



Constitutional Scholarship in Canada

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Abstract

This article identifies and evaluates the kinds of constitutional scholarship currently produced in Canada and suggests some directions in which future research might profitably be directed. Part I sets out the framework within which the state of Canadian constitutional scholarship will be assessed, considers some of the factors that have shaped that scholarship, and provides a brief overview of the various kinds of work being produced in Canada. Part II outlines some of the areas where more and different work needs to be done, concluding with some general thoughts on how the development of such directions in scholarship might be facilitated.

CONSTITUTIONAL SCHOLARSHIP IN CANADA

BY MARC GOLD*

This article identifies and evaluates the kinds of constitutional scholarship currently produced in Canada and suggests some directions in which future research might profitably be directed. Part I sets out the framework within which the state of Canadian constitutional scholarship will be assessed, considers some of the factors that have shaped that scholarship, and provides a brief overview of the various kinds of work being produced in Canada. Part II outlines some of the areas where more and different work needs to be done, concluding with some general thoughts on how the development of such directions in scholarship might be facilitated.

I. THE STATE OF CONSTITUTIONAL SCHOLARSHIP TODAY

What analytical framework should be used to understand the state of constitutional scholarship in Canada, and what criteria should be applied in evaluating that work? In terms of a framework, I rely on *Law and Learning*¹ for both the typology of research that it develops and for its analysis of some of the formative influences on the nature of that research. To evaluate the state of constitutional scholarship, I will apply a test of utility: work will be considered worthwhile if it is useful for the various audiences to which it is directed.

A. *A Framework of Analysis*

Law and Learning sets out four categories of legal research by which the state of Canadian legal scholarship can be mapped: conventional, theoretical, law reform, and fundamental.² These categories form points on a continuum, the boundaries of which are defined by the perspective from which the research is undertaken. At one extreme, defined by

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¹ Consultative Group on Research and Education in Law, *Law and Learning* (1983).

² *Law and Learning*, *ibid.* at 65-66. Conventional research is defined as "research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources," while theoretical work is understood as "research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled." Law reform research is "designed to accomplish change in the law," and fundamental research is "designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law."

conventional research, the perspective is internal to the law. It adopts the basic assumptions of the legal system and works within the framework of the authoritative sources as defined by the legal system. At the other extreme, defined by fundamental research, the perspective is largely external to the legal system, treating law as a social phenomenon, any aspect of which is open to question and challenge. The former kind of work will be termed "traditional," the latter "non-traditional."

Law and Learning concludes that the great majority of Canadian legal scholarship is traditional.³ This conclusion flowed naturally from the mandate and methodology of the Consultative Group. Their terms of reference focussed their attention upon legal research and education in the context of faculties of law, and this in turn shaped the methodology of their research. A survey was done of writing appearing largely in law journals and texts, with no attention paid to work published in non-legal journals, nor presumably in texts produced by non-lawyers. Although the Report notes this fact with regret,⁴ the background paper on legal research prepared for the Report observed that to have broadened the data base would not have produced "a significantly different profile of legal research publication than that produced by the survey conducted."⁵

However true this might be in other areas of law,⁶ it is somewhat misleading in the area of constitutional scholarship. The subject of the Constitution has always attracted the interest of scholars in other disciplines, thereby bringing to the literature a diversity of theoretical perspectives and research methodologies. Were this work to have been factored into the survey, a different picture of constitutional scholarship would have emerged. Nevertheless, most writing about constitutional law (as opposed to writing about constitutional issues more broadly) has been produced by lawyers and most of it would fall within the category of traditional scholarship. In the paragraphs that follow, I attempt to explain why this is so.

B. *Formative Influences on Constitutional Scholarship*

Just as modern theories of rhetoric place the concept of the audience at the centre of the scholarly inquiry,⁷ one cannot overstate the influence

³ *Ibid.* at 6.

⁴ *Ibid.* at 75.

⁵ A.H. Janisch, *Profile of Published Legal Research* (1982) at 2.

⁶ At least one commentator has criticized *Law and Learning* for its failure to have considered non-lawyers' writing about law. See R.P. Saunders, "Review" (1984) 16 Ottawa L.R. 218 at 221-22.

⁷ On the importance of the audience to rhetorical theory, see C. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric* (1969) especially Part One.

of the audience on the kind of constitutional scholarship produced in Canada. The values, expectations, and needs of the audience shape the form and content of any purposive discourse, defining the issues deemed relevant, the sources of information deemed admissible, and the range of solutions deemed plausible. Yet notwithstanding the variety of potential audiences for scholarship on constitutional matters,⁸ the dominant producers of, and audiences for, writing about constitutional law have been the legal community. This has influenced the type of work produced in Canada considerably.

In the early decades of this century, lawyers, historians, and political scientists worked together in the same university departments, with constitutional law being a major part of the intellectual agenda within the university. In such an environment, constitutional lawyers could feel comfortable in tackling the large questions of political theory, as Professor Kennedy did in his well-known Kirby Lectures.⁹ Moreover, both lawyers and political scientists were concerned, in part, with the same issues, thereby providing the possibility of a cross-fertilization of views and perspectives. But beginning in the 1930s, the political science departments gradually lost their lawyers to departments and faculties of law. Accordingly, political scientists began to turn away from the study of legal phenomena and to focus more on the empirical study of politics, thereby defining political science as a distinct discipline.¹⁰ It was not until the 1960s, and then only in a relatively small way, that political scientists returned to the study of the legal aspects of the Constitution. As a result, for a significant period of time, scholarship about constitutional law was

⁸ The nature of any given subject matter will dictate the range of possible audiences to which scholarship might be directed, and in the case of constitutional law, the range is potentially very broad. One set of audiences will be those whose job it is to work with the rules and principles of constitutional law. These "natural consumers" include the bench, bar, and government, as well as students of the subject. Another obvious audience will be the community of academic lawyers, for which much academic writing is produced. Another potential audience is the academic community more generally; unlike other areas of law, where the lawyers appear to be the only constituency interested in the subject, constitutional issues would appear to be important to scholars working in such disciplines as philosophy, political science, economics, sociology, and history. Finally, fueled no doubt by the debate concerning patriation and the entrenchment of the Charter, there is a growing interest on the part of the public in matters constitutional, and recent years have seen a flurry of writing directed to this particular audience. See, for example, D.A. Milne, *The New Canadian Constitution* (1982); R. Sheppard & M. Valpy, *The National Deal* (1982).

⁹ W.P.M. Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law* (1931).

¹⁰ This account is drawn from Russell, "The Constitution, Courts and Judicial Behaviour" (unpub.). Russell suggests a number of additional reasons for this withdrawal of interest by political scientists in constitutional law, among which was a perception that, given the apparent rise of central power during and after World War II and the increased use of intergovernmental, administrative, and fiscal mechanisms to circumvent the division of powers in the Constitution, the courts had become virtually irrelevant.

largely in the hands of a small number of full-time academic lawyers, working in isolation from their former colleagues in other disciplines.

This disassociation undermined the potential for interdisciplinary work on constitutional law; lawyers would no longer expect to find assistance in the work of political scientists and others as their intellectual agendas had diverged. As well, it reinforced the doctrinal, court-focused perspective of the academic lawyer, a perspective that is a natural product of the education and orientation of lawyers.¹¹ Moreover, the movement of lawyers into professional faculties of law during this period might very well have blunted the impact that the emerging Realist movement in the United States could have had on the kinds of work produced.¹² This was a function of the relatively unstable and unclear position of academic lawyers within the profession of law.

