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David Schneiderman

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Abstract

Judicial recourse to constitutional law sources from abroad has been likened to the process of bricolage--coined by anthropologist Claude Lévi- Strauss, this refers to the "borrowing from materials readily at hand." Building on the idea of constitutional borrowing, this paper aims to take account of the role dominant political culture plays in constitutional interpretation, in particular, the values associated with economic globalization. If resort to comparative constitutional sources is on the rise, dominant political culture will likely have the effect of limiting the stock of tools available to judges. The author argues that, in an age of economic globalization, the "buyer-seller" model of constitutional interpretation will be one of the principal interpretive sources readily at hand. This is a model which valorizes market relations of free and mutual exchange, ideas familiar to U.S. constitutional law particularly in the Lochner era. It is argued that this market model has emerged as an important mode of interpretation in Canadian constitutional law since 1982. This is suggested by an examination of recent decisions in the realms of federalism, Charter rights, and Aboriginal rights, though not all cases can be explained in this way. Nor is this a phenomenon isolated to Canada; rather, it is to be expected that the buyer-seller model will have universal appeal, for it appears to be the best available method of securing economic success in an era of intense competition between national states for foreign capital.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Constitutional law; Canada

EXCHANGING CONSTITUTIONS: CONSTITUTIONAL *BRICOLAGE* IN CANADA©

BY DAVID SCHNEIDERMAN*

Judicial recourse to constitutional law sources from abroad has been likened to the process of *bricolage*—coined by anthropologist Claude Lévi-Strauss, this refers to the "borrowing from materials readily at hand." Building on the idea of constitutional borrowing, this paper aims to take account of the role dominant political culture plays in constitutional interpretation, in particular, the values associated with economic globalization. If resort to comparative constitutional sources is on the rise, dominant political culture will likely have the effect of limiting the stock of tools available to judges. The author argues that, in an age of economic globalization, the "buyer-seller" model of constitutional interpretation will be one of the principal interpretive sources readily at hand. This is a model which valorizes market relations of free and mutual exchange, ideas familiar to U.S. constitutional law particularly in the Lochner era. It is argued that this market model has emerged as an important mode of interpretation in Canadian constitutional law since 1982. This is suggested by an examination of recent decisions in the realms of federalism, *Charter* rights, and Aboriginal rights, though not all cases can be explained in this way. Nor is this a phenomenon isolated to Canada; rather, it is to be expected that the buyer-seller model will have universal appeal, for it appears to be the best available method of securing economic success in an era of intense competition between national states for foreign capital.

Tel que décrit par l'anthropologue Claude Levi-Strauss, le recours aux sources constitutionnelles de l'extérieur du pays ressemble à un processus de bricolage et équivaut à un emprunt de matériaux facilement disponibles. Par l'entremise d'une discussion des emprunts constitutionnels, cet article a pour but l'examen du rôle dont se dote la culture politique dans l'interprétation constitutionnelle et, plus particulièrement, les valeurs associées à la globalisation économique. Si l'on peut remarquer une hausse dans le recours aux sources constitutionnelles comparatives, la culture politique dominante pourrait limiter la gamme d'outils disponibles aux juges. L'auteur maintient que dans une époque de globalisation économique, le modèle vendeur-client de l'interprétation constitutionnelle deviendra l'un des outils d'interprétation facilement disponibles. Il s'agit d'un modèle qui valorise les échanges libres et mutuels au sein des relations économiques, familier au droit constitutionnel américain de l'époque de Lochner. En examinant des décisions en matière du fédéralisme, des droits fondamentaux offerts par la *Charte* et des droits aborigènes, l'auteur maintient que ce modèle à la base du marché est devenu un mode important d'interprétation dans le droit constitutionnel canadien depuis 1982, malgré les exceptions à cette règle. Ce phénomène n'est pas uniquement canadien, mais le modèle vendeur-client aurait supposément un attrait universel puisqu'il semble être la meilleure façon de garantir le succès économique dans une ère de compétition intense entre les nations pour les capitaux étrangers.

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* Associate Professor, Faculty of Law, University of Toronto, Toronto. The author wishes to thank Harry Arthurs, Sujit Choudhry, Donna Greschner, Darlene Johnston, Patrick Macklem, and Andrew Petter for comments and Douglas Sanderson for research assistance. The author is also pleased to acknowledge the support of the Connaught Research Fund at the University of Toronto.

I. INTRODUCTION

Some time ago, Montesquieu argued that the laws of each nation are those best suited to a number of variables which, when taken together, comprise the essence of a people. Factors such as geography, religion, history, and form of government were determinative of this essence. Montesquieu declared that the best constitution "is one whose particular arrangement best relates to the disposition of the people for whom it is established."[1] Particularity now has given way to universality. In the contemporary world, there is talk of the rise of "world constitutionalism"[2] and "a world-wide legal culture."[3] Due to the proliferation of constitutional borrowing in the formation, drafting, and interpretation of constitutional text, the outlines of a global cluster of constitutional principles, it is claimed, have come into view.[4]

For Mark Tushnet, the idea of "constitutional *bricolage*" best reflects the tendency to constitutional borrowing in the modern age.[5] *Bricolage*—coined by anthropologist Claude Lévi-Strauss, meaning borrowing from what is readily at hand[6]—displaces emphasis on constitutional unity in favour of constitutional compromise and contingency. According to this account, framers and interpreters seek immediate solutions to constitutional problems and so they will look to the surfeit of materials at hand, including other constitutional regimes. Yet, constitutional borrowing has not proliferated to every corner of the globe. One of the world's oldest constitutional democracies, the United States, continues to resist this trend.[7] Borrowing of this sort, moreover, is not strictly a contemporary phenomenon. Consider, for example, the lively

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[1] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, ed. and trans. by Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone (Cambridge: Cambridge University Press, 1989) at 8.

[2] Bruce Ackerman, "The Rise of World Constitutionalism" (1997) 83 Va. L. Rev. 771.

[3] Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J. 1225 at 1286 [Tushnet, "Possibilities of Comparative Constitutional Law"]. For an earlier invocation of the *bricoleur*, see Mark Tushnet, "The Bricoleur at the Center," Book Review of *The Partial Constitution* by Cass R. Sunstein (1993) 60 U. Chicago L. Rev. 1071.

[4] David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 10, 142.

[5] See Tushnet, "Possibilities of Comparative Constitutional Law," *supra* note 3. See also Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information" (1999) 40 Harv. Int'l L.J. 221 at 279, n. 205.

[6] Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966) at 17-36.

[7] Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 Ind. L.J. 819 at 830-32.

Anglo-American constitutional conversation giving rise to "classical legal thought" of the late nineteenth century.[8] Talk about global constitutionalism and *bricolage* deserves our attention, however, if only because it helps to explain a number of developments within Canadian constitutional law and elsewhere over the past twenty years.

