
Canada's "Newer Constitutional Law" and the Idea of Constitutional Rights

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This article places F.R. Scott's 1935 call for entrenched constitutional rights within the context of marked changes in constitutional scholarship in the 1930s—what the author refers to as the "newer constitutional law". Influenced by broader currents in legal theory and inspired by the political and economic upheavals of the Depression, constitutional scholars broke away from the formalist traditions of a previous generation and engaged in new ways of thinking and writing about Canadian constitutional law. In this new approach, scholars questioned Canada's constitutional connection to Britain and argued instead for a made-in-Canada constitutional law that could functionally address the changing needs of Canada and its citizens. In the process, scholars legitimated the prospects and possibilities of constitutional adaptation and change. Scott's vision of constitutional renewal entailed a strong central government capable of national economic planning, but he added constitutional rights to protect the personal liberties he viewed as particularly under threat in the 1930s. In so doing, Scott subtly recast the meaning of constitutional rights and took the first tentative steps in a rights revolution that would fundamentally transform Canada in the decades that followed.

L'article situe l'appel de F.R. Scott de 1935 pour des droits constitutionnels enchâssés dans le contexte des grands changements ayant marqué la doctrine constitutionnelle durant les années 1930, ce que l'auteur considère comme le «*newer constitutional law*». Influencés par des courants de théorie légale plus diversifiés et inspirés par les bouleversements politiques et économiques de la Grande Dépression, les érudits du droit constitutionnel se sont détachés du formalisme de leurs prédécesseurs et ont mis de l'avant de nouvelles façons d'aborder le droit constitutionnel canadien. Cette nouvelle approche a amené les auteurs à remettre en question le lien constitutionnel entre le Canada et la Grande-Bretagne et à avancer l'idée d'un droit constitutionnel propre au Canada, qui répondrait adéquatement aux besoins changeants du Canada et de ses citoyens. Au cours de ce processus, les juristes ont légitimé les avenues prometteuses et les possibilités de l'adaptation et du changement constitutionnels. Le renouvellement constitutionnel tel qu'envisagé par Scott mena à l'établissement d'un gouvernement central fort et détenant un pouvoir de planifier l'économie nationale, mais il ajouta la notion de droits constitutionnels afin de protéger les libertés personnelles selon lui menacées durant les années 1930. Ce faisant, Scott remania subtilement le sens des droits constitutionnels et fit de discrets premiers pas vers une révolution des droit qui transforma fondamentalement le Canada dans la décennie suivante.

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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 and the “insistent demands of modern life” were compelling scholars to view constitutional law from “newer and more urgent angles.” The “older constitutional law”, Kennedy insisted, 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, not in a major piece of scholarship, but in a review of three publications in British constitutional law.² Although Kennedy’s Canadian colleagues largely 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, Kennedy never used the expression in writing again either. Yet in the 1930s, Canada, like Britain, was in the midst of a marked transition in the way that scholars thought and wrote about constitutional law, a shift that is well captured by the concept of a newer constitutional law.

Kennedy himself was one of the principal figures responsible for the emergence of the newer constitutional law in Canada. The other was Francis Reginald Scott, poet, activist, and professor of constitutional law at McGill. Although in the early 1930s these men were at notably different stages of their careers—Kennedy near the end of his and at the height of his influence, Scott at the beginning—both contributed profoundly to the reinterpretation of constitutional law in Canada in that decade. This is not to say that other scholars did not also participate in the formation of the newer constitutional law. 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 also contributed to the shift in constitutional thought, though they played less prominent roles, at least in retrospect, than did Kennedy and Scott. Nor am I suggesting that the scholars of the newer constitutional law could not or did not disagree with one another. Scott and Forsey were avowed socialists, while Kennedy, MacDonald, and Rogers were more moderate liberal centrists. Whatever

¹ W.P.M. Kennedy, “Three Views of Constitutional Law” (1931) 9 Can. Bar Rev. 553 at 553-54.

² Kennedy gave positive reviews of Arthur Berriedale Keith, *An Introduction to British Constitutional Law* (Oxford: Oxford University Press, 1931); Carleton Kemp Allen, *Bureaucracy Triumphant* (London: Oxford University Press, 1931); E.C.S. Wade & G. Godfrey Phillips, *Constitutional Law: An Outline of the Law and Practice of the Constitution Including English Local Government, the Constitutional Relations of the British Empire and the Church of England* (London: Longmans, Green & Co., 1931); Kennedy, *ibid.*

their political differences, however, the scholars of the newer constitutional law 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, Quebec constitutional scholars such as Léo Pelland at Laval University focused on the need for the continued autonomy of provincial governments and the maintenance of Privy Council appeals.³ 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.⁴ Their contribution, however, goes much further and deeper. The scholars of the newer constitutional law fundamentally altered the landscape of Canadian constitutional thought by abandoning the formalist traditions of early twentieth-century scholarship. In its place emerged a functional approach to constitutional analysis inspired by a new sense of Canadian nationalism and broader ideas about the social utility of law.⁵ With this new approach, the scholars of the newer constitutional law questioned Canada's constitutional connection to Britain, arguing instead for a made-in-Canada constitutional law that could functionally address the lived 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 was deficient, then the constitution should be amended. In this way, the scholars of the newer constitutional law legitimated the prospects and processes of constitutional change while simultaneously reinforcing the idea that constitutional law could and should progressively transform society. As Morton J. Horwitz has written of the American experience, a "constitutional revolution can take place only when the

³ See e.g. Léo Pelland, "Problèmes de droit constitutionnel" (1936-37) 15 R. du D. 5 & 65 & 194 [Pelland, "Problèmes (1936-37)"]; Léo Pelland, "Problèmes de droit constitutionnel" (1937-38) 16 R. du D. 86 [Pelland, "Problèmes (1937-38)"].

⁴ See generally Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 Man. L.J. 496 [Risk, "Scholars"]. For a contemporary critique of the "centralist myth" these scholars helped to foster, see P. Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperiled Confederation* (Toronto: University of Toronto Press, 1999) at 161.

⁵ 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" (*Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 97-98). The newer constitutional law represented the legal modernist theories applied to Canadian constitutional law.

intellectual ground has first been prepared.”⁶ In Canada, the scholars of the newer constitutional law tilled the soil that germinated the first seeds of a constitutional revolution that would reshape Canada over the ensuing fifty years.

Yet to date, historians and legal thinkers have underappreciated or ignored the role of constitutional thought in shaping Canada’s constitutional law, and in particular, the development of Canada’s modern constitutional rights discourse. Recent literature has largely emphasized the influence of civil liberties activists, the Second World War, the international human rights movement, and the politics of Quebec nationalism in laying the foundations for Canada’s “rights revolution”.⁷ These international and domestic influences certainly shaped the direction and content of Canada’s postwar rights debates but, as this article demonstrates, the *idea* of constitutional rights in Canada first emerged when Scott filtered his concern for civil liberties through the transformative concepts of the newer constitutional law. Specifically, this article claims that Scott’s call for the constitutional entrenchment of civil liberties in 1935 emerged out of three central and related ideas of the newer constitutional law. First, as a mature nation, Canada should be in charge of its own constitutional destiny. Second, constitutional change was legitimate and necessary given the social and economic crisis gripping the nation. Third, constitutional law could and should function as an agent of progressive social change.

In *Social Planning for Canada*, published in 1935, Scott advanced the first scholarly proposal for an entrenched “Bill of Rights” in Canadian history.⁸ In many ways, *Social Planning* was an odd text in which to find an argument for constitutional rights. In 1935, the *Lochner* era still loomed largely and (for many) menacingly across the southern border.⁹ Under *Lochner* and its precedents, the United States

⁶ *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 3.

⁷ See Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000); Edward McWhinney, *Quebec and the Constitution 1960-1978* (Toronto: University of Toronto Press, 1979); Roy Romanow, John Whyte & Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984). Two recent works have taken a longer view of Canada’s twentieth-century rights history but do not focus on the role of legal, and in particular constitutional, thought: Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen’s University Press, 2003); Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005).

⁸ Research Committee of the League for Social Reconstruction, *Social Planning for Canada*, rev. ed. (Toronto: University of Toronto Press, 1975) [*Social Planning*]. See generally Michiel Horn, *The League for Social Reconstruction: Intellectual Origins of the Democratic Left in Canada 1930-1942* (Toronto: University of Toronto Press, 1980) [Horn, *League*].

⁹ The so-called “*Lochner* era” takes its name from *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (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

Supreme Court employed constitutional rights and the rhetoric of freedom and liberty to strike down a number of pieces of progressive labour legislation, most often minimum wage laws. By contrast, *Social Planning* 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, he 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 constitutional law.