As *Law and Learning* documents, the full-time legal academic is a relatively recent phenomenon in Canada, and there is a need felt by many legal academics to be perceived as "equal partners" with the bench and bar. Given the historic distrust (if not indeed outright hostility) of our legal tradition to matters theoretical,¹³ academic lawyers are subject to the pressure of proving their value to the audiences whose approval and acceptance would validate academics' roles within the legal system. Notwithstanding certain signs that the role of the academic is being appreciated by the bench to a greater degree than ever before,¹⁴ the pressure to "belong" continues to exert a powerful force on the kinds of work produced by academic lawyers.

¹¹ One need not dwell at length on the question of the training of lawyers, as this has been addressed comprehensively in the literature. See, for example, *Law and Learning*, *supra* note 1, ch. 4. It is sufficient to note that legal education continues to emphasize the courts as the focal point of study and to emphasize doctrinal analysis over other forms of analysis. This results in a scholarly agenda that is defined, in large measure, by what courts are doing and how they appear to be doing it, and the work is produced by scholars who, by and large, lack rigorous training in anything but law. This training tends to incline the academic lawyer towards an identification with the bench and bar, in part as a way to rationalize what the academic lawyer can do best.

¹² The impact of the realist movement can be seen in a number of Canadian works. See, for example, J.R. Mallory, *Social Credit and the Federal Power in Canada* (1954); E. McWhinney, *Judicial Review in the English-Speaking World* (1956). The fact remains, however, that the bulk of Canadian legal scholarship was not as heavily influenced by the realist perspective as was American scholarship. One reason might be that American legal academics had already established themselves in university-based law schools by the time of the realist challenge. As such, they might have been more able to embrace realism than were their Canadian counterparts, whose struggle for legitimacy (in the eyes of the profession) was more pronounced.

¹³ The aversion to theory can be traced to our English legal heritage. See e.g., R.B.M. Cotterrell, "English Conceptions of the Role of Theory in Legal Analysis" (1983) 46 *Mod. L. Rev.* 681.

¹⁴ For example, in a recent speech to the mid-winter meeting of the Canadian Bar Association in Edmonton, Feb. 2, 1985, Chief Justice Dickson called upon the academic community to assist the bench in coming to grips with the challenges posed by the Charter. One also detects a greater use of academic writing by the Supreme Court in its reasons for judgment.

At the same time, academic lawyers have to justify their roles as members of a university community. The work of the courts is the natural focus for the academic lawyer, inasmuch as it legitimates the legal system with which academic lawyers (and their students) largely identify, and stakes out a territory of inquiry that differentiates the academic study of law from other disciplines within the university. The way to accommodate the conflicting demands of the profession and the university is, for most academic lawyers, to take a perspective on the work of the courts that, while critical of how the courts perform in constitutional matters, did not question the larger issues of the legitimacy of constitutional review or of the constitutional order itself. In this way, the orientation of most academic writing by lawyers remains largely professional.¹⁵

These factors shape the expectations about scholarship that are held within the community of academic lawyers, but there the issue becomes more complicated. Most writing by academic lawyers is aimed at the audience of other academic lawyers. In order to secure tenure, to rise to the status of full professor, or to move to a more prestigious law faculty, a body of writing must be produced that will be evaluated by other academics. To the extent that such academics have a professional orientation, this will tend to exert some influence on the type of work pursued. However, at any given time, there will be a strand of scholarship that challenges the dominant approach to scholarship practised within the academic community. One way to make one's reputation is to argue that the conventional approaches to a subject are somehow intellectually wanting.¹⁶ The quality of such arguments aside, the success of such efforts will depend upon there being a critical mass of like-minded scholars in the field, or at least a sufficient number of scholars either tolerant

¹⁵ Material considerations reinforce this professional identification. Academic lawyers are constantly being called upon to render practical assistance to the profession and government in the form of providing legal opinions and serving as constitutional advisers, serving on or writing for government commissions examining constitutional issues, and serving as adjudicators in the human rights field. Both the prestige and remuneration associated with these activities plays a role in contributing to the professional orientation of many academic lawyers, as do the structures of funding available for legal research generally. See, generally, *Law and Learning*, *supra* note 1 at 87-129.

¹⁶ I do not want to be understood as implying that no scholar ever asks a question or writes an article without some financial or careerist motive. This would not be an accurate assessment, for one of the more obvious audiences for scholarship is the person doing the writing. To the extent that work is done "to please oneself," it might be thought to fall outside the gravitational pull of these factors. But it cannot escape entirely. We are all products of our training and background, and we are influenced by the expectations of those whom we respect. Moreover, we are rarely aware of all that motivates us to act as we do. Even as we write "for ourselves," the "ourselves" is a product of and reaction to the factors sketched above.

of such work or sufficiently insecure about the integrity of the more traditional forms of work, to embrace these scholarly efforts. Accordingly, there will always be a body of work that attempts to push the intellectual agenda beyond the issues conventionally addressed in the literature. But in a relatively small community of legal scholars such as Canada, there will never be more than a handful of people doing work of this kind. Therefore, most of the constitutional scholarship produced by lawyers in Canada will tend to be of a traditional kind.

C. *On Traditional Scholarship*

The general issue that defines traditional work is a search for the meaning of the Constitution for those called upon to work with its terms. The centrality of this issue flows from the professional orientation of most producers and consumers of research in constitutional law, and this in turn shapes the methodologies by which this issue is addressed.

In the early decades after Confederation, three methodologies dominated most constitutional scholarship, and although some of the concrete issues have changed over time, these approaches continue to define most traditional writing in the subject. The first was an historical approach, the objects usually being to understand both the meaning of the text and the extent to which Confederation represented a continuation of or deviation from our English constitutional heritage.¹⁷ The second approach may be termed textual exegesis, understood as the search for the meaning of the Constitution through an analysis of the words of the text.¹⁸ As judicial precedents began to accrete around the provisions of the Constitution, the focus of the writing became more doctrinal. Some of this writing was largely expository,¹⁹ but at least since the 1930s, when the province-building implications of the work of the Judicial Committee of the Privy Council became dramatically clear, the dominant focus of doctrinal analysis has been and remains more analytical and critical.²⁰

¹⁷ See, for example, A.R. Hassard, *Canadian Constitutional History and Law* (1900). A good deal of this kind of work was highly expository — little more than historical reportage. Some of the later work of an historical kind was more analytical and critical. See, for example, W.P.M. Kennedy, *The Constitution of Canada* (1922).

¹⁸ Typically, the textual approach was combined with an historical approach. See, for example, W.R. Riddell, *The Constitution of Canada* (1917).

¹⁹ See, for example, A.H.F. Lefroy, *The Law of Legislative Power in Canada* (1897-98); W.H.P. Clement, *The Law of the Canadian Constitution*, 3d ed. (1916).

²⁰ See, generally, A.C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sc. at 301.

