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The New Borders of the Constitutional

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The New Borders of the Constitutional

Abstract

The key critical constitutional debates of the future are likely—and need—to be very different from those that animated the Charter’s first thirty years. Since 1982, the borders between law and politics, rights and utility, and the public and the private have staked out the main territory contested by critical scholarship. However, these borders now demarcate a restricted landscape, drawing critics onto the ground of normative debate preferred by liberal theory, and leading them to propose, at best, a form of moderate pragmatism. A more promising approach lies in reconnecting constitutional debate to the socio-historical strand of critical theory, as represented by the emergent school of constitutional sociology, and in developing this connection in light of the insights of postcolonial studies. The new borders of the constitutional are located between those approaches that accept the epistemological framework of modern Western constitutionalism, and those that make that framework the object of critical inquiry.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Constitutional law; Canada

The New Borders of the Constitutional

GAVIN W. ANDERSON *

The key critical constitutional debates of the future are likely—and need—to be very different from those that animated the *Charter's* first thirty years. Since 1982, the borders between law and politics, rights and utility, and the public and the private have staked out the main territory contested by critical scholarship. However, these borders now demarcate a restricted landscape, drawing critics onto the ground of normative debate preferred by liberal theory, and leading them to propose, at best, a form of moderate pragmatism. A more promising approach lies in reconnecting constitutional debate to the socio-historical strand of critical theory, as represented by the emergent school of constitutional sociology, and in developing this connection in light of the insights of postcolonial studies. The new borders of the constitutional are located between those approaches that accept the epistemological framework of modern Western constitutionalism, and those that make that framework the object of critical inquiry.

Les principaux débats critiques de l'avenir sur la constitution seront probablement—et devront être—fort différents de ceux qui ont animé les trente premières années de la *Charte*. Depuis 1982, la frontière entre droit et politique, droits et utilité, et domaines public et privé ont constitué le champ principal de contestation des chercheurs critiques. Ces frontières délimitent toutefois désormais un panorama restreint, ce qui amène les critiques sur le terrain d'un débat normatif qui privilégie les théories libérales et les pousse à proposer, à tout le mieux, une forme de pragmatisme modéré. Une approche plus prometteuse consisterait à rétablir le lien entre le débat constitutionnel et le fil socio-historique de la théorie critique, comme le représente l'école émergente de la sociologie constitutionnelle, et à mettre en œuvre ce rétablissement à la lumière des acquis des études postcoloniales. Les nouvelles frontières de la constitutionnalité se situent entre ces approches qui acceptent le cadre épistémologique du constitutionnalisme occidental moderne et celles qui font de cette structure l'objet d'un questionnement critique.

* School of Law, University of Glasgow. An earlier version of this article was presented at the inaugural Osgoode Hall Law Journal Symposium, "Canada's Rights Revolution: A Critical and Comparative Symposium on the Canadian Charter," Osgoode Hall Law School, York University, Toronto (14 September 2012). I would like to thank the participants at the Symposium for their helpful and stimulating comments on an earlier draft, and in particular, Jenny Nedelsky, for her insightful commentary. I also wish to express gratitude to the guest editors, Benjamin Berger and Jamie Cameron, for their careful reading of the original paper, and for the supportive manner in which they have overseen the publication of this special edition.

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IN CONTEMPORARY CONSTITUTIONAL DEBATE, critical fears and liberal hopes appear to combine in questioning the viability of a critical constitutional enterprise. For critics, constitutional law is regarded as unpromising ground from which to attack unequal power relations and to address the task of social reconstruction. In the classic tension between the constituent power of the *demos* and the power that is already constituted in institutional form, the latter is seen as overdetermining the former, ensuring that constitutionalism remains pre-committed to maintaining the existing order.¹ From a liberal perspective, the most trenchant account of the ideological shortcomings of prevailing constitutional forms must ultimately address the question of the normativity of constitutional law.² Moreover, it is argued that doing so necessarily brings critics inside the constitutional fold, requiring them “to engage seriously in setting out the proper relationship between the legislature, the administration and the judiciary.”³ On either count, the cost of constitutional engagement is a dilution of critical ambition: In place of radical manifestos, the best we can now expect is some version of moderate pragmatism.

