
F.R. Scott's Constitution (Inaugural Lecture)[†]

Roderick A. Macdonald*

This lecture reviews and assesses Frank Scott's vision of Canada, a vision that encompassed not only a legal dimension, but also political, economic, social, and cultural aspects. The author distinguishes between "the constitution according to F.R. Scott" and "F.R. Scott's constitution". The former idea refers to the position with respect to the constitution that Scott advocated throughout his life, and that he actually saw achieved in the last years of his life. It stresses the explicit constitution over the implicit constitution, giving precedence, in the author's terms, to constitutional reason over constitutional rhyme. The author argues that Scott's complete vision of the Canadian constitution is not yet realized. We need to discover "F.R. Scott's constitution" in order to reverse the contemporary tendency to deploy a constitutional reason grounded in rights discourse over the constitutional rhyme of justice, equity, and social responsibility.

Cette conférence met en lumière la vision du Canada de Frank Scott; une vision qui englobe non seulement une dimension juridique, mais aussi des dimensions politique, économique, sociale et culturelle. L'auteur distingue «la constitution selon F.R. Scott» de «la constitution de F.R. Scott». La première idée se rapporte au rôle de la constitution tel que défendu par Scott au cours de sa carrière, rôle qu'il a vu achevé à la fin de sa vie. Elle insiste sur la constitution explicite aux dépens de la rime constitutionnelle. Elle donne, selon l'auteur, préséance à la raison constitutionnelle aux dépens de la rime constitutionnelle. L'auteur avance que la vision complète de Scott ne s'est pas encore réalisée. Nous devons découvrir «la constitution de F.R. Scott» afin de renverser la tendance contemporaine à employer la raison constitutionnelle dans un discours de droits pour défaire la rime constitutionnelle de justice, d'équité et de responsabilité sociale.

[†] This essay was initially delivered on 16 February 1996 as the Inaugural Lecture by the F.R. Scott Professor of Constitutional and Public Law at the Faculty of Law, McGill University. In preparing the lecture for publication, I have not reworked its style in any substantial way. Some footnotes have, however, been added to direct the reader to specific sources. The primary sources upon which I have drawn are: D. Lewis & F.R. Scott, *Make This Your Canada* (Toronto: Central Canada, 1943); F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959); F.R. Scott, *The Collected Poems of F.R. Scott* (Toronto: McClelland & Stewart, 1981); F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics*, F.R. Scott, ed. (Toronto: University of Toronto Press, 1977); F.R. Scott, *A New Endeavour: Selected Political Essays, Letters, and Addresses*, M. Horn, ed. (Toronto: University of Toronto Press, 1986); and F.R. Scott & A.J.M. Smith, eds., *The Blasted Pine: An Anthology of Satire, Invective and Disrespectful Verse, Chiefly by Canadian Writers*, rev. ed. (Toronto: Macmillan, 1967). Principal secondary sources are: S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland & Stewart, 1987); S. Djwa & R. St.J. Macdonald, eds., *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics* (Montreal: McGill-Queen's University Press, 1983); G. LeDain, "F.R. Scott and Legal Education" (1982) 27 McGill L.J. 1; and W.S. Tarnopolsky, "Frank Scott — Civil Libertarian" (1982) 27 McGill L.J. 14. I should like to thank my colleagues Stephen Toope, David Stevens, Nicholas Kasirer, Daniel Jutras, Richard Janda, and especially Jeremy Webber for their comments on an earlier version of this essay. The usual exculpation applies.

* F.R. Scott Professor of Constitutional and Public Law, Faculty of Law, McGill University; Fellow, Law and the Determinants of Social Order Programme, Canadian Institute for Advanced Research.

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Introduction

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Introduction

Le nom F.R. Scott a une signification particulière pour nous tous. Que nous le connaissions personnellement, ou de par ses écrits, il nous a marqués profondément. Que ce soit par son activité juridique ou par ses œuvres littéraires, il a tracé une vision de son Canada, de l'ambition social-démocrate de ce pays et de sa conception de la constitution.

We are each admirers of F.R. Scott. We each have experienced, either directly through his teaching and friendship or indirectly through his legal essays and through his poetry, the influence of this great Canadian. We each have benefitted from his life-long commitment, even at great personal cost, to the fundamental values of a liberal-democratic polity: the rule of law and the legal control of governmental authority; respect for and celebration of linguistic and cultural diversity; the marshalling of the resources of the State to shape an economy that justly distributes the material benefits it produces among all members of society; and the nourishing of the aesthetic and cultural dimensions of human life.

It is an honour for me to deliver this Inaugural Lecture on the occasion of my appointment as the F.R. Scott Professor of Constitutional and Public Law. It is also a daunting task. Frank Scott was an intellectual giant; I do little more than walk in his shadow. Frank Scott was an energetic social activist in the courts and in the political arena; my own modest contributions in these domains do not nearly measure up to his. Frank Scott was an extraordinary teacher and scholar; I can only dream of reaching his standards. Frank Scott was a renowned poet and man of letters; I have a soul of many fewer dimensions.

But I take comfort in Frank's warm reaction to a motto I once had occasion to recite to him in the Faculty lounge. It was the motto of a group of former counsellors at a boy's summer camp I attended as a camper and staff member from 1957 through 1974. This group, called the Nor'Wester Society, among its other activities raised money to sponsor young boys from inner-city Toronto to spend a couple of weeks at camp. The motto was "In the strengths of our forebears we go, not in their footsteps; it is their stars we follow, not their dead campfires." As F.R. Scott Professor of Constitutional and Public Law, this is my own aspiration: not simply to retrace Frank Scott's intellectual trajectory, but, standing on his shoulders, to pursue in my own way his ambitions for a better society.

