied bill of rights jurisprudence, American constitutional ideas necessarily adapted to Canadian constitutionalism in the broadest of senses. Once again, Frank Scott stood at the centre of this transition. In the 1930s, Scott had been a key figure in the newer constitutional law; in the 1940s, he had contributed to the scholarship of rights; in the 1950s, donning “bib and gown,”149 he reframed his constitutional ideas into submissions of constitutional law.

Scott’s foray into constitutional litigation began from the wings but quickly gravitated to centre stage. Glen How initially sought out Scott’s advice on the Jehovah’s Witnesses political campaign for a bill of rights,150 but by the time Boucher reached the Supreme Court for re-hearing, Scott was also advising on How’s Supreme Court litigation.151 With Scott’s influence, How began to integrate more Canadian constitutional sources into his arguments. In Saumur, How blended his American constitutional arguments with references to Sir John A. Macdonald and the Confederation debates, the Senate’s O’Connor Report, Frank

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Scott’s constitutional scholarship, and a trio of Supreme Court of Canada jurisprudence: Reference re Alberta Legislation, Winner, and Boucher.\textsuperscript{152} It was, in fact, Canadian constitutional sources that won over the majority in Saumur.

Citing the Quebec Act of 1774, the Constitutional Act of 1791, and the Act of Union of 1840, Justice Locke found ample evidence to support the view that “liberty of conscience is one of the fundamental principles of our Constitution.”\textsuperscript{153}

In Chaput v. Romain,\textsuperscript{154} Scott similarly pushed How to frame his tort claim against members of the Quebec provincial police in terms consonant with British, and by extension, Canadian constitutional law.\textsuperscript{155} That constitution, How now argued, protected religious liberties not as a derivative of American constitutional theory, but because the BNA Act’s preamble placed British civil liberties beyond the competence of either the provincial or federal governments. “Parliament,” How argued “could not abolish itself” and neither, so the reasoning followed, could it abrogate through legislative or executive action the personal liberties “essential to the operation of a democratic constitution.”\textsuperscript{156} A majority of the Court side-stepped those constitutional issues, but allowed the appeal, rejecting the police officers’ statutory defence for failing to demonstrate good

\textsuperscript{151} See e.g. How-Scott correspondence: 20 December 1950, 21 December 1950, 2 March 1951, 16 March 1951, LAC, Scott Papers, MG 30, D211, Vol. 10, H-1222.

\textsuperscript{152} SCCA, File No. 7899, Appellant’s Supplementary Factum, Saumur.

\textsuperscript{153} Saumur, supra note 12 at 372, per Locke J. citing Duboc. J. in dissent in Barrett v. City of Winnipeg (1891), 7 M.R. 273.

\textsuperscript{154} Chaput, supra note 13. In September 1949, without warrant or cause, three members of Quebec’s provincial police had entered the home of Esmier Chaput, seizing religious literature and forcefully breaking up an otherwise peaceful gathering of Jehovah’s Witnesses. Chaput sued in damages, a claim the trial and appeal courts denied on the basis that the statutory protections of the Magistrate’s Privilege Act barred the action. See Chaput v. Romain [1954] B.R. 794 Q.C.Q.B. As How admitted to Scott, “we are really trying to use the law of tort to enforce the law of the constitution.” How to Scott, Letter, (2 January 1954), LAC, Scott Papers, MG 30, D211, Vol. 16, H-1275.

faith in the exercise of their duties. Nonetheless happy with the result, Scott thanked How for the opportunity to work on such “spectacular and important cases” involving “the fundamental freedoms on which our constitution is supposedly based.” Scott, however, had important cases of his own.

As counsel in his own right, Scott was involved in two of the Supreme Court’s most famous post-war decisions, *Switzman v. Elbling* and *Roncarelli v. Duplessis*. The latter, of course, gave rise to “one of the classic judgments in Canadian public law,” and continues to be admired among scholars, lawyers, and law students for Rand’s exposition and application of the rule of law. Although often linked temporally and, to a certain extent, thematically to the decade’s other landmark constitutional cases, *Roncarelli* is a case about the principles of administrative law far more than it is about individual constitutional rights. The *Switzman* case, on the other hand, which began later but ended earlier, represented the high-water mark of the Supreme Court’s acceptance of the idea of implied constitutional rights.

As the students in Professor Scott’s classes in Constitutional Law knew well, Scott regarded Quebec’s infamous *Padlock Act* as unconstitutional. The Act entitled the attorney-general to order the padlocking of any dwelling on suspicion that its occupant was involved in the printing, publishing, or distribution of

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156 SCCA, File No. 08247, *Supplementary Factum, Chaput* at 6.
157 *Chaput, supra* note 13 at 859.
159 *Switzman, supra* note 14.
material propagating “Communism or Bolshevism.” On 27 January 1949, the
Quebec government ordered John Switzman’s Montreal apartment padlocked for
one year. His unimpressed landlady sued Switzman for the lost rent. Having lost
in the courts below, Switzman’s lawyers, Abraham Feiner and Albert Marcus,
approached their former professor to assist them as they began to prepare their
Supreme Court appeal. Initially reluctant, Scott agreed to write the factum and
argue the matter. “I couldn’t run away,” he conceded. “Had I been teaching
nonsense for eighteen years?”

