Constitutional Courage

Harry Arthurs*

In this lecture, Professor Arthurs argues that we are currently in need of "constitutional courage"—the courage to say "no" to ambitious projects of constitutional reform and constitutional litigation as a way to solve our pressing social and political problems.

Professor Arthurs first lays out why our current obsession with the constitution is problematic. He insists that we do not even know what the supposed "supreme law of Canada" actually *is*, what it *says*, or even what it *does*. Moreover, instead of transforming society, the current "cult of constitutionalism" has only served to transform legal practice and scholarship. He then surmises on the potential causes of our constitutionalism: the preponderant influence of American political and legal culture in Canada; the patchy and uncertain nature of our own constitution; frustration with parliamentary politics; the neo-liberal agenda; and perhaps even postmodernism. Lastly, he examines the role constitutionalism has played in the expansion of the judiciary power.

Professor Arthurs concludes that it is time we said "no" to the constitution. Only by summoning up our constitutional courage will we be able to turn away from the distractions of constitutionalism and toward the more pressing and practical problems of the day.

Dans cette conférence, le professeur Arthurs en appelle au «courage constitutionnel». Il faut selon lui s'opposer d'une part aux ambitieux projets de réforme constitutionnelle, et d'autre part au litige constitutionnel comme mode de résolution des problèmes sociaux et politiques pressants du Canada.

En premier lieu, Arthurs explique ce qui rend problématique cette obsession collective à l'égard la constitution. On comprend mal, selon lui, ce qu'*est* la «loi suprême du Canada», ce qu'elle *dit*, ou même ce qu'elle *fait*. De plus, ce «culte constitutionnel» a changé la pratique et la théorie juridiques plutôt que la société elle-même. Arthurs conjecture ensuite les causes de ce «constitutionalisme». Parmi les explications possibles figurent l'influence politique et juridique des États-Uuis, la nature fragmentaire et incertaine de la constitution canadienne, un certain mécontentement envers le système parlementaire, l'agenda politique néolibéral, et la postmodernité. Enfin, Arthurs examine le rôle du «constitutionnalisme» dans l'expansion du pouvoir judiciaire.

Il conclut qu'il est temps de dire non à la constitution. Ce n'est qu'en rassemblant son courage constitutiounel que l'on pourra ignorer les distractions du «constitutionnalisme» et se consacrer à des problèmes actuels plus concrets et importants.

* University Professor of Law and Political Science and President Emeritus, York University. Originally presented as the McGill Lecture in Jurisprudence and Public Policy, April 1, 2003. I am grateful to the Faculty of Law for its invitation to deliver the McGill Lecture, to the SSHRC for its support of my work, and to Oleg Roslak, Brent Arnold, and Oleksandra Baglay for their able research assistance.

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Introduction: Constitutional Courage

"Constitutional Courage" is perhaps a misleading title. I am not here to tell epic tales of brave citizens fighting to defend their constitution because they believe in what it stands for, or fighting to defy their constitution because they believe it transgresses some higher moral imperative. Nor will I wax poctic, even in the ironic style of Frank Scott, about bold lawyers who courageously risk their clients' futures and fortunes in constitutional litigation.[1] Rather, I will try to persuade you that the most attractive kind of constitutional courage is the courage to say "no" to the constitution. "No" to what, exactly? "No" to ambitious projects of constitutional reform, "no" to Charter challenges, "no" to the compelling rhetoric and evocative symbolism of the constitution, "no"—most of all—to the temptation to chisel into the granite of the constitution good, true, and right ideas about public policy, personal dignity, collective identities, or our federal union.

Why do I advocate this unromantic, even perverse, kind of constitutional courage? Well, surely *someone* needs to. We are all overinvested in the constitution. It is by far the greatest preoccupation of Canadian legal scholars,[2] and an obsession of our politicians and journalists. Americans fought a civil war to preserve their constitution; South Africans avoided a civil war by negotiating a new one; Mexicans amended theirs 350 times to get it just right; and even the British—notoriously laggard in matters constitutional—now favour adopting a written constitution by large majorities, according to recent polls.[3] The EU is writing a new constitution for

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[1] See *e.g.* F.R. Scott, "A Lass in Wonderland" in *The Collected Poems of F.R. Scott* (Toronto: McLelland and Stewart, 1982) 264.

[2] In a survey of Canadian law school faculty members, of 220 respondents from 19 law schools (35 per cent of all full-time law teachers), 67 indicated a teaching and/or research interest in constitutional law, which was the most frequently indicated area of interest; four of the top five interest areas were related to constitutional law: Department of Justice, *Research Report: Canadian Law School Faculty Survey 2000-3e*, by Anna Paletta, Christopher Blain & Daniel Antonowicz (N.p.: Canadian Council of Law Deans and Research and Statistics Division, Department of Justice Canada, 2000) at 3-5. See also Theresa Shanahan, *Legal Scholarship: An Analysis of Law Professors' Research Activities in Ontario's English-Speaking Common Law Schools* (Ph. D. Thesis, University of Toronto Law School, 2002) [unpublished] at 203-204, Appendix D. Shanahan found that the most frequently cited subject area of research was constitutional law; second and third were international law (including human rights) and aboriginal legal issues, both closely related to constitutional law. However, she indicates that in terms of actual "research products", constitutional law ranked second to family law, although the family law ranking may have been distorted by a single respondent who reported a total of 103 research "products"—about 40 per cent of the total number.

[3] See Nicholas Dusic *et al.*, "Five Democratic Tests for Europe", online: Charter 88 <http://www.charter88.org.uk/europe/0306summary.html> (citing a 2003 poll that found 60 per cent in favour of adopting a written constitution); Andrew Holden, ed., *Unlocking the Policies: The General Election Handbook on Democracy and the Constitution* at § 2(iii), online: Charter 88 <http://www.charter88.org.uk/policy/citizens_constitution.html> (citing an October 2000 Joseph Rowntree Reform Trust / ICM State of the Nation Poll that found 71 per cent in favour of a written constitution);

itself,[4] while the Council of Europe has established the Venice Commission to help states write new constitutions if they feel in need of one.[5] Even the World Bank now promotes constitutionalism as a necessary, if not sufficient, condition for the success of global capitalism.[6] You can see, then, that I have to muster my constitutional courage just to do what any self-respecting scholar ought to do: challenge the conventional wisdom. Frankly, I sometimes wonder if I am being courageous or just foolish: after all, my evidence is modest; my arguments require a lot more work; and I find myself disagreeing with scholars whose writings I respect, advocacy groups whose values I embrace, and judges whose intelligence and ingenuity I quite admire. But "foolish" would bring this lecture to an abrupt end, while "courageous" will at least sustain me through the next fifty minutes; so "courageous" it will be.