This article proceeds in three parts. Part I examines constitutional writing and thinking in the early twentieth century, which 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 intellectual sources and institutional developments within the legal academy. Constitutional scholars combined ideas about the constitutional maturity of Canada and the function, utility, and inherently political nature of law to reshape Canadian constitutional analysis. Borrowing from Kennedy, I label these changes Canada's "newer constitutional law". 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 socialism. I address these tensions by placing Scott's thinking in the larger context of the newer constitutional law and, in particular, emphasizing his underlying faith in the progressive possibilities of the rule of constitutional law.

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

From Confederation until the 1920s, Canada's constitutional scholars were generally 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).¹⁰ Accordingly, the constitutional scholarship of the period—

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 Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2 Int'l J. Const. L. 1 at 15, 53.

¹⁰ See generally R.C.B. Risk, "A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada: On Burying One's Grandfather" (1991) 41 U.T.L.J. 307 [Risk, "Lefroy"]. The other prominent lawyers publishing on constitutional law in the first decades of the twentieth century included J.S. Ewart and C.B. Labatt (see Risk, "Scholars", *supra* note 4; R.C.B. Risk, "John Skirving Ewart: The Legal Thought" (1987) 37 U.T.L.J. 335).

whether in books, case comments, or articles—was generally aimed at the small number of lawyers who litigated or advised on constitutional matters.¹¹ Since constitutional litigation overwhelmingly involved the legislative division of federal and 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 consulted Lefroy’s *The Law of Legislative Power in Canada*.¹² Influenced by the Oxonian text writers of the late nineteenth century, Lefroy claimed to cover “the whole of the law of legislative power” through the exposition of sixty-eight “general Propositions”.¹³ 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 through a detailed analysis of case law. In reviewing the constitutional common law, Lefroy accepted judicial interpretation as authoritative, rational, and apolitical. His deep admiration for the Privy Council’s interpretation of the *British North America Act* (“*BNA Act*”)¹⁴ pervaded the text,

¹¹ 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.

¹² A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897) [Lefroy, *Legislative Power*]. The work was revised and shortened in *Canada’s Federal System: Being a Treatise on Canadian Constitutional Law Under the British North America Act* (Toronto: Carswell, 1913) and *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) [Lefroy, *A Short Treatise*]. Other constitutional texts of the period include: Walter S. Scott, *The Canadian Constitution Historically Explained* (Toronto: Carswell, 1918); William Renwick Riddell, *The Constitution in Its History and Practical Working* (New Haven: Yale University Press, 1917); The Hon. W.H.P. Clement, *The Law of the Canadian Constitution*, 3d ed. (Toronto: Carswell, 1916); Edward Robert Cameron, *The Canadian Constitution: As Interpreted by the Judicial Committee of the Privy Council in Its Judgments* (Winnipeg: Butterworth & Co., 1915); Sir J.G. Bourinot, *A Manual of the Constitutional History of Canada From the Earliest Period to 1901*, rev. ed. (Toronto: Copp, Clark, 1901); J.E.C. Munro, *The Constitution of Canada* (Cambridge: The University Press, 1889).

¹³ 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 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 10 at 329-30).

¹⁴ Now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C 1985, App. II, No. 5. In this article, I refer to the *BNA Act* using its historic name.

leading him to approach their decisions, as Richard Risk puts it, not as texts to be criticized, but as “oracle[s] to be studied and accommodated.”¹⁵

Lefroy analyzed particular constitutional decisions on the basis of whether or not judicial reasoning cohered and persuaded in accordance with the text’s “true construction”¹⁶—a process of internal criticism. Lefroy implicitly accepted that legislation had one true meaning that could be illuminated through the formal application of logic and reasoning. In a 1913 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.”¹⁷ In 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. That said, Lefroy’s constitutional thought was also his own, reflecting his adaptation of the principles of British constitutionalism to Canada. In his eyes, the Canadian constitution—though federal like the American constitution—in all other respects “adhered as closely as possible to the British system in preference to that of the United States.”¹⁸ Lefroy stressed that the *BNA Act*, like its British unwritten counterpart, operated under the principle of parliamentary supremacy—“that good servants ought to be trusted”¹⁹—rather than an American-style limitation of powers born of “distrust of those who exercise public authority.”²⁰ Lefroy recognized, however, that the unwritten 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”²¹ became, for Lefroy, the right of federal and provincial governments to legislate “in respect to any matter over

¹⁵ Risk, “Lefroy”, *supra* note 10 at 327.

¹⁶ A.H.F. Lefroy, “The Alberta and Great Waterways Railway Case” (1913) 29 Law Q. Rev. 285 at 288 [Lefroy, “Great Waterways”].

¹⁷ *Ibid.* 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” (*ibid.*).

¹⁸ Lefroy, *Legislative Power*, *supra* note 12 at lx. Lefroy devoted his first chapter to refuting Dicey’s claim that the *BNA Act* was “a copy, though by no means a servile copy, of the Constitution of the United States” (A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 4th ed. (London: Macmillan, 1893) at 156, n. 1 [Dicey, *Law of the Constitution*]).

¹⁹ Lefroy, *Legislative Power*, *ibid.* at xlv.

²⁰ *Ibid.* at liv.

²¹ Dicey, *Law of the Constitution*, *supra* note 18 at 38.

which it has jurisdiction.”²² “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.”²³ 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 and, 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 ...”²⁴

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, by their very nature, assured Canadians of their rights. For Lefroy, the *BNA Act* “guard[ed] the liberty of the subject without destroying the freedom of action of the legislature.”²⁵ 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 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 demonstrated, the wresting of responsible government from the executive in the nineteenth century vested Canadian legislatures with tremendous and enduring symbolic authority.²⁶ For Lefroy and his contemporaries, “protecting liberty meant fostering robust legislatures that would be able to constrain executive power.”²⁷ In other words, a democratically elected

²² Lefroy, *Legislative Power*, *supra* note 12 at 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.)).

²³ Lefroy, *Legislative Power*, *ibid.* at xvii.

²⁴ *Ibid.* at xxii-xxiii.

²⁵ *Ibid.* at ix. Walter S. Scott, by contrast, more readily adopted Dicey’s view that the judiciary protected personal liberties and freedoms through the rule of law: “judicial decisions determining the rights of private persons in particular cases brought before the Courts” (*supra* note 12 at 5-6).

²⁶ See Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991); Robert C. Vipond, “Alternative Past: Legal Liberalism and the Demise of the Disallowance Power” (1990) 39 U.N.B.L.J. 126; Robert C. Vipond, “The Provincial Rights Movement: Tensions Between Liberty and Community in Legal Liberalism” in Janet Aizenstat & Peter J. Smith, eds., *Canada’s Origins: Liberal, Tory, or Republican?* (Ottawa: Carleton University Press, 1995) 233; Richard Risk & Robert C. Vipond, “Rights Talk in Canada in the Late Nineteenth Century: ‘The Good Sense and Right Feeling of the People’” (1996) 14 L.H.R. 1; R.C.B. Risk, “Blake and Liberty” in Janet Aizenstat, ed., *Canadian Constitutionalism, 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992) 195. On the malleability of constitutional rights to serve conservative ends during this period, see David Schneiderman, “A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century” (1998) 16 L.H.R. 495.

²⁷ Risk & Vipond, *ibid.* at 15. See also R.C.B. Risk, “Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work” (1996) 46 U.T.L.J. 427 at 433, n. 19.

responsible government, by its very nature, offered all of 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 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 recasting legislatures as the potential or actual abusers, not protectors, of individual rights and liberties.

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 had immigrated to Canada from Ireland in 1913 and the following year began teaching history at the University of Toronto.²⁸ Although trained as an ecclesiastical scholar of Elizabethan England and not in any formal sense in law, after Kennedy's arrival at the University of Toronto, he acquired a keen interest in Canadian constitutional history. By 1918, he had compiled a text of Canadian constitutional documents²⁹ and contributed a historical introduction to Lefroy's updated text, *A Short Treatise on Canadian Constitutional Law*.³⁰ 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, owing to the force of his personality and the extent of his influence, became simply known as the Kennedy (or Kennedy's) School.³¹

²⁸ See generally R.C.B. Risk, "The Many Minds of W.P.M. Kennedy" (1998) 48 U.T.L.J. 353 [Risk, "The Many Minds"].

²⁹ W.P.M. Kennedy, ed., *Documents of the Canadian Constitution 1759-1915* (Toronto: Oxford University Press, 1918).

³⁰ W.P.M. Kennedy, "Historical Introduction" in Lefroy, *A Short Treatise*, *supra* note 12 at 1-35.

