RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION AND THEORY, Anthony A. Peacock, ed., (Don Mills: Oxford University Press, 1996)

I. INTRODUCTION

Unlike some of the other banalities of modern English, the expression "political correctness" arrived in our language as an instantaneous cliché — the sort of term that is both novel and tiresome at the same time. This is probably because it is an expression that itself described a manner of mouthing empty words which are calculated to suggest wisdom and modernity in the speaker. "Political correctness" is language as artifice — words that can mean anything that the speaker, like Alice, might want it to mean depending on the audience. One affliction of modern political and sociological discourse is that, presumably in a calculated effort to out-do one another with punchy and creative linguistics, writers too often resort to the creation of such inanities. Such writers then frequently surround these "nuggets" with astonishingly long and clause-ridden sentences deploying words like "epistemological," "communitarian," "taxonomy," and "distributionist." Save us.

By comparison, it was quite stimulating to read this anthology edited by Anthony Peacock. Students of law, sociology or politics should occasionally get a chance to read a crisp collection of meaty but brief opinion pieces by plain-speakers on a topic as important as Constitutional law. It also doesn't hurt if the writers evaluate accepted scripture both positively and negatively, as these certainly do. Anthony Peacock's collection of authors — lawyers, journalists and academics of varying philosophies — seem here to be refreshingly committed to getting their points across in a manner which is both efficient and effective.

One feature of this book is that there are, in each of the articles, turns of phrase both meaningful and memorable. I can readily recommend this collection for study purposes in politics, sociology and law. This is an easy and entertaining read — even on the bus on the way home. It certainly leaves you thinking. There is no better way to begin a review of this book than by quoting some of its most intriguing passages:

> No longer is the constitution considered to reflect a permanent order or as maintaining fixed constitutional forms. Rather it is a register of social pressures that must change and adapt to changing circumstances. The constitution is not a guide to politics so much as to be guided by politics. The implication is that as the constitution adapts to changing circumstances, so the rules and principles that apply to the circumstances must change with them. No longer a series of neutral rules for the resolution and management of political disputes, the constitution has become, in many important respects, a forum for the implementation of partisan programs. Liberal constitutionalism has been displaced, in increasing measure, by programmatic liberalism, a conception of the constitution that views it as a vehicle for potentially unlimited reform.[1]

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[1] A.A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills: Oxford University Press, 1996) at xii.

In his introduction, Anthony Peacock provides not merely an outline of the three areas of Constitutional discussion to which the contributors' pieces relate, but succinctly summarizes the essence of the book. Consequently, the book may be denounced by those who profit from trafficking in the Constitutional marketplace, since the writers, by and large, condemn Canada's venturing into the moral barrens of legalized politics. The book's three areas of Constitutional discussion are "Constitutional Reform," "Constitutional Interpretation" and "Constitutional Theory," but they could well be described as "Where did the Constitution come from?," "How is it doing?" and "Where is it going?"

The Constitution is now much more than a brooding omnipresence from which inspiration is occasionally drawn. Indeed, some contributors seem to suggest that our Canadian moral core has been at least partially evacuated, and that the Constitution is now a large and turbulent arena resembling an American football stadium in which everyone is required to buy a pricey ticket and to sit in the stands and watch self-selected teams of disputants win resources paid for by the tickets. So far, the audience has not been required to cheer.

II. WHERE DID THE CONSTITUTION COME FROM?

The purpose of the *Constitution Act, 1982* seems to have been to guarantee, against no then existing threat and by a fully formed Constitution installed directly into an already modern, free and democratic nation at peace, the values of liberty and equality, tolerance and morality, individuality and universality, religion and secularism, independence and mutuality, sensitivity and respect, law and order, peace and good government. To make this cornucopia of ("wish-list") guarantees workable, the judicial branch of government was not only recognized, but given the Constitutional tools to continuously re-work the Constitution and suppress, if necessary, any activities of the other branches of government. The supremacy of Parliament, a democratic notion purchased at great historical cost, was jettisoned in favour of a diminished override power under s. 33, and the vagaries of judicial permission under s. 1.

