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## Canadian Constitutional Identities

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*Constitutions are stories nations tell about themselves. Despite the famous declaration in the Constitution Act, 1867 that the "Provinces of Canada...Desire...a Constitution similar in Principle to that of the United Kingdom," most of Canada's constitutional history can be understood as the search for a distinctly Canadian constitutional identity. Canadians have always looked to their constitutional instruments to both reflect and produce a particular vision of the nation and its citizens. This article focuses on the search for Canada's constitutional identity during its first century as a nation, from Confederation until the 1960s. Drawing on a varied array of sources and voices, this article argues that the powerful yearning for identity operated as a driving force in Canadian constitutional law, politics, and culture in an era before the catalytic arrival of the Canadian Charter of Rights and Freedoms.*

*Les constitutions sont des récits que les nations racontent sur elles-mêmes. Malgré la déclaration solennelle dans le préambule de la Loi constitutionnelle, 1867, que « les provinces du Canada...ont exprimé le désir...d'une constitution reposant sur les mêmes principes que celle du Royaume-Uni », la plus grande partie de l'histoire constitutionnelle du Canada peut être interprétée comme étant la recherche d'une identité constitutionnelle distinctivement canadienne. Les Canadiens ont toujours considéré que leurs outils constitutionnels reflètent et produisent une vision particulière de la nation et de ses citoyens. L'article traite de la recherche de l'identité constitutionnelle du Canada pendant les cent premières années de son existence en tant que nation, de la Confédération jusqu'aux années 1960. S'appuyant sur un large éventail de sources et de voix, l'auteur de l'article avance que le fort désir d'identité a été un moteur important du droit constitutionnel, de la politique et de la culture au Canada, à l'époque qui a précédé l'arrivée du catalyseur qu'a été la Charte canadienne des droits et libertés.*

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*Introduction*

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*Introduction*

John Sanborn is not an especially well-known figure in Canadian history, despite being the only Canadian politician elected on a platform promoting Canada's annexation to the United States.<sup>1</sup> Born in New Hampshire in 1819, he ventured to Canada as a young man to lead a school in Sherbrooke, Quebec, before beginning a prosperous legal career. Elected to the Legislative Assembly of Canada in 1850 advocating the economic benefits of joining the United States, he was later acclaimed to the Legislative Council, and then appointed to the Canadian Senate after Confederation. A former political adversary, John A. Macdonald, appointed Sanborn to the Superior Court of Quebec in 1872. A long-time political friend, A.-A. Dorion, promoted Sanborn to the Quebec Court of Queen's Bench (later renamed the Quebec Court of Appeal) in 1874. His sudden death in 1877 caused the *Montreal Gazette* to lament the loss of "a bright and shining example of the upright lawyer, the learned and conscientious Judge, the good citizen."<sup>2</sup> Indeed, Sanborn lived a life suffused with law, politics, and citizenship in the most dynamic, exciting, and tumultuous era of constitution making in Canada's history.

Sanborn's perspective on Confederation itself was complicated. While he supported the creation of the federal nation of Canada in principle, he would have preferred an elected Senate, greater safeguards for the protection of property and civil rights for the English-speaking minority in Quebec, and a constitution-making process that more directly engaged voters. But Sanborn's contributions to Canada's Confederation debates stand out for another reason. Rising in the Legislative Council on 9 February 1865, Sanborn reminded his fellow politicians that to succeed, a constitution must provide more than a legal blueprint for governance:

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1. "Sanborn, John Sewell" *Dictionary of Canadian Biography*, online: <222.biographi.ca/en/bio.php?id\_nbr=5251>.

2. "The Late Mr Justice Sanborn" *Montreal Gazette* (19 July 1877) 2.

If we desired to have a constitution that would afford good hope of permanency, it must be planted deep in the affections of the people ... for until their intellects were convinced of its excellence, they would not be prepared to uphold it and resist innovations. But they must feel and comprehend the obligation....To render it secure, it must be in the hearts of the people.<sup>3</sup>

Sanborn spoke of the need for a Canadian constitution that could be *felt* as well as comprehended, a constitution that engaged the intellect, but more importantly stirred the heart. A constitution of the people, Sanborn argued, found its full life as an idea, story, and identity in the thoughts and dreams of those subject to its rule.

Today, Canada's constitution serves as an object of law for lawyers, a set of rules for governments, and as a repository of politics for political scientists and journalists. A constitution is, of course, all of those things, but a constitution also consists of the stories a nation tells about itself.<sup>4</sup> A constitution finds full meaning and expression in the multiple, diverse, layered, and conflicting claims made about its histories, purposes, and defining characteristics.<sup>5</sup> Just as personal identity is forged and sustained in a narrative of the self,<sup>6</sup> constitutional stories are driven by the desire to make coherent these varied strands of constitutional text, perspective, and experience.<sup>7</sup> Such stories serve as a living oral history, always in the process of being made and re-made in the telling. A particular constitutional story may be dominant or subversive, popular or obscure at any particular moment, but regardless these stories draw from, and also give shape

3. Janet Ajzenstat et al, eds, *Canada's Founding Debates* (Toronto: University of Toronto Press, 1999) at 231.

4. On the constitutive power of stories see J Edward Chamberlin, *If This is Your Land, Where Are Your Stories?: Finding Common Ground* (Toronto: AA Knopf Canada, 2003) at 2. Stories, Chamberlin writes, "tell people where they came from, and why they are here; how to live, and sometimes how to die. They come in many different forms, from creation stories to constitutions, from southern epics and northern sagas to native American tales and African praise songs, and from nursery rhymes and national anthems to myths and mathematics. And they are all ceremonies of belief as much as they are chronicles of events."

5. "We cannot escape from these constitutional cross-currents," Alan Cairns writes. "To accept their coexistence as central components of our constitutional fabric is the beginning of wisdom." Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992) at 65.

6. "Self-identity," Anthony Giddens argues, "presumes a narrative." Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991) at 76. See generally, Dan P McAdams, *The Stories We Live By: Personal Myths and the Making of the Self* (New York: William Morrow & Company, 1993) at 11.

7. I use the term constitutional stories to refer generally to the narratives that are devised about the constitution and its meanings as a whole, rather than to the particular stories of specific constitutional cases. On the latter in the American context see Michael C Dorf, ed, *Constitutional Law Stories* (New York: Foundation Press, 2004).

and meaning to, the constitution itself as well as the constitutional law, politics, and culture in which it is embedded. The creation of constitutional meanings, in this sense, are the products not only of judges, politicians, and civil servants, but of a broader “interpretive community” comprising lawyers, scholars, journalists, artists, and citizens.<sup>8</sup> Not all are equally influential, but all may play a role in telling more or less compelling stories of constitutional significance. The stories themselves tell us much in their content and omissions, proponents and critics, tenor and tone. In this, Sanborn was surely right: a constitution endures in its capacity to garner affection, in the stories it tells, in the identities it fosters.

This article argues that a great deal of constitutional law, culture, and politics can be explained in terms of the making, contestation, and transformation of such constitutional stories, or, as I call them here, constitutional identities. From early struggles to define the balance of federalism in the relationship between the provinces and federal government, to ongoing controversies concerning the place of Quebec in the federation, the application of individual rights and their proportionate limits, judicial remedial discretion and deference, and aboriginal rights and Indigenous sovereignty, Canada’s constitution has been defined as much by a struggle to determine Canada’s constitutional identity as to interpret its formal constitutional text.<sup>9</sup> My purpose in this article is to examine one particularly enduring strand among the battles over Canada’s constitutional identity: the search for “constitutional autochthony,” or, what Peter Oliver usefully describes as the “constitution of independence.”<sup>10</sup> The term autochthony originates in the comparative constitutional work of Kenneth Wheare as a way of explaining the twentieth-century desire of some Commonwealth countries, including Canada, to constitutionally separate from Great Britain. But Wheare intended the term to gesture to something altogether deeper and less tangible than mere autonomy: autochthony, he

8. Cairns, *supra* note 5 at 63.

9. Other projects of mine have charted the role of ideas emanating from the constitutional culture as powerful forces of constitutional change. See Eric M Adams, “Canada’s ‘Newer Constitutional Law’ and the Idea of Constitutional Rights” (2006) 51:3 McGill LJ 435; Eric M Adams, “Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture” (2010) 55:3 McGill LJ 437 [Adams, “Building a Law of Human Rights”]; and Eric M Adams, “Constitutional Nationalism: Politics, Law, and Culture on the Road to Patriation” in Steve Patten & Lois Harder eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 49 [Adams, “Constitutional Nationalism”].

10. KC Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960) at 89; Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

observed, described the desire for an indigenous constitutionalism “sprung from their own soil.”<sup>11</sup>

Despite the famous declaration in the *Constitution Act, 1867* that the “Provinces of Canada... Desire... a Constitution similar in Principle to that of the United Kingdom,”<sup>12</sup> much of Canada’s constitutional history can be understood as the search for an autochthonous and distinctly domestic Canadian constitutional identity, one tied up with, but not limited to, independence, a domestic amending formula, and recognition and expression of the diverse political, social, and cultural realities of Canada. That yearning for a uniquely Canadian constitutional identity emerged from and textured Canada’s constitutional jurisprudence, scholarship, and culture just as it came to drive the constitutional politics of Confederation, independence, patriation, and the Meech Lake and Charlottetown Accords.