³¹ 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 5 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 for the Osgoode

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*.³² Though Kennedy indulged in the occasional moment of whiggish rhetorical flourish—he analogized “constitutional development” to a “stream of evolution ... reaching inevitably the ocean of constitutional life”³³—for the most part, he suggested that constitutional law was the product, not of divine creation, 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 moment ...”³⁴ 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,” he argued, and provided a model of interdependence and coordinate sovereignty worthy of international emulation.³⁵ 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 comment³⁶ on *Toronto Electric Commissioners v. Snider*³⁷ 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

Society, 1987); Martin L. Friedland, *The University of Toronto: A History* (Toronto: University of Toronto Press, 2002) at 139-43, 306-308, 438-42.

³² W.P.M. Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (London: Oxford University Press, 1922) [Kennedy, *Constitution of Canada*].

³³ *Ibid.* at vii.

³⁴ *Ibid.* at viii.

³⁵ *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 28 at 358-59; 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.

³⁶ “The Residue of Power in Canada” (1926) 4 Can. Bar Rev. 432. See generally Richard Risk, “Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s” (2000) 63 Sask. L. Rev. 195 at 198.

³⁷ [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.) [*Snider* cited to A.C.]. For an overview of *Snider* and the federalism decisions of the Privy Council of the 1920s, see John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: Osgoode Society, 2002) at 150-86. On Haldane’s intellectual influences, see David Schneiderman, “Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century” (1998) 48 U.T.L.J. 521 [Schneiderman, “Harold Laski”].

McGill's faculty of law in the mid-1920s.³⁸ In his lectures on constitutional law, Smith argued that the federalism decisions of the Privy Council were wandering increasingly astray from the original purpose and intent 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."³⁹ 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' intention 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.⁴⁰ This attack on the historical myopia of the Privy Council would become a *cause célèbre* of the newer constitutional law.

Smith concluded his *Snider* comment by stating that "[w]hether the principle of federal government devised by our forefathers or that more recently established by the Privy Council is the better for Canada is a question of policy beyond the scope of this article."⁴¹ Nevertheless, Smith's views on the need for a strong centralized government were readily apparent in the balance of his comment. The scholars of the newer constitutional law adopted and shared Smith's views on federalism but, in the years that followed, were increasingly prepared to advance their arguments on both legal and policy grounds. Indeed, their willingness to engage with law *as* policy, and not simply in the abstract, would be one of the defining features of the newer constitutional law. More subtly, Smith marked a departure from a previous generation of scholars by highlighting a gap between "the practice of our courts in the nineteenth century"⁴² and the political needs of the twentieth. 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 ideas flourish. His legacy remained, however, not only in the ideas he articulated in his *Snider* comment, but also through the imprint he left on one of his students, F.R. Scott.⁴³ 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 the broader features

³⁸ See Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal. L.J. 211 at 261 [Macdonald, "National Law Programme"].

³⁹ Smith, *supra* note 36 at 433-34.

⁴⁰ *Ibid.* at 438-39.

⁴¹ *Ibid.* at 439.

⁴² *Ibid.* at 432.

⁴³ Roderick Macdonald has argued that Smith's "intellectual framework" left a deep imprint on "F.R. Scott's understanding of the constitution" ("F.R. Scott's Constitution" (1997) 42 McGill L.J. 11 at 16 [Macdonald, "Scott's Constitution"]).

of the newer constitutional law: an unwavering Canadian nationalism, the treatment of constitutional law as politics, and a belief in the progressive possibilities of constitutional reform.

B. A New Nationalism

In keeping with the national pride he had articulated in *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.”⁴⁴ In the decade after the publication of his 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”.⁴⁵ Legally, however, Canada remained an adolescent—subordinate both in international affairs and in certain domestic matters to the Imperial Parliament.⁴⁶ 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.⁴⁷ Other Commonwealth nations, notably Australia, 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 other Dominions were “autonomous Communities within the British Empire, equal in status, in no way

⁴⁴ Kennedy delivered the Fred Morgan Kirby Lectures at Lafayette College, published as *Some Aspects of the Theories and Workings of Constitutional Law* (New York: Macmillan, 1932) at 132-33 [Kennedy, *Aspects*].

⁴⁵ *House of Commons Debates*, 160 (20 March 1924) at 508.

⁴⁶ Although 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” were considered indications of its increasing independence. See Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2004) at 49, n. 10.

⁴⁷ Byng instead called upon the Conservative opposition leader, Arthur Meighen, to form a government. When Meighen’s government toppled soon after, King was returned to office on an election platform that stressed the need for greater Canadian independence. In the same year, the Privy Council struck down the federal legislation purporting to end appeals to the Privy Council in criminal matters in *Nadan v. The King*, [1926] A.C. 482, [1926] 2 D.L.R. 177 (P.C.). The decision did not elicit much response in the legal literature, although J.W. Dafoe criticized the decision sharply in the editorial pages of the *Winnipeg Free Press*. See Jacqueline D. Krikorian, “British Imperial Politics and Judicial Independence: The Judicial Committee’s Decision in the Canadian Case *Nadan v. The King*” (2000) 33 *Canadian Journal of Political Science* 291.

subordinate one to another in any respect of their domestic or external affairs ... ”⁴⁸
The declaration’s principled statement of autonomy was legally entrenched four years later in the *Statute of Westminster, 1931*.⁴⁹

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*.⁵⁰ As a result, Canada specifically requested that the power to amend the *BNA Act* continue to vest solely in the British Parliament.⁵¹ The constitutional status quo 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 there is no possibility of escape.”⁵² 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.”⁵³ 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.”⁵⁴ If opaque on the details, scholars

⁴⁸ *Report of Inter-Imperial Relations Committee* (25 October 1926), reprinted in Maurice Ollivier, ed., *The Colonial and Imperial Conferences from 1887 to 1937* (Ottawa: Queen’s Printer, 1954) vol. 3, 145 at 146. The declaration struck a chord with certain strains of Quebec nationalism, as had been historically articulated and advanced by Henri Bourassa (see Un Professeur, “L’Autonomie du Canada et sa nouvelle situation internationale” (1927-28) 6 R. du D. 65). See generally Michael Oliver, *The Passionate Debate: The Social and Political Ideas of Quebec Nationalism, 1920-1945* (Montreal: Véhicule Press, 1991).

⁴⁹ (U.K.), 22 & 23 Geo. V., c. 4, s. 4, reprinted in R.S.C. 1985, App. II [*Statute of Westminster*].

⁵⁰ Disagreements between the federal and provincial governments emerged over whether Confederation was a “compact” requiring all (or some) of its parties to assent 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).

⁵¹ *Statute of Westminster*, *supra* note 49 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” (*ibid.*, s. 7(1)).

⁵² John W. Dafoe, “Revising the Constitution” *Queen’s Quarterly* 37:1 (Winter 1930) 1 at 1 [Dafoe, “Revising the Constitution”]. See generally Ramsay Cook, *The Politics of John W. Dafoe and the Free Press* (Toronto: University of Toronto Press, 1963).

⁵³ “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.

⁵⁴ Dafoe, “Revising the Constitution”, *supra* note 52. Dafoe seemed prepared to ignore that old adage that the devil was in the details. For similar work in this vein, see Norman MacKenzie,

were clear on the principle that Canada, as a mature nation, was ready to define her own aspirations and control her own destiny through constitutional law.

A parallel nationalism was simultaneously taking hold in the arts. In the 1920s and '30s, 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 that “Canada [remained] unwritten, unpainted, unsung.”⁵⁵ 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.”⁵⁶ Poets too—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.⁵⁷ 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 1928.⁵⁸ “Canadian literature—if there be such a thing—is overburdened with dead traditions and outworn forms,” echoed Scott and Smith.⁵⁹ “We are a pitiful extension

“Constitutional Developments in the Commonwealth of Nations” (1930) 8 Can. Bar Rev. 213; Frank L. Bastedo, “Amending the British North America Act” (1934) 12 Can. Bar Rev. 209; Norman McL. Rogers, “The Constitutional Impasse” *Queen’s Quarterly* 41:4 (Winter 1934-35) 475; R.F. McWilliams, “The Amendment of the Constitution” (1938) 16 Can. Bar Rev. 466.

⁵⁵ Quoted in W.H. New, *A History of Canadian Literature* (New York: New Amsterdam, 1989) at 144. Lismer, of course, conveniently ignored a great deal of Canadian art and literature, but his sentiments, while inaccurate, were nonetheless acutely felt among his generation.

⁵⁶ “Lakeshore” in F.R. Scott, *The Collected Poems of F.R. Scott* (Toronto: McClelland & Stewart, 1981) at 50 [Scott, *The Collected Poems*]. See also Newton MacTavish, *The Fine Arts in Canada* (Toronto: Macmillan, 1925); F.B. Housser, *A Canadian Art Movement* (Toronto: Macmillan, 1926); Charles C. Hill, *The Group of Seven: Art for a Nation* (Ottawa: National Gallery of Canada, 1995). The mystical vision of Canada created by the Group of Seven had its own set of cultural assumptions and biases; their landscapes were sublime places, but untroubled by settlers, workers, or Aboriginal peoples. See Scott’s similar characterization in “Laurentian Shield” of a geography “Hidden in wonder and snow, or sudden with summer,/ This land stares at the sun in a huge silence/ ... Inarticulate, arctic./ ... It leans away from the world with songs in its lakes/ Older than love, and lost in the miles.” (*The Collected Poems, ibid.* at 58).