I have entitled this Lecture "F.R. Scott's Constitution", and not "The Constitution According to F.R. Scott". There are two reasons for doing so. Most importantly, I am less concerned with what F.R. Scott thought his view of the constitution was, than I am with what, from a contemporary perspective, we can see that view to have been. Authors are often the worst judges of their own work. Their preoccupations are with the specific points they want to make, and not with the assumptions underlying the arguments they are advancing. Their concern lies more in convincing a reader or listener that the conclusions they draw are correct than it does in arguing for the premises from which the conclusions are derived.

“F.R. Scott’s Constitution” is a more meaningful title for another reason. It suggests prescription rather than description. Frank Scott was not so naive as to believe that his vision actually described the living constitution of his day. But it is this vision of constitutionalism, his intuition of a constitution’s possibilities, that I seek to explore in this Lecture. Not only the constitution as enacted, but the constitution as practiced. Not only the constitution as written in dusty (and not so dusty) documents establishing our governmental institutions, but the constitution as reflected in those living documents by which we attempt to express our views of authority and legitimacy in our everyday lives as citizens. Not only the constitution as currently understood, but the constitution as it could be. Not only, to paraphrase the title of a National Film Board tribute,¹ Frank Scott’s constitutional reason, but also Frank Scott’s constitutional rhyme.

I. Intellectual Antecedents and Intellectual Legacy: Herbert A. Smith and Pierre E. Trudeau

Frank Scott a terminé ses études de premier cycle en histoire à l’Université Bishop’s en 1919, avant de poursuivre des études supérieures en Angleterre comme boursier Rhodes. Il s’inscrit à la Faculté de droit de l’Université McGill en 1924, pour ensuite devenir professeur de droit constitutionnel, toujours à McGill, en 1927. Son frère aîné, plus tard juge en chef de la Cour supérieure du Québec, lui conseilla de se lancer en pratique privée. Frank avait d’autres idées. Il occupa le poste de professeur pendant presque quarante ans, jusqu’en 1966. Même s’il dut prendre sa retraite à cette époque, il continua d’entretenir des rapports étroits avec le droit et de participer à la vie intellectuelle de la faculté pendant quinze autres années. Somme toute, soixante années dévouées à l’enseignement, à la pratique et à l’étude de sa matière: le droit constitutionnel.²

Although a man of ideas, F.R. Scott was not of a particularly theoretical cast of mind. While at Oxford he came under the influence of British progressives such as Bertrand Russell, R.H. Tawney and H.G. Wells. These thinkers liberated his poetry and animated his politics. But most of his understanding of the enterprise of law and the constitution was shaped by his own professor of constitutional law at McGill, Herbert A. Smith. From Smith (and in part in opposition to Smith) Scott derived a few central notions that were to ground his conception of constitutional law and politics throughout his life. True to his English training, Smith believed in a strong central government, preferably in a unitary and not a federal state, and in the parliamentary, rather than the congressional-republican, political system. He held to the conception of the rule of law as a check on the executive, first elaborated by the Victorian jurist A.V. Dicey. He strongly supported the jurisdiction of the common-law courts to exercise a supervisory control over public officials and administrative decision makers. Smith was an Impe-

¹ D. Winkler, dir., *F.R. Scott: Rhyme and Reason* (Montreal: National Film Board of Canada, 1982) videocassette.

² On these points and for other biographical information, see S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland & Stewart, 1987).

rialist and a traditionalist who felt that English practices and institutions were the perfection of legal reason. And he felt that England had a special burden to pass its legal and political culture to its colonies, including Canada, and to the developing world.

Scott adhered to a number, but not all, of these views. Throughout his career he remained wedded to a Diceyan view of the rule of law: his defence of the "Toronto Communists" in the 1930s, his opposition to the deportation orders issued against Japanese Canadians in the mid-1940s, and his support of Quebec's Jehovah's Witnesses in the 1950s, culminating in his vindication of Frank Roncarelli before the Supreme Court of Canada, attest to this vision.³ Throughout his career he believed in a strong central government as the best way to advance desirable social policies: his pamphlets written in the 1930s for the League for Social Reconstruction, his attacks on the decentralizing constitutional jurisprudence of the Judicial Committee of the Privy Council, and his work on section 94 of what is now the *Constitution Act, 1867* are all exemplars of his faith in national initiatives.⁴ Throughout his career he held to a liberal and formal conception of law: a Quebec *Charter of Human Rights*, on whose design he laboured during the late 1960s and early 1970s, and a constitutionalized pan-Canadian Bill of Rights were touchstones for civil liberties and linguistic equality for Scott — not only freedom from governmental action to repress speech, belief, association and language, but also freedoms relating to housing, employment and social security.⁵

Nevertheless, F.R. Scott parted company with his intellectual mentor on various issues. Throughout his career he was sceptical of the Imperial tie, arguing passionately for a made-in-Canada constitution, interpreted and applied in the last resort by Canadian judges who understood the true nature of the federal design in Canada.⁶ Throughout his career Scott believed that government and governmental agencies were capable of improving the lot of ordinary citizens, and so was impatient with certain forms of judicial review of social legislation championed by politically conservative English jurists like Smith. Throughout his career Scott showed a commitment to cultural diver-

³ See, respectively, F.R. Scott, "The Trial of the Toronto Communists" (1932) in F.R. Scott, ed., *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 49 [hereinafter *Essays*]; F.R. Scott, "The Deportation of Japanese Canadians: An Open Letter to the Press" (1946) in *Essays, ibid.*, 190; and *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

⁴ See, respectively, F.R. Scott, "A Decade of the League for Social Reconstruction" (1942) in M. Horn, ed., *A New Endeavour: Selected Political Essays, Letters, and Addresses* (Toronto: University of Toronto Press, 1986) 54 [hereinafter *A New Endeavour*]; F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951) in *Essays, ibid.*, 251; and F.R. Scott, "Section 94 of the British North America Act, 1867" (1942) in *Essays, ibid.*, 112.

