Article

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Les Cahiers de droit, vol. 33, n° 4, 1992, p. 1057-1092.

Towards an Integrated, Liberal Theory of the Canadian State*

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In this article, the author challenges the tendency in common law Canada to conflate the distinction between State and society. Following the analysis of Kenneth Dyson, the author contends that the State occupies a distinct sphere produced by or contained in the interconstitutive relationship of State institution, on the one hand, and State idea, on the other. The State concept is presented as neither merely active nor merely passive but as involving a relationship between action and reflection, between institution and idea. The author then analyses the broadly shared public values which are contained in the Canadian State idea when viewed from a liberal political perspective. That these values incrementally modulate the exercise of public power — and vice versa *— argues for a State-society distinction which is not generally emphasized in common law Canada.*

L'auteure remet en cause la tendance à assimiler les notions d'État et de société qui existe dans les provinces canadiennes de common law. À la manière de Kenneth Dyson, elle avance l'idée que l'État occupe une sphère distincte, produit de l'interrelation de l'État-institution et du concept d'État. Ni simplement actif ou passif, ce concept d'État confronte action et réflexion, institution et idée. L'auteure analyse ensuite les valeurs publiques couramment véhiculées par le concept d'État canadien perçu

* I would like to thank Professor David Percy of the Faculty of Law, University of Alberta, Professor Daniel Mockle of the Université du Québec à Montréal and James McGinnis of the Edmonton law firm of Parlee McLaws for providing useful commentary on earlier drafts of this paper.

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Les Cahiers de Droit, vol. 33, n° 4, décembre 1992, p. 1057–1092
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dans une perspective libérale. Ces valeurs modulent graduellement l'exercice du pouvoir et inversement. Ce phénomène devrait conduire à distinguer l'État de la société, ce qui n'est pas aussi courant dans les provinces de common law.

By following a well-worn Anglo-American strategy, Canada outside Quebec has not produced an integrative theory of the State. Alan Cairns, for example, while acknowledging a society-State symbiosis[1], and producing significant insights concerning its impact, nonetheless relies on a model which emphasizes conflation. The State — because it cannot exist « in splendid isolation from the buffeting world and from its own history[2] » — often simply coextends with the society in which it is found. On the « embeddedness » of State and society, Cairns writes :

> The recent literature positing the autonomy of the state is a welcome advance from assumptions that the state is no more than a reflecting mirror, or a neutral arena where contending social interests struggle ceaselessly for advantage. The state is unquestionably actor as well as umpire [...] However, the stress on autonomy can lead to an uncritical view of the state as aloof and distant. *Realistically, autonomy exists only at the margin where the state can play a catalytic role with new ventures* [...] The state, as a result of past performance, is embedded in society, linked in thousands of ways to interests in society that no longer can meaningfully be described as private [emphasis added][3].

1. A. CAIRNS, « The Past and Future of the Canadian Administrative State », (1990) 40 *U. Toronto L.J.* 319, 321.
2. *Id.*, 320.
3. A. CAIRNS, « The Embedded State : State-Society Relations in Canada », in K. BANTING (ed.), *State and Society : Canada in Comparative Perspective*, Toronto, University of Toronto Press, 1986, p. 53, pp. 78-79 (foonotes deleted).

The perspective of David Cohen is entirely similar. As Daniel Mockle points out :

> Cohen revient constamment sur certains thèmes, un peu comme s'il s'agissait de leitmotiv. [Une] confusion « state-community » est d'une importance majeure dans l'approche suivie par Cohen puisqu'il n'hésite pas à en tirer les ultimes conséquences (« the state is everything » ; « we are also regulating bureaucrats »). L'État ne bénéficie d'aucune autonomie fonctionnelle et politique. Il n'est plus qu'un cadre ou un moyen où s'opposent irréductiblement divers intérêts particuliers au sein de la communauté[4].

The model invoked by Cohen and Cairns — while clearly providing insight into important aspects of the modern Canadian State — also leads to disintegration because its constitutive elements are predicated on the presence of social fragmentation, political diversity and pluralism. As these are the matters which the model selects for discussion, these are also the matters which are taken as comprising the State. Indeed,

> The pervasive grip of the society-centred perspective helps explicate the common absence of a clear and consistent state-society distinction. It has also resulted in a conception of the state as little more than an arena within which societal conflicts are fought out, interests mediated, and the ensuing results authoritatively confirmed[5].

In short, a disintegrative theory analyzes the Canadian State in a self-validating way. It only finds diversity because it does not possess mechanisms to detect or account for cohesion.

Even Anglophone experts on constitutional law fail to consider the State as a subject for distinct study. The approach of Peter Hogg is representative : it is to make do with a juridical theory of the State[6]. This means regarding the Canadian State independently from the sociological, political and intellectual activity which produces it and so to see the State as being

4. D. MOCKLE, « La Couronne et l'Administration fédérale : mise au point », (1989) 28 *Osgoode Hall L.J.* 135, 138 (footnotes deleted).

5. E.A. NORDLINGER, *On the Autonomy of the Democratic State*, Cambridge, Harvard University Press, 1981, p. 5.

6. Though his text on constitutional law is otherwise exceptional, Hogg chooses to approach the idea of the State from a doctrinal and instrumental perspective only. This is revealed in his definition of constitutional law as « the law prescribing the exercise of power by the organs of the State ». See P. HOGG, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, p. 1. Beyond endorsing the position, at p. 1, that the constitution is « a mirror reflecting the national soul », Hogg does not explore the ideas behind the rules. This silence is not inadvertent but axiomatic : in Hogg's construction, the State is, by and large, no more or less than those things by which it is regulated. The traditional strategy is not the exclusive one, however. The University of Toronto, for example, has recently produced a special issue on administrative law wherein several of its contributors distance themselves from overly juristic constructions. Nonetheless, these scholars remain in the minority. See (1990) 40 *U. Toronto L.J.* 305 and following.

contained in, described by, and coextensive with an organization of legal structures. Accordingly, the State is only considered within the context of those formalized and definition producing rules, procedures, regulations, systems, and orderings which constrain it. While it is generally acknowledged that principles contained in rules qualify the exercise of power so as to ensure that the State does not behave in an arbitrary, though technically legal fashion[7], this acknowledgement is rather more a tacit assumption than it is a matter for analysis. There is no exploration of the relationship between individual and State, no attempt to identify « the framework of values within which public life should be conducted[8] », no attempt to understand the Canadian State as an integrated, multifaceted concept. Indeed, and as a result, many Canadian legal scholars tend not to distinguish between State and law ; the coextension is so patent, it seems, that they perceive no need to acknowledge the distinction even for the purpose of dismissing it[9].

But the Canadian State is not simply about rules and the procedurally correct exercise of power. Nor is it mainly about a relatively fluid means of dispute resolution amongst competing groups. Because both approaches are complementary — it is the law which decides whether a dispute has been resolved authoritatively or not — both suffer from the same deficiency. That is, both fail to disclose fully that the State is not a « neutral executor mechanically implementing societal choices and choosing among competing demands by some agreed calculus[10] » ; or a « neutral institution [which has] arisen out of pure chance or accident[11] ». The State must be about something more than law or social compromise or a « ragged pattern » of incrementalism[12], because government institutions create « problems of rule [...] not to be understood exhaustively by describing their formal structures or the patterns of interaction within them[13] ». As Mockle notes :

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7. For more on this point, see A. D'ENTRÈVES's account of the difference between legality and legitimacy : *The Notion of the State : An Introduction to Political Theory*, Oxford, Clarendon, 1967, pp. 141-149.
8. K. DYSON, *The State Tradition in Western Europe : A Study of an Idea and Institution*, Oxford, Martin Robertson, 1980, p. 271.
9. While it is true that a text on constitutional law should devote much of its attention to legal constructs, a less juristic approach would also lead to analysis of principles informing the rules as well as an evaluation of their conformity to the requirements of liberal democratic theory and other measures of political legitimacy.
10. A. CAIRNS, *loc. cit.*, note 3, 58.
11. A. VINCENT, *Theories of the State*, Oxford, Basil Blackwell, 1987, p. 3.
12. A. CAIRNS, *loc. cit.*, note 1, 321.
13. K. DYSON, *op. cit.*, note 8, p. 6.

> Entre l'État et la communauté, cette différence est éclatante. Différence de buts, de moyens, de statut, d'organisation, tout concourt à accentuer l'autonomie de l'État même s'il existe depuis fort longtemps une imbrication étroite et complexe entre l'État et la société. Par analogie avec la pensée écologique, Fleiner-Gerster affirme que loin d'être antagoniques, ces deux éléments sont semblables aux éléments naturels d'un biotope en étant complémentaires, interdépendants et distincts. D'où la nécessité de maintenir un équilibre[14].

Articulation of a theory of the State based on identifiable public values and broadly shared understandings remains an endeavour long outstanding amongst certain groups within Canada. While State theory has received significant treatment from French-speaking theorists[15], American femin-

14. D. MOCKLE, *loc. cit.*, note 4, 141. He also writes, in reference to Cohen and unnamed others (p. 140) : « Ces auteurs, la plupart libéraux ou néo-libéraux, auraient dû pourtant comprendre que l'État et la société ne forment pas deux domaines objectivement distincts, mais représentent en réalité deux formes distinctes de la communauté civile, chacune ayant sa nature propre. »

15. Francophone scholars, in keeping with the European tradition, have produced a vast body of literature concerning the State. See the list of works identified by the LAW REFORM COMMISSION OF CANADA, *The Legal Status of the Federal Administration*, Working Paper No. 40, Ottawa, Law Reform Commission of Canada, 1985, pp. 89-100. In addition, see : G. BERGERON, *Le fonctionnement de l'État*, Quebec, PUL, 1965 and *Petit traité de l'État*, coll. « La politique éclatée », Paris, PUF, 1990 ; D. MOCKLE, « La réforme du statut juridique de l'Administration fédérale : observations critiques sur les causes du blocage actuel », (1986) 29 *Adm. Pub. Can.* 282, *loc. cit.*, note 4, and « Les enjeux et les difficultés d'une conception essentialiste de l'État et de l'Administration en droit français », (1990) 24 *R.J.T.* 291-337 ; G. BUDEAU, *L'État*, coll. « Points », Paris, Seuil, 1970 ; H. LEFEBVRE, *De l'État*, Paris, Union générale d'éditions, 1976 ; A. PASSERIN D'ENTRÈVES, *La notion d'État*, Paris, Sirey, 1969 ; T. FLEINER-GERSTER, *Théorie générale de l'État*, Paris, PUF, 1986 ; B. BADIE and P. BIRNBAUM, *Sociologie de l'État*, Paris, Grasset et Fasquelle, 1982 ; J. CHEVALLIER, « L'État de droit », (1988) *R.D.P.* 313. Mockle summarizes the European State tradition in the following terms, *loc. cit.*, note 4, 141 :

> Il faut simplement noter que tout au long des XIX^e^ et XX^e^ siècles, un courant multiforme de la pensée politique, juridique et sociologique a toujours accepté ce postulat fondamental de l'autonomie de l'État. Dans la pensée européenne, cette idée est si bien assimilée que nombreux sont les auteurs qui ne soupçonnent même pas qu'on puisse postuler autre chose, tellement le fait semble élémentaire. D'un commun accord, ils se bornent à constater que la société globale est faite elle-même de sociétés de tout ordre, au nombre desquelles figure principalement l'institution par excellence, soit l'État à titre de société institutionnalisée. Tout récemment, on a même tenté de montrer l'existence d'une conception organique de l'État dans la pensée européenne, à travers l'évolution complexe d'une multitude de courants politiques et philosophiques [footnotes deleted].

ists, and scholars writing from a neo-Marxist perspective[16], there has been no sustained effort in common law Canada to produce a *liberal* theory of the State, no attempt to explore the extent to which the Canadian State achieves a separate existence through what liberal democratic theory would require of it both ideologically and institutionally.

