THE REAL LAWS OF THE CONSTITUTION

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Legal doctrine alone is rarely determinative of the outcome in constitutional adjudication. Recalling the hypotheses of the legal realist movement, the author discusses some of the non-doctrinal factors that may be at work in judicial decision-making. The author calls for greater judicial frankness when invoking such non-doctrinal factors and for assistance from the academic community in order to help identify those factors. In the result, it is hoped that those factors which judges are ill-equipped to consider be isolated and, if need be, reposed in other, more suitable, bodies by the legislatures.

La doctrine du droit suffit rarement à déterminer, seule, le prononcé d'une décision constitutionnelle. En rappelant les hypothèses du mouvement réaliste juridique, l'auteur examine certains des facteurs non doctrinaux pouvant entrer en ligne de compte dans le processus décisionnaire judiciaire. L'auteur exhorte la magistrature à une plus grande franchise à ce sujet et propose que la communauté universitaire soit mise à contribution pour identifier les facteurs en question. Il souhaiterait que l'on parvienne à isoler ces facteurs que les juges sont mal préparés à traiter et que les législatures les confient, si besoin est, à des instances plus appropriées.

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I. INTRODUCTION

This essay is an attempt to apply to Canadian constitutional law a root hypothesis of old-fashioned American legal realism: that factors other than legal doctrine are at least as influential as doctrine, and sometimes more so, in judicial decision-making.

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The suggestion is far from novel; virtually everyone who has taught Constitutional Law in Canada for at least the last thirty years has engaged her or his class in discussions about what "really" was decisive to the outcome of problematic cases. The reason I consider the topic worthy of further examination at this late date is that despite apparent widespread acceptance of the realist hypothesis at the academic level over many years, little was ever done about it. Instruction in Constitutional Law is still organized chiefly in terms of legal doctrine, and examinations still focus almost exclusively on students' ability to apply those doctrines. With rare exceptions, Canadian judges eschew any reference in their decisions to factors other than doctrinal ones, and lawyers wishing to address other issues in their submissions to the courts are often forced to use clandestine means. The situation is similar to that of map-makers in the ancient world who, though aware of convincing evidence that the world is round, continued to produce maps based on the flat world hypothesis because their customers, and the church, were more comfortable with the old approach.

I think that the time has come for Canadian constitutional scholarship to give serious attention to the realist hypothesis. The hypothesis should be subjected to rigorous academic investigation, and it should be rejected if it cannot be confirmed. If it is confirmed, its ramifications must be studied carefully, and its lessons acted upon by judges, lawyers, scholars, and politicans.

This paper is speculative, rather than scientific. It expresses my belief that the realist hypothesis is valid, so far as it applies to Canadian constitutional law, and it provides a few examples of the impressionistic evidence upon which that belief is based. It then attempts to identify some of the more common non-doctrinal factors I believe to be involved, and some of the major consequences of the hypothesis.

My argument has four components. The first is an assertion that law is not determinative alone. The second examines the contribution that law does make to the process of constitutional decision-making. The third speculates about the nature of the non-legal factors involved. The fourth addresses the consequences of the hypothesis, if valid.

II. IMPORTANT JUDICIAL DECISIONS ABOUT CONSTITUTIONAL LAW ARE SELDOM DETERMINED BY LEGAL DOCTRINE ALONE

A quarter century of studying and teaching Canadian Constitutional Law has convinced me of this proposition. The evidence, circumstantial but overwhelming, consists of a large body of judicial decisions on constitutional questions that cannot be adequately explained in terms of legal doctrine, but can be quite readily accounted for if other, non-legal factors, are considered. To present a sufficiently large sample to be statistically significant would be impossible in the space available for this essay, so I will offer only two introductory examples, to be supplemented by a few additional illustrations later in the discussion.

The first case in point is *Temple* v. *Bulmer*,[1] a decision of the Supreme Court of Canada, confirming holdings of the Ontario Court of Appeal and the Ontario High Court. The case involved a claim by a Toronto resident for an order that a writ be

1. [1943] 3 D.L.R. 649 (S.C.C.). I am grateful to Lee Gibson for her assistance concerning the background to this case.

issued for a by-election in his constituency to fill a long vacant seat in the Provincial Legislature. The previously elected member for that constituency had died, and two sessions of the Legislature had passed without a by-election having been called to choose a replacement. By the time the Supreme Court of Canada ruled upon the matter, almost three years had elapsed.

The relevant section of the provincial Legislative Assembly Act read, in part, as follows:[2]

> [I]f the seat of a member of the Assembly has been vacant for three months and no Writ has been issued, the Clerk of the Crown in Chancery shall issue the Writ forthwith.

The plaintiff sought an order of *mandamus* against the Clerk of the Crown in Chancery, ordering the Clerk to issue an election writ. The claim was rejected by Greene J., of the Ontario High Court, and, unanimously, by both the Ontario Court of Appeal and the Supreme Court of Canada. The decision of the latter court, written by Chief Justice Sir Lyman Duff, was based upon only one of the grounds stated in the reasons of the Court of Appeal: that to issue the requested Order "would constitute an intrusion upon the privileges of the Legislative Assembly."[3] The Court of Appeal had added the observation that:[4]

> The Legislative Assembly has itself the right to declare when and by whom elections shall be held . . .

Although not quoted by the Supreme Court, this statement was undoubtedly approved by it.

As a basis for refusing to enforce an unequivocal statutory obligation, this rationale was patent nonsense. The calling of elections is neither a function nor a privilege of the Legislative Assembly itself; it is an *executive* responsibilty. As the trial judge pointed out, the task normally falls to the Lieutenant-Governor-in-Council. It is for the Legislature to lay down the general principles relating to when and how elections should be conducted, of course, and the Ontario Legislature had done precisely that in this case. It had declared, to use the words of the Court of Appeal, "when and by whom elections shall be held", if a vacancy occurred. What the plaintiff was seeking was an order against an officer of the *executive* branch of government for refusing to do *precisely what he had been told to do by the Legislature* itself.

The denial of this remedy ignored a compelling line of judicial decisions confirming that the legality of administrators' actions is subject to review by the courts. In particular, it overlooked the old decision of *Ashby* v. *White*,[5] which confirmed the right of a citizen to sue election authorities if unlawfully denied the right to vote. Most egregiously of all, the *Temple* decision, by excusing the executive from its statutory responsibilities concerning elections, violated the principle of the rule of

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2. *Election Act*, R.S.O. 1937, c.12, s.34.

3. *Supra*, note 1 at 651. The Court of Appeal had used the expression "functions and privileges", rather than just "privileges", but the contraction by Duff C.J.C. would not appear to be significant. The Supreme Court declined explicitly to deal with the Court of Appeal's primary reason — that the applicant had no "status" (standing). Neither court commented upon the reasons of Green J. that it would be impossible for the Clerk to comply with the statutory obligation because of another statute giving the power to call elections to the Lieutenant-Governor-in-Council, and (much more plausibly), that *mandamus* is a discretionary remedy which a court may refuse if it sees fit.

4. *Ibid.*

5. (1703), 2 Lord Raymond 938, 92 E.R. 126 (H.L.).

law, which the Supreme Court of Canada has recently assured us has always been a foundation of the Canadian Constitution.[6]

In the face of the Supreme Court's failure to explain its decision satisfactorily, some legal academics have attempted to provide a different doctrinal rationalization than that which the Court offered. They have suggested that the case constitutes a Canadian application of the American "political questions" doctrine. This principle is to the effect that questions which, though formally couched in justiciable form, are primarily political in their essence, are not appropriate for judicial determination.[7] Although it is often explained in terms of the American constitutional doctrine of "separation of powers", the "political questions" principle could also be explained, perhaps more realistically, by an observation attributed to Solon:[8]

> Laws are like cobwebs in that if any little thing falls into them they hold it fast, but if a thing of any size falls into them, it breaks the meshes and escapes.

The problem with a "political questions" explanation of *Temple* v. *Bulmer* is that the Supreme Court of Canada sometimes undertakes to deal with intensely political issues. It did not hesitate, for example, to apply the Canadian Charter of Rights and Freedoms to a federal Cabinet decision permitting the testing of Cruise missiles in this country by American military forces,[9] or to rule on the existence of a *non-legal* constitutional convention prohibiting the Government of Canada from seeking an amendment to the Constitution of Canada over the objections of eight provincial governments.[10] There is, moreover, nothing in the reasoning of the *Temple* decision, at any level, that supports a "political questions" rationale; and there is no authoritative Canadian jurisprudence that recognizes the legitimacy of such a principle.

All doctrinal explanations of this unanimous decision by distinguished judges seem, therefore, to fail. Can a non-doctrinal rationale be found? I believe so.