Making due allowance for the distortion that any generalization produces, it is possible to identify four general issues around which most of this writing revolves. The first, as noted above, concerns the meaning of the provisions of the Constitution. Work of this kind constitutes a large portion of the writing on our recent constitutional amendments, the work blending the historical, textual, and doctrinal approaches.²¹ The second issue that defines much traditional scholarship concerns the internal consistency of the judicial opinion: considerable energy has been and continues to be devoted to showing how a given decision did or did not follow from the putative imperatives of the text, history, or earlier cases. In many ways, this kind of work is what lawyers do best, and writings exploring these two themes probably constitute the majority of scholarship of a traditional kind. The third theme is a concern for the proper approach to the judicial interpretation of the Constitution: can and should courts restrict themselves to the text and doctrines, or should they interpret the Constitution in light of the social exigencies of the times? This competition between what we might term the formalist and realist approaches has been played out rather inconclusively since the first attacks of the Judicial Committee of the Privy Council.²² Finally, attention is focussed on the attitude that courts ought to take to their function in the light of the competing demands of other governmental institutions, the issue typically framed as a choice between activism or restraint.²³ As we move from the first to the fourth theme, the work becomes less conventional and more theoretical.

Pursuing these themes, Canadian scholars have produced work of exceptional quality in terms both of its clarity and analytical rigour, and in terms of its utility to the legal profession, government, and the academic community generally. Good textbooks have been published in both English and French, and most doctrinal issues in constitutional law have

²¹ On the Charter, see, for example, W.S. Tarnopolsky & G.A. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (1982). On the resource amendment to section 92, see, for example, W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. B. Rev. 715.

²² See Cairns, *supra* note 20. See also D.W. Mundell, "Tests for the Validity of Legislation under the B.N.A. Act" (1954) 32 Can. B. Rev. 813; cf. B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter?'" (1955-56) 11 U. Toronto L.J. 114.

²³ Although the issue has figured in the scholarship concerning the division of powers, see *infra* note 25, it has come to the fore in the writings on the Charter. The majority of writings by lawyers seems to call for an activist court. See, for example, M. Manning, *Rights, Freedoms and the Courts* (1982); Cf. M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Supreme Court L.R. 131.

been subjected to extensive treatment in the periodical literature.²⁴ Indeed, the work of the Supreme Court in constitutional matters is now subjected to annual comment in the *Supreme Court Law Review*, and the work to date has been of the highest quality. Moreover, the literature contains a number of divergent views on both the nature of constitutional law and on the appropriate role of the courts, thereby providing a variety of perspectives on the subject.²⁵

Furthermore, there appears to be a trend among lawyers to produce more work of a theoretical kind. Professor Weiler's *In the Last Resort* deserves special mention, for while the analytical tools employed were not necessarily original to the author, the book was an original attempt to approach the work of the Supreme Court from a jurisprudential and institutional perspective. More recently, the decision of the Supreme Court in the first patriation reference²⁶ generated a body of writing that raised fundamental questions about the role of the Court and the conceptions of law that underlay the opinions in that case.²⁷ Indeed, in an important article, Professor Slattery uses the patriation issue as a device to challenge the conventional wisdom concerning the juridical basis of Canadian constitutional law.²⁸ This is work of a traditional kind, as defined by

²⁴ The leading modern textbooks include P. Hogg, *Constitutional Law of Canada*, 2d ed. (1985), and H. Brun & G. Tremblay, *Droit Constitutionnel* (1982). For examples of work on more specific issues, in the area of native rights, the scholarship combines careful textual and doctrinal analysis with a sensitivity to history and, in some cases, to legal theory. See, for example, B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 *Queens L.J.* 232, and articles referred to in n. 1 therein. In the scholarship concerning issues of natural resources, we find detailed analyses of the legal questions informed by an appreciation of the political and economic consequences of the judicial, inter-governmental, and constitutional developments in the area. See, for example, W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18 *Osgoode Hall L.J.* 1.

²⁵ For example, Professor Hogg's work draws upon an essentially positivist image of law and an argument for judicial restraint. See Hogg, *ibid.* As a counterpoint to Hogg's approach, the writings of Professor Lederman offer a perspective rooted in a more sociological conception of law and a belief in the virtues of a more activist role for the courts. See, generally, W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981). A similar approach characterizes the work of Professor Lyon. See, for example, J.N. Lyon, "The Central Fallacy of Canadian Constitutional Law" (1976) 22 *McGill L.J.* 40. See also J.N. Lyon & R.G. Atkey, *Canadian Constitutional Law in a Modern Perspective* (1970). For an approach generally more critical of the Supreme Court's work in constitutional matters, see P.C. Weiler, "The Supreme Court and The Law of Canadian Federalism" (1973) 23 *U. Toronto L.J.* 307.

²⁶ *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3) (1981) 125 *D.L.R.* (3d) 1.

²⁷ See, for example, Institute of Intergovernmental Relations (Queens Univ.), *The Court and the Constitution* (1982); P. Hogg, *Comment* (1982) 60 *Can. B. Rev.* 307; B. Schwartz & J.D. Whyte, "The Patriation References and the Idea of Canada" (1982-83) 8 *Queens L.J.* 158; E. Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 *Supreme Court L.R.* 3; G. Rémillard, "Legality, Legitimacy and the Supreme Court", in K.G. Banting & R. Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act* (1983) 189; P. Blache, "La Cour suprême et le rapatriement de la constitution: l'impact des perceptions différentes de la question" (1981) 22 *C. de D.* 649.

²⁸ B. Slattery, "The Independence of Canada" (1983) 5 *Supreme Court L.R.* 369.

Law and Learning, but in offering us a redefinition of the jurisprudential foundations of Canadian constitutional law, it is theoretical work of the highest quality.

The burgeoning literature on the Charter also contains some work of a theoretical kind.²⁹ Attempts have been made to offer courts a theoretical perspective within which they should approach the interpretation of the Charter,³⁰ while a recent piece on the scope of the Charter attempts to illuminate the competing images of political association underlying the now flourishing debate.³¹ With respect to the value of the Charter, a number of articles have provided provocative counterpoints to the general enthusiasm with which most academic lawyers have embraced the Charter.³² In addition, there is the beginning of a feminist

²⁹ It must be conceded that a lot of this writing is highly expository and somewhat pedestrian in ambition and execution. This can be explained, in part, by the fact that it has been very much a producers' market: every journal and book publisher appears eager to have work published on the Charter. As well, a fair bit of this writing undoubtedly originated as continuing education pieces for the bench and bar; work of this kind tends to be narrower in scope than writing aimed more directly at an academic audience. By focussing on work of a more theoretical kind, however, I do not mean to deprecate the value of the better conventional writings on the subject. By marshalling arguments based on the text, its legislative history, and the jurisprudence from other jurisdictions, such writing provides valuable information and analysis to those called upon to work with the Charter.

³⁰ On the interpretation of the Charter generally, see, for example, N. Lyon, "The Charter as a Mandate for New Ways of Thinking About Law" (1983-84) 9 *Queens L.J.* 241; N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague but Meaningful Generalities" (1982) 4 *Supreme Court L.R.* 57; H.S. Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982) 4 *Supreme Court L.R.* 217. On the interpretation of the guarantees of freedom of expression, see, for example, C.F. Beckton, "Obscenity and Censorship Re-examined under the Charter of Rights" (1983) 13 *Man. L.J.* 351. On the interpretation of the equality rights guarantees, see, for example, A.F. Bayefsky, "Defining Equality Rights," in A.F. Bayefsky & M. Eberts, eds. *Equality Rights and Canadian Charter of Rights* (1985) 1; P. Blache, "Equality and reverse discrimination: the application of section 15(2) of the Charter," in J.M.P. Weiler & R.M. Elliot, eds. *The Canadian Charter of Rights and Freedoms: Litigating the Values of a Nation* (1985, forthcoming); W.W. Black, "Intent or Effects — Section 15", in Weiler and Elliot, *ibid.*; Gold, *supra* note 23.