Whether it is the intention of any of the contributors to say so, the articles on the whole seem to make a case for concluding that the Constitution was installed in *rejection* of what Canada was and towards the creation of an Ameriform republic. On the other hand, they also seem to show that the net result of the efforts of the politicians of the times was an intensely legalistic document of pious generalities recognizing the value of *everything* that was considered a good thing in the late 1970s and early 1980s, from burly individualism through rights and freedoms, to language collectivism, to cultural recognition for aboriginal peoples, to affirmative action. As Peacock says, referring to Rob Martin's first contribution to the book, the influential politicians of the day engaged in "filling our constitutional cart with an incoherent array of different products."[2] It might be added that the consumers no longer push the cart nor decide what goes in it. This was, in one view represented here, nonetheless a great moral experiment:

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[2] *Ibid.* at xiv.

> Trudeau's vision was a moral vision, finally, because it demanded a special kind of self-sacrifice, connected with its being, at least on the surface, an experiment. If successful, all Canadians will of course benefit more or less. Those who designed and conducted the experiment will enjoy everlasting fame as benefactors of mankind. But if the experiment fails to produce a model for imitation, the reputations of some leaders may suffer, and so will the country. The real beneficiaries will be people living elsewhere. Doctors who test new drugs on themselves put the interests of their patients ahead of their own immediate interests. Similarly, Trudeau called upon Canadians to embark on a noble experiment for the sake of increasing mankind's political knowledge. Humanity stands to gain from Trudeau's experiment with Canada, no matter how it turns out.[3]

Forbes' sympathetic portrayal of Trudeau as a pragmatic visionary whose greatest achievements were in the areas of official bilingualism, multiculturalism and the *Canadian Charter of Rights and Freedoms*, achieves something that he may not have intended. A skeptic might infer that the sweep of Trudeau's aspirations was not exclusively altruistic and also reflected something of a consummate paternalism on the part of the long-serving Prime Minister, though Forbes prefers to call his approach a "far more principled, intelligent, generous and progressive response to the challenges of the time."[4]

Forbes points out, rightly, that the early writings of Trudeau demonstrate neither detailed nor unambiguous views of rights, or democracy, or values, and that his actual governance of Canada mainly reflected skillful improvisation, and pragmatism. Fundamentally, Trudeau, as a Prime Minister, believed in *central* government. Trudeau sought the benefits to well-being that *central* government, as opposed to the "private sector" or "local government," could provide, thus establishing systems with a continuously expanding and intrusive form of central command respecting social issues and distribution of resources.

Trudeau seemed to have a pluralist viewpoint, embodying some respect for individuality and some for community, but his routine response to a perceived threat to some form of his authority or to some element of his vision of the good society was to institute state structures, with a particular role for the *cognoscenti*, viz., smart lawyers and the judiciary. In other words, taking nothing away from the *ends*, the *means* selected by him were fundamentally aristocratic. Accordingly, Trudeau's working philosophy of government *is* very much reflected in the *Constitution Act, 1982*, whereby his dreams of the benevolent and wise government with flexible but absolute power is maintained by the mystique of Constitutional law. The problem is that

> There is no longer a Canadian idea that can give coherence to the Canadian state. There is, then, no obvious basis upon which Canada may survive as a multi-ethnic democracy. This assertion will probably be regarded as contentious in what is now more or less officially referred to, not as English-speaking Canada, but as 'the rest of Canada', but it would be seen as self-evidently true by most people

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3 H.D. Forbes, "Trudeau's Moral Vision" in *ibid.* 17 at 34.

4 *Ibid.* at 17.

> in Québec. A substantial number of Québécois now see no *raison-d'être* for the current Canadian state. No amount of constitutional tinkering will change this.[5]

Robert Martin's brisk and acerbic commentary in two segments endows this book with spice. With a journalist's skill for crisp sentence structure and colourful imagery, Martin wastes little time crediting anyone in particular with the *Constitution Act, 1982*, but does point out what a jolt it was for Canada, disavowing, as it did, the very idea of an initial marriage between an English and a French North America. Shedding the traditions of our European antecedents was not merely a legal revolution accomplished without swords, it was a true conquering of Canadian notions of democracy and law by the American politics of style, showbiz and "to the victims go the spoils."