In Switzman, Scott channelled more than two decades of thinking and
writing about Canadian constitutional law into his submissions. Unlike How,
Scott had no need for American constitutional authorities. Instead, he could rely
on a Canadian constitutional theory begun by Justices Duff and Cannon in
Reference re Alberta Legislation and cited by four judges in Saumur that the
BNA Act’s preamble “imports into our constitutional law and practice the
principles and conventions of the British Constitution.” Those “principles and
conventions” included “the political or public right of freedom of speech and
freedom of the press.” Shorn of How’s prolixity, Scott’s pithy factum argued
that the Padlock Act contravened the division of powers as an invasion of the
federal government’s jurisdiction over both criminal law and the “fundamental

162 Act Respecting Communist Propaganda, S.Q. 1937, c. 11.
163 Djwa, Politics of the Imagination, supra note 17 at 299.
164 SCCA, File No. 08263, Appellant’s Factum, Switzman at 25, 28. Scott repeated his arguments
in the Alan B. Paunt Memorial Lecture in the spring of 1959; published as F.R. Scott, Civil
Liberties & Canadian Federalism (Toronto: University of Toronto Press, 1959) [Scott, Civil
Liberties].
165 SCCA, File No. 08263, Appellant’s Factum, Switzman at 32.
rights of Canadian citizens.”\textsuperscript{166} Despite the division of powers framework, the characterization of freedom of speech as a constitutional right dominated the written argument. “[T]he Act, in its pith and substance, its avowed purpose and obvious effect,” Scott argued, “is simply a prohibition of freedom of speech, of assembly and of the press.”\textsuperscript{167} “[S]uch rights,” he elaborated, “constitute the very essence of freedom under the law of the Canadian Constitution, and are of such extraordinary magnitude and importance as to be completely beyond the competence of a provincial legislature.”\textsuperscript{168} “[A] province,” Scott concluded, “cannot ... deprive Canadian citizens of fundamental ‘constitutional’ rights granted by the B.N.A. Act ... and hallowed by the most sacred traditions in our constitutional history.”\textsuperscript{169} In effect, Scott urged the Court to recognize the rights-protecting norms inherent in the centralized features and historic practices of Canadian constitutional law.

Counsel for Quebec’s attorney-general was only too glad to argue the case on the basis of British and Canadian constitutional theory. “Under our constitution which, on this point, is similar to the British constitution,” L.E. Beaulieu stated, “there is no liberty which is over and above the legislative competency of the Dominion Parliament or of the provincial legislatures. Under both constitutions, freedom is ‘freedom governed by law’ .... There is no absolute freedom.”\textsuperscript{170} As for provincial jurisdiction, “the so-called civil liberties are but

\textsuperscript{166} \textit{Ibid.} at 7.
\textsuperscript{167} \textit{Ibid.} at 14.
\textsuperscript{168} \textit{Ibid.} at 26.
\textsuperscript{169} \textit{Ibid.} at 34. The single quotation marks around constitutional are revealing. As confidently as Scott made his claim, his punctuation sent subtle signal of the still uncertain state of the argument.
\textsuperscript{170} SCCA, File No. 08263, \textit{Respondent’s Factum, Switzman} at 34.
civil rights .... If freedom of worship is a civil right, the same may be said of the freedom of speech.”  

Beaulieu had precedent on his side. In addition to the majority view in *Saumur*, which placed issues of religious freedom within provincial jurisdiction, Quebec could rely on *Fineburg v. Taub*, a previously unsuccessful challenge to the *Padlock Act*, as well as *Bédard v. Dawson*, a thirty-year old Supreme Court precedent upholding Quebec legislation closing “disorderly houses” as an appropriate exercise of provincial jurisdiction over property and civil rights.

In the spring of 1957, the Supreme Court released its decision. Only Justice Taschereau sided with Quebec. In separate reasons, Chief Justice Kerwin and Justices Cartwright, Fauteux, and Nolan (joined by Locke) overruled *Fineburg*, distinguished *Bédard*, and declared the *Padlock Act* an *ultra vires* infringement of federal jurisdiction over criminal law. “The validity of the statute was attacked upon a number of grounds,” the Chief Justice acknowledged, “but, in cases where constitutional issues are involved, it is important that nothing be

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172 *Fineberg v. Taub* (1939), 73 C.C.C. 37 at 48 (Que. K.B.).
174 Accepting the provincial nature of the legislation, Taschereau reminded that “[c]es libertés ... ne sont pas des droits absolus” and that “la sévérité d’une loi adoptée par le pouvoir compétent ne la marque pas du caractère d’inconstitutionnalité.” In addition, Taschereau’s view of the need to repress communism remained enmeshed in his memory of the spy scandal: 

*L’expérience, il nous est permis d’en prendre une connaissance judiciaire, nous enseigne, en effet, que des Canadiens, il y a moins de dix ans, malgré les serments d’allégeance qu’ils avaient prêtés, n’ont pas hésité au nom du communisme à violer les secrets officiels, et à mettre en péril la sécurité de l’État. La suppression de la diffusion de ces doctrines subversives par des sanctions civiles, est sûrement aussi importante que la suppression des maisons de désordre. Je demeure convaincu que le domaine du droit criminel, exclusivement de la compétence fédérale, n’a pas été envahi par la législation en question, et qu’il ne s’agit que de sanctions civiles établies pour la prévention des crimes et la sécurité du pays.*

*Switzman*, *supra* note 14 at 299, 300 [my emphasis].
said that is unnecessary.” Justice Rand, in reasons adopted by Justice Kellock, once again ignored that advice. In Switzman, Rand explored still further his constitutional conception of personal liberties, citizenship, and democracy. On division of powers grounds, Rand found the Padlock Act invaded the exclusive federal domain over both “citizenship status” and parliamentary institutions: the former because free speech “is little less vital to man’s mind and spirit than breathing is to his physical existence,” the latter because democracy depended on “government by the free public opinion of an open society.” On this basis – as in Saumur – Rand declared the provincial law unconstitutional.