This article has three parts. Part I sketches more fully what I mean by constitutional identity, charts the forces which create those identities, and argues that constitutional identities play a crucial role in Canadian constitutional law, politics, and culture. Part II identifies constitutional nationalism as an early and influential strand in the formation of Canadian constitutional identity. As I have explained elsewhere, constitutional nationalism “locates its demand for national self-determination, ideology, and sovereignty in formal constitutional instruments. It takes seriously the *legal* authority of the constitution to effect change but also the *symbolic* role of the constitution as an instrument to construct and cement national identity, unity, and purpose.”<sup>13</sup> Early efforts to define Canadian constitutional distinctiveness by Thomas D’Arcy McGee, among others, transformed into calls for constitutional autonomy from Great Britain, and, ultimately, the search for complete constitutional independence, alongside a distinct and indigenous expression of Canadian constitutionalism. Part III examines arguments for a Canadian constitutional identity within the context of the political, cultural, and constitutional debates of the 1960s. In discussions about the new national flag, national unity, and repatriation of the constitution, Canadians were at once unified by a desire for constitutional self-definition, but also on the cusp of profound disagreement about how new constitutional arrangements might best express and reflect the nation’s true nature and essential characteristics.

11. Wheare, *supra* note 10 at 89. Following developments in the Commonwealth over much of the twentieth century, Wheare observed the common constitutional demand for “self-sufficiency, of constitutional autarky... of being constitutionally rooted in their own native soil.”

12. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, Preamble.

13. Adams, “Constitutional Nationalism,” *supra* note 9 at 49-50.

### I. *Constituting identities*

Constitutional law scholars have been inclined to downplay or ignore the force and utility of an abstract and elusive concept like constitutional identity in favour of the firmer stuff of positive law. But defining the provisions of Canada's constitution has proven a notoriously slippery exercise. Even the constitution itself shies away from the task. Section 52(2) stipulates the formal instruments included in the "supreme law of Canada," but leaves open the possibility that other elements might also have constitutional status.<sup>14</sup> And, of course, in its preamble, the *Constitution Act, 1867* declared that Canada's constitution would be "similar in Principle" to the essentially unwritten constitution "of the United Kingdom."<sup>15</sup> The Supreme Court of Canada famously peered into the constitution's open-ended self-definition in the *Secession Reference* to discover a series of unwritten constitutional principles—"supporting principles and rules, which include constitutional conventions and the workings of Parliament"—which "inform and sustain the constitutional text."<sup>16</sup> Especially of late the Supreme Court has emphasized the normative force of the constitution's "internal architecture," the unwritten structural features that span and connect its written terms.<sup>17</sup> Elements of that architecture, like unwritten constitutional principles more broadly, the Court counsels "must inform our interpretation, understanding, and application of the text."<sup>18</sup> The amorphous constitutional swirl of text, unwritten principles, and internal architecture makes definitive statements on the constitution's precise content difficult, if not impossible. "After 136

14. The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(2) provides that "The Constitution of Canada includes" the *Canada Act 1982*, Acts and orders listed in the schedule, and amendments to those included constitutional instruments. "Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada": *Reference re Senate Reform*, 2014 SCC 32 at para 24, [2014] 1 SCR 704.

15. *Constitution Act, 1867*, *supra* note 12.

16. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 32, 49, 161 DLR (4th) 385 [*Secession Reference*].

17. *Reference re Senate Reform*, *supra* note 14 at para 26: "[T]he Constitution," the majority writes, "must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another." See also *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 at para 100, [2014] 1 SCR 433 holding that the Supreme Court of Canada formed "an essential part of Canada's constitutional architecture"; and *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 27, 375 DLR (4th) 599 holding that in determining the scope of constitutional heads of power "the Court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text." But see *British Columbia v Imperial Tobacco Canada*, 2005 SCC 49 at para 67, [2005] 2 SCR 473 reminding that "[t]he rule of law is not an invitation to trivialize or supplant the Constitution's written terms."

18. *Reference re Senate Reform*, *supra* note 14 at para 26.

years as a sophisticated nation supposedly devoted to constitutionalism and the rule of law,” Harry Arthurs complains, “we still do not know what the Canadian constitution actually *is*.”<sup>19</sup>

Yet it is difficult to imagine how it might be otherwise, and not only because, in Lord Sankey’s famous metaphor, the constitution “planted in Canada a living tree capable of growth and expansion within its natural limits.”<sup>20</sup> A constitution structures the organs of government, creates legal rights and obligations, and embodies a set of ideals and aspirations of governance, but it is not self-executing. Constitutions ultimately rely on the arguments of lawyers, interpretations of courts, observance of governments, and the imaginations of citizens. There will always be uncertainty in the interpretation and application of abstract constitutional provisions to concrete and ever-changing social realities. So too with the judicial attachment to constitutional precedents which often bends, shifts, and breaks in the gears of time.<sup>21</sup> There is “no still point,” R.C.B. Risk reminds us, in the dynamic meaning of constitutional principles.<sup>22</sup> A constitution is better envisaged not as an object of defined and rigid borders, but rather as a fluid and never-ending process of relations worked and re-worked over time. A constitutionalism of context, process, and relationships is one in which conceptions and contestations of identity take on greater importance in establishing the normative frameworks by which the disparate features of the constitution cohere.

As Hanna Pitkin also reminds us, “constitutions are *made*, not found.”<sup>23</sup> The Canadian constitution, like the foundational documents of other nations, is the product of human creation, compromise, and context, as well as relationships between and across levels and branches of government, civil society and the state. Despite our attention to the constitutional texts enacted at and after Confederation, Canada’s constitution originated

19. Harry Arthurs, “Constitutional Courage” (2004) 49:1 McGill LJ 1 at 7 [emphasis in original].

20. *Edwards v Canada (AG)*, [1930] AC 124 at 136, [1929] All ER Rep 571 [Edwards].

21. The Supreme Court has shown a recent willingness to revise, overturn, or side-step precedent in a number of constitutional cases. “[S]tare decisis is not a straightjacket that condemns the law to stasis.” Precedent may be revisited, the Court explained, where there have been “significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.” *Carter v Canada*, 2015 SCC 5 at para 44; *Canada v Bedford*, 2013 SCC 72 at para 42, [2013] 3 SCR 1101; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 32. See generally Eric M Adams, “Twice Upon a Time: Re-litigating the *Charter*” [unpublished manuscript].

22. RCB Risk, “Blake and Liberty” in RCB Risk, *A History of Canadian Legal Thought: Collected Essays*, ed by G Blaine Baker & Jim Phillips (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2006) 130 at 146.

23. Hanna Fenichel Pitkin, “The Idea of a Constitution” (1987) 37:2 J Legal Educ 167 at 168 [emphasis in original].



in Indigenous legalities and were forged in relations, and then treaties, between newcomers and Indigenous peoples.<sup>24</sup> Canada's turn to written constitutionalism during the "empire of writing" of the late eighteenth and nineteenth centuries, produced formal constitutions but ones still reliant on a host of unstated political, cultural, and linguistic assumptions, context, and meanings.<sup>25</sup> And, like the constitutional treaties before them, Canada's constitutional instruments formalized and made normative relationships within government and between government and civil society. The result is a constitution that, like the background assumptions and relationships upon which it is based, can shift and transform over time; a constitution that perpetually exists in a state of becoming.

The "children of two logics" is how Benjamin Berger describes the Canadian constitution's inevitable textual and philosophic tensions which emerge from the compromises inherent in its creation, and ongoing negotiation crucial to its survival. For Berger, Canada's constitution is defined by two poles: "that of the local, the particular, and of harmonious relations between diverse communities through political compromise; and that of the metaphysical, the universal, and of a faith in the reason of legal principle."<sup>26</sup> But as Canadian judges quickly discovered in very real and practical ways, the *Constitution Act, 1867* presented a broad series of competing logics and tensions in the formal text beyond the local versus the universal: "exclusive" heads of jurisdictional power that nonetheless substantially overlapped; a constitution "similar in Principle to that of the United Kingdom,"<sup>27</sup> but fundamentally American-inspired in its approach to a written division of federal and provincial powers; a nation simultaneously created by, and divided into, sub-national provinces with amorphous constitutional roles, among a host of other uncertainties about the meaning of words, phrases, and concepts. Indeed, there may have been considerable wisdom in doing so; eschewing precise prescriptions allowed a diversity of views and political orientations to plausibly fit within its terms. Hence both John A. Macdonald's centralized vision of federalism and Oliver Mowat's interpretation of decentralized provincial rights

24. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*" (2001) 24:2 Dal LJ 75.

25. Linda Colley, "Empires of Writing: Britain, America and Constitutions, 1776–1848" (2014) 32:2 LHR 237.

26. Benjamin L Berger, "Children of Two Logics: A Way Into Canadian Constitutional Culture" (2013) 11:2 Intl J Constitutional L 319 at 321–322.

27. *Constitution Act, 1867*, *supra* note 12, Preamble, ss 91–92.

both could find resonance in the constitution as drafted.<sup>28</sup> Janet Ajzenstat goes further in arguing that failure to entrench clear substantive goals or a “single idea of Canada” was intentionally premised on the principles of parliamentary democracy, the idea that a flexible constitution enabled rather than constrained the policy choices of political parties of differing persuasions.<sup>29</sup> Whatever the origins—intended purpose, product of compromise, or creature of happenstance—the *Constitution Act, 1867* and its flexible and uncertain mix of cross-currents has proven a remarkably durable framework of governance.

The *Constitution Act, 1982* offers similar provisions of dissonance. Its preamble announces that Canada “is founded upon principles that recognize the supremacy of God” while section 2 secures the freedom to believe or not believe in the divine. It entrenches equality rights for “every individual” while elsewhere proposing differential treatment for “citizens,” certain linguistic minorities, and the “aboriginal peoples of Canada.” The section of the *Canadian Charter of Rights and Freedoms* which “guarantees” rights and freedoms also subjects them to “reasonable limits,” while select rights can be overridden entirely.<sup>30</sup> In confronting such dilemmas of constitutional coherence, here, again, Pitkin is instructive. “[T]o understand what a constitution is,” she writes, “one must look not for some crystalline core or essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept helps us to hold in tension.”<sup>31</sup> In other words, in navigating fissures of logic and ambiguity, judges, lawyers, governments, and civil society turn to and construct a deeper set of constitutional meanings and values in order to make sense of an instrument of abstraction that matters deeply to a collective sense of legality, justice, and nationhood. In doing so, they craft and sustain constitutional identities.