These theoretical concerns have considerable resonance when we reflect upon the thirty years since the *Charter of Rights and Freedoms*⁴ was enacted; from a critical point of view, this anniversary is in many ways the most acute and troubling. It is only as liberal bills of rights become embedded over the longer term that the full scale of the critical predicament becomes apparent. This is generally obscured during two earlier phases of critical scholarship. The first phase is characterized

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1. See Emiliios Christodoulidis, “Against Substitution: The Constitutional Thinking of Dissensus” in Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 189 at 191.
 2. David Dyzenhaus, “The Left and the Question of Law” (2004) 17:1 Can JL & Jur 7 [Dyzenhaus, “The Left”].
 3. *Ibid* at 30.
 4. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

by *ex ante* opposition to the very idea of an entrenched bill of rights. This opposition rests on principled and consequentialist objections to judicial, as opposed to political, decision making. The second phase arises once the bill of rights is in force, with critical theory operating in an “I told you so” mode, vindicating its initial scepticism in light of the dismal record of constitutional adjudication. However, as bright-line questions of legitimacy that critics sought to keep to the fore gradually recede through the attrition of time, we enter a third phase in which critics face the reality of a bill of rights as a fact of constitutional life. The transition to the third phase crystallizes the dilemmas facing critical scholars. If they choose—as some leading voices of the first two phases have done—to vacate the constitutional stage, they risk irrelevance in an age of constitutional rights; however, if they advocate an unmediated return to politics, as others appear to do, they potentially align themselves with an unsavoury populism and with some unlikely fellow travellers.⁵ According to David Dyzenhaus, the only viable option remaining for critics is to abandon concerns about co-option and to work within the rule of law to advance their own theory of judicial review.⁶

In this article, we question the conclusion that the zenith of critical constitutionalism has passed. While agreeing with Dyzenhaus that the transition from the second to the third phase has posed significant difficulties for critical theorists, we offer here a different diagnosis of these problems. In particular, we argue that the borders over which the initial theoretical encounters of the *Charter* era were conducted delineated a somewhat constricted landscape—moreover, one whose pathways led critics directly onto the horns of Dyzenhaus’s dilemma. These borders principally marked out the opposition between legal and political forms of constitutionalism, and while initially a fruitful source of critical inspiration, they can now be seen as self-limiting in narrowing the scope of the constitutional debate. This dynamic in the second phase ensured that the substantive terms of debate in the third phase were conducive to liberal interests and that protagonists were drawn, methodologically, onto the latter’s favoured normative terrain. These metaphorical borders also have an important territorial dimension.⁷ Namely, it is assumed without comment that these debates take place within the bounds of modern constitutionalism as it has developed in the West—more specifically, in

5. Dyzenhaus, “The Left,” *supra* note 2 at 8.

6. *Ibid* at 9.

7. I am grateful to Mark Tushnet for raising this point at the inaugural Osgoode Hall Law Journal Symposium, “Canada’s Rights Revolution: A Critical and Comparative Symposium on the Canadian *Charter*,” Osgoode Hall Law School, York University, Toronto (14 September 2012).

the Canadian nation-state—and that this is the frame of reference within which critical resources are to be located.