Elsewhere in his reasons, however, Rand strained to cast the division of powers as a normative commitment to rights. Portraying Quebec’s position as premised on a flawed view of “unlimited legislative power ... untrammelled by constitutional limitation,” Rand doubted whether “in our federal organization power absolute in such a sense resides in either legislature.” Constitutional allocations of power were, Rand argued, limitations of power. Sections 91 and 92 produced, he suggested, a visual image of that restraint: “a pattern of limitations, curtailments and modifications of legislative scope within a texture of interwoven and interacting powers.” Far from absolute legislative power, Rand argued that Canada’s constitutional arrangements produced partial and relative authority embedded within, and dependent upon, express and implied limits. Although Rand never explicitly placed any subject beyond both provincial and federal

\begin{itemize}
\item \textsuperscript{175} Ibid. at 288.
\item \textsuperscript{176} Ibid. at 306-07. “The aim of the statute,” Rand suggested, “is ... to prevent what is considered a poisoning of men’s minds, to protect him, in short, from his own thinking propsities.” See also Ivan C. Rand, “Man’s Right to Knowledge and Its Free Use” (1953-54) 10 U.T.L.J. 167 at 167.
\item \textsuperscript{177} Switzman, \textit{ibid.} at 302 [my emphasis].
\end{itemize}
authority, he gestured to a constitutional theory which, in practice, produced that result. For Rand, in the absence of entrenched rights, federalism supplied the means by which governmental power might yet yield to the new ideas of constitutional rights. He did this not only by taking jurisdictional authority from one level of government and placing it with another, but by suggesting that in the constitutional weave of limits and constraints resided individual constitutional rights.

In these respects, Justice Rand gladly adapted the views of Chief Justice Duff, a legal mind he deeply admired. In addition to the underlying rights supporting parliamentary institutions, Rand articulated a constellation of rights and freedoms encircling an amorphous and flexible conception of citizenship. For Rand, citizenship incorporated fundamental aspects of personhood including equality, freedom of movement, freedom of religion, and freedom of speech. Placing the imputed aspects of citizenship within exclusive federal jurisdiction, Rand offered the means to declare unconstitutional the repressive provincial legislation he thought inimical to a modern constitutional democracy. But citizenship simultaneously afforded him a tool to nationalize and constitutionalize the legal subject. Which is to say, despite the division of powers framework, Rand shifted the constitutional focus away from the legislative capacities of government to the liberal needs and aspirations of individual citizens in civil society.

178 Ibid. at 304.
While Rand gestured ambiguously, Justice Abbott addressed the matter directly. Appointed to the Supreme Court in 1954, Abbott, an Anglophone from Quebec, had been a prominent federal politician having held the position of minister of finance for nearly a decade under Louis St Laurent.\footnote{He was, Snell and Vaughan point out, “probably the best-known and one of the most highly regarded federal politicians after Louis St Laurel himself.” Snell & Vaughan, \textit{supra} note 2 at 199.} His appointment to the Court had received a mostly cool reception given his lack of judicial experience and the crassness of patronage on display.\footnote{\textit{Ibid.} at 199-200. Certainly, Glen How was no early fan. Frustrated by Abbott’s comportment during the \textit{Chaput} hearing, How bluntly suggested to Scott that “Abbott … and Cartwright should be tied together and dropped some place, preferably where the water is deep. In my view Abbott is most lacking in judicial sense and also in the dignity that is required for his position.” How to Scott, 14 May 1955, LAC, Scott Papers, MG 30, D211, Vol. 16, H-1275. By contrast, Edward McWhinney, a future Liberal politician himself, looked positively on Abbott’s “vast public experience” and characterized his appointment as “a good sign for the future development of Canadian constitutional jurisprudence.” Edward McWhinney, “Correspondence: Criteria for Appointments to the Bench in Canada” (1955) 33 Can Bar Rev. 979 at 979.} Abbott’s decision in \textit{Switzman}, however, quickly endeared him to civil liberties enthusiasts. After praising Scott’s “very able argument,” Abbott cited Duff in \textit{Reference re Alberta Legislation} for the proposition that “free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to debate such matters … are essential to the working of a parliamentary democracy.”\footnote{\textit{Switzman}, \textit{supra} note 14 at 325-27.} The right of citizens to “explain, criticize, debate and discuss in the freest possible manner” political issues “cannot be abrogated by a Provincial Legislature” with the exception of defamation and similar protections of “private rights.”\footnote{\textit{Ibid.} at 327-28.} But Abbott went still further. Because parliamentary features were entrenched both explicitly in the \textit{BNA Act} and implicitly (via the preamble), Abbott opined that “as our constitutional Act now stands, Parliament itself could not abrogate this rights
of discussion and debate.” Abbott legitimately reasoned that if the rights at issue were indeed constitutional, then only constitutional amendment could alter them. Abbott’s view was premised on a particularly robust view of implied constitutional rights, but also the notion that the federal government could not unilaterally amend the Constitution.

From where did Justice Abbott draw his ideas that certain rights lay beyond both provincial and federal competence? Although Scott did not press the argument in his factum, Glen How had put the concept before the Court in both Saumur and Chaput. Abbot was not yet on the Court in Saumur, but he would have read How’s argument in Chaput that

Parliament ... is not entitled, any more than are the Provinces, to destroy the constitution which has set it up. The destruction of [freedom of assembly and religion] would substantially mean the destruction of the democratic constitution itself and therefore ... even Parliament cannot destroy these rights.

That idea was present enough in Switzman that the government of Quebec felt compelled to argue against it. Although Abbott alone endorsed this strong version of the implied bill of rights, Rand appeared at least sympathetic to that view. Perhaps conscious of the taint of patronage clinging to his appointment, Abbott sought to demonstrate his judicial independence, and willingness to constitutionally circumscribe not only provinces but the federal government as well. It may also be that, as a long-time politician, Abbott had a genuine commitment to protecting free speech as an essential element of the democratic

184 Ibid. at 328.
185 SCCA, File No. 7899, Appellant’s Appendix, Saumur, at 23-25; File No. 08247, Supplementary Factum, Chaput at 5-6.
186 Supplementary Factum, ibid.
187 SCCA, File No. 08263, Factum of the Respondent, Switzman at 34.
process. Finally, Abbott’s views also had the advantage of logic. There was no
textual or theoretical reason to place implied and unwritten constitutional
features under federal, as opposed to provincial, control. If the BNA Act’s
preamble did import foundational constitutional features into Canada’s
constitutional law, those features should be changeable only by formal
amendment. Whatever the background reasons, it is clear that Scott’s cogent and
compelling advocacy pushed Abbott into new constitutional territory.