³¹ J.D. Whyte, "The Application of the Charter to the Private Sector" (Presented at the National Symposium on Equality Rights, Toronto, 1985).

³² See, for example, R.A. Macdonald, "Postscript and Prelude — the Jurisprudence of the Charter: Eight Theses" (1982) 4 *Supreme Court L.R.* 321; R.A. Samek, "Untrenching Fundamental Rights" (1982) 27 *McGill L.J.* 755; P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 *Can. B. Rev.* 30; P. Fitzgerald, "Canadian Rights and Freedoms — First Class or Charter?" (1983) 13 *Man. L.J.* 277; H.W. MacLauchlan, "Review" (1984) 33 *U.N.B.L.J.* 385; P.C. Weiler, "Rights and Judges in Democracy: A New Canadian Version" (1984) 18 *J. of Law Ref.* 51. Some of the best of the critiques of the Charter were published before the Charter was entrenched. See, for example, D.V. Smiley, "The Case against the Canadian Charter of Human Rights" (1969) 2 *Can. J. Pol. Sc.* 277; P.H. Russell, "A Democratic Approach to Civil Liberties" (1969) 19 *U. Toronto L.J.* 109; D.A. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights" (1973) 1 *Dal. L.J.* 15.

In general, there seems to be a greater enthusiasm for the Charter among academic lawyers than one finds in the writings of political scientists. This likely reflects the lawyers' faith in the ability of the legal process to handle the complex issues of social policy (and philosophy) implicated by the Charter.

literature on constitutional issues in Canada that promises to challenge some of the basic assumptions of the more conventional writings on the subject.³³

The great strength of traditional scholarship lies in its critical analysis of the performance of the courts, its attempt to offer the bench and bar a coherent framework within which the Constitution can be interpreted, and its close attention to issues surrounding the meaning of the provisions of the Constitution. Indeed, as I suggest in Part III, work of this kind is a necessary part of any serious attempt to understand constitutional law. It does, however, have its limitations.³⁴

In general terms, these limitations are related to the nature of the professional audiences to which most traditional work, whether explicitly or implicitly, is aimed. Because these audiences are both consumers and proponents of constitutional argumentation, traditional scholarship tends to fall within what Paul Brest has called "advocacy scholarship."³⁵ The work rarely stands back to evaluate the nature of the arguments forwarded

³³ See, for example, K.E. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1985) 17 *Ottawa L. Rev.* 33; Charter of Rights Educational Fund, *Report on the Statute Audit Project* (1985). As well, the recently created Canadian Journal of Women and the Law, the first volume of which will be devoted to equality theory, is likely to be a place where scholarship informed by feminist theories will appear. For a recent attempt to apply feminist theories to a reconstruction of American constitutional law, see K.L. Karst, "Woman's Constitution" [1984] *Duke L.J.* 447.

³⁴ Some of these limitations appear to be a function of certain facts unique to the Canadian situation, rather than flowing from the nature of traditional scholarship itself. Unlike the situation in the United States, Canadian academic lawyers tend to work in isolation in the sense that we do not subject each others' work to regular and sustained criticism in the literature. To be sure, interested scholars occasionally address each other's work in a critical way, but such occasions, usually in the form of short book reviews, are all too infrequent and episodic. One reason may be that Canadian scholars simply do not produce work with the same theoretical pretensions — I use the term in its French sense — as do their American counterparts. As such, there is not as much grist for the critical mill. Moreover, the influence of constitutional theorists on the work of the courts has been less apparent in Canada than in the United States, thereby making it less obvious that something practical is at stake in analyzing and criticizing such work. Finally, we confront the bald fact of numbers: the community of Canadian constitutional scholars is tiny as compared with the American. Although scholars in both countries are called upon to perform a variety of service functions to government, thereby channelling energy away from pure scholarship, the impact on Canadian scholarship is more extreme given our size. For these reasons, there simply is not enough scholarship about scholarship.

In addition, there is a tendency among too many English-speaking scholars to ignore the work being produced in Quebec in French. Most of the Quebec scholarship is very traditional in focus, but is characterized by clarity and intellectual rigour. In certain respects, some of the work provides a perspective on constitutional issues that non-Quebec scholars must take into account. See, for example, D. Latouche, "Les Calculs Strategiques derriere le 'Canada Bill'" (1982) 45:4 *Law & Contem. Prob.* 165. Although ignorance of or difficulty with the French language explains why most English-speaking academics do not refer to the work of their Quebec colleagues, it does not justify it. Greater efforts must be made by English-speaking academics to acquaint themselves with the scholarship from Quebec, and more moneys ought to be made available for the translation of major works emanating from Quebec.

³⁵ P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 *Yale L.J.* 1063.

or to assess the impact on the Canadian polity of having matters of public importance debated and resolved through arguments. The almost exclusive focus on constitutional arguments from a perspective internal to the constitutional order suppresses the relevance of other issues that flow from the practice of constitutional review by courts.

In specific terms, there is a tendency to treat the judicial opinion as if it accurately reflected the reasoning processes of the court, rather than viewing it in rhetorical terms as an example of how the court wants itself to be perceived in making the decision. As well, there is virtually no work focussing upon the impact of constitutional decisions or on the compliance with them by other government institutions. As a result, our understanding of the consequences of constitutional decisions is poor. Further, insufficient attention is paid to the basic theoretical issues implicated by the process of constitutional interpretation. Traditional scholars tend to make arguments about how specific provisions ought to be interpreted rather than evaluate the nature of the interpretive process itself. Finally, to the extent that scholars are pursuing work of a theoretical kind, virtually all of it tends to be of a justificatory, rather than explanatory kind. Again, this leaves a gap in our understanding of constitutional law. These themes are developed more fully in Part III, where I offer some suggestions for work that could be done to remedy these limitations. Before doing so, it is appropriate to consider the kind of scholarship being done of a non-traditional kind.