The central argument of this article is that in order to overcome the constraints imposed by these assumptions, critical scholarship has to relocate itself to more fertile surroundings and reorient constitutional debate around a different set of borders. To that end, we propose two ways in which the critical perspective may be expanded. The first is to effect a shift away from the normative preoccupation of present-day scholars by exploring the relevance for the critical dilemma of the recent sociological turn in the constitutional literature. This applies to the constitutional context the (so far underdeveloped) socio-historical strand of critical theory that seeks to “relat[e] law to underlying historical interests and structures of power.”⁸ While there has been a tendency for proponents of normative and sociological approaches to talk past each other,⁹ we argue here that the interface between the two now provides a key source of critical tension.¹⁰ However, it is crucial that this methodological development also transcend the geopolitical borders of Western constitutionalism. Thus, a second innovation proposed here is to adapt the sociological approach by examining the ways in which postcolonial studies can contribute to a reformulated critical constitutionalism. This brings directly into constitutional focus the implications of the insight elaborated by scholars such as Michael Asch and James Tully that the legacy of colonialism implicates the metropolitan West as much as its far-flung former and present colonies.¹¹ As such, the crucial divide that the new borders of the constitutional emphasize is between those who broadly accept the epistemological framework of modern Western constitutionalism and those who seek to make that framework the object of critical inquiry. The prospects for generating a fourth phase, which would reinvigorate the critical project, depend on the latter repositioning itself to the second half of this divide.

The structure of this article is as follows: Part I revisits the first thirty years of *Charter* scholarship; demarcates the three phases so far of the critical variant

8. Alan W Norrie, *Law and the Beautiful Soul* (London, UK: GlassHouse Press, 2005) at 6.

9. *Ibid* at 1. See also Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992) at 58-62.

10. See Chris Thornhill & Samantha Ashenden, eds, *Legality and Legitimacy: Normative and Sociological Approaches* (Baden-Baden: Nomos, 2010) at 7-12.

11. See Michael Asch, “Governmentality, State Culture and Indigenous Rights” (2007) 49:2 *Anthropologica* 281 at 283; James Tully, “On Law, Democracy and Imperialism” in Emilios Christodoulidis & Stephen Tierney, eds, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 69.

thereof; and sketches the borders between law and politics, rights and utility, and the public and the private, which have been the principal focus of its engagement. Part II locates the difficulties facing critical scholars in the wider setting of debates within critical theory and, with reference to the key distinction between metaphysical and socio-historical approaches, argues that the general neglect of the latter within constitutional discourse in large part explains those difficulties. Part III assesses the potential relevance of the emergent school of constitutional sociology for debates in critical constitutionalism and lays out the principal differences between that school and the normative method in constitutional scholarship. In Part IV, we develop constitutional sociology in the light of postcolonial studies and posit the new borders of the constitutional.

I. THE BORDERS OF THE CONSTITUTIONAL: FROM PHASE ONE TO PHASE THREE

In an article published at the time of patriation, Roderick Macdonald provided a prescient analysis of *Charter* scholarship's likely course, which pays revisiting thirty years on.¹² Indeed, from our present vantage point, the article can be seen to provide a conspectus of the past, present, and future of critical theory's engagement with a constitutional bill of rights. In charting the first phase of scholarship in 1982, Macdonald observed that as the *Charter's* entrenchment became a *fait accompli*, pre-enactment opposition seemed to have been replaced by a certain quiescence on the part of constitutional theorists. However, noting that philosophical writings may take longer to gestate, he sought to assist that process by distilling eight propositions from the pre-enactment debate as a prelude to reformulating them as a framework for developing theoretical debate. These propositions were:

- that an entrenched *Charter* is an illusory guarantee of fundamental rights;
- that entrenchment is foreign to the Canadian constitutional tradition;
- that an entrenched *Charter* is incompatible with parliamentary supremacy;
- that *Charter* litigation will compromise the independence and impartiality of the courts;

12. "Postscript and Prelude – the Jurisprudence of the Charter: Eight theses" (1982) 4 Sup Ct L Rev 321.