Martin's lament also embodies his concern that we may well have also instilled in our young a "big lie," namely that prior to the *Charter* Canadians had no rights, and did not live in a "proper, respectable country."[6] In a sense, the *Constitution Act, 1982* was a form of self-directed "ethnic cleansing." Rather than being the "beacon of tolerance, universality, and diversity" to lead the rest of the world from darkness, as Forbes sees it, Canada has been enveloped in an American relativist fog where we can no longer even see ourselves, forcing us to try and find our identity.

> The reality, however, is that the quest for Canadian identity is just as pointless as the quest for Canadian literature. Good literature, like good politics, seeks answers to universal questions about human existence; the characters and setting may be Canadian, but the problems are general. A Canadian identity cannot be captured at a particular moment and imposed through an act of constitutional will; at best, the constitution can supply the political mechanisms for the gradual development of identity.[7]

Christopher Manfredi cites no less an authority than Peter Russell on Canada's pre-occupation with "mega-Constitutional" debate for some 30 years.[8] It has not been productive to lurch from accord to accord at the highest Constitutional level in an effort to continuously approximate a vision of Canadian unity, since unity is something that is not really a legal topic, nor necessarily served by legal symbols. In his view, a Constitution should be limited giving "the widest possible latitude of operation to the deliberative process" and limiting by embodying "however imperfectly, universal and eternal principles of moral justice."[9] The process of rendering liberal constitutions more perfect belongs to the citizens who must live under them; it is a slow process.

Manfredi suggests that the *Charter* invited the theory that mega-constitutional debate could occur in every legal dispute, thereby encouraging "policy competitors to raise their sights from legislating to constitutionalizing."[10] One went to Court to jostle for

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5 R. Martin, "A Lament for British North America" in *ibid.* 1 at 11.

6 *Ibid.* at 11.

7 C.P. Manfredi, "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord" in *ibid.* 40 at 56-57.

8 *Ibid.* at 41.

9 *Ibid.* at 57.

10 *Ibid.* at 56.

resources after the executive and legislative branches have been subdued. This piece thus led logically into the next segment of the book.

III. HOW IS IT DOING?

If there is particular theme in common to the contributors of this segment of the book, it is that the *Constitution Act, 1982* tilted Canadian government away from representative democracy and towards an élitist system whereby official citizens duly interpret democracy for the rabble below. This form of an official citizenry may well be developing along the lines of Athenian democracy. It is not easy to credit this dominating trend as an improvement or a desirable feature of a re-structured Canadian polity. This is so, even if, for now, the manifestations of it have had a somewhat better proportion of positives over negatives, rule over misrule, when compared with the forms of Canadian government which preceded it. The courts hold sway.

> Making use of the courts enabled these interests to throw a veil of legalism over their agenda, of course, but political analysts rightly peered beneath the veil. The same scepticism should govern the analysis of the current outbreak of judicial power....
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> We contend that Canada's modern Court Party, like its Depression-era predecessor — and as one might expect with any political faction attracted to an appointed institution — is a coalition of élites....
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> The old Court Party was inspired by materialist élites who attempted to use the courts to resist the interventionist and redistributionism policies of elected governments. The postmaterialist knowledge class underlying the current Court Party, by contrast, wants to use the courts to further activist projects of social transformation, either in the service of national unity (by re-engineering political identities) or in the name of re-engineering the systemic or structural causes of evil in human relations.[11]

As Knopff and Morton point out, there is nothing new about persons forming alliances in a movement to re-create the state to favour the new group's aims. This is ordinary politics. What is somewhat different is that the Court Party, as they conceive it, has gravitated to the part of government occupied by tenured and appointed officials who are virtually invulnerable and who are not even *supposed* to act like temporary "responsible government" officials.