Scott won in Switzman, but a majority of the Court continued to reject the
notion of implied constitutional rights. Although Andrew Brewin rated Switzman
“another landmark” and celebrated the “bill of rights embodied in Canada’s
written constitution,” in retrospect, the decision equally signals the failure of
implied constitutional rights. In the two decades since its first articulation, the
idea that a sphere of individual rights and freedoms lay beyond legislative
jurisdiction had never been adopted by a majority of the Supreme Court. As the
new decade began, “[t]he open activism of the fifties was succeeded by cautious
pragmatism. Terse and technical exposition replaced declamation.” When
Scott returned to the Court in 1963 to argue that British Columbia legislation
which precluded unions from making political donations contravened
fundamental constitutional rights, he lost. When the Court revisited the idea of

188 Brewin, “A Bill of Rights Implicit,” supra note 8 at 557. Scott’s students thought so – they
lavished him in praise and gifted him a large cardboard Padlock to commemorate his victory. The
Padlock hung in Scott’s office for the rest of his career. See the melancholic “On Saying Goodbye
to My Room In Chancellor Day Hall” in Scott, Collected Poems, supra note 72 at 218. See also
Djwa, Politics of the Imagination, supra note 17 at 303.
189 Dale Gibson, “And One Step Backward: The Supreme Court and Constitutional Law in the
Sixties” (1975) 53 Can Bar Rev. 621 at 622.
190 Oil, Chemical and Atomic Workers International Union, Local 16-601 v. Imperial Oil Ltd.,
[1963] S.C.R. 584 [Oil, Chemical and Atomic Workers]. Rejecting Scott’s argument that the
legislation “curtail[ed] the fundamental rights of Canadian citizens essential to the proper
an implied bill of rights more than a decade later, Justice Beetz, for the majority, held that no individual rights are “so enshrined in the Constitution as to be beyond the reach of competent legislation.” 191 Switzman represents, in these respects, the end rather than the beginning of a journey.

A cluster of reasons explain the pre-Charter fate of implied constitutional rights. Most significantly perhaps, the death of Justice Estey in 1956, and the retirement of Justice Rand in 1959, silenced two of its strongest proponents.192 Neither Justice Abbott, nor any of his colleagues, picked up the mantle.193 As well, a succession of Chief Justices – Rinfret, Kerwin, and Taschereau – strenuously disagreed with the theory, and in the absence of Rand, their views began to dominate. More practically, as cases involving Jehovah’s Witnesses functioning of parliamentary institutions,” Justices Martland, Tashereau, Fauteux, and Ritchie held the law a valid exercise of provincial jurisdiction. In dissent, Justices Cartwright, Abbott, Judson would have relied on Switzman to find the law unconstitutional.


dried up, constitutional litigation turned away from the legislated repressions that dominated the 1950s. Moreover, competing ideas began to disturb the centralizing consensus proposed by the scholars of the newer constitutional law. This view was always, of course, anathema in Quebec, and it is no coincidence that no francophone judges ever accepted any version of the implied bill of rights. In Quebec in the 1950s, the “crisis” in federalism continued to be the perceived invasion of the federal government into provincial spheres of jurisdiction. But even in English-Canada, the emergence of a new scholarly voice in William Lederman began to suggest that “balanced” federalism offered the more appropriate constitutional model for Canada. In the ebbs and flows that have characterized the history of Canadian federalism jurisprudence, it is not surprising that a period of more cautious retrenchment followed a decade characterized by an expanding conception of federal power.

Yet “like freeway proposals and snakes,” Peter Hogg writes, “the theory [of implied rights] does not die easily.” With the adoption of the Canadian Charter of Rights and Freedoms, liberal rights theories and unwritten constitutional principles have returned to places of constitutional prominence

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and controversy. Looking to its past, the Supreme Court has frequently turned to its constitutional jurisprudence of the 1950s to illuminate, historicize, and legitimate the entrenched rights that define so much of the Canadian constitutional present. But even in their own time, the implied bill of rights reflected changing ideas in Canadian constitutional thought. Despite their status as *obiter dicta*, the conception of rights and nation offered in *Reference re Alberta Legislation*, *Boucher*, *Saumur*, and *Switzman* drew wide notice from the legal community, virtually all of it positive. Reacting as much to the style as the content, scholars celebrated the creation of a distinctly Canadian jurisprudence seemingly attuned to their desire for nationalist symbols of constitutional change. Civil liberties enthusiasts embraced the implied bill of rights because it offered through creative interpretation what they had failed to secure politically, namely, a constitutional bill of rights to protect individual civil liberties. But more generally, the implied bill of rights spoke to the hope that a Supreme Court, freed from Privy Council oversight, might forge a new constitutional identity based on citizenship, rights, and nation.

The implied bill of rights emerged not from a vacuum but from within the dynamic context of a Canadian constitutional thought and culture in transition. As we have seen, Canadian Jehovah’s Witnesses – as the frequent targets of legalized abuse – drew heavily upon the constitutional tactics and ideals of their American brethren. In doing so, they channelled American constitutional ideas

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directly into Canadian constitutional political and legal discourses. But the implied bill of rights did more than import the logic of American constitutionalism. As Frank Scott explained, the development of the idea of a Canadian bill of rights – whether express or implied, statutory or constitutional – “took place inside and under” the Canadian constitution.200 By that he meant that the on-going “evolution” of constitutional ideas remained anchored to the constitutional structures and practices – federalism, parliamentary supremacy, and historical rights protection – that gave shape to Canadian law and the legal thought within it.201 Whatever its triumphs or failures, Scott implied, the idea of constitutional rights, implied or entrenched, was always going to be our own.