⁵ See, respectively, P.-A. Crépeau, "F.R. Scott et la réforme du Code civil" in S. Djwa & R. St.J. Macdonald, eds., *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics* (Montreal: McGill-Queen's University Press, 1983) 153; F.R. Scott, "Freedom of Speech in Canada" (1933) in *Essays, ibid.*, 60; and F.R. Scott, "Expanding Concepts of Human Rights" (1960) in *Essays, ibid.*, 353.

⁶ See F.R. Scott, "The Development of Canadian Federalism" (1931) in *Essays, ibid.*, 35; F.R. Scott, "The Special Nature of Canadian Federalism" (1947) in *Essays, ibid.*, 175; and F.R. Scott, "Our Changing Constitution" (1961) in *Essays, ibid.*, 390.

sity and linguistic duality, never being reluctant to take on the anglophilic aesthetic presumption of the English-speaking elites in Montreal, either in his poetry or in the courts.⁷

If Professor Herbert Smith's teaching provided the antecedents and intellectual framework of F.R. Scott's understanding of the constitution, Prime Minister Pierre Trudeau's legislative initiatives reflected its practice. Like Scott, with whom he shared some of the epic struggles of the 1940s and 1950s, Trudeau was a believer in the rule of law and was a Canadian constitutional patriot. He argued for cutting the colonial tie, and for an entrenched civil-liberties guarantee. After he entered federal politics in 1965, Trudeau revised his earlier favourable attitude towards the decentralizing jurisprudence of the Privy Council and renounced his earlier criticisms of the use of the federal spending power to promote a social safety net and to redistribute income to less wealthy provinces. Like Scott, he came to believe in a strong central government, favouring the development and deployment of national symbols — a flag, an anthem, social programmes — to galvanize Jacobinic assumptions about non-ethnic citizenship. As Prime Minister, he was committed to a policy of official bilingualism. Again like Scott, Trudeau held to a sharp distinction between law and politics, which sustained his scepticism towards legalizing cultural pluralism. It also grounded his reluctance to see a more decentralized federalism as a means of responding to the problem of divided political loyalties, especially among Francophones in Quebec.

Pendant les vingt dernières années de sa vie, Frank Scott défendit les initiatives constitutionnelles et quasi-constitutionnelles du Premier ministre Trudeau, tout en exprimant parfois sa dissidence vis-à-vis de ce qu'il percevait comme un manque de courage constitutionnel de la part du gouvernement fédéral face aux souverainistes québécois. La promulgation de la *Loi sur les langues officielles* lui plut beaucoup à cause de sa conception de l'égalité formelle des langues française et anglaise à travers le Canada et à cause de son scepticisme à l'égard de solutions territoriales aux questions linguistiques — scepticisme qui l'amena d'ailleurs à exprimer son désaccord face à la solution proposée par la Commission royale d'enquête sur le bilinguisme et le biculturalisme.⁸ Il appuya ouvertement et sans réserve la mise en vigueur de la *Loi sur les mesures de guerre*, qui allait de pair avec sa conception de la nature des «droits et libertés publiques» nécessaires à une société paisible et avec son respect pour l'autorité constituée tant et aussi longtemps que cette dernière agit dans les limites de ses pouvoirs juridiques.⁹

Toujours au cours des années soixante-dix, Scott encouragea l'expansion *de facto* de la compétence fédérale, surtout en raison de son désir de bâtir un pays socialiste où le gouvernement gérerait l'économie à l'avantage des travailleurs. Il trouva une autre

⁷ See Scott's defence of *Lady Chatterley's Lover* in *Brodie v. R.*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507. See generally F.R. Scott, "Canada, Quebec, and Bilingualism" (1947) in *Essays, ibid.*, 197; F.R. Scott, "Confederation Is a True Alliance" (1963) in *A New Endeavour, supra* note 4, 124; F.R. Scott, "Language Rights and Language Policy in Canada" (1971) in *Essays, ibid.*, 375.

⁸ See F.R. Scott, "Language Rights and Language Policy in Canada", *ibid.*

⁹ See F.R. Scott, "Global Attack on Our Institutions" (1970) in *A New Endeavour, supra* note 4, 126; and F.R. Scott, "The War Measures Act in Retrospect" (1971) in *A New Endeavour, ibid.*, 131.

raison de soutenir la prépondérance fédérale dans ses démêlés avec le régime Duplessis et dans sa conviction que les unités politiques plus grandes et plus hétérogènes seraient moins portées à opprimer les minorités. Le rapatriement de la constitution canadienne en 1982 et l'enclassement de la *Charte canadienne des droits et libertés* représentent l'achèvement de ses principaux objectifs constitutionnels: la fin du colonialisme et la protection juridique des droits et libertés. Bien qu'il se soit montré déçu par le refus du gouvernement fédéral d'exercer son pouvoir de désaveu contre les projets de loi 22 en 1974 et 101 en 1977,¹⁰ et malgré son opposition à l'insertion de la clause «nonobstant» dans la *Charte canadienne des droits et libertés*, il appuyait en principe le programme législatif de Pierre Trudeau.