Add constitutional theory, then, to the long list of disciplines across the social sciences and humanities engaging in questions of why and how identities are formed (and reformed), and why and how they function.

28. The battle to uncover the historical essence of Canada’s federal arrangements continues. Contrast John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002) [Saywell, *The Lawmakers*] with Paul Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999).

29. Janet Ajzenstat, *Discovering Confederation: A Canadian’s Story* (Montreal: McGill-Queen’s University Press, 2014) at 4; Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queen’s University Press, 2007).

30. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss Preamble, 1, 2, 3, 6, 15, 23, 25, 33.

31. Pitkin, *supra* note 23 at 167.

"There are no ceremonies more important to the imagining of individual and collective identity," literary scholar J. Edward Chamberlin writes, "than our contracts with each other."<sup>32</sup> In the influential philosophical work of Charles Taylor, identities emerge from deep dialogue with a dynamic environment of others. "We define our identity," Taylor writes, "always in dialogue with, sometimes in struggle against, the things our significant others want to see in us."<sup>33</sup> Rather than preordained, identities take shape and find expression in everyday moments of human contact: nurture, kindness, love; misunderstanding, animosity, defiance. We can see a very similar social and relational dynamic at work in the formation of constitutional identities. "[A] constitution," Gary Jacobsohn explains "acquires an identity through experience," a "dialogical" process in which the "disharmonies of constitutional law and politics" create the space and drive the need for competing claims about the constitution's true nature.<sup>34</sup>

The origins of constitutional identity in experience calls to mind Oliver Wendell Holmes's famous aphorism that "[t]he life of the law has not been logic; it has been experience."<sup>35</sup> In the less well-known sentences that follow, Holmes elaborates,

The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.<sup>36</sup>

32. Chamberlin, *supra* note 4 at 226.

33. Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 25 at 32-33; Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1992). See also Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, NJ: Princeton University Press, 2005); Richard Ned Lebow, *The Politics and Ethics of Identity: In Search of Ourselves* (Cambridge: Cambridge University Press, 2012).

34. Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010) at 4, 7. Michel Rosenfeld helpfully reminds that "Constitutions and constitutionalism only make sense under conditions of pluralism. A purely homogenous society ... would not require a constitution." According to Rosenfeld, "democracies ... revolve around a multiplicity of identities and differences in constant dynamic interaction resulting in a diverse array of selves ... demarcated through a constant process of inclusion and exclusion." Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2009) at 21.

35. OW Holmes Jr, *The Common Law* (Boston: Little, Brown, & Co, 1881) at 1.

36. *Ibid.* See generally, Brian Hawkins, "The Life of the Law: What Holmes Meant" (2011-2012) 33:2 Whittier L Rev 323.

In similar fashion, constitutional identity is created by a plurality of contextual experience, blending political theory, narratives of the past, and aspirations for the future. When this deeper constitutional identity resonates with and finds acceptance in the broader constitutional culture, it shapes the interpretation of substantive constitutional law, channels and frames constitutional politics, and, in some instances, operates as a shadow constitution cast off at an angle from the formal one. At times, a constitutional identity can even become dominant enough to challenge the legality—*de facto* or *de jure*—of the constitution itself.

Constitutional identities draw principally from the constitution's formal provisions, but not exclusively so. They rely too on historical understandings, national agendas and dilemmas, and a multiplicity of dreams, demands, hopes, and wishes. They may overlap with and encompass a broader series of national identities, but they are not synonymous with images of the nation in the strict sense.<sup>37</sup> While national identities speak broadly to the "imagined communities" of the nation-state and its peoples,<sup>38</sup> constitutional identities are more narrowly attached to the constitution, its modes of organizing, logics of legality, rule of law symbolism, and instrumental purpose in creating and limiting the state and mediating relations within it. Constitutional identities are malleable, sometimes tendentious, constructs capable of disagreement and contest, as well as shifts and change over time. Constitutional identities give shape and meaning to the formal constitution by providing a guide to constitutional interpretation. In these respects, constitutional identities are employed to resolve a constitution's tensions, ambiguities, and disagreements; select its unwritten principles; determine the expanse of its internal architecture; bend the arc of its interpretation; inform the content and force of its conventions; and set the intensity of the demands to amend its provisions.

Judges play an important role in the process of shaping a constitution's identities and the interpretive and substantive consequences that flow from them, but they are not alone in their influence. The constitution is a legal instrument with a broad political and cultural life in civil society. A constitution finds meaning in more than the black letters of cases, but also in media representations of judicial decisions and constitutional provisions, politics in its broadest sense, popular media, literature, art, and film.<sup>39</sup> Within this broader sphere of constitutional culture, constitutional identity

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37. Rosenfeld, *supra* note 34 at 12.

38. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 2nd ed (London: Verso, 1991).

39. Benjamin Authers, *A Culture of Rights: Law, Literature, and Nation* (Toronto: University of Toronto Press, forthcoming).

takes shape. Naturally enough this multiplicity of perspectives can and does produce conflict over the constitution's true identity. Such disagreements are inevitable, indeed are themselves productive of the ongoing formation of constitutional identities. Somewhat ironically, the search for a defining constitutional identity often proceeds on the understanding that there is a defined singular essence of the constitution. And yet, the process of constitutional identity-making, and its history over time, reveals just the opposite: that a constitution and its contested identities exist in a dynamic state of transition and pluralism. Some identities have a stronger and more enduring purchase on the constitutional imagination than others, but all are subject to changes in the political, legal, and cultural forces which gave rise to those identities in the first place. Charting moments when a particular identity or set of identities held sway, were swept aside, or rose to challenge existing or partial constitutional understandings gives access to a richer and more complete view of the history of Canadian constitutionalism.

Where there is constitutionalism, there will be competing conceptions of constitutional identity. In Canada, conflicting identities explain how a formal constitution with a strongly (but not uniformly) centralizing division of powers came to support a highly decentralized federation. So it was that by the 1930s, given the decentralist jurisprudence crafted by the Judicial Committee of the Privy Council, and in light of a half century of political maturation among provincial governments, Justice Cannon could confidently declare that “[u]niformity is not in the spirit of our constitution,” but rather that “[d]iversity is the basis of our constitution.”<sup>40</sup> “Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today,” the Supreme Court agreed in recognizing federalism as one of the unwritten principles of the Canadian constitution.<sup>41</sup> A constitution's written terms, in other words, will only tell you so much about how a constitution actually operates, about what a constitution actually means. Which is not to deny the power of constitutional text to define and proscribe constitutional outcomes, so much as a recognition that in the fissures, gaps, ambiguities, and abstract language of constitutional law, constitutional identities often serve as powerful interpretive guides. Throughout Canada's constitutional past, an identity of constitutional nationalism—the desire for autonomous control and independence in formal constitutional terms, but also the need to see the nation reflected and embodied in its constitutional spirit—

40. *Canada (AG) v Ontario (AG)*, [1936] SCR 461 at 521, [1936] 3 DLR 673 [*Labour Conventions*].

41. *Secession Reference*, *supra* note 16 at para 43.

exerted a powerful influence on constitutional law, politics, and culture. The force of the search to find Canada in the constitution propelled Canadians on the path of constitutional renewal, disagreement, and, in some cases, disenchantment.

## II. *Canadian constitutional nationalism*

The search for a distinctive Canadian constitutional identity began before the nation of Canada existed and has continued after the *Constitution Act, 1982* purported to settle the matter. Transplanted law is always transformed in the process of migration by the imperatives of local custom and circumstance, and, in the case of Canada, by the existing legal frameworks of Indigenous peoples.<sup>42</sup> Eighteenth-century constitutional law in North America—first in treaties and then in instruments such as the *Royal Proclamation of 1763*—often reflected the realities of respecting Indigenous peoples and their laws.<sup>43</sup> Equally, the unique circumstances posed by the French fact led to the pluralism, partial and hesitant before fully accepted and embraced, reflected in the *Constitutional Act of 1791*<sup>44</sup> and the *Quebec Act of 1774*.<sup>45</sup> In the century which followed, in what is now Western Canada, it was a dynamic blend of the English common law, Hudson's Bay Company law, Cree law, and Métis law that regulated the fur trade, governed private relations, and dispensed criminal justice.<sup>46</sup> Perhaps most significantly, the push for and achievement of responsible government in the colonies in the mid-nineteenth century represented the ideal of local independence in constitutional governance. As Robert Baldwin Sullivan enthused in 1844, "When Canadians obtained Responsible Government, they got the life and soul of the constitution with it."<sup>47</sup> But if the constitution's soul rested in Canada, much of the inspiration for its machinery still remained tied to British antecedents.

42. Borrows, *supra* note 24.

43. For the history of one often overlooked constitutional instrument in the era before Confederation see Eric M Adams, "Ghosts in Court: Jonathan Belcher and the Proclamation of 1762" (2004) 27:2 Dal LJ 321.

44. (UK), 31 Geo III, c 31.

45. (UK), 14 Geo III, c 83.

46. John McLaren, Hamar Foster & Chet Orloff, eds, *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains Research Centre, 1992); H Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835–51" (1999) 17:2 LHR 209; Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

47. Michael S Cross, *A Biography of Robert Baldwin: The Morning-Star of Memory* (Oxford: Oxford University Press, 2012) at 85. See generally, Benjamin T Jones, *Republicanism and Responsible Government: The Shaping of Democracy in Australia and Canada* (Montreal: McGill-Queen's University Press, 2014).