**Conclusion**

It was “constitutional conceptions of a different order” that made the implied bill of rights possible.202 As the Supreme Court of Canada entered a new era of supremacy, the Court faced constitutional demands for change over stability, and individual rights over parliamentary supremacy. Both arose from a search for a distinctly Canadian constitutional identity – one that continued to dynamically blend British and American constitutional ideals. At the centre of this transition

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200 Scott, *Civil Liberties*, supra note 164 at 25. Speaking to the graduates of Dalhousie Law School in 1958, Scott noted that “for the first time in our history,” the Supreme Court of Canada had constructed “a Canadian law of human rights. The great legal battles of the past affecting freedoms in Canada were mostly concerned with minority rights to separate schools and the use of the French language; now the emphasis has shifted to the individual freedoms, such as freedom of religion, of speech, and of the press, which have always been a part of our constitutional tradition but have not been fitted into the framework of our fundamental law. Convocation Address, Dalhousie (1 November 1958), LAC, Scott Papers, MG 30, D211, Vol. 19, Reel H-1278.

201 Scott, *Civil Liberties*, ibid. at 5.

in Canadian constitutional thought was a new idea of constitutional purpose, what Frank Scott called “a citizen’s constitution and not just a lawyer’s constitution.” A citizen’s constitution did more than distribute power; a citizen’s constitution created a nation and constituted a people defined by their “human rights.” When the political quest for a citizen’s constitution foundered, Scott and How found themselves demanding one in front of the Supreme Court of Canada.

In approaching the constitutional decisions of courts as the singular products of the judicial imagination, legal scholars have too often effaced the role of lawyers in the adjudicative process. The implied bill of rights found its first expression, not in the pages of the Supreme Court Reports, but in the facta of Aimé Geoffrion, James Ralston, Glen How, and Frank Scott. Together, their arguments reveal the medley of constitutional sources that inspired the theory of implied constitutional rights. By turns drawing on the histories of British, American, and Canadian constitutionalism, they proceeded from a shared conviction that the normative structure of Canadian constitutional law offered protection for individual rights and freedoms. In large measure, litigants based these arguments on ideas of Canada’s constitutional scholars. Arthur Lower’s arguments about constitutional citizenship and parliamentary democracy find expression in Reference re Alberta Legislation. Glen How’s American constitutional idealism resonates in Boucher and Saumur. Frank Scott’s conception of Canadian constitutional rights protection defines Switzman. If the idea of an implied bill of rights failed to convince a majority of the Court, the

cases themselves nonetheless reveal a further site of transition in Canadian constitutional thought. The search for constitutional rights – if momentarily abated – was here to stay.
Conclusion

The essence of this dissertation’s argument is captured in a remarkable edit Bora Laskin made between the first and second editions of his constitutional casebook, *Canadian Constitutional Law: Cases and Text on Distribution of Legislative Power.*¹ Laskin’s casebook – a series of leading Privy Council and Supreme Court of Canada decisions annotated with brief commentary – first appeared in 1951. The text undeniably filled a gap in the existing literature, almost nothing having appeared since A.H.F. Lefroy defined the field a half-century earlier.² Although the text was mostly devoted to controversies in the division of powers, a short final chapter entitled “Constitutional Guarantees” addressed the constitutional protection of civil liberties.³ “There are no explicit guarantees of ‘civil liberties’ in the B.N.A. Act,” Laskin stated by way of short conclusion, “nothing comparable to the ‘Bill of Rights’ ... in the Constitution of the United States.”⁴ “[I]n Canada, as

¹ (Toronto: Carswell, 1951) [*Canadian Constitutional Law*, 1st ed.]; 2d ed., (Toronto: Carswell, 1960) [*Canadian Constitutional Law*, 2d ed.]. Although Laskin envisioned the work primarily for law students, he allowed himself to hope that “it may have an appeal for members of the bar and for government departments concerned with constitutional law” (Preface). On the whole, the text mirrored Laskin’s overwhelming interest in the division of powers. “There was,” Philip Girard elaborates, “little on constitutional history, and nothing on the meaning of responsible government, the separation of powers doctrine, language rights, or numerous other topics of constitutional law.” Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: The Osgoode Society for Canadian Legal History, 2005) at 204.

² “There has been no text-book on, or any other generalized treatment of the distribution of legislative power in Canada for thirty-five years,” Laskin pointed out, “works by Lefroy and Clement, excellent as they were when published are hardly adequate or even accurate today.” *Canadian Constitutional Law*, 1st ed., *ibid*, at Preface. He referred, of course, to A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897-8) and W.H.P. Clement, *The Law of the Canadian Constitution* (Toronto: Carswell, 1916). Constitutional professors would have produced their own in-house casebooks, of course, but those would not have been available outside the law schools which printed them.


⁴ *Ibid.* at 663.
in Great Britain,” he explained, the common law, political processes, and statutory enactments protected “[f]reedom of the individual.” Accordingly, although “[t]he [American] literature on constitutional guarantees is vast,” Laskin off-handedly noted, “its comparative irrelevance for Canada warrants only a few references.” The implications were left implied: the idea of entrenched constitutional rights remained largely foreign and irrelevant.

Not quite a decade later, Laskin produced a second edition of Canadian Constitutional Law. Now titled, “Civil Liberties and Constitutional Guarantees,” Laskin’s chapter on rights had quadrupled in length with the addition of several of the landmark decisions of the 1950s: Winner v. S.M.T. (Eastern), Saumur v. Quebec, and Switzman v. Elbling. Laskin’s commentary had expanded too, exploring in greater detail the meaning of constitutional civil liberties and their relationship to federalism. Laskin was unconvinced by claims that the BNA Act’s preamble imported constitutional limitations, believing that the “theory of exhaustiveness” continued to demand that “civil liberties, however classified, must be within the keeping of either Dominion or the Provinces.” For Laskin, although political rights and freedoms fell exclusively within the federal domain, economic liberties, and legal and equality rights could fall within either the federal or provincial jurisdiction depending on the circumstances. In many

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5 Ibid. at 663-64.
6 Ibid. at 663.
7 Canadian Constitutional Law, 2d ed., supra note 1.
11 Canadian Constitutional Law, 2d ed., supra note 1 at 941.
13 Ibid. at 942-43.
respects Laskin continued to offer orthodox division of powers analysis, hardly constitutional iconoclasm. And yet, that constitutional rights and freedoms had become a serious topic of constitutional inquiry, and that increasingly they strained at the logic of parliamentary supremacy, signalled a profound shift in the discipline. Laskin himself noted the change only obliquely. “There is a vast literature on constitutional guarantees in the United States,” Laskin again asserted, but he added a new conclusion: “and a discernable growing relevance of such matters for Canada warrants a few references.” Laskin’s parsimonious edit revealed a monumental change afoot in Canadian constitutional law – the idea of entrenched constitutional rights had transformed Canadian constitutional law.