D. *Non-Traditional Scholarship*

Law and Learning observes that very little work of a non-traditional kind is being produced by legal academics in Canada. In the area of constitutional scholarship, most of the non-traditional work is produced by non-lawyers, and as such, it tends to focus on issues other than those concerning the interpretation of the Constitution by the courts. Undoubtedly a function of the professional disassociation between academic lawyers and those in other disciplines, this has resulted in such work paying only marginal attention to the issues identified as the limitations of traditional scholarship. Nonetheless, a good deal of this work would fall within the category of fundamental research. For example, in the area of federalism, the focus has not been on the problems associated with judicial review under the Constitution, but on such issues as the implications of the division of powers for the functioning of the Canadian

economy,³⁶ or for the adequate workings of a modern regulatory state in economic matters.³⁷ The intergovernmental conflict that has characterized much of our history has been examined in terms of the apparent logic of modern government³⁸ and in the competition between the various political cultures that constitute Canada.³⁹

Scholarship of this kind is essential to a full understanding of the constitutional order in Canada, and lawyers have a good deal to learn from it. For example, the literature contains valuable contributions to our understanding of the language within which constitutional issues are conceived in Canada. It is commonplace that the language of federalism has dominated the debates about fundamental political issues in Canada, and scholars have provided a number of models of Canadian federalism with which to better understand the debate.⁴⁰ And working within these models, some important work has been produced. For example, Ramsay Cook's historical study of the origins of the compact theory illuminates the persistence of compact theory rhetoric in current debates about the Constitution.⁴¹ As well, the identification and dominance of these various models have enabled scholars to question the utility of framing our political issues in these terms, for it is clear that the language of federalism has functioned to suppress the rise in Canadian political debate of a focus on what are deemed to be more fundamental issues of political economy.⁴²

³⁶ The classic study in the modern era remains A.E. Safarian, *Canadian Federalism and Economic Integration* (1974). A number of writers have examined the extent to which provincial laws and policies inhibit the development of a common market in Canada. See, for example, Ontario Economic Council, *Intergovernmental Relations* (1977). For an overview of the fiscal relations between the provincial and federal governments, see, for example, P. Lewis, "The Tangled Tale of Taxes and Transfers," in Fraser Institute, *Canadian Confederation at the Crossroads* (1978) 39. On the economics of Canadian federalism generally, see D.V. Smiley, *Canada in Question: Federalism in the Eighties* (1980) ch. 6.

³⁷ See, for example, A.G. Careless, *Initiative and Response: The Adaptation of Canadian Federalism to Regional Economic Development* (1977).

³⁸ A.C. Cairns, "The Other Crisis of Canadian Federalism" (1979) 22 Can. Pub. Adm. 175.

³⁹ See, for example, D. Bell & L. Tepperman, *The Roots of Disunity* (1979). Respecting the role of Quebec within Canadian federalism, see, for example, K. McRoberts & D. Posgate, *Quebec: Social Change and Political Crisis*, rev'd ed. (1980); E. McWhinney, *Quebec and the Constitution 1960-1978* (1979). For an explanation of Quebec's language laws in terms of both demographic and ideological changes in Quebec, see, for example, H. Guindon, "The Modernization of Quebec and the Legitimacy of the Canadian State," in D. Glenday, H. Guindon & A. Turowetz, eds., *Modernization and the Canadian State* (1978) 212. On Quebec ideologies more generally, see D. Monière, *Ideologies in Quebec: The Historical Development* (1981). For excellent analyses of the rise of western nationalism in Canada, see Mallory, *supra* note 12; J. Richards & L. Pratt, *Prairie Capitalism: Power and Influence in the New West* (1979).

⁴⁰ See, for example, E.R. Black, *Divided Loyalties* (1975); J.R. Mallory, "The Five Faces of Federalism," in P.-A. Crepeau & C.B. Macpherson, eds., *The Future of Canadian Federalism* (1965) 3; G. Stevenson, *Unfulfilled Union* (1979).

⁴¹ R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (1969).

⁴² See, for example, Black, *supra* note 40, ch. 1.

In this regard, some recent work represents a promising rapprochement between the interests of lawyers and non-lawyers. For example, Richard Simeon's recent attempt to elucidate the values implicated in debates about Canadian federalism is a step towards expanding the language of discourse within which the issues traditionally have been addressed.⁴³ Professor Monahan's efforts to reveal the conflicting visions of federalism embodied within constitutional doctrine itself offers a provocative challenge to the integrity of the adjudicative process in constitutional matters.⁴⁴

More generally, with the non-lawyers' return to an interest in law has come a greater convergence of the agendas of legal and non-legal academics, evident in the writings on patriation and the Charter. With respect to patriation, the work of lawyers tended to focus on the jurisprudential underpinnings of the Supreme Court's opinions in the Patriation Reference.⁴⁵ (A notable exception to this focus on the Court, and a partial antidote to the lack of explanatory theory is the attempt by Professors Glasbeek and Mandel to explain patriation and the entrenchment of the Charter in neo-Marxist terms.)⁴⁶ Non-lawyers, although not indifferent to the role of the Supreme Court in the patriation process,⁴⁷ have to concentrate more on the historical and political forces that shaped the process.⁴⁸ This kind of work promises greater dialogue between the disciplines, as each brings its own distinct perspective to bear upon the same subject matter.

The work of political scientists regarding the Charter tends to downplay the analysis of the meaning of various provisions in the Charter, focussing instead on the impact of the Charter on the traditional image of the judiciary, on the possible influence of the Charter on the development of a more national political consciousness in Canada, and on the impact that the Charter might have more generally on the way

⁴³ R.E. Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 *Queens L.J.* 131.

⁴⁴ P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 *U. Toronto L.J.* 47.

⁴⁵ *Supra* note 27.

⁴⁶ H. Glasbeek & M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2:2 *Socialist Studies* 84.

⁴⁷ See, for example, "The Supreme Court Decision: Bold Statescraft based on Questionable Jurisprudence," in Institute of Intergovernmental Relations, *supra* note 27, 1; S.V. LaSelva, "Federalism and Unanimity: The Supreme Court and Constitutional Amendment" (1983) 16 *Can. J. of Pol. Sc.* 757; R. Knopff, "Legal Theory and the 'Patriation' Debate" (1981) 7 *Queens L.J.* 41.

⁴⁸ See, for example, Banting & Simeon, *supra* note 27; F. Sabeti, "The Historical Context of Constitutional Change in Canada" (1982) 45:4 *Law & Contem. Prob.* 11; J.R. Mallory, "The Politics of Constitutional Change" (1982) 45:4 *Law & Contem. Prob.* 53.

in which politics is practised in Canada.⁴⁹ While much of this writing is more speculative than empirical at this point, it does raise important issues that more traditional work tends to neglect. As further evidence of a convergence in intellectual agendas, one should note the growing interest of non-lawyers in the issue of judicial reasoning about rights, as a recent article by Professors Morton and Pal exemplifies.⁵⁰

A most encouraging development is the willingness of both academic lawyers and scholars in other disciplines to tackle the question of constitutional rights from a philosophical perspective. For example, in attempting to construct a philosophically coherent approach to fundamental rights, Professor Conklin has addressed the normative foundations of the idea of fundamental rights,⁵¹ while Professor Smith has approached the issue from the perspective of modern analytical philosophy.⁵² In contrast, Professor Samek has been concerned with the ideological dimensions inherent in entrenching rights in the Constitution,⁵³ an issue also noted by Professor Macdonald.⁵⁴ In more specific areas, lawyers and non-lawyers are addressing the issues of equality⁵⁵ and collective rights⁵⁶ in an effort to understand their philosophical implications.

Law and Learning summarizes its survey of legal scholarship by observing that "mediocrity prevails, with certain exceptions."⁵⁷ At least as applied to constitutional scholarship, I do not agree. To be sure, in

⁴⁹ See, for example, A.C. Cairns, "The Canadian Constitutional Experiment" (1984) 9 Dal. L.J. 87; D. Smiley, "A Dangerous Deed: The Constitution Act, 1982," in Banting & Simeon, *supra* note 27, 74; P.H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982) 25 Can. Pub. Admin. 1.

⁵⁰ F.L. Morton and L.A. Pal, "The Impact of the Charter of Rights on Public Administration" (1985) 28 Can. Pub. Admin. 221.