⁵⁷ See Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland & Stewart, 1987) at 82-84; Leon Edel, “The Young Warrior in the Twenties” in Sandra Djwa & R. St J. Macdonald, eds., *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics* (Montreal: McGill-Queen’s University Press, 1983) 6.

⁵⁸ Lawren Harris, “Creative Art and Canada” *The McGill News* 10:1 (December 1928) 6 at 6. See also H.A. Voaden’s call for an indigenous Canadian drama in “A National Drama League” *Canadian Forum* 9:99 (December 1928) 105.

⁵⁹ F.R. Scott & A.J.M. Smith, Editorial, *McGill Fortnightly Review* (18 February 1927) 41, cited in Djwa, *supra* note 57 at 90. See also A.J.M. Smith, “Wanted—Canadian Criticism” *Canadian Forum* 8:91 (April 1928) 600.

of the Victorians,” they continued. “If a living, native literature is to arise we must discover our own souls ...”⁶⁰

Ironically, this 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.⁶¹ Six years later, Scott noted the “common historical origins”, “common plan or purpose”, and “parallel roads” of Canada and the United States.⁶² 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, moving pictures and radio programs, [which] all account for a growing intercommunication of ideas.”⁶³ Scott attributed this shift directly to the growth of the “Canadian national feeling”.⁶⁴ In his estimation, “Canadians have matured to the point where they no longer fear the loss of their identity on the American continent.”⁶⁵

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

⁶⁰ 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 (“CAA”): “Expansive puppets percolate self-unction/ Beneath a portrait of the Prince of Wales,” he observed after attending a CAA meeting 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 56 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 57 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.

⁶¹ John W. Dafoe, *Canada: An American Nation* (New York: Columbia University Press, 1935) at 3. See also William Bennett Munro, *American Influences on Canadian Government* (Toronto: Macmillan, 1929).

⁶² F.R. Scott, *Canada and the United States* (Boston: World Peace Foundation, 1941) at 9.

⁶³ *Ibid.* at 51.

⁶⁴ 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*].

⁶⁵ *Ibid.* at 87. I think it fair to say that the second half of the twentieth century proved Scott wrong.

the norm, but at Harvard.⁶⁶ 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.⁶⁷ 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 British scholars of the late nineteenth century like Anson, Bagehot, and Dicey were read with less reverence and cited with less frequency.⁶⁸ 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 also profound, influence of Roscoe Pound and his theory of sociological jurisprudence.

Roscoe Pound towered over American legal theory for much of the first three decades of the twentieth century.⁶⁹ Although he had received his Ph.D. in botany,

⁶⁶ When he returned, Wright encouraged talented graduates like Bora Laskin to follow in his footsteps (see Jerome E. Bickenbach & Clifford Ian Kyer, “The Harvardization of Caesar Wright” (1983) 33 U.T.L.J. 162; Girard, *supra* note 5, c. 4). Wright, however, was not the first to venture to Harvard. A number of Dalhousians had attended Harvard after graduation, 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*].

⁶⁷ Kyer & Bickenbach, *supra* note 31 at 139.

⁶⁸ Kennedy and Scott both cited Laski in their 1930s work (see e.g. Kennedy, *Aspects*, *supra* note 44; *Social Planning*, *supra* note 8 at 490. Both refer to Laski’s *A Grammar of Politics*. In addition, Scott and Laski maintained a friendship and correspondence during these years (see Djwa, *supra* note 57 at 239). As well, Laski maintained active interest in Canadian constitutional law, and both published on the subject and recommended Kennedy’s *The Constitution of Canada* to Oliver Wendell Holmes. See H.J. Laski, “A Note on Sovereignty and Federalism” (1915) 35 Can. L.T. 891; Harold J. Laski, “Canada’s Constitution”, Book Review of *The Constitution of Canada* by W.P.M. Kennedy *The New Republic* 35:448 (4 July 1923) 159. See generally Schneiderman, “Harold Laski”, *supra* note 37 at 550, n. 184. On the shifts in legal thinking in Britain during this period, see Martin Loughlin, “The Functionalist Style in Public Law” (2005) 55 U.T.L.J. 361; Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).

⁶⁹ See generally David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Conn.: Greenwood Press, 1974); N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997).

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.⁷⁰ In its place, Pound called for “sociological jurisprudence”: the view of law as a “jurisprudence of ends” emphasizing law’s ability to achieve or retard progressive social change.⁷¹ 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.”⁷² Pound’s work reverberated across American legal theory, challenging the era of classical legal thought and “fashioning an American jurisprudence for the twentieth century.”⁷³

By the early 1930s, however, a new group of American legal theorists—the legal realists—whispered privately (and occasionally publicly) that Pound and his ideas had stalled or, worse still, drifted into conservatism.⁷⁴ 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 *words* ...”⁷⁵ 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. Pound, for his part, criticized realism’s 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.”⁷⁶ Whatever the force of these

⁷⁰ Roscoe Pound, “Mechanical Jurisprudence” (1908) 8 Colum. L. Rev. 605 [Pound, “Mechanical Jurisprudence”]. See also Roscoe Pound, “Do We Need a Philosophy of Law?” (1905) 5 Colum. L. Rev. 339; Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence” (1910-11) 24 Harv. L. Rev. 591 & (1911-12) 25 Harv. L. Rev. 140 & 489 [Pound, “Scope and Purpose”].

⁷¹ Pound, “Mechanical Jurisprudence”, *ibid.* at 611; Pound, “Scope and Purpose”, *ibid.* at 513-16.

⁷² Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923) at 1.

⁷³ Hull, *supra* note 69 at 17. On the transition to Pound’s progressivism from the tradition of classical legal thought, see generally Horwitz, *supra* note 6.

⁷⁴ See *e.g.* Karl Llewellyn’s characterization of Pound as “a man partially caught in the traditional precept-thinking of an age that is passing” in “A Realistic Jurisprudence—The Next Step” (1930) 30 Colum. L. Rev. 431 at 434; Jerome Frank’s criticism of Pound in *Law and the Modern Mind* (New York: Brentano’s, 1930) 207-16. Much ink has been spilled concerning the legal realists and their legacy. See *e.g.* John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill, N.C.: University of North Carolina Press, 1995); Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995); Laura Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill, N.C.: University of North Carolina Press, 1986).

⁷⁵ Llewellyn, *ibid.* at 435 [emphasis in original].

⁷⁶ Roscoe Pound, “The Call for a Realist Jurisprudence” (1930-31) 44 Harv. L. Rev. 697 at 697.

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,⁷⁷ legal realism did not deeply infiltrate Canadian constitutional scholarship—not in the 1930s at any rate. 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.⁷⁸

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 ...”⁷⁹ But if Pound and the realists received equal play in the classroom, it was Pound’s ideas in particular that found expression in Kennedy’s constitutional scholarship. 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 amid the complex social problems of present-day life ...”⁸⁰ Further, Kennedy argued that constitutional law in Canada had begun to reflect a “social point of view”,⁸¹ though he admitted that the law remained “still far out of tune with the complex civilization of a modern state.”⁸² As Risk has pointed out, Kennedy widely embraced Pound’s language in his lectures, peppering his remarks with references to the “socialization of law”, the “social point

⁷⁷ For examples of Willis’s Canadian brand of realism see John Willis, “Three Approaches to Administrative Law: the Judicial, the Conceptual, and the Functional” (1935-36) 1 U.T.L.J. 53 [Willis, “Three Approaches”]; John Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can. Bar Rev. 1 [Willis, “Statute Interpretation”]. See also the special issue of the University of Toronto Law Journal: *Administrative Law Today: Culture, Ideas, Institutions, Processes, Values: Essays in Honour of John Willis* (2005) 55 U.T.L.J. 311; Robert W. Gordon, “Willis’s American Counterparts: The Legal Realists’ Defence of Administration” (2005) 55 U.T.L.J. 405. See also R.C.B. Risk, “John Willis—A Tribute” (1985) 9 Dal. L.J. 520; Michael Taggart, “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law” (2005) 43 Osgoode Hall L.J. 223.

