

# DAYDREAM BELIEVING: VISIONARY FORMALISM AND THE CONSTITUTION

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*The failure of traditional strands of legal formalism to provide a satisfactory account of law's relation to material conditions, and its distinction from political practice, has given rise to a new variant of formalist theory: visionary formalism. In this essay, the authors examine visionary formalism through the work of one of its leading exponents, William E. Conklin. They contend that, far from rescuing legal formalism, the visionary account of constitutional adjudication put forward in Conklin's recent treatise, *Images of the Constitution*, exposes formalism for what it is: an effort to romanticize and legitimize a peculiarly regressive mode of political practice. In the final sections of the essay, the authors provide their own account of the connections among law, politics and material conditions. They conclude that only a "constitutive legal theory", embracing a critical understanding of the political nature and historical contingency of legal structures, offers any real hope of harnessing law as a progressive social instrument.*

*L'insuccès des courants traditionnels du formalisme juridique à expliquer de façon satisfaisante les rapports du droit avec les conditions matérielles et ses distinctions avec la pratique politique a donné naissance à une nouvelle variante de la théorie formaliste: le formalisme visionnaire. Dans cet essai, les auteurs examinent le formalisme visionnaire en analysant le travail d'un de ses principaux représentants, William E. Conklin. Ils maintiennent que, loin de sauver le formalisme juridique, l'explication visionnaire des décisions constitutionnelles des tribunaux avancée dans le récent traité de Conklin, *Images of the Constitution*, révèle ce que le formalisme est véritablement: une démarche visant à romantiser et légitimer un mode de pratique politique particulièrement rétrograde. À la fin de leur essai, les auteurs donnent leur propre explication des rapports entre le droit, la politique et les conditions matérielles. Ils concluent que seulement une « théorie constitutive du droit », comprenant une vision critique de la nature politique et de la contingence historique des structures juridiques, permet d'espérer que le droit soit utilisé comme instrument de progrès social.*

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## INTRODUCTION

While most disciplines experience occasional lapses of professional confidence, law seems to exist in a permanent state of identity-crisis. Much of legal scholarship's energy and motivation is drawn from a desire to answer the central question of modern social theory — the question of how social structures and values relate to the material conditions of life. Without some plausible explanation of this relation, the validity of social knowledge is suspect and the status of social theorizing remains deeply problematic.

The challenge facing contemporary scholars has been to provide an account of changing social structures and values — from the rise of the welfare state to the enactment of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> — that gives sufficient recognition to their relation to underlying material conditions but does not reduce them to mere epiphenomenal effects of those conditions. Thus scholars have sought to provide answers that, on the one hand, avoid totalistic, static or overly instrumental accounts of social life but on the other hand, recognize that social structures and values cannot be divorced from their historical context and material setting.

As a branch of social theory, jurisprudence is obliged to share in that explanatory task and to run similar risks. Although often less self-conscious in their reflections, legal scholars have grappled with this intellectual challenge in their continuing debates over the intelligibility and integrity of the "Rule of Law".<sup>2</sup> Yet mainstream legal scholarship bears an additional burden — the task of distinguishing law from other social structures. In order to preserve the legal system's authority and legitimacy, traditional theorists must provide an explanation of social theory that not only addresses the relation between social phenomena and material existence, but that maintains law's autonomy from other social institutions. Can we know the judgment from the judge? Is law more than a reflection of patriarchal or capitalist social relations? Does the legal system serve to frustrate or merely to legitimize abuses of political power? In short, the central mission of conventional jurisprudence has been to provide a convincing account of the relation between legal doctrine and socio-economic conditions that, at the same time, preserves a distinction between law and politics. Without such a distinction, law and lawyers must abandon their claims to be the

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<sup>1</sup> Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>2</sup> Both left and right have sought to appropriate its powerful rhetorical appeal for their own political campaigns. See, e.g., F. Hayek, *LAW, LEGISLATION AND LIBERTY* (Chicago: The University of Chicago Press, 1976); E.P. Thompson, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (Harmondsworth: Penguin, 1977). See generally A.C. Hutchinson & P. Monahan, *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Toronto: Carswell, 1987).

privileged and prestigious guardians of collective power: they will become only its naked purveyors.

This claim that law is a distinct social form that operates independently of politics is the essence of legal formalism. Although it has suffered a number of deaths, formalism has proved to have more lives than the proverbial cat. While most mainstream legal scholars are now prepared to concede that law arises in and affects its social context, they continue to insist that law can be studied and understood apart from that constitutive context. Unlike political, sociological or historical methods of inquiry, legal formalism is an intellectual attitude and analytical technique that purports to provide a coherent, determinate and neutral account of law as a particular dimension of human behaviour.<sup>3</sup> Unsullied by ideological impurities, it demands institutional allegiance and universal obedience solely by dint of its inherent rationality and intellectual cogency. Formalism's informing characteristics are most obvious in the study of adjudication and legal reasoning — the attempt to identify a mode of decision-making that stands in contrast to ideological debate and that offers a means for resolving disputes based on enduring principles of justice rather than ephemeral sources of political predilections. Thus formalists continue to believe that they can provide an account of law without having to take a stance on the major and controversial questions of what is the best way to live collectively and individually. Insisting that the form of social life can be separated from its substance, they maintain that the lasting demands of intellectual integrity can be satisfied without regard to the shifting dynamics of social experience.

Our purpose in this essay is to challenge this prevailing orthodoxy. We will argue that the continuing efforts of traditional legal scholars to rescue formalism are as futile as they are fanciful. No matter how modern and sophisticated its accoutrements, no theory (or its scholarly production) exists apart from prevailing social and political practice. The pertinence and value of any legal theory is a function of its interplay with the irrepressibly contingent context of social life whose unfolding it can neither fully predict nor entirely control: the contingent pressures of politics subvert the objectivist pretensions of formalism. As a consequence, the achievement of a just social order cannot be accomplished through a rigorous deployment of perennial legal techniques and immutable structures. Rather it depends upon an appreciation of and sensitivity to the changing circumstances of political power in particular societies.