The Court Party coalition that they see consists of the "unifiers": *Charter*philes who see the Constitution as a glue to hold the country together, like Trudeau; the "*Charter* Canadians": segments of the body politic who share some particular policy *animus* that they feel is not adequately rewarded by the legislative and executive branches; and the "Social Engineers": people who believe that changing the government can solve all social woes. Significantly, of these components of the Court Party, they are also dominated by internal élites. It is an irony that, mesmerized by "Constitutionspeak," the persons most likely to be harmed by the Court Party agenda are the ones called upon to pay for its advancement.

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[11] R. Knopff & F.L. Morton, "Canada's Court Party" in *ibid.* 63 at 80-81.

> [Judicial] activism, in other words, is an activism that comes to light in the particularly pernicious atmosphere of late-twentieth century self-expressive liberalism. It is therefore accurate to say that judicial activism itself is not, strictly speaking, the heart of the problem. It is now merely one of the primary vehicles by which the new moral philosophy insinuates itself into Canadian life. This is a reality with which the Canadian legal academy is congenitally incapable of dealing, so stunted is its philosophical horizon. This horizon generally extends no further than John Rawls, or perhaps Ronald Dworkin or Robert Nozick on a clear day. Traditional Canada and, perhaps more important, the tradition of western philosophy are anachronism for historians and theologians to preach about; they are not to stand in the way of realizing the brave new world of *Charter* politics.[12]

Bradley Watson sees the discourse in *Charter* litigation as much too heavily influenced by the "me-first" perspective which was the predictable outcome of the sort of liberalist theory that dominated academia, the media and governing circles at the time the *Charter* came into effect. The efforts of the Mulroney administrations to further tinker with the *Charter*, in his view, accorded with the fact that his governments were a "strange admixture of conservative stalwarts led by a thoroughgoing liberal élite utterly devoid of vision or a substantive understanding of the kind of Canada they haphazardly stumbled toward."[13] So, *Charter* boosterism and "rights talk" are connected, but unguided.

> Unfortunately, while the general concept of rights seems to have stuck in many minds and inspired many hearts, few of those so enkindled seem to have pursued the object of their inspiration in any intellectually rigorous way. With their personal visions of 'the good' flitting before their eyes like butterflies, they have tried to use the concept of rights like a net to capture the pretty prize; but in doing so, they have unwittingly torn gaping holes in the net and let escape what they were hoping to secure.[14]

Karen Selick makes no pretence about her belief in the benefits of the free market economy. Like Robert Martin, she is not shy about expressing her views, even if they may set a few icons aquivering. She also shares with others in this segment a thoughtful skepticism about the benefits of a judicial aristocracy. Like Forbes, however, she may support an argument she had not directly intended. Her advocacy of a means of *re-designing* the content of the *Charter* so as to protect "property rights" and drop out affirmative action seems really to resemble what Knopff and Morton would say to be the agenda of merely a *different* "Court Party." The image of chasing butterflies, moreover, must in some instances be adjusted, since a curial process is generally more like using artillery. One captures few butterflies and knocks over many other good things.

> When the process that was intended to remove the protection of equality from partisan, political disputes, itself becomes consumed by partisanship and ideology, meting out economic and legal benefits on the basis of dubious generalizations about groups, the relationship between the individual

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12 B.C.S. Watson, "The Language of Rights and the Crisis of the Liberal Imagination" in *ibid.* 88 at 98.

13 *Ibid.* at 99.

14 K. Selick, "Rights and Wrongs in the Canadian Charter" in *ibid.* 103 at 103-104.

> and the group that has characterized Canadian pluralism becomes inverted. No longer is the individual identified as an individual, but as a member of a group with fixed characteristics and interests. The very group-based distinctions that determined political rights and privileges in non-democratic regimes, and that the modern democratic state was intended to overcome, resurface as the basis of political rights. Has Canadian democracy then been transformed into a status regime?[15]

Anthony Peacock's own discussion of "equality" litigation, with its boosters adverting to the fundamental failure of the law to heretofore approach real equality, draws heavily from Alexis De Tocqueville, whose influence on the American Constitution can hardly be doubted. De Tocqueville predicted that efforts to bring about a sovereignity of an utterly equal populace would require a regulation and surveillance that would stifle the very liberties and rights it was supposed to protect, and ultimately link every activity to the state in an "immense and tutelary power." This caricature of the advanced democratic society would resemble Stalinism more than Westminster, or so *Charter* skeptics might say.