⁷⁸ Although the divide between Pound and his realist interlocutors was not sharp, a faith in the intrinsic value of law qua law did distinguish these thinkers. Kennedy and Scott embraced Pound’s faith and shied away from the sharper edges of the realist project. For this reason, I think that Risk mislabels Scott and Kennedy as realists (see Risk, “The Many Minds”, *supra* note 28 at 369; R. Blake Brown, “The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941” (2000) 9 Dal. J. Leg. Stud. 36; R. Blake Brown, “Realism, Federalism, and Statutory Interpretation During the 1930s: The Significance of *Home Oil Distributors v. A.G. (B.C.)*” (2001) 59 U.T. Fac. L. Rev. 1).

⁷⁹ Bora Laskin, “Cecil A. Wright: A Personal Memoir” (1983) 33 U.T.L.J. 148 at 150.

⁸⁰ Kennedy, *Aspects*, *supra* note 44 at 22 (Kennedy cites Cardozo in the same passage).

⁸¹ *Ibid.* at 20.

⁸² *Ibid.* at 20, 23.

of view”, and a “sociological jurisprudence”.⁸³ 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.”⁸⁴

Scott’s constitutional writings in the 1930s display a similar set of assumptions about the functionalism of constitutional law. Although Scott infrequently referenced Pound,⁸⁵ 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.”⁸⁶ Scott continued that “the state is a 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.”⁸⁷ 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

Kennedy and Scott imbued constitutional law with such progressive potential because of the expansive view they took of constitutional law’s ambit. 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 had steadfastly maintained between constitutional law and politics. For the scholars of the newer

⁸³ *Ibid.* at 20, 22, 23. Risk also points out that Harold Laski initially coined the phrase “socialization of law” (Risk, “The Many Minds”, *supra* note 28 at 365, n. 53).

⁸⁴ Kennedy, *Aspects*, *ibid.* at 22.

⁸⁵ 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. by Michiel Horn (Toronto: University of Toronto Press, 1986) 10 at 13 [Scott, *A New Endeavour*].

⁸⁶ Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) at ix [Scott, *Essays*]. In noting this passage, William R. 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 57, 117 at 120.

⁸⁷ Scott, *Essays*, *ibid.*

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. This understanding of the political nature of constitutional law legitimated—in their minds at least—the political activities of legal scholars. It was not enough to criticize. If modernity required the rebuilding of the state and the rethinking of the constitution, then the scholars of the newer constitutional law were needed as intellectuals and teachers, but also as activists and political thinkers. “Let us not become legal monks,” Pound had famously counselled.⁸⁸ The scholars of the newer constitutional law were only too glad to abandon the monastery.

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.⁸⁹ As a result of small faculty sizes—usually three or four full-time professors per school—professors were expected to teach a diverse array of legal subjects and tackle all the grading and administrative tasks that teaching 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.⁹⁰

Yet these circumstances did not, especially in the field of public law, translate into a paucity of legal imagination or lack of scholarly vitality. In ways that differed markedly from Lefroy and his generation, Canada’s public law scholars of the 1930s

⁸⁸ “Law in Books and Law in Action” (1910) 44 Am. L. Rev. 12 at 36.

⁸⁹ 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’s law program was not recognized by the society until its reorganization 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 Mr. Justice Roy J. Matas & Deborah J. McCawley, eds., *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education Held in Winnipeg, Manitoba, October 23-26, 1985* (Montreal: Federation of Law Societies of Canada, 1987) 111; W. Wesley Pue, “Common Law Legal Education in Canada’s Age of Light, Soap and Water” (1996) 23 Man. L. J. 654; D.G. Bell, *Legal Education in New Brunswick: A History* (Fredericton: University of New Brunswick, 1992); David Howes, “The Origin and Demise of Legal Education in Quebec (or Hercules Bound)” (1989) 38 U.N.B.L.J. 127; Macdonald, “National Law Programme”, *supra* note 36; Peter M. Sibenik, “Doorkeepers: Legal Education in the Territories and Alberta, 1885-1928” (1990) 13 Dal. L. J. 419; Kyer & Bickenbach, *supra* note 31; Willis, *Dalhousie*, *supra* note 66; W. Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: University of British Columbia Faculty of Law, 1995).

⁹⁰ McLaren, *ibid.* at 126-27.

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.⁹¹ Scholars in the emerging disciplines of the social sciences, in particular, assumed that the complexity of modern industrial society demanded both a much enlarged state as well as a new expertise in running the nation.⁹² Not surprisingly, many professors began to view themselves as the experts the state required to reform itself.

That reform—economic, political, constitutional—was desperately needed appeared beyond obvious to many scholars. Looking back, Scott remembered the 1930s as “the most traumatic of the decades into which my life has been naturally divided.”⁹³ 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 meagre assistance they could provide. The images of the 1930s that left indelible marks on Scott and his contemporaries were “the shelters and soup kitchens ... [and] the humiliation of breadwinners who could no longer provide for their families.”⁹⁴ The ravages of poverty were not the only dispiriting signs of crisis. Meetings of unemployed workers—in particular those of the Communist Party of Canada—were routinely and forcefully broken up by police.⁹⁵ In the process, foreign-born attendees were often detained and deported under the *Immigration Act*.⁹⁶

⁹¹ See Doug Owram, *The Government Generation: Canadian Intellectuals and the State 1900-1945* (Toronto: University of Toronto Press, 1986) at 151-59. See also Barry Ferguson, *Remaking Liberalism: The Intellectual Legacy of Adam Shortt, O.D. Skelton, W.C. Clark, and W.A. Mackintosh, 1890-1925* (Montreal: McGill-Queen's University Press, 1993); Carl Berger, “The Founders of Critical History” in Berger, *Writing of Canadian History*, *supra* note 35 at 1-31. For Quebec, see Ronald Rudin, *Making History in Twentieth-Century Quebec* (Toronto: University of Toronto Press, 1997).

⁹² Owram, *ibid.* at 50ff. See also Frank H. Underhill, “On Professors and Politics” *Canadian Forum* 15:182 (March 1936) 6.

⁹³ F.R. Scott, “The Nineteen Thirties in the United States and Canada” in Victor Hoar, ed., *The Great Depression: Essays and Memoirs from Canada and the United States* (Vancouver: Copp Clark, 1969) 169 at 169 [Scott, “Nineteen Thirties”].

⁹⁴ *Social Planning*, *supra* note 8 at vi.

⁹⁵ See F.R. Scott, Letter to the Editor, *The [Montreal] Gazette* (3 February 1931) 12 [Scott, Letter to the Editor].

⁹⁶ R.S.C. 1927, c. 93, ss. 41, 42. See Scott's critique of such deportation practices in Case Comment on *Wade v. Egan* (1936) 14 Can. Bar Rev. 62. See also his 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 /

Although the ubiquity of society’s failings haunted many intellectuals, the prospect of social and economic transformation in the face of these deficiencies 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.”⁹⁷ 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.”⁹⁸ For John Willis, “the world was turned upside down.”⁹⁹ 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 reform efforts, whether through their teaching, publications, or extrascholarly activities.

Not everyone welcomed this activity. In some cases, university administrators, newspaper editors, and political figures frowned on public expression from professors, especially when deemed radically socialist or anti-British.¹⁰⁰ Scott’s academic career, among others, was jeopardized because his public comments and political affiliations rankled university officials and members of Montreal’s business establishment. Nevertheless, 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 refine their ideas on the contemporary constitutional issues they found pressing.¹⁰¹ 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 polemical *Canadian Forum* increasingly devoted attention to the subject of constitutional law. In the pages

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 56 at 66-67).

⁹⁷ Scott, *The Collected Poems*, *ibid.* at 87.

⁹⁸ J. King Gordon, “The Politics of Poetry” in Djwa & Macdonald, *supra* note 57, 17 at 21.

⁹⁹ Richard Risk, “Canadian Law Teachers in the 1930s: ‘When the World Was Turned Upside Down’” (2004) 27 Dal. L.J. 1 at 2.

¹⁰⁰ See generally Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999). As Scott and his co-authors pointed out in their introduction to the reissue 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 8 at vi). Prime Minister Bennett certainly looked down on the contributions of this new generation of scholars. “Do you think I want a lot of long-haired professors telling me what to do?” he rhetorically asked his minister of trade and commerce in 1931 (Horn, *League*, *supra* note 8 at 49).

¹⁰¹ Both journals began publishing in 1935: see R.C.B. Risk, “Volume 1 of the Journal: A Tribute and a Belated Review” (1987) 37 U.T.L.J. 193.

of these various 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 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 did. However, their ideas on how the text should be interpreted, or indeed, what the text should say, were generated from circumstances external to the text itself. That is, the scholars of the newer constitutional law turned to history (when it suited their objectives) in arguing, as had Smith in his *Snider* comment, that the framers of the *BNA Act* had intended the federal government to be vested with legislative powers both wide and deep.¹⁰² 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."¹⁰³

The full force of external constitutional criticism became apparent when the Privy Council struck down most of Prime Minister Bennett's New Deal in 1937.¹⁰⁴ In

¹⁰² See Scott, *Canada Today*, *supra* note 64 at 80. See also F.R. Scott, "Section 94 of the British North America Act" (1942) 20 Can. Bar Rev. 525 [Scott, "Section 94"]: still harping on Haldane's judgment in *Snider*, Scott cited the case as "a classic ... for its misreading of Canadian history" ("Section 94", *ibid.* at 538).