Our particular focus in this essay is upon the emerging strand of "visionary formalism". In Part One, we situate this recent theoretical

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<sup>3</sup> See, e.g., P.W. Hogg, *CONSTITUTIONAL LAW OF CANADA*, 2d ed. (Toronto: Carswell, 1985); B. Slattery, *A Theory of the Charter* (1987) 25 OSGOODE HALL L.J. 701.

innovation in its broader jurisprudential context, with particular regard to constitutional law and theorizing. This is followed in Part Two by a description of the work of William Conklin, a leading exponent of this approach to legal enlightenment.<sup>4</sup> Parts Three and Four provide a critique of and response to Conklin's theoretical exposition. In Part Five, we adumbrate our own view of the relation between law and politics. By way of conclusion, we reach some tentative conclusions on the preferred focus of further jurisprudential study.

## I

According to conventional wisdom, constitutionalism is the "technique of establishing and maintaining effective restraints on political and government action".<sup>5</sup> Yet this is a limited and limiting understanding of a much broader and richer concept. A constitution is a forum for determining the kind of society and individuals that we are and wish to become. It embraces the dynamic efforts of people to negotiate and establish the institutional and substantive terms of their collective existence; the process, the product and their dialectical relation are all within its conceptual provenance. It is not a one-time event nor a purely practical act of political will. It is an enduring moment and continuing occasion through which societies, sometimes as much by default as design, constitute themselves and define the temporary circumstances and transitory possibilities of their existence. While the formal documents and conventions of nationhood represent a privileged resolution of constitutional debate, each attempt to interpret and re-interpret that compromise gives fresh meaning and effect to it. At the same time, the efforts of workers and the poor to achieve better social programs and a fairer distribution of wealth should also be counted as constitutional expressions. Thus constitutionalism embraces the practical and the utopian, the institutional and the ideological, the real and the imagined, the past and the future.

A constitution is a power map that charts the distribution and diffusion of political authority in society.<sup>6</sup> Within such an understanding, the role of traditional scholars has been to work as official

<sup>4</sup> See also D.M. Beatty, *TALKING HEADS AND THE SUPREMES: THE CANADIAN PRODUCTION OF CONSTITUTIONAL REVIEW* (Toronto: Carswell, 1990).

<sup>5</sup> C.J. Friedrich, *CONSTITUTIONAL GOVERNMENT AND POLITICS: NATURE AND DEVELOPMENT* (New York: Harper & Bros, 1937). Although Friedrich takes a broader approach than many, his work exemplifies a traditional understanding of constitutionalism. For other leading works in this genre, see C. McIlwain, *CONSTITUTIONALISM AND THE CHANGING WORLD* (London: Cambridge University Press, 1939); M.J.C. Vile, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (Oxford: Clarendon Press, 1967); C.J. Friedrich, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (Boston: Ginn and Company, 1950) at 121.

<sup>6</sup> See I.D. Duchacek, *POWER MAPS: COMPARATIVE POLITICS OF CONSTITUTIONS* (Santa Barbara: Clio Press, 1973) at 3.

cartographers. Operating in that precarious terrain between rhetoric and reality, they map the evolving contours of political authority and record its historical progress. Because of their belief in legal formalism, much of their work has been preoccupied with providing an account and justification of the function performed by lawyers and judicial elites. Thus jurists have continued to search for a grand theory that would help to explain the licence, limits and legitimacy of constitutional interpretation and judicial review. As futile as this quest may be, the zeal with which it has been pursued emphasizes its centrality to prevailing constitutional paradigms.

Having long ago abandoned the discredited and transparent values of rule-formalism, constitutional scholars turned to purposive reasoning and policy analysis as a means of maintaining their formalist faith. Recognizing that any serious account of constitutional development had to take account of larger questions of social justice, mainstream jurists began to look upon legal doctrine as reflecting an underlying political rationality or scheme of social justice that rendered constitutional interpretation and judicial review coherent and legitimate. By adhering to this ideal, judges and jurists could avoid engaging in open-ended exchanges of ideological debate and retain their vaunted democratic independence.

Recently, however, there has been a growing consensus that policy-formalism has been unable to withstand the sustained attentions of the anti-formalist critics. Traditional scholars extricated themselves from the false security of black-letter rules only to fall victim to the deceptive allure of black-letter theory. The change was one of location rather than of mind. Although they looked beyond the limiting horizons of law and explored the ample attractions of other disciplines, such as moral philosophy and economics, they never disabused themselves of the worth of formalism as an intellectual project and political aspiration. Their ambition was to colonize and exploit these extra-legal outposts for the greater imperial benefit of formalism. As such, jurists resorted to "policy" as a means of securing the crumbling foundations of the traditional legal edifice, not as an opportunity for escaping its undesirable confines.

Undaunted by the demise of policy-formalism as a site of intellectual refuge, traditional scholars have again shifted ground, this time to the loftier plane of constitutional "visions". While their passion for purposive reasoning and policy analysis has been quelled, their fixation with formalism is unflagging. Of course, it cannot be denied that social visions play an essential role in the development and understanding of constitutional norms. Behind every constitution lies a set of social visions that give it life and meaning. Whether involved in its design or interpretation, all constitutional actors must possess a framework of ideas that helps them to grasp the past tradition of political ordering, the nature of present reality, the possibilities for future action, and the justifications for these understandings. Constitutional visions structure perception and prescription. They inhabit the twilight zone between

pure normative abstractions and historically verifiable assertions. Although largely mythic in source and simplicity, they influence the ordering of reality and become part of people's lived experience and self-understanding. By mediating the actual and the ideal, such visions simultaneously empower and limit the political imagination. In this way, they not only carry strong explanatory force, they also wield significant moral authority. While they resonate with utopian echoes, they are meant to convey a sense of the attainable and the realistic in historical experience.