> The most profound criticism by the *Charter* sceptics cannot be characterized as either left- or right-wing. Rather, it concentrates on the nature of judicial decision-making and maintains that the courts are inherently unsuitable, or even incompetent, to make good decisions about public policy. Courts are designed as chambers of adjudication rather than as parliamentary bodies. All of their internal workings suit them to resolve disputes on a case-by-case basis rather than to make decisions with wide-ranging policy implications.
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> For example a court is bound by its mandate to regard all matters in terms of rights, rather than in terms of the public good.[16]

Scott Reid's piece ultimately asserts that the judicialization of the Canadian policy debate is not the most effective means, let alone the most democratic means, for determining such important policy issues. He does not suggest that the Courts fail in their traditional functions, but expresses the view that a modernized referendum-connected process under s. 33 of the *Charter* could work well with both traditional democratic processes and the judicial process. He observed that the current methodology of assaying the validity of a law in the crucible of s. 1 presented the judiciary with a daunting task of discerning what a free and democratic society would regard as acceptable limitation on a right or freedom without the sources of information available to Parliament.

> The Supreme Court of Canada's call for and acceptance of a mass of doubtful political evidence and its casual use of it has simply illustrated the incapacity of any court satisfactorily to exercise the power that the Court so complacently holds. A proper use of evidence would limit its quantity and use to showing that the legislature was reasonably addressing a problem and not simply contemptuous of rights and freedoms. It would see the Court expressly relying on evidence in its reasons or expressly

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[15] A. Peacock, "Strange Brew: Tocqueville, Rights and the Technology of Equality" in *ibid.* 122 at 152.

[16] S. Reid, "Penumbras for the People: Placing Judicial Supremacy under Popular Control" in *ibid.* 186 at 193.

> rejecting it as unhelpful and unwanted. It would subsume evidence within an extended legislative history and allow the Court to speak once on the validity of legislation rather than leaving it open for fresh evidence or changed circumstances. Most importantly it would require the Court expressly to limit its own absolute power.[17]

John Pepall's short piece concludes with the above paragraph, after analyzing a number of cases in which the Supreme Court of Canada found itself asked to address difficult and controversial social issues that were at the heart of specific litigations, including several criminal cases. This article, and that of Gerald Owen[18] are the two shortest pieces in the book, and have perhaps the most direct focus. Rather than speaking to larger philosophical questions, the authors look at specific issues, Owen writing somewhat mildly about the downstream effects of a criminal law watershed, and Pepall rather negatively about the efficacy of the Court as an arena of social policy fact finding.

IV. WHERE IS IT GOING?

This final collection draws from the first and second parts to imagine how new Constitutional theory might be translated through the presently judicialized processes towards either reinvigorating or finally dispatching what is — in the present writer's view, and for all its confusions — the greatest nation in the history of the world. Providing a fascinating historical perspective drawing from such disparate sources as Fortescue, Homer, and Margaret Thatcher, Barry Cooper notes that the development of a popularly accepted Constitution by incremental association of sentiment and convention with governing practices had largely converted institutional structures into Constitutional ones.[19] By comparison, the *Constitution Act, 1982* transformed Constitutional notions into institutional structures, an approach not curing any problems with Canada.