The case was decided during the darkest days of World War II. A new, left-wing, political party, the Cooperative Commonwealth Federation (predecessor of the N.D.P.), was flexing its muscles in Ontario.[11] To the astonishment of many, a C.C.F. candidate had recently defeated no less a political giant than former Prime Minister Arthur Meighen in a federal by-election in that province.[12] The plaintiff, Temple, was a C.C.F. supporter. He and his political colleagues sensed that the

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6. *Patriation Reference* (1981), 125 D.L.R. (3d) 1 (S.C.C.).
7. See G. Sawer, "Political Questions" (1963) 15 U.T.L.J. 49; L. Henkin, "Is There An Internal "Political Question" Doctrine?" (1976) 85 Yale L.J. 597; B.L. Strayer, *The Canadian Constitution and Courts*, (3rd ed.) (Toronto: Butterworths, 1988) at 216 ff. Strayer does not treat the *Temple* as having been determined on the basis of the political questions principle, however.
8. Quoted in W. Seagle, *Men of Law from Hammunabi to Holmes*, (New York: Macmillan, 1947) at 42.
9. *Operation Dismantle Inc.* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.). Strayer, *supra*, note 7 at 338-9 suggests that the Supreme Court may have "rejected" the political questions notion altogether in this case. That may not be a safe assumption. In the *Quebec Veto Reference* (1983), 140 D.L.R. (3d) 385 at 395 (S.C.C.), the Court declined an opportunity to apply the doctrine, but only because it regarded the question before it as not being "purely political". The Court's treatment of the issue in that case appears intended to preserve the possibility of invoking the political questions doctrine if it should appear appropriate in some future case.
10. *Supra*, note 6.
11. L. Zakuta, *A Protest Movement Becalmed* (Toronto: Univ. of Toronto Press, 1964) at 62, cites figures showing a remarkable growth in party membership between 1941 and 1943.
12. Toronto Globe and Mail, February 10, 1942.

federal by-election might signal mushrooming C.C.F. fortunes at the provincial level as well. (Subsequent events proved them right; when a provincial election was finally held, the C.C.F. won 32 seats in the provincial house and 32 percent of the popular vote. Temple himself ran a close second to Conservative leader, George Drew.)[13] Those who seek an explanation for the courts' refusal to order the Clerk of the Crown in Chancery (the provincial Cabinet, in reality) to abide by the statutory obligation to call a by-election need look no further than to these political realities.

Mitchell Hepburn resigned as Premier of Ontario immediately after the Court of Appeal decision in *Temple* v. *Bulmer*, having remained in office until he was sure of the judicial results. In a letter written to two of his political allies at that time Hepburn explained his reasons for refusing to countenance by-elections in the prevailing circumstances:[14]

> I am proud of the fact that I did not succumb to the demand for a general election and have this province in a turmoil when the . . . blood-bath in Europe is about to take place. There would be created, among other things, a sharp division between labour and industry at a time when we are trying to obtain maximum production.

Another, probably equally valid, rationale was expressed in a Toronto *Globe and Mail* editorial comment at about the same time:[15]

> With the War Measures Act, Ottawa has virtually complete control of the provinces, and there is little left in purely provincial jurisdiction. There is no need for a disturbing general election for this glorified county council, which the legislature has become.

The courts knew, as well as everyone else, that a radicalization of the electorate was in progress, that a major shift in the distribution of political power might disrupt the single-minded concentration on the war effort that most considered desirable, and that, in any event, the distraction of election campaigns would divert some of the energy that might otherwise be available for war work. No one should be (or was) surprised that they decided the case as they did.

It might be objected that situations like those involved in the *Temple* case are so unusual as to be aberrations, and are not typical of constitutional decision-making in general. They might be considered "exceptions that prove the rule," or the "hard cases" that are said to produce bad law. This objection can be countered in two ways. In the first place, many landmark constitutional cases, if not most of them, are "hard" cases. A very high proportion of constitutional disputes involve tensions between important communitarian values and the equally important rights of individuals or minority groups. To accept that such "hard" cases usually produce bad law would be to damn a substantial portion of existing constitutional jurisprudence. The other response is that the phenomenon of doctrinally inexplicable but practically understandable constitutional decision-making is as observable in relation to garden-variety disputes as it is in relation to politically momentous ones.

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13. Toronto Globe and Mail, August 5, 1943.
14. Hepburn to Manion and Bracken, October 17, 1942, quoted in N. McKenty, *Mitch Hepburn* (Toronto: McClelland and Stewart, 1967) at 253. He went on to add a second reason: "There would have been raised in all probability a bitter racial issue which would have destroyed the last vestige we have of national unity". This second reason presumably refers to the possibility that a provincial election would somehow raise the conscription question, upon which many Quebecers were sharply divided from other Canadians, but that risk would seem to have been quite remote.
15. Toronto Globe and Mail, October 19, 1942.

My second introductory illustration involves a group of "everyday" cases: claims to the right to counsel under s.10(b) of the *Canadian Charter of Rights and Freedoms*.

The success rate of *Charter*-based claims and defences varies interestingly from one right or freedom to another. The overall success rate, for all categories, over the first four years of *Charter* litigation has been calculated to be 31 percent.[16] Some rights have fared much less well than the norm, however. Claims to freedom of conscience and religion under s.2(a), have been successful in only 19.2 percent of cases, for example.[17] Invocations of s.9, freedom from arbitrary detention, were successful in 28.5 percent of the cases, which coincides almost exactly with the rate for "legal rights" cases generally.[18] Where the right to counsel under s.10(b) of the *Charter* is concerned, however, the success rate soars to 45.3 percent.[19]

What can account for the remarkable track record of s.10(b) before the courts? One explanation could be that the right to have legal advice is more fundamental than other Charter rights, in the sense that it serves those other rights by ensuring that they will be recognized and acted upon in the most effective manner. Other, less noble, explanations are also available. One possibility is that judges, as former lawyers, are simply more alive to the importance of a right that involves their former profession directly, and affects the livelihood of its members, than they are to other rights and freedoms.

This suspicion of professional bias gains plausibility in light of judicial rulings on other matters, some of them of very long standing, that seem to display favoritism toward the legal profession or the judiciary itself. There is, for instance, the rule of evidence by which the legal profession is the only one whose members cannot be compelled under subpoena to disclose professional confidences in court. Jeremy Bentham remarked about this rule that:[20]

> English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice.

The exaggerated gravity that Canadian judges often attribute to criticisms of the judicial process, and their sometimes heavy-handed use of the contempt power to suppress such criticism, is well known. In *R.* v. *Vancouver Province*,[21] for example, a nationally respected newspaper columnist, Eric Nicol, and the newspaper that employed him, were found guilty of contempt of court for publishing an article, in opposition to capital punishment, that depicted Nicol himself (as a member of the public that tolerates capital punishment) being on trial before God for the "murder" of a man recently sentenced to be hanged. The article referred to the jury as "the people who planned the murder" and to the judge as the one

16. F.L. Morton and Michael J. Withey, "Charting the Charter, 1982-1985: A Statistical Analysis" [1987] Canadian Human Rights Yearbook 65.

17. Based on 52 cases: all those reported in *Canadian Charter of Rights Annotated* up to December 1988, supplemented by several reported cases found in other sources. I am grateful to Allan Domes and Donna Molzan for compiling the statistics on sections 2(a), 9, and 10(b).

18. Based on 77 cases chosen as indicated in note 17. The general average for all legal rights was found by Professors Morton and Withey to be 28 percent: note 16, above.

19. Based on 64 cases, chosen as indicated in note 17, above.

20. J. Bentham, *Rationale of Judicial Evidence* (New York: Garland Pub., 1978, reprint of 1827 edn.).

21. (1954), 12 W.W.R. 349 (B.C.S.C.)

"who chose the time and place and caused the victim to suffer the exquisite torture of anticipation". For this imaginative social criticism, both the author and the newspaper were subjected to substantial fines.[22]

The Supreme Court of Canada's recent ruling that courthouse employees who are lawfully on strike may not conduct even token picketing of the court buildings without being in contempt of court also raises doubts about judicial objectivity where judicial interests are involved.[23] The same Court's holding in the *Dolphin Delivery*[24] case that judges are the only public officials exempt from obligations under the Canadian Charter of Rights and Freedoms had provided an earlier basis for similar doubts.

None of this proves that the remarkable success rate of right-to-counsel claims is the result of professional favoritism, of course. What is clear is that there is no compelling doctrinal rationale for the discrepancy, and that the non-doctrinal explanation of professional bias has considerable plausibility.

III. THE ROLE OF LEGAL DOCTRINE IS RESTRICTED TO: (A) DELIMITING THE RANGE OF JUDICIAL DISCRETION; AND (B) ENCAPSULATING SOME, BUT NOT ALL, OF THE FACTORS TO BE TAKEN INTO ACCOUNT

I do not deny that law plays a role in constitutional decision-making. The second part of my argument postulates two uses for legal doctrine. The first of these is to restrict the factors that may legitimately be taken into account by courts in determining particular types of disputes. The second is to contribute some, but not all, of the substantive factors that are taken into account.