Without generative visions, legal reasoning would be reduced to a desultory game of catch-as-catch-can; law's normative dimension would be lost. Yet as a means of prescribing constitutional interpretation or justifying judicial review, visionary formalism is as ill-fated as its rule-bound and policy-oriented predecessors. Indeed this latest switch of formalist allegiance discloses more than it conceals. The unrealizability of formalism as a theoretical or practical program is now exposed for all but those too blinded by their formalist fervour to see. Formalist fidelity has been purchased at the cost of political transparency.

There are at least two major directions of the critical rejection of the formalist legacy. First, the shift to visionary formalism has provided further evidence of the intellectual credulity possessed by formalists of all stripes. Robustly skeptical about the relation between constitutional posturing and political reality in other cultures, formalists exhibit an almost wide-eyed naivety about their congruence in domestic situations. For instance, North American constitutional scholars are quick to scoff at Paraguayan assertions that "the exploitation of man by man is proscribed" or Chinese claims that "citizens enjoy freedom of speech and assembly". When championing their own constitutions, however, the existential gap between constitutional aspiration and lived reality is readily ignored. In the United States, Japanese internment, McCarthyism and union-bashing are commonly overlooked in the encomiums to the First Amendment. In Canada, scholars regularly trumpet the Constitution's commitment to equality without ever feeling obliged to mention the gross disparities in wealth, income and power that characterize our social existence or the continuing reduction of First Nations to Third World status.

Secondly, visionary formalism is even less successful than rule formalism and policy formalism at concealing its political persuasions. Scholars of a visionary formalist bent have difficulty denying that the affirmation of a particular vision amounts to the acceptance of a basic epistemology, social theory and political agenda, along with a whole host of foundational premises, insights and intuitions about the human condition and its potentialities.<sup>7</sup> Thus the resort to constitutional visions

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<sup>7</sup> For a good account of the relation between legal doctrine and social vision, see H. Steiner, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* (Madison: University of Wisconsin Press, 1987).

is not so much an attempt to escape from politics as it is an effort to romanticize and exalt a particular form of political insight. This serves to legitimize the activities of academics and judges whose work can be identified with that form. Moreover, the form, while conceded to be political in nature, is represented as operating independently of ordinary ideological conflict. Visionary formalists gain their rhetorical force and constitutional authority by disclaiming their partisanship on contested matters of national politics, even as they claim their authority to make decisive interventions into those matters. Neutrality and impartiality are a function, and not a renunciation, of ideological context.

## II

Rather than offer a critique of visionary formalism as an emerging tendency in modern Canadian jurisprudence, we intend to concentrate on the work of one of its leading exponents. We would prefer to run the risk of mistaking the species for the genus than to be accused of attacking a strawperson. William E. Conklin's recent book, *IMAGES OF A CONSTITUTION*,<sup>8</sup> provides a deserving focus of critical attention. His writing is erudite and rigorous. Indeed, the strongest part of his scholarship is his exposure of the shortcomings of rule- and policy-formalism. However, despite strenuous and inventive attempts to do so, he is unable to avoid the force and sweep of his own critical arguments. His proposed alternative of visionary formalism is open to the same debilitating criticisms that he uses against these earlier formalist incarnations: he manages to highlight the inevitable failings of formalism in the process of crafting its most sophisticated expression.

The book seeks to describe the constitutional images held by Canada's judicial and academic elites. According to Conklin, these images are important not because of what they tell us about the constitution or those judicial officials granted the privilege of enforcing the constitution, but rather because they *are* the constitution. Conklin insists that the legal text and the compendium of doctrinal interpretations that have been grafted upon it are the residual deposits of the more dynamic engagement over competing images of constitutional reality: "a constitution is an image; it is a product of the legal community's imagination. A constitution does not live except through the consciousness of the legal community."<sup>9</sup>

From this starting point, Conklin proceeds to describe three constitutional images that have found expression and favour in the

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<sup>8</sup> (Toronto: University of Toronto Press, 1989). Conklin tends to talk about "rationalism" rather than formalism, but we do not believe that this is of any great significance in terms of our critical claims.

<sup>9</sup> *Ibid.* at 3.

Canadian legal community of scholars and judges. The first is an historicist image. Looking to the history of institutional arrangements as the source of constitutional norms, this image rests its claims to validity on tradition and reaches its most potent manifestation in the Martland/Ritchie dissent in *Re: Resolution to Amend the Constitution*.<sup>10</sup> On the other hand, the rationalist image views the constitution as a self-contained collection of posited rules or values. Celebrating the rational architecture of the law's internal logic, the different versions of this image can be found in the writings of William Lederman and P.M. Kennedy.<sup>11</sup> Finally, the teleological image derives constitutional meaning from the ends toward which society is or ought to be moving and receives its strongest approval in the judicial and scholarly legacy of Ivan Rand.<sup>12</sup>

While each of these images has had its practitioners and apologists, Conklin maintains that the rationalist image has dominated Canadian constitutional discourse. Indeed his account and criticism of this image is the book's intellectual heart and soul. According to Conklin, the rationalist image is not monolithic. On the contrary, he goes to great lengths to show that there has been a continuing tension and variation among three distinct strains of rationalist imagery: rule rationalism, policy rationalism and orthodox rationalism. Rule rationalism sees the constitution as a comprehensive set of rules or doctrines that can be derived rationally from the constitutional text and from the real or presumed intent of its framers. Born in the 1920s, it captured the allegiance of Albert Abel, Louis-Phillippe Pigeon and Jean Beetz.<sup>13</sup> Policy rationalism looks beyond the rules to policies or values that are said to underlie the constitutional text. The inquiry remains rationalist in that the policies being sought are assumed to possess an objective identity that can be ascertained through rational inquiry: "the policy image merely adds a broader resource material (social/economic facts and shared goals) and more diversified techniques of rationality (psychology, theory, and history)".<sup>14</sup> This image was embraced by Bora Laskin, Noel Lyon and Peter Russell. Finally, orthodox rationalism seeks constitutional truth in the interplay between textual rules and extrinsic policies. As expressed in the work of Brian Dickson, Bertha Wilson and William Lederman, its aspiration is to escape the rationalist confines of both rule rationalism and policy rationalism. Ultimately, however, orthodox rationalists are forced to seek refuge in some form of rationalist discourse. For Conklin, they "uncontrollably, impercep-

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<sup>10</sup> *Ibid.* at 74-81, [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 D.L.R. (3d) 1.