Debates surrounding Confederation revealed just how strongly the British constitutional ideal remained in the Canadian legal and political imagination. Although the constitution-making process revealed a complicated tapestry of ideas blending American and British constitutional models with existing constitutional practices and traditions in the uniting colonies, including Lower Canada's civilian legal system, an especially dominant theme in the confederation debates was the necessity of retaining an identity of constitutional Britishness, especially among the Anglophone framers. John A. Macdonald spoke frequently of the founding of "a great Kingdom, in connection with the British monarchy and under the British flag."<sup>48</sup> But many others too emphasized the desire for a new united Canada to retain its connection—legal, political, military, economic, cultural, and psychological—to Great Britain. In the Nova Scotia House of Assembly on 10 April 1865, Charles Tupper declaimed with confidence that, "the desire of every British American is to remain in connection with the people of Great Britain. If there is any sentiment that was ever strong in the breast of our people, it is a disinclination to be separated in any way whatever from the British Empire."<sup>49</sup> Of course, Tupper glossed over many points of difference among Canadian politicians, let alone the Canadian public. To be sure, the intensity of the desire to maintain the connection to Britain, and the underlying reasons for it, varied sharply. Nonetheless, the centrality of the British constitutional connection found expression in countless ways in the *Constitution Act, 1867*, including the declaration of emulation of British constitutionalism and the centrality of "the Interests of the British Empire" in the preamble, but also, and perhaps more pointedly, in the absence of a domestic amending formula, and the extensive, powerful, and enduring presence of the Crown in the balance of the instrument.<sup>50</sup>

Canada's constitutional connection to Britain extended beyond the strictures of the constitutional text into broader claims championed by groups like the Orange Order about the essential Britishness of Canadian constitutional culture. In the late nineteenth century, the Imperial Federation League (later the British Empire League) also emerged as centres of

48. Donald Creighton, *John A Macdonald: The Young Politician* (Toronto: University of Toronto Press, 1998) at 458.

49. Ajzenstat et al, *supra* note 3 at 170.

50. *Constitution Act, 1867*, *supra* note 12. Take, for example, section 9 which provides: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

intense and impassioned “British Canadian patriotism.”<sup>51</sup> As Carl Berger explains, “in French Canada [the League’s] progress was viewed firstly with indifference, then alarm, and finally with massive hostility.”<sup>52</sup> In Quebec, some observers began to note that the ascendancy of an identity of constitutional Britishness had ramifications beyond the formal workings of parliamentary government and might more broadly influence ethnic, religious, and linguistic conceptions of citizenship, belonging, and nation, as well as relations between the federal government and Quebec. Canada’s decision to join Great Britain in the Boer War proved a decisive moment in the emerging fault lines between imperialists and many in francophone Quebec. Henri Bourassa, in particular, gave voice to a growing movement in what would become the *Ligue Nationaliste* which decried Canada’s colonial status and British imposition on Canadian domestic affairs. “In vain do our Canadian imperialists proclaim that we have attained the status of a nation,” Bourassa argued. “[T]he fact is that we have never yet exercised one of the essential prerogatives of national sovereignty: ...the conduct of and the control over our foreign relations.”<sup>53</sup> In English Canada too, voices emerged in constitutional law and politics challenging the constitutional status quo and asserting the presence and authority of a latent but visceral Canadian constitutional identity of independence. It did not take long for the veneer of Tupper’s confident claims at Confederation to wear thin, exposing a more complicated set of constitutional identities within the Canadian polity.

In reality such threads had always been present. The politician and writer, Thomas D’Arcy McGee, had championed and given eloquent expression to the concept of a “new northern nationality”—a common phrase in the period, “but which McGee made his own”—in the decade leading to Confederation.<sup>54</sup> Although George-Étienne Cartier spoke more cautiously of a “political nationality” that permitted, even celebrated, a diversity of peoples, the language and status of nationhood was everywhere apparent.<sup>55</sup> For McGee, that nationality was always to be intimately bound

51. Carl Berger, ed, *Imperialism and Nationalism, 1884–1914: A Conflict in Canadian Thought* (Toronto: Copp Clark, 1969) at 2 [Berger, *Imperialism and Nationalism*]. See also Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism* (Toronto: University of Toronto Press, 1970).

52. Berger, *Imperialism and Nationalism*, *supra* note 51.

53. Henri Bourassa, *Great Britain and Canada: Topics of the Day* (Montreal: Beauchemin, 1902) at 4. See generally R  al B  langer, *Henri Bourassa: Le fascinant destin d’un homme libre (1868–1914)* (Laval: Presses de l’Universit   Laval, 2013) at 98–100.

54. David A Wilson, *Thomas D’Arcy McGee, Volume 2: The Extreme Moderate, 1857–1868* (Montreal: McGill-Queen’s University Press, 2011) at 22, 39.

55. Ajzenstat et al, *supra* note 3 at 230.



up in its constitutional arrangements, the federalism of its constitution, and, in particular, the protection of minority religious education rights. In his last speech in Parliament before his assassination in 1868, McGee predicted that

[t]ime will show us the Constitution of this Dominion as much cherished in the hearts of the people of all its Provinces...as is the British Constitution itself...I have faith in the Confederation for another reason...I believe that it is the design of Providence that there shall be established on the northern portion of this continent, a nationality and system of government different from that other nationality existing to the south of us.<sup>56</sup>

McGee prophesied, he claimed, “not as the representative of any race, or of any Province, but as thoroughly and emphatically a Canadian.”<sup>57</sup> At his funeral one week later, “some eighty thousand people thronged the streets of Montreal” to pay their respects to the man considered Confederation’s poet.<sup>58</sup>

McGee’s ideas lived. On 1 July 1867, the *Globe* hailed “this birthday of a new nationality. A united British America...takes its place among the nations of the world.”<sup>59</sup> Canadian nationalism took many forms in the decades that followed, but one variant followed McGee’s insistence on the connection between a distinctive nationality and the constitution. What I am calling constitutional nationalism focused on the constitution as instantiating, in both symbolic and practical terms, Canada’s fundamental identity.<sup>60</sup> Because of the constitutional ambiguities discussed above, there was nothing preordained in the constitutional identities or distinct nationalisms different individuals and groups could draw from Canada’s constitutional instruments. Indeed, deciphering the true meaning of Confederation and the *Constitution Act, 1867*—was it a compact among provinces, a bargain of two founding peoples, the imperial or domestic creation of a single nation?—preoccupied a good deal of twentieth-century Canadian constitutional thought and politics. The Commissioners of Quebec’s Tremblay Commission viewed Confederation as “a pact of

56. *House of Commons Debates*, 1st Parl, 1st Sess, No 1 (6 April 1868) at 470–471 (Hon Thomas D’Arcy McGee), online: <[https://archive.org/stream/cihm\\_38998#page/n3/mode/2up](https://archive.org/stream/cihm_38998#page/n3/mode/2up)>.

57. *Ibid.*

58. Wilson, *supra* note 54 at 386.

59. Peter B Waite, *The Life and Times of Confederation, 1864–1867: Politics, Newspapers and the Union of British North America*, 3rd ed (Toronto: Robin Brass Studio, 2001) at 322.

60. Adams, “Constitutional Nationalism,” *supra* note 9.

honour between the two great races which founded it”<sup>61</sup> Historian and constitutional scholar, Arthur Lower and his coauthors, on behalf of the Native Sons of Canada, saw it differently. “The purpose of Confederation,” they argued “was to establish a national unit, and...to obliterate the provincial boundaries and fuse the colonial units then existing.”<sup>62</sup> Uniting even the wide gulf of understanding that lay between these opposing views, was the idea that the constitution carried a particular meaning and a capacity to shape and define the identity of the nation and its peoples. More than that, such differing conceptions of the constitution also increasingly agreed that Canada’s constitutional identity was the singular product of its own constitutional principles and experience, even as they differed about what those values and realities were and what lessons should be drawn from them.

In the early twentieth century, lawyer and writer J.S. Ewart emerged as the most vocal, insistent, and persistent of Canada’s constitutional nationalists. Emphasizing the strength of Canada’s “feelings,” “aspirations,” and “strivings,” Ewart reminded that “[t]he founders of our federation... desired that Canada should be a ‘nation’. They wished to be ‘subjects of a great British-American nation,’ styled ‘The Kingdom of Canada[.]’... [I]s that not what we still desire, and that which we must still diligently seek after?”<sup>63</sup> For Ewart, Canada’s *true* constitutional intentions of distinctive independence had been hijacked by several of its on-going constitutional practices: Canada’s British-controlled foreign policy, the legal supervision of the Judicial Committee of the Privy Council, and the absent amending formula in Canada’s constitutional documents. What Canada required was constitutional change to align with its initial constitutional vision, its animating constitutional identity. Typically dismissed as something of a constitutional eccentric, if not heretic, in the early years of his campaign for Canadian constitutional independence, Ewart’s constitutional views slowly became orthodoxy over the course of the first two decades of the twentieth century as various of the strings binding Canada to Great Britain began to loosen, and eventually come undone altogether.

61. Quebec, Royal Commission of Inquiry on Constitutional Problems, *Report*, vol 1 (Quebec: Province of Quebec, 1956) at v. The battle, of course, over the meaning of Confederation is ongoing. See Cara Des Granges, “Finding Legitimacy: Examining Quebec Sovereignty from Pre-Confederation to Present” (2014) 50 *Intl J Can Studies* 25.

62. Native Sons of Canada, *Brief Submitted to Royal Commission on Dominion-Provincial Relations* (Winnipeg: Albion Press, 1937) at 7.

63. John S Ewart, *The Kingdom of Canada: Imperial Federation, The Colonial Conferences, The Alaska Boundary and Other Essays* (Toronto: Morang & Co, 1908) at 1, 3.