And courage is needed at this particular moment in history. By any reckoning, we are in a severe international crisis, and arguably a domestic one as well. Crises throughout history have given rise to cults, to faiths, to ideologies that teach that all can be made calm, can be made new, can be made just, can be made *perfect* by a new, just, and perfect constitution. Would that it were so. Alas, history shows that constitutions seldom resolve crises—whether of economics, politics, religion, or culture—and sometimes exacerbate them. In fact, constitutions themselves are quite regularly destroyed by crises.[7] That is why I bolster my own constitutional courage by imbibing a wee sip of history every time I sit down to write about the subject.

The most important reason for constitutional courage just now, however, is that we have embarked on the long and hazardous project of rediscovering and revising our understanding of law. Constitutions represent the epitome of the old, command model of law—the notion that law has only to be authoritatively announced and applied in order to transform social behaviour. Constitutions on this theory are a special, privileged kind of law: they speak to state actors as well as to ordinary

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"Constitutional Reform", online: BBCi <http://www.bbc.co.uk/politics97/issues/constref.shtml> (citing a 1995 State of the Nation Poll that found 79 per cent in favour of a written constitution).

[4] The EU governments received a draft constitutional treaty in July 2003: *Draft Treaty establishing a Constitution for Europe*, submitted 18 July 2003, CONV 850/03, online: The European Convention <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>. See also Daniela Spinant, "Giscard Likes Reform Fever in EU Institutions" *EUobserver* (22 June 2002), online: Euobserver.com <http://www.euobserver.com/index.phtml?aid=6752>.

[5] See online: Venice Commission <http://www.venice.coe.int/>.

[6] See *World Development Report 2002: Building Institutions for Markets* (New York: Oxford University Press, 2002) c. 5, online: The World Bank Group <http://econ.worldbank.org/files/2409_61606_05_chf.pdf>.

[7] In the aftermath of World War I some 22 new European constitutions were adopted: Mark Mazower, *Dark Continent: Europe's Twentieth Century* (London: Allen Lane, 1998) at 5. An astonishing 70 constitutions were adopted or significantly revised from 1980-2000, principally by states in Africa, Asia, and Latin America that had experienced revolutions or significant political, economic, or social upheavals, as well as by the former Communist or Soviet states of Eastern and Central Europe: Robert L. Maddex, *Constitutions of the World*, 2d ed. (Washington: Congressional Quarterly, 2001) at xvi-xxii; and see online: International Constitutional Law <http://www.oefre.unibe.ch/law/icl/index.html>.

citizens; and they announce ideals as well as rules; but in the end constitutions are still meant to be commands: everyone must comply with the fundamental rules of the polity, and if they do not, the state will mobilize its powers to ensure compliance. Note, moreover, that according to the command model, constitutions cannot be trumped by appeals to superior or anterior norms: nothing is higher, nothing is prior; the constitution is the last word in debates on politics as well as on law.

Now the problem: the command model of law is in deep disrepute, at least in scholarly circles. By no means is it clear that law in general, and constitutions in particular, actually operate as the command model suggests; that constitutions can or do shape the behaviour of either citizens or state actors; or that constitutions actually end debates.[8] In reality, to the contrary: it is clear that constitutions are often ignored; that the norms that shape the lives of people and institutions originate from sources and operate in ways that the constitution does not contemplate; and that politics and social change grind on despite supposed constitutional closure.[9] Yet these revelations do not cause nations to crumble, nor is their social fabric rent asunder; in fact, the results are as often positive as negative. So perhaps constitutional courage amounts to no more than a willingness to say that like the emperor who had no clothes, the constitution in fact brings no closure.

This brief meditation on constitutional courage defines my agenda. I am going to make four distinct points. First, if we want to take the whole idea of constitutionalism seriously, I will suggest, we may have to radically revise our notion of what our constitution really is. Second, I will review the causes and effects of what I think of as the "cult of constitutionalism". Third, I will say a word about the unfortunate effects of this cult on its high priests, the judges. And finally, I will try to show how my brand of constitutional courage—the courage to say "no"—might just produce some positive results.

I. What Is the Canadian Constitution?

Given our constitutional obsessions of the past quarter century—the Charter, Quebec nationalism, Western alienation, equitable access to public goods—we ought by now to be able to answer the simple question: what is the constitution of Canada? But we cannot, in fact, draw an accurate map of our constitution. Obviously, by any definition, the celebrated *Constitution Act, 1867* ("1867 Act") and *Constitution Act,*

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[8] See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) [Bogart, *Courts*]; W.A. Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002) [Bogart, *Consequences*].

[9] See Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Ariz. J. Int'l & Comp. L. 69; Gavin W. Anderson, *Unthinking Constitutional Law: Towards a Legal Pluralist Theory of Constitutionalism* (S.J.D. Thesis, University of Toronto Law School, 2002) [unpublished].

1982 ("1982 Act"; together, the "Constitution Acts") are part of the constitution.[10] So, too, are a number of other "Acts and orders" listed in the schedule to the 1982 Act.[11] But from that point on, we are in *terra incognita*—the place map-makers used to label either El Dorado, if they wanted to lure people there, or "here be monsters" if they wanted to scare them away. Even a plain reading of the Constitution Acts shows that the "c-word" has several possible meanings. Section 52 of the 1982 Act says that "the Constitution of Canada," which "includes" the Constitution Acts themselves, is the "supreme law of Canada," that it makes all non-conforming laws "of no force and effect," and that it can only be amended—if at all—in accordance with an elaborate formula. By contrast, section 45 confirms the right of the provinces to make laws amending their own "constitutions", which are apparently neither the supreme law of the provinces, nor capable of rendering other laws void, nor subject to any particular amending formula. Moreover, the Constitution Acts also mention the "Constitution of Parliament", of the Senate, and of the House of Commons.[12] This is a different and older usage, in which the "c-word" has no particular prescriptive power; it only describes the elements or characteristics of government institutions.[13] And then, famously, there is the preamble of the 1867 Act which speaks of Canada having a "Constitution similar in Principle to that of the United Kingdom,"[14] which, in principle, has no constitution, at least as we use the term in section 52. To all of these our courts have added so-called "conventions"—customary ways of organizing the institutions and processes of state—which apparently have constitutional, though not necessarily legal, force.[15] Nor is that the end: Various scholars and judges, like birdwatchers pursuing rare species, claim to have sighted "unwritten", "organic", or "implicit" constitutions.[16]

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[10] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[11] *Constitution Act, 1982, ibid.*, s. 52 (2)(b).