But to argue in favour of a cohesive, liberal theory of the State is not to be blind to the enormous difficulties associated with producing it. Indeed, the notion of the « State » is subject to contestation because it seeks agreement on fundamental antecedents such as matters of method and questions of epistemology ; it seeks agreement on the nature of power and its exercise ; it seeks agreement on the essence of humankind[17] and on the quality of public authority. Further, even with a level of agreement on these matters, the nature of a given State must be interpreted within the context of the ideological tradition with which it combines[18]. In sum, the whole project is subject to derailment at any point because the State « involves problems of meaning and application[19] ». For this reason, discussion of the

16. For a neo-Marxist critique, see, for example, L. PANITCH (ed.), *The Canadian State : Political Economy and Political Power*, Toronto, University of Toronto Press, 1977. For a powerful feminist account of the State, for example, C. MACKINNON, *Toward a Feminist Theory of the State*, Cambridge, Harvard University Press, 1989, pp. 161-162 : « The state is male in the feminist sense : the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender [footnotes deleted] ». See too, C. Weisbrod, « Practical Polyphony : Theories of the State and Feminist Jurisprudence », (1990) 24 *Georgia L. Rev.* 985.

17. C.B. MACPHERSON, « Do We Need a Theory of the State », *Archives européennes de sociologie*, vol. 18, 1977, p. 224, writes : « The hallmark of the grand theories [of the State] is that they all tied the state back to supposed essentially human purposes and capacities, to a supposed essential nature of man. » A. VINCENT, *op. cit.*, note 11, p. 43, remarks that while there is no single conclusion to be derived from one's view of human nature, nonetheless, the political theorist « will want to tie in the account of human beings with the structure of political arrangements ». G. DUNCAN, « Political Theory and Human Nature », in I. FORBES and S. SMITH (eds.), *Politics and Human Nature*, London, Francis Pinter, 1983, as quoted in A. VINCENT, *op. cit.*, note 11, p. 43, asserts that « at the centre of political theory lies the effort to establish a relationship between human nature, however that is conceived, and the State ».

18. K. DYSON, *op. cit.*, note 8, p. 255, attributes part of the elusive quality of the State as resulting from the numerous ideological manifestations it is capable of assuming. Speaking more theoretically, R. ALFORD and R. FRIEDLAND, *Powers of Theory : Capitalism, the State, and Democracy*, Cambridge, Cambridge University Press, 1985, p. 3, remark that because the State can be regarded from the perspective of the individual, from the perspective of organizations, from the perspective of society — as well as interperspectively — the meaning of « State » is contingent.

19. K. DYSON, *op. cit.*, note 8, p. 252.

concept of the State imports an intellectual vulnerability openly acknowledged by scholars in the field[20].

And this paper, of course, can only offer itself as a proverbial drop in the dialogical bucket. My object is to establish the existence of an autonomous State based on sources available in the English language, leaving an assessment of the French and German literature to another day. The first section of this paper seeks to provide a framework within which an integrative theory of the Canadian State might be constructed. The second section attempts to account for the absence of State theory in common law Canada. The third section takes the initial step of assessing State theory in the context of liberal political dictates. I will argue that locating liberal political theory within the State construct in turn generates recognition of a fluctuating set of public values which mandatorily constrain executive, legislative and judicial conduct[21] : this is what provides symmetry to individual-State relations. In accord with the European tradition, and addressing the matter from a liberal perspective, I will contend that the State has an existence beyond the arena of compromise and law[22].

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20. For example, K. DYSON, *op. cit.*, note 8, p. VII, remarks that his book, *The State Tradition in Western Europe*, was not easy to write: « Indeed, colleagues have frequently revealed by their facial expressions (rather than by unkind words of discouragement) a feeling that I was embarking on a hazardous enterprise. » A. D'ENTRÈVES, *op. cit.*, note 7, p. 148, makes a similar point : « The search for a legitimate basis of power is not an empty and senseless search [...] A theory of the state which takes no account of it is necessarily incomplete. It is no use protesting that such notions as legitimacy or authority are emotionally loaded, that they are at bottom irrational and certainly incapable of definition with the precision and severity of scientific language. This emotional and irrational character has never been denied by those few thinkers who have been inclined to investigate the idea of legitimacy, and to take it more seriously than a mere ideology, a political formula, or a noble lie. » Even the merely institutional State cannot be definitionally isolated. See A. CAIRNS, comment, *op. cit.*, note 1, p. 322: « The attempt to pin down the contemporary administrative state is doomed to failure. Its very boundaries become unclear as the state increasingly involves numerous private actors in its pursuit of goals by joint ventures, contract compliance in the service of disadvantaged minorities, and extensive and discretionary funding of many of the pressure groups. »

21. For example, I have argued elsewhere that liberal democratic theory mandatorily constrains the permissible conduct of the State in the marketplace. I thus question the validity of construing government liability through the traditionally invoked private law model. See S. O'BYRNE, « Public Power and Private Obligation : An Analysis of the Government Contract », (1992) 14 *Dalhousie L.J.* 485. For similar reasons, I have contended that common law Canada requires a disciplined approach to public law matters as manifest, for example, in *le droit administratif*. See S. O'BYRNE, « Generating Public Law », (1992) 5 *C.J.A.L.P.* 133.

22. Note that Dyson would regard Canada as a whole as following a « stateless » tradition. See my discussion of this point, *infra*, section 2.

In seeking to locate the autonomy of the Canadian State, I do not act as its panegyrist. I acknowledge the vast array of critical scholarship which identifies the human pain produced by the operation of liberal democratic theory, the Rule of Law, and the power structures represented therein. But nor am I prepared to trash the Canadian State. I contend that by locating the State concept, in unpacking its separate constituents, one finds embodiments of important human values as well as « problems of rule ».

1. Locating the State

In *The State Tradition in Western Europe : A Study of an Idea and Institution*, Kenneth Dyson describes the approach of Western continental Europe to the State. In this tradition, the State is produced by or contained in the interconstitutive relationship of State institution, on the one hand, and State idea, on the other. Dyson distinguishes between the institution and idea which comprise the State notion as follows :

> The notion of the state is neither a passive reflection, nor a determinant, of political conduct. Being in part constitutive of political activity and of the [institution of the] state itself, the idea of the state is connected in an intimate, complex and internal way with that conduct, shaped by and shaping it, manipulated by and imprisoning the political actor whose political world is defined in its terms[23].

This is a complex representation. The notion of the State is presented as neither merely active nor merely passive but as involving a relationship between action and reflection, between institution and idea : one's theory of the State thus becomes a form of social practice and *vice versa*[24]. Dyson's position is that « ideas do reflect political activity » but not merely as « expedients or reflexes of political practice »[25]. This is because people « are as much prisoners as manipulators of the ideas by which they seek to explain and legitimate their actions[26] ». Accordingly, to understand the State, one must accept that it is more than governmental apparatus and political decision-making : it is « partly constituted by the beliefs that people hold about it[27] ». In sum, the State idea is recognized as a force which consciously modulates, forms, and combines with the institutional State in its every incarnation : theory is not only system, it is also participant.

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23. K. DYSON, *op. cit.*, note 8, pp. 2-3.
24. Dyson's strategy here has much in common with Terry Eagleton's assertion that « just as all social life is theoretical so all theory is real social practice ». See : T. EAGLETON, *The Significance of Theory and Other Essays*, Oxford, Basil Blackwell, 1990, p. 24.
25. K. DYSON, *op. cit.*, note 8, p. 2.
26. *Ibid.*
27. *Id.*, p. 3.

Approaching the State from a Western continental European perspective means accepting that the State is not understood only by isolating bureaucratic and political behaviour, or discussing the power struggles born of federalism, or analyzing Canadian statutory law. Adopting a Western continental European strategy means acknowledging the value in exploring pre-existing perspectives on what the State is ; it means taking the position that standards influence official behaviour and *vice versa*. It necessarily requires locating the State notion beyond idea, beyond institution and in the space between those two constituents[28].

Dyson's account of the State is far removed from the traditional, doctrinal analysis of the institutional State as it is often understood. To recognize an imbricated notion of the State, to venture beyond the State's obvious physical and legal connotation and consider it as a « « lived » historical and socio-cultural phenomenon[29] » is not a common strategy amongst English-speaking legal theorists[30]. This absence, I will argue in the next section, must be considered a deficiency because the notion of the State clearly exists and is contained, partially at least, in the conduct of bureaucrats and politicians ; in the reasons for which they choose to so conduct themselves ; in the liberal democratically imbued measure or standard against which that conduct is evaluated ; and, in the unities and

28. The conceptual complexity in arguing that the State exists in the space between idea and institution can perhaps be alleviated by averting to a literary example. The Anglo-Irish poet, William Butler Yeats, wrote several ballads which were unconventional for employing antithetical structures. Yeats's strategy was to facilitate a collision between ballad stanza and refrain instead of the more traditionally expected unity. As a result, poetic meaning is not present within the words of stanza and refrain, nor in the ballad structure itself. Rather, it is necessarily located outside the confines of both. Put another way, the antithetical relationship (both in structure and theme) between ballad and refrain in turn generates, relocates, and transforms poetic meaning. While it is impossible to develop this analysis in a footnote, the reader is referred to W.B. YEATS, « The Ghost of Roger Casement », in P. ALTT and R. ALSPACH (eds.), *The Variorum Edition of the Poems of W.B. Yeats*, London, Macmillan, 1966, p. 583. In this ballad, John Bull — symbol of British colonial rule in Ireland — is ultimately seen by the poem's speaker to have misused and devalued language, history, and folk wisdom. This misuse — present in every stanza — is incrementally revealed through the unvaried refrain : « The ghost of Roger Casement/is beating on the door ». By invoking this image of a well known, murdered Irish rebel, the refrain directs the poem's movement from uncertainty, to knowledge, to an unspoken acceptance by the poem's speaker of Casement's call to defy British rule. Like the concept of the State described by Dyson, the meaning of Yeats's ballad is located outside of the constituents of form and substance, action and reflection, thought and expression. Meaning — both for Yeats and Dyson — is *consciously* presented as the dynamic product of constitutive interaction.