<sup>11</sup> Conklin, *supra*, note 8 at 173-214.

<sup>12</sup> *Ibid.* at 219-35.

<sup>13</sup> *Ibid.* at 173-84.

<sup>14</sup> *Ibid.* at 186.

tibly relapse into rationalist horizons not unlike generations of Canadian scholars before them".<sup>15</sup>

Having rejected rationalism, Conklin throws his jurisprudential weight behind the teleological image. He maintains that it is necessary and realizable that constitutional law would consist of judicial efforts to engage in reflection about the telos to which Canadian society is evolving. However, while constitutional adjudication must involve itself in the potentially open-ended issues of ideal-directed theory, it is constrained by the need to situate such reflection within the historical tradition of social/cultural practice in Canadian law and politics. In this way, according to Conklin, constitutional law not only becomes a dynamic mediation between political theory and legal practice, but also ensures that it contains an appropriate dimension of self-criticism and scrutiny: "The challenge for the contemporary lawyer is to picture a constitution which allows him [or] her to question the 'givens', to connect the 'givens' to universalist human rights claims of theory, and to critique their reified character when divorced from social/cultural practice."<sup>16</sup>

All of this makes for interesting reading, but what does it tell us about the Canadian Constitution and the way that it operates? How does it advance our understanding of the practice and legitimacy of constitutional adjudication? The answer is that it tells us far less than Conklin would have us believe. Emboldened by the initial power of his categorical insight, Conklin relies upon his taxonomy of constitutional images to develop a full-blown theory of constitutional decision-making. Unfortunately, his normative ambitions outstrip his analytical reach. Indeed, the juxtaposition of quotes from the rationalist Plato and the deconstructionist Derrida on the opening pages of *IMAGES OF A CONSTITUTION* create a suitable, but unintended contradictory icon for the ensuing text. For Conklin's espousal of visionary formalism to carry the day, he must demonstrate not only that judicial utterances can be usefully and consistently categorized according to particular constitutional images, but that the images judges hold drive the outcome of the cases they decide. Moreover, if his advocacy of teleological imagery is to pass jurisprudential muster, he must be able to demonstrate that resort to such imagery has justificatory validity in a democratic polity. It is the burden of the next two sections to show that Conklin is unable to meet these crucial challenges. Rather his constitutional vision, by losing contact with socio-political reality, becomes little more than constitutional dreaming.

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<sup>15</sup> *Ibid.* at 216.

<sup>16</sup> *Ibid.* at 218.

## III

While they may sometimes appear self-contained and exhaustive, constitutional visions are never complete or mutually exclusive. They are inevitably selective in emphasis and embrace. It is their *raison d'être* to comprise an accessible distillation of the historical and aspirational elements of our collective and personal lives. Because of their generality and aphoristic nature, they often lead to contradictions between visionary intimations and existential practices and result in incoherences among commonplace patterns of behaviour:<sup>17</sup> the constitutional practice is not always the child of the visionary parent. Constitutional actors are divided among and within themselves about the appeal and efficacy of different visions of constitutional order.<sup>18</sup>

The courts and legal doctrine are venues for the ceaseless negotiation of visionary conflict. As there are many different visions at work in its formulation and interpretation, even one judge's contribution to legal doctrine is not a reflected embodiment of one indwelling and sufficient vision, but is the formal site for the attempted, but elusive, blending and reconciliation of competing visions. The temporary accommodations made are more a result of political expediency than moral purity. Although one vision may tend to dominate and infuse the law with its guiding principles, competing visions will constantly challenge it and provide a debilitating set of counter-principles. At times, the tension will precipitate doctrinal crisis; at other times, the friction will be subdued and less disruptive. Yet, muted or manifest, this antagonism fuels and informs constitutional development.

Consider the example of Bora Laskin to which Conklin frequently refers. Whereas, at times, Conklin tries to label Laskin a policy rationalist, at other times he characterizes him as a rule rationalist. Conklin begins by proclaiming that "Bora Laskin, as a young scholar, gives policy rationalism a rigour and sophistication unmatched in Canadian constitutional history."<sup>19</sup> Yet, a short time later, he contends that "[f]or Laskin, the teacher, the British North America Act, 1867 posits rules and those rules constitute the exclusive resource material for constitutional law."<sup>20</sup> Is Conklin trying to make a distinction between Laskin as a "young scholar" and Laskin as a "teacher"? If so, what accounts for the change? Which is the real Laskin? Conklin remains suspiciously silent on these pressing questions. Of course, the

<sup>17</sup> See M. Oakeshott, *RATIONALISM IN POLITICS* (London: Methuen & Co. Ltd, 1962) at 123-25; R.M. Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT* (Cambridge: Harvard University Press, 1986).

<sup>18</sup> See D. Kennedy, *Form and Substance in Private Law Adjudication* (1976) 89 HARV. L. REV. 1685.

<sup>19</sup> *Supra*, note 8 at 7.