[12] *Constitution Act, 1867, supra* note 10, ss. 17, 22, 37, 51A.

[13] See Gerald Stourzh, "*Constitution*: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century" in Terence Ball & J.G.A. Pocock, eds., *Conceptual Change and the Constitution* (Lawrence, Kan.: University Press of Kansas, 1988) 35; Graham Maddox, "Constitution" in Terence Ball, James Farr & Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989) 50; Damian Chalmers, "Post-nationalism and the Quest for Constitutional Substitutes" (2000) 27 J.L. & Soc'y 178 at 181-82.

[14] *Constitution Act, 1867, supra* note 10, Preamble.

[15] See *e.g.* Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, rev. ed. (Oxford: Clarendon Press, 1986) c. 11 at 181ff. ("The Problem of Patriation"); Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991); Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389.

[16] See *e.g.* Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L.J. 101; Jamie Cameron, "The Written Word and the Constitution's Vital Unstated Assumptions" in Pierre Thibault, Benoît Pelletier

My point is a simple one. After 136 years as a sophisticated nation supposedly devoted to constitutionalism and the rule of law,[17] we still do not know what the Canadian constitution actually *is*. And now worse news: even when we are pretty sure we know what it is—the Charter, for example—we do not necessarily know what it *means*. Of course, we can always ask the judges, and they will tell us; but they may well tell us one thing this time around and something else the next. And worse yet: even supposing we know what the constitution means, we do not necessarily know what it *does*. For example, the 1867 Act gives the federal government power to reserve and disallow provincial legislation, and it denies to the Canadian Parliament any "privileges, immunities, and powers" greater than those of the United Kingdom Parliament.[18] Such provisions, experts say, have fallen into desuetude—which means that the words are still in the constitution, but their force has gone mysteriously missing, like odd socks that disappear in the wash. I ask you: If we do not know what the constitution *is*, or *says*, or *does*, how seriously are we to take the claim that it is the "supreme law of Canada"?

And now the worst news of all: If we were to ask what *really* is our "supreme law", we might find that it is not something called the "Constitution of Canada" at all. If the hallmark of a constitution is that it constrains legislative and executive power, we might find that the global economy and the legal structures that organize it—the WTO, NAFTA, and so forth—impose far stricter limits on Canadian governments than anything in the Constitution Acts.[19] We might find that technology and demography have changed Canadian culture, social policy, and inter-group relations more profoundly than anything in the Charter.[20] We might find that it is the tactical calculations of populists,[21] elites and their lobbyists,[22] or technocratic managers[23] that

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& Louis Perret, eds., *Essays in Honour of Gérald-A. Beaudoin: The Challenges of Constitutionalism* (Cowansville, Qc.: Yvon Blais, 2002) 89.

[17] See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 32, 49, 70-78, 161 D.L.R. (4th) 385.

[18] *Constitution Act, 1867*, *supra* note 10, s. 18.

[19] See especially David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U.T.L.J 499; David Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25 Law & Soc. Inquiry 757. See also Harry W. Arthurs, "Governing the Canadian State: The Constitution in an Era of Globalization, Neo-Liberalism, Populism, Decentralization and Judicial Activism" (2003) 13 Const. Forum Const. 16; Harry Arthurs, "Governance after the Washington Consensus: The Public Domain, the State and the Microphysics of Power in Contrasting Economies" (2002) 24:4 Man & Dev. 85.

[20] For example, increased longevity and the rising average age of the population may well undermine existing assumptions about old-age pensions and income security; the rapidly changing ethnicity of Canadian cities has altered political power struetures and conventions of advertising; and the advent of satellite broadcasting has made attempts to enforce Canadian content rules very difficult.

[21] An example would be the decision by Ontario's Progressive Conservative government to release its budget not in the legislature, in accordance with parliamentary convention, but in a press conferenee outside the legislature: Richard Mackie, "Eves to Shun Legislature in TV Budget" *The Globe and Mail* (13 March 2003) A1. Following considerable public outcry, the Speaker of the legislature obtained a legal opinion which stated that this proccdure had violated the privileges of the Assembly, and he made a provisional ruling to that effect: legal opinion letter from Neil Finkelstein to

dictate how things get done in twenty-first century politics, not nineteenth century English constitutional "conventions". And we might find that the banalities of American television[24] or the complexities of postmodernism[25] have transformed Canadian constitutional discourse more definitively than all the learned judgments of our own Supreme Court.

That is what we *might* find, if and when we examined the evidence; but that is a task for another occasion. Now, I want to turn to the second issue on my agenda: what are the causes and consequences of what I have labelled "the cult of constitutionalism"?

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the Honourable Gary Carr, Speaker of the Legislative Assembly of Ontario, "The Constitutionality of the Government's Proposal to Announce the Budget Outside of the Legislative Assembly" (24 March 2003), online: Ontario Legislative Library <http://www.ontla.on.ca/library/repository/mon/5000/10310660.pdf>. During a debate on the Speaker's ruling, it was revealed that the government had adopted an Order-in-Council that allowed it to issue warrants to cover expenses for up to six months without the legislature's approval. However, notwithstanding these revelations, Finkelstein's legal opinion, and the Speaker's ruling, the government used its majority to defeat a motion censuring it for contempt of the Assembly: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 12A (21 May 2003) at 477 (Hon. Gary Carr).