29. K. DYSON, *op. cit.*, note 8, p. 4.

30. K. DYSON, *op. cit.*, note 8, p. 4, quoting J.P. NETTL, « The State as a Conceptual Variable », (1968) *World Politics* 559, as cited by Dyson.

tensions generated by these constitutive elements. If this argument can be made successfully, it means that Canada participates, albeit with greater attenuation, in a kind of State concept normally only associated with Western continental European countries, a concept which involves :

> a body of values, powers, procedures and offices ; [it] represents a concern for logic and order in collective arrangements. Its emphasis is upon the autonomous exercise of public authority under law [...] upon the unity of such authority, a monism that suggests the distinctive character of public affairs ; upon technical criteria and professionalism of bureaucratic mores rather than group conflict and adjustment ; and upon an essentially moral, substantive concept of the public interest that is not viewed as simply emerging from a pluralist process in which groups openly compete[31].

2. The Absence of Theory

It is the case that the concept of the State has been regarded suspiciously by numerous Anglo-American theorists. Indeed, their « academic climate has been generally unreceptive to any general discussion on the nature of the State[32] ». Even in continental Europe, where the concept of the State has genuine cultural resonance, the matter has only recently regained its former significance as a component in political and social theory[33]. I now propose to explore the Anglo-American disregard for the State concept which — given historical and geographical proximities[34] — provides reasons for the absence of theory in common law Canada as well. My account of the Anglo-American perspective will be partial by necessity ; a full discussion would require a prolonged interpretation of philosophical, social, historical and political directions which influenced scholars both to generate and follow certain theoretical paths. Further, an explanation for the absence of theory is not pivotal to the integrity of the

31. K. DYSON, *op. cit.*, note 8, p. 270.

32. A. VINCENT, *op. cit.*, note 11, p. 1. See also K. DYSON, *op. cit.*, note 8, p. 4. One important exception, as Mockle points out, is H. LASKI, *The State in Theory and Practice*, New York, The Viking Press, 1935. See D. MOCKLE, *loc. cit.*, note 4, 140. The treatment of State theory by those writing from a Marxist and feminist perspective is acknowledged in *supra*, note 16.

33. J. KEANE (ed.), *Civil Society and the State : New European Perspectives*, London, Verso, 1988, p. 1.

34. P. ROMNEY, « From Constitutionalism to Legalism : Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture », (1989) 7 *Law & Hist. Rev.* 121, explores certain of the political, economic and cultural influences which Great Britain and the United States have had on Canada. He notes, among other matters, that Canada's political culture is the complex product of the « North Atlantic Triangle », which references Canada's relationship to the United States and Great Britain. See his discussion, *loc. cit.*, 122, of J.B. BREBNER, *The North Atlantic Triangle : The Interplay of Canada, the United States, and Great Britain*, New Haven, Columbia University Press, 1945.

limited State theory which I will offer later in this paper—the mere absence of a theory cannot, without more, prove that a subsequently generated one lacks viability. The following comments are simply intended, therefore, to place into context my own project and to suggest that any reflexive tendencies to dismiss the concept of the State are the result of contingencies unrelated to the integrity of the concept itself.

A primary cause for neglect of the State concept in the Anglo-American tradition lies in the real and perceived conflict between the idea of the State and the informing principles of democratic liberalism. That the power of the merely *institutional* State cannot be fully reconciled with the liberal based sovereignty of each citizen is problematic enough[35]—when the *idea* of the State is superimposed onto the institutional one, the assailability of the individual and the spectre of totalitarianism appear heightened. Indeed, the idea of the State has been linked to problems profoundly antagonistic to liberal democratic constructs, including: dictatorial elites[36]; a reduced competitive function in political parties and the legislative branch of the State[37]; intolerance of dissent and a refusal to accommodate special interests[38]; the growth of an overly bureaucratized, formalized and hierarchial administration[39]; depoliticisation resulting from constraints placed both on governmental rule and politicking presumed to emanate from that idea[40]; and the growth of intellectual despotism[41] the force of which is premised on a dictatorial interpretation and imposition regarding the content of that idea[42].

Related to the anti-statism of liberalism is the commonly evoked strategy of Anglo-American political philosophy to pay « considerable attention to particular concepts like democracy, equality, liberty, and

35. Q. SKINNER, « The State », in T. BALL and J. FARR (eds.), *Political Innovation and Conceptual Change*, Cambridge, Cambridge University Press, 1989, p. 122.
36. K. DYSON, *op. cit.*, note 8, p. 257.
37. *Id.*, p. 259.
38. *Id.*, p. 260.
39. *Id.*, p. 263.
40. *Id.*, p. 265.
41. *Id.*, pp. 268-269.
42. The irony of this fear is commented on by Mockle who writes, *loc. cit.*, note 4, 140: « Malgré certaines exceptions notoires comme l'œuvre de H.J. Laski, ces difficultés ou ces réticences à développer une approche conceptuelle fondée sur l'autonomie de l'État mènent directement aux pires aberrations. Cohen devrait pourtant savoir que cette volonté d'assimiler l'État à la communauté a été l'argument privilégié de plusieurs régimes totalitaires où la communauté organique des citoyens et de l'État ne formaient plus qu'un. (C'est la solution unitaire de type fasciste.) Le pire, c'est principalement par crainte d'un envahissement incontrôlé de l'État au sein de la société civile que tout un courant, et non des moindres, a nié l'existence de l'État au profit de la communauté [footnotes deleted]. »

social justice but not to an overarching concept of rule like state with reference to which these might be related[43] ». The search for the cohesive element implied in the concept of the State is seen as either foolishly metaphysical — particularly in light of the growth of twentieth-century, Anglo-American empiricism and nominalism[44] — or foolishly diversionary because the exercise detracts attention from actual political or governmental conduct, a more common subject matter of Anglo-American analysis[45]. Further, the centre stage of liberal theorizing remains largely occupied by the rational, self-maximizing individual who axiomatically constitutes the starting point of any analysis and whose interests are considered paramount over collective ones[46].

In sum, the State idea has a contradictory, troubling quality in the context of traditional democratic liberal theory and method which even now militates against a complete understanding of what political consequences flow from accepting it. All of this leads Anglo-American jurisprudence away from acknowledging a fuller concept of the State. Additional reasons contributing to the absence of a national theory of the State relate to common law Canada's inheritance of certain confusing juristic traditions from Britain, the pluralist quality of Canadian society, and to the fact of Canadian federalism. As surveys by F.W. Maitland, Dyson, Skinner, and The Law Reform Commission of Canada show[47], the British notion of State

43. K. DYSON, *op. cit.*, note 8, p. 201. See a similar assessment by A. VINCENT, *op. cit.*, note 11, pp. 1-2.

44. A. VINCENT, *op. cit.*, note 11, p. 2; K. DYSON, *op. cit.*, note 8, pp. 199-200 ; A. D'ENTRÈVES, *op. cit.*, note 7, pp. 62-64. See also K. VON BEYME's discussion : « The Role of the State and the Growth of Government », *International Political Science Review*, vol. 6, 1985, p. 12.

45. A. D'ENTRÈVES, *op. cit.*, note 7, p. 62 ; K. DYSON, *op. cit.*, note 8, p. 197.

46. See J. GRAY, *Concepts in Social Thought : Liberalism*, Minneapolis, University of Minneapolis, 1986, p. 56, wherein he references the rational, self-maximizing, possessive individual model in J. BUCHANAN, *Freedom in Constitutional Contract*, College Station, Texas, Texas A & M University Press, 1977, and D. GAUTIER, *Morals by Agreement*, Oxford, Oxford University Press, 1985. See K. DYSON's general discussion, *op. cit.*, note 8, p. 254 and also at pages 198-199, where he discusses the presence of this model in the work of modern liberal theorists such as Robert Nozick and John Rawls.

47. F.W. MAITLAND, « The Crown as Corporation », (1901) 17 *Law Q. Rev.* 131 ; K. DYSON, *op. cit.*, note 8, pp. 36-37, 210-211 ; Q. SKINNER, *loc. cit.*, note 35 ; THE LAW REFORM COMMISSION OF CANADA, *op. cit.*, note 15, pp. 6-12. For comments on the confusion, unrealities and fictions associated with the British constitutional Monarch, see A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, MacMillan & Co. Ltd., 1965, pp. 7-12 (1st ed. : 1885). In his introduction, the editor of the 10th edition states : « the text remains in the form in which it appeared in the seventh edition published in 1908. This was the edition in which the Author finally settled the text. »

and Crown lacks a coherence which Canada—being a former British colony and still a titular monarchy—has largely inherited. First, to arrive at a modern concept of the State whereby power is understood as impersonal, that is, where an office of the State is seen as having an existence separate from and above the individual office-holder, itself involved a long historical journey[48] and is summarized by Skinner in the following terms :

> the idea that the supreme authority within a body politic should be identified as the authority of the state was originally the outcome of one particular theory of politics, a theory at once absolutist and secular-minded in its ideological allegiances. That theory was in turn the product of the earliest major counter-revolutionary movement within modern European history, the movement of reaction against the ideologies of popular sovereignty developed in the course of the French religious wars, and, subsequently, in the English Revolution of the seventeenth century. It is perhaps not surprising, therefore, to find that both the ideology of state power and the new terminology employed to express it provoked a series of doubts and criticisms that have never been altogether stilled[49].

Some of the more significant doubts are illustrated in an analysis by F.W. Maitland showing the imperfect fusion which incorporation effected between State and Crown. Mincing no words, Maitland relies on quotations from old English case law and texts to bolster his characterization of the Crown corporate concept as an abortive and mischievous trick :

> In the first place, the theory is never logically formulated even by those who are its inventors. We are taught that the king is two « persons », only to be taught that though he has « two bodies » and « two capacities » he « hath but one person ». Any real and consistent severance of the two personalities would naturally have led to « the damnable and damned opinion », productive of « execrable and detestable consequences », that allegiance is due to the corporation sole and not to the mortal man. In the second place, we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong and (says Blackstone) think no wrong ; and such talk has not been innocuous [...] But in the third place, the theory of the two kings or two persons stubbornly refuses to do any real work in the cause of jurisprudence [footnotes deleted][50].

48. K. DYSON, *op. cit.*, note 8, p. 42.
49. Q. SKINNER, *loc. cit.*, note 35, 121-122.
50. F.W. MAITLAND, *loc. cit.*, note 47, 135. For Maitland (p. 133), the modern British State emerged with Henry VIII's description of the English body politic. I quote from Henry's declaration because it encapsulates one thread in the perplexing history of the British State. Henry VIII is reported to have said: « Where by divers sundry old authentick histories and chronicles it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in the world, governed by One supreme Head and King, having the dignity and royal estate of the Imperial Crown of the same, unto whom a Body Politick, compact of all sorts and degrees of people and by names of Spirituality and Temporalty been bounden, and owen to bear, next to God, a natural and humble obedience [footnotes deleted]. »

The relationship between the undeniable confusion Maitland identifies and the fact that common law Canada has not pursued a theory of the State is, of course, impossible to establish. We do know that the « Crown » functions as symbol of the State in the British tradition but that it cannot do the job. We know it cannot do the job because the idea is perplexing, conveys no notion of nationhood and does not in any way « systematize the relationship of the individual to the state[51] ». It may therefore be an idea which sustains only refractory analysis and so derails the formulation of a coherent State idea. This in turn, may account for the absence of theory.