<sup>20</sup> *Ibid.* at 41.

reality is that Laskin, like other judges, was quite capable of cutting his constitutional image to suit his political cloth. Thus, while Conklin goes to great pains to contrast the rule rationalism of Justice Laskin with the policy rationalism of Justice Dickson, it is not difficult to find examples that run counter to this assessment. Conklin claims that:

Dickson understands constitutional judgments to be “value decision” whereas for Laskin, the judge, values constitute an illegitimate source of law. Dickson incorporates values and public policy as constituent elements of his image whereas Laskin, as a judge, relies entirely upon posited rules for his image of a constitution.<sup>21</sup>

This assessment sits very uneasily with the well-known picketing case of *Harrison v. Carswell*.<sup>22</sup> In that case, Justice Dickson steadfastly maintained that it was not the role of the Court to “weigh and determine the respective values to society of the right to property and the right to picket” because doing so would raise “important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs”.<sup>23</sup> On the other hand, Justice Laskin advocated that the Court engage in a “balancing of interests” in order to further its “search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation”.<sup>24</sup> How could this be? How could Laskin, the great rule rationalist, have so openly embraced an inquiry into policy? And how could Dickson, one of Conklin’s prime examples of a policy rationalist, suddenly have become so rule-bound? The answer, surely, is that the images Conklin projects onto these two judges did not suit their political purposes in this case. For Laskin, perhaps because of his experience with labour relations, the rule established by the picketing law seemed oppressive and repugnant; he therefore found it necessary to invoke policy arguments to challenge its continued authority. For Dickson, possibly because of his corporate law background, the same rule seemed natural and desirable; he therefore had no wish to subject it to searching scrutiny.

We do not mean to suggest that Conklin is wrong to argue that Laskin, Dickson and other jurists have an affinity for one constitutional image over another. On the contrary, he makes a strong case that they do. Where he goes wrong is in assuming that these images actually drive legal outcomes. As the judgments in *Harrison v. Carswell* show, judges are quite capable of shifting images when it suits their political purposes: constitutional images are a fungible part of a broader vision

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<sup>21</sup> *Ibid.* at 63.

<sup>22</sup> [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68 [hereinafter cited to S.C.R.].

<sup>23</sup> *Ibid.* at 218.

<sup>24</sup> *Ibid.* at 209.

of political justice. Such shifts, however, are rarely necessary; there is usually sufficient scope within a judge's preferred image to fashion whatever results he or she desires. No better evidence of constitutional imagery's indeterminacy exists than that provided by Conklin himself. In discussing the judicature sections of the *Constitution Act, 1867*,<sup>25</sup> Conklin notes that Laskin's views shifted over time concerning the proper interpretation to be placed upon section 96 — the section that provides for federal appointment of superior, county and district court judges. As an academic, Laskin viewed this section as nothing more than an appointing power and dismissed the "needless artificiality" of reading section 96 as preserving the judicial functions of section 96 courts. As a judge, however, Laskin embraced such "artificiality", holding in *Crevier v. A.G. Canada* that it "would make a mockery"<sup>26</sup> of the *Constitution Act, 1867* to allow provincial governments to transfer section 96 powers to provincially appointed appeal tribunals.<sup>27</sup>

Conklin's explanation for this shift is supremely unconvincing. It did not occur because Laskin became disaffected with one constitutional vision and turned his judicial affections to another; it was more than a whimsical change of judicial outfit. As Conklin concedes, both arguments are consistent with the judge's rule rationalist image of the constitution. Rather Conklin tells us that the shift came about because Laskin moved from a "textualist" approach to rule rationalism to a "functionalist" approach to rule rationalism. Notwithstanding its particular leanings and defining characteristics, rule rationalism, it seems, can accomplish many things depending upon the approach taken to it: its apparent indirection belies its predictive significance.

But the question remains of why Laskin moved from one approach to another. Conklin cannot really expect us to believe that Laskin went to sleep as a "textualist" one night and woke up as a "functionalist" the next morning, the result, perhaps, of a nocturnal visit from some jurisprudential fairy who sprinkled constitutional moondust in his eyes. It is more likely that the move had less to do with the taxonomic niceties of constitutional imagery than with the dynamic forces of social and political power. Rather than Conklin's juristic flights of fancy, a more plausible explanation might be that Laskin, as an academic, identified with the interests of labour tribunals and other administrative bodies while, as a judge, he came to care more about the parochial concerns of the judiciary and be influenced by its special interests. If constitutional image had anything to contribute to the process, it was more likely a matter of Laskin's need to maintain his judicial self-image than anything else.

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<sup>25</sup> (U.K.), 30 & 31 Vict., c. 3.

<sup>26</sup> [1981] 2 S.C.R. 220 at 237, 127 D.L.R. (3d) 1 at 13.

<sup>27</sup> Conklin, *supra*, note 8 at 41-43.

## IV

The upshot of all this is that constitutional imagery is much less important in explaining constitutional discourse and decisions than Conklin recommends or predicts. Certainly, “the expression of a judge’s image of the constitution” is not the major source from which “to understand a judgment as it really is”.<sup>28</sup> Constitutional visions, on their own, tell us very little about legal outcomes. However, this does not mean that they are of no importance to the constitutional critic. Their significance lies in their contribution to the essential task of legitimacy — the effort to convince citizens that the power wielded by the judiciary has an authority and wisdom that transcends the collective views of its existing membership and is thereby deserving of civil obedience. Contrary to the insistence of Conklin and other formalists, constitutional imagery is not a source of determinative reasons for judicial decisions, but rather a mode of rationalization that judges and judicial apologists use to account for decisions driven by forces largely extrinsic to constitutional discourse.