As constitutional thinkers, McGee, Bourassa, and Ewart are significant for the particular and emphatic manner in which they tied Canada's national identity to its constitutional structures, laws, and conventions. In their massive output of writings, and more generally in their careers as prolific writers and speech makers, they framed the subject of the Canadian constitution not as a matter of formal provisions and legal doctrine, but rather as the repository of an identity that could be shaped and bent for higher purposes.<sup>64</sup> In these respects, they are usefully contrasted with Canada's leading constitutional scholar of the period, A.H.F. Lefroy. Lefroy's influential treatise on Canadian constitutional law, *The Law of Legislative Power in Canada* offered a principled synthesis of legal principles dealing with the division of powers modeled on the methodologies of legal science, and steeped in a veneration of British constitutionalism.<sup>65</sup> And although it was Lefroy's work that lawyers and judges turned to when faced with a constitutional dilemma of a legal nature, it was the spirit of McGee's, Bourassa's and Ewart's conception of constitutional identity of distinctive independence that became increasingly reflected in political, jurisprudential, and cultural constitutional developments.

Throughout the 1920s, the precise nature of Canada's constitutional status was a frequent topic of debate in the House of Commons. Canada's international commitments and the question of national evolution within the British Commonwealth ensured the frequent revisiting of Canada's status as an independent nation. Canada's wartime service during the First World War and increasing autonomy over international affairs led to its symbolically significant signing of the Treaty of Versailles in 1919 as an independent nation rather than a member of the British Commonwealth. In 1926 the Balfour Declaration further recognized Canada and several other Dominions as "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs."<sup>66</sup> *The Statute of Westminster, 1931*<sup>67</sup> confirmed that autonomy in legal terms, with the exception of Canada's

64. See Peter Price, "Fashioning a Constitutional Narrative: John S. Ewart and the Development of a 'Canadian Constitution'" (2012) 93:3 Can Historical Rev 359; Sylvie Lacombe, *La rencontre de deux peuples élus: Comparaison des ambitions nationale et impériale au Canada entre 1896 et 1920* (Québec: Les Presses de l'Université Laval, 2002).

65. AHF Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897). See RCB Risk, "A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada: On Burying One's Grandfather" (1991) 41:3 UTLJ 307.

66. *Report of Inter-Imperial Relations Committee* (25 October 1926), reprinted in Maurice Ollivier, ed, *The Colonial and Imperial Conferences from 1887 to 1937*, vol 3, part 2 (Ottawa: Queen's Printer, 1954), 145 at 146.

67. *Statute of Westminster, 1931* (UK), 22 & 23 Geo V, c 4, s 4, reprinted in RSC 1985, Appendix II.

constitutional documents which would remain under British jurisdictional authority since Canadian federal and provincial governments had not been able to agree on a domestic constitutional amending formula. Both Bourassa and Ewart had influence in the period's politics of constitutional independence, Bourassa as an independent member of Parliament and Ewart, behind the scenes, cajoling parliamentarians and providing (solicited and unsolicited) constitutional advice to his friend, William Lyon Mackenzie King.<sup>68</sup> The resulting constitutional debates about Canada's independence more typically sounded in the register of the spirit, purpose, and identity of the constitution rather than in the formal key of constitutional law. Bourassa, for one, while pleased by the progress, remained unsatisfied by the advancements of the Balfour Declaration. In criticizing the advancements as insufficient he sought to resurrect an older constitutional spirit set in motion by the framers of Confederation, he claimed, one committed to complete constitutional autonomy and severance from British constitutional control. "The evolution [towards constitutional independence] which is the natural and inevitable outcome of the principle of self-government," Bourassa argued "was anticipated at the time of confederation not by the radicals and not by the Liberals who opposed confederation, but by the very founders of that confederation."<sup>69</sup> Bourassa's turn to constitutional history—a forgotten history no less—would emerge as a recurring theme and crucial argumentative lever in the quest for Canada's constitutional identity.<sup>70</sup> Driven by the politics of the present, giving purpose to Canada's constitutional identity invariably involved framing (and reframing) Canada's constitutional past.

For others, it was a different set of political objectives which provided the impetus for constitutional change. J.S. Woodsworth, leader of the Co-operative Commonwealth Federation, drove at the same constitutional outcome of independence as Bourassa but for a different constellation of reasons. For Woodsworth and the CCF, Canada needed a domestic constitutional amending formula so that the constitution could be amended to better align its nineteenth-century terms with the deeper social

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68. Price, *supra* note 64 at 367.

69. *House of Commons Debates*, 16th Parl, 1st Sess, No 2 (29 March 1927) at 1675 (Hon Henri Bourassa).

70. As Anthony Brundage and Richard A Cosgrove write, "What is central to [national identity] debates is the consensual verdict that history plays the ultimate arbiter. Whether that history is nostalgic, romantic, antiquarian, scientific, elitist, or popular, the past, often imagined or invented, has defined the boundaries for understanding national identity issues." Anthony Brundage & Richard A Cosgrove, *The Great Tradition: Constitutional History and National Identity in Britain and the United States, 1870–1960* (Stanford: Stanford University Press, 2007) at 7.

democratic norms of the twentieth-century welfare state.<sup>71</sup> Here too, the constitution emerged as bifurcated—a formal document out of step with its own underlying meaning. The division raised the subtle prospect that the formal constitution may be unconstitutional, not in any strict legal sense, but rather as contrary to a constitutional identity. “[C]onstitutions are made for people; not people for constitutions,” Joseph Shaw, a progressive independent, argued in the House of Commons. “Constitutions must be just and must be interpreted not to bind and shackle the people, but to meet the changing conditions of the times.”<sup>72</sup>

By the end of the Second World War, the changes that mattered included Canada’s sacrifices in war. “[W]ho governs here?” demanded Ligouri Lacombe, an Independent MP. “Is it London or is it Ottawa? What a shame for a country that has shed its best blood and shaken its economic structure for the sake of the United Nations victory to apply to the British parliament because we lack the power to amend our own constitution! How disgraceful and humiliating for a nation!” “We shall not be our true selves,” Lacombe declared, “until we abolish appeals to the Privy Council, until we can amend our constitution without currying favour from anyone and until we can hoist a truly distinctive flag.”<sup>73</sup> In a final flourish, Lacombe raised the idea that perhaps Canada existed as a nation “without a constitution, since our constitution does not belong to us. It cannot be called ours.” “Let us free our Canadian constitution from all parasitic influences.”<sup>74</sup> The strangeness of this imagery, of an unreal constitution, or, at the very least a trapped or infected one, emerged from an effort to make sense of an identity of autonomy and distinctiveness in the face of formal provisions which dictated otherwise. The potential for disjuncture between a constitutional instrument and its constitutional identity would fuel much of the patriation politics to come.

Initially resistant, courts became increasingly sensitive to the rumblings of Canadian constitutional nationalism in constitutional politics and culture. While the “Persons Case” has secured canonical status for its cultivation of the “living tree” metaphor of constitutional interpretation, the case has been largely overlooked as an early expression of Canada’s

71. See Adams, “Constitutional Nationalism,” *supra* note 9.

72. *House of Commons Debates*, 14th Parl, 3rd Sess, No 1 (20 March 1924) at 530-531 (Hon Joseph Shaw).

73. *House of Commons Debates*, 20th Parl, 2nd Sess, No 2 (6 June 1946) at 2257-2258 (Hon Ligouri Lacombe).

74. *Ibid* at 2259.

drive for constitutional independence.<sup>75</sup> Before he planted his metaphorical tree, Lord Sankey tilled the figurative soil. Turning to “the special history” of the Canadian constitution, Lord Sankey makes plain that it is the particular constitutional history of Canada and its peoples that provide the necessary context of constitutional interpretation, not the numerous foreign judgments relied on by the Supreme Court of Canada and stressed in argument by counsel. Despite drawing on bigoted evolutionary thinking about the “Britannic system[’s] embrace [of] countries and peoples in every stage of social, political and economic development,” Lord Sankey concluded that the legal cultures of place mattered and required judicial deference and respect (at least insofar as Canada was concerned). “[T]his Board must take great care,” he noted, “not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another.”<sup>76</sup> Thus Lord Sankey envisaged a living tree “*planted in Canada*” in order to “grant a Constitution *to Canada*.”<sup>77</sup> And to make his meaning plainer still, he explained as follows:

Their Lordships do not conceive it to be the duty of this Board...to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.<sup>78</sup>

The living tree metaphor has been largely embraced as an approach to liberal and progressive constitutional interpretation, but in its own time and context, set against the backdrop of the Balfour Declaration, the politics of independence, and on the eve of the passage of the *Statute of Westminster, 1931*, the living tree was an expression and confirmation of Canada’s constitutional distinctiveness and independence.

Contemplating the end of Privy Council appeals in criminal matters a few years later, the Privy Council similarly determined that “[s]uch appeals seem to be essentially matters of Canadian concern and...a prime element in Canadian sovereignty as appertaining to matters of justice.”<sup>79</sup>

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75. Edwards, *supra* note 20. See generally Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2007); Saywell, *The Lawmakers*, *supra* note 28 at 191-192.

76. Edwards, *supra* note 20 at 135.

77. *Ibid* at 136 [emphasis added].

78. *Ibid*.

79. *British Coal Corp v R*, [1935] AC 500, [1935] All ER Rep 139. Contrast the Privy Council’s much different tone in *Nadan v R*, [1926] AC 482, 95 LJPC 114.

For the Privy Council, the constitutional evolution that mattered had already taken place: Canada's constitutional maturity to independent and autonomous status created new realities to which the constitution itself must now conform.