Frank Scott was very much a man of his time and place. His view of the constitution, like his career in law and politics, and like his life, was a bridge between the Canada of the late nineteenth century (firmly situated as a British colony not far removed from the English Victorian assumptions of a well-ordered, class-based society) and the Canada of the late twentieth century (nearly clear of its colonial past and largely committed to the institutions of a liberal-democratic pluralistic state). Intellectually, F.R. Scott's view of the constitution reflected his divided self. However much he knew that a constitution was more than just its written documents, he had trouble expressing, let alone celebrating, its fundamental implicit elements. As reflected in his legal essays, "the constitution according to F.R. Scott" was an epitome of reason: constitutional reason over constitutional rhyme. By contrast, as revealed in his politics and his poetry, "F.R. Scott's constitution" was a subtle and complex interweaving of constitutional reason and constitutional rhyme.

II. The Constitution According to F.R. Scott: Reason over Rhyme

The constitution of a modern liberal state comprises both text, on the one hand, and tradition and practices, on the other. The role of each in any particular context depends mostly on endogenous factors — factors internal to the state in question. What constitutional lawyers and constitutional drafters usually seek to put in writing is shaped largely by two perceptions about existing implicit constitutional arrangements: what they perceive as valuable but vulnerable, and wish to preserve against erosion; and what they perceive as inappropriate but ingrained, and wish to recast for the future. The subtle interplay of the written, explicit constitution and the unwritten, implicit constitution is particularly evident in states such as the United Kingdom. There, practice has typically preceded prescription, and major social change is managed by incremental modifications to the working of institutions rather than through wholesale invention of new institutions.

This interplay is, however, less apparent in the case of most modern documentary constitutions. These written constitutions typically find their origins in momentous political events. Some result from the desire to make a clean break with a colonial past.

¹⁰ Bill 22, *Loi sur la langue officielle*, 2d Sess., 30th Leg., Quebec, 1974 (assented to 31 July 1974, S.Q. 1974, c. 6, as rep. by *Charte de la langue française*, S.Q. 1977, c. 5, s. 224); Bill 101, *Charte de la langue française*, 2d Sess., 31st Leg., Quebec, 1977 (assented to 26 August 1977, S.Q. 1977, c. 5).

Examples of such desire may be seen in the United States of 1789, the several new states emergent in nineteenth-century South America under the tutelage of Simon Bolivar, or in Africa and Asia from the 1940s through the 1980s. Others result from the desire to reorient the political discourse and the legal processes of a society thought in desperate need of either a first commitment or a re-commitment to democratic constitutionalism. Examples here would include the France of 1793, Juarez's Mexico of 1866, Germany and Japan in the late 1940s, or the former members of the Warsaw Pact in the later 1980s and 1990s.

Only rarely, and Canada's evolutionary constitutionalism from 1763 through 1982 is perhaps the world's leading example, are the written components of a constitution themselves the fruit of incremental recognition. Only rarely, therefore, does the explicit constitution not proclaim itself competent to address the full panoply of fundamental questions about the organization of public authority so dear to political theorists. Even in those infrequent cases of evolutionary constitutionalism such as Canada's, the official narrative tends to focus more on text and momentous events — conquest in 1759, partition in 1791, rebellion in 1837, confederation in 1867, patriation in 1982 — than on changing traditions and practices. Modern Canadian constitutionalism, especially as now taught and learned in law faculties and political-science departments, is true to F.R. Scott's expressed conception of its province, celebrating progress and privileging constitutional reason. But Frank Scott himself actually lived a much more nuanced constitutional practice.

In twentieth-century liberal democracies, the central features of the explicit constitution may usefully be grouped around three main themes: membership and motive; governance and legitimation; and fidelity and continuity.

L'établissement des fondements de la souveraineté est le thème principal d'une constitution explicite et écrite. Une telle constitution répond aux questions: qui proclame le nouvel ordre constitutionnel? qui est membre de ce nouvel ordre? quels sont les motifs pour le faire? Nous vivons actuellement au Québec une période où les souverainistes se sentent obligés de rendre ces thèmes constitutionnels explicites. F.R. Scott, cependant, ne les a jamais considérés comme étant fondamentaux. Selon lui, le Canada n'avait pas besoin d'une formule d'appartenance telle que «nous le peuple» ou «We the People» pour inciter les citoyens à se reconnaître dans ce pays.¹¹

De même, il ne croyait ni aux préambules ni aux déclarations de souveraineté pour récrire l'histoire afin de justifier la proclamation de l'indépendance du Canada. F.R. Scott acceptait la réalité sociologique d'un Canada qui existait déjà. Il n'était pas nécessaire de se servir de la rhétorique pour le créer. Tout ce qu'il fallait, c'était annoncer ce fait juridiquement. En d'autres termes, que l'existence d'un peuple ou de plusieurs peuples soit une condition nécessaire à la fondation d'un État relevait de l'évidence; que ce peuple ou ces peuples s'identifient expressément dans une constitution n'était ni nécessaire, ni souhaitable.

¹¹ See F.R. Scott, "The Redistribution of Imperial Sovereignty" (1950) in *Essays*, *supra* note 3, 244.