The delimiting function narrows the range of doctrinal matters that may properly be considered. As section 1 of the *Canadian Charter of Rights and Freedoms* subjects *Charter* rights to only those "reasonable limits . . . in a free and democratic society" that are "prescribed by law", for example, it would not be open to a court to uphold a police policy denying access to lawyers until after suspects have undergone an initial interrogation, even if it were considered completely reasonable, unless the policy had been enshrined in law.[25] In this respect, law may be thought of as a set of book-ends, supporting and defining the authorities that may legitimately be consulted for the purpose of solving the problem at hand.

Legal doctrine also provides some, but not all, of the books between the book-ends. If, for example, a police policy restricting the right of detained persons to counsel were "prescribed" in some statute or regulation, the courts would then have the task of deciding whether that policy was "reasonable". In doing so they would be considerably guided by the factors which the Supreme Court of Canada set out in *R.* v. *Oakes*:[26] whether the policy serves a "pressing and substantial"

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22. It must, in fairness, be noted that the Ontario Court of Appeal recently held that the law of contempt of court must yield to the *Canadian Charter of Rights and Freedoms: R* v. *Kopyto*, (1988) 147 D.L.R. (4th) 213 (Ont.C.A.). It is interesting to note, however, that the defendant in that case was a lawyer.
23. *British Columbia Government Employees Union* v. *Attorney-General of British Columbia, et al.* (1988), 53 D.L.R. (4th) 1 (S.C.C.).
24. *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (S.C.C.). See *infra* note 25, and associated text.
25. *R.* v. *Therens* (1985), 18 D.L.R. (4th) 655 (S.C.C.).
26. (1986), 26 D.L.R. (4th) 200 (S.C.C.).

social objective, and whether the means chosen to achieve the objective are "rationally connected" to the goal, are designed to achieve it with as little obstruction of constitutional rights as reasonably possible, and are not productive of harm "disproportionate" to the objective sought to be achieved. As this example illustrates, however, the doctrinal factors are seldom if ever automatically determinative. Most of them include discretionary components that invite the courts to make socio-political value assessments.

Another feature of the legal doctrines found between the bookends is that many of them come in matched sets, each being paired by a logical opposite. This characteristic of many legal principles has long been observed.[27] Examples from Canadian constitutional law are legion. To determine whether a provincially-imposed tax is "direct", and therefore within the constitutional authority of the provincial legislatures under s.92(2) of the Constitution Act, 1867, the courts usually adopt a functional test, originally enunciated by John Stuart Mill.[28] If, however, the functional test does not produce a desirable result, it is alternately open to the courts to apply the "historical" test, which ignores functional factors, and classifies taxes according to the manner in which they were generally categorized in the past.[29] When applying these, or any other constitutional doctrines, it is usual to look beyond the mere form of the law or arrangement in question to its real "pith and substance".[30] If that would produce an unsatisfactory result, however, a court may choose to look no further than the form.

A good illustration of all this is the Privy Council decision upon which the constitutional authority of the provinces to impose sales taxes is based: *Atlantic Smoke Shops* v. *Conlon*.[31] Sales tax is the classic example of an indirect tax. It was precisely the type of tax that the drafters of the Constitution Act attempted to prevent the provinces from levying. Its most undesirable feature was thought to be its capacity to remain hidden. If levied against retailers, it might be passed on to consumers without their knowing the extent of the taxation to which they were being subjected in actuality. By the "historical" test, therefore, sales tax would not be within provincial jurisdiction. Nor would it be so if Mill's functional test were applied, since that test finds any tax to be indirect which has a general tendency to be passed on from the person against whom it is initially assessed to someone else. However, the political fact is that by the time of World War II the sources of revenue open to provincial governments under the 1867 Constitution had ceased to be adequate for their growing governmental responsibilities. A way had to be found that would permit the provinces to impose sales taxes, and the direction was pointed by a tobacco tax created by the Nova Scotia legislature and held to be valid by the Privy Council in the *Atlantic Smoke Shops* case.

The device employed was to phrase the tax as a "purchase" tax, levied directly against the purchaser of tobacco products. The retailer was then designated as a "collector" of the tax on behalf of the government, rather than as the "taxpayer".

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27. See, for example, W.L. Twining and D. Miers, *How To Do Things With Rules* (London: Weidenfeld and Nicolson, 1976) at 210.

28. *Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575 (P.C.).

29. *Halifax* v. *Fairbanks*, [1928] A.C. 117 (P.C.).

30. *Texada Mines Ltd.* v. *A.G. of British Columbia*, [1960] S.C.R. 713 (S.C.C.).

31. [1943] A.C. 550 (P.C.).

The effect of this scheme was identical to that of a classic sales tax. For the purchaser of a package of cigarettes, there was no discernable difference; the difference was simply one of legal form. If the "pith and substance" principle had been applied, the scheme would have been struck down. The Privy Council chose to consider only the form, however, and the door was thereby opened to sales taxes of many varieties (always cast as "purchase taxes", of course), including complex schemes in which manufacturers and wholesalers are designated as "collectors", and retailers as "deputy collectors".[32]

Other principles of constitutional law also come in boxed sets, like matching pairs of duelling pistols. If, for example, a provincial statute contains a provision relating to a matter that falls under federal jurisdiction, it may be invalidated on the ground that the Parliament of Canada has "exclusive" jurisdiction over the topic[33] or it may be permitted to survive on the ground that it falls within an area of "overlapping" federal and provincial jurisdiction, where provincial enactments are valid unless they conflict with inconsistent federal legislation.[34] If an otherwise valid statute contains an unconstitutional provision, the offending section can be labelled "severable", and can be surgically removed from the statute,[35] or it can be characterized as "necessarily incidental" to the rest of the statute, and allowed to remain in force.[36] In the latter situation there is, in fact, a third possibility available as well: the invalid part can be treated as involving the "pith and substance" of the legislation, and the entire statute can be accordingly struck down.[37]

This promiscuity of constitutional doctrine does not render it meaningless. My point simply is that legal principles are not absolutes. They are useful to the determination of disputes only after they have been given a weighting appropriate to the context, and have been balanced against other principles that are also relevant to the question at hand. Their function is very similar to that of popular proverbs. Proverbs also come in matched pairs (Absence makes the heart grow fonder/Out of sight is out of mind. Penny-wise may be pound-foolish/A penny saved is a penny earned. All work and no play makes Jack a dull boy/The devil finds work for idle hands). This does not invalidate the proverbs, however; they each express, in capsule form, a consideration that should be taken into account when decisions are being made. But none is conclusive; the final decision depends upon the weight that each factor deserves in the particular situation, and the number and weighting of all other relevant factors.[38] Constitutional doctrines operate in precisely the same manner.

The doctrines seldom cover all the factors that judges take into account when determining constitutional questions, however. Like proverbs, they account for many of the major considerations that frequently arise in such situations, but neither proverbs nor legal principles will ever exist in sufficient variety to encapsulate every

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32. See, for example, *Re Lobe Inc.* v. *Minister of Revenue* (1987), 39 D.L.R. (4th) 723 (Ont.H.C.).
33. *Switzman* v. *Ebling*, [1957] S.C.R. 285 (S.C.C.); *Westerndorp* v. *R.*, [1983] 1 S.C.R. 43 (S.C.C.).
34. *Bedard* v. *Dawson*, [1923] S.C.R. 681 (S.C.C.); *Nova Scotia Board of Censors* v. *McNeil* (1978), 84 D.L.R. (3d) 68 (S.C.C.).
35. *Breathalyzer Reference*, [1970] S.C.R. 777 (S.C.C.).
36. *Reference re Minerals Under Rail Lines*, [1958] S.C.R. 285 (S.C.C.).
37. *Alberta Bill of Rights Reference*, [1947] A.C. 503 (P.C.).
38. See, D. Gibson, "Blind Justice and Other Legal Myths: The Lies that Law Lives By" (1987) Dalhousie Review.

consideration that human judgment might regard as pertinent to either general or legal decision-making. The purpose of this paper is to focus attention on those factors that have not yet been (and, for the most part never will be) enshrined in doctrine.

IV. IT IS POSSIBLE TO IDENTIFY, STUDY, AND EVALUATE MANY OF THE NON-DOCTRINAL FACTORS THAT AFFECT CONSTITUTIONAL DECISION-MAKING

While most of what has been asserted up to this point has long been regarded as commonplace by those whose work brings them into regular contact with the legal system, remarkably little effort has been exerted by students of the system to extend the analysis any further. No systematic attempt has been made to identify, much less to evaluate, the major non-doctrinal factors that influence judicial decision-making. Little scholarly attention has been given to the ramifications for various sectors of the legal system if the commonly held belief that non-doctrinal factors are highly influential is accurate. The third and fourth parts of my argument relate to those neglected questions.

There are differences of opinion as to the most appropriate term by which to refer to the non-doctrinal factors. They are commonly called "policy" elements. Sometimes the term "political" (usually with "small-p" prefix) is used. Professor Ronald Dworkin has attempted to distinguish considerations of "policy", which he regards as illegitimate, from those of "principle", which he treats as proper to invoke.[39] We shall return to Professor Dworkin's distinction a little later. In the meantime, it may be convenient to avoid the issue by employing the compendious term "P factors". The compilation of a thorough and convincing catalogue of major "P factors" in Canadian constitutional decision-making would be a massive undertaking, requiring painstaking examination of all the circumstances surrounding a large and representative sampling of judicial decisions in the area. I do not pretend to have undertaken such a study. Many years of contact with constitutional determinations by Canadian courts have, however, left me with an impressionistic view of commonly recurring "P factors" at work. Some of these, along with a few suggestive examples, will be outlined below. Those to be discussed fall into four categories.