¹⁰³ Kennedy, *Aspects*, *supra* note 44 at 93. In his 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 at 2). Wright studied Pound's work under the man himself, having attended Dean Pound's famous jurisprudence seminar while studying at Harvard in 1926.

¹⁰⁴ Bennett's New Deal consisted of the following legislation: *The Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 14; *The Minimum Wages Act*, S.C. 1935, c. 44; *The Limitation of Hours of Work Act*, S.C. 1935, c. 63; *The Natural Products Marketing Act, 1934*, S.C. 1934, c. 57; *The Employment and Social Insurance Act*, S.C. 1935, c. 38; *The Farmers' Creditors Arrangement Act, 1934*, S.C. 1934, c. 53; *The Dominion Trade and Industry Commission Act*, S.C. 1935, c. 59; *An Act to amend the Criminal Code*, S.C. 1935, c. 56, s. 9. See generally W.H. McConnell, "The Judicial Review of Prime Minister Bennett's 'New Deal'" (1968) 6 Osgoode Hall L.J. 39.

January 1935, in the dying days of his deeply unpopular government, Bennett announced in a series of radio broadcasts the drafting of a package of legislation that “thrust the state more boldly into the regulatory arena than ever before.”¹⁰⁵ The statutes comprising the New Deal sought to criminalize anticompetitive 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.¹⁰⁶ The Court released its divided decisions, striking down most of the legislation, in June 1936.¹⁰⁷ The Privy Council, after the inevitable appeals, found virtually all of the legislation unconstitutional.¹⁰⁸ In striking down the legislation, Lord Atkin admonished 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.”¹⁰⁹

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

¹⁰⁵ Saywell, *supra* note 37 at 204. See also Larry A. Glassford, *Reaction and Reform: The Politics of the Conservative Party Under R.B. Bennett, 1927-1938* (Toronto: University of Toronto Press, 1992).

¹⁰⁶ 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 56 at 73).

¹⁰⁷ See *Reference Re Section 498A of the Criminal Code*, [1936] S.C.R. 363, [1936] 3 D.L.R. 593 (upheld by a majority of four to two); *Reference Re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379, [1936] 3 D.L.R. 607 (mostly upheld); *Reference Re Farmers’ Creditors Arrangement Act*, [1936] S.C.R. 384, [1936] 3 D.L.R. 610 (upheld by a majority of five to one); *Reference Re Natural Products Marketing Act*, [1936] S.C.R. 398, [1936] 3 D.L.R. 622 (held *ultra vires*); *Reference Re Employment and Social Insurance Act*, [1936] S.C.R. 427, [1936] 3 D.L.R. 644 (held *ultra vires* by a majority of four to two); *Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitations of Hours of Work Act*, [1936] S.C.R. 461, [1936] 3 D.L.R. 673 (divided three to three).

¹⁰⁸ The Privy Council upheld the *Criminal Code* section regarding anticompetitive practices and the farmers’ credit protection regime, but the balance of the legislation—the national marketing plan, the employment laws dealing with wages and hours of work, the trade regulations (save a few sections), and the unemployment and social insurance system—was declared *ultra vires*. See *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.) [*Labour Conventions Case* cited to A.C.]; *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 368, [1937] 1 D.L.R. 688 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 391, [1937] 1 D.L.R. 695 (P.C.); *Ontario (A.G.) v. Canada (A.G.)*, [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.).

¹⁰⁹ *Labour Conventions Case, ibid.* at 354.

earnest with Smith's case comment in *Snider* now 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.¹¹⁰ 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." Kennedy continued, "At long last 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."¹¹¹ Here, with characteristic rhetorical flourish, Kennedy expressed the multiple dimensions of the newer constitutional law: a new nationalism that rejected constitutional "ancestors" paired with political criticism grounded in contemporary events. Vanished completely was Lefroy's venerable regard for the "the loyal wisdom of British statesmen"¹¹² and the internal probing of the text's true meaning. For his part, Scott echoed 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."¹¹³

Scott's increasingly concrete constitutional and political convictions led him to a host of extrascholarly 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.

¹¹⁰ W.P.M. Kennedy, "The *British North America Act*: Past and Future" (1937) 15 Can. Bar Rev. 393 at 398.

¹¹¹ *Ibid.* at 398-99.

¹¹² Lefroy, *Legislative Power*, *supra* note 12, Preface.

¹¹³ F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485 at 494 [Scott, "Consequences"]. See also Vincent C. MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15 Can. Bar Rev. 401; F.C. Cronkite, "The Social Legislation References" (1937) 15 Can. Bar Rev. 478; A. Berriedale Keith, "The Privy Council Decisions: A Comment from Great Britain" (1937) 15 Can. Bar Rev. 428 (defending these decisions). By contrast, among academics in French-speaking Quebec, the decisions were largely celebrated. For Léo Pelland, for example, the centralizing tendencies of the New Deal violated "la lettre et l'esprit de la Constitution qui régit l'État fédératif canadien" (Pelland, "Problèmes (1936-37)", *supra* note 3 at 214). See also Pelland's support for the Privy Council decisions in "Problèmes (1937-38)", *supra* note 3.

Woodsworth.¹¹⁴ Whereas Woodsworth influenced the leftward drift of Scott’s politics, Scott guided Woodsworth in constitutional matters. 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 situation,” and stressed the need for the domestic power to amend the *BNA Act*.¹¹⁵ Woodsworth was no constitutional scholar, however, and he turned to Scott, among others, to help him refine and develop his ideas concerning the prospects of constitutional amendment.¹¹⁶ In a 1935 address to the House, 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 ...”¹¹⁷ The motion passed unanimously, perhaps as a testament to Woodsworth’s repeated tenacity on this point over the preceding decade, but likely too because the increasing severity of the Depression brought a number of Canada’s constitutional deficiencies into sharper relief. Whatever the reason, Vincent MacDonald suggested that the passage of Woodsworth’s motion indicated that Parliament had finally grasped the fact that the constitution was “not aptly framed to enable Canadian governments properly to grapple with current problems ... in the way which a changed political philosophy

¹¹⁴ Kenneth McNaught, *A Prophet in Politics: A Biography of J.S. Woodsworth* (Toronto: University of Toronto Press, 2001) at 257-59, 264, 271, 273. 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 57 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 League to assist in the drafting of the Regina Manifesto in the summer of 1933. Scott went on to become national chairman of the CCF through much of the 1940s (see David Lewis, “F.R. Scott’s Contribution to the CCF” in Djwa & Macdonald, *supra* note 57, 78).

¹¹⁵ *House of Commons Debates*, 160 (20 March 1924) at 511 (Hon. James S. Woodsworth). See also the 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.

¹¹⁶ Woodsworth thanked, among others, F.R. Scott, Norman Rogers, Brooke Claxton, and Eugene Forsey for their assistance when he raised the issue of constitutional amendment again in 1931: *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. Woodsworth 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, Woodsworth 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 J.S. 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”]).

¹¹⁷ *House of Commons Debates*, 203 (28 January 1935) at 217, 218. Woodsworth quoted from Scott’s League for Social Reconstruction pamphlet, *Social Reconstruction and the B.N.A. Act* (Toronto: Thomas Nelson & Sons, 1934) at 8 [Scott, *Social Reconstruction*].

requires.”¹¹⁸ As a result of the influence Scott had on Woodsworth and vice versa, the ideas of the newer constitutional law not only found expression in scholarly journals, but could also be found in the pages of Hansard and heard in the chambers of Parliament.

Charles Cahan, a Conservative MP from Montreal and former secretary of state, also sought the constitutional advice of scholars. In the aftermath of the Privy Council decisions striking down the New Deal legislation, Cahan 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 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 ...”¹¹⁹ In response, the Liberals referred Cahan’s bill to the Supreme Court for an opinion on its constitutionality. The Court upheld the bill¹²⁰ and, after a delay due to the war, so did the Privy Council.¹²¹ 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.¹²² As well, the

¹¹⁸ Vincent C. MacDonald, “Judicial Interpretation of the Canadian Constitution” (1935-36) 1 U.T.L.J. 260 at 260. 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.); *Re 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, *ibid.* 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).

¹¹⁹ *House of Commons Debates*, 216 (8 April 1938) at 2157 (Hon. Charles Cahan). See Letter from Charles Cahan to Frank Scott (11, 18 February 1938); Letter from Frank Scott to Charles Cahan (17 February 1938), Ottawa, Library and Archives Canada (MG 30, D211, vol. 5, reel H-1216). Saywell reports on the correspondence that passed between Kennedy and Cahan in Saywell, *supra* note 37 at 406.