The irony of the distant Privy Council pronouncing on the nature of Canadian constitutional autonomy was not lost on the increasing number of lawyers and politicians from English Canada still calling for the end of Privy Council appeals.<sup>80</sup> Constitutional scholar Frank Scott among others had long noted that "the interpretation of the Constitution is a matter that cannot be left to judges who are unfamiliar with Canadian traditions and with the Canadian situation."<sup>81</sup> Here again Scott signalled the disjunction of the formal constitution from another set of constitutional values and norms born of "Canadian traditions" and circumstances. While many constitutional observers in francophone Quebec, and other staunch proponents of provincial rights, continued to worry that the loss of the Privy Council as a final court of appeal would erode the judicial protections for provincial jurisdiction and autonomy,<sup>82</sup> the fate of British legal oversight had been sealed as fundamentally out of step with Canada's constitutional identity of independence. Significantly, when the Tremblay Commission criticized the federalism jurisprudence of the Supreme Court of Canada in the 1950s, the proposed solution was not a return to Privy Council oversight, but rather a differently constituted Supreme Court comprising judges selected by provinces as well as the federal government.<sup>83</sup>

A shift in constitutional tone and confidence began to mark the jurisprudence of the Supreme Court of Canada too. Writing in dissent in a now largely forgotten criminal law decision in 1945, Chief Justice Rinfret rather starkly announced that the case "may not be discussed from the viewpoint of the English constitutional law. In this country we have to apply the B.N.A. Act and the Criminal Code, two statutes which, of course, do not apply in England." Further, he continued, since "the Supreme Court of

80. Those calls grew louder after the Privy Council struck down the majority of the New Deal legislation in 1937. See FR Scott, "The Consequences of the Privy Council Decisions" (1937) 15:6 Can Bar Rev 485 at 494; WPM Kennedy, "The *British North America Act*: Past and Future" (1937) 15:6 Can Bar Rev 393; Vincent C MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15:6 Can Bar Rev 401; FC Cronkite, "The Social Legislation References" (1937) 15:6 Can Bar Rev 478.

81. Memorandum from FR Scott to Escott Reid, "Memorandum Re Appeals to the Privy Council" (4 November 1932), Ottawa, Library and Archives Canada (MG 30, D 211, vol 7, reel H-1218), online: <[http://heritage.canadiana.ca/view/oocihm.lac\\_reel\\_h1218/975?r=0&s=3](http://heritage.canadiana.ca/view/oocihm.lac_reel_h1218/975?r=0&s=3)>.

82. See *House of Commons Debates*, 18th Parl, 3rd Sess, No 3 (8 April 1938) at 2190-2191 (Hon JH Blackmore). Léo Pelland, "Problèmes de droit constitutionnel" (1936-37) 15:1,2,4 R du D 5, 65, 194.

83. Quebec, Royal Commission of Inquiry on Constitutional Problems, *Report*, vol 3 (Quebec: Province of Quebec, 1956) at 287-296.

Canada is now the court of last resort in criminal matters,” Privy Council decisions were no longer strictly binding. “For all these reasons,” he concluded, the present case “stands to be decided according to Canadian law.”<sup>84</sup> Delayed by the Second World War, both the Supreme Court of Canada and the Privy Council subsequently upheld as constitutional the federal legislation making the Supreme Court of Canada the final court of appeal in all legal matters. The Privy Council decision upholding the constitutionality of Canada’s new judicial hierarchy was particularly direct. “[I]t must be within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court shall be ultimate,” Lord Jowitt held. “No other solution is consonant with the status of a self-governing Dominion.”<sup>85</sup>

Canada entered the second half of the twentieth century in a significantly different constitutional position than at any earlier time in its history. The ideological battle between the imperialists and nationalists had been decisively won in favour of those promoting the need for Canadian constitutional independence. J.S. Ewart and Henri Bourassa, once lonely voices against the constitutional establishment, now reflected the mainstream insofar as they reflected the popular desire for Canadian constitutional autonomy.<sup>86</sup> The *Statute of Westminster, 1931* had, in Frank Scott’s phrasing, ensured “[t]he [e]nd of [d]ominion [s]tatus,” and “complete national independence.”<sup>87</sup> Flush with postwar confidence, in 1946, Canada enacted its first *Canadian Citizenship Act*, as an expression of its growing sense of national distinctiveness and identity.<sup>88</sup> For all Canadian cases beginning in 1949, appeals to the Privy Council had been abolished. In that same year, the British Parliament passed a constitutional amendment granting Parliament circumscribed authority to amend the constitution in respect of matters falling exclusively within federal jurisdiction.<sup>89</sup> A pleased Frank Scott heralded the beginning of Canada’s journey of “bringing to her shores that ultimate legislative authority which, in spite of her complete political autonomy, has continued to rest in

84. *In Re Storgoff*, [1945] SCR 526 at 538, [1945] 3 DLR 673.

85. *Ontario (AG) v Canada (AG)*, [1947] AC 127, [1947] 1 All ER 137.

86. John S Ewart, “The Statute of Westminster, 1931, as a Climax in its Relation to Canada” (1932) 10:2 Can Bar Rev 111. See also Un Professeur, “L’autonomie du Canada et sa nouvelle situation internationale” (1927–28) 6:2 R du D 65.

87. FR Scott, “The End of Dominion Status” in Frank R Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 157 at 171 [Scott, *Essays on the Constitution*].

88. *Canadian Citizenship Act*, RSC 1946, c 15.

89. *British North America (No. 2) Act, 1949*, 13 Geo VI, c 81 (UK).



the Parliament of the United Kingdom.”<sup>90</sup> Others put that quest in sharper terms. “We Canadians have stood about enough of this,” a *Maclean’s* editorial announced. “The fact that Canada still has to run to mother to have her constitutional buttons done up is a national shame and we have a right to expect serious, self-effacing efforts to remove it.” If the current batch of federal and provincial politicians was not able to work together to find a constitutional solution, the editors warned, “we ought to think about hiring ourselves a new set of politicians.”<sup>91</sup>

Canadians *did* have a new set of judges atop the judicial hierarchy, the Supreme Court of Canada, although the question of whether Privy Council precedents remained binding posed an unresolved question. For the most part, the Court shied away from answering that query directly, although Justice Ivan Rand, on his own (and in his own idiosyncratic judicial style), seemed to suggest the ending of Privy Council appeals had brought about a definitive break with the past:

The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee... [T]hat incident of judicial power must, now... be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.<sup>92</sup>

In envisioning a constitutional law in step with the “particularized” and “evolving features” of “the life of the country,” Justice Rand called for a constitutional law fully attuned to the deeper currents of constitutional identity. It is a search that continues to dominate Canadian constitutional law.

90. FR Scott, “The British North America Act (no. 2) Act, 1949” in Scott, *Essays on the Constitution*, *supra* note 87, 202 at 202.

91. “It’s Time Our Hired Hands Stopped Their Quarreling” *Maclean’s Magazine* (15 January 1950) 1 at 1.

92. *Reference Re The Farm Products Marketing Act*, [1957] SCR 198 at 212-213, 7 DLR (2d) 257. Bora Laskin, especially anxious for a new direction in the Supreme Court’s federalism jurisprudence, called for the Court to embrace “the spirit of its new status” and free itself from the Privy Council’s doctrinal chains. Bora Laskin, “The Supreme Court of Canada: A Final Court of and for Canadians” (1951) 29:10 Can Bar Rev 1038 at 1057, 1076. Following Laskin’s lead, other lawyers and scholars filled the pages of the *Canadian Bar Review* in the decade that followed similarly demanding the creation of an independent Canadian jurisprudence.

### III. *Searching for a Canadian constitution*

The decade of the 1960s in Canada and its various social, political, and cultural upheavals has sparked a great deal of recent scholarly attention. “Rather than oversimplify it as a decade of protest, we present the ‘sixties’ as a transformative *era* for Canadian society that was diffuse and widespread,” a recent collection notes.<sup>93</sup> “[T]here can be no doubt,” Dimitry Anastakis echoes, “that the period’s transformative effect upon Canadians—culturally, politically, and economically—was immense.”<sup>94</sup> The rupture was not as sudden as has sometimes been imagined and, indeed, the groundwork had been laid in the “intense cultural and social negotiation” of the 1950s and the “constant shifting of axes between the elements of tradition and modernity” that marked the immediate post-war years.<sup>95</sup> But it is true that the 1960s accelerated change across a variety of social and cultural planes, although change was not especially pronounced in either the common law or Canadian legal system as a whole. Certainly, in relation to doctrinal matters, the 1960s was a period of relative calm in Canadian constitutional law. With Justice Rand’s retirement in 1959, the Supreme Court had lost its only constitutional iconoclast, and the excitement of the Rand-led “implied bill of rights” era largely ended when he left the Court.<sup>96</sup> With only one or two exceptions, the 1960s produced virtually no leading constitutional law decisions or lasting doctrinal developments of note beyond perhaps the slow incremental drift towards greater acceptance of federal jurisdictional authority in division of powers matters.<sup>97</sup> The widely accepted transformative power of the 1960s, most constitutional lawyers would be forced to admit, did not really extend to Canadian constitutional law.

The life of the constitution, however, was more complex and dynamic than its case law of the 1960s revealed. Historians agree that the period witnessed intense political and cultural negotiation of the essential elements of Canadian national identity. In one sense, there was nothing especially new in this. “The elaboration of Canadian nationhood was...a

93. Lara Campbell & Dominique Clément, “Introduction: Time, Age, Myth: Towards a History of the Sixties” in Lara Campbell, Dominique Clément & Gregory S Kealey, *Debating Dissent: Canada and the Sixties* (Toronto: University of Toronto Press, 2012) at 3.

94. Dimitry Anastakis, *The Sixties: Passion, Politics, and Style* (Montreal: McGill-Queen’s University Press, 2008) at 3.