Second, and as referred to above, common law Canada has inherited the Diceyan-inspired tendency to de-emphasize the separation between public and private law — particularly when contrasted to the Roman law influence in continental Europe through which the distinction becomes pivotal[52]. Much of the Rule of Law — which includes the idea that every person, of whatever rank or condition « is subject to the ordinary law of the realm[53] » — must go to discounting the Western continental European argument of subjecting government to a separate legal regime and holding it accountable to a separate court or tribunal. Dicey's text on British constitutional law dismisses the French administrative approach, for example, as resting on « ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law[54] ». The French *droit administratif* therefore « illustrates, by way of contrast, the full meaning of that absolute supremacy of the ordinary law of the land [...] which we have found to be a salient feature of English institutions[55] ».

It should be noted that any attempt to dismiss out of hand the distinction between private and public law in Canada and Britain is at bottom fictional, given that, for centuries the British government has had a collection of special powers and immunities derived from its Crown status : it is not subject only to ordinary law[56]. Yet the Diceyan perspective still holds

51. K. DYSON, *op. cit.*, note 8, p. 40.
52. A. VINCENT, *op. cit.*, note 11, p. 11. See too THE LAW REFORM COMMISSION OF CANADA, *op. cit.*, note 15, p. 27.
53. A.V. DICEY, *op. cit.*, note 47, p. 193.
54. *Id.*, p. 329.
55. *Id.*, p. 330.
56. See P. HOGG, *Liability of the Crown*, 2nd ed., Toronto, Carswell, 1989, for a discussion of these powers and immunities and his criticism of Dicey for failing to deal with them properly (p. 3). A.V. DICEY, *op. cit.*, note 47, does acknowledge some points of contact between French *droit administratif* and the British common law (pp. 373-405) and in : « The Development of Administrative Law in England », (1915) 31 *Law Q. Rev.* 148, he acknowledges even more. Note too Dyson's comment, *op. cit.*, note 8, p. 234, that in Britain « a characteristically medieval confusion of public and private responsibility remains ». The common law system is caught up in a « web of medieval government

remarkably persistent theoretical sway notwithstanding its fictional quality and despite the fact that Canadian law — in both its civil and common law traditions — does recognize the public-private distinction.

For example, at the end of the day, it is Dicey upon whom Hogg and the Ontario Law Reform Commission indirectly rely when they advocate that government be regulated, for the most part, through private law principles[57]. There is a characteristically Anglo-Canadian reluctance either to accept the public-private distinction or to acknowledge that the differences between the individual and the State should generate legal consequences. My object at this point is not to debate the logic of Hogg's conclusion, nor to assess the ideological, epistemological or descriptive critiques of the public-private distinction. It is only to argue that denying the significant differences between public and private perpetuates the continued ascription of a weak status to the Canadian State. Put another way, if we accept that public and private are very much the same, then the State cannot be about anything very distinct either. And so, again, the relative lack of theory about it.

Another account of why Canada has no theory of the State can be related to its composition. On federalism, Vincent makes the classic observation that it « encourages centrifugal forces, distinct legal structures and a general mistrust of centralism[58] ». Cairns is more specific, referring to:

> the more than 260 cabinet ministers and their departments of its 11 senior governments, and in a proliferation of government agencies and corporations only loosely connected to the traditional responsible government focus of executive authority. Countless programs, mostly old, occasionally new, and frequently contradictory are applied by the thousands of separate bureaucratic units of the eleven governments. The result is a fragmented state with a fragmenting impact on society. Social actors are pulled in multiple directions by the scattering of state structures and policies[59].

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immunities and concepts which have not permitted the evolution of a coherent body of public law ». Notwithstanding, the LAW REFORM COMMISSION OF CANADA, *op. cit.*, note 15, p. 27, remarks that governmental powers and immunities in Canada actually « represent the beginnings of a separate body of administrative law applicable to a large part of the Administration ».

57. See P. HOGG, *op. cit.*, note 56, p. 3, and THE ONTARIO LAW REFORM COMMISSION, *Report on the Liability of the Crown*, Toronto, Ontario Law Reform Commission, 1989, pp. 2-3. Note that Hogg had conduct of the aforementioned report from its inception (p. XIII).
58. A. VINCENT, *op. cit.*, note 11, p. 11. It should be noted that D. SMILEY and R. WATTS, *Intrastate Federalism in Canada*, Toronto, University of Toronto Press, 1985, pp. 1-4, are careful to criticize equally conceptions of federalism which either over or underemphasize the effect of constitutional power divisions.
59. A. CAIRNS, *loc. cit.*, note 3, 56.

The fragmenting effect of federalism, when combined with significant post-war growth in the Canadian public sector[60], a widely dispersed public authority[61], and a pluralistic society the constitutionally enshrined multicultural quality of which manifests « the multiple politicized cleavages of modernity[62] », results in a characterization of the Canadian State as « multiple, scattered and diffuse[63] ». This reality leads scholars away from seeking to understand the Canadian State as integrative and so, in turn, accounts for the relative absence of theory.

All the foregoing is offered only by way of background, not as apology or special pleading. Indeed, whatever one's objective, the concept of the State is ultimately not about consensus as it cannot be[64], nor is it determined by what the academic climate would have or not have us do. Accordingly, I propose simply to enter the debate and turn to a discussion of central components contained in the idea of the Canadian State. By uncovering these components, I hope to show — indirectly at least — that the public-private distinction is a defensible one, that there is a difference between public and private power, and that, from a liberal perspective, it is

60. *Ibid.* K. BANTING, « Images of the Modern State », in K. Banting (ed.), *op. cit.*, note 3, p. 2, remarks that the most usual measure for growth in the Canadian public sector is public expenditure as a proportion of the gross domestic product : « by this standard government spending in Canada has risen dramatically from 15.7 percent of our economic product in 1926 to 47.9 percent in 1983 ». Banting refers the reader to STATISTICS CANADA, *Historical Data Compendium*, prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, Ottawa, Statistics Canada, 1985, Table 5.12. See also A. CAIRNS's comment, *loc. cit.*, note 1, 325, in reference to the same Royal Commission report, that federal and provincial Crown corporations together actually may produce about 10 percent of the gross national product.

61. As A. CAIRNS, *loc. cit.*, note 1, 348-349, comments : « The contemporary Canadian state is not a unitary actor, but rather a fragmented, sprawling colossus. It manifests itself through the central government and the governments of ten provinces and two territories [...] Each government is internally fragmented. At the elementary level of the number of cabinet ministers with separate portfolios, the combined cabinets of the nine provinces and the national government contained only 118 ministers in 1945 ; four decades later, with Newfoundland now a province, the combined figure was 269. »

62. A. CAIRNS, *loc. cit.*, note 3, 56.

63. *Ibid.* CAIRNS also points out (p. 62) that even government attempts to « shape a conception of community » have become politicized ; this is clearly illustrated, he suggests, in the ongoing contest between the federal government and the government of Quebec for francophone allegiance.

64. While a concept of the State seeks agreement over a diverse range of subjects, no such agreement is achievable. As K. DYSON, *op. cit.*, note 8, pp. 254-255, comments : « the state tradition is replete with internal disputes which can be traced back to its ideological ambiguity, its openness to reformulation and reinterpretation ». See also R. ALFORD and R. FRIEDLAND, *op. cit.*, note 18, pp. xiii-xiv.

a distinction which makes rational governance possible[65]. Though the bifurcation has been subject to considerable criticism which I acknowledge elsewhere[66], the retrievability of the distinction is demonstrated to the extent that the State and society inhabit relatively distinct spheres.

3. The State Idea

3.1 Introduction

In order to understand the idea of the Canadian State from a liberal perspective, I propose first to analyze the Rule of Law, realizing, of course, that, like the idea of the State, it is a heavily « contested concept[67] ». I will then seek to identify some of the liberal democratic values which affirm the dignity of the individual and which define the public interest. It is my position that at least these elements constrain State conduct and render it subject to normative scrutiny. Put another way, the Canadian Rule of Law and certain other liberal democratic constructs provide the fixed and inherited standards upon which the State is constructed and against which its conduct is measured. These are the factors which allow us to speak about the State as an entity distinct from the pluralizing factors of society alone.

3.2 The Rule of Law

The Rule of Law receives one of its earliest and most famous definitions by A.V. Dicey, who describes it as comprising three related concepts : first, no person « is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land[68] ». Second, no person

65. See J. BLUM's discussion of rational governance : « Critical Legal Studies and the Rule of Law », (1990) 38 *Buffalo L. Rev.* 59, 76-77.

66. In S. O'BYRNE, *loc. cit.*, note 21, 140-145, I acknowledge the epistemological and ideological critique of the public-private distinction as well as criticism that the distinction has no sustainable, descriptive foundation. It is incontestable, as Allan Hutchinson asserts, that one ought to acknowledge « similarities between the exercise of government and private power and their shared potential for abuse ». See A. HUTCHINSON, « Mice under a Chair : Democracy, Courts, and the Administrative State », (1990) 40 *U. Toronto L.J.* 374, 377. In my view, Hutchinson's contention does not require elimination of the public-private distinction but a reconsideration of the line which is traditionally drawn between the two spheres. We can then still acknowledge the significant qualitative differences between the exercise of public power through government — or its contextual equivalent — and the private power to, for example, enter into a consumer contract or quit a job.

67. See M.J. RADIN, « Reconsidering the Rule of Law », (1989) 69 *B.U.L. Rev.* 781-819, 791.

68. A.V. DICEY, *op. cit.*, note 47, p. 188.

is « above the law, but (what is a different thing) [absolutely everyone] is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals[69] ». Third, « the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions[70] ». It is the second arm of Dicey's formulation that most concerns us here.