In an age of economic globalization, states increasingly are under pressure to adopt legal regimes that emulate economic success experienced elsewhere. Growing membership in the European Union, the rise of regional trading blocs, the global expanse of bilateral investment treaties, and the emergence of the World Trade Organization as a global force are manifestations of this increasing pressure on states to adopt legal forms that stimulate trade and investment. This pressure also is being felt in the realm of constitutional law. Constitutionalism, after all, is a convenient device for limiting, or at least slowing down, state capacity to intervene in markets. States, therefore, are asked to embrace a variety of pre-commitment strategies that constrain their capacity to regulate markets. For instance, in Latin America, constitutional obligations to protect the national patrimony are giving way to privatization schemes and other "governance" strategies that are more amenable to strategies for economic growth championed by international lending institutions.[9] Judicial actors also have a role to play in these developments: the judiciary can either be conscripted by or resist these tendencies.[10] In these cases, framers and interpreters are under pressure to adopt dominant values and strategies—constitutional difference, after all, does not "add value" in an age of economic globalization.

The phenomenon described here has its Canadian analogue. Among the notable developments in Canadian constitutional law is the role that the market—premised on the free and mutual exchange of value between buyers and sellers—increasingly plays in constitutional interpretation. In this article, I argue that Canadian courts are embracing the "buyer-seller" model of constitutional interpretation. This model places

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[8] See Hugh Tulloch, *James Bryce's American Commonwealth: The Anglo-American Background* (Suffolk: Boydell Press, 1988); David Schneiderman, "Constitutionalism in an Age of Anxiety: A Reconsideration of the Local Prohibition Case" (1996) 41 McGill L.J. 411 [Schneiderman, "Constitutionalism in an Age of Anxiety"]. On classical legal thought, see Duncan Kennedy, "Towards a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940" (1980) 3 Res. L. & Soc. 3.

[9] See David Schneiderman, "Constitutional Approaches to Privatization: An Inquiry Into the Magnitude of Neo-Liberal Constitutionalism" (2000) 63 Law and Contemp. Probs. 83.

[10] See *e.g.* my discussion of Israeli and Colombian high courts in David Schneiderman, "Comparative Constitutional Law in an Age of Economic Globalization" in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, Conn.: Praeger, 2002) 237 [Schneiderman, "Age of Economic Globalization"].

emphasis on market relations and conscripts constitutional interpretation as a promotional vehicle for market values. It is a model conducive to the market exchange that was a dominant mode of constitutional interpretation in the United States in the late nineteenth and early twentieth centuries.[11]

Associated with the period known as the "Lochner era," this interpretative trope licensed the judiciary to shackle legislative power in order to advance business interests.[12] Dominant in this period was a style of constitutional thought concerned not only with the rationality of legislative power—the typical "means-ends" inquiry—but also with prevailing societal norms.[13] In other words, judicial review provided an entry point for culture.[14] Gerald Garvey invokes the trope "constitutional *bricolage*" to describe this judicial reliance on received values and ruling principles.[15]

In Part II, I inquire into the idea of constitutional borrowing or *bricolage*. In order to make the model more robust, I maintain that we should account for the role culture plays in moulding interpretive strategies in constitutional law. In Part III, following Garvey, I argue that interpretive tools are at hand for reasons having to do with dominant societal norms and values, particularly those that have infiltrated Canadian legal and political culture by reason of Canada's geopolitical proximity to the hegemon of the contemporary world.[16]

In Part IV, I examine the incorporation of the model of market relations into Canadian constitutional law. While Canada is not experiencing, nor has it experienced, a type of Lochnerian episode, constitutional interpretation currently is shifting conspicuously in the direction of the market model. This shift comports well with the buyer-seller model identifiable in the Lochner era. I argue that this shift is discernible in some instances of Supreme Court interpretation, not only of the *Canadian Charter of Rights and Freedoms*[17] but also of Canadian federalism and Aboriginal rights.

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[11] Gerald Garvey, *Constitutional Bricolage* (Princeton: Princeton University Press, 1971).

[12] It also enabled legislative authority to remove obstacles to market exchange. See *ibid.* at 102.

[13] *Ibid.* at 113.

[14] Law was "brought into harmony with the broader culture." See *ibid.* at 3.

[15] *Ibid.* at 14-15.

[16] On this, see Stephen Clarkson, *Uncle Sam and US: Globalization, Neoconservatism, and the Canadian State* (Toronto: University of Toronto Press, 2002).

[17] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

Not all constitutional interpretation under the *Charter* over the last twenty years can be explained in this way. If we think of judicial review as an entry point for dominant political culture, however, that elements of Canadian constitutional law are moving in this direction should come as no surprise. After all, economic rationality played a role, though often obscured, in the interpretation of the Canadian division of legislative powers.[18] The proclamation of the *Constitution Act, 1982*[19] significantly enlarged the range of judicial inquiry into legislative enactment from that which occurred previously. Courts remain constrained in significant ways, as they have in the past, by text, legal argumentation, and precedent.[20] This shift, however, reflects the influence of larger patterns of socio-economic and political behavior—what Harry Arthurs calls the "globalization of the mind."[21] If judicial interpretation leads us to the "grand entrance hall"[22] of values associated with dominant political culture, then we should find traces of the values we associate with economic globalization and its political handmaiden, neo-liberalism.

II. CONSTITUTIONAL *BRICOLAGE*

Adopting Lévi-Strauss' terminology,[23] constitutional *bricolage* refers to the activity whereby constitution makers and interpreters look to the constitutional tools "at hand"—tools which may originate from constitutional regimes elsewhere—to solve constitutional problems. For Tushnet, constitutional *bricolage* represents a method of comparative constitutional analysis that helps to explain contemporary constitutional borrowing.[24] *Bricolage* also may be the method best suited for the "cautious and careful" incorporation of constitutional experiences elsewhere into U.S. constitutional law. An exemplar of *bricolage* in the contemporary world may be the new South African constitutional regime. Breaking from

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[18] See Schneiderman, "Constitutionalism in an Age of Anxiety," *supra* note 8. See also J.R. Mallory, "The Courts and the Sovereignty of Canadian Parliament" (1944) 10 Can. J. Ec. Pol. Sc. 167.

[19] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[20] See the classic statement in Max Lerner, "The Supreme Court and American Capitalism" (1933) 42 Yale L.J. 668 and the fuller account in Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings L.J. 805.

[21] H.W. Arthurs, "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1997) 12 C.J.L.S. 219.

[22] *Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 at 78.

[23] *Supra* note 6 at 17-36.