⁵¹ W.E. Conklin, *In Defence of Fundamental Rights* (1979). See also W.E. Conklin, "The Utilitarian Theory of Equality Before the Law" (1976) 8 Ottawa L.R. 485.

⁵² J.C. Smith, *Legal Obligation* (1976). See also R.E. Robinson, S.C. Coval & J.C. Smith, "The Logic of Rights" (1983) 33 U. Toronto L.J. 267.

⁵³ Samek, *supra* note 32.

⁵⁴ Macdonald, *supra* note 32.

⁵⁵ See, for example, Vickers, "Equality Theories and Their Results," in Smith *et al.*, eds., *Righting the Balance: Canada's New Equality Rights* (1985, forthcoming); M. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L.J. 336 at 358-70.

⁵⁶ See, for example, M. McDonald, "The Rights of People and the Rights of a People," in S.G. French, ed., *Philosophers Look at Canadian Confederation* (1979) 333; M. McDonald, "Aboriginal Rights," in W.R. Shea & J. King-Farlow, eds., *Contemporary Issues in Political Philosophy* (1976) 27; P. Carignan, "De la notion de droit collectif et de son application en matière scolaire au Québec" (1984) 18 R.J.T. 1.

⁵⁷ *Law and Learning*, *supra* note 1 at 75. Part of this assessment would appear to flow from the Report's general dissatisfaction with the utility of traditional scholarship *per se*, a dissatisfaction that informs much of the Report notwithstanding occasional disclaimers to the contrary. The question of the value of traditional scholarship is addressed *infra*, in Part II(1).

strictly quantitative terms, a considerable body of writing would have to be judged as mediocre by any reasonable standard. Given the proliferation of journals within which work can be published, it is inevitable that work of an ordinary kind appears with some frequency. A good deal of writing is produced by and for the practising bar, and this work tends to be either expository or little more than embellished appellate briefs. While this work is of some value to the practising lawyer, it hardly advances one's understanding beyond the obvious. Add to this the almost obsessive demand of law journals and book publishers for anything written about the Charter, however pedestrian, and the picture can look awfully grim. Nevertheless, this should not obscure the fact that Canadian scholars have produced a significant body of work of considerable quality.

Although traditional scholarship continues to dominate the writings of academic lawyers, it is increasingly theoretical in approach. As well, a growing number of academic lawyers appear to be producing work of a non-traditional kind. Non-lawyers continue to provide valuable contributions to our understanding of the constitutional order from a variety of intellectual perspectives, and the number of non-lawyers interested in the legal dimensions of the Constitution appears to be increasing. From all of this, clearly there are reasons to be fairly optimistic about the future of constitutional scholarship in Canada.

II. THE FUTURE OF CONSTITUTIONAL SCHOLARSHIP

The object of this part is to suggest certain areas where future research could profitably be directed. In general terms my prescription is a familiar one, for I believe that we must take steps to increase the amount of inter-disciplinary work done on constitutional issues. Here, however, we must temper aspiration with realism. Notwithstanding the renewed interest in law among academics in other disciplines, most writing on constitutional law will likely be produced by legal academics, and given the training and orientation of lawyers, work of a traditional kind will continue to define much of the scholarship. If this is correct, it seems appropriate to begin with some thoughts on the future and value of traditional scholarship.

A. *The Future of Traditional Scholarship*

Although this article calls for more work of a non-traditional kind to be pursued by constitutional scholars in Canada, nothing is meant to imply that scholars should abandon the more traditional forms of

writing. In instrumental terms alone, the audiences who benefit from such work deserve the assistance it provides. Lawyers will continue to argue cases, judges will continue to render decisions in constitutional matters, and governments will continue to have to respect the confines, however elastic, of the constitutional order. In this respect, those engaged in traditional scholarship function, in the best sense of the word, as the rhetoricians of the constitutional system: they provide the critical analysis of the language within which constitutional change is justified. It would be the height of irresponsibility to suggest that those with the greatest claim to expertise about the workings of the constitutional rules should abandon their efforts to assist the bench, bar, and government in the tasks they confront.

Moreover, the existence of a body of such work is a necessary precondition for the creation of other forms of scholarship about constitutional law, for only by working with the legal materials "on their own terms" can one appreciate both the limitations inherent in such efforts and the larger issues that need to be addressed. For example, the need for some theory or theories of equality only becomes clear when one has tried to answer specific questions on the basis of an analysis of the text and its legislative history alone.⁵⁸ Only by beginning with more traditional forms of analysis can one appreciate both the need for and the directions of further scholarly inquiry.

This having been said, it is incumbent on scholars pursuing traditional work to free themselves from an unreal conception of how judges decide constitutional cases. Judges do not decide cases exclusively, or indeed not even primarily, on the basis of logical consistency in doctrine.⁵⁹ Judges worry about the implications of their decisions for the workings of other governmental institutions, on the court's own credibility, on the proper balance between central and provincial power, on the appropriate limits (or duties) on government towards individuals and collectivities, and so on. To the extent that traditional scholarship is to provide real assistance to its various audiences, it should focus on the consequences of various lines of doctrinal development, make more explicit the value choices

⁵⁸ M. Gold, "Moral and Political Theories in Equality Rights Adjudication," in Weiler & Elliot, *supra* note 30.

⁵⁹ One need go no further than the performance of the Supreme Court of Canada with respect to the peace, order, and good government clause of the Constitution to see how apparently indifferent the courts can be to even recently promulgated doctrine of their own creation. See, generally, Hogg, *supra* note 24 at 375-83.

implicit in the cases, and more generally, attempt to provide a broader context within which the bench, bar, and government can appreciate constitutional law.⁶⁰

B. *On More and Better Theory*

Notwithstanding some signs that more work of a theoretical kind is being produced in Canada, especially in relation to the Charter, there clearly is a need for more and better work of this kind. In many cases, theory appears to be used as a substitute for doctrine in an effort to provide concrete answers for lawyers and judges. In such endeavours, there is an understandable tendency to invoke American theories with insufficient attention paid to the differences between our legal cultures.⁶¹ More fundamentally, there is a lack of scholarship exploring the problems associated with using theory as a guide to the judicial decision. How does one choose and justify a particular theory as an appropriate reference point, and can any such theory generate answers specific enough to assist in the resolution of concrete cases?⁶² Until such work is done in Canada, there is a very real danger that black-letter law will be replaced by black-letter theory.⁶³ It is imperative that lawyers, philosophers, and sociologists assist one another in pursuing these theoretical issues.

In addition to work of this kind, there is a need for more theoretical work of an explanatory, rather than justificatory kind. I have already alluded to some work of this kind concerning inter-governmental conflict in Canada⁶⁴ and the patriation process,⁶⁵ but much more could be done to relate constitutional developments to the social circumstances from which they emerged. For example, much has been written about the decentralizing thrust of the Judicial Committee of the Privy Council's interpretations of the *British North America Act, 1867*, but little has been

⁶⁰ This appears especially important with respect to the Charter, as the Chief Justice himself has acknowledged, *supra* note 14.

⁶¹ In fairness, many writers gesture towards this issue. See, for example, G.V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Can. B. Rev. 19 at 24. As well, the courts have made it clear that they are endeavouring to create a Canadian jurisprudence of rights. See, e.g., *Regina v. Videoflicks Ltd. et al.* (1984) 48 O.R. (2d) 395. Nevertheless, far too little work is being done by academics to create such theories. I am hardly suggesting that we would be better off by returning to the era where courts dismissed American ideas out of hand, but we must do more and better work to create theories that speak to the unique features of our society.