Since Dicey's late nineteenth-century definition, the Rule of Law concept has been subject to analysis by numerous theorists including, and without seeking to enumerate them, Sir Ivor Jennings[71], and Sir William Holdsworth[72], it assumes a libertarian incarnation in the work of F.A. Hayek[73] and, for Bernard Schwartz in *Law and the Executive in Britain*[74], a normative and descriptive one. The Rule of Law appears as the exclusive object of study at a Chicago Colloquium in 1957[75] and a Warsaw Conference the following year[76]. It is regarded supra-nationally by Norman Marsh[77], tied to legal efficiency by Lon Fuller[78], posited as being integral to the idea of justice by John Rawls[79], scrutinized from a Marxist perspective by British historian E.P. Thompson[80], contained by Joseph Raz[81], « trashed » by the Critical Legal Studies Movement[82], retrieved by reform

69. *Id.*, p. 193.
70. *Id.*, p. 195.
71. I. JENNINGS, *The Law and the Constitution*, 5th ed., London, University of London Press, 1959 (1st ed. : 1943).
72. W. HOLDSWORTH, *Some Lessons from Our Legal History*, New York, Macmillan, 1928.
73. F.A. HAYEK, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960.
74. B. SCHWARTZ, *Law and the Executive in Britain : A Comparative Study*, New York, New York University Press, 1949.
75. See N. MARSH's discussion of this Colloquium : « The Rule of Law as a Supra-National Concept », in A.G. GUEST (ed.), *Oxford Essays in Jurisprudence*, London, Oxford University Press, 1961, pp. 223, 230.
76. See N. MARSH, *loc. cit.*, note 75, 235.
77. *Ibid.*
78. L. FULLER, *The Morality of Law*, rev. ed., New Haven, Yale University Press, 1969, pp. 33-94.
79. J. RAWLS, *A Theory of Justice*, Cambridge, Belknap Press, 1971, pp. 235-243.
80. E.P. THOMPSON, *Whigs and Hunters : The Origin of the Black Act*, London, Allen Lane, 1975.
81. J. RAZ, « The Rule of Law and Its Virtue », in J. RAZ, *The Authority of Law : Essays on Law and Morality*, Oxford, Clarendon Press, 1979, p. 210.
82. See, for example, A. HUTCHINSON and P. MONAHAN, « Democracy and the Rule of Law », in A. HUTCHINSON and P. MONAHAN (eds.), *The Rule of Law : Ideal or Ideology*, Toronto, Carswell, 1987, pp. 97-124. See also M. HORWITZ, « The Rule of Law : An Unqualified Human Good » ?, (1977) 86 *Yale L.J.* 561. Further, see the C.L.S. articles on the Rule of Law cited by A. ALTMAN, *Critical Legal Studies : A Liberal Critique*, Princeton, Princeton University Press, 1990, p. 57, and following as well as Altman's defense of the Rule of Law against its C.L.S. detractors.

orientated liberals such as Jeffrey Blum[83] and reconsidered by Margaret Jane Radin within the context of Wittengensteinian philosophy[84]. But notwithstanding the diversity of treatment it has received, however, there has been some measure of agreement with respect to its modern formulation as being the rule « of laws, not men[85] ».

Whether the foregoing phrase best contemplates a formalist or substantive model, however, has not produced the same consensus. Formalists — also known as instrumentalists — regard the Rule of Law as going to institutions and procedures[86] constraining the exercise of power so that State action will be predictable though not necessarily fair or just. Accordingly, it is a purely formal ideal which the legal system of any kind of polity is competent to achieve[87]. Though the Rule of Law can produce a good[88], it need not do so because the Rule is non-ideological. As Raz asserts : « It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man [sic][89] ».

Raz argues that the Rule of Law involves two principles : the making of specific laws must be « guided by open and relatively stable general rules[90] » and the law must be « capable of guiding the behaviour of its subjects[91] ». On this reading, the Rule of Law is simply not limited to liberal democratic constructs (although it is clear that liberal democratic constructs would require the Rule of Law). Raz goes so far as to claim that the Rule of Law can be consistent with many forms of arbitrary rule : « A ruler can promote general rules based on whim or self-interest, etc., without

83. J. BLUM, *loc. cit.*, note 65.
84. M.J. RADIN, *loc. cit.*, note 67.
85. See A. HUTCHINSON, *op. cit.*, note 82, IX. See also M.J. RADIN, *loc. cit.*, note 67, 781 ; J. RAZ, *loc. cit.*, note 81, 212, and a comparable definition offered by F.A. HAYEK, *The Road to Serfdom*, Chicago, University of Chicago Press, 1944, p. 54. Like Radin, I shall define the Rule of Law as « the rule of law, not individuals », bearing in mind as she does that the original formulation proved accurate until quite recently because, until quite recently, only men had any part in political life.
86. See M.J. RADIN's discussion, *loc. cit.*, note 67, 784-787, and J. RAZ, *loc. cit.*, note 81, 210-289. See too S. MACEDO, *Liberal Virtues : Citizenship, Virtue and Community in Liberal Constitutionalism*, Oxford, Clarendon Press, 1990, p. 10.
87. J. RAZ, *loc. cit.*, note 81, 211.
88. E.P. THOMPSON, *op. cit.*, note 80, p. 265, notes that the reconciliation of conflicts through the Rule of Law — and the elaboration of rules and procedures [...] seems to me a cultural achievement of universal significance ». Elsewhere (p. 267), Thompson refers to the Rule of Law as « an unqualified human good ».
89. J. RAZ, *loc. cit.*, note 81, 211.
90. *Id.*, 213.
91. *Id.*, 214.

offending against the rule of law[92]. » Radin sees things the same way when she states that the « instrumental conception is a model of government by rules to achieve the government's ends, whatever they may be[93] ». A legal system will be consistent with the Rule of Law if it produces laws which are knowable and capable of being followed[94]. What interests or values the law promotes is an extraneous matter. Of course, instrumentalists would acknowledge that the Rule of Law operates within a political context and that the law which qualifies as such under the Rule of Law would in turn promote specific values ; they simply deny that the Rule of Law itself carries any stringent ideological baggage.

Further, formalists regard the Rule of Law as competent to contain value under certain circumstances. It can found social relationships which otherwise would be « erratic » by rendering « law itself a stable and safe basis for individual planning »[95]. This stability, in turn, produces a form of freedom which, while not political, is the result of a relatively predictable environment[96]. The Rule of Law also contemplates a kind of human dignity because its non-violation prevents « frustration » and « disappointed expectations »[97]. On this model, the Rule of Law constitutes a negative virtue in that « conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which only could have been caused by the law itself[98] ».

And so, while the Rule of Law is indifferent as to the object of a given law, it does promote essential features of any properly working legal system, namely efficiency[99], the provision of effective guidance[100] regarding the outcome of any given course of conduct and legally enforceable remedies[101].

One could charge the instrumentalist Rule of Law model with being unacceptably reductionist because, in liberal democracies at least, one does not simply seek to ensure efficiency, certainty, and the avoidance of disappointment and then assume all political work to have been accom-

92. *Id.*, 219. It must be emphasized that while such rules may be in themselves whimsical, they could not be applied whimsically or be subject to retroactive change and still be consistent with the Rule of Law.
93. M.J. RADIN, *loc. cit.*, note 67, 792.
94. *Id.*, 786.
95. J. RAZ, *loc. cit.*, note 81, 220.
96. *Ibid.*
97. *Id.*, 222.
98. *Id.*, 224.
99. *Id.*, 226.
100. *Id.*, 218.
101. *Ibid.*

plished. There are additional, more pressing values requiring respect and these are often regarded as being contained in the Rule of Law.

Those who advocate this latter, substantive account assert that the Rule of Law is consistent only with a free society[102] and accordingly, the State does not meet the Rule of Law standard simply by exercising power in a procedurally or formally correct fashion. In addition, the exercise of power must be legitimate[103], that is, legally exercised *and* capable of substantive justification because the Rule of Law involves « positive content capable of being expressed in terms of fundamental values[104] ». One common version of the substantive model is found in Hayek's contention that the Rule of Law should not be confined to mere legality because it :

> presupposes complete legality, but this [legality] is not enough : if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism : it requires that all law conform to certain principles[105].

And these principles are specifically liberal democratic ones. As earlier discussed, the liberal model of the individual tends to be that of the rational self-maximizer. Because each individual needs a « guaranteed sphere of liberty » classical liberals argue that « only a State conceived as a civil association, providing a general framework of over-arching rules (a rule of law), and restrained in its conduct could guarantee such conditions[106] » can afford self-maximization of the individual. Accordingly, the Rule of Law is regarded as integral to promoting the negative liberty of classical liberalism advocated by John Rawls[107] (in that predictability and

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102. See N. MARSH's discussion, *loc. cit.*, note 75, 243, and that of A. D'ENTRÈVES, *op. cit.*, note 7, pp. 145-146.

103. A. D'ENTRÈVES, *op. cit.*, note 7, p. 141.

104. J.A. JOLOWICZ, « Digest of the Discussion — Chicago Colloquium on « The Rule of Law as Understood in the West » », (1959) *Annales de la Faculté de droit d'Istamboul*, IX, as cited by A. D'ENTRÈVES, *op. cit.*, note 7, p. 145.

105. F.A. HAYEK, *op. cit.*, note 85, p. 205. See J. RAZ's rebuttal, *loc. cit.*, note 81, 228, where he points out that what Hayek condemns as « arbitrary exercises of power » are, in fact, « perfectly principled particular orders ». It is worth noting too that Hayek misconstrues the Rule of Law on another basis. This is because a law which gave unlimited power to the government to do whatever it pleased would not, obviously enough, promote the certainty, efficiency and realized expectations which are integral to a properly functioning Rule of Law and so would be contrary to it on an instrumental reading alone.

106. A. VINCENT, *op. cit.*, note 11, p. 118.

107. See M.J. RADIN's discussion of Rawlsian liberty, *loc. cit.*, note 67, 788-790. She quite rightly asserts that while Rawls has an instrumentalist conception of the Rule of Law, he offers a substantive justification for it (p. 790) : « the Rule of Law is grounded not on the bare claim of efficacy of behavioral control, but on the specific political vision of traditional liberalism. Liberty is the core value; overreaching by Leviathan is the danger on one hand, and disintegration of social cooperation [...] is the danger on the other. »

certainty and justice are required if people are to exercise the rational choice required for the good life)[108]. It is also seen as integral to promoting the positive liberty of reform liberalism encapsulated in the following quotation :

> The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of [the person] as an individual. This dignity requires not only the recognition of his [or her] civil and political rights but also the establishment of social, economic, educational and cultural conditions which are essential to the full development of his [or her] personality[109].

Not surprisingly, advocates of the substantive model evaluate State conduct on normative grounds. Hayek, for example, argues that State interference with the economy is contrary to the Rule of Law[110] not because of any procedurally incorrect aspect in gaining the legislative authority to so act but because anything less than a free market economy is contrary to Hayek's vision of classical liberalism. Similarly, it is this model of the Rule of Law which permits Dicey to offer very specific conclusions regarding the permissibility of State provided goods and services[111] (they are not permissible) and the acceptability of specialized tribunals to deal with administrative matters (they are not acceptable)[112] as judged against the liberal principles he finds embedded in the Rule of Law. In sum, the substantive model regards the power of the State to be limited by both law and a « value » which is « inherent in the State and expressed in the law[113] ».

It should be clear by this point that the two models summarized above are not opposite but additive. Put another way, the substantive model contains the instrumental one while grafting on — and this is the difference between them — an absolute obligation on the State to obey liberal democratic constraints (however conceived) when exercising power. Does the strong relationship between these two models mean, in turn, that we should also dismiss the distinction between them ? For the purposes of this project, does it really matter whether one views the Canadian State as being constrained by one thing — the Rule of Law construed as inherently liberal — or by two things — an instrumental Rule of Law *and* its specific ideological content generated by liberal democratic constructs ?

108. See M.J. RADIN's discussion, *loc. cit.*, note 67, 788.
109. Clause I of the report of Committee I of the International Congress of Jurists at New Delhi, 1959, quoted with derision in J. RAZ, *loc. cit.*, note 81, 210, who describes it as a « perversion of the doctrine of the rule of law ».
110. See F.A. HAYEK's discussion, *op. cit.*, note 85, pp. 227-228.
111. D. COHEN, « Thinking about the State : Law Reform and the Crown in Canada », (1987) 24 *Osgoode Hall L.J.* 379, 389.
112. A.V. DICEY, *op. cit.*, note 47, p. 193.
113. A. D'ENTRÈVES, *op. cit.*, note 7, p. 3.