95. Nancy Christie & Michael Gauvreau, “Introduction: Recasting Canada’s Post-war Decade” in Nancy Christie & Michael Gauvreau, eds, *Cultures of Citizenship in Post-war Canada, 1940–1955* (Montreal: McGill-Queen’s University Press, 2003) at 17.

96. Adams, “Building a Law of Human Rights,” *supra* note 9 at 451.

97. I assign a single case decided in the 1960s—*Carnation Co Ltd v Quebec (Agricultural Marketing Board)*, [1968] SCR 238, 67 DLR (2d) 1—in my first year constitutional law class. By contrast we study four cases from the 1950s and six from the 1970s.

complicated historical process,” Bryan Palmer argues, “one that unfolded at the interface of worlds old and new. It reached across the expanse of Canada’s nineteenth and twentieth centuries, through two world wars and multiple moments of independence-making. A colony came to see itself as a nation.”<sup>98</sup> Yet a confluence of events and circumstances that inspired soul-searching national debates marked the 1960s as unique. The Quiet Revolution, the Royal Commission on Bilingualism and Biculturalism, the adoption of a new national flag, Canada’s Centennial celebrations, the premiers’ Confederation of Tomorrow conference, and the intensifying meetings between the provinces and federal government on a constitutional amending formula and reform package, all offered opportunities to search for, discuss, and disagree about the meaning of Canada in constitutional terms.

In Peter Russell’s apt description, the 1960s initiated the beginning of a quarter century of “mega constitutional politics” in Canada. Mega constitutional politics, Russell explains, “addresses the very nature of the political community on which the constitution is based. Mega constitutional politics...is concerned with reaching agreement on the identity and fundamental principles of the body politic.”<sup>99</sup> Indeed, participants seemed especially keen to approach such moments as opportunities to define and express Canadian constitutional identity. So it was that the Royal Commission’s terms of reference asked for recommendations on “what steps [should] be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races,” taking into account “the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution.”<sup>100</sup> As John Saywell drily observed, “[t]he Commissioners felt they had been called upon to refashion the state, and not just its framework but its foundations.”<sup>101</sup> It was difficult, Frank Scott admitted as one of the Commissioners, to avoid the constitution in the Commission’s public hearings and deliberations. It was not the job of the Commission, Scott protested, to “talk about the ‘repatriation’ of the constitution, or to recommend the nature of the amending process,” and yet he acknowledged that the constitution—the special status of Quebec,

98. Bryan D Palmer, *Canada’s 1960s: The Ironies of Identity in a Rebellious Era* (Toronto: University of Toronto Press, 2009) at 11.

99. Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) 75.

100. Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen’s Printer, 1967) at 21, 23.

101. John T Saywell, “The Royal Commission on Bilingualism and Biculturalism” (1965) 20:3 *Intl J* 378 at 380.

the flexibility or rigidity of fiscal and federal arrangements, the amending process—was “going on around us”. “We have a *rendez-vous* with the BNA Act,” Scott often claimed in his speeches on constitutional matters. “It’s going to come some day!”<sup>102</sup> The moment of *rendez-vous* had, for all intents and purposes, already arrived.

Historians have generally agreed that one of the powerful undercurrents in Canada’s intensifying search for national identity in the 1960s was the erosion and replacement of several of the symbols of Canada’s Britishness. While some accounts emphasize Prime Minister Pearson and the Liberal government’s engineered “crisis of Britishness,”<sup>103</sup> as we have seen, Canada’s constitutional nationalists had long identified overt British constitutional symbols as indicative of an absence of distinctive constitutional maturity. Whatever its derivation, that profound change was taking place in Canada’s self-understanding was obvious for contemporaries.<sup>104</sup> Most famously, George Grant’s *Lament for a Nation: The Defeat of Canadian Nationalism*, published in 1965, set out a forceful elegy mourning the loss of “the Britishness of Canada” at the expense of American-dominated liberal capitalism.<sup>105</sup> For Grant, the regrettable, inevitable, and certainly destructive, transition had occurred because of a loss of tradition, a forgetting of the past, and a betrayal of heritage by Canada’s wealthy and powerful for economic gain. But liberalism meant more than economics, J.A. Corry stressed in his 1971 Massey Lectures. “In Canada, for a long time it was generally believed that the British tradition of public law...was strong enough among us to give adequate protection to civil rights,” he argued. “It has been realized,” he continued, “that Canada lacks the social homogeneity of Britain. We, like the United States, are a people of diverse origins and differing cultural traditions.” “[W]e are pulled one way by our traditions,” he concluded, “and another

102. FR Scott, “Address” (Delivered at the Joint Dinner of the Association of Canadian Law Teachers and the Canadian Political Science Association at Charlottetown, PEI, 11 June 1964) in P-A Crepeau & CB MacPherson, eds, *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) 181 at 183-185.

103. See CP Champion, *The Strange Demise of British Canada: The Liberals and Canadian Nationalism, 1964–1968* (Montreal: McGill-Queen’s University Press, 2010). By contrast see José E Igartua, *The Other Quiet Revolution: National Identities in English Canada, 1945–1971* (Vancouver: UBC Press, 2006).

104. Blair Fraser, *The Search for Identity: Canada, 1945–1967* (Toronto: Doubleday, 1967).

105. George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1965) at 33.

way by realizing that North America is not Britain.”<sup>106</sup> “On both sides of the debate,” C.P. Champion writes, “the confrontation with Britishness was a struggle over the meaning of Canada and Canadianism, and the role of memory, history, and heritage in imagining the Dominion.”<sup>107</sup>

Perhaps nowhere was this battle better reflected than in the divisive debates surrounding the adoption of the red maple leaf as Canada’s national flag. From the outset, Pearson framed the adoption of a new national flag as “part of the large question of national unity.”<sup>108</sup> First the Quiet Revolution and then the Royal Commission on Bilingualism and Biculturalism had revealed disquiet and disappointment in francophone Quebec and strains of hostility and indifference in English Canada towards the current federal arrangements in Canada. Seeking new symbols of national unity, Pearson and the Liberals forwarded the idea of a new flag that would “symbolize and be a true reflection of [a] new Canada.”<sup>109</sup> It was true, Pearson conceded, that Canadians “had a responsibility to the past. But we have also a greater responsibility to the present and to the future.”<sup>110</sup> In parliamentary debates, the flag and its symbolism easily and frequently evoked the search for Canadian constitutional identity. “[I]t is one of the unique ironies of Canadian history,” John Diefenbaker, leader of the Progressive Conservative opposition observed, “that parliament should halt consideration of the question of national flags in order to make an application, by way of address to the British parliament, to ask that house to amend the Canadian constitution.” “[I]t is not Westminster that exercises by its own wish this authority over Canada,” Diefenbaker argued. “It is the failure of Canadians to build within this nation one Canada.”<sup>111</sup>

But, if Diefenbaker had correctly identified a constitutional failure, it was increasingly one of details and not desire. The demand for constitutional autonomy and independence crossed all party lines and united the Canadian public more broadly. While the imagery of the new flag drove wedges between liberals and conservatives, political opponents agreed that Canada needed a new constitution in line with its constitutional identity as a mature and sophisticated nation state. Stanley Knowles for

106. JA Corry, *The Power of Law* (Toronto: Hunter Rose, 1971) at 50. Looking back over the same period, Alan Cairns observed that the “relaxation of the British grip on Canadian constitutional identity” manifest itself in a “great burst of nationalist activity in the years just after the war,” Cairns, *supra* note 5 at 21.

107. Champion, *supra* note 103 at 5.

108. Igartua, *supra* note 103 at 177.

109. *Ibid* at 182.

110. *Ibid*.

111. *House of Commons Debates*, 26th Parl, 2nd Sess, No 4 (18 June 1964) at 4446-4447 (Hon John Diefenbaker).

the New Democratic Party expressed a common sentiment that “it is something less than dignified for us to be talking so much as we are these days about our nationhood and independence, and yet forever to be going through this form of getting an amendment to our own constitution by having to send a request to the legislative halls of another country.”<sup>112</sup> R  al Caouette, of the Social Credit Party, raised again the idea of a constitution lost in its own archaic history.

I think that the constitution would have been brought back long ago, and I wonder whether the original text has not been lost abroad, so that one would be able to determine whose signature it bears. For the past ten years or so, there has always been some talk about the constitution. I have begun to wonder whether the Minister of Justice will not, some day, state that the constitution having been put on some dusty shelf in the parliament of Westminster, the original text has been irretrievably lost, so that we should make out a new one here, in this parliament.<sup>113</sup>

Equal parts fantasy, distrust of the Liberals, and criticism, Caouette evoked the strange image of a constitution literally lost in dust. The remedy he claimed, like others before and alongside him, was the fashioning of a new domestic constitution “conceived by Canadians for Canadians.”<sup>114</sup> In this light, the *British North America Act* (now the *Constitution Act, 1867*, strategically renamed to cut ties with its past) ceased to be the real constitution, but a foreign imposter. “We must eventually nationalize the constitution,” Frank Scott argued, “[and] get rid of one anomaly called the British North America Act, replacing that obsolete title by the Constitution of Canada.”<sup>115</sup>

This strange constitutional duality—the disjuncture between a foreign formal constitutional instrument and an authentic but ephemeral domestic constitutional spirit—may explain in part the prevalence of the language of *repatriation* in constitutional debates, and the image of *returning* the constitution home. The expression became synonymous with the movement to amend Canada’s constitution with a domestic amending formula and, eventually, the adoption of a bill of rights. “The very term ‘repatriation’ is, of course, misleading,” Saskatchewan’s attorney general, Robert Walker, pointed out. “We cannot repatriate the constitution because it has never

112. *House of Commons Debates*, 26th Parl, 2nd Sess, No 4 (18 June 1964) at 4465 (Hon Stanley Knowles).