Another central theme of modern written constitutions is their technical organization of political sovereignty: the establishment and legitimation of the institutions of governance. Here again F.R. Scott was only partially interested. He was quite content with a parliamentary system of governance, and saw no need for redesigning Canada's legislative and executive institutions along a congressional-republican model like that of the United States. Nor did he much worry about explicitly recasting the allocation of political sovereignty in the existing federal system, although he did feel that the federal government should not be reticent to act to the full extent of its constitutional authority.¹² And he also sought to ensure that the Privy Council did not continue, in his view, to misread the *British North America Act, 1867*.¹³ Finally, he argued that particular allocational differences such as those announced by sections 94, 98 and 133 of the *British North America Act, 1867* simply reflected the political trade-offs generated by Canada's cultural-linguistic duality. They did not, that is, make Quebec a "*société distincte*".¹⁴

As a socialist, Frank Scott was preoccupied with the ownership of public property, taxation, borrowing, spending, transfer payments to provinces and individuals, equalization, and the division of the public debt. He saw the acquisition and disposal of public property, the power to tax and the power to spend as important instruments of governmental planning that need not necessarily rest on judgments directly linked to those made in connection with the distribution of legislative power. While F.R. Scott did not want the federal government hamstrung in its efforts to manage the national economy by a narrow reading of its legislative powers under sections 91 and 92 of the *British North America Act, 1867*, he later came to feel that existing constitutional principles governing the authority of the federal government to own, contract, tax and spend were a substitute for direct legislative authority sufficient to its purposes.¹⁵

More fundamentally, Scott was obsessed with the question of the legitimacy of governmental action. The detail of these legitimating processes — modes of voting, for example — he left aside. But abstract principle was central. In his cosmology, the House of Commons, as an elected body, was legitimate; the Senate, unelected, was not. The Supreme Court of Canada, as a Canadian court to which Canadians were appointed, was legitimate; the Privy Council, a vestige of remote Imperialism, was not. Parliament, as an institution of representative democratic governance, was legitimate; newfangled processes of "direct democracy", such as initiative and recall, plebiscite, and referendum, were not. For Frank Scott the key issues in governance were the rule

¹² See F.R. Scott, "The Development of Canadian Federalism", *supra* note 6; F.R. Scott, "État fédéral canadien et provinces" (1944) in *Essays*, *supra* note 3, 131; and F.R. Scott, "Our Changing Constitution", *supra* note 6.

¹³ See F.R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" (1950) in *Essays*, *ibid.*, 90; F.R. Scott, "Federal Jurisdiction Over Labour Relations: A New Look" in *Essays*, *ibid.*, 336.

¹⁴ See F.R. Scott, "Areas of Conflict in the Field of Public Law and Policy" (1957) in *Essays*, *ibid.*, 302.

¹⁵ See: F.R. Scott, "The Constitutional Background of Taxation Agreements" (1955) in *Essays*, *ibid.*, 291; F.R. Scott, "Constitutional Adaptations to Changing Functions of Government" (1945) in *Essays*, *ibid.*, 142; and F.R. Scott, "Canadian Federalism: The Legal Perspective" (1967) in *Essays*, *ibid.*, 362.

of law, the subordination of the executive to Parliament, and the power of the federal government to manage the national economy.

A third main ambition of modern written constitutions is to trace out the conditions of their own continuity: they explicitly proclaim their supremacy and establish a self-referential procedure for their amendment. A constitution that would achieve both objectives was a life-long crusade for F.R. Scott. Throughout the 1930s, 1940s and 1950s, notwithstanding his successful deployment in the Supreme Court of Canada of arguments based on the idea of an "implied" Bill of Rights, he promoted the idea of imposing counter-majoritarian constraints on legislative and governmental activity under the guise of entrenched, or partially entrenched, "civil liberties" guarantees.¹⁶ Frank Scott also was concerned with how the explicit constitution was interpreted and applied. Because the Privy Council did not, in his eyes, adequately understand the *British North America Act, 1867* as a Canadian constitution, it could understand neither the supremacy of the text of the constitution nor the primacy of constitutional politics over other politics. Part of his idealized Canadian constitution involved the abolition of Privy Council appeals, and part involved severing the colonial link by patriating the amending formula. To have a made-in-Canada constitution meant a made-in-Canada process of constitutional amendment.

Constitutional texts concerning membership and motive, governance and legitimation, and fidelity and continuity have come to be associated with the modern liberal state. But as students of these constitutions readily acknowledge, even when a constitution is written in a document bearing that title, it will always contain implicit elements that cannot be identified and organized in an *a priori* fashion. Constitutional reason presupposes constitutional rhyme. Two implicit dimensions of liberal constitutionalism — two features of constitutional rhyme — merit notice: inheritance or tradition; and context or practices.

Il n'est pas surprenant, étant donné les événements politiques qui ont servi de toile de fond à la rédaction de la plupart des constitutions écrites — les révolutions et guerres civiles, la fin du colonialisme — que les thèmes de continuité, de tradition et d'histoire ne figurent pas de manière proéminente dans les théories des constitutionnalistes. Par contre, dans les États comme le Canada, les politiciens aussi bien que les juristes, les politologues et les historiens sont enclins à légitimer l'accession du pays à la souveraineté au moyen de métaphores liées à la «complétude» ou à la «nécessité»: dans le brocard du célèbre historien Arthur Lower, c'est la progression «*Colony to Nation*».¹⁷ Ainsi, le rapatriement en 1982 fut présenté comme le signe de la maturation politique et constitutionnelle du Canada. Nonobstant les préoccupations de la tradition académique, le constitutionnalisme libéral présuppose l'existence d'une constitution implicite.

En d'autres termes, il n'y a pas de constitution effective qui ne soit perçue comme légitime. La légitimité provient non pas de la ratification momentanée d'un texte quel-

¹⁶ Scott employed the "implied" Bill of Rights argument in *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337, and argued for civil-liberties guarantees as a federal matter in "Dominion Jurisdiction over Human Rights and Fundamental Freedoms" (1949) in *Essays, ibid.*, 209.

¹⁷ A. Lower, *Colony to Nation: A History of Canada* (Toronto: Longmans, Green, 1946).

conque, mais plutôt du fait que les pratiques et l'autorité qu'il établit sont acceptées par la population. Une telle croyance populaire est reflétée dans toutes les formules constitutionnelles adoptées au Canada depuis 1867 — que ce soit «une constitution reposant sur les mêmes principes que celle du Royaume-Uni» ou que ce soit «la suprématie de Dieu et la primauté du droit».¹⁸ Comme d'autres l'ont souligné, le véritable but d'un ordre constitutionnel est de fixer les questions (et non pas les réponses) du processus politique.