In fact, the shifting landscape of Canadian constitutional law, thought, and culture was already well underway when Laskin wrote the first edition of his casebook. Canada’s rights revolution began in the crucible of the Depression when Frank Scott applied Roscoe Pound’s theories of sociological jurisprudence to the field of Canadian constitutional law, producing, in the process, “a newer constitutional law.” The spirit of this scholarly approach entailed the demand for a constitutional law responsive to citizens. Believing in the need to increase the powers of the central state in matters of economic regulation, and to protect traditional civil liberties from governmental, especially provincial, repression, Scott called simultaneously for socialist economic planning and entrenched constitutional rights. The intervention of the Second World War and the rapid rise of the administrative state convinced a wide spectrum of other politicians, lawyers, and members of the public of the need for entrenched constitutional

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rights too, whether to protect equality rights, free speech, legal rights, or property rights or some combination thereof. By mid-century, the idea of constitutional rights could be found in parliamentary debates and committees, newspapers and pamphlets, scholarly journals and the meetings of the Canadian Bar Association. “One of the most important questions before the Canadian public at the moment,” announced the Canadian Bar Review in 1948, “is the question of human rights and fundamental freedoms.”¹⁵

The Supreme Court of Canada first encountered the altered terrain of constitutional thought in Reference re Alberta Statutes and more fully in a series of cases involving the Jehovah Witnesses in the 1950s. Drawing first on ideas of the newer constitutional law, and then the politics and scholarship of rights, lawyers urged the Court to adopt a new theory of constitutional limitations in the name of individual rights. Those views found famous expression in the decisions of Justice Ivan C. Rand. Without question, Rand’s theory of constitutional citizenship took inspiration from his American legal training at Harvard and, more generally, his liberal esteem for the American constitutional system. Lauded as it was in the academic literature, however, Rand’s theory of implied constitutional rights never gained the approval of a majority of the Court. Neither the francophone members of the Court, nor Justices Kerwin or Cartwright ever accepted either the relevance of American constitutional precedents, or the centralizing drift of exclusive federal responsibility for civil liberties. Rand’s jurisprudence implicitly rejected the sharpness of that supposed duality. For

Rand, Canadian constitutional law had always been fashioned as a dynamic and syncretic blend of constitutional ideals. The new emphasis on individual rights and constitutional limitations was simply that – an emphasis of liberal elements already longstanding in the British, French, American, and by extension, Canadian, constitutional tradition.

Yet the tensions between the British and American constitutional approaches, and the dilemma about which direction Canada should lean, remained very real. Drawing from the work of Dicey and Lefroy, generations of lawyers, politicians, and judges had imbibed the idea that the foundation of British and Canadian constitutionalism was parliamentary supremacy: a constitutional system premised upon the notion that “good servants ought to be trusted,” as opposed to the American assumption of “distrust of those who exercise public authority.” The theory of parliamentary supremacy appeared to offer a stern rebuke to those arguing for a new set of constitutional limits. Indeed, the legal and political opponents of entrenched constitutional rights repeatedly framed a constitutional bill of rights as anathema to the British-inspired tenets of Canadian constitutional history and culture, meaning and practice. The doctrine of parliamentary supremacy may have been tempered by a federal division of powers, but, they reminded, the BNA Act’s preamble declared the uniting provinces’ “Desire to be federally united into One Dominion ... with a

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Constitution similar in Principle to that of the United Kingdom.”

Entrenching constitutional rights involved, in the estimation of critics, a “radical departure” from that sacrosanct tradition, and, worse yet, the “Americanization of our constitution.” A good deal of Canada’s rights revolution involved determining the appropriate and relevant balance of its constitutional antecedents.

Parliament’s enactment of the *Canadian Bill of Rights* in 1960 confirmed the increasing dominance of written rights and American constitutional theories in that balance. At first blush, the passage of a mere statutory declaration of rights, as opposed to constitutional entrenchment, might suggest a rejection of American norms in favour of the British tradition. The wide-ranging debates surrounding the legislation, however, reveal the constitutional dimensions at stake. Diefenbaker immediately set the tone upon introducing the legislation in 1958. Invoking the constitutional theories of Thomas Jefferson, Diefenbaker declared: “Experience has shown that freedom is not always safe in the custody of an overwhelmingly powerful government supported by an overwhelming majority....Unless restrained ... the pathways of power lead to the degradation of the rights of individuals.” A parliamentary bill of rights, he announced, would hold in check the state’s propensity for authoritarian impulses and protect the legal rights, fundamental freedoms, and equality rights of Canadians. The government would have, he averred, constitutionalized the bill had not provincial impediments and the dilemmas of

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18 *House of Commons Debates* (May 19, 1947) at 3215 (Hon. J.L. Ilsely).
19 *S.C. 1960,* c. 44.
20 *House of Commons Debates* (5 September 1958) at 4641.
constitutional amendment stood in the way. Nonetheless, Diefenbaker made clear his view that the legislation would transform parliamentary practice by elevating the normative, if still ambiguously legal, force of individual rights.