Theorists like Raz persuasively argue that the distinction between the models should be maintained if only because the substantive model leads to false conclusions. The central difficulty with the substantive description of the Rule of Law is that it mistakenly casts negative values as positive ones. For instance, the Rule of Law is often juxtaposed with the exercise of arbitrary power[114] when in fact it is more accurate to say that the Rule of Law, because it produces certainty with respect to how power will be exercised, helps to curb arbitrariness[115]. Similarly, the Rule of Law is said to protect individual freedom but again, this protection is simply the likely consequence of a legal system which produces predictability of result[116]. As yet another example, one can look to the claim that observance of the Rule of Law is intended to ensure respect for each person's human dignity[117]. Raz points out that observance of the Rule of Law produces no such axiomatic conclusion though it is clear that « deliberate violation of the rule of law violates human dignity[118] ». In short, the Rule of Law enshrines negative values and so does not guarantee any political or social outcome ; its non-observance, however—and this is where the two models coalesce—leads to a State which is antinomic to liberal democratic constructs.

By restricting what conclusions can be drawn from essentially negative virtues, a divorce of the Rule of Law from precise ideological pronouncements enables one to identify the extraneous basis for the claims made by Hayek and Dicey referred to above. The instrumental model thus contributes significantly to the discussion regarding the Canadian State by highlighting the relationship while denying any exclusive coextension between liberal democratic values on the one hand and the ostensible certainty, efficiency, and predictability of a legal system operating in accordance with the Rule of Law on the other.

Nonetheless, the instrumental model provides an overly simple account of Rule of Law component in the Canadian State idea because it fails

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114. See, for example, M.J. RADIN's discussion of this traditional approach, *loc. cit.*, note 67, 781 ; J. BLUM's, *loc. cit.*, note 65, 94, as well as K. HENLEY's comment : « Protestant hermeneutics and the Rule of Law : Gadamer and Dworkin », (1990) 3 *Ratio Juris* 14-28, 26 : « The rule of law is concerned with protecting people from arbitrary power. »
115. J. RAZ, *loc. cit.*, note 81, 219 ; J. BLUM, *loc. cit.*, note 65, 94.
116. J. RAZ, *loc. cit.*, note 81, 220-221.
117. See, for example, the definition of the Rule of Law given by the International Congress of Jurists quoted earlier in this paper at p. 1078.
118. J. RAZ, *loc. cit.*, note 81, 221-222.

to acknowledge its own unarticulated predicates[119]. Even at this skeletal level, the model can assume, among other matters that first, there is a formal or foundational connection between a rule and its application[120]; second, that there is an analytic connection between a word and its meaning[121]; and third, that rules exist prior to and apart from human conduct[122]. All this is to manifest a positivistic naivete.

Radin proposes a way of remedying these problems through reliance on a Wittgensteinian conception of rules. This is to retrieve their possibility by regarding rules both as a « social and practice conception. It is a social conception because in this view rules depend essentially on social context, and it is a practice conception because rules also depend essentially on reiterated human activity[123] ». On this reading therefore, and setting aside the question of whether Wittgenstein's writings do support Radin's model or not[124], the Rule of Law is reconstructed as a social practice[125] which acknowledges that « every time we apply a rule we also make it[126] ». It requires an antiformalist construct: each and every rule is contingent[127]; each and every rule is socially constructed[128].

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119. Radin shows that the substantive and procedural Rule of Law models are both guilty of relying on extreme formalism. See M.J. RADIN, *loc. cit.*, note 67, 792-797. Because I propose to rely on the procedural model for the purposes of my own work, I do not propose to return to an analysis of the substantive model in this paper.
120. *Id.*, 793.
121. *Id.*, 794.
122. *Id.*, 795.
123. *Id.*, 797.
124. It is beyond the scope of this paper to assess whether Radin's perspective is based on a proper reading of Wittgenstein's writings or not as there is considerable debate concerning the impact of Wittgensteinian philosophy on legal theory. On the one hand, Wittgenstein is relied upon by certain members of the C.L.S. movement as supporting a radical scepticism regarding the possibility of law. See, for example, M. TUSHNET, « Legal Scholarship, Its Causes and Cure », (1981) 90 *Yale L.J.* 1205 and « Following the Rules Laid Down: A Critique of the Interpretivism and Neutral Principles », (1982) 96 *Harv. L. Rev.* 781 and other leading articles cited by B. LANGILLE, « Revolution without Foundation: The Grammar of Scepticism and Law », (1988) 33 *McGill L.J.* 451. See too the numerous articles referenced by G.A. SMITH, « Wittgenstein and the Sceptical Fallacy », (1990) 3 *C.J.L.P.* 155. On the other hand, Wittgenstein is regarded as having been appropriated by advocates of « legal conservatism ». See A. HUTCHINSON, « That's Just the Way It is: Langille on Law », (1989) 34 *McGill L.J.* 145 and R. COOMBE, « « Same as It Ever Was »: Rethinking the Politics of Legal Interpretation », (1989) 34 *McGill L.J.* 603. See too B. LANGILLE's response: « Political World », (1990) 3 *C.J.L.P.* 139 and the numerous articles he cites which rely upon Wittgensteinian philosophy.
125. M.J. RADIN, *loc. cit.*, note 67, 797.
126. *Id.*, 807.
127. *Ibid.*
128. *Id.*, 810.

Does this modified instrumentalist approach carry with it the conclusion that a Rule of Law cannot really exist at all ? If rules are contingent, if rules are made even while they are being applied, if rules cannot be fully separated from the particular circumstances which seem to invoke them, does this not deny the possibility of the legal certainty and the predictability of outcome required by the instrumental version of Rule of Law ?

My position, and that of others including Radin, is that the Rule of Law survives notwithstanding. As Radin points out, a Wittgensteinian construction does not insist upon extreme rule scepticism because rules rest on « agreement in a form of life[129] ». We know, for example, that rules exist when « disputes don't break out[130] ». But a Wittgensteinian construction does reject traditional formalism, and so regards judges less as functionaries[131] and more as

> an interpretive community conscious of their obligation to act as independent moral choosers for the good of a society, in light of what that society is and can become. The law [...] is neither « found » nor « made », but continuously re-interpreted. There are still rules. But there are no rules that can be understood apart from their context ; nor are there rules that can be understood as fixed in time [footnotes deleted][132].

Modified instrumentalism requires that one emphasize « practice as well as words[133] », that one regard even the application of « procedural » rules as a « pragmatic normative practice[134] » — a delimited social practice, not the embodiment of purely objective, purely formalized orderings. (This is to correct for the illusory quality of the Rule of Law when « overstated in

129. *Id.*, 803.

130. *Id.*, 800 (Radin quoting Wittgenstein).

131. *Id.*, 811-812. It should be noted that Radin, and not particularly well, criticizes Michael Moore for his attempt to combine a traditional Rule of Law with an abandonment of traditional formalism. She is particularly concerned that he continues to see the judge as a functionary, as being under a « constraint » which demands, in Moore's view, that « judges give up some of the decisional freedom we each have as persons when deciding what, all things considered, it is best to do ». Radin (p. 811) wants to know how Moore's judge can ever be « a responsible moral chooser (a person) » if so constrained yet one then must ask Radin what she means by « responsible » (is not a « responsible » person likewise « constrained » ?) or what she means when she argues (p. 819) that the Rule of Law involves seeing the law as a « pragmatic normative practice » (is not a « normative practice » also a « constrained » activity ?). While Moore's position has its difficulties — he argues in favour of a kind of natural law theory — Radin has not clearly distinguished her own position regarding the practice of judging from his.

132. *Id.*, 817. Radin's use of the word « independent » here is unfortunate only because it is unclear — it seems to suggest that judges are not subject to any formalized orderings, however conceived. I believe, however, that the word is intended to convey her position that judges are to conduct themselves as people, not as positivistic automatons.

133. *Id.*, 813.

134. *Id.*, 819.

ways that are invited by extreme or simplistic versions of legal formalism[135] ».) And finally, it means that, notwithstanding the express accommodation of all this necessary contingency, one preserve the Rule of Law « as a central normative commitment of our legal system[136] ».

It needs to be pointed out that Radin's Wittgensteinian perspective on rules also contains its share of obvious assumptions, including the possibility of knowing and applying socially constructed rules. It has the advantage, however, of disengaging itself from formalistic naivety while preserving the idea that the social practice of justice is competent to generate fairness of result and is a worthwhile human endeavour. On this model, then, even a procedural interpretation of the Rule of Law is subject to substantive scrutiny resulting from an acknowledgement of and adjustment (inspired by a rejection of extreme positivism) to the background values upon which it is based[137]. One thus achieves a more realistic conception of law by focusing on what is necessarily involved in understanding and applying it. Accordingly, modified instrumentalism does not create additional uncertainty or contingency in the idea of the Canadian State — it only seeks not to deny that which is already inescapably present. As Herzog asserts :

> nothing of political note [...] follows from accepting the claim that forms of life are socially constructed and not mandated by any kind of natural or transcendant necessity. It does not follow, for instance, that radical change may be achieved simply by persuading people of the social-construction thesis. Nor does it follow that everything must always be up for grabs[138].

Blum makes the same kind of point when he defends the Rule of Law from charges of pernicity by members of the Critical Legal Studies Movement who argue that it cannot meet the standards of legal formalism. Blum replies : « the failure to satisfy extreme formalist criteria of objectivity and separation from politics do [*sic*] not negate the existence of doctrinal regularities differentiating law from purely ad hoc politics[139] ».

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135. J. BLUM, *loc. cit.*, note 65, 7.
136. M.J. RADIN, *loc. cit.*, note 67, 814.
137. For example, the traditional Rule of Law requirement that one must have notice of a rule before one can be regarded as culpable for disregarding it would require reconstruction in light of social practice. For example M.J. RADIN, *loc. cit.*, note 67, 815, footnote 120, implicitly endorses the position that a car manufacturer would not be entitled to successfully argue that « it was justified in behaving negligently in light of the old (and decaying) doctrine limiting recovery to those in privity of contract with the manufacturer [footnotes deleted] ».
138. D. HERZOG, « As Many as Six Impossible Things before Breakfast », (1987) 75 *Calif. L. Rev.* 609, 622. J. BLUM, *loc. cit.*, note 65, 72-73, agrees with Herzog and M.J. RADIN, *loc. cit.*, note 67, 803, makes a very similar observation.
139. J. BLUM, *loc. cit.*, note 65, 71.

The Canadian Charter of Rights and Freedoms[140] (the « Charter ») asserts that Canada is founded upon the Rule of Law, the instrumentalist quality of which has been formally recognized in a 1985 decision of the Supreme Court of Canada[141]. This also implies that the Canadian State ought to be partially limited by the bindingness which adheres to the State's autolimiting act of placing itself under the Rule of Law[142]. This, in turn, produces a mandatory context for the individual-State relationship which is not utterly contingent or hopelessly vulnerable. It is a fixture of the Canadian State idea that rules or « doctrinal regularities » *should* determine outcome — not the army, not pure politics, not unfettered bureaucratic will, not simple expedience, and not — contrary to Dyson's assessment — a reflexive deference to compromise and civility[143].