¹²⁰ *Ontario (A.G.) v. Canada (A.G.)*, [1940] S.C.R. 49, (*sub nom. Reference Re Privy Council Appeals*) [1940] 1 D.L.R. 289 [*Privy Council Appeals* (S.C.C.) cited to S.C.R.].

¹²¹ *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127, [1947] 1 D.L.R. 801 (P.C.), *aff’g Privy Council Appeals* (S.C.C.), *ibid.*

¹²² The Rowell-Sirois Report called for comprehensive amendments to the Constitution, including explicit federal jurisdiction over unemployment and old age pensions. See Canada, *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: Queen’s Printer, 1940) (Chairs: Newton W. Rowell, Joseph Sirois) [Rowell-Sirois Report].

Senate struck its own committee to examine the pre-Confederation records and report on the framers’ true intentions.¹²³

My point here is that the scholars of the newer constitutional law were 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. Scholars felt a sense of urgency in expressing themselves, not only because of the depth of the constitutional crisis they perceived, but also because they believed that they could and should participate in the direction of constitutional change. Although their contributions could be, and often were, dismissed as woolly headed or, worse, radical, there were also political figures like Woodsworth and Cahan eager to incorporate the ideas of the newer constitutional law into their political rhetoric. 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. Kennedy, for example, 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 rebalanced federalism and criticizing the Privy Council’s decentralist reading of the Constitution, but 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. After the Montreal police had dispersed a number of meetings of communists in the early 1930s, *The Gazette* published a letter from Scott

¹²³ The Senate’s O’Connor Report, named after its author, William F. O’Connor, argued that the framers of the *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 *BNA Act* in light of these findings. See *Report to the Honourable the Speaker of the Senate of Canada by the Parliamentary Counsel of the Senate Relating to the Enactment of the British North America Act, 1867, Any Lack of Consonance Between Its Terms and Judicial Constitution of Them and Cognate Matters* (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 report: “‘The O’Connor Report’ on the British North America Act, 1867” (1939) 17 Can. Bar Rev. 309.

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.¹²⁴ 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.¹²⁵ 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 ...”¹²⁶

Despite Scott’s prodding, governments and police were far from prepared to accept communism as a legitimate political alternative. 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.”¹²⁷ Conviction could result in up to twenty years in prison. To Scott, it became increasingly clear that the state intended to actively suppress any criticism challenging the legitimacy of capitalism and liberal democracy. In a series of articles published in *Canadian Forum* and *Queen’s Quarterly*, Scott criticized the arrest and subsequent trial and conviction of Tim Buck and the other Toronto communists.¹²⁸ Scott attacked the conviction on the conventional legal grounds that “[t]here 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.”¹²⁹ More importantly for my purposes, he went on to frame the issue in terms of 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.”¹³⁰ 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 subject give the subject personal liberty.”¹³¹ For Scott, the liberties of the subjects were only

¹²⁴ Scott, Letter to the Editor, *supra* note 95.

¹²⁵ 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 57 at 130-31).

¹²⁶ Scott, *A New Endeavour*, *supra* note 85 at x-xi.

¹²⁷ 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.

¹²⁸ F.R. Scott, “Communists, Senators, and All That” *Canadian Forum* 12:136 (January 1932) 127 [Scott, “Communists, Senators”]; F.R. Scott, “The Trial of the Toronto Communists” *Queen’s Quarterly* 39:3 (August 1932) 512 [Scott, “Trial”]; F.R. Scott “Freedom of Speech in Canada” (Paper presented to the Canadian Political Science Association, 1933), reprinted in Scott, *Essays*, *supra* note 86 at 60 [Scott, “Freedom of Speech”].

¹²⁹ Scott, “Trial”, *ibid.* at 516.

¹³⁰ *Ibid.* at 512.

¹³¹ Scott, “Communists, Senators”, *supra* note 128 at 128.

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.”¹³² By the early 1930s, even King and the Opposition Liberals had declared their distaste for the provision. After regaining office in 1935, King kept his 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.¹³³ 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 facism,” describing the systemic suppression of free speech in that province as “ruthless and persistent.”¹³⁴ 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.¹³⁵ 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 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.”¹³⁶ In its

¹³² Co-operative Commonwealth Federation, “Co-operative Commonwealth Federation Programme” (Adopted at the First National Convention, July 1933), reprinted in McNaught, *supra* note 114, 321 at 328.

¹³³ On Forsey, see Frank Milligan, *Eugene A. Forsey: An Intellectual Biography* (Calgary: University of Calgary Press, 2004); Eugene A. Forsey, *A Life on the Fringe: The Memoirs of Eugene Forsey* (Toronto: Oxford University Press, 1990). On Underhill, see R. Douglas Francis, *Frank H. Underhill: Intellectual Provocateur* (Toronto: University of Toronto Press, 1986); Berger, *supra* note 35, c. 3.

¹³⁴ F.R. Scott, “The Unholy Trinity of Quebec Politics” in Scott, *A New Endeavour*, *supra* note 85, 14 at 15. Scott later came to believe that the fascist designation was unfair. That he published the article under the pseudonym J.E. Keith suggests he knew that this was a bold thing to say in 1934: the article was first published as J.E. Keith, “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.

¹³⁵ *Act Respecting Communistic Propaganda*, S.Q. 1937, c. 11.

¹³⁶ Eugene Forsey, “Civil Liberties in Quebec” *Canadian Forum* 17:196 (May 1937) 42 at 42. See also the following articles by Eugene Forsey: “Under the Padlock” *Canadian Forum* 18:208 (May 1938) 41; “Disallowance: A Contrast” *Canadian Forum* 18:209 (June 1938) 73; “Mr. Lapointe and the Padlock” *Canadian Forum* 18:211 (August 1938) 148; “Breaking the Padlock” Editorial, *Canadian*

first eighteen months of operation, the government padlocked ten houses and confiscated over fifty thousand newspapers and nearly forty thousand books, in addition to thousands of circulars, pamphlets, and buttons. 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 including "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."¹³⁷ "The individual liberties of the Canadian citizen," he noted, "have suddenly been discovered to have very definite and unexpected limits."¹³⁸

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 was far from wanting to wipe clean the foundations of Canadian constitutional law. In his 1934 pamphlet, *Social Reconstruction and the B.N.A. Act*, Scott asked, "Can we build a new society without destroying the constitution?"¹³⁹ For two reasons, Scott believed the answer had to be yes. First, he 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 reshape 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."¹⁴⁰ 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 *Social Planning*, Scott attempted, for the first time, to address this tension with a concrete proposal for constitutional reform.

III. A Constitutional Bill of Rights for Canada

Social Planning and the group that authored it, the League for Social Reconstruction, had their genesis in a hike up a New England mountain in the

Forum 18:212 (September 1938) 164. See also MacLennan, *supra* note 7 at 19-20; Lambertson, *supra* note 7 at 16-66.

¹³⁷ Scott, "Freedom of Speech", *supra* note 128 at 60.

¹³⁸ *Ibid.*

¹³⁹ Scott, *Social Reconstruction*, *supra* note 117, outside cover.

¹⁴⁰ *Ibid.* at 4.

summer of 1931.¹⁴¹ 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, 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”)),¹⁴² 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, economic regulation, social legislation, increased taxation, and amendment of the constitutional division of powers.¹⁴³ 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”.¹⁴⁴

Several years in the researching and writing, *Social Planning* 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.”¹⁴⁵ It comprised over five hundred pages organized in twenty-two chapters setting out and justifying the LSR’s political, economic, and social program.¹⁴⁶ 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.”¹⁴⁷ Scott, with some assistance from Underhill,

¹⁴¹ See Scott’s reminiscences in “Nineteen Thirties”, *supra* note 93 at 172-75; “FHU and the Manifestos” *Canadian Forum* 51:610 (November 1971) 8.

¹⁴² Scott hated the 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 & Madonald, *supra* note 57, 71 at 74). As Horn points out, “either the spirits or the spirit failed” (*ibid.*). In French, the name translated somewhat awkwardly as “La Ligue de Réconstruction sociale” or “La Ligue pour la Réorganisation de la Société”. See also Horn, *League*, *supra* note 8 at 26-27, 58, 219-20.

¹⁴³ The LSR manifesto is reprinted in Horn, *League*, *ibid.* at 219-20.

¹⁴⁴ *Social Planning*, *supra* note 8 at x.

¹⁴⁵ F.R. Scott, “A Decade of the League for Social Reconstruction” in Scott, *A New Endeavour*, *supra* note 85 at 56.