[22] An example would be the role of business in the FTA/NAFTA negotiations. See *e.g.* Gordon Ritchie, *Wrestling with the Elephant: The Inside Story of the Canada-US Trade Wars* (Toronto: Macfarlane Walter & Ross, 1997) at 139-42; Michael Hart, with Bill Dymond & Colin Robertson, *Decision at Midnight: Inside the Canada-US Free-Trade Negotiations* (Vancouver: University of British Columbia Press, 1994) at 76-82, 129-30, 241; John R. MacArthur, *The Selling of "Free Trade": NAFTA, Washington, and the Subversion of American Democracy* (New York: Hill and Wang, 2000); and especially Martha Lara de Sterlini, "The Participation of the Private Sector in International Trade Negotiations: The Mexican Experience with NAFTA", online: International Trade Centre UNCTAD/WTO <http://www.intracen.org/worldtradenet/docs/information/referencemat/roomnextdoor.pdf> (discusses the operation of the "room next door" to the Mexican NAFTA negotiators, which housed a broad coalition of business interests, whose interests, opinions, and wishes were continuously consulted by government negotiators).

[23] For example, there is an increasing tendency to introduce business-style approaches to public governance via the "new public management" strategies: see *e.g.* Mohamed Charih & Arthur Daniels, eds., *New Public Management and Public Administration in Canada* (Toronto: Institute of Public Administration of Canada, 1997); Robin Ford & David Zussman, eds., *Alternative Service Delivery: Sharing Governance in Canada* (Toronto: Institute of Public Administration of Canada, 1997). These approaches are also introduced via the Auditor General's conduct of value-for-money audits: see *e.g.* Office of the Auditor General of Canada, *Reflections on a Decade of Serving Parliament: Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 2001); Office of the Auditor General of Canada, *Public Service Management Reform: Progress, Setbacks and Challenges* (Ottawa: Minister of Public Works and Government Services Canada, 2001).

[24] For example, prior to the adoption of the Charter, Canadian criminals allegedly asked to be "read their rights", as were American criminals in crime dramas. The stories were perhaps apocryphal.

[25] See *e.g.* Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507; Carl F. Stychin, "A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination" (1994) 17 Dal. L.J. 61; William E. Conklin, "Human Rights, Language and Law: A Survey of Semiotics and Phenomenology" (1995) 27 Ottawa L. Rev. 129; Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

II. The Causes and Effects of Constitutionalism

Why do we do it? Why this urge to constitutionalize? Why, specifically, this powerful contemporary Canadian impulse to reinvent our constitution? At the most obvious level, constitutionalism is driven by the desire to create and enforce a new hierarchy of juridical norms. To label a legal text as "constitutional" is to argue that it should prevail over other legal texts that are *not* constitutional. That is why constitutional claims are so hotly—and expensively—contested. However, there is more to constitutionalism than the bidding of juridical trumps. To say that a norm, rule, custom, or process is constitutional is also to propose that it is worthy of special respect, deference or attention not just in the domain of law but in other contexts as well. That is why Quebec, the West, First Nations, supporters of the welfare state, neo-liberals, the mayors of Canada's great cities—and others—have proposed a new constitutional dispensation for Canada. But respect, deference, and attention do not mean very much unless they translate into tangible, material changes that improve people's lives. This, constitutions notoriously fail to accomplish. Wealth—the most accurate predictor of health, educational achievement, vulnerability to offieial abuse, and labour market opportunities—is more unequally distributed in Canada today than it was when our Charter was adopted twenty years ago.[26] Conversely, it is clear that great material and moral change is possible without a word of the constitution changing. Anyone who doubts this has only to compare, say, Quebec culture and society or the Alberta economy in 2003 with their society, culture, and economy in 1953.

Nonetheless, governments, social movements, corporations, and advocacy groups often launch constitutional litigation. Why do they bother? Surely not in the expectation that a favourable ruling will transform the deep structures of the economy or society: Studies have shown that some of the most famous Supreme Court judgments in both the United States and Canada have not had the practical results that the winners desired or the losers feared.[27] No: no sensible person who wanted to make the world a better place would choose litigation as the way to do so. What sensible and knowledgeable people expect is that constitutional litigation will enhance the visibility and legitimacy of their cause, that it will complement or reinforce their political strategy, or that it will embarrass their opponents. If they actually get some practical short term benefit out of the litigation itself, that is icing on the cake. By and large, however, social transformation is a slow and painful process, which cannot be accelerated much, or made more pleasant, even by well-meaning judges.

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[26] See *e.g.* Armine Yalnizyan, *The Growing Gap: A Report on Growing Inequality Between the Rich and Poor in Canada* (Toronto: Centre for Social Justice, 1998); Ann Curry-Stevens, *When Markets Fail People: Exploring the Widening Gap Between Rich and Poor in Canada* (Toronto: CSJ Foundation for Research and Education, 2001); Karen Hadley, *And We Still Ain't Satisfied: Gender Inequality in Canada, A Status Report for 2001* (Toronto: CSJ Foundation for Research and Education and The National Action Committee on the Status of Women, 2001).

[27] See Rosenberg, *supra* note 8 at 336-43; Bogart, *Courts*, *supra* note 8 at 301-19; Bogart, *Consequences*, *supra* note 8 at 315-28.

This is not to say that constitutional negotiation and litigation have no effect at all. In fact, they have transformed something, but that something is Canadian legal practice and scholarship rather than society itself. There have been many highly publicized controversies: not only over the actual social, economic, and political effects (or non-effects) of Supreme Court decisions,[28] but over the existence and identity of a so-called "Court party",[29] over the judicialization of politics,[30] over the existence and significance of a "dialogue" between courts and legislatures,[31] and over its relevance for new "identities",[32] not to mention doctrinal issues such as the application of section 1,[33] or the extension of Charter rights to "analogous groups".[34]

I truly do believe that the Charter has aroused Canada's legal academy, and would hate to think that my call for constitutional courage might dampen its ardour.[35]

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[28] See generally Bogart, *Courts*, *ibid.*; Bogart, *Consequences*, *ibid.*

[29] F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

[30] Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1992).

[31] Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures: (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Christopher P. Manfredi & James B. Kelly, "Six Dcgrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg & Allison A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529; Christopher P. Manfredi & James B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask. L. Rev. 323.

[32] See *e.g.* Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston & Montreal: McGill-Queen's University Press, 1994); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); William E. Scheuerman, "Constitutionalism and Difference" (1997) 47 U.T.L.J. 263; Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

[33] See Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup. Ct. L. Rev. 469; Martha Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996) 34 Osgoode Hall L.J. 661; Leon E. Trakman, William Cole-Hamilton & Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83.

[34] See Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing" (1991) 29 Alta. L. Rev. 772; Donna Greschner, "Does Law Advance thc Cause of Equality?" (2001) 27 Queen's L.J. 299.