In the same way that the paparazzi who chronicle royal apparel maintain it is the clothes that make the monarch, visionary formalists perpetuate the myth that it is the image that makes the judge. This shallow pretence is no more persuasive in the judicial arena than it is in the royal realm. Presumably, it is only convincing to those dedicated followers of fashion that have a material stake in the public’s continued hoodwinking. It is true, obviously, that some judges prefer one kind of sartorial rationalization to others and that this inclination may bear some connection to their deeper political predilections. Moreover, it is worth observing that particular styles of discursive dressing may sometimes have to be changed to better produce or match a desired effect. But, when all is said and done, clothes are clothes. And, while the choice of apparel, literally or figuratively, may signal much, rarely will it determine the identity and intentions of the person who is in the clothes. It is the familiar error of, at best, mistaking symbol for substance or, at worst, treating symbol as substance.

Nevertheless, even if Conklin’s account of visionary formalism could overcome the fatal weaknesses of incoherence and indeterminacy, the question would still remain of why a democratic polity should be governed by the constitutional and social visions of an elite cadre of political officials. Mindful of the fact that, in spite of recent and continuing efforts to pluralize it, the judiciary remains a very unrepresentative and relatively homogeneous group, Conklin offers no real defence of the legitimacy of subjecting citizens to its partial visions of justice. It is not a challenge to the *bona fides* of judges to suggest that their largely male, white, Christian, wealthy and middle-aged identities will influence and shape their acceptance of certain values as funda-

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<sup>28</sup> *Ibid.* at 45.

mental verities. Like all people, judges' images of the good life tend to reflect the limited and, in their case, privileged vantage-points from which they survey and evaluate events. As such, judicial imagery is a part of, not apart from, the regularly contested and always contestable context of politics.

This points to another, but more fundamental problem with Conklin's analysis and that of visionary formalism in general. By simultaneously discussing differences in constitutional imagery and discounting underlying forces of class and power, Conklin pretends that there is far more room for diversity and radicalism in constitutional adjudication than actually exists. Judges may be free to chose historicism, rationalism or teleology as an imaginative mode of justificatory argument, but they cannot detach themselves from certain foundational understandings. While the respective rights of picketers and property owners may be modified at the margins, the underlying institutions and distributions of property are not subject to challenge. While the courts may occasionally voice sympathy for the plight of ordinary and disadvantaged Canadians, they remain firmly wedded to a vision of rights that privileges those who wield market power and restricts those who would like to see that power restrained. Thus, despite a considerable change of personnel over the last little while, Supreme Court of Canada decisions remain all too predictable. Changes in constitutional imagery belie a depressingly consistent devotion to a conservative vision of society and its transformative possibilities — *plus ça change, plus c'est la même chose*.

Evidence supporting this sad conclusion is to be found in the reactionary assumptions and regressive implications of the Supreme Court's holdings in cases such as *Hunter v. Southam Inc.*,<sup>29</sup> *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd*<sup>30</sup> and *Andrews v. Law Society of British Columbia*.<sup>31</sup> These cases reveal the Court's preoccupation with negative as opposed to positive liberty, its emphasis on individual over collective interests, and its assumption that governments represent the greatest threat to social justice.<sup>32</sup> Additional evidence may be found in two decisions which the Supreme Court handed down during the summer of 1990. In these cases, the Court further hammered down a couple more political planks on its platform of constitutional ideology. The first decision showed the extent of the Court's solicitude to economic power; the second

<sup>29</sup> [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

<sup>30</sup> [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

<sup>31</sup> [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

<sup>32</sup> For an extended account of these cases and their political implications, see A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT L. REV. 473; A.C. Hutchinson & A. Petter, *Private Rights / Public Wrongs: The Liberal Lie of the Charter* (1988) 38 U.T.L.J. 278; A.C. Hutchinson & A. Petter, *Paradise Postponed* (1990) 1:3 CONSTITUTIONAL FORUM 8.

demonstrated the willingness of the Court to deny constitutional recognition to the collective claims of working people. In the process, the Court gave confirmation — if any were needed — that it will continue to interpret the Constitution as a document devoted to protecting established interests and values.

In *Rocket v. Royal College of Dental Surgeons of Ontario*,<sup>33</sup> the Court confirmed its willingness to treat commercial speech as deserving of the full rigours of constitutional protection. Although the particular facts of the case may have seemed suitable for judicial intervention, the wider implications of the Court's reasoning are distinctly distasteful for those swayed by a democratic vision of social justice. The founders of Trident Dental Services were disciplined for advertising in contravention of the dental profession's statutory regulations against advertising. The Court had little difficulty in deciding that such a blanket prohibition infringed the *Charter*'s guarantee of freedom of expression. Moreover, it held that, while certain restrictions were permissible to preserve professional standards, an across-the-board ban could not be "demonstrably justified as reasonable limits in a free and democratic society" under section 1 of the *Charter*.

In delivering the Court's judgment, Justice McLachlin insisted that "advertising involves more than economics".<sup>34</sup> It was important that consumers were able to make informed choices, and access to advertising was the best way to ensure this: "[advertising] does serve an important public interest by enhancing the ability of [consumers] to make informed choices".<sup>35</sup> The difficulty with this kind of reasoning is that it assumes that the sources of commercial speech — primarily large economic enterprises — are best placed or motivated to provide the information upon which informed choices can be made. Yet if these choices are so important, why would we leave advertising to the discretion of those who stand most to benefit from partial disclosure and distortion of information? Whatever else it may be, commercial advertising constitutes a concerted attempt to persuade people to add to the profitability of business. This does not mean that such advertising is a bad thing in itself: all societies benefit from a large quantity and high calibre of product information. But the crucial issue is who is to regulate and monitor such information — citizens and consumers through legislative initiatives and regulatory agencies or the corporate sector by means of market power? To choose the corporations is to elevate the pursuit of profit to a constitutional status that it does not warrant, thereby diminishing, rather than enhancing, the quality of democratic life.<sup>36</sup>

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<sup>33</sup> [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter cited to S.C.R.].