¹⁴⁶ 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” (*Social Planning*, *supra* note 8 at v). Sales of the first 1500 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 *Canadian Forum*. See generally Horn, *League*, *supra* note 8 at 54, 69, 129-33.

¹⁴⁷ Sean Mills, “When Democratic Socialists Discovered Democracy: The League for Social Reconstruction Confronts the ‘Quebec Problem’” (2005) 86 *Canadian Historical Review* 53 at 57-58.

drafted chapter twenty-one: "Parliament and the Constitution".¹⁴⁸ In this chapter, 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 by assuring readers that a socialist 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 ..."¹⁴⁹ Rather, the constitution, he argued, was "a mere political framework" capable of countenancing any manner of legislative agenda, even a socialist one.¹⁵⁰ "All the economic changes necessary for the creation of a co-operative 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."¹⁵¹ 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."¹⁵² 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."¹⁵³ "There are no guaranteed 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."¹⁵⁴

¹⁴⁸ Horn, *League*, *supra* note 8 at x.

¹⁴⁹ *Social Planning*, *supra* note 8 at 501.

¹⁵⁰ *Ibid.* at 494.

¹⁵¹ *Ibid.* at 502.

¹⁵² *Ibid.* at 492-93.

¹⁵³ *Ibid.* at 502.

¹⁵⁴ *Ibid.* at 502-503. Scott's belief that a Canadian socialist government was within easy constitutional grasp evidenced a certain naïveté—the triumph of politics over more objective constitutional analysis. 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. Although the case is usually read as an early victory for constitutional civil liberties, I suggest that it is

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 moved Canada closer to an American constitutional model and away from the British principle that parliament was supreme. 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.”¹⁵⁵ In effect, minority rights should be “rendered inviolable,” not unlike the American constitutional practice.¹⁵⁶ Up to this point, Scott simply repeated constitutional arguments he had helped Woodsworth to craft in 1931.¹⁵⁷ 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 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.¹⁵⁸

While mere 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.

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 potentially “reactionary”¹⁵⁹ with his faith in their ability to protect civil liberties? One view is that Scott’s proposal fragments under scrutiny—a reflection 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.

better understood as an example of the Court’s use of judicial review to overturn political and economic legislation about which it felt profoundly uncomfortable.

¹⁵⁵ *Social Planning, ibid.* at 508.

¹⁵⁶ *Ibid.* These rights were entrenched in the *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.

¹⁵⁷ 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).

¹⁵⁸ *Social Planning, supra* note 8 at 508.

¹⁵⁹ *Ibid.* at 504.

Scott was not of a particularly theoretical cast of mind.”¹⁶⁰ Nevertheless, the tensions within Scott’s thinking fade when placed within the context of the thinking of newer constitutional law.

Scott’s call for entrenched constitutional rights reflected the nationalism of the newer constitutional law in the sense that it implicitly assumed Canada’s right to chart its own constitutional future.¹⁶¹ 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 functional: law 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 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. Constitutional law could best protect democracy’s need for freedom of speech, assembly, and the press through the medium of entrenched rights. Scott drew his constitutional aspirations from a blend of principle and politics. Like his fellow scholars of the newer constitutional law, Scott called for 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 the iron heel of repression actively suppressing political dissent. In this respect, he proposed the entrenchment of those liberties he saw particularly under threat in the 1930s.

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.¹⁶² Interestingly, Scott never interpreted

¹⁶⁰ Macdonald, “Scott’s Constitution”, *supra* note 43 at 14.

¹⁶¹ 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 8 at 504). He abandoned this argument after the Supreme Court issued its decisions striking down the New Deal legislation (see “Consequences”, *supra* note 113 at 494).

¹⁶² 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 as a systemic indictment of judicial review like so many realist critics. Scott conceded that judges were capable of interpreting law incorrectly, but he believed that scholarly criticism, time, 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 planning.¹⁶³ Written rights were 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, 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. These ideas would not be introduced to Canadian constitutional thought for another decade, sparked by the experience of the Second World War and the passage of the *Universal Declaration of Human 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 ...”¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ Scott’s socialism led him to a similar conception of the public good, but he always blended into his socialism a place for certain individual rights.¹⁶⁷ Again, these rights were ones that Scott saw as particularly vulnerable at the hands of

Lochner, *supra* note 9; *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 9. The court famously reversed itself in *West Coast Hotel*, *supra* note 9.

¹⁶³ See Mills, “Charters and Justice”, *supra* note 116 at 47.

¹⁶⁴ Kennedy, *Aspects*, *supra* note 44 at 5.

¹⁶⁵ Willis, “Three Approaches”, *supra* note 77 at 60. See also Willis, “Statute Interpretation”, *supra* note 77; John Willis, “Administrative Law and the British North America Act” (1939) 53 *Harv. L. Rev.* 251 at 273, 281.

¹⁶⁶ On the influence of the new liberalism on thinking about rights, see Ferguson, *supra* note 91 at 237-38.

¹⁶⁷ Interestingly, one of the books that Scott credited with his political awakening is, essentially, an indictment of individual rights. In *The Acquisitive Society*, R.H. Tawney challenged “[t]he disposition to regard individual rights as the centre and pivot of society” (*The Acquisitive Society* (London, U.K.: G. Bell and Sons, 1948) at 30). “[I]f society is to be healthy,” he argued, “men must regard themselves not as the owners of rights, but as trustees for the discharge of functions and the instruments of a social purpose” (*ibid.* at 54). On Scott’s regard for Tawney, see Scott, *A New Endeavour*, *supra* note 85 at ix.

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* 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 caused only a minor ripple when it appeared in 1935. Predictably, left-leaning reviewers praised its good sense, those in the centre questioned its naïveté, and right-wing critics attacked its dogmatic thinking.¹⁶⁸ Over the ensuing seventy years, the text faded into obscurity. Yet Scott's call for the constitutional entrenchment of civil liberties signalled a historic moment in Canadian constitutional thought. In reframing Canadian constitutional law as the merger of social justice, democratic theory, and civil liberties concerns, Scott anticipated Pierre Trudeau and the rights revolution that would transform Canada in the postwar decades. Arguments for and against constitutional rights continued in the decades following the Second World War as the "age of rights" transformed Canadian law and society.¹⁶⁹ The implied bill of rights cases¹⁷⁰ (in many of which Scott appeared as counsel), Diefenbaker's *Canadian Bill of Rights*,¹⁷¹ and the creation of antidiscrimination legislation and later human rights codes¹⁷² demonstrated the escalating role of rights in Canadian law through the 1940s, '50s, and '60s. By September 1967, Pierre Trudeau, then minister of justice, announced to the Canadian Bar Association 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 ..."¹⁷³ This era has drawn the most attention from historians, political scientists, and legal scholars. It is worth remembering, however, the newer constitutional law and Scott's 1930s vision of constitutional rights. In taking the first steps in a debate that continues on the role of rights, the courts, and legislatures in the constitutional governance of Canada, Scott

¹⁶⁸ See Horn, *League*, *supra* note 8 at 68-70.

¹⁶⁹ Lorraine E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Can. Bar Rev. 699. See also George Egerton, "Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945-50" (2004) 85 Canadian Historical Review 451. The phrase "age of rights" is usually attributed to Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

¹⁷⁰ *Boucher v. The King* (1950), [1951] S.C.R. 265, [1951] 2 D.L.R. 369; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, [1951] 4 D.L.R. 529; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641; *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

¹⁷¹ S.C. 1960, c. 44.

¹⁷² See generally Walter Surma Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo, 1982) at 25-37.

¹⁷³ Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968) at 54.

offered a singular contribution to the history of Canadian constitutional thought and law.

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 participated in the remaking of Canadian constitutional law. Whether in scholarly publications, newspapers, magazines, think tanks, discussion groups, or political parties, scholars voiced the ideas of the newer constitutional law to a wider audience of Canadians. Scott delved furthest into these extrascholarly activities, so much so that he is often remembered today more as a civil liberties activist and lawyer than as a constitutional scholar.¹⁷⁴ Rather than viewing stark divisions between Scott’s work inside and outside the academy, I see continuity and convergence in these facets of his 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*. In seeking to fashion a political, social, and economic program defined, at least in part, by constitutional renewal, Scott drew on the normative underpinnings of the newer constitutional law and its legitimation of constitutional change. Seen in the context of the newer constitutional law, Scott’s call for judicially enforced constitutional rights appears as a story of time and place, of personality and circumstance. More than that, this important moment in Canadian

¹⁷⁴ But see Walter Tarnopolsky’s effort to place Scott’s civil liberties work in the context of his contribution to constitutional thought (Walter Tarnopolsky, “F.R. Scott: Civil Libertarian” in Djwa & Macdonald, *supra* note 57, 133).

constitutional history also reveals itself to be a story of legal thinking and constitutional thought. It is a story of ideas, as much as anything else.