[35] It might, however, be a good idea if the judiciary dampened *its* ardour. Sce *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (2002), 220 Nfld. & P.E.I.R. 1, 221 D.L.R. (4th) 513, in which significant portions of a 147 page opinion by Marshall J.A. were given over to a denunciation of "undue incursions by the judiciary into the policy domain of the elected branches of government" (*ibid.* at para. 364). His judgment in turn provoked a public rebuke by Wells C.J. (who did not sit on the case) in the form of a scathing letter to the *Globe and Mail*, which in turn provoked a concurring opinion from the editorial writers, who denounced Marshall J.A. for his "chutzpah": Kirk Makin, "Wells Rejects Interpretation of Ruling" *The Globe and Mail* (13 December 2002) A1; "Judge Marshall's Injudicious Tirade", Editorial, *The Globe and Mail* (14 December 2002) A22. However, it also provoked a complaint by John Crosbie (a former federal justice minister) to the

Fortunately, there is little chance of that. Like their counterparts all over the world, Canadian scholars will continue to fantasize about ideal constitutions, to plot ambitious constitutional litigation, to write brilliant constitutional commentaries and critiques. The next questions are obvious: Why have we all become so obsessed with the constitution? And why now, at this particular moment in our history? One set of explanations has to do with the dominant influence of American political and legal culture in Canada. The deep penetration of American media, the breadth and power of American intellectual and professional discourse, the considerable though incomplete convergence of Canadian and American public policies—especially since NAFTA—all help to explain the growing conscious and unconscious adoption by Canadian constitutional lawyers, activists, and scholars of American analytical frameworks, fundamental values, factual assumptions, strategies, and rhetoric of all kinds from the critical to the neo-liberal.[36] This is by no means to deny that there are countercurrents in Canadian constitutional theory and praxis, some originating in Canada, some the work of scholars influenced by European perspectives. But these countercurrents challenge and modify, rather than displace, the dominant American paradigms.

Second, perhaps we are susceptible to the cult of constitutionalism in Canada because our own constitution is unusually patchy and permeable. The 1867 Act, after all, proceeded from the assumption that the imperial model was so widely admired and understood that it needed neither recapitulation nor restatement—only practical translation into a new context where, in fact, it had already been functioning for some time. Consequently, it consisted largely of prosaic language designed to resolve past and anticipated future differences—the building of transportation links, the sharing and dividing of liabilities and assets, the accommodation of idiosyncratic local legal and political institutions within a new federal structure. Similarly, the *Constitution Act, 1982* lurches from the prosaic, where it seeks to resolve practical issues,[37] to the

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Canadian Judicial Council against Wells C.J., citing the "unprecedented hubris" with which he "arbitrarily and without authority interfered with the judgments of judges on his court ... ": Kirk Makin, "Old Foes Crosbie and Wells Square Off over Judge's Rights" *The Globe and Mail* (7 January 2003) A1. The Council dismissed the Croshie complaint, an outcome that Crosbie characterized as "a judicial whitewash": Kirk Makin, "Crosbie Takes Aim at Judicial Council: 'Insider's Club' Is Biased and Must Reform Complaints Process, Former Minister Says" *The Globe and Mail* (2 May 2003) A10. Marshall J.A. also grasped the opportunity, in one of his last decisions before retiring, to attack criticism of his initial decision, including newspaper articles and editorials, one of which he dismissed as "an injudicious tirade": Kirk Makin, "Prominent Nfld. Judge Denounces His Critics" *The Globe and Mail* (9 May 2003) A1. Academic controversies, alas, are tame by comparison.

[36] See H.W. Arthurs, "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1997) 12:2 C.J.L.S. 219 [Arthurs, "Globalization"]; Harry W. Arthurs, "Poor Canadian Legal Education: So Near to Wall Street, So Far from God" (2000) 38 Osgoode Hall L.J. 381.

[37] *Supra* note 10, ss. 50-51 (now section 92A of the *Constitution Act, 1867*, specifying that each province has the power to make laws "respecting non-renewable natural resources, forestry resources and electrical energy").

obfuscatory, where it seeks to avoid them,[38] to the inoperable where the so-called "solutions" it adopted proved to be too risky or too cumbersome.[39] Only the Charter comes anywhere near reading like a constitution should, and it too has its prosaic, obfuscatory, and inoperable provisions.

All in all, then, except for the Charter, there is not much in our constitutional texts to assist idealistic law professors, persuasive advocates, and ingenious judges in resolving the great issues of our time through litigation. Perhaps that is why we catch them so often in the act of manipulating texts, rewriting history, reinventing tradition, using forked twigs to divine constitutional meanings, and pulling frantically on their own bootstraps as they struggle heroically to think the unthinkable and do the undoable.

A third explanation: constitutionalism is an attempt to escape from the perceived gridlock of Canadian electoral politics. Not only is Parliament fractured along regional fault lines, and dominated by an all-powerful prime minister; it is excessively influenced by the media, financial contributors, and disciplined rent-seeking lobby groups. As a result, important national issues often fail to appear on the parliamentary agenda, or if they do, Parliament seems unwilling or unable to produce anything like a national consensus; and if a consensus does somehow emerge, it is seldom translated into effective public policies or backed up by adequate public resources. This has caused frustration especially among groups that feel—and often are—excluded or marginalized. When these groups are unable to influence public policies through conventional social and political mobilization, constitutional litigation seems the only possible alternative.

In all of this Canada is not alone. Frustration with electoral politics is common in many countries, some with rich traditions of civic participation.[40] Fewer people are joining political parties or voting; moral entrepreneurship by professionals or public intellectuals is becoming rather rare; and grassroots action all too often amounts to no more than occasional episodes of street theatre. However, not all countries turn from electoral to constitutional politics. In some we see a realignment of political forces (not always to our liking) and the reinvigoration of parliamentary or presidential politics; in others, politics is waged quietly in the form of debates within expert, professional, or academic networks or more overtly by writers, satirists, or musicians; and in still others, there are prospects for a new extraparliamentary politics based on social movements. There is some evidence of each of these forms of political mobilization in Canada. We are, however, next door to the United States, which is heavily invested in constitutional politics—in part because its own electoral politics

[38] *Ibid.*, ss. 35, 35.1 (aboriginal peoples), s. 36 (equalization and regional disparities), ss. 37, 37.1 (constitutional conferences—since repealed).