⁶² Gold, *supra* note 58.

⁶³ The phrase is from R. Stevens, "American Legal Scholarship: Structural Constraints and Intellectual Conceptualism" (1983) 33 J. Leg. Ed. 442 at 447.

⁶⁴ Cairns, *supra* note 38.

⁶⁵ Glasbeek & Mandel, *supra* note 46.

written about the forces shaping the litigation that gave rise to these province-building precedents. Many of the important cases turned on provincial initiatives to raise revenue or to regulate commercial activity under circumstances where the country was struggling through a severe economic depression.⁶⁶ This legislation might be understood as a response, in part, to the inability of the federal government to adequately fund the needs of the provinces or to otherwise play a leading role in the economic development of the country.⁶⁷ If this view could be substantiated through historical research, it would provide useful data from which one could then examine the larger question of the relationship between economic forces, legal initiatives, and constitutional evolution. Here, as elsewhere, the skills of the lawyer must be combined with those of the social historian and economist if such work is to yield helpful insights.

C. *On the Impact and Importance of Constitutional Law*

Although traditional scholarship does not want for a body of work highly critical of the courts' performance, there is virtually no attempt to assess either the impact of constitutional decisions or the compliance with them by other government institutions.⁶⁸ (Indeed, most writing tends to overstate the significance of judicial decisions.) One might explain this gap in the literature in a number of ways. In part, it follows from an often inarticulated view of law as somehow autonomous from other disciplines, a view that is related in some way to the idea that law is self-executing. This view may have been reinforced by the institutional disassociation of law from other disciplines mentioned above. Given that lawyers had the field of constitutional law virtually to themselves for much of our recent history, there was a lack of pressure from social scientists concerned about the actual consequences of what courts do. Explanations aside, this is not good enough.

Consider the impact of two major Supreme Court decisions concerning constitutional jurisdiction over natural resources. The immediate impact of the *CIGOL* decision was effectively avoided by the legislature of Saskatchewan levying a tax on the profits of the oil companies,⁶⁹ while

⁶⁶ See, for example, *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575.

⁶⁷ The significance of the depression for the evolution of Canadian federalism has been noted by a number of writers. See, for example, Careless, *supra* note 37 at 144; Mallory, *supra* note 12 at 33.

⁶⁸ The point is noted by P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. B. Rev. 30 at 42.

⁶⁹ *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* [1978] 2 S.C.R. 545. On the aftermath of the case, see Moull, *supra* note 24 at 25-26.

the doctrinal significance of the case has been rendered irrelevant by the terms of the resource amendment to the Constitution.⁷⁰ Respecting the Court's decision vesting exclusive jurisdiction in Parliament over the resources off-shore from Newfoundland,⁷¹ the impact has been blunted by the political arrangement that followed between the federal government and Newfoundland.⁷² To be sure, these decisions set the framework for the subsequent political debate, and in this sense, had an impact, but at the end of the day, the decisions were only of marginal significance.

The entrenchment of the Charter also raises a set of similar issues. For example, consider the recent decision of the Supreme Court in the *Singh* case, holding that the absence of an oral hearing in applications for refugee status violated the right to fundamental justice.⁷³ Notwithstanding the apparent impact that this decision will have on the procedures whereby immigration officials deal with the backlog of such applications, it seems clear that the provision of an oral hearing would soon have been legislated by Parliament in response to suggestions of a Task Force and others.⁷⁴ In the long run, the impact of the *Singh* case on immigration law is likely to be minimal.

Evaluating the impact of the Charter seems especially important in the context of the legal rights guaranteed in sections 7 to 14. To what extent have police departments and other investigative agencies promulgated new rules for officials "in the field" in light of the legal rights guaranteed by the Charter, and to what extent have these new rules actually altered behaviour in the field? The latter issue clearly cannot be addressed using traditional lawyers' skills alone: empirical research on the actual impact of these Charter rights appears essential.

⁷⁰ Section 92A of the *Constitution Act, 1982* provides, *inter alia*, that a province can legislate in relation to the inter-provincial trade in non-renewable natural resources, and can levy indirect taxes on those resources. For a careful analysis of these provisions, see Moull, *supra* note 21.

⁷¹ *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984) 5 D.L.R. (4th) 385.

⁷² The "Atlantic Accord" on offshore oil and gas development, entered into by the governments of Canada and Newfoundland, February 11, 1985.

⁷³ *Singh et. al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

⁷⁴ A task force established in 1980 has recommended that a person claiming refugee status should be given an oral hearing where the Refugee Status Advisory Committee is not prepared to make a positive recommendation on the basis of the transcript of the claimant's examination by an immigration officer. See Task Force on Immigration Practices and Procedures, *The Refugee Status Determination Process* (1981). The same conclusion was reached in a report commissioned by the Honourable John Roberts, the then Minister of Employment and Immigration. See E. Ratushny, *A New Refugee Status Determination Process for Canada* (1984). The federal government is planning to introduce legislation that will deal with the backlog of some twenty thousand cases where refugee status has been claimed. "Bill promised to ease refugee backlog," *Globe and Mail* (22 May 1985) 3.

In terms of the possibility of excluding evidence unconstitutionally obtained, the Charter invites us to consider the impact of admitting or excluding such evidence on the public's perception of the integrity of the justice system.⁷⁵ Absent some attempt to gauge such perceptions empirically, notwithstanding the many difficulties associated with such an effort,⁷⁶ the impact of the Charter in this area will remain largely speculative. Work needs to be done to assess the impact that decisions to exclude such evidence actually have on the outcome of cases. Although the popular image may be one of the "criminal" going free, research might disclose that evidence often is excluded because there is other admissible evidence with which to convict the accused.⁷⁷ All of these issues, when properly explored, might suggest that the impact of the Charter is less dramatic than one might otherwise have thought.

D. *On Interpretation and Rhetoric*

Notwithstanding the fact that traditional scholarship places the judicial opinion at the core of its agenda, there has been insufficient attention paid to the theoretical issues concerning constitutional interpretation. Paradoxical though this may sound, it is a function of what might be termed the reactive nature of most scholarship to what the courts do. Scholars tend only to go one step beyond what the courts do. For example, to the extent that a court offers reasons for judgment that are formalistic in tone, critics will respond by signalling the call for a more realist or consequence-oriented approach. To the extent that courts invoke, implicitly or explicitly, a particular image of Canadian federalism in justification of their decision, commentators tend to do little more than argue for or against that image. There is a lack of a critical distance from the terms of the debate, an insufficient attention to the problem of interpretation as a problem. Indeed, just as the critics of the Privy Council failed to provide a consistent or coherent picture of constitutional interpretation,⁷⁸ contemporary scholars pay insufficient

⁷⁵ Section 24(2).

⁷⁶ For a sympathetic, though not uncritical discussion of the use of opinion polls in this context, see D. Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" (1983) 61 Can. B. Rev. 377. In *The Queen v. Therens*, [1985] 1 S.C.R. 613, Le Dain J. rejects the use of opinion polls in applying section 24(2). Nevertheless, measuring the public's perceptions would still be important for those interested in gauging the impact of the Charter on public attitudes.