Darby and Emberley note the fixation with linguistics that a Constitution drafted by lawyers for an existing society constructed on honour has produced. They suggest that attending only to words and ignoring the real nature of things is not only naive, but is oblivious to the acquired wisdom of drawing law from life as well as from ideas. The deployment of words according to an "artificial, ideological agenda" offers no comfort.[20] Like Cooper earlier in the book, and Isaac Newton long before, Darby and Emberley "stand on the shoulders of giants" of political thought to evaluate the prospects for Constitutional development. Perceiving politics as a continuous process of balancing nature and convention, realities and rules, they bemoan the excessive burden being placed upon the Constitution of Canada to carry the burden of continuous

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17 J.T. Pepall, "What's the Evidence? The Use the Supreme Court of Canada Makes of Evidence in Charter Cases" in *ibid.* 161 at 173.

18 G. Owen, "Disclosure After Stinchcombe" in *ibid.* 177.

19 B. Cooper, "Theoretical Perspectives on Constitutional Reform in Canada" in *ibid.* 217.

20 T. Darby & P.C. Emberley, "'Political Correctness' and the Constitution: Nature and Convention Re-examined" in *ibid.* 233 at 234.

social transformation at all levels and in all contingencies. Most specifically, they denounce wordplay law:

> These pressures, we argue, have their origin in intellectual fantasies for which the shorthand name is "political correctness." These fantasies stem from a distortion of the relation of nature to convention that links the romanticism of Rousseau, the cynicism of de Sade, and the psychopathology of pity described by Nietzsche. Political correctness has targeted the very medium of understanding and of engagement between human beings — speech — as the object of a radical debunking of the order of the world. It is an attempt to cleanse speech of the hierarchies, judgments, and ambiguities that emerge from our everyday experiences. Political correctness attempts to put in place a fluid, artificial system of communication that by re-naming the world will alter its reality. Political correctness is a bid at world re-creation.[21]

Transformation theorists, of course, would not worry about world re-creation because they would think it deserves it. The problem is that Constitutions don't exist to transform, but to gather and protect the fundamental. Like school curricula, which should be open frameworks beyond sectarian interest and compromise, Constitutions should be broad, formal and impartial matrices of the rules of law. Using the Constitution to resolve temporary crises of accommodation not only trivializes the Constitution but imposes the most ruthless measures on the situation.

In his second piece, Robert Martin follows up this theme in a robust but detailed article decrying what he calls the "orthodoxy of relativism," to which one would not wish any Constitution to fall victim. He recognizes the oxymoronic character of a notion like "orthodoxy of relativism" but does point out that relativism is not subjected to the same test that it inflicts on other opinions.[22] Ultimately, what commences as skepticism about the inevitability of the necessary truth of traditional intellectual, cultural or moral viewpoints becomes cynicism, and degenerates into a self-centred passion for something else.[23] In his view, that philosophy can be quickly exposed as a substitution of a new dogmatism, without any goal larger than creating artificial classes of persons according, almost exclusively, to physical denominations, for whom entitlement to benefits is reflexively recognized. Martin Luther King opined that persons should be measured otherwise, urging that the evaluation should be by the "content of their character." Being unable to evaluate character, the idealogues of the artificial classes have the ease of identifying themselves to qualify.

Closing out with a brief commentary on the aftermath to the Quebec Referendum, Anthony Peacock expresses no surprise for its occurrence, but distress about its implications.[24] He proposes that we think about establishing a common understanding of the role of government rather than the role of the Constitution, but is uncertain about

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21 *Ibid.* at 245-46.

22 R. Martin, "Reconstructing Democracy: Orthodoxy and Research in Law and Social Science" in *ibid.* 249 at 250.

23 *Ibid.* at 253.

24 A.A. Peacock, "The 1995 Quebec Referendum, Liberal Constitutionalism, and the Future of Canada" in *ibid.* 271.

the willingness to do this, or the chances of success if attempted.[25] It is difficult to avoid seeing Canada as suffering from factionalism, perhaps a reaction attributable in part to the experiment of Pierre Trudeau. What is more worrisome, though, is the level of indifference or even hostility manifested by a surprising number of Canadians to the whole idea. We all should worry if too many people in the stands don't care any more. The game is not close to decision but people are already heading to the parking lot.

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[25] *Ibid.* at 274.