But the formal similarity of a constitutional text over time does not mean that its political content is static. The implicit constitution is daily shaped by context: what issues cry out for attention and what resources can be marshalled to address these issues? Here the context of constitutionalism is not just its inheritance, but also comprises the structure of politics that is pursued within that inheritance.

It follows that a final element of the implicit constitution is, inevitably, political practice. What are the patterns by which the institutions of government actually work? Sometimes, when they become stabilized institutional practices, these patterns are referred to as conventions. Frequently, however, they simply remain practices. The practice of designating a Quebec lieutenant whenever an English-speaking Prime Minister from outside Quebec is in office is part of the living constitution. So are different patterns of deference to provincial interests whenever matters of language, natural resources, fisheries, forestry or manufacturing are in issue. Some constitutional theorists suggest that these practices have no normative force, and that they may be departed from freely.¹⁹ Yet the point is that they are not frequently departed from, and are always subject to notice when they are. Practices change, but they have their own dynamic of change.

One should neither be mesmerized nor deceived by the explicit constitution. The implicit constitution is as important as the explicit in shaping the character of liberal constitutionalism. A constitutional text is a point of access, not an exhaustive formulation. No modern "*nous le peuple*" will ever embrace those who cannot recognize themselves in the "*nous*" so stated. No explicit allocation of legislative power will describe governance practices sufficiently to explain why federal social transfer benefits are structured so as to favour certain regions, such as unemployment insurance for the Newfoundland fishery. And no civil-liberties document itself explains how its own implicit limitations prevent a finding that eighty years' worth of legislative activity in Manitoba has been *ultra vires*.²⁰ All of these implicit elements of the Canadian constitution were understood and appreciated by F.R. Scott, the constitutional lawyer; yet he reserved commentary on them for his political writings and his poetry. "The constitution according to F.R. Scott" presupposed the promotion of the explicit constitution over the implicit; by contrast, "F.R. Scott's constitution" gave full measure to both.

¹⁸ From the preambles to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 and to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, respectively.

¹⁹ See e.g. P. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 20-22.

²⁰ See *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

III. F.R. Scott's Constitution: Rhyme and Reason

Depuis la fin de la Deuxième guerre mondiale et jusqu'à tout récemment, la constitution canadienne a évolué, de manière apparemment inexorable, vers ce que F.R. Scott envisageait comme un prérequis pour le vingt-et-unième siècle: un gouvernement central fort. Le fait d'établir, au cours des années soixante et soixante-dix, un programme national de pensions de vieillesse, l'assurance-maladie, l'assurance-chômage plus souple, la péréquation entre les provinces, la lutte contre l'inflation et le programme d'énergie nationale, a annoncé une présence accrue du gouvernement fédéral dans la gestion et la réglementation de l'économie, allant dans le même sens que l'usage croissant du pouvoir fédéral de dépenser et la réforme du système fiscal. Ces initiatives devinrent l'expression législative de l'idée avancée par F.R. Scott, voulant que les ressources et les instruments du gouvernement fédéral soient indispensables pour parvenir à une distribution plus équitable des bénéfices économiques de la société canadienne.

L'accession à la souveraineté et la fin formelle du colonialisme britannique en 1982 furent précédées par la création, à l'époque du centenaire en 1967, d'institutions nationales comme le drapeau, l'hymne nationale et la Cour fédérale, et par l'instauration d'une politique fédérale de bilinguisme. Les années soixante-dix ont témoigné la création d'une Commission canadienne des droits de la personne, ainsi que l'adoption d'une loi sur l'accès à l'information et d'une loi sur le contrôle judiciaire des règlements. En 1982, c'était l'enchassement de la *Charte canadienne des droits et libertés*. Tout ceci servit de pierre angulaire à l'édifice constitutionnel de F.R. Scott, édifice en chantier depuis ses croisades contre le colonialisme du Conseil privé et contre l'ethno-centrisme de Maurice Duplessis.

By the time of his death in 1985, most of "the constitution according to F.R. Scott" had been achieved. And yet the promised, and hoped for, constitutional nirvana was not at hand. Canadians and their political leaders seemed strangely resistant to and sceptical of the triumph of constitutional reason. Today, no part of Canada seems immune from a mood of disaffect and a discourse of failure.

In Quebec, the appropriate role of the federal government in directing social and economic policy remains a live issue. Whether expressed in the language of "distinct society" by moderate nationalists, or expressed in the language of "sovereignty" or "a real country" by separatist nationalists, rejection of a uniform pan-Canadian nationalism remains unabated. In much of Canada west of Ontario, a sentiment of alienation and exploitation is reflected in resistance to notions of regional status, the demand for a constitutional veto and the idea of Senate reform. In the Maritimes and Newfoundland, scepticism is manifested in opposition to the federal withdrawal from equalization and established programme funding, and to the redesign of unemployment insurance and other income-support programmes. In Ontario, doubt about the new constitutionalism finds a locus in adverse reaction to the F.T.A. and N.A.F.T.A., and in opposition to the withdrawal of the federal government from its historic role in managing the economy. In the Territories, frustration with the post-1982 status quo translates into a desire for provincehood. Among First Nations peoples, dissatisfaction finds expression in the claim for an inherent right to self-government. And among equality seekers under the *Canadian Charter of Rights and Freedoms*, the newly achieved liberal constitution is

contested in the demand for greater efforts at promoting substantive and not just formal equality.