A. SURVIVAL FACTORS

1. Survival of the Nation

Mr. Justice W.O. Douglas, a long-time champion of civil liberties on the Supreme Court of United States, uncharacteristically sided with the majority of the Court in rejecting the first two constitutional challenges to the severe restrictions to which Japanese-Americans were subjected during World War II. His biographer explained his position as follows:[40]

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39. R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 22 and 82 ff.

40. J.F. Simon, *Independent Journey* (New York: Harper and Row, 1980) at 243-4. As to the manner in which Japanese-Americans were generally treated during World War II, see Peter Irons, *Justice at War* (New York: Oxford Univ. Press, 1983).

> Douglas . . . felt he owed primary allegiance to his country's survival.

There are reasons for believing that Canadian constitutional decisions made in circumstances of real or perceived national emergency have been influenced by the same consideration. As far as the Canadian decision upholding orders made under the *War Measures Act* for the wholesale deportation of Japanese-Canadians at the end of World War II is concerned,[41] the evidence of legal doctrine being overborn by the survival factor is not as obvious as in the American cases, because there were fewer plausible legal arguments open to the Canadian plaintiffs. It is noteworthy, however, that judges of the Supreme Court of Canada who were to become renowned in the next decade or so for their passionate defence of civil liberties,[42] like Mr. Justice Ivan Rand, could dispose of the case on coldly formalistic grounds, without a murmur, even by way of *obiter dictum*, about the frightful impact their decision would have upon the lives of thousands of human beings.

More obvious evidence of the skewing effect of emergency considerations can be seen in the first Supreme Court of Canada decision concerning the *War Measures Act, Re Gray.*[43] The case involved a challenge to the validity of an Order-in-Council, passed under the authority of the War Measures Act, 1914, imposing a system of military conscription. One effect of the Order-in-Council was to abolish certain exemptions to military service established by statutes of the Parliament of Canada. The applicant, an individual against whom the conscription order was sought to be enforced, contended that a delegation of powers from Parliament to the executive branch which was so sweeping as to grant the power to amend the statutes of Parliament was too extensive to be constitutionally valid.[44] Only a year later, in a case considering the constitutional validity of a Manitoba statute permitting laws to be enacted by means of a referendum initiated by citizens and approved by a majority of the provincial voters, Viscount Haldane expressed, on behalf of the Judicial Committee of the Privy Council, grave doubt about the ability of a Canadian legislative body to delegate such sweeping law-making powers:[45]

> Section 92 of the Act of 1867 entrusts the legislative power in a province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies . . . ; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.

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41. *Cooperative Committee on Japanese Canadians* v. *A.G. Canada*, [1947] A.C. 87 (P.C.), varying *Reference re Deportation of Japanese*, [1946] 3 D.L.R. 321 (S.C.C.). See, generally, T.R. Berger, *Fragile Freedoms* (Toronto: Clarke, Irwin Co. Ltd., 1982) at 93 ff.

42. For an overview of the Supreme Court's activism in support of civil liberties during the 1950's, see: F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959). As to the role of Mr. Justice Rand, see, E.M. Pollock, "Mr. Justice Rand — A Triumph of Principle" (1975) 53 Can.Bar Rev. 519; W.R. Lederman, "Mr. Justice Rand and Canada's Federal Constitution" (1979-80) 18 U.W.O.L.R. 31.

43. (1918), 57 S.C.R. 150 (S.C.C.).

44. It should be noted that the Order-in-Council did, in fact, have the support of a resolution passed by both Houses of Parliament: *Ibid.* at 151. That fact had no legal significance, however. A resolution is not a statute. Mr. Justice Idington noted (*Ibid.* at 164) that "the fact that the Order-in-Council now in question was supported by a resolution of the two Houses of Parliament was very properly discarded by counsel for the Crown as failing to give any statutory efficacy thereto".

45. *Re Initiative and Referendum Act*, [1919] A.C. 935 at 945 (P.C.).

This was not the *ratio decidendi* of the decision; Viscount Haldane made it clear that he was not prepared to deal with the question "finally" in that case because it was not "strictly necessary" to do so. Nevertheless, there can be little doubt that he considered the principle enunciated to be a significant one. It is a principle that has been acted upon occasionally by Canadian courts. In *Outdoor Neon* v. *Toronto*,[46] for example, the Ontario Court of Appeal invalidated a provision of a provincial statute granting a regulatory board the power to validate municipal bylaws, on the ground that it involved an excessive delegation of the Legislature's own law-making function.[47]

In *Re Gray* the judges of the Supreme Court of Canada acknowledged a similar restriction on the ability of a legislature to delegate its law-making powers. Mr. Justice Anglin, for example, considered a "complete abdication by Parliament of its legislative functions" to be "inconceivable".[48] Chief Justice Fitzpatrick, who concurred with Mr. Justice Anglin and the majority in the case, also asserted that "Parliament cannot, indeed, abdicate its functions . . . " although it may, "within reasonable limits at any rate . . . delegate its powers to the executive government".[49] The majority of the Supreme Court had no difficulty, however, accepting the validity of a delegation so sweeping as to empower the executive to make new laws or amend existing statutes. This was considered to be well within the "reasonable limits" of delegation to which the Chief Justice referred.[50]

How can it be that it would be unconstitutional to delegate a law-making power to the voters, but that it is quite permissible to delegate so sweeping a law-making power as the *War Measures Act* involved to the executive branch of government? The answer, I think, can be found in the reasons given by the majority judges in *Re Gray*. Mr. Justice Anglin commented:[51]

> The exercise of legislative functions such as those here in question by the Governor-in-Council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extraordinary measures.

Chief Justice Fitzpatrick said:[52]

> Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.

Students of the Canadian Constitution are indebted to Chief Justice Fitzpatrick for his forthright acknowledgement that he regarded the "safety of the country" to be our "supreme law". It is difficult to escape the impression that this view has

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46. (1959), 16 D.L.R. (2d) 624 (Ont.C.A.), affirmed on other grounds, [1960] S.C.R. 307 (S.C.C.).

47. In *R.* v. *Picard* (1968), 65 D.L.R. (2d) 658, the Quebec Court of Appeal declined to strike down legislation conferring upon a Commission of Inquiry the power to dictate the terms of certain collective agreements, indicating that delegation would not be excessive unless it amounted to a "permanent" abdication of power, including an abandonment of the Legislature's ultimate power to annul decisions of the Commission. In *Re Manitoba Government Employees Association* v. *Government of Manitoba* (1978), 79 D.L.R. (3d) 1 at 15 (S.C.C.), however, Ritchie J. of the Supreme Court of Canada suggested that legislation delegating to the Lieutenant-Governor-in-Council the power to decide upon the terms of collective agreements would amount to "an abdication by the Legislature of its ultimate authority to pass laws . . .".

48. *Supra*, note 43 at 176.

49. *Ibid.* at 157.

50. There was a strong dissent by Mr. Justice Idington: *Ibid.* at 161 ff.

51. *Ibid.* at 181-2.

52. *Ibid.* at 160.

been acted upon by Canadian courts in numerous other situations of perceived national peril, but few judges have been as honest in admitting it as Chief Justice Fitzpatrick. (If national survival continues to be accorded the "supreme" priority that Chief Justice Fitzpatrick and his colleagues gave to it, an interesting question is now raised by s.52(1) of the Constitution Act, 1982, which declares that it is "the Constitution of Canada" which is the "supreme law of Canada".)

Although no other judge has expressed the supremacy of national survival quite as unequivocally as Chief Justice Fitzpatrick, a few others have been almost as blunt. Viscount Haldane, who was responsible for developing the "national emergency" principle in a series of Privy Council decisions in the 1920s, described it as follows in the pivotal case, *Fort Frances Pulp and Paper Company* v. *Manitoba Free Press Company*:[53]

> [I]n a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumerations in s.92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units.

While this emergency power of the Parliament of Canada has been widely interpreted as having been intended by Viscount Haldane to be based on Parliament's residual jurisdiction under s.91 of the *Constitution Act, 1867* to deal with matters concerning "peace, order and good government", there are some suggestions in his reasons for judgment that it may have had a different, more fundamental, basis. He referred, for example, to "other powers which may well be implied in the constitution",[54] and at another point he said:[55]

> The kind of power adequate for dealing with [emergencies] is only to be found in that part of the constitution which establishes power in the State as a whole.