[24] See Tushnet, "Possibilities of Comparative Constitutional Law," *supra* note 3.

a racist constitutional past, the South African constitutional text mandates that judges have recourse to international law and other constitutional regimes in the course of judicial interpretation of the Bill of Rights.[25]

Tushnet contrasts this notion of constitutional *bricolage* with functionalism—where constitutional text serves certain predictable functions, like economic development—and expressivism—where constitutionalism is viewed as the outgrowth of distinctive political communities, resembling Montesquieu's account. The idea of *bricolage* destabilizes the presumed rationality inherent in functionalism and the essentialism suggested by expressivism.[26] Keeping open the possibility of critique, the *bricoleur* views constitutional regimes as the product of indeterminate outcomes and so "existing legal materials [will be] coopted and transformed to address the problem at hand."[27]

If Tushnet thereby emphasizes the agency of judicial interpreters, he elides the structural constraints that help to determine the materials interpreters will have "at hand." The element of constraint, in other words, is obscured in this account. A similar blurring occurs in much work in cultural studies. Dick Hebdige, for instance, invokes *bricolage* to describe the appropriation of the signs and symbols of dominant culture by English skinheads and punks.[28] School uniforms, rain coats, safety pins, and lavatory chains were "symbolically defiled ... and juxtaposed" by new subcultures. These improvised combinations generated new meanings upsetting "every relevant discourse."[29] For Hebdige, dominant meanings are not fixed or guaranteed but are capable of fracture, resistance, and transformation.[30] The appropriation of the signs and symbols as means of resistance may constitute, as Ranajit Guha writes, "a project predicated on power."[31] But this belies the capacity of signs, taken alone, to upset relations of power.

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[25] Constitution of the Republic of South Africa 1996, No. 108 of 1996, s. 39(1). See discussion in Choudhry, *supra* note 7 at 841ff.

[26] See Tushnet, "Possibilities of Comparative Constitutional Law," *supra* note 3 at 1286.

[27] *Ibid.* at 1301.

[28] Dick Hebdige, *Subculture: The Meaning of Style* (London: Methuen, 1979) at 102-06.

[29] *Ibid.* at 107-08.

[30] *Ibid.* at 103, 116.

[31] Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Delhi: Oxford University Press, 1983) at 75. Guha writes about the appropriation of symbols in Indian peasant insurgencies—as in forms of dress or an upturned moustache—as only "the very beginning" of class consciousness and self-awareness. These forms of rebel discourse were in the "borrowed language" of the enemy. See *ibid.* at 19ff, 75.

Rather, consumer-led accounts tend to exaggerate the scope of freedom available and resulting shifts in dominant understandings.[32]

We might bring in the element of structural constraint by returning to Lévi-Strauss' account. Lévi-Strauss contrasts the worlds of the engineer with those of the *bricoleur*. The engineer uses the stock of available tools for definite and determinate uses.[33] The *bricoleur*, by contrast, can imagine using a set of tools and materials—his "treasury"[34]—in different and heterogenous ways; he will make do with "whatever is at hand." But, Lévi-Strauss maintains, the "universe of instruments available" to the *bricoleur* is "closed" and their possibility of use always remains "limited by the particular history of each piece." In other words, there are limits to the *bricoleur's* "freedom of manouevre."[35] If the engineer is "trying to make his way out of and go beyond the constraints imposed by a particular state of civilization," the *bricoleur* "by inclination or necessity always remains within them."[36]

Diagnoses of contemporary constitutional borrowing also must admit that only a closed set of tools, with particular histories, are available at hand. Tushnet elsewhere emphasizes that judicial choice is constrained by a "highly developed" and "deeply entrenched" system that structures interpretation in ways compatible with the values of liberal capitalism.[37] In an age of economic globalization, we might want also to admit that judicial borrowing similarly is limited to a small range of acceptable outcomes. The range will be consonant with a historically contingent but dominant view of constitutionalism with pretensions to universality, yet reflective only of a particular version of U.S. constitutional law.[38]

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[32] See Nicholas Garnham, "Political Economy and Cultural Studies: Reconciliation or Divorce?" (1995) 12 Critical Studies in Mass Communication 62.

[33] *Supra* note 6 at 18.

[34] *Ibid.* at 18.

[35] *Ibid.* at 19.

[36] *Ibid.*

[37] Mark V. Tushnet, "Following the Rules Laid Down: Critique of Interpretivism and Neutral Principles" (1983) 96 Harv. L. Rev. 781 at 824.

[38] On the claim to universality in law, see Bourdieu, *supra* note 20 at 844. For the argument that this "master narrative" of U.S. constitutional law does not represent U.S. constitutional history, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

III. THE BUYER-SELLER MODEL

One reason for the success of the U.S. model of rights abroad in the last half century, it has been said, is the increasing acceleration of social and economic relations—the oft-cited "compression of time and space." Judicial review under a bill of rights provides opportunities for flexible and adaptive interpretation. William Scheuerman suggests that this flexibility offers a legal recipe for societies experiencing difficulty responding to the challenges of economic globalization.[39] To be sure, as Morton Horwitz and Bernard Hibbitts have shown, judges have in the past manipulated legal doctrine so as to facilitate the improvement of market mechanisms.[40] In an era of constitutional convergence, however, constitutionalism also facilitates the spread of market values by locking in gains made by transnational capital in the post-1989 international economic environment.[41] Rather than making legal regimes more fluid and flexible, as Scheuerman argues, constitutional law in the age of economic globalization plays a significant role—as it often has in the past[42]—in preserving and enhancing the position of economically powerful interests by constraining state capacity in regard to the market.[43]

Constitutionalism long has been associated with market values. James Madison famously admitted that U.S. constitutional design was intended to safeguard the interests of the propertied from dispossessed factions.[44] Constitutionalism in the United Kingdom has been portrayed as a vehicle for preserving vested interests or as a prophylactic to class rule.[45] Karl Polanyi characterized U.S. constitutionalism as having as its objective

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[39] William E. Scheuerman, "Constitutionalism in an Age of Speed" Const. Commentary [forthcoming in 2002]. Canadian constitutional courts, it might be said, have eagerly embraced the capacity for judicial innovation in constitutional interpretation. Cases like the *Quebec Secession Reference* suggest that the Supreme Court has great confidence in its ability to adapt constitutional law to the demands of socio-political *realpolitik*. See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.

[40] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); Bernard J. Hibbitts, "Progress and Principle: The Legal Thought of Sir John Beverley Robinson" (1989) 34 McGill L.J. 454.

[41] Schneiderman, "Age of Economic Globalization," *supra* note 10.

[42] Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957).

[43] As Wolin reminds us, political economy "reveals a depoliticized state rather than the depoliticized economy emphasized by the economists." See Sheldon S. Wolin, *Tocqueville Between Two Worlds: The Making of a Political and Theoretical Life* (Princeton: Princeton University Press, 2001) at 349.

[44] Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, ed. by Clinton Rossiter (New York: Mentor Books, 1961) at 78-79.