Far from solving the central Canadian constitutional conundrums that provoked F.R. Scott to such energy for forty years, or at least displacing them to the realm of quotidian political debate and disposition, some aspects of the Jacobinic model of constitutional reason seem to have enhanced the place of these conundrums in public-policy formation by giving them textual expression. If anything, one might conclude that Frank Scott succeeded all too well in his endeavour to promote the explicit constitution as a symbol of Canadian nationhood. Constitutionalism has become the talisman of contemporary Canada.

Political, economic and social-policy debates have been subsumed in law. The *Canadian Charter of Rights and Freedoms* has transformed a politics of the good into a politics of rights. The *Constitution Act, 1982* has transformed political negotiation between provinces and Ottawa about fiscal federalism into constitutional squabbles over division of powers, amending formulae and the spending power. So too economics and social policy. The economic assumptions underlying governmental policies over Canada's first one hundred years — policies that produced enterprises like Canadian Pacific, Massey-Harris and Bell Canada as well as Crown corporations in energy, transportation and telecommunications — no longer hold. An increasing reflex to command and control regulation and to its evil twin, deregulation, and the displacement of energy to the legalistic interpretations of treaties like N.A.F.T.A. and the G.A.T.T. compromise the capacity of the political state to govern. When social policy regarding health, education and welfare is debated today, the relevant battery of experts is more likely to be composed of lawyers than of doctors, educators and social workers; and the privileged language is more likely to be equality rights and discrimination than fairness, justice and social responsibility. Everyday-life itself has become constitutionalized; but sadly, the constitution in question celebrates reason and denigrates rhyme.

The key challenges now facing Canada cannot be addressed without the rediscovery of rhyme and the celebration of both rhyme and reason in Canadian constitutionalism. What are these contemporary challenges of "F.R. Scott's constitution"?

First of all, how should national governments conceive their role in managing social policy and the economy in an increasingly globalized economy? The patriated national constitution of F.R. Scott's imagination has little to say about the allocation and control of social power in a world economy. Rather, it is the idea of democratic governance and political legitimacy — even across state boundaries in an implicit transnational constitutional order — that makes the explicit institutions of national governance meaningful.

Secondly, how should governments respond to the challenges of pluralism? The forging of a unitary Canadian civic identity, so central to F.R. Scott's constitutional vision, has little to say about the recognition and accommodation of ethnic and cultural diversity in a modern multicultural state such as Canada. Rather, it is the theme of multiple allegiances — the need to mediate between different and divided loyalties

within a state that does not seek to impose a homogeneous view of citizenship — that makes the explicit claims of *Charter* patriots possible.

Thirdly, how should constitutions evolve to foster experimentation and responsiveness in social policy? The centralization of levers of economic regulation in the federal government, so much a part of F.R. Scott's conception of how a more egalitarian and just Canada might be achieved, has little to do with claims for self-empowerment in relation to decisions that define local communities. Rather, it is the theme of subsidiarity, according to which the powers needed to foster democratic governance should be wielded by the least embracing political unit capable of doing so, that makes progressive and responsive social policy possible.

Finally, how should governments act so as to reinvigorate democratic politics in the face of excessive judicialization of everyday life? The expansion of the state's reach and the subsumption of all mediating social institutions into delegates of the state, which F.R. Scott saw as a constitutional prerequisite to effective social and economic planning, has little to say about why people choose to join, to participate in and to remain loyal to associations by which their lives are enriched in voluntary interaction with others. Rather, it is the theme of a vibrant civil society, comprising multiple groupings of citizens in associations through which they pursue the diverse components of their plural selves, that is a prerequisite to generating the fidelity necessary to sustain commitment to the more abstract idea of democratic citizenship.

Ces quatre thèmes sont, de bien des points de vue, l'antithèse de ce que j'ai appelé «la constitution selon F.R. Scott». Ces thèmes laissent entendre que l'État-nation moderne n'est pas forcément le meilleur cadre de régulation économique et sociale dans un marché mondial. Ils laissent entendre que le local aussi bien que le national pourrait être un site approprié de direction politique. Ils laissent entendre que le défi primordial de l'État moderne sera de développer, en parallèle avec les droits explicites, une conception plus nuancée de la normativité implicite. Ils laissent entendre que les organismes et associations non-étatiques et volontaires de la société civile servent de fondement à l'ordre constitutionnel démocratique. Ces quatre thèmes sont, en d'autres mots, les thèmes contemporains d'un constitutionnalisme qui comporte un aspect implicite (la rime constitutionnelle), ainsi qu'un aspect explicite (la raison constitutionnelle). Ensemble, ces quatre thèmes sont l'essentiel de la véritable «constitution de F.R. Scott».

Conclusion

I should like to bring this Inaugural Lecture to a close by recalling that Frank Scott spent his entire career as a professor at the Faculty of Law of McGill University. Unlike some other leading constitutionalists of his era, he spurned the siren song of both elective politics and the Supreme Court bench. He was passionately, and above all else, a *universitaire*.

This passion is no better illustrated than in his view of the primary mission of the University. In one of his most celebrated quips, which he more than once visited upon me in opprobrium, Frank Scott observed that “the University exists to tell the truth to

the powerful." It requires little imagination to deduce who, during the bulk of his professorial career, he saw as the powerful in need of truth telling.

Politically, the powerful were Maurice Duplessis, Mackenzie King and other established figures. He took them on with gusto, in the courts and in his poetry. I quote one of his most celebrated and cited works:²¹

How shall we speak of Canada,
Mackenzie King dead?
The Mother's boy in the lonely room
With his dog, his medium and his ruins?

He blunted us.