This interpretation was adopted by Mr. Justice Beetz, of the Supreme Court of Canada, in his famous and highly influential dissent in the *Anti-Inflation Reference*:[56]

> [I]f one looks at the practical effects of the exercise of the emergency power, one must conclude that it operates so as to give to Parliament for all purposes necessary to deal with the emergency, concurrent and paramount jurisdiction over matters which would normally fall within exclusive provincial jurisdiction. To that extent, the exercise of that power amounts to a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament. The legitimacy of that power is derived from the Constitution: *When the security and the continuation of the Constitution and of the nation are at stake, the kind of power commensurate with the situation "is only to be found in that part of the Constitution which establishes power in the state as a whole . . .*[57]

Beetz, J. seems clearly to be asserting, and to be attributing a similar assertion to Viscount Haldane, that when national survival is at stake, constitutional law is somehow suspended, to the extent necessary to permit federal authorities to deal with the emergency.

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53. [1923] A.C. 695 at 315 (P.C.).
54. *Ibid.* at 703.
55. *Ibid.* at 704.
56. (1976), 68 D.L.R. (3d) 452 at 528 (S.C.C.).
57. *Ibid.*, emphasis added.

2. Survival of Civil Order

One of the most unusual rulings ever made by the Supreme Court of Canada occurred in the *Manitoba Language Reference*.[58] Manitoba's constitution, the *Manitoba Act, 1870*, required that provincial statutes be printed and published in both English and French.[59] This requirement was complied with until 1890, when a provincial statute, the *Official Language Act*, purported to restrict the language of legislation in Manitoba to English. The Supreme Court of Canada eventually ruled, in 1979, that the purported amendment of the dual-language requirement had been unconstitutional,[60] but it did not indicate whether the unilingual English statutes, enacted every year since 1890, continued to be legally valid. The Government of Manitoba was slow to remedy the defect, and in 1985, after much legal and political skirmishing, the Supreme Court of Canada was called upon to rule on the legality of Manitoba's still predominantly English statute books. The Court held that statutes enacted in English only were constitutionally invalid. This left the province in a state of almost totally lawlessness, so far as provincial legislation was concerned. In order to avoid the legal chaos that would otherwise have ensued, the Supreme Court granted temporary validity to the English language statutes for such minimum period of time as would be necessary to re-enact the laws in bilingual form. The Court put it this way:[61]

> [B]ecause of the Manitoba legislature's persistent violation of the constitutional dictates of the *Manitoba Act, 1870*, the Province of Manitoba is in a state of emergency: all of the Acts of the Legislature of Manitoba . . . are and always have been invalid and of no force or effect, and the Legislature is unable to immediately re-enact these unilingual laws in both languages. The Constitution will not suffer a province to be without laws. Thus, the Constitution requires that temporary validity and force and effect be given to the current acts of the Manitoba Legislature from the date of this judgment, and rights, obligations and other effects which have arisen under these laws . . . prior to the date of this judgment . . . are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the rule of law preserved.

The Court's reliance on "the rule of law" is interesting. Earlier in its reasons for judgment, the Court examined two "unwritten postulates"[62] of the Constitution: the "doctrine of state necessity",[63] and the concept of rule of law.[64] As to the necessity doctrine, the Court commented:

> Necessity in the context of governmental action provides a justification for otherwise illegal conduct of a government during a public emergency. . . .[65] The doctrine of state necessity has also been used to uphold laws enacted by a lawful government in contravention of expressed constitutional provisions under extraordinary circumstances which render it impossible for the government to comply with the Constitution.[66]

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58. (1985), 19 D.L.R. (4th) 1 (S.C.C.). See D. Gibson, "The Rule of Non-law: Implications of the Manitoba Language Reference", Transactions, Royal Society to Canada, (5th Series, Vol. I 1986).
59. Section 23.
60. *Attorney General of Manitoba* v. *Forest* (1979), 101 D.L.R. (3rd) 385 (S.C.C).
61. *Supra*, note 58 at 35-6.
62. *Ibid.* at 25.
63. *Ibid.* at 29 ff.
64. *Ibid.* at 21 ff.
65. *Ibid.* at 29-30.
66. *Ibid.* at 32.

As to the rule of law, it noted:[67]

> [I]n the process of constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. . . . in the present case it is the principle of rule of law.

The Court claimed that the two ideas are related, and that they operated in tandem to produce the result, in that case, that Manitoba's illegal laws must be granted temporary legality:

> "The doctrine of necessity is not used . . . to support some law which is above the Constitution; it is, instead, used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution."[68]
>
> "The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.
>
> Nor will the constitutional guarantee of rule of law tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future."[69]

When considering the validity of this line of reasoning, it should be borne in mind that s.52(1) of the *Constitution Act, 1982*, stipulates that the Constitution is the "supreme law" of Canada. According to that "supreme law" all Manitoba statutes were illegal. If the "rule of law" is a "fundamental postulate" of the Constitution, it must demand that the illegality of unilingual Manitoba statutes be recognized. The Court's refusal to do so during the period of "temporary validity" must, therefore, involve a *denial*, not an application, of the rule of law.

What the Court was actually doing was applying the *other* constitutional postulate it invoked: the doctrine of state necessity. Far from being a part of the rule of law, the doctrine of state necessity is its antithesis. Whereas the rule of law requires that everyone and every institution in the country, however highly placed they might be, must abide fully by the strictures of law, the doctrine of state necessity relieves governmental authorities of that responsibility when necessitous circumstances create perceived overwhelming reasons for doing so. In the case of Manitoba's unilingual statutes, a massive violation of the law by the Government and Legislature of Manitoba was temporarily overlooked in order to avoid the "anarchy and chaos" the Court thought would otherwise prevail.

The alleged bridge between the antithetical concepts of necessity and rule of law is the fact that the rule of law cannot be said to prevail in a society where no laws exist. That is true, of course, but it does not follow that whatever illegal norms happen to exist in that society must therefore be regarded as law. The Court's reasoning may be paraphrased as follows:

(a) The law requires statutes to be bilingual.

(b) The statutes of Manitoba, being in English alone, are illegal.

(c) Respect for the rule of law therefore requires that those statutes be considered void.

(d) But this would deprive the province of most of its laws, and the rule of law cannot prevail in a jurisdiction without laws.

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67. *Ibid.* at 25.

68. *Ibid.* at 35.

69. *Ibid.* at 29.

(e) To preserve the rule of law it is accordingly necessary that unilingual statutes not be considered void until there has been an opportunity to rectify their illegality.

(f) Therefore, the law does not require statutes to be bilingual for the time being.

The defect in this reasoning is that the term "law" is being used in two different senses. The first concerns scrupulous compliance with the procedures that society has established for governing itself; the second concerns the norms that regulate the day-to-day conduct of citizens in their relations with each other. While the latter are essential to an orderly society, and while many of them have the status of law in most societies, it is a contradiction in terms to refer as "laws" to those which lack proper legal sanction.

What the Supreme Court of Canada was really doing by ensuring that its ruling would not create "a local vacuum"[70] and leave Manitoba "without a valid and effectual legal system",[71] was attempting to "preserve normative order".[72] Normative order does not necessarily involve law. Normative order may be created by the informal rules of a club, or by the dictates of a Mafia Don. Order is one thing, law is quite another. What the Supreme Court of Canada accomplished in the *Manitoba Language Reference* was to ensure that strict enforcement of the law would not result in civil disorder. It came very close to acknowledging this when it stated that:[73]

> [T]he courts will not allow the Constitution to be used to create chaos and disorder.

If one substitutes the term "supreme law" for "Constitution", it becomes obvious that the Court was giving priority to order over law.

My point is not that it was necessarily wrong to do so, but that by doing so in the name of "law", rather than forthrightly acknowledging the "supremacy" of the non-legal survival factor, as Chief Justice Fitzpatrick had in *Re Gray*, The Court obfuscated the meaning of "law", and damaged the vital principle of the rule of law.

3. Survival of the Courts

Some constitutional decisions seem easier to explain in terms of the courts' desire to protect themselves, or their jurisdiction, from external attack, than in any other way. It has often been contended that the sharp change of direction that occurred in the approach of the Supreme Court of the United States to the constitutionality of New Deal social welfare legislation was precipitated by President Roosevelt's threat to "pack" the Court with appointees sympathetic to his policies in 1937.[74]

There is some reason to suspect that the Supreme Court of Canada might have succumbed to similar pressure as long ago as 1880, when it also executed what some

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70. *Ibid.* at 25.

71. *Ibid.* at 29.

72. The Court used this expression, *ibid.* at 35, in reference to a decision of the Pakistan Federal Court which granted temporary validity, under the "state necessity" principle, to laws that would otherwise have been unconstitutional. The Supreme Court of Canada considered "the rule of law" to have been upheld in that instance also.

73. *Ibid.* at 35.