[45] See discussion in Schneiderman, "Constitutionalism in an Age of Anxiety," *supra* note 8.

the isolation of economic power from the political sphere;[46] Zygmunt Bauman similarly describes the current push toward globalization as meaning, among other things, "the progressive separation of power from politics."[47]

If *bricolage*—resort to the stock of tools at hand—helps to describe processes of judicial interpretation in an era of globalization, how might we identify the inventory to which judges will have resort? Are all constitutional experiences elsewhere included within the judicial tool kit? Garvey suggests that the judicial *bricoleur's* tools will be derived from society's "political culture." Courts operate within a "received budget of legal and social concepts" and so will seek to solve legal problems from this "limited cultural reserve."[48] This is not to say, Garvey insists, that judges are merely cultural dupes, but rather that judges are limited in their ability to respond to change and so are constrained by the stock of culturally accepted solutions to legal problems. Processes of globalization—for instance, transnational judicial conversations between national high courts[49]—will presumably widen the inventory of constitutional resources available to the constitutional *bricoleur*. But not all constitutional traditions will be treated equally.

The pressures of economic globalization are being felt at every level of state institution, though responses by state actors to these pressures may be different, even contradictory.[50] Even if outcomes are not entirely predictable, dominant political culture associated with economic globalization will have the effect of constraining the stock of options available to decision makers. In the field of constitutional interpretation, there will be a range of acceptable results, many of which will be expected to facilitate economic growth and productivity. If there is a worldwide legal culture, then we will expect its constituent elements to promote economic liberty and protect private property, the supposed recipes for economic success in an era of intense competition between national states for foreign capital. Limiting state capacity to intervene in the market—shrinking the range for political action in the economic sphere—is the regrettable consequence. It is not to say that judicial capacity to deflect these cultural pressures is entirely non-existent. As mentioned, there are a range of

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[46] *Supra* note 42 at 225.

[47] Zygmunt Bauman, *In Search of Politics* (Stanford: Stanford University Press, 1999) at 120.

[48] *Supra* note 11 at 5.

[49] See Kirk Makin, "Canadian Legal Wisdom a Hot Commodity Abroad" *The Globe and Mail* (28 August 2000) A1.

[50] Nicos Poulantzas, *State, Power, Socialism*, trans. by Patrick Camiller (London: Verso Books, 1980) at 135.

outcomes that may be acceptable, and these may even contradict the values associated with the dominant political culture. As William Sewell reminds us, the reproduction of powerful structures is never automatic: "Structures are at risk, at least to some extent, in all of the social encounters they shape."[51] But the range of autonomy is also confined, in which case we might not anticipate that the judiciary, even if inclined to do so, will easily break free from these constraints.

The rise of the buyer-seller model represents the spread of market power under constitutionalism, where public power is rendered subordinate to the economic rationality of private market transactions. The model is predicated upon a mutuality of interest between willing sellers and buyers mediated through the exchange of value.[52] For Garvey, the promise of *exchange* permits the application of the buyer-seller model to a wide variety of transactions beyond the traditionally economic.[53] The buyer-seller model anticipates the payment of compensation—there will be payers and payees in the market model (this is in contrast to the "donor-donee" model or "gift" model of distribution). There are close affinities here to another of Garvey's models, what he calls the "ruler-subject" model. According to this model, social relations are predicated upon relations of domination and subordination rather than relations of equal economic opportunity. It is important to note the close connection between these two models which, Garvey claims, have been of paramount importance in U.S. constitutional interpretation.

In the late nineteenth century, U.S. courts were able to screen, under the guise of the buyer-seller model, "the development of an essentially exploitative economy in which power, not contract, actually dominated employer-employee relationships."[54] These were relations more in the nature of those between ruler and subject. It was precisely the failure of courts in the Lochner era to admit this close connection—that labour power, made material through individual contracts of employment, was not equivalent to the power of capital.[55] The observation can be generalized,

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[51] William H. Sewell, Jr., "A Theory of Structure: Duality, Agency, and Transformation" (1992) 98 Am. Jour. Soc. 1 at 19.

[52] The typical economic explanation, as Marx describes it, is that "in exchange, production and consumption are mediated through the contingent specificity of individuals." See T. Carver, ed., *Karl Marx: Later Political Writings* (Cambridge: Cambridge University Press, 1996) at 134.

[53] For instance, the model is generalizable to other spheres, like the sexual division of labour. See Garvey, *supra* note 11 at 29.

[54] *Ibid.* at 31.

[55] A realization the U.S. Supreme Court came to only in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

though Garvey does not go so far: relations of domination and subordination are ubiquitous in market relations.

The vitality of the buyer-seller model in the modern age is represented well by the centrality of consumerism in market societies. Consumerism offers a semblance of freedom for many who experience constraints, if not oppression, in other areas of their lives.[56] As exemplified by Hebdige, work in cultural studies suggests that the agency offered by consumerism enables the formation of new identities and the pursuit of independent, even alternative, life strategies.[57] Consumerism provides a medium for belonging, a surrogate for citizenship at a time when people are estranged from traditional political processes. Citizenship, according to this model, is equated with economic membership through purchasing power. But this is an impoverished version of citizenship; it represents a class of "imperfect" citizens.[58] Real citizenship rights in the global economic order are accorded to those with capital, such as foreign investors and global traders—those whom Leslie Sklair designates the "transnational capitalist class"[59]—in contrast to the aggregate of wage earners or consumers.

The current citizenship regime might better be described as one made up of nineteenth-century citizens and twentieth-century consumers.[60] According to David Harvey, the globalization of capital has not resulted in any momentous change in modes of production and associated social relations. If there has been any qualitative change, "it is towards the reassertion of early nineteenth-century capitalist values coupled with a twenty-first century penchant for pulling everyone (and everything that can be exchanged) into the orbit of capital."[61] We should not be surprised to find that Canadian constitutional law also will have been lured toward this

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[56] See Zygmunt Bauman, *Freedom* (Minneapolis: University of Minnesota Press, 1988) at 61.

[57] *Supra* note 28. For a critique, see Garnham, *supra* note 32. For a defence, see Lawrence Grossberg, "Cultural Studies vs. Political Economy: Is Anybody Bored With This Debate?" (1995) 12 Critical Studies in Mass Communication 72.

[58] I draw here on Aristotle's formulation. See *Politics, Books III and IV*, trans. by Richard Robinson (Oxford: Oxford University Press, 1995) at 1275^{a}5, 1277^{b}39. This also is suggested in Zygmunt Bauman, *Work, Consumerism and the New Poor* (Buckingham: Open University Press, 1998) at 38.

[59] Leslie Sklair, *The Transnational Capitalist Class* (Oxford: Blackwells, 2001).

[60] I borrow this phrase from Néstor García Canclini, *Consumers and Citizens: Globalization and Multicultural Conflicts*, trans. by George Yúdice (Minneapolis: University of Minnesota Press, 2001).