On behalf of the federal Liberals, Lester B. Pearson maintained the party’s confused position. He criticized the legislation for its uninspiring language, exception of wartime restraints, lack of provincial consultation, omission of economic rights, absence of an enforcement mechanism, and non-constitutional nature, while, at the same time, lamenting the departure from the British ideal of parliamentary supremacy. “Our basic constitutional structure in Canada that we have inherited from Great Britain,” Pearson reminded, “is based on parliamentary sovereignty....The measure of our rights and liberties as Canadian citizens is the enlightenment, the tolerance and the good sense of our society.”

“Incorruptible” courts and “free men” in Parliament, he argued: “[t]his is the tried and tested British way, and this is a better course to follow than the mere pious affirmation of general principles, to which some political societies are addicted.” What was at stake was not “whether we should protect our rights, but how to do it.” In other words, the debate about the Canadian Bill of Rights struck at the heart of Canada’s constitutional arrangements between citizen and state, courts and legislatures. In fighting for the constitutional status quo, the Liberals invoked British tradition and identity, but in their equivocations, one

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21 *House of Commons Debates* (5 September 1958) at 4642; *House of Commons Debates* (1 July 1960) at 5649.
22 *House of Commons Debates* (4 July 1960) at 5657-5666.
23 *House of Commons Debates* (5 September 1958) at 4649-50.
24 *House of Commons Debates* (4 July 1960) at 5561.
detects a sense in which they too felt the constitutional terrain shifting beneath them.

The debates surrounding the *Canadian Bill of Rights* also highlight the continuing influence of legal elites in the constitutional transition in effect. Diefenbaker repeatedly cited Arthur Lower’s demands for a bill of rights.²⁶ The CCF, not surprisingly, emphasized Scott.²⁷ The Liberals also turned to Bora Laskin and the Canadian Bar Association’s Civil Liberties Committee to support their criticisms of the bill.²⁸ The point is not that scholars and lawyers were of one mind on the issue (they were not), but to highlight the political reliance on these broader voices in Canada’s constitutional culture. Indeed, the *Canadian Bill of Rights* re-energized the scholarship of rights, producing a new wave of reflection on the idea of rights in Canadian constitutional law. The National Conference on Human Rights held in Ottawa in December 1958 became, in effect, a debate on the merits of Diefenbaker’s proposed legislation. The prominent speakers and delegates included academics, lawyers, politicians, bureaucrats, and the quizzical sometime lawyer, writer, pundit, traveller, Pierre Elliott Trudeau.²⁹ The *Canadian Bar Review* subsequently published many of the papers delivered

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²⁶ *House of Commons Debates* (5 September 1958) at 4642. Indeed, Lower and Diefenbaker maintained a lively correspondence on the topic of Diefenbaker’s bill of rights, culminating in Lower’s assurance that Diefenbaker’s initiative would “procure [his] place in Canadian history.” Diefenbaker, for his part, returned an autographed copy of the legislation “in recognition of [Lower’s] constant interest in and defence of human rights and individual freedoms in Canada.”

²⁷ *House of Commons Debates* (5 September 1958) at 4655. Lower to Diefenbaker, 11 August 1960, and Diefenbaker to Lower, 5 July 1962, Queen’s University Archive [QUA], Lower Papers, Box 7, A119.

²⁸ *House of Commons Debates* (4 July 1960) at 5662.

at that conference in a special edition devoted to the *Canadian Bill of Rights*.30 Virtually every Canadian constitutional scholar of note – William Lederman, Edward McWhinney, Wilbur Bowker, Louis-Phillip Pigeon, Albert Abel, Laskin and Scott – addressed the constitutional implications of entrenched rights. Whatever perspective these scholars adopted, they wrote from the shared assumption that the question of rights was now of fundamental, perhaps even defining, importance to the field of Canadian constitutional study.

Trudeau’s participation at the margins of these debates can be traced, in part, to Frank Scott. Trudeau first encountered Scott in 1943 when he attended a lecture Scott gave at the Université de Montreal, where Trudeau was studying law.31 Initially impressed with Scott’s erudition and passion for a sociological approach to Canadian constitutional law, Trudeau regularly sought out Scott’s counsel in the decades that followed. By the 1950s, they had become friends: Scott provided steady guidance when Trudeau struggled to complete his now famous edited collection on the Asbestos Strike;32 Trudeau attended several of

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Scott’s appearances before the Supreme Court; together they spent several weeks canoeing the arctic-destined waters of the Mackenzie River. Looking back over this period, Trudeau credited Scott with shaping much of his “constitutional thinking,” gracefully acknowledging, “[Scott] was a hero of mine.” In his mild socialism, challenge to Quebec’s political oligarchy, and calls for entrenched constitutional rights, Trudeau paddled waters already traversed by Scott.

When Trudeau left his position teaching constitutional law at the Université de Montreal to enter politics in 1965, he brought his constitutional views to the federal Liberal Party. When Pearson appointed him minister of justice the spring of 1967, the need for entrenched constitutional rights became the official position of the Government of Canada. Almost immediately upon his appointment, Trudeau surrounded himself with law professors to guide the

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34 The trip prompted several poems, among them the memory at “Fort Smith” when
   Pierre, suddenly challenged,
   Stripped and walked into the rapids
   Firming his feet against rock,
   Standing white, in white water,
   Leaning south up the current
   To stem the downward rush,
   A man testing his strength
   Against the strength of his country.
35 Djwa, ibid. at 326.
government’s constitutional policy on the question of entrenched rights.  