74. W. McCune, *The Nine Young Men* (1947), c. 3.

have considered an "about face" at a time when it was under political attack. The change of heart concerned the Federal Parliament's jurisdiction over "the regulation of trade and commerce" under s.91(2) of the Constitution Act, 1867. Early rulings by the Supreme Court of Canada had given a quite generous interpretation to that power.[75] The Court was under seige from several directions at the time. In 1879, and again in 1880, a private member's bill had been introduced in Parliament calling for the Court's abolition.[76] One of the criticisms levelled at the Court was that it was exhibiting too centralist an approach in its interpretation of the respective constitutional responsibilities of the Parliament of Canada and the provincial legislatures. When the Court was next called upon to interpret the federal trade and commerce power, it took a much less generous approach.[77] The possibility that this was, in part at least, a response to the external pressures the Court was experiencing, has been noted by some commentators.[78] While the suggestion has been rejected by a distinguished constitutional scholar,[79] its plausibility lingers.

A suspicion of death-bed repentance also hangs over the Privy Council's celebrated change of heart in *A.G. Ontario* v. *Canada Temperance Federation*[80] as to the federal Parliament's "peace, order and good government" jurisdiction. A line of previous rulings by the Judicial Committee of the Privy Council, commencing with the *Board of Commerce Reference* in 1922,[81] had imposed progressively narrower interpretations on the power, culminating in a series of rulings striking down most of the "Bennett New Deal" legislation of the 1930's on the ground, among others, that not even the Great Depression constituted a sufficient "national emergency" to justify federal legislative action.[82] Those decisions had provoked more insistent demands than ever before for the abolition of Canadian appeals to the Privy Council, and the Law Lords were fully aware of these sentiments. Even before the "New Deal"cases were decided, Lord Hailsham, the Lord Chancellor, had expressed his concern to Lord Atkin, who presided on those appeals, about "the paramount importance of retaining the appeal to the Privy Council from the dominions", and therefore the importance of ensuring that the decisions of the Privy Council "will inspire confidence . . . in all parts of the Empire".[83] It was soon obvious that the Privy Council decisions in the "New Deal" cases did not "inspire confidence" in Canadians. The government of Mackenzie King had not yet decided whether to abolish Privy Council appeals when the *Canada Temperance Federation* case came before the Privy Council in 1946.[84]

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75. *Severn* v. *The Queen* (1878), 2 S.C.R. 70 (S.C.C.); *City of Fredericton* v. *The Queen* (1880), 3 S.C.R. 505 (S.C.C.).

76. J.G. Snell and F. Vaughan, *The Supreme Court of Canada — History of the Institution* (Toronto: Univ. of Toronto Press, 1985) at 28 ff.; F. MacKinnon, "The Establishment of the Supreme Court of Canada", in W.R. Lederman (Ed.), *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964) at 106.

77. *Citizens' Insurance Company* v. *Parsons* (1880), 4 S.C.R. 215 (S.C.C.), affirmed (1881), 7 A.C. 96 (P.C.).

78. A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 36.

79. *Ibid.* at 41-2.

80. [1946] A.C. 193 (P.C.).

81. [1922] 1 A.C. 191 (P.C.).

82. For example, *"Unemployment Insurance Reference*, [1937] A.C. 355 (P.C.).

83. Quoted in: R. Stevens, *Law and Politics — The House of Lords as a Judicial Body, 1800-1976* (Chapel Hill: Univ. of North Carolina Press, 1978) at 241 n. 141.

84. Snell and Vaughn, *The Supreme Court of Canada — History of The Institution*, *supra*, note 76 at 189.

The Privy Council held in that case that its previous narrow interpretations of Parliament's "peace, order and good government" power had been mistaken, and it upheld a much broader interpretation, to the effect that the power justifies federal legislation on any topic having a "national dimension". Whether or not the uncertainty of the Privy Council's fate as Canada's court of last resort inspired the ruling may never be known, but it would be unrealistic not to consider the possibility.

Even where the issues raised by a case do not affect the courts' actual survival, there is reason to believe that a desire to protect their jurisdiction or their prerogatives may sometimes influence decisions. The most notable recent indication of this nature came in the Supreme Court of Canada's much-discussed rulings in *Retail Wholesale and Department Store Union* v. *Dolphin Delivery Ltd.*[85] The issue in that case was whether the common law prohibits secondary picketing, and, if so, whether such prohibition offends the Charter guarantee of free expression. The Court held that secondary picketing is prohibited, that this prohibition does deny freedom of expression, but that the denial is constitutionally permissible as a "reasonable limit . . . in a free and democratic society" within the meaning of s.1 of the Charter. Although there was no need to do so, the Court took the opportunity to settle some unresolved questions about the scope of the Charter. Two of these "clarifying" rulings seem[86] to have been to the effect that:

(a) The judiciary is not subject to the obligations imposed by the Charter because its functions are not "governmental" in nature; and

(b) The common law, being a creature of the judiciary, is not subject to Charter constraints except where it arises in situations where governmental activities are involved.

Mr. Justice MacIntyre, who wrote for the majority of the Court in *Dolphin*, acknowledged that the word "government" in the application section of the Charter, s.32, is capable of more than one meaning. The "generic"[87] or "political science"[88] meaning of the term is broad enough to include the courts. He chose to reject that broad meaning, however, and instead construed the word to refer only to "the executive or administrative branch of government".[89] Accepted principles of constitutional interpretation provided much stronger support for a broad interpretation of s.32 than for this narrow one. The Court has generally adopted a "purposive" approach to the interpretation of the Charter, seeking the meaning that will best serve the apparent objective of the particular Charter right in question.[90] It has also frequently applied the common law interpretative presumption

85. (1986), 33 D.L.R. (4th) 174 (S.C.C.). See D. Gibson, "What Did *Dolphin* Deliver?", in G.-A. Baudoin (Ed.), *Your Clients and the Charter — Liberty and Equality* (Montréal: Yvon Blais, 1988) at 75.

86. The language employed by MacIntyre J. on behalf of the Court was not altogether clear, and some room remains for varying interpretations. See P. Hogg, "Who Is Bound By The Charter?", J.-L. Baudouin, "Qu'en est-il du droit civil?", D. Gibson "What Did *Dolphin* Deliver?", all in G.A. Beaudoin, *ibid.*

87. *Supra*, note 85 at 194.

88. *Ibid.* at 196.

89. *Ibid.* at 194.

90. *Hunter* v. *Southam Inc.* (1984), 11 D.L.R. (4th) 641 at 650 (S.C.C.).

that ambiguities should be resolved in favour of the liberty of the subject many times.[91] What is the purpose of providing special constitutional protections against the actions of "government" which are not available with respect to private sector activities? Surely it is to compensate for the fact that government has (or was perceived by the drafters of the Charter to have) greater potential for oppressing the citizen than private sector actors have. Are courts different than executive agencies in this respect? If so, it is because they have *more*, not less, power than their executive counter-parts. Courts are capable, after all, of exercising judicial review over both executive and legislative actions, and of being the final determiners of citizens' constitutional rights. A "purposive" interpretation of s.32 would therefore have included the courts within its ambit. The presumption in favour of the liberty of the subject would also lean heavily against an interpretation that would deny citizens constitutional protection from oppressive behavior by this very powerful group of public authorities.

What considerations could have persuaded the Supreme Court of Canada to abandon its normal interpretative practices in favour of a construction that excluded itself and other courts from the obligation to respect Charter rights and freedoms? If it was anything other than that which springs readily to the cynical mind, there is no indication of it in the reasons for judgment of Mr. Justice MacIntyre.

4. Survival of the Constitution

There is considerable evidence that the courts have been motivated in their choice of applicable constitutional doctrines by a desire to keep federal and provincial powers roughly in equilibrium, and thereby to preserve the federal nature of the Constitution. While this motivation is not frequently articulated expressly by the judges, its influence was unmistakeable in the 1981 *Patriation Reference*.[92] The question before the Court in that case was whether the Government of Canada had the right, either legal or conventional, to request a major amendment of the Constitution of Canada by the British Parliament without the consent of eight out of the ten provinces whose powers would be affected by the amendment. The Court held that although federal authorities had the legal right to do so, their exercise of that right would violate constitutional convention.

Before this case was decided, there was wide-spread agreement among constitutional authorities that the judicial function was restricted to questions of law, and that non-legal norms, such as constitutional conventions, were matters to be determined politically rather than juridically. In *Reference Re Disallowance and Reservation*,[93] for example, the Supreme Court of Canada was asked whether the power of the Governor-General-in-Council to disallow provincial legislation was subject to any "limitations" or "restrictions". In holding that there were none, the Court made it clear that it did not consider itself free to take non-legal limita-

91. For example, *Manitoba Fisheries Ltd.* v. *R.* (1978), 88 D.L.R. (3rd) 462 (S.C.C.); *Abbas* v. The Queen (1985), 14 D.L.R. (4th) 449 (S.C.C.), per Dickson C.J.C. and Lamer J.

92. (1981), 125 D.L.R. (3rd) 1 (S.C.C.).

93. [1938] S.C.R. 71 (S.C.C.).

tions into account.[94] In the *Patriation* case, however, the Court had no compunction about venturing into non-legal territory. Its justification for doing so appears to have been its concern that if both the federal government and the objecting provincial governments were not accorded partial victory (and thus armed for the negotiations that finally broke the patriation deadlock) the "federal principle" would be endangered. It pointed out that:[95]

> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.