113. *House of Commons Debates*, 26th Parl, 2nd Sess, No 4 (18 June 1964) at 4472 (Hon R  al Caouette).

114. *Ibid.*

115. FR Scott, “Civil Liberties and Canadian Federalism” in Bernard Ostry & Janice Yalden, eds, *Visions of Canada: The Alan B. Plaunt Memorial Lectures, 1958–1992* (Montreal: McGill-Queen’s University Press for Carleton University, 2004) 42 at 74.

been a fully Canadian instrument... We are... still groping for our national maturity and the search for a Canadian constitution, amendable in Canada, is only one aspect of this evolutionary process.”<sup>116</sup> Nonetheless the label stuck (although patriation was common too), perhaps because it resonated with the view of Canadian constitutionalism as historically “sprung from their own soil.”<sup>117</sup> An amended constitution, from this perspective, was not a new instrument, but an old one, returning home. The language of repatriation also extended the implicit suggestion that a constitution could exist in multiples: domestic and foreign, informal and formal, real and unreal. In such a state of confusion, what else could a nation do but turn to deeper principles of constitutional identity to discern authenticity from doppelganger? What else to do but, in Walker’s evocative phrase, “search for a Canadian constitution.”<sup>118</sup>

In many ways, the sense of purpose in that search tended to downplay the difficulties inherent in the looking. By 1968 the Government of Canada announced a new round of constitutional negotiations with the express intention of adopting a new Canadian constitution with an amending formula and a charter of human rights. Credited to Prime Minister Pearson but drafted by Pierre Trudeau, the Government of Canada’s policy statement recognized that “a constitution is more than a legal document; it is an expression of how the people within a state may achieve their social, economic and cultural aspirations through the exercise and control of political authority. We must look therefore to the essential nature of the Canadian federation in examining our Constitution.”<sup>119</sup> There was to be little consensus on what that essential nature entailed in the decade that followed. Diversity or unity? Biculturalism or multinationalism? Centralization or decentralization? Judicial enforcement of rights or parliamentary sovereignty? The quest for a singular unifying and constitutive vision of Canada’s constitutional identity was fraught with disagreement, exclusion, and recriminations. Aboriginal peoples, citizens whose background was neither British nor French, and other historically marginalized social groups did not always see themselves in the new constitutional project. And constitutional priorities, unified by a spirit of constitutional nationalism, fractured again in the face of drafting

116. RA Walker, “Repatriating the Constitution” (Address delivered to the Saskatoon Bar Association, 17 February 1961), (1961) 26 Sask Bar Rev & L Society’s Gaz 12 at 12.

117. Wheare, *supra* note 10.

118. Walker, *supra* note 116.

119. Canada, *Federalism for the Future* (Ottawa: Queen’s Printer, 1968) at 10; John English, *Citizen of the World: The Life of Pierre Elliott Trudeau Volume One, 1919–1968* (Toronto: Knopf Canada, 2006) at 455.

and agreeing on new constitutional principles to govern Canada's next century, as the divisions exposed by patriation, and the Meech Lake and Charlottetown Accords made clear. The search for constitutional identities, despite moments of powerful consensus, will always unfold "with a mix of defiant realities."<sup>120</sup> Canada ended its first century as a nation unified in the need for formal constitutional change to satisfy an array of unfulfilled constitutional identities, but divided by unseen disagreements about which identities should predominate.

### *Conclusion*

Although the search for constitutional identity is often premised on the singular identification of essential and true qualities of the constitution, the process of searching reveals the inherently plural, contradictory, and messy nature of constitutional identities in complex politics. The same is inevitably true in the quest to define other aspects of national identity in art, culture, or history. Amidst the national constitutional soul searching of the 1960s, parallel movements across the humanities and social sciences engaged in similar searches for meaning in Canada's past and present. Canadian historians, led by W.L. Morton and Donald Creighton, aimed to definitively canvass the history of Canada in the Canadian Centenary Series. In Canadian political science, Donald Smiley's *The Canadian Political Nationality* reinterpreted the past, present, and future of the Canadian political state.<sup>121</sup> In Canadian literature, Carl Klinck's edited *Literary History of Canada* testified to the existence of a distinctive and worthy literary tradition in English Canada.<sup>122</sup> The volume is especially well known for Northrop Frye's concluding essay in which he confidently articulated his famous "garrison mentality" as a unifying theme in Canadian literature and suggested that the question underlying the search for Canadian identity was not so much "Who am I?" as "Where is here?"<sup>123</sup>

In his much less well known Whidden Lectures delivered at McMaster University shortly afterwards, in the nationalistic glow of the centennial year, Frye elliptically expressed more ambivalence and less certainty on the question of Canadian identity. "My present task, I think, is neither to eulogize nor to elegize Canadian nationality, neither to celebrate its survival nor to lament its passage," he explained.<sup>124</sup> "All nations have...a

120. Palmer, *supra* note 98 at 17.

121. Donald V Smiley, *The Canadian Political Nationality* (Toronto: Methuen, 1967).

122. Carl F Klinck, ed, *Literary History of Canada: Canadian Literature in English* (Toronto: University of Toronto Press, 1965).

123. Northrop Frye, "Conclusion" in Klinck, *ibid*, 821 at 826, 830.

124. Northrop Frye, *The Modern Century: The Whidden Lectures 1967* (Toronto: Oxford University Press, 1967) at 17.



buried or uncreated ideal, the lost world of the lamb and the child, and no nation has been more preoccupied with it than Canada.”<sup>125</sup> Canadian art and literature, he observed, “seems constantly to be trying to understand something that eludes it, frustrated by a sense that there is something to be found that has not been found.” “The Canada to which we really do owe loyalty,” Frye concluded “is the Canada that we have failed to create. In a year to be full of discussions of our identity, I should like to suggest that our identity, like the real identity of all nations, is the one that we have failed to achieve. It is expressed in our culture, but not attained in our life.”<sup>126</sup>

Frye might well have been speaking of the Canadian constitution. The search for Canadian constitutional identity has been an endemic feature of our constitutional history, one driven, more often than not, by a desire to create and express something distinctive and organic about the Canadian constitutional experience. The search itself revealed deep engagement with Canada’s constitutionalism, most prominently among elites in law and politics, but also more broadly in popular constitutional culture, especially journalism. As Peter Waite has shown, newspapers provided “continuous, almost exhaustive” treatment of Confederation because Canadians cared deeply about the topic, quite rationally recognizing that Canada’s constitutional arrangements had direct and meaningful impact on their lives.<sup>127</sup> Although I have cited only a smattering of journalists here, the same observation can be made about the media’s relationship to Canada’s constitutional status, dilemmas, and controversies of the twentieth century. More often than not, the constitutional message delivered to the doorsteps of Canadians in newspapers and magazines, especially in English Canada, was that Canada’s constitutional maturity, independence, and distinctiveness must be reflected in its formal constitutional law. Formally expressing that autonomy and defining that distinctiveness in constitutional text proved more difficult than demanding the need for them. In this way, the search for Canada’s constitutional identity (certainly one that could unite the disparate elements of the polity) often proved elusive—the search for lost meaning that could not be found. And yet, Frye gestures to the hopeful possibility that identity, if it resides beyond precise and *a priori* definition in some perfect past or Aristotelian form, finds real expression and meaning in the broader cultural life which sustains it. Frye raises the intriguing possibility that Canadian constitutional identity may exist as

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125. *Ibid* at 122.

126. *Ibid*.

127. Waite, *supra* note 59 at 347.

no definitive destination beyond the rich and productive negotiations of the journey to find it; a constitutional identity, in other words, of inquiry, negotiation, and relationships. Such a constitutional identity of process and relations might explain a constitutional law, politics, and culture of balanced federalism, reconciliation between Crown and aboriginal sovereignties, and proportionate limits on rights and freedoms.

I conclude with the thoughts and words of the constitutional thinker with whom this article began. Recall John Sanborn's belief that the power of a constitution lay in its ability to secure affection as an idea, ideal, and identity that resonated in the hearts of citizens. In the Confederation debates, he commended a constitution of the heart as a bulwark against change, so that it might resist innovation. A decade later, his experience deepened and nuanced by time in politics and law, his position had changed. An enthusiastic crowd gathered to hear Justice Sanborn's evening lecture on 15 February 1876 in the Reading Rooms of the Young Men's Christian Association in downtown Montreal. His topic was "The British Constitution" and his address began with a recitation of the period's typical observations about the virtues of the Magna Carta, habeas corpus, trial by jury, and the rule of law. But Sanborn ended his talk in a different vein. Turning his attention to "the constitution of the Dominion of Canada," Sanborn described its features for his lay audience but emphasized, in particular, "the various steps that have been taken to improve it." "[A]lthough great progress has been made," he averred, "it is not perfect". "[W]e should, while cherishing it," he concluded, "use our best endeavo[u]rs to further improve it, and thus become a really great and noble people."<sup>128</sup> Although Sanborn had previously counselled the necessity of resistance to constitutional change, he now saw a different set of lived constitutional attributes worth promoting. A constitution was still to be cherished, still a matter of the heart and not simply the mind, but now it was less a static object of reverence than a process of experience to be worked and reworked in reach of a distant destination of greatness, virtue, and justice. Above all, it was still a constitution of the people with its future held firmly and resolutely in their hands. Rising to their feet at the conclusion of Sanborn's remarks, the crowd heartily cheered, and headed out into the crisp winter air of a Montreal night to live their lives under a constitution they could not see, but was everywhere around them.

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128. "Justice Sanborn on 'The British Constitution,'" *Montreal Daily Witness* (16 February 1876) 2.