Trudeau announced the government’s new direction to the Canadian Bar Association in September 1967, advising the assembled lawyers that “a matter calling for urgent attention, is a constitutional Bill of Rights – a Bill that would guarantee the fundamental freedoms of the citizen from interference, whether federal or provincial.” Trudeau delivered that same message to the premiers at the beginning of a new round of constitutional negotiations in February 1968. Already visible were the hallmarks of Trudeau’s constitutional vision and political strategy. Trudeau proposed to entrench individual and minority language rights before a re-balancing of the division of powers because “the rights of people must precede the rights of governments.” This approach affirmed Trudeau’s liberal faith in individual rights, but it also gestured to his willingness to use rights as a sword and shield against the demands of Quebec nationalists, and his propensity to use the rhetorical power of rights (which he equated with the “people”) against those opposed to his constitutional project. Undoubtedly suffused with constitutional politics, Trudeau’s constitutionalism nonetheless speaks equally of a fundamental reorientation of constitutional thought that began with the newer constitutional law. “[A] constitution is more than a legal document;” Trudeau argued, “it is an expression of how the people within a state may achieve their

39 On 5 April 1967, Trudeau appointed Carl Goldenberg, a former colleague at the Université de Montréal, as Special Counsel on the Constitution and established an advisory task force of constitutional scholars including Ivan Head, Mark MacGuigan, Gerald LeDain, Barry Strayer and Gerrard La Forest. See S. Clarkson & C. McCall, supra note 31 at 259-260.  
40 The speech is re-printed in Pierre Elliott Trudeau, Federalism and the French Canadian (New York: St. Martin’s Press, 1968) 52 at 54.  
42 Ibid. at 8. “The rights of the individual – human and linguistic – are so fundamental to the will of the nation to survive, that the Government of Canada suggests as the first step in reviewing Canada’s Constitution the guarantee of these rights in the fundamental law” (at 18).
social, economic, and cultural aspirations.” Frank Scott had been making that claim for nearly forty years.

This shifting conception of Canadian constitutional law did not come without loss: travelling somewhere new invariably involves leaving somewhere else behind. This is not to lament those aspects of our legal, political, and constitutional culture which repeatedly denied the dignity, autonomy, and, in some cases, humanity of the legal subject. The idea of individual rights and freedoms enabled the challenge – discursively, ideologically, politically, legally – of at least some of the repressive and marginalizing ascriptions that marred too many of Canada’s laws and state actions. But so too has the now dominant discourse of rights eroded our faith in politics and arguably blunted communitarian visions of the state. “Canada has its charters of liberty,” Liberal Cabinet Minister Ian Mackenzie told the House of Commons in the late 1940s, “her maritime rights, her prairie rights, her Pacific rights, her Ontario rights, her Quebec rights; of course they are there. Our rights in a federal state are such as are agreed upon by cooperation and consent.” “That is our constitution,” he declared, “and our bill of rights.” That notion of Canadian constitutional law, now seemingly quaint, vanished under the powerful logic of individual rights.

Still another consequence of that logic has been the gradual abandon of constitutional history. For the first generation of Canada’s constitutional scholars, the study of constitutional law and history were one and the same. As W.P.M. Kennedy explained, before his own turn from historical concerns, the Canadian
constitutional project was a product of “a hundred years of anxious questions, of
difficult and complicated situations, of insight and blindness, of despair and
faith.”45 “An historical background,” he declared, “is emphatically necessary for a
Treatise on Canadian Constitutional law.”46 But historical preoccupations fell
from favour as scholars such as Scott and Laskin sought to imbue constitutional
law with a national, reflexive, and rights-protecting identity.47 Today’s
constitutional scholars continue to labour in that same ahistorical tradition.48
Seduced by the allure of a revolution in their midst, contemporary constitutional
scholars have tended to focus their attention on debates about the Charter’s
legitimacy, transformative aspirations, and judicial extrapolation. In their study
of rights and their judicial interpretation, constitutional scholars have fashioned
a discipline attuned to certain complexities and dilemmas of the here and now,
but usually without a sense of a shared and contingent constitutional past.

This dissertation has attempted to reclaim a space for constitutional
history in the study of rights. It has done so by demonstrating the singular role of
constitutional thought and culture, as formulated by scholars, lawyers, and

45 W.P.M. Kennedy, “Historical Introduction” in A.H.F. Lefroy, A Short Treatise on Canadian
Constitutional Law (Toronto: Carwell, 1918) 1 at 1.
46 Ibid. at 2.
47 On the paucity of legal history in the postwar academy see Philip Girard, “Who’s Afraid of
Canadian Legal History” (2007) 57 U.T.L.J. 727. By the early 1930s, Kennedy himself exalted in
the abandon of what he termed the “dull ... unrealities of legal or constitutional history” toward
the “newer and more urgent angles” of the present.
48 See Roderick A. Macdonald, “Post-Charter Legal Education: Does Anyone Teach Law
Anymore?” Policy Options (February 2007) 75; Harry Arthurs & B. Arnold, “Does the Charter
have similarly noted how the homogenous uniformity implicit in the Charter’s formal logic of
individual rights and provincial equality “indirectly encourages ... ahistorical constitutionalism”
by suppressing pluralist conceptions of Canada’s constitutional founding. See Sujit Choudhry &
Jean-Francois Gaudreault-DesBiens, “Justice Iacobucci as Constitution Maker: From the Quebec
Veto Reference to the Meech Lake Accord and the Quebec Secession Reference” (2007) 57 U.T.L.J.
165 at 168, 169. An exception to this general trend might be the Court’s approach to aboriginal
rights which has been fixed squarely on the past. See Eric Adams, “Ghosts in Court: Jonathan
judges, in redefining the idea of rights in Canadian constitutional law. The idea of constitutional rights emerged from the interaction of personality and circumstance, theory and context. The idea that the Constitution should recognize the inviolability of the human person by protecting a sphere of autonomy and dignity from government migrated across borders and bridged political spectrums. The idea took shape according to the contours of our constitutional arrangements and the complex pressures of our constitutional traditions. It found expression in reactions to moments of crisis and challenge: the deprivations and repressions of the Depression, the triumphs and tragedies of the Second World War, and the lingering suspicions and growing prosperity of the postwar world. The remaking of Canadian constitutional law in the image of individual rights has been a story of ideas and ideals forged as answers to pressing questions of national identity and personal politics. The powerful legacy of the idea of constitutional rights continues to reverberate across our political lives. And that, in itself, makes it history worth studying.
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