The Rule of Law which I have articulated carries with it a conception of rules whereby the result of the interaction between State and individual seeks to be formal in the sense of being as certain as is humanly possible. The Rule of Law on this model, like the idea of the State formulated by Dyson, seeks to « systematize the relationship between individual and State[144] », by striving to make it predictable. Like the idea of the State, the Rule of Law emphasises the « autonomous exercise of public authority under law rather than participation or citizen competence[145] », and « carries few implications about the form of polity[146] », yet is located within an ideological context[147]. And it simultaneously obligates the State to seek relatively formalized orderings between it and the individual. Identifying the Rule of Law as being in part constitutive of the Canadian State leads to a clearer understanding of that concept by revealing the relative formal stability staked out by the Rule of Law, on the one hand, and the dynamism produced in the State idea by the realities of social and political practice as

140. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11, preamble.

141. *In Re Language Rights under the Manitoba Act, 1870*, (1985) 19 D.L.R. (4th) 1, 23, refers to Raz's model with approval and, at 24 reaffirms the following quotation from its decision in *Patriation Reference* : « The « rule of law » is a highly textured expression [...] conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. »

142. K. DYSON, *op. cit.*, note 8, p. 15, asserts that « the idea of the state as a juristic person [implies] the subordination of the state to the law which it [creates.] In this process of auto-limitation, the state [retains] its inherent power of will ; in submitting to the rule of law it limited itself. »

143. *Id.*, p. 201.

144. *Id.*, p. 40.

145. *Id.*, p. 270.

146. *Ibid.*

147. *Id.*, pp. 252-255, wherein Dyson discusses the relationship between ideology and the State concept.

well as by the influence of liberal political values, on the other. It is to this latter influence that I propose to turn now.

3. Liberal Political Theory

Liberal political theory, obviously enough, is not all one theory or idea. It is a multifaceted, contested concept which generates debate on matters as basic as whether the traditional liberal model of the rational, self-maximizing, possessive individual is an impoverished[148] or a solidly realistic account of human nature. To this extent, liberal theory does the very thing it seeks to describe[149] by manifesting a tolerance for diversity and in tacitly assuming that the best account will carry the day[150]. This also means, however, that the conceptual dynamic inherent in liberal theory poses problems both of simple description and substantive resolution.

Nonetheless, it is possible to identify relatively stable, core liberal values[151] while acknowledging the impossibility of incontestability. And though the project of identification is thereby necessarily limited and consciously constricted for the purposes of this paper, it produces enough to assist in directing debate regarding important aspects of the Canadian State.

Liberalism is first and foremost about regard for the human person[152], about an overarching respect for individual rights and freedoms. It stands for « peace through toleration, law-bound liberty and a rights-orientated conception of justice[153] ». Respect for individual autonomy means that, for the most part, the individual occupies a qualified position of primacy over the collective[154]; this in turn includes « the right to define, revise, and pursue a vision of the good life[155] ». Liberalism is egalitarian, holding that

148. See C.B. MACPHERSON, *The Real World of Democracy*, Toronto, The Hunter Rose Company, 1965, pp. 54-55. He holds the position that the model is profoundly impoverished; authors referred to by Dyson and Gray in footnote 46 take the opposite position.

149. S. MACEDO, *op. cit.*, note 86, p. 40, notes that « liberal institutions provide the settings for ongoing efforts to formalize, clarify, contest, justify, refine, and extend liberal principles ».

150. J. GRAY, *op. cit.*, note 46, p. x, remarks upon the distinctive meliorist trend characterizing liberalism.

151. *Id.*, IX: Gray asserts that « whereas liberalism has no single, unchanging nature or essence, it has a set of distinctive features which exhibits its modernity ».

152. S. MACEDO, *op. cit.*, note 86, p. 87.

153. *Id.*, p. 40.

154. J. GRAY, *op. cit.*, note 46, p. x.

155. S. MACEDO, *op. cit.*, note 86, p. 78. There are, of course, limits to what liberals would accept as the legitimate pursuit of good life. See, for example, J. RAWLS, *op. cit.*, note 79, pp. 60-65, where he presents two overriding principles through which individual liberty is constrained.

all members of society are of equal moral worth[156] and possess the same legal and political rights[157]. It acknowledges threats to individual autonomy inherent in the overarching quality of State authority[158] and in the potential for an intolerant use of power by the political majority[159]. Accordingly, it seek to mitigate social and political relationships because it assumes that « individual rights have a substance worth preserving[160] ». It seeks to safeguard liberty[161] through enforcing an evolving, mutable[162] list of freedoms, including freedom of speech, expression, movement and association as well as freedom from arbitrary arrest or detention[163]. It identifies the need for checks and balances on government and political majorities to avoid abuses of power[164] ; it affirms the principle of governmental accountability[165] as well as the constructive possibilities of human rationality[166]. Liberals trust in the corrective power and justice producing capacity of procedure generally and the Rule of Law specifically[167] ; they affirm the possibility of and value in principled strategies of « rational governance[168] ».

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156. J. GRAY, *op. cit.*, note 46, p. x.
157. J. BLUM, *loc. cit.*, note 65, 146.
158. A. CAIRNS, *loc. cit.*, note 1, 320, asserts that the Canadian state is « not a distant Olympian presence, but an omnipresent factor » and his footnote 3, approvingly refers to Douglas Hartle's assertion in *Public Policy Decision Making and Regulation*, Toronto, Butterworths, 1979, that the state has a vital role « as the ultimate rule maker and rule enforcer that can and does, by changing the rules, affect all of the sources of well-being of all individuals directly or indirectly, for good or for ill ».
159. See R. DWORKIN, « Liberal Community », (1989) 77 *Calif. L. Rev.* 479, 481-484.
160. J. BLUM, *loc. cit.*, note 65, 71.
161. J. GRAY, *op. cit.*, note 46, p. 61.
162. *Ibid.* As Gray notes, liberal freedoms are not fixed : they « will embody the conditions necessary in a given historical circumstance for the growth and exercise of powers of autonomous thought and action ».
163. *Ibid.* These individual rights and freedoms are constitutionally enshrined in the Charter, *supra*, note 140.
164. As J. GRAY, *op. cit.*, note 46, p. 74, notes, a liberal political order requires « constraints on the arbitrary exercise of governmental authority » and insulates basic liberties from « revision by temporary political majorities ». See too J. BLUM, *loc. cit.*, note 65, 77. It is clearly at this point that the Rule of Law regard for procedural integrity becomes both an informing structure and a value. Good procedure is seen as integral, but not sufficient to justice and fairness.
165. J. BLUM, *loc. cit.*, note 65, 77.
166. *Id.*, 76 : Blum argues that under liberalism, the government has a fundamental obligation « to act rationally and to promote the general welfare. »
167. See S. MACEDO, *op. cit.*, note 86, pp. 10 and 272.
168. J. BLUM, *loc. cit.*, note 65, 77. For a similar account of core liberal values, see W. KYMLICKA, *Liberalism, Community, and Culture*, Oxford, Clarendon Press, 1989, p. 140. Charles Taylor notes that a different model of liberalism is at work in Quebec. See

I will postpone a discussion of the positive values associated with liberalism until later in this paper. For now, the foregoing attenuated account is offered only as a summary of critical private rights elevated by liberal political theory ; it is offered as an illustration of the negative values which constitute one of its dominant features. It is because of this negative content that liberalism has often been regarded as having no developed understanding of the public interest : as being incapable of fostering a « consensual community[169] » or of providing a public morality[170]. Accordingly, the liberal societies of Britain and the United States, for example, are also seen to embody only a weak notion of the State (when compared to their Western continental European counterparts) because, I suggest, Anglo-American liberalism is regarded as having stripped away the political tools and social resolve to produce a structured notion of the public interest. In short, it is believed liberalism is so focused on the private, that it cannot properly acknowledge, let alone generate insight into, the public.

Dyson, for example, offers numerous and distinct reasons for his assessment of Anglo-American societies as « stateless » (that is, he recognizes parallels and differences between the British and American traditions both of which lead away from a full State understanding), none of which directly refers to the impact of liberalism but many of which unmistakably assume its influence. Take, for instance, his assertions that England has manifested « in particular a disinclination to explore ideas about the distinctive character of public authority[171] » that Anglo-American governments are not ascribed with any strong « capacity to determine what the public interest is[172] », that there is no conceptualization of the public interest as pre-existing but rather as something which emerges as the « compromise product » of bargaining amongst competing groups[173]. All this is to argue subtextually that a primary regard for the individual, doubtless a feature of Anglo-American societies, is to foreclose the existence of a strong community and sense of the public interest and well-being. Accordingly, for Dyson, Anglo-American societies — instead of adopting a Western continental European notion of the public interest, that is a notion which unifies, and is « common to all members of society, a collective self-interest subject to reinterpretation by which individuals will prefer not to

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C. TAYLOR, « Shared and Divergent Values », in R. WATTS and D. BROWN (eds.), *Options for a New Canada*, Toronto, Toronto University Press, 1991, p. 53, and discussion in footnote 193, *infra*.

169. S. MACEDO, *op. cit.*, note 86, p. 78.

170. *Ibid.*

171. K. DYSON, *op. cit.*, note 8, p. 42.

172. *Id.*, p. 272.

173. *Id.*, pp. 273-274.

pursue their « egoistic » interests in order that others will not inflict damage on them by pursuing theirs[174] » — make do with something considerably less rarefied. British societies in particular, notes Dyson, tend to translate political morality into the practice of civility which involves mutual respect for individuality and, therefore, « tolerance for diversity and individuality[175] ». All this implies exhibiting a reliance not on some relatively fixed State idea but on the « creative nature, vitality and resilience of a variegated civil society and in civic humanism, rooted in the practice of civility, as the source of standards in public life[176] ».

If Dyson's assessment of the Anglo State is correct, then two things follow. First, it means that common law Canada, as a beneficiary of British tradition and so a participant in a similar kind of liberalism, has a very rudimentary idea of community and thereby partakes in a highly contingent existence. Second, it means that the idea of the State is emphatically unidirectional ; it specifies what the Government *cannot* do but provides no guidance as to what it *can* or *ought* to do. Accordingly, the positive content in the Canadian idea of the State is thin, mercurial, and elusive. And because it is very difficult to theorize about, it therefore can provide only limited assistance in defining the nature of the Canadian State.

Fortunately for this project, however, Dyson's assessment is incorrect. Like other critics of liberalism, he falters in his analysis simply because he fails to « take liberalism seriously[177] » and in this case, he does so on three closely related fronts. First, he fails to see how aspects of the State idea could legitimately and usefully be founded on specifically negative values related to protecting individual autonomy and the concomitant ethic which casts the provision of this protection as a worthwhile State endeavour[178]. Second, he fails to recognize that even the most « rights » orientated version of liberalism has embedded in it a notion of community and so of what constitutes pivotal components in the public interest[179].

174. *Id.*, p. 274.