In a later case, the Supreme Court made the following comment about its rulings in the *Patriation Reference*:[96]

> [I]n the process of constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference* this unwritten postulate was the principle of federalism.

Much evidence of the courts' concern about the need to adjust the federal/provincial power balance from time to time can be found in the often-noted "pendular" or "cyclical" patterns in the interpretation of major federal jurisdictional responsibilities such as "regulation of trade and commerce" and "peace, order and good government". These and other sources of federal jurisdiction have undergone periods of narrow interpretation, and periods of liberal interpretation. It is obvious that something other than strict doctrinal considerations influence the swings of the interpretative pendulum. While judicial sensitivity to the federal balance of powers is not likely to have been responsible in every case, it does appear to have been influential on some occasions. The marked change of emphasis from federal to provincial concerns that occurred in about 1977 or 1978, and continued for some years thereafter, can probably be attributed to a desire to preserve the federal principle.

B. JUSTICIABILITY FACTORS

Courts are loathe to be drawn into disputes with which they are not well equipped to deal. An issue may hinge upon factors that are highly political in nature, or are otherwise alien to customary legal norms. The issue may not be sufficiently ripe for judicial determination, extra-legal recourses not having been fully exhausted. Perhaps the evidence necessary to decide the matter satisfactorily is not available. Alternatively, the dispute may be such that the court lacks the remedial resources necessary to enforce or supervise its decision. For any of these reasons, or many others, an issue under litigation may lack "justiciability". In such circumstances it is not surprising that courts sometimes seek to avoid making decisions.

Procedural rules concerning evidence, mootness, and standing, when combined with the discretionary quality of many remedies, provide numerous formal methods by which issues of questionable justiciability can be side-stepped. Occasionally, however, a dispute which satisfies formal rules of procedure is nevertheless con-

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94. "We are, of course, concerned here only with legal limitations and restrictions . . . (Crocket J. at 87); ". . . we are not concerned with constitutional usage or constitutional practice . . . (Duff C.J.C. at 78); "the circumstances under which the powers referred to may be exercised are not matters upon which this Court is constitutionally empowered to express an opinion . . ." (Kerwin J. at 95).

95. *Supra*, note 92 at 104.

96. *Manitoba Language Reference* (1985), 19 D.L.R. (4th) 1 at 25 (S.C.C.).

sidered inappropriate for judicial determination. A case in point is *Calder* v. *Attorney General for British Columbia, et. al.*[97]

The question that the Supreme Court of Canada was called upon to answer in the *Calder* case was one that had been plaguing both legal and political authorities for a very long time: whether the descendants of Canada's native population could legally enforce aboriginal rights that had never been formally extinguished, and whether the rights of a certain group of British Columbia Indians had, in fact, ever been extinguished. Of the seven Supreme Court of Canada judges who heard the case, three were of the view that unextinguished aboriginal rights are legally enforceable, and that the particular rights in question had never been extinguished. Three others disagreed on both issues, holding that aboriginal rights are not recognized by the Canadian legal system, unless granted after European settlement, and that in any event, the particular rights had been extinguished if, indeed, they had ever been granted. The seventh judge, Mr. Justice Pigeon, rejected the claim on purely procedural grounds, without any consideration of the merits.

Given that the case had been several years in preparation, that it had cost a large sum of money to take to the Supreme Court of Canada, and that it involved a very important legal and social issue, the Supreme Court's inconclusive response was surprising to many, and painfully disappointing to Canada's native population. Pigeon J. could not have been unaware of the distress his refusal to deal with the substantive issues raised by the case would cause. The likelihood is accordingly high that he, and perhaps his colleagues as well, consciously declined to settle the question of aboriginal rights because of a belief that such matters are more appropriately resolved by political negotiation. A hint of this may be found in his concluding words:[98]

> I am deeply conscious of the hardship involved in holding that the access to the Court for the determination of the Plaintiff's claim is barred by sovereign immunity from suit without a fiat. However, I would point out that in the United States, claims in respect of the taking of lands outside of reserves and not covered by any treaty were not held justiciable until legislative provisions had removed the obstacle created by the doctrine of immunity. In Canada, immunity from suit has been removed by legislation at the federal level and in most Provinces. However, this has not yet been done in British Columbia.

While this comment directly addresses only the procedural point upon which Pigeon J. chose to base his reasons for judgment, there is some reason to believe that it was intended to convey another message as well: that the political process is more suitable than legal adjudication for determination of this type of problem.

C. DECENCY FACTORS

There have been a number of doctrinally questionable, though applaudably humane, Canadian constitutional decisions that appear to have been motivated more by considerations of decency or inter-party fairness than by any concern for the development of effective and consistent constitutional jurisprudence.

The most noteworthy series of decisions to which that observation is clearly applicable was the group of cases in which the Supreme Court of Canada, in its first decade of independent responsibility for the Canadian Constitution, struck

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97. (1973), 34 D.L.R. (3d) 145 (S.C.C.).

98. *Ibid.* at 226.

down several laws and practices which violated the religious freedom of the Jehovahs' Witnesses in the province of Quebec.[99] Several of these cases, along with an earlier decision of the Supreme Court of Canada in which they were doctrinally rooted,[100] ruled that provincial restrictions on freedom of expression and religion invaded the Parliament of Canada's exclusive legislative jurisdiction over the subject of "criminal law". While the outcome of the decisions — protection of civil liberties from provincial encroachment at a time when no direct constitutional protection of that kind existed — was commendable, the attendant distortion of Canadian constitutional law (and aggrandizement of federal powers) was regrettable. Considerations of justice and decency had produced fair resolutions of the immediate disputes, with unfortunate constitutional sequelae.

The Supreme Court of Canada's decision in *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan, et. al.*[101] is open to the same criticism. At issue in that case was a controversial attempt by the Government of Saskatchewan to confiscate by taxation one hundred percent of the increase in petroleum profits resulting from skyrocketing oil prices in the early 1970's. The Supreme Court's ruling — that this was a form of "indirect tax", which provinces are constitutionally prohibited from imposing — would be difficult to fault in terms of simple justice, but it involved a very dubious application of the distinction between "direct" and "indirect" taxes that has resulted in added confusion for Canadian constitutional jurisprudence. It is difficult to believe that the outcome of the case would have been the same if the government had imposed a less rapacious rate of taxation on the windfall oil profits.

D. EXPEDIENCY AND POLICY FACTORS

The considerations discussed under the heading of "Justiciability" involve questions of juridical expediency, relating to the practicality or the suitability of employing judicial machinery to resolve certain kinds of disputes. The outcome of constitutional litigation can also be sometimes affected by considerations of expediency that are not peculiar to the judicial process. The factors that were decisive in *Temple* v. *Bulmer*,[102] probably fell into this category, for example. The courts in that case seem to have shared the view of Premier Hepburn and others that it would have been unwise to hold a potentially divisive election at that point in Canada's wartime crisis. The considerations of expediency involved had a political, rather than a juridical, character.

Other illustrations abound of important constitutional decisions being apparently based upon considerations of political expediency or public policy. One of the most notorious concerned the function of the *Canadian Bill of Rights* as guardian of the equality rights of native people. In *R.* v. *Drybones*[103] Mr. Justice Ritchie lead the Supreme Court of Canada in a bold new direction by holding that the equality guarantee in the *Bill of Rights* overrode a provision of the federal *Indian Act* which

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99. For a commentary on the cases by a close and sometimes involved observer of the Quebec scene at the time, see F.R. Scott, *Civil Liberties and Canadian Federalism*, *supra*, note 42.

100. *Reference Re Alberta Statutes*, [1938] S.C.R. 100 (S.C.C.).

101. (1977), 80 D.L.R. (3d) 449 (S.C.C.).

102. *Supra*, note 1.

103. (1970), 9 D.L.R. (3d) 473 (S.C.C.).

prohibited Indians being drunk off a reservation. As the first instance of legislation being invalidated because of inconsistency with the *Canadian Bill of Rights*, the case was widely celebrated, and Mr. Justice Ritchie was regarded by some as a Messiah of equality. Only a few years later, in *Attorney General of Canada* v. *Lavelle*,[104] the same judge again wrote the leading judgment for the Supreme Court of Canada in a dispute involving a section of the *Indian Act* which denied equality to a large group of native people. In *Lavelle*, however, Justice Ritchie and the Court declined to apply the *Bill of Rights* in preference to the *Indian Act*. The provisions of the Act that were under attack in that case stipulated that Indian women who married non-Indians would thereby abdicate their status and rights as Indians under the Act, whereas Indian men who did the same thing would not suffer any such consequences. In ruling that this discrepancy between the treatment of men and women did not violate the equality protection of the *Canadian Bill of Rights*, Ritchie J. attempted to distinguish the *Drybones* case, but his tortured reasoning was entirely unpersuasive.[105] Since judges rarely articulate their real reasons for such radical and doctrinally inexplicable changes of direction, one can only guess about the motivation of Ritchie J. and his colleagues in this case. There is, however, strong reason to speculate that the decision was based upon an acceptance of the view, held by the many male-dominated native organizations that intervened in the case, and stressed by their counsel, that the discriminatory marriage provisions of the *Indian Act* were essential to the preservation of native cultures in Canada.