[39] *Ibid.*, ss. 38-49 (Part V, amending formula).

[40] See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); Robert D. Putnam, ed., *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (Oxford: Oxford University Press, 2002).

are in such disarray. And for reasons already suggested, the American example is highly influential.

Now a fourth reason why constitutionalism may be an idea whose time has come. It happens to be consistent with the central themes of the "Washington Consensus"—globalization and neo-liberalism—both of which enjoy strong support among Canada's own policy elites.[41] Globalization is premised on the legal commitment of states to avoid actions that might impair international flows of trade and investment; neo-liberalism advocates permanent constraints on state regulation, taxation, and expenditure; and constitutionalism—traditionally concerned with preventing abusive state action and maximizing individual freedom—increasingly promotes economic rationality as a dominant value.[42] Thus, while by no means identical, globalization, neo-liberalism, and constitutionalism all happen to converge on the notion that the best government is the least government, that constitutional limitations are the ideal way to prevent government overreaching, and that those limitations should be enforced by courts, which are considered the "least dangerous"[43] (that is to say, the most passive branch of government).

Obviously, no one would argue for abuse by the state or against individual freedom; and no one would deny that states, which adhere to the rule of law, practise "good governance", and respect the independence of their judges, are doing more than just creating a positive environment for business. But at the same time, proponents of constitutionalism must surely be aware that by making judges the custodians of the constitution, they are giving judges a licence to impose procedural and substantive requirements on governments that will limit their ability to regulate markets, redistribute wealth, promote cultures, or protect environments.[44]

We cannot, however, explain the recent growing belief in constitutionalism entirely on the basis of politics. Polities, for these purposes, happens to converge with, and to reinforce, the tendencies in intellectual life that answer to the name of postmodernism.

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[41] See Arthurs, "Globalization", *supra* note 36.

[42] See David Schneiderman, "Exchanging Constitutions: Constitutional *Bricolage* in Canada" (2002) 40 Osgoode Hall L.J. 401.

[43] Alexander Hamilton, "A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour" in Alexander Hamilton, James Madison & John Jay, *The Federalist, or, the New Constitution*, ed. by Max Beloff (Oxford: Basil Blackwell, 1948) 395 at 396 (The 78th *Federalist*).

[44] See Boaventura de Sousa Santos, "Law and Democracy: (Mis)trusting the Global Reform of Courts" in Jane Jenson & Boaventura de Sousa Santos, eds., *Globalizing Institutions: Case Studies in Regulation and Innovation* (Aldershot, U.K.: Ashgate, 2000) 253. Recent revisionist scholarship, however, challenges the broad consensus on the tendency of courts to frustrate state intervention, especially in the period 1877-1937, when "Lochnerism" was supposedly at its strongest: William J. Novak, "The Legal Origins of the Modern American State" in Austin Sarat, Bryant Garth & Robert A. Kagan, eds., *Looking Back at Law's Century* (Ithaca: Cornell University Press, 2002) 249 at 251, 254.

Postmodernism—the fifth explanation for the growing cult of constitutionalism—at first blush seems an unlikely candidate. After all, postmodernism shakes us loose from the notion that ideas, values, processes—and constitutions—are fixed and immutable. All of these previously accepted certainties—constitutions not least—are socially constructed and are the result of particular historical circumstances. Thus, there is nothing sacrosanct about particular forms of civic participation, about the institutions of the welfare state, about such "essential" identities as citizenship, class, or gender; nothing sacrosanct—not even constitutions. And this, as it happens, is also the message of neo-liberals: old forms of ownership, production, and employment are gone forever; old impediments to free markets—taxes, regulations, public enterprise, trade unions—must be swept aside; old infatuations with the state, public goods, and civic identities are anachronistic. Note that I am making only a limited claim: a coincidence of views does not equate to conspiracy. Postmodernists are generally descriptive, while neo-liberals are prescriptive. Postmodernists seek opportunities for emancipation, while neo-liberals seek opportunities for global markets and powerful corporations. But the two have this in common: they contend that the foundational assumptions underlying our old constitution have disappeared into the dustbin of history.

Postmodernists, almost by definition, would be uncomfortable with conventional political or legal strategies. However, suspend disbelief for a moment. Imagine, if you can, a Canadian constitutional convention called jointly by postmodernists and neo-liberals. What would be on the agenda? First, the need to redefine, or perhaps erase, the boundary between the public domain and the realm of the private. Services previously thought to be the exclusive or primary concern of the state—adjudication, legislation, welfare, education, policing—are increasingly performed by private or partly private agents. Conversely, activities previously privileged as private are increasingly exposed to state scrutiny and regulation—family dynamics, corporate financial information, gun ownership, and health data. Second agenda item: the need to reimagine the identities that underlie so many of our public policies. Production or work-based identities are being replaced by those that derive from consumption; class identities are giving way to racial, gender, or cultural identities; citizens of complex, heterogenous states identify themselves increasingly with smaller political or cultural entities or with transnational corporations, movements, or religions. Indeed, the very concept of identity is changing. Once identities were of the essence, immutable, and singular; today, they are contingent, multiple, and marketable.[45] And a third agenda item: the need to reinvent cumbersome old institutions of governance such as legislatures and regulatory agencies—both products of the industrial age—or better yet, to replace them with, say, cyber polls and strategies of so-called "horizontal government".[46]

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[45] See Macdonald, *supra* note 9.

[46] See Donald G. Lenihan, *E-Government, Federalism and Democracy: The New Governance*, vol. 9, Changing Government (Ottawa: Centre for Collaborative Government, 2002), online:

In the end, however, this fantastical constitutional convention would confront an insuperable problem. No new text it might propose could possibly accommodate the new values and relationships, the new conceptions of the public and private, the new identities, the new flux and variability of institutions, which are central to both postmodernism and neo-liberalism. The rapidity, the intensity, the vastness of change they describe and advocate clearly exceed the capacity of all known constitutional discourses and technologies that emphasize certainty and promise continuity. Yet given the worldwide embrace of constitutionalism, people would still want a constitution, would fear that states—or postmodern and neo-liberal state substitutes—would be ungovernable and illegitimate without something resembling a constitution in the old sense.