⁷⁷ American studies generally suggest that the impact of the exclusionary rule has been less dramatic than public perceptions would suggest. See, for example, B.C. Canon, "Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention" (1982) 23 S. Tex. L.J. 559.

⁷⁸ Cairns, *supra* note 20.

attention to the foundations of their arguments about interpretation. There is a rich literature being produced in the United States on the subject of interpretation and Canadian academics could profit by immersing themselves in it and adapting it to the Canadian context.⁷⁹

In this regard, there is considerable promise in the application of rhetorical theory to constitutional law.⁸⁰ On issues of interpretation, a rhetorical perspective would reveal the futility of any attempt to reduce constitutional interpretation to a single method or approach. Instead, a rhetorical perspective both reveals and justifies a variety of competing conventions and functions of interpretation, all of which legitimately can be invoked in constitutional cases.⁸¹ Moreover, by insisting on the non-conclusive nature of argumentation generally, rhetorical theory offers the possibility of rescuing the debate about the integrity of judicial interpretation from the sterility of the "law versus politics" dichotomy into which it too often falls.⁸²

Rhetorical theory is also useful in understanding the nature of the judicial opinion. Generations of legal realism notwithstanding, there is a tendency amongst many writers to take the judicial opinion at face value as if it necessarily reflected the reasoning process of the courts. Were the rhetorical nature of reasons for judgment better appreciated, scholars would have a sounder basis for better understanding how courts invoke various forms of constitutional argument in an effort, in part, to legitimate their decisions as appropriate in the circumstances.⁸³ This, in turn, would provide valuable information to a variety of audiences, notably the bar, whose function is largely rhetorical, and to the academic community interested in the behaviour of governmental institutions like the courts. More generally, viewing constitutional law as a rhetorical process can serve as an organizing paradigm within which interdisciplinary research on constitutional law could be undertaken. Inasmuch as the analysis of rhetoric is concerned primarily with how argumentation does or does not persuade, rhetorical analysis demands both an internal and external perspective on its subject. An internal perspective is necessary

⁷⁹ Helpful introductions to this literature may be found in (1982) 60 Tex. L. Rev. 373 ff. and in (1985) 58 S. Cal. L. Rev. 1-725.

⁸⁰ On modern theories of rhetoric, see Perelman & Olbrechts-Tyteca, *supra* note 7; K. Burke, *A Rhetoric of Motives* (1950); M.A. Nathanson & H.W. Johnstone, eds., *Philosophy, Rhetoric, and Argumentation* (1965); L.F. Bitzer & E. Black, eds., *The Prospect of Rhetoric* (1971); T.R. Nilsen, ed., *Essays on Rhetorical Criticism* (1968).

⁸¹ See P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).

⁸² M. Gold, "The Rhetoric of Constitutional Argumentation" (1985) 35 U. Toronto L.J. 154.

⁸³ M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Supreme Court L.R. 455.

because the rhetorical conventions that make up constitutional argument are the tools with which decisions are reached and justified, while an external perspective is necessary to understand the values and expectations of the audiences to which constitutional argument is directed.⁸⁴

In summary, scholarship of a traditional kind is an important and necessary part of a proper understanding of the Constitution, but it must be complemented by work that draws upon the perspectives of disciplines other than law. Although there are some examples of inter-disciplinary work being done on constitutional issues, it hardly represents the main-stream of constitutional scholarship. It only remains to conclude with some general thoughts about how we might facilitate the production of more work of this kind.

III. CONCLUSION

One can be forgiven for reacting in a bemused way to a call for more work of an inter-disciplinary kind, for despite such prescriptions having been made in the past, relatively little work of this kind has been done. One problem continues to be that lawyers talk a different language from those engaged in other disciplines. We lawyers may tell ourselves that we are receptive to the insights possibly available from other disciplines, but our training and orientation constitute a certain bridge over which much dialogue simply founders. Moreover, from an institutional point of view, attempts to bring the perspective of other disciplines to the study of law typically begin and end by appointing one or two non-lawyers to law faculties, if that at all. This marginalizes the contribution that such scholars might make. I overstate the case unfairly, no doubt, but the fact remains that the promise of a new inter-disciplinary scholarship remains more a matter of aspiration than of realization.

Nevertheless, in certain ways, we are better situated now to pursue inter-disciplinary work than were previous generations of academic lawyers. This is a function of the assimilation into main-stream legal thinking of some of the central claims of the realist movement: few serious scholars would dispute the propositions that law is not a field completely autonomous from other disciplines, that judges make choices even as they appear to be following the ostensible imperatives of text or doctrine, and that the nature of these choices is, in principle, subject to evaluation from perspectives beyond the law itself.

⁸⁴ *Ibid.*

This having been said, it remains the case that this work will not flourish unless some evaluation takes place within the institutional structures in which scholarship is produced. In the long run, the key may be to develop what *Law and Learning* calls a scholarly stream within legal education, although the risk is that, in an enthusiasm to embrace the putative insights from other disciplines, one might ignore the distinctive contribution that traditional forms of scholarship might make.⁸⁵ In the short run, we should build upon some of the networks that are currently emerging between law and other disciplines. For example, the Canadian section of the International Association for Philosophy of Law and Social Philosophy brings lawyers and philosophers together on an annual basis to exchange papers on topics of mutual interest, most recently that of equality rights. As well, the Canadian Law and Society Association has recently been created, with the same potential for fruitful exchange.⁸⁶

In my view, we should go one step further to institutionalize such inter-disciplinary contact in a more durable way. We require more and better-funded research centres wherein interested scholars can work together for a protracted period of time, and where lawyers and non-lawyers can educate themselves in the methodologies and perspectives of each others' disciplines.⁸⁷ Lawyers interested in pursuing inter-disciplinary work must guard against the assumption that there is some "magic key" to be found in some other discipline that will provide the hard answers to difficult issues. This is especially important when the other discipline tends to make rather overblown claims for itself, as is the case with too much work in law and economics.⁸⁸ Non-lawyers interested in legal matters must educate themselves in the methods and assumptions of traditional legal scholarship in order to better understand the significance of constitutional law to the constitutional lawyers themselves. No account of any social phenomenon is adequate without a sensitivity to the meaning of that phenomenon for those actively engaged in it.⁸⁹

The generation of more and better inter-disciplinary work is the challenge that faces constitutional scholars at the present time. One cannot

⁸⁵ For some thoughts on the unique contribution that the legal perspective can offer, see C. Fried, "The Artificial Reason of the Law or: What Lawyers Know" (1981) 60 *Tex. L. Rev.* 35.

⁸⁶ The creation of the Canadian Law and Society Association coincides with the launching of the *Canadian Journal of Law and Society*, thereby providing a specific place where inter-disciplinary work on Canadian topics can be published.

⁸⁷ See *Law and Learning*, *supra*, note 1 at 126-27.

⁸⁸ See, generally, G. Hughes, "The Great American Legal Scholarship Bazaar" (1983) 33 *J. Leg. Ed.* 424.

⁸⁹ See W. Runciman, ed., *Max Weber: Selections in translation* (1978) at 7-25.

and should not force inter-disciplinary work on those unwilling to do it, but we can facilitate it to a greater degree than we have. I am optimistic that, with some institutional changes along the lines of the research centre model, constitutional scholars can and will respond to the challenge.