V. RAMIFICATIONS

Several consequences flow from the foregoing observations. Some of these will depend upon confirmation of my impressionistic conclusions; others are applicable whether or not those conclusions are valid. Some ramifications affect judges, others apply to legal scholars; still others ought to be of concern to politicians.

A. THE JUDICIARY

The application of realist analysis to Canadian constitutional decision-making ought to have both stylistic and substantive implications for the courts. Each will be addressed briefly.

Stylistically, it is important that judges be more willing in the future than in the past to articulate the *full* reasoning behind their constitutional determinations, including the matters I have designated as "decency", "expediency", and "policy" factors. Karl Llewellyn once said that:[106]

> "An institution we could not honor naked we should not dare to strip".

The attitude exhibited by that statement, and by the traditional reluctance of the judiciary to admit to reliance upon factors other than legal doctrine in their determinations, is unfortunate. Surely an institution that would not be honoured if fully exposed to public view is, in a democracy, urgently in need of being stripped naked. Democracy demands accountability of its public institutions, and misrepresenta-

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104. (1974), 38 D.L.R. (3d) 471 (S.C.C.).

105. See Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell 1990) at 32-6.

106. Quoted in W.L. Twining, *Karl Llewellyn and the Realist Movement* (Oxford: Clarendon Press) at 227.

tion or obfuscation of the real reasons for judicial decision-making prevents full accountability.

Perhaps the most important contribution made to jurisprudence by Lord Alfred Denning in the latter stages of his brilliant and controversial career was his frankness in exposing the non-legal policy preferences upon which his legal conclusions were often founded.[107] Particular policy justifications he offered were often of questionable validity, which is precisely why it was desirable for them to be openly acknowledged. Once they had been exposed to view they could be evaluated, criticized, and then accepted, modified, or rejected by higher or later courts. The common law's vaunted capacity to "work itself pure" through constant re-evaluation over time cannot operate effectively without an awareness on the part of subsequent courts of the decisional actualities that were at work in the cases under review. If my unscientific belief that those actualities frequently include non-legal "P factors" is mistaken, a full and forthright explanation of judicial reasoning would establish that fact, and would permit the hypothesis to be discarded. If the hypothesis should be confirmed, on the other hand, the data would be available to permit appropriate responses to be made by lawyers, courts, and politicians. Stylistically, therefore, judicial frankness is called for whether or not my assertions about the role of "P factors" is correct.

The substantive importance to judges of a realist approach to constitutional adjudication is that it would permit them to give the overt attention to "P factors" that will enable them to differentiate between those which ought to influence their decisions and those which ought not to do so. This is a vital distinction. Professor Dworkin's contrast of "policy" and "principle" provides a useful starting point, but rationality in constitutional decision-making requires much finer tuning than that.

The factors identified above as relating to "justiciability" would be regarded by most judges and scholars as appropriate constraints to be taken into account by courts. This view is reflected in the fact that formal principles of justiciability, mootness, and timeliness are openly articulated in both legislative enactments and judicial pronouncements. Those principles have not yet been developed to the point of permitting courts to opt out of every case they believe to be inherently unsuited for judicial determination, however. It would therefore be desirable for the Canadian courts to consider the desirability of a full-blown "political questions" principle, by which matters like the aboriginal rights questions put to the Supreme Court of Canada in the *Calder* case could be overtly side-stepped on the ground that they are more appropriate for political than for juridical settlement.

I also believe that courts will inevitably continue to be influenced by the "survival factors" outlined above. It would be helpful, though, if they could do so under the rubric of some special excusive standard analogous to the "reasonable limits" restriction which section 1 of the *Canadian Charter of Rights and Freedoms* places upon *Charter* rights. The existence of some such justificatory norm would help to ensure that survival factors would only be relied upon if it were clearly justifiable to do so. Whether the Supreme Court of Canada could propound such an excusive

107. See, for example, *Spartan* v. *Martin*, [1972] 3 All E.R. 557 (C.A.). While this was not a constitutional decision, the forthright exposition of "policy" grounds in which Lord Denning engaged, would, I believe, be equally desirable in Canadian constitutional decision-making.

norm as a part of Canada's constitutional common law may be doubted by some, though I would regard such a development as no more radical than the judicial creation of several other fundamental constitutional principles in the past. If the Court were not prepared to create an explicit principle concerning survival factors, it would, of course, be possible to create such a norm by constitutional amendment. The likelihood of Canadian politicians ever agreeing to do so would not be very high, however.

The other "P factors" identified above ("decency", "expediency", "policy") are, in the writer's view, inappropriate matters for courts to take into account. These are questions better left to the democratic process. When judges exercise political discretion, the power of the Constitution to protect against abuses of political discretion is seriously compromised. Open discussion of the validity of various "P factors" could be expected to produce a consensus to roughly that effect among thoughtful members of the legal community.

It is to be hoped, therefore, that a realist approach to identifying decisive factors in constitutional litigation would ultimately result in fewer instances of judicial reliance on criteria the judiciary is ill-equipped to administer. If the judiciary did not exercise such self-restraint, it would then be the task of politicians to determine whether appropriate reforms could be achieved by the imposition of institutional changes.

B. THE ACADEMICS

A realist approach to constitutional law would place heavy reliance on legal scholarship. To confirm or discredit the impressionistic views of the writer and others that inappropriate "P factors" too often influence Canadian constitutional adjudication would require a prodigious amount of quite sophisticated empirical research. If the research supported the hypothesis, as I strongly believe it would, the professoriate would then have a large role to play assisting the courts and politicians to identify the impermissible factors and to find ways of avoiding judicial reliance upon them. As teachers, too, academics owe a responsibility to their students to help them understand the factors that are truly crucial in constitutional adjudication, and to learn how, as advocates, to address those issues effectively.

C. THE POLITICIANS

If the hypothesis presented in this paper should be confirmed by empirical studies, it would become the responsibility of Canadian politicians to ensure that appropriate corrective steps were taken. If, as suggested above, the judiciary itself voluntarily shifted its emphasis from political or "policy" types of considerations to matters more closely related to the nature of the judicial process (plus the unavoidable "survival" factors) not much would be left for the politicians to do. Even in that case, however, the fact that courts will probably always be influenced by "survival factors", ought to cause the politicians to ask whether the persons they appoint to the bench represent a sufficiently broad philosophical and experiential spectrum to ensure balanced consideration of such matters. One obvious first step would be to ensure that the judiciary was composed of an equal number of males and females.

If the judiciary remained reluctant to abjure matters of policy, expediency, and short-term equities, it might become necessary for the politicians to consider a more radical restructuring of the courts. Why should constitutional adjudication on the basis of factors that are non-legal in nature continue to be made by courts composed exclusively of lawyers? Tribunals that apply a mixture of legal principle and non-legal policy criteria ought perhaps to be composed of a mixture of lawyers and non-lawyers. Juries, after all, have proved beyond all reasonable doubt over several centuries the viability of adjudicative tribunals composed of non-lawyers. So have a variety of arbitral and special administrative tribunals. If courts persist in basing constitutional decisions on non-legal factors, it would be wise to devise ways in which their members can exhibit the same expertise in those matters as they now do on questions of law.

VI. CONCLUSION

There is a faddishness to intellectual movements that is every bit as silly as, and considerably more regrettable than, the constant shifting of clothing styles. A recent book review has referred to legal realism as "a finished chapter in intellectual history".[108] That makes no more sense than it would to say that conservatism or optimism are dead. Basic ways of thinking about things do not disappear when the spotlight of intellectual fashion shifts. The labels by which they are identified may change, and the numbers and influence of their adherents may vary, but basic intellectual approaches, of which legal realism is one, are indestructible. This paper was intended to serve as a reminder that Canadian constitutional adjudication has never been subjected to extensive and intensive legal realist scrutiny, and to suggest that when it is there will be profound lessons to be learned.

Professor Laura Kalman, whose book was the subject of the above-mentioned review, has asserted that American legal realism never fulfilled its promise. While that may be both an exaggerated and a premature assessment, it cannot be denied that it is substantially true at this point in history. Most legal institutions, in Canada as well as in the United States, continue to enjoy extensive immunity from the prying eyes of scientific and democratic scrutiny. It may well be, however, that this immunity is more attributable to the potency of legal realism than to its weakness. Kalman's book concludes with the observation that the most important revelation of American realism was "a message so arresting that even the realists never dared face it — that all law is politics".[109]

It is time, at least in the realm of Canadian constitutional adjudication, that this message be faced — and answered.

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108. Ralph S. Brown, reviewing Laura Kalman, *Legal Realism at Yale: 1927-1960*, (1988) 6 Law and History Review 191.

109. *Ibid.* at 231; see, for a fuller examination of this thought, J.A.G. Griffiths, *The Politics of the Judiciary*, (3rd ed.), (G.B.: Fontana, 1985).