How to square the circle? Perhaps adjudication is the answer. I have already suggested why constitutional adjudication appeals to neo-liberals. Now I want to add that adjudication is quintessentially postmodern precisely because it is so paradoxical. Court decisions must appear to be rational, principled, and firmly rooted in fixed rules of the constitution; otherwise they will command no respect. But clearly such decisions are none of the above. If they were, outcomes would be largely predictable and there would be little excuse for constitutional litigation. Scholars understand and even revel in this delightful paradox. Postmodern constitutional law, it turns out, is like postmodern architecture: it consists of making private jokes in public places. But constitutional scholars cannot laugh out loud, as it were, even though they appreciate the jokes. To do so would destroy the whole project of constitutional adjudication. Nor can judges titter or smile; they must remain solemn. That is why they claim to be merely interpreting constitutional texts and historical precedents, or reinterpreting them in light of contemporary circumstances and understandings. That is why they seldom attempt root-and-branch rewriting of the constitution but concentrate instead on incremental, issue-by-issue changes. And that is why they emphasize their own autonomy, rectitude, modesty, and austerity, and why they appeal to "neutral principles" while using discursive strategies to conceal the ideological content of their actions.[47]

The apparent success of these well-known judicial techniques, however, produces unexpected consequences. Success imposes a moral obligation on judges, which they gladly accept, to "do justice though the heavens fall". Taking up that obligation enhances their credibility, in contrast to the loss of credibility suffered by so many other institutions. It is no wonder, then, that even postmodernist scholars who should know better continue to look to courts as a promising way to bring about change. However, much as I would like to be a true believer, the evidence is all the other way:

Crossing Boundaries <http://www.crossingboundaries.ca/reports/ktapublication_vol9e.pdf>; Donald Lenihan & Tony Valeri, *Horizontal Government: The Next Step*, vol. 2, Policy, Politics and Governance (Ottawa: Centre for Collaborative Government, 2003), online: Crossing Boundaries <http://www.crossingboundaries.ca/materials/Policy, Politics and Governance_-_vol_2.pdf>.

[47] See Vidya S.A. Kumar, *Constitutional Law and Ideology: The Mechanism Component of Ideological Critique* (LL.M. Thesis, Osgoode Hall Law School, 2002) [unpublished].

judges are not effective change-agents; they are unsuited for the job because of their training, temperament, mandate, intellectual techniques, and institutional incapacities. But alas, judges themselves are true believers—unlike me and unlike other scholars, need I add? Judges believe in their own omniscience, neutrality, and capacity to do good. This belief—benignly and strongly held, if quite mistaken—prompts judges to seek out ways to expand their own mandate, powers, and prerogatives. That is why I must now say something about the expansion of the judiciary power under Canada's constitution over the past twenty or thirty years.

III. The Unfortunate Effects of Constitutionalism on Our Courts

In a sense, the judiciary power has always been open-ended. For example, the jurisdiction of courts to imprison persons guilty of contempt,[48] to issue labour injunctions,[49] and to review administrative tribunals and arbitrators[50] is said to be "inherent". But from where do judges "inherit" power? Not from the Constitution Acts, which do not even mention such powers. Not, presumably, from reception statutes or provincial judiciary acts, because powers thus conferred would be neither "inherent" nor immune from legislative repeal or restriction. Judges therefore often insist that their powers are implied—even if not expressed—in the judiciary provisions of the *Constitution Act, 1867*;[51] or that they originate in our so-called unwritten constitution;[52] or that they were bequeathed to Canadian courts by the courts of the United Kingdom;[53] or that they are intrinsic to the very process of adjudication;[54] or all else failing, that these powers have "ancient origins", are "long-

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[48] See *e.g. MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385 [*MacMillan Bloedel*]; *R. v. Vermette*, [1987] 1 S.C.R. 577 at 581, 38 D.L.R. (4th) 419, McIntyre J.; *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618, (*sub nom. Canadian Broadcasting Corp. v. Cordeau*) 101 D.L.R. (3d) 24, Beetz J.

[49] See *e.g. St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1 [*St. Anne Nackawic* cited to S.C.R.].

[50] See *e.g. Douglas Aircraft Co. of Canada v. McConnell* (1979), [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, Estey J., dissenting in part; *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[51] *Supra* note 10, ss. 96-101. See *Reference Re Residential Tenancies Act, 1979 (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554 [*Residential Tenancies*]; *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238 at 245, 57 D.L.R. (4th) 1.

[52] See *e.g. Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-51, (*sub nom. Reference Re Language Rights Under the Manitoba Act, 1870*) 19 D.L.R. (4th) 1.

[53] See *e.g. Three Rivers Boatman Ltd. c. Conseil Canadien des Relations Ouvrières* [1969] S.C.R. 607, 12 D.L.R. (3d) 710 at 716-17; *Canada (A.G.) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 326-27, 137 D.L.R. (3d) 1; *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 72-73, D.L.R. (4th) 481, Dickson C.J.C. [*Beauregard* cited to S.C.R.].

[54] See *e.g. Re Oil, Chemical & Atomic Workers & Polymer Corp. Ltd.* (1959), 10 L.A.C. 51, aff'd (1961), 26 D.L.R. (2d) 609 (Ont. H.C.), aff'd (1961), 28 D.L.R. (2d) 81 (Ont. C.A.), aff'd (*sub nom. Imbleau v. Laskin*) [1962] S.C.R. 338, 33 D.L.R. (2d) 124.

settled", and "unquestioned".[55] All of these explanations are circular and solipsistic; however, since they are found in judicial rulings, there is not much anyone can do to challenge them. To be fair, courts have occasionally acknowledged that even inherent power is not unlimited.[56] Whether they are being expansive or more modest in their claims, the same issue presents itself: how, where, why, and by whom are boundaries to be drawn around "inherent" judicial powers?

The problem of "inherent powers" is only the tip of the iceberg. Consider the important constitutional principles of judicial independence and the separation of powers. As with "inherent powers", there is considerable controversy over these principles. Where do they come from and what is their effect? Some judges believe that they are implicit in our having a constitution "similar in Principle to that of the United Kingdom,"[57] and it is true that some aspects of judicial independence can be traced to specific British constitutional documents or doctrines.[58] But once we get beyond those documents and doctrines, we are back to the same dubious approaches I mentioned a moment ago: unwarranted inferences from the Constitution Acts, poorly researched history, constitutions conjured up out of thin air, or objections magically made to disappear because they are inconvenient or unanswerable.