We had no shape
Because he never took sides,
And no sides
Because he never allowed them to take shape.

He skilfully avoided what was wrong
Without saying what was right,
And never let his on the one hand
Know what his on the other was doing.

...

Truly he will be remembered
Wherever men honour ingenuity,
Ambiguity, inactivity, and political longevity.

Let us raise up a temple
To the cult of mediocrity,
Do nothing by halves
Which can be done by quarters.

Economically, the powerful were Sir Edward Beatty, J.W. McConnell and other scions of Canadian capitalism. They too were skewered on his legal and literary rapier. Once again I quote:²²

They say we lack audacity, that we are middle class, without the
adventurousness that arises from the desperation of the lower
classes or the tradition of the upper classes.

²¹ F.R. Scott, "W.L.M.K." in *The Collected Poems of F.R. Scott* (Toronto: McClelland & Stewart, 1981) [hereinafter *Collected Poems*] 78 at 78 (l. 1-13), 79 (l. 31-37).

²² F.R. Scott, "Audacity" in *Collected Poems, ibid.*, 213 at 213 (l. 1-13, 29-33), 214 (l. 34-39, 66-73), 215 (l. 74-80).

They say we are more emphatically middling than any country
west of Switzerland, and that boldness and experiment are far
from our complacent thoughts.

But I say to you, they do not know where to look, and have not
the eyes to see.

For audacity is all around us,
Boldness sits in the highest places,
We are riddled with insolence.

Do you want audacity?
Let me tell you —

...

You may marvel at the boldness of promoters of oil and natural
gas, men too quick for production, fixers and peddlers,
Getting their hands on concessions and rights, access to
underground treasures awaiting man's use in the womb of
our northland,
Playing the suckers and markets, turning their thousands to
millions, loading the pipe-lines with overhead that is paid by
the housewife who cooks her spaghetti,
Then solemnly demanding higher rates for sales of the product
(extra hot, natural gas!) before friends on the Board of
Control:

...

But all this is as nothing, not worthy of mention,
Beside the supreme, the breath-taking audacity
Of the great executives in their panelled boardrooms
Found at every point in the social structure where policy is laid
down or decision taken,
Without whom no hospital can be opened, no charitable
campaign launched, no church can engage a preacher and no
university can build a building,
Daring to be omniscient, omnipotent, omnipresent, not to
mention omnivorous —
These surely you can see in this Canada of ours, O London
Times,
In this country that has the audacity to proclaim the "supremacy
of God"
In its Bill of Rights?

Socially, the powerful were the arbiters of taste and convention among the English-speaking Montreal elites. He challenged their morals with the law, their narrowness with his translations, and their presumptuousness with his wit. A third time let me quote from his poetry:²³

²³ F.R. Scott, "A Lass in Wonderland" in *Collected Poems, ibid.*, 264 at 264 (ℓ. I-12), 265 (ℓ. 37-40).

I went to bat for the Lady Chatte
 Dressed in my bib and gown.
 The judges three glared down at me
 The priests patrolled the town.

My right hand shook as I reached for that book
 And rose to play my part.
 For out on the street were the marching feet
 Of the League of the Sacred Heart.

The word "obscene" was supposed to mean
 "Undue exploitation of sex."
 This wording's fine for your needs and mine
 But it's far too free for Quebec's.

...

Oh Letters and Law are found in the raw
 And found on the heights sublime,
 But D.H. Lawrence would view with abhorrence
 This Jansenist pantomime.

The university of the time was one of the few places where dissent from orthodoxy was possible. But even in its sacred precincts there were costs to truth telling; and as we all now know, these costs Frank Scott paid, and paid willingly.

Aujourd'hui le terrain intellectuel n'est plus le même. Loin de mettre les idées reçues à l'épreuve, les universitaires investissent beaucoup d'efforts à protéger leurs propres orthodoxies, ainsi que celles de la société. Il reste peu de professeurs qui se consacrent à dire leurs quatre vérités aux agents sociaux. On préfère les luttes intestines sur l'avenir de l'université — ses présupposés, son curriculum, sa mission — aux débats de société. Plus encore, la polyphonie traditionnelle du débat universitaire, où les politologues, les sociologues, les économistes et les philosophes prônaient tous, dans leur propre langage, leur vision du bien social et de la structure politique de l'état, a cédé la place à la monotonie du discours juridique. Le monde universitaire semble désormais hypnotisé par le droit.

Hors du milieu universitaire aussi, le droit occupe toute la place comme nouvelle orthodoxie. Les juristes ont accédé seuls au statut de prophètes. Bien que nos poètes et écrivains, nos peintres et nos sculpteurs, nos musiciens et nos danseurs expriment aussi leurs vérités (tout comme F.R. Scott, qui se servait naguère de ses poèmes pour excorier les puissants), ils ont largement cédé la place en matière constitutionnelle au droit et aux juristes.

The historical "constitution according to F.R. Scott" has led us, as Canadians, to the discovery of our constitutional reason; but along the way we have marginalized our constitutional rhyme. "F.R. Scott's constitution", by contrast, invites us to celebrate the truth reflected by both reason and rhyme.

Under "F.R. Scott's constitution" then, what is today's truth? And who are the powerful to whom it must be told? I have no doubt as to what Frank Scott's response would be, were he with us. So, as the newly installed incumbent of the F.R. Scott Chair in Constitutional and Public Law, I shall conclude by expressing his absent voice.

The truth is our capacity to imagine a Canada in which we recognize the advantages we have derived from our membership in such a richly diverse political community, a Canada in which we are dedicated to a just and equitable sharing of those advantages with others. The powerful to whom this truth must be told are none other than ourselves. Such is the faith that grounds "F.R. Scott's constitution".