[61] Harvey's quote continues "... while rendering large segments of the world's population permanently redundant in relation to the basic dynamics of capital accumulation." See David Harvey, *Spaces of Hope* (Berkeley: University of California Press, 2000) at 68.

constellation of values. It is to a discussion of this particular constitutional regime that we now turn.

IV. MARKET CULTURE IN CANADIAN CONSTITUTIONAL LAW

A. *Federalism*

The central issue for Canadian constitutional law prior to 1982 was the division of legislative authority between the federal and provincial governments. According to William Lederman, the classification of laws between levels of government was at the heart and soul of constitutional adjudication, not questions about state capacity in relation to individual rights.[62] Even in the performance of this classification function, Canadian constitutional law did not escape entirely from anxieties raised by unconstrained legislative authority. There is evidence that judicial review under the *Constitution Act, 1867*[63] was faithful to classical legal thinking by shielding private property from legislative intrusion and promoting economic liberty.[64] The *Charter* enhanced, and rendered more transparent, this objective of promoting market relations. As business interests have made gains under the *Charter*, we may lose sight of the role of the law of Canadian federalism in promoting the buyer-seller model.[65]

The market model visibly entered into the Canadian law of federalism in the Supreme Court of Canada decision of *Hunt v. T&N plc.*[66] The case concerned a Quebec "blocking statute"—a statute prohibiting the removal of documents from within the province that may be required for legal proceedings taking place outside of the province. These statutes originated as a means of preventing the extraterritorial reach of U.S. antitrust legislation, but extended to interprovincial requests for the

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[62] W.R. Lederman, "Classification of Laws Under the British North America Act" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964) at 177.

[63] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[64] I have argued that elite anxiety with "class rule"—an anxiety common to legal elites in the United States and the United Kingdom—entered in Canadian constitutional adjudication in the late-nineteenth century. 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.

[65] One could begin this discussion by citing the non-binding Agreement on Internal Trade designed to remove non-tariff restrictions on the movement of goods, services, and persons across provincial boundaries.

[66] [1993] 4 S.C.R. 289 [*Hunt*]. Here I draw on an arguments made earlier in Joel Bakan *et al.*, "Developments in Constitutional Law: The 1993–94 Term" (1995) 6 Sup. Ct. L. Rev. (2d) 67 at 119-25.

production of documents.[67] According to Justice La Forest, writing for the majority of the Court, rules respecting diversity of jurisdiction were now anachronistic:[68]

> [I]n our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must ... be a workable method of coordinating this diversity. Otherwise, the anarchic system's worst attributes emerge, and individual litigants will pay the inevitable price.

Drawing on structural themes reflected in the 1867 and 1982 constitution acts—common citizenship, mobility rights, the economic union, and unitary court structure—the Supreme Court found the Quebec law beyond the provincial legislature's constitutional capacity. Justice La Forest thereby read into the constitution, without textual foundation, the "full faith and credit" clause found in the U.S. Constitution.[69] Otherwise, the blocking statute would discourage "international commerce" and the "efficient allocation and conduct of litigation."[70] The resulting "higher transactional costs for interprovincial transactions [would] constitute an infringement on the unity and efficiency of the Canadian marketplace, as well as unfairness to the citizen."[71]

Justice La Forest drew here on his earlier ruling in *Morguard*,[72] where he invoked the same neo-liberal themes. He declared that "[m]odern states ... cannot live in splendid isolation."[73] Rather, the modern rules of comity are "grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner." Justice La Forest maintained that "[a]ccommodating the flow of wealth, skills and people across state lines has now become imperative."[74] In *Hunt*, these compulsions rise to the level of constitutional obligation.

According to this account, constitutional law must be reconfigured to facilitate market transactions between buyers and sellers. However

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[67] *Hunt*, *ibid.* at 304.

[68] *Ibid.* at 295.

[69] Art. IV, § 1 states: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[70] *Hunt*, *supra* note 66 at 327.

[71] *Ibid.* at 330.

[72] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1098 [*Morguard*]. See also Justice La Forest's related judgment in *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (S.C.C.).

[73] *Morguard*, *ibid.* at 1095.

[74] *Ibid.* at 1096, 1098.

desirable it may be to remove these kinds of impediments to civil proceedings (in *Hunt*, the circumstances were compelling), it is startling how far the Court is willing to bend Canadian constitutional law in order to satisfy these economic imperatives.[75] This conclusion is underscored by the fact that, among the factums filed in the Supreme Court of Canada, no litigant invoked these neo-liberal rationales. Pierre Bourdieu has written that legal judgment is the "product of a symbolic struggle between professionals possessing unequal technical skills and social influence."[76] Using its superior position as author of the content of constitutional law, the Court invokes dominant cultural values—cloaked in a discourse of inevitability—to steer Canadian constitutional law in the direction of the market model.[77]

B. Charter *Rights*

The market model perhaps is better represented in the jurisprudence under the *Charter*. This is not a claim that only economic interests have been well served by the *Charter*, for there are varying results and other discursive threads found in the jurisprudence. For instance, the idea that some vulnerable groups have benefitted from *Charter* decision making—though these victories may be "partial, fragile and

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[75] There are notable exceptions. See *e.g. Canadian Egg Marketing Agency v. Richardson* (1999), 166 D.L.R. (4th) 1 (S.C.C.) [*Richardson*]. The allocation of egg quotas under Canada's national marketing scheme for the production and distribution of eggs was challenged under the mobility rights section of the *Charter* (section 6). Though egg producers in the Northwest Terrorities were barred permanently from participating in the interprovincial marketing scheme, the Court ruled that the scheme was prompted not by discriminatory purposes but by historical patterns of egg production. As the quota system did not discriminate "primarily" on the basis of residence, it did not offend section 6 rights. Justice McLachlin, dissenting, found that mobility rights were infringed as equality of opportunity was denied and the scheme did not advance any pressing and substantial objective. Both the majority and minority in *Richardson* agreed, however, that barriers to the mobility of capital, goods, and services that unreasonably discriminate primarily along provincial lines are constitutionally prohibited under section 6. Yet this is not expressly part of the *Charter's* mobility rights provisions—in fact, reform of section 121 of the *Constitution Act, 1867* along just these lines was rejected in the 1980s and 1990s. So even in *Richardson*, where a majority of the Court appeared to rebuff the market model, its influence can be observed.

[76] Bourdieu, *supra* note 20 at 827.