175. *Id.*, p. 201.

176. *Ibid.*

177. J. BLUM, *loc. cit.*, note 65, 79, uses this phrase. Blum also asserts that (p. 68) « Currently in the United States, we are experiencing a kind of political confusion and backlash against liberalism. » S. MACEDO, *op. cit.*, note 86, p. 4, notices this trend as well : « « liberal » has become a term of abuse in the American political lexicon ».

178. My point is that even « stateless » societies are organized in terms of important, foundational ideas.

179. R. DWORKIN, *loc. cit.*, note 159, 480. W. KYMLICKA, *op. cit.*, note 168, p. 1, is of a similar view : « Liberalism, as a political philosophy, is often viewed as being primarily concerned with the relationship between the individual and the state, and with limiting state intrusions on the liberties of citizens. But, implicitly or explicitly, liberalism also contains a broader account of the relationship between the individual and society — and, in particular, of the individual's membership in a community and a culture. »

Third, he implicitly assumes that Anglo-American liberalism is incompetent to generate principled « strategies of governance[180] » because, for him, liberalism resolves all conflicts by compromise only — there are few fixed ideas which limit how conflict is to be resolved. As I have already made note of the ethical and procedural principles concomitant with a liberal respect for individual autonomy, I will now explore the notions of community and the strategies of governance which are implicit in liberalism. In this way, I hope to uncover further content to the idea of the Canadian State, content which is positive and generative.

We have already said that majority rule is not another word for democratic liberalism. Neither is it another word for community. Indeed, Dworkin cogently argues that liberalism embraces a notion of community as constituted in part by formal political decisions made by officials who « act self-consciously under a constitutional structure that transforms their individual behaviour into national decisions[181] ». This notion of community is also grounded in an abiding affirmation of justice and on the notion that the individual has an integrative stake in the salubrity of even the most thinly construed political community[182]. Hence, while there may be disagreement amongst community members as to what justice is, there is a shared understanding

> that politics is a joint venture in a particularly strong sense : that everyone, of every conviction and economic level, has a personal stake-a *strong* personal stake for someone with a lively sense of his [or her] critical interests — in justice not only for [that individual] but for everyone else as well. That understanding provides a powerful bond underlying even the most heated argument over particular policies and principles[183].

For Dworkin, an unjust community impedes the critical interests of the individual in pursuing his or her life project ; accordingly, each of us « shares that powerful reason for wanting our community to be a just one[184] ». Further, the liberal public ideal to favour policies which respect the equality of each citizen[185] is not realized in a community which disregards justice. Thus, concludes Dworkin, « our success or failure in

180. I have borrowed this phrase from J. BLUM, *loc. cit.*, note 65, 120.
181. R. DWORKIN, *loc. cit.*, note 159, 496.
182. *Id.*, 499.
183. *Id.*, 501-502.
184. *Id.*, 504.
185. *Id.*, 503.

leading the lives people like us should have, are in that limited but powerful way parasitic on our success together in politics. Political community has that ethical primacy over our individual lives[186]. »

This foundational integration between justice and liberalism has been asserted by other modern theorists as well, including d'Entrèves[187], John Rawls[188], and Macedo[189]. It is a core liberal political value which has strong public repercussions including the provision of social stability and the aspiration that conflict can be peacefully resolved on the basis of principled rationality. It also provides specific content to the idea of the Canadian State in that it requires a normative concern with determining the proper conditions for the exercise of State power and how individuals are entitled to interact. For the specific matter of what Government can and cannot do, of what would be just Governmental conduct, the idea of the Canadian State means that it is held to standards of behaviour which, while never capable of a definitive articulation, can be identified. Blum convincingly argues, for example, that liberal values limit the range of options open to the State[190]—he thereby places the matter of Governmental conduct squarely in the normative realm. And so, among other matters, Government is bound by the Rule of Law ; Government is bound by its democratic mandate to serve the electorate ; and, more expansively, Government is bound by an ethic which enforces respect for individual autonomy. Put another way, ideas imbedded in the notion of justice and negative liberal values are the ideas which constrain Government and foster a consensual community. And all this can and does occur in the midst of liberal democratic pluralism because « liberal justice overarches the diversity of liberal society informing its constitution and [provides] a public morality[191] ».

The notion of justice, of bounded choices emanating from democratic liberalism, does not, of course, create an uncontestable and enumerative understanding of the public interest or of the consensual community embodied in democratic liberal societies of the Canadian State itself. This is

186. *Id.*, 504.

187. A. D'ENTRÈVES, *op. cit.*, note 7, pp. 3-4, notes that one account of why laws are obligatory is because « laws are the expression of a value called « justice » ».

188. J. RAWLS, *op. cit.*, note 79.

189. S. MACEDO, *op. cit.*, note 86. Macedo uses a slightly different vocabulary to discuss justice, devoting much of his book to what he calls (p. 41) « public justification ». Public justification requires that « the application of power [by the State] should be accompanied with reasons that all reasonable people should be able to accept ».

190. J. BLUM, *loc. cit.*, note 65, 135-138.

191. S. MACEDO, *op. cit.*, note 86, p. 78.

because first, both theory and practice deny such a possibility[192] and second, the flexibility mandatorily produced by a liberal ethic of tolerance forecloses the possibility of definitive autocratic pronouncements regarding it[193]. But at the same time, the idea of the Canadian State is not rudderless. We have seen that it requires both the modification of and constraint upon political choices open to Government which are derived from respect for negative liberal values. And, in addition, when one ascribes to the State, as most liberals do[194] a proactive role through which it is made responsible for general welfare[195] and so is required to have a community presence and social commitment « going beyond rights-protection and the upholding of justice[196] », further content is lent to the Canadian idea of the State. Taken together, the State's performative and reactive functions, as well as the auto-limiting act binding it to the Rule of Law, each identify and create standards of conduct which the Government must meet in its activities. And these standards are not the result of compromise but are derived from and necessarily elevated by the State's solemn obligation to protect individual rights, promote the common good, provide collective goods and social welfare benefits, respect the Rule of Law, and ensure the presence of justice in the community. The standards of conduct concomitant with such powers and responsibilities are mandatory. Concerning at least this, Canada has a public morality, a consensual community, a State concept.

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192. Indeed, even the elevated sort of public interest manifest in the Western continental European State cannot be clearly identified because, as K. DYSON, *op. cit.*, note 8, p. 8, points out, the notion of the State is unavoidably imprecise : « As a philosophical and culturally rich concept, state is not amenable to the elaboration of « operational indicators » involved in the sort of rigorous definition desired by advocates of the natural science paradigm and system builders. »

193. Toleration for pluralism has the potential, for example, to resolve the conflict between the liberal model present in Quebec as compared to the rest of the country. C. TAYLOR, *loc. cit.*, note 168, 72, points out that Quebec's liberalism combines itself with an emphasis on collective goals and thus opposes the Kantian, procedural-based view of liberalism characteristic of the rest of Canada. These two inconsistent views of liberalism can be reconciled, according to Taylor, through the identification of common ground : « Procedural liberals in English Canada just have to acknowledge first that there are other possible models of liberal society, and second that their francophone compatriots wish to live by one such alternative. »

194. Most liberals would agree that more than a minimalist level of government is mandated by liberal democratic tenets. According to J. GRAY, *op. cit.*, note 46, p. 73 : « Classical liberals such as Humboldt, Spencer and Nozick have argued, it is true, that the functions of the state must of necessity be restricted to the protection of rights and the upholding of justice, but this position has no clear warrant in liberal principles and is a minority view within the liberal tradition. »

195. J. BLUM, *loc. cit.*, note 65, 76.

196. *Id.*, 73-74.

Conclusion

My objective in this paper has been to show how liberal democratic theory, both in its negative and positive requirements, helps identify a Canadian State idea in the sense described by Dyson and discussed in Part I of this paper. That is, the idea of the Canadian State — which I have argued is partially located by liberal democratic constructs — produces broadly shared public values. These values interact with institutional conduct not as merely passive reflections nor determinants of action but as dynamic constituents[197] of the State concept.

This interaction, in turn, is competent to produce — as in the State tradition articulated by Dyson :

> [a] holism [a] normative concern with the nature of public authority and the terms on which it is to be exercised, its rationalist preoccupation with the creative role of institutions and with giving its constituent ideas institutional expression as a way of « fixing » certain meanings within public life[198].

That the State idea can be regarded as incrementally modulating the exercise of public power — and *vice versa* — itself argues for a State-society distinction which is not generally acknowledged or explored in common law Canada.

The discussion in this paper has also been offered as illustration that accounting for the Canadian State is an elusive project because the State is not contained in its constitutive components — it is necessarily located outside of the ideas and conduct which produce it. The State concept is found in the fluctuating convergence and tension between theory and practice, in its foundational ideas which are both fixed and contingent, and in the conduct of public officials and elected representatives which is both principled and not, both considered and not. The State concept is constantly transcending the words used to describe it.

But though the State concept transcends its constituents, its effect on the lives of individuals and groups is far from metaphysical. Within the context of debates generated by philosophical theory, Rosemary Coombe asserts :

> We do not have, nor do we need, any transcendental or metaphysical foundation to legitimate our convictions that poverty and sexual violence, torture and racial

197. Of course, the pronouncements of liberal democratic theory have their origins in society as well — in debate, conflict, and often enough, compromise. But this origin does not necessarily lead back to a disintegrative theory of the State. I take the position, along with Dyson, that while the moral and political ideas in the State are partially created and modulated by conduct, these moral and political ideas simultaneously exist « apart from the conflicts and fluctuations of social and political life ». See K. DYSON, *op. cit.*, note 8, p. 232.

198. *Id.*, p. 8.

> discrimination should not be tolerated as part of the social reality or form of life in which we live, and the lack of such foundations will not alter our political practices in the least[199].

This is deconstructionist commentary which, from the perspective of State model offered in this paper, itself becomes an important part of the Canadian State idea. I make this claim with no intention autocratically to relocate Rosemary Coombe's analysis. I mean only to underscore the essential role of such work in analysing the Canadian State concept. In short, a liberal democratic State which does not protect its citizenry from profound attacks on human dignity is itself in collision with the ideas which ostensibly bind it. In highlighting contradictions between what the State is meant to do from the perspective of theory, and what it does institutionally, discourse concerning the State can possess unshakeable generative capabilities through its call to remediation or the deepest political reform.

Hence, notwithstanding the intractable problems posed by State theory, I have, in this paper, spoken about the State in the belief that it will get us somewhere. While the State is a problem-creating concept[200] it is also a problem-solving concept[201] — among other matters, it has the potential to contextualize the exercise of public power and to suggest limits on what officials can do in the name of the polis and how they can do it[202]; it can enforce a relationship between « idea and conduct », between « form and practice in public life[203] ». All this points to a State concept which does not merely coincide with the society in which it is found or with the laws which constrain it but which exists in its own right.

199. J. COOMBE, *loc. cit.*, note 124, 64, her footnote 146.
200. K. DYSON, *op. cit.*, note 8, pp. 254 and 270.
201. *Id.*, p. 270.
202. *Id.*, p. 275.
203. *Id.*, p. 6.