<sup>34</sup> *Ibid.* at 241.

<sup>35</sup> *Ibid.* at 247.

<sup>36</sup> See A.C. Hutchinson, *Money Talk: Against Constitutionalizing (Commercial) Speech* (1990) 17 CAN. BUS. L.J. 1.

The second decision, *Professional Institute of the Public Service of Canada v. Northwest Territories*,<sup>37</sup> concerned the right of workers to bargain collectively. In a factually complex case, the Supreme Court had to decide whether the *Charter*'s guarantee of freedom of association prevented a government from curtailing the capacity of unions to represent their members in collective bargaining. The decision was the seventh on labour relations under the *Charter* to go to the Court and it went the way of the earlier six — a crushing defeat for workers. Speaking for a majority of the Court, Justice Sopinka held that "bargaining for working conditions is not, of itself, a constitutional freedom of individuals".<sup>38</sup> Relying on an earlier trilogy of cases denying a constitutional right to strike, he stated that, while the *Charter* protects the right to form and belong to a union, "it does not protect an activity solely on the ground that the activity is a foundational or essential purpose of a [union]".<sup>39</sup> As such, the Northwest Territories' government refusal to give legislative recognition to a public service union as a bargaining unit did not contravene the *Charter* and was perfectly constitutional.

Sopinka's pronouncements that, in the constitutional scheme of things, "bargaining for working conditions is not, of itself, a constitutional freedom of individuals",<sup>40</sup> is offensive and hardhearted, especially in contrast with the Court's concern for the speech rights of corporate advertisers. The fact that retiring Chief Justice Dickson went along with this verdict, albeit "reluctantly" and "not without considerable hesitation", is a sad, but perhaps revealing last word to a long judicial career and offers a telling footnote to Conklin's pigeonholing Dickson as an "orthodox rationalist".<sup>41</sup> As Justice Cory on behalf of the dissenting three judges stated, to grant a constitutional right to form a union, but to deny its associating members the right to engage in the very activity that comprises the *raison d'être* for forming the union in the first place is to render the right of association empty and meaningless.

The fact that the Court, in a period of a few months, had no difficulty upholding commercial speech rights to the benefit of corporate advertisers while denying collective bargaining rights to the detriment of unionized workers reveals the force and direction of its constitutional ideology. In a society that espouses democracy and equality, one might have thought that the capacity of employees to bargain collectively for better working conditions would be accorded at least the same constitutional status as the ability of entrepreneurs to promote their products through commercial messages. One might also

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<sup>37</sup> [1990] 2 S.C.R. 367, 72 D.L.R. (4th) 1 [hereinafter cited to S.C.R.].

<sup>38</sup> *Ibid.* at 404.

<sup>39</sup> *Ibid.* at 402.

<sup>40</sup> *Ibid.* at 404.

<sup>41</sup> *See supra*, text accompanying note 20.

have thought that real citizens, not economic entities like corporations, would enjoy priority to basic human rights. The Court's denial of both of these propositions represents a stunning disregard for human values and working people that is made no more palatable by being couched in the reassuring rhetoric of constitutional principle.

The distinct preference of the courts for the interests of the haves over the have-nots persists in the face of much activity in the rhetorical salons of constitutional imagery. Doctrinal indeterminacy masks and gives way to ideological proclivity. Rather than expose this objectionable state of affairs, academics seem content to record and quibble over the latest trends in the judicial fashions of argumentative attire. This is particularly galling in the work of sophisticated scholars like Conklin. Recognizing that constitutional adjudication takes place in a ongoing context of power relations, he pays only lip-service to this context and makes no real attempt to comprehend the relation between constitutional imagery and the protocols of social and economic power.<sup>42</sup> Moreover, he fails to address the radical implication of the critical idea that "all knowledge is socialised" — the implication that any attempt to salvage judicial review as a formally viable and substantively democratic enterprise is doomed to failure.<sup>43</sup> In the process, Conklin has reduced the promising insights of constitutional imagery into an escapist exercise in constitutional dreaming.

## V

In contemporary debate, there is almost complete agreement that law is neither fully beholden to socio-economic conditions nor fully independent from them. The notion that law possesses no autonomy or distinctiveness as a mode of thinking and acting is seldom taken seriously. Conversely, the belief that law is an entirely autonomous field of human activity has long been discredited. Rather than make a futile Kelsenian attempt "to free the science of law from alien elements", the present concern is to identify the formal and substantive connections between law and these "alien elements". Indeed, contemporary jurisprudence seems to find an elusive intellectual and political unity in the notion that legal doctrine is "relatively autonomous" from the political formation of social life. Unfortunately, this unity is more apparent and superficial than real and informing. The notion of "relative autonomy" is so ample that it can accommodate almost all theorizing about law. As such, it offers little guidance or comfort to those seriously committed to explicating the law-and-politics conundrum. There is a vast and intellectually significant difference between

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<sup>42</sup> Conklin, *supra*, note 8 at 256-59 and 269-71.

<sup>43</sup> See A.C. Hutchinson, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT (Toronto: Carswell, 1988) c. 9.

those scholars who maintain that law is primarily separate from society but is partly determined by it, and those who hold that law is primarily determined by society but is partly separate from it.

The differences between these positions are much more than matters of emphasis and degree. Nevertheless, most of the scholarly antagonists share enough to become ensnared in the same two traps. The first is approaching law and politics as though they were separate entities whose relations need to be explicated. This approach fails to recognize that law and politics, by interacting and combining in manifold and mutually-generative ways, comprise inseparable parts of the same whole.<sup>44</sup> Law is not only a political artifact of the first-order, it is also a primary artificer of its political context. This does not mean that law and politics, because they are fully implicated in one another, replicate each other in a simple or undistorted fashion: the life of the law is much more than its internal logic, yet something less than the totality of political experience. However it does mean that there is no form of social life "out there" independent of the law which constitutes and structures it. Nor is there any law "out there" independent of the society that generates and defines itself through the law. The world to which law applies is already thoroughly informed and constituted by the forms and structures of law.