[77] Following Stuart Hall, we might call this typically ideological: "representing the order of things ... with that natural or divine inevitability which makes them appear universal, natural and coterminous with 'reality' itself." See Stuart Hall, "The Rediscovery of Ideology: Return of the Repressed in Media Studies" in Michael Gurevitch *et al.*, eds., *Culture, Society and the Media* (London: Methuen, 1982) 56 at 65.

contradictory"[78]—is not without foundation.[79] That economic interests have benefitted from the *Charter* is indisputable, though the Court will not admit it. In the *Pepsi-Cola* case,[80] Chief Justice McLachlin and Justice LeBel, writing for the Court, distinguished between those "fundamental Canadian value[s]," like freedom of expression, and those diverse interests served by the common law and "not engaged by the *Charter*. Salient among these are the life of the economy and individual economic interests."[81]

The record of success for business interests has been mixed, but there is little doubt that gains continue to be secured in the guise of making constitutional law. As Gregory Hein shows, "corporate interests" are actively engaging in *Charter* litigation—they represent nearly 40 per cent of the cases that target the decisions of elected officials.[82] Business firms have had some success in conscripting *Charter* review in order to resist government regulation. According to Richard Bauman, constitutional challenges "have become an important strategic device for businesses as they have made political gains through the process of Charter review."[83]

Nowhere is this success more apparent than in the field of commercial speech. From its modest doctrinal beginnings in *Ford*[84] to its robust articulation in *RJR-MacDonald*,[85] commercial expression under the *Charter* has proven to be a valuable resource for promoting the buyer-seller model. Once it is accepted that "all expressions of the heart and mind" together with all "human activity" which "conveys or attempts to convey a

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[78] See Brenda Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" (2002) 40 Osgoode Hall L.J. 223 at 225.

[79] Brad Daisley, "New Era of Charter Litigation on the Horizon" *The Lawyer's Weekly* (6 June 1997) 16. Justice McLachlin is quoted there as saying: "Where we have [Charter rights], the state has a new tool to aid them in this protection, and indeed the Charter has been a way for disempowered individuals, people who have no voice, to ... come before the court and bring [forward] issues like discrimination on the basis of gender, poverty."

[80] *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 [*Pepsi-Cola*].

[81] *Ibid.* at para. 21.

[82] Gregory Hein, "Interest Group Litigation and Canadian Democracy" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 214.

[83] Richard W. Bauman, "Business, Economic Rights, and the Charter" in David Schneiderman & Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 58. This is a phenomenon which, curiously, escapes the attention of F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

[84] *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 [*Ford*].

[85] *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

meaning" falls within the scope of constitutionally protected expression,[86] then it comes as little surprise to find that the promotion of commercial products will find safe harbour in the *Charter*.

The Court, however, has appeared agnostic about the relationship between the state and the market. The constitutionalization of commercial speech rights need not lead necessarily to the constitutionalization of "free enterprise." The U.S. Supreme Court might be viewed as having gone further along this road. Justice Blackmun wrote that commercial speech—the "dissemination of information as to who is producing and selling what product, for what reason, and what price"—is indispensable for the maintenance of a "predominantly free enterprise economy."[87]

Instead, the Canadian Supreme Court appears to have been more attracted to protecting the consumer's interest in receiving commercial information.[88] For the Court, constitutionalizing commercial speech has the advantage of enabling individuals to make informed economic choices, which is "an important aspect of individual self-fulfillment and personal autonomy."[89] In the interests of informing consumers, the Court even has been prepared to enter the realm of labour relations—a domain which the Court mostly has shielded from *Charter* review. The Court has identified a public interest in receiving important messages about labour disputes, either through consumer pamphleting at retail outlets[90] or secondary picketing.[91] The juridical thrust of these cases is to value consumer interests—the interests of buyers—which is equated with a public interest in the free flow of commercial information.[92] By constitutionalizing the

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[86] *Attorney General of Quebec v. Irwin Toy*, [1989] 1 S.C.R. 927 at 968-69.

[87] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 at 765 (1975) [*Virginia State Board of Pharmacy*]. For an argument that this amounts to the disguised revival of discredited Lochnerism, see Thomas H. Jackson & John Calvin Jeffries, Jr., "Commerical Speech: Economic Due Process and the First Amendment" (1979) 65 Va. L. Rev. 1 at 30-32.

[88] *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247; *RJR-MacDonald*, *supra* note 85 at 347. Admittedly, this too attracts the U.S. Supreme Court in *Virginia State Board of Pharmacy*, *ibid.*

[89] *Ford*, *supra* note 84 at 767.

[90] *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at 1105.

[91] *Pepsi-Cola*, *supra* note 80 at paras. 34-35.

[92] By endowing commercial speech with constitutional protection, the Court has helped to promote what Leslie Sklair calls the "culture-ideology of consumerism": a "set of practices, attitudes and values, based on advertising ... that encourages ever-expanding consumption of consumer goods." See Leslie Sklair, "The Culture-Ideology of Consumerism in Urban China: Some Findings From a Survey in Shanghai" in Clifford J. Shultz, Russell W. Belk & Güliz Ger, eds., *Research in Consumer Behavior: Consumption in Marketizing Economies*, vol. 7 (Greenwich, Conn.: Jai Press, 1994) at 260.

interests of consumers, the Court also enhances the constitutional position of producers, though this relationship is often obscured.

The Court was more frank about this relationship, however, in *R. v. Guignard*.[93] There, the Court invalidated a Saint-Hyacinthe municipal bylaw prohibiting advertising outside of designated "industrial areas." Roger Guignard erected a sign on one of his commercial properties complaining about his insurance company's delay in indemnifying him for repairs done several months earlier. On his billboard, Guignard announced: "When a claim is made, one finds out about poor quality insurance."[94] Justice LeBel, for the Court, embarked on his section 2(b) discussion by acknowledging the great value placed on commercial speech by the Court in previous decisions:[95]

> The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information. ... The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising.

The interests of commercial enterprise now are equally paramount to those of consumers. Perhaps this only is a slight shift in emphasis. It goes some distance, however, to reveal the direction the Court has taken—that commercial speech doctrine is predicated upon the constitutional rights of producers to bring products to market through advertising.[96]

According to Justice LeBel, consumers also have constitutional rights to freedom of expression and this occasionally will take the form of "counter-advertising": "Given the tremendous importance of economic activity in our society, a consumer's 'counter-advertising' assists in circulating information and protecting the interests of society just as much as does advertising of certain forms of political expression."[97] So while it is satisfying to see the Court valorize "culture-jamming,"[98] it is disquieting to

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[93] 2002 SCC 14 [*Guignard*].

[94] *Ibid.* at para. 3.

[95] *Ibid.* at paras. 21, 23.

[96] This conclusion was embraced readily by the Ontario Court of Appeal in *Vann Niagara Ltd. v. Oakville (Town of)* (14 June 2002), Toronto C36773 (Ont. C.A.). According to Justice Borins, for the majority, commercial expression is "a key component to our economic system and therefore merits Charter protection." See *ibid.* at para. 17.

[97] *Guignard*, *supra* note 93 at para. 23.