Whatever the true historical and textual sources of judicial power, whatever the strengths and weaknesses of the constitutional arguments justifying that power, these debates have had one depressing consequence. They have revealed a tendency among judges to believe—not wisely but too well—in their own indispensability, wisdom,

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[55] See *e.g. St. Anne Nackawic*, *supra* note 49 at 721-22; *MacMillan Bloedel*, *supra* note 48 at para. 39.

[56] They have acknowledged, for example, that judges may lack the power to create new torts (*Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278); *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, (*sub nom. Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*) 124 D.L.R. (3d) 193); that judicial review of administrative tribunals, ostensibly designed to ensure that non-curial bodies conform to the intention of the legislature, may be made less intrusive by appropriate privative clauses (*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417); that the legislature has the right to mandate the use of unconventional methods of fact-finding, styles of interpretation, and remedies if it nses clear language (*Residential Tenancies*, *supra* note 51); and that whole areas of law can be removed from the judicial to the administrative sphere, at least at first instance, provided the courts retain a minimal supervisory jurisdiction and are not ousted altogether (*Quebec (A.G.) v. Grondin*, [1983] 2 S.C.R. 364, (*sub nom. Re Attorney-General of Quebec and Grondin*) 4 D.L.R. (4th) 605).

[57] *Constitution Act, 1867*, *supra* note 10, Preamble. See *e.g. Beauregard*, *supra* note 53 at 72; *Ontario Public Service Employees' Union v. Ontario (A.G.)*, [1987] 2 S.C.R. 2, (*sub nom. Re Ontario Public Service Employees' Union and Attorney-General for Ontario*) 41 D.L.R. (4th) 1; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 12, 140 D.L.R. (4th) 193, Lamer C.J.C.; *New Brunswick Broadcasting v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 354, 100 D.L.R. (4th) 212, Lamer C.J.C.

[58] *Bill of Rights, 1689* (U.K.), 1 Will. & Mar., sess. 2, c. 2; *Act of Settlement, 1700* (U.K.), 12 & 13 Will. III, c. 2. See E. Neville Williams, *The Eighteenth-Century Constitution 1688-1815: Documents and Commentary* (Cambridge: Cambridge University Press, 1960) at 5.

and virtue. This is a mistake no postmodernist—and no guardian of fundamental values—should ever make. Hence the unedifying spectacle of judges using the constitution to stipulate how judicial salaries should be set,[59] to protect judicial sinecures,[60] to quarantine courthouses against everyday social conflict,[61] and to assert that judge-made law is not subject to the Charter.[62] A failure of constitutional courage, as I define it, has encouraged judges to make these constitutional claims on their own behalf and to resolve them in their own favour. What they have done is not only legally and historically problematic, it is unseemly as well.

IV. What Would the World Be Like if We Were All Brave Enough to Say "No" to the Constitution?

I have been pretty hard on judges, but perhaps not hard enough on the rest of us who have lacked the courage to say "no" to the constitution or the imagination to say "yes" to other ways of addressing the great issues of our time. In this final section of my lecture I will offer what might be described as a counter-factual account of the last twenty-five years of Canadian history. I will imagine what might have happened over the past quarter century if we had shown more constitutional courage; if we had said "no" to the idealistic, clever, naive, or cynical politics of constitutionalism and its beguiling theories and tempting projects; if there had been no attempts to reach a constitutional settlement with Quebec, no patriation initiative, no Charter, no Meech Lake conference, no Charlottetown process, no expansion of the judiciary power.

Here is what I think would have happened. First, without the provocations and counter-provocations of twenty-five years of constitutional trench warfare, Quebec might have devoted even more energy to building its unique culture and society, might have saved itself some economic grief, and might have arrived somewhat sooner at the conclusion that the constitution is not, after all, much of an obstacle to the creation of a dynamic, equitable, prosperous, and predominantly francophone society. Second, if there had been no attempt to arrive at a settlement with Quebec, perhaps Alberta, British Columbia, and Ontario might be less interested today in tearing down the makeshift constitutional structures that support the Canadian welfare state. Third, we might not have destabilized federal politics, destroyed the

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[59] See *e.g. Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, (*sub nom. Reference Re Public Sector Pay Reduction Act (P.E.I.), s. 10*, 150 D.L.R. (4th) 577.

[60] See *e.g. Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 209 D.L.R. (4th) 564, 2002 SCC 13.

[61] See *e.g. British Columbia Government Employees' Union v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1; *Ontario Public Service Employees Union v. Ontario (A.G.)* (2002), 58 O. R. (3d) 577, 157 O.A.C. 315, leave to appeal to S.C.C. refused; see also *Ontario Public Service Employees Union v. Ontario (A.G.)* (2002), 158 O.A.C. 113.

[62] See *e.g. Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

Progressive Conservative Party and the NDP, and promoted parties of regional protest to the improbable status of governments-in-waiting. Fourth, we might have invented flexible new institutions to help Canada develop effective economic and political strategies to respond to the challenges of globalization and continental integration. Fifth, equality-seeking groups might well be better off today than they have become with the "assistance" of the Charter. This last suggestion is contentious, I know, but I make it for three reasons: first, because these groups actually are not much better off, even with the Charter; second, because similar groups in comparable countries have made as much progress, or more, without a Charter; and third, because they might have gained more by devoting their resources, energies, and moral credit to political and social mobilization rather than constitutional lobbying and litigation.

All of these counter-factual scenarios are mere speculations about what might have happened "if only". I cannot prove them, any more than they can be disproved. But they are sufficiently plausible to support an hypothesis, which is this: If we actually could summon up our constitutional courage—if we could accept to live in a world without constitutional conferences and manifestos, without lengthy and learned lectures from the Supreme Court, without governments, judges, advocacy groups, and corporations making pre-emptive constitutional claims on our institutions, resources, and values—if we could do all of that, we might finally be able to turn our attention to more pressing and practical problems. We might begin to think about improving our political culture, about providing long-neglected public goods, about enhancing social inclusion and social equity, and about addressing Canada's growing vulnerability as a small branch-plant economy and peripheral power. Constitutional courage will not guarantee success in dealing with any of these huge challenges. But until we find that courage—the courage to say "no" to the constitution—we will continue to be distracted and divided.