The second trap is thinking that it is necessary to provide an account of the law-and-politics relation that can claim some general or universal validity. There will always be an inseparable and organic relation between law and politics, but no one account of that relation will be valid for all times and all societies. While it is possible and desirable to provide historically or socially specific explanations of legal and social change, it would be a mistake to try to extrapolate from these insights universal statements about law in general.<sup>45</sup> For instance, a convincing account of the role played by law in advanced capitalist societies may have only limited application to pre-industrial or customary societies. Any kind of static, unified or instrumentalist account of the relation between law and politics, whether it comes from the right, left or centre of the political spectrum, is unconvincing. The relation between law and social conditions is indeterminate and indeterminately so. Like law and society itself, their relationship is contingent and its precise nature will vary with the context. The socio-economic context is itself largely indeterminate and requires no particular legal rule for its continued survival.

While a shift in the whole regime of legal rules (for example, contract and property) will be significant, the existence or shading of particular rules (for example, the postal rules and the finders' rules)

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<sup>44</sup> See, e.g., G.E. Frug, *The Ideology of Bureaucracy in American Law* (1984) 97 HARV. L. REV. 1276.

<sup>45</sup> See, e.g., M. Barrett, *WOMEN'S OPPRESSION TODAY* (London: Verso, 1980) at 251-53.

will not be crucial. Moreover, in the same way that the socio-economic context under-determines law, that very same law over-determines the possible outcomes to any legal dispute. It is possible and desirable to offer sensible explanations of doctrinally discrete and historically specific regions of legal and social change,<sup>46</sup> but scholars should resist the temptation to go further. It is mistaken to extrapolate from those findings to more universalizable statements about law in general at different times and in different places. As traditional Kuhnian wisdom reveals, any account (including, of course, this one) is as dependent upon historical circumstances and social context as the phenomena it seeks to explain. Thus the extent to which law is determined by, and a determinate of social conditions is itself contingent. Indeed, the acknowledgement of indeterminacy is an ineradicable and pervasive feature of knowledge about ourselves, our situation and our theorizing about them.

Our own understanding of the law-and-politics relation can best be expressed in the imaginative terms of a sheepish metaphor: the relation between society at large and law is like the "inseparable closeness" between sheep farming and woollen sweaters.<sup>47</sup> This understanding exhibits both differences and similarities with the views of traditional theorists. Our view differs from instrumentalists' in that it recognizes that the law can be more than a sheepskin: the relation is more than one-dimensional, deterministic and unidirectional. At the same time, it is similar in that it concedes that law is significantly constrained by the dominant mode of social organization. On the other hand, our view is different to the idealists in that it does not think that law can stand apart from social life. But it is similar in that it sees a more multi-linear relation between law and its social-economic milieu. In short, the relation is both more complex and more indeterminate. The legal products woven are constrained by and take on meaning in the larger socio-economic circumstances. The precise relation will be contingent and depend upon the historical and social details of the particular situation. The law may be more than a sheepskin, but it is never more than the product of the sheep.

## CONCLUSION

More than most countries, North America is a land of dreams. It exists as much in the gazetteer of the ideological imagination as in the atlas of political reality. No matter how often old dreams die, new dreams spring up in their place. The human capacity to dream is

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<sup>46</sup> See, e.g., E. Tucker, *ADMINISTERING DANGER IN THE WORKPLACE: THE LAW AND POLITICS OF OCCUPATIONAL HEALTH AND SAFETY REGULATION IN ONTARIO, 1850-1914* (Toronto: University of Toronto Press, 1990).

<sup>47</sup> F. Schauer, *Lawyers and Lawmaking* (1985) 83 MICH. L. REV. 1141.

irrepressible. And this is no bad thing. Once people lose the will to dream, they succumb too easily to an abject fatalism in which they see their lot as one to be endured rather than improved. But, while giving up on dreaming entirely is to submit to despair, to live entirely in a world of dreams is to mistake fantasy for reality. This is the dubious achievement of Conklin and those tempted by the rhetorical appeal of a visionary formalism.

Like the law itself, modes of thinking about law have their limits and orientations. As special kinds of social knowledge, explanations are contingent and open to constant interpretation and reinterpretation. There is no world of reality that stands apart from the way in which the world is described or judged. Nor is there a way of describing or judging that exists outside the world. Reality and the medium in which it is understood and evaluated are inextricable. Rightness is not about correspondence with an external world nor a solipsistic harmony with our own prejudices. It is to be found in the historical and reflective negotiation between the two.

In this important sense, law is always and inescapably political. While this insight carries profoundly disturbing implications for the mainstream legal theorists and their conceptions of law, it also means that radical theorists must take seriously the possibility of law as a formative constituent of social life and a transformative instrument of political struggle. This does not mean that social activists should rush like lemmings into the courts or mindlessly embrace the "Rule of Law"; such responses are more suited to the born-again legal zealot than the progressive skeptic. A transformative approach to law entails much more than pouring new legal wine into old institutional bottles. It requires a critical understanding of the political nature of legal structures, the limitations of the instrumental impact operation and their capacity to accommodate change. For this reason, a constitutive theory of law, founded upon an understanding of historical and political contingency, can be conducive to the progressive use of law while guarding against "the slide into reformism or cynicism".<sup>48</sup> Visionary imaginings must interact with and be framed by concrete realities to create a politically effective form of legal practice. Then, and only then, can engagement with law begin to influence the substance of our existence, contributing to a social life in which people are less alien to their better selves and more able to shape their collective destinies. Visionary formalism is not the answer.

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<sup>48</sup> K. Klare, *Law-Making as Praxis* (1979) 40 *TELOS* 135.