[98] On culture jamming, see any number of *AdBusters* and, for the definitive statement, see Kalle Lasn, *Culture Jam: How to Reverse America's Suicidal Consumer Binge—And Why We Must* (New York: Quill, 2000).

see how far the Court has gone down the path of constitutionalizing the social relations of the market based on the buyer-seller model.

C. *Aboriginal Rights*

The affirmation and recognition of existing Aboriginal rights in section 35 of the *Constitution Act, 1982* undoubtedly has improved the constitutional position of Aboriginal peoples. The promise of inter-societal reconciliation between Aboriginal legal systems and the Canadian state suggested by the Supreme Court in *Sparrow*,[99] however, eroded significantly during the Lamer years.[100] It is not my object here to reprise or critique this record;[101] rather, my aim in this part is to explore the extent to which, even in this field, the buyer-seller model has entered into Canadian constitutional discourse. This also is an opportunity to express some ambivalence about the arrival of this model on the Canadian constitutional scene. It presents, perhaps, new opportunities for Aboriginal peoples, but also many attendant risks.

Much of the Americas were settled by European colonists without the consent of, or in consultation with, First Nations. The Royal Proclamation of 1763 signaled an end to this practice, committing the Crown to seek the consent of Aboriginal peoples through the purchase of their lands. In the interests of swiftly colonizing these "waste lands," however, legislative deviations from the principle "no acquisition without consent" were frequent in the pre- and post-Confederation periods.[102] Even when treaties were entered into, often these were interpreted strictly and against Aboriginal interests, or their terms were ignored altogether. In the words of Miguel Alfonso Martínez, United Nations Special Rapporteur, treaties have undergone "a process of retrogression," depriving Indigenous peoples of the essential elements of their sovereign status, "namely their

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[99] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

[100] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]; *R. v. Gladstone*, [1996] 2 S.C.R. 672 [*Gladstone*].

[101] See Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973–96" in Paul Havemann, ed., *Indigenous People's Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999) 428.

[102] These practices are comprehensively documented and discussed in Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989) at 8.

territory, their capacity to enter into international agreements, and their specific forms of government."[103]

It might be said that the donor-donee model best represents Aboriginal-Canadian state relations—Aboriginal people sharing, even giving up, lands to facilitate mutual coexistence on the colonial frontier.[104] From the European perspective, market imperatives came to shape these inter-societal relations and so the buyer-seller model has a dominant presence in these interactions. I argue here that the model is reflected in the Crown's capacity to take Aboriginal lands. In this scenario, there is an element of exchange as the Crown buys and Aboriginal people sell their lands. The idea of purchase and sale is not alien to the field of takings law.[105] For instance, Montesquieu understood the exercise of eminent domain as being in the nature of a forced sale.[106] Absent, however, is the element of free exchange, as property is purchased without consent. In the context of takings, then, the buyer-seller model takes on the hue of the ruler-subject model.

Early formulations of the *Indian Act* included a statutory capacity in the Crown to take Aboriginal lands for "any railway, road or public work" with the payment of compensation.[107] These public works and compensation requirements were dropped in 1951 when the Act was revised. For a period of time, the *Indian Act* even enabled the compulsory removal of Indians from reserve lands adjacent to towns and cities with populations of more than eight thousand.[108] At present, section 35 of the *Indian Act* entitles the Crown to compulsorily acquire Indian lands without consent and without the payment of compensation.[109]

With the advent of the *Constitution Act, 1982* things now have changed. A strong version of the *Indian Act* takings rule was elevated to the

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[103] Sub-Commission on Prevention of Discrimination and Protection of Minorities (final report by Miguel Alfonso Martínez), *Human Rights of Indigenous Peoples: Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, UN ESCOR, 51st Sess., UN Doc. E/CN.4/Sub.2/1999/20 at para. 105.

[104] See Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997) at 25.

[105] Arthur Lenhoff, "Development of the Concept of Eminent Domain" (1942) 42 Colum. L. Rev. 596 at 601.

[106] Montesquieu, *supra* note 1 at 510, writes: "If the political magistrate wants to build some public edifice, some new road, he must pay compensation; in this regard the public is like an individual who deals with another individual."

[107] *Indian Act*, S.C. 1868, c. 42, s. 25; *Indian Act*, S.C. 1876, c. 18, s. 20.

[108] Johnston, *supra* note 102 at 86-88.

[109] This is in contrast to statutory regimes for the expropriation of private property in place across Canada which ordinarily require the payment of compensation.

level of constitutional doctrine in *Delgamuukw*.[110] Chief Justice Lamer, writing for the Court, first broadened the permissible range of governmental objectives which could infringe Aboriginal title beyond those mentioned in *Gladstone*.[111] The "development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of ... [the province], protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims" were the kind of objectives which could justify limitations on Aboriginal title.[112] It should be noted that this wide range of objectives little resembles the "strong check" on governmental action that Chief Justice Dickson described in *Sparrow*.[113]

Chief Justice Lamer then moved to the question of reconciling legislative authority with Aboriginal rights. In order to justify limitations on Aboriginal title in the pursuit of these objectives, the Crown is expected to "reflect the prior interest" of Aboriginal peoples in resource allocation, to respect the duty of consultation, and to pay compensation:[114]

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

The *Delgamuukw* decision thus elevates Aboriginal title to the level of a constitutional interest requiring the payment of just compensation in event of expropriation. Like the fifth and fourteenth amendments to the U.S. Constitution, property cannot be taken for public use[115] without the payment of just compensation.[116] Though there is some dispute in the United States about which measures go so far as to require compensation, the takings rule imposes substantial constraints on governmental authority

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[110] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[111] *Supra* note 100.

[112] *Delgamuukw*, *supra* note 110 at 1111.

[113] *Supra* note 99.

[114] *Delgamuukw*, *supra* note 110 at 1114.

[115] The "public use" requirement has ceased to act as an impediment in modern U.S. law. This is the subject of complaint in Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985) at 161-81.

[116] The comparison also is noted in James Youngblood Henderson, Marjorie L. Benson & Isobel Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) at 332.

as it impacts on property rights.[117] It turns out, however, that the incorporation of a takings rule into Canadian constitutional law does not amount to wholesale adoption of the U.S. rule. Rather, it turns out to be its opposite. Absent government recognition of ownership, the taking of Indian title does not require the payment of compensation under the U.S. constitution.[118] According to Justice Reed, the U.S. rule follows naturally from Chief Justice Marshall's ruling in *Johnson* v. *McIntosh*[119] that "discovery" gave exclusive underlying title to the conquering European power:[120]

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

The constitutional recognition of Aboriginal title in Canada is long overdue, but remains problematic for a variety of reasons. It is not my intention to expound here on all of these reasons.[121] That the rule continues to vitiate the consent requirement is an obvious concern.[122] If the element of negotiated settlement is a prerequisite to constitutional reconciliation, then a takings rule preserving unilateralism in regard to Aboriginal lands is problematic. A constitutional takings rule also may preclude us from exploring the suspect origins of the claim to underlying Crown sovereignty that gives rise to this power of eminent domain.[123] Instead, adopting the

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[117] See Molly S. McUsic, "The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation" (1996) 76 B.U.L. Rev. 605.

[118] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) [*Tee-Hit-Ton*]. This decision was adopted with approval by Justice Judson in *Calder v. British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 at 168 (S.C.C.).

[119] *Johnson v. McIntosh*, 21 U.S. 543 (1823).

[120] *Tee-Hit-Ton*, *supra* note 118 at 322-23.

[121] It is not troublesome that the doctrine accords constitutional status only to Aboriginal property interests. As Macklem argues, the fact of Aboriginal occupancy prior to the establishment of the Canadian state justifies this differential treatment. See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

[122] Consultation is always required, but "full consent" is required only in some cases, "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." See *Delgamuukw*, *supra* note 110 at 1113.

[123] See Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.v. Sparrow*" (1991) 29 Alta. L. Rev. 498 at 510. The absorption of Aboriginal peoples within the Canadian political community for the purposes of eminent domain does not mean equivalency with all citizens in regard to all property matters. Note that the content of Aboriginal title in *Delgamuukw* is limited to land use not "irreconcilable" with the "nature" of Aboriginal title. A variety of commercial uses inconsistent with that specific title (the Court mentions strip mining and construction of a parking

tactics of the *bricoleur* and having access to a "limited cultural reserve,"[124] the Court looked to the tools readily at hand in order to fill out the content of Aboriginal title.[125] The common law has long recognized that the taking of property requires the payment of compensation, though the Crown can vitiate this presumption.[126] In other words, the requirement has never been a constitutional one. But this move by the Court in the context of Aboriginal rights fits dominant political trends. Foreign investors, for instance, have a similar right to compensation under the North American Free Trade Agreement (NAFTA) should a state party take measures that go so far as to expropriate or nationalize an investment interest. Although property rights are not otherwise part of Canada's constitutional order,[127] NAFTA's regime for the protection of investments has constitution-like effects.[128] The Court's Aboriginal rights jurisprudence can be viewed as pushing us further along in this direction.

Some reasonably will ask whether it is appropriate to only extend this sort of protection to foreign investors and Aboriginal peoples, and not to all Canadians. International trade law writers admit that this, precisely, is their end game: to have domestic legal systems absorb these very high standards of protection for all property and investment interests. For instance, Kenneth Vandevelde expresses the desire to have the investment

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lot) are permitted only if land then is surrendered to the Crown for the purposes of economic development along these lines (see *Delgamuukw*, *supra* note 110 at 1089). The author thanks Darlene Johnston for this point.

[124] Garvey, *supra* note 11 at 5.

[125] The same claim might be made about the *Van der Peet* test—that s. 35(1) Aboriginal rights are only those that are "a central and significant part of the society's distinctive culture." See *Van der Peet*, *supra* note 100 at 553. Russel Barsh and James Henderson show that centrality requirement is derived from the American constitutional experience, where only those religious beliefs "central and indispensable" to an indigenous group will receive constitutional protection. They write: "Without referring to the American experience, Canada's Supreme Court blithely copies it on an even grander scale, applying 'centrality' to *all* rights of Aboriginal peoples." See Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1000. Another borrowed idea is the "honor of the King," central to the *Sparrow* justification process, which has its origins in the Crown prerogative and sovereign immunity. See Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Butterworth, 1820) at 394. Justice Story of the U.S. Supreme Court invoked the concept so as to limit governmental interference with contractual rights in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 at 597 (1837).

[126] See Andrée Lajoie, *Expropriation et Fédéralisme au Canada* (Montreal: Les Presses des Université de Montréal, 1971).

[127] Note the presence of a property rights clause, though, in the *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(a).

[128] See David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U.T.L.J. 499.

treaty system "protect all investment in the host state, regardless of nationality. ... This would ensure genuine investment neutrality and create a host constituency in support of an enduring liberal investment regime."[129] Is it only a matter of time, then, before Canadians seek to amend their constitutional order in order to ensure equal treatment as regards property, drawing us further in the direction of the market model of constitutional design?

V. CONCLUSION

This article explored the idea of constitutional *bricolage*—making constitutional law with reference to "whatever is at hand."[130] Following Tushnet, I have suggested that it is a helpful heuristic device for elucidating the rising interest in comparing and learning from other constitutional traditions. While the rise of comparative constitutional law enables the judiciary to reflect upon and import, even improve, the development of constitutional law within their home countries, the opportunity carries with it many risks. In an era of economic globalization, the judiciary will likely look to those rules of constitutional law that impart success in global economic terms. In the Canadian context, this means invoking the rules and values usually associated with U.S. constitutional law, particularly the variant that emphasizes the liberty-property nexus familiar to the Lochner era. Situating this phenomenon within larger socio-economic and political patterns—namely, the phenomenon associated with economic globalization—better explains a particular comparative influence—the buyer-seller model—in Canadian constitutional law.

This model has entered into Canadian constitutional law in the disparate constitutional fields of federalism, the *Charter*, and Aboriginal rights. There is no claim here that the buyer-seller model of constitutional law explains all constitutional outcomes over the last twenty years, but it likely helps to explain more of the outcomes than the few identified here.[131]

If one of the defining characteristics of Canadian constitutional law has been the diversity of ideological commitments to which it may give

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[129] Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" (1998) 92 A.J.I.L. 621 at 639.

[130] Lévi-Strauss, *supra* note 6 at 17.

[131] On federalism, see *e.g.* Jean Leclair, "The Supreme Court's Understanding of Federalism: Efficiency at the Expense of Diversity," (Paper presented in Toronto to the Canadian Association of Law Teachers 2002 Annual Conference, May 2002) [unpublished]. On the *Charter*, see Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) c. 3-6.

expression[132]—resulting, to be sure, in some dominant and steady streams of socio-economic thought but none *necessarily* resulting from the constitutional text—this pluralism may now be under threat. To the extent that current trends continue, it will have the effect of foreclosing political alternatives, checking further our capacity for self-government. If there is room for constitutional difference in a world of increasing constitutional convergence and homogeneity, we reasonably might conclude that it will not be the judiciary, through the aegis of constitutional interpretation, who will be the vanguard reversing or even resisting these tendencies.

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[132] See Patrick Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117 at 121; Roderick A. Macdonald, "The New Zealand Bill of Rights Act: How Far Does It Or Should It Stretch?" in *The Law and Politics: Proceedings of the 1993 New Zealand Law Conference Held March 2 - 5, 1993*, vol. 1 (Wellington: New Zealand Law Society, 1993) 94 at 104.