- that the *Charter* discriminates between different categories of rights;
- that the *Charter* reinforces the power of lawyers and the ideology of legalism;
- that the *Charter* favours the political and economic theory of the minimal state, and;
- that the *Charter* provides protection for fundamental freedoms only against encroachment by the government.¹³

Macdonald suggested that *Charter* scholarship should be carried out by those who reject the basic premises offered both in support of and against these propositions, and should instead embrace a *via media*. Thus, for example, his analysis of the first proposition leads to the thesis that the *Charter* should be seen as just one aspect of the justification of civil liberties in Canadian law, and should not become a proxy for the need to advance a “comprehensive justification of fundamental rights claims.”¹⁴ We will return to the significance of this approach for the difficulties encountered by critical scholars in the third phase discussed in the Introduction. However, it is important first to pause and reflect on the extent to which these propositions seem to preordain the second phase of critical scholarship. Far from the air of resignation Macdonald detected in 1982, the decade and a half following the *Charter*'s passing witnessed a reinvigoration of constitutional critique animated by, and structured around, the affirmation of the arguments outlined above.

Overarching, and embodied to varying degrees by the propositions, are three classic dichotomies around which the main themes of critical constitutional scholarship have coalesced: namely those between politics and law, between utility and rights, and between the public and the private. Taken together, these divides establish the borders over which the opening constitutional skirmishes of the *Charter* era were fought. It is the attempt to renegotiate these borders while retaining them as the framework of inquiry that proves problematic as critical scholarship contemplates the transition to the third phase. To place this discussion in context, we turn now to map the principal contours of these borders and to examine how critical theorists have positioned themselves in relation to them.

In highlighting the divides enumerated above at the start of the *Charter* era, critics sought to differentiate themselves from mainstream scholars in a number

13. *Ibid* at 324-25.

14. *Ibid* at 329.

of important respects. First and foremost, they focused upon the relation between the *Charter* and prevailing power relations in society. As such, rather than seeing a bill of rights as largely “a legal instrument to be evaluated from a juridical perspective,” it was regarded instead as “a political instrument to be evaluated from an ideological perspective.”¹⁵ In contrast with scholarship that assumed the *Charter* could promote justice and freedom and that concentrated on how constitutional doctrine could better advance those ideals, the primary objective for critics was to keep questions about the *Charter*'s (lack of) legitimacy very much to the fore.¹⁶ Thus, the distinctive feature of a critical approach is that rather than maintaining debate *within* the prevailing rules—compatible with the view that the *Charter* is, if not the optimum, the best available constitutional arrangement in the circumstances—it strives to keep debate open *over* the rules.¹⁷ In particular, this debate considers whether this arrangement should include an entrenched bill of rights.

Interrogation of the borders between law and politics, rights and utility, and the private and the public was to play a pivotal role in pursuing this goal of foregrounding the question of (il)legitimacy during the second phase of *Charter* scholarship. In this connection, critics staked out a position that sought to show that the liberal side of the border, where the emphasis was upon law, rights, and the private, was, contrary to *Charter* rhetoric, supportive of hegemonic interests. As such, rather than placing legal constraints on unacceptable political practices, the *Charter* was said to entail the legalization of politics, where decision making in the judicial arena produced victories for the already powerful that could not necessarily have been secured through majoritarian politics.¹⁸ Moreover, critics saw the particular form of rights-based argument employed by legalized politics as the basis for undermining hard won advances in social welfare, which had reversed historic power imbalances.¹⁹ Following from this, they found that the

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15. Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 7. See also Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 5 [Bakan, *Just Words*].
 16. See Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 20-24 [Hutchinson, *Coraf*].
 17. James Tully, “The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy” (2002) 65:2 *Mod L Rev* 204 at 218.
 18. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised ed (Toronto: Thompson Educational, 1994) [Mandel, *Legalization of Politics*].
 19. For an overview of the various strains of rights scepticism, see Adam Tomkins, “Introduction: On Being Sceptical about Human Rights” in Tom Campbell, KD Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 1 at 6-7. See

importance placed on protecting the individual's private sphere by means of legal rights resulted in the immunization of significant concentrations of private, especially economic, power from mechanisms of public accountability.²⁰

The critical orientation to the law/politics, rights/utility, and private/public divide rests first in the conviction that egalitarian understandings of social justice are better served by the second part of each coupling. Thus, political mobilization is preferred to litigation,²¹ open-ended assessments of social issues to the "dyadic"²² reasoning of rights, and expansive conceptions of public power to anti-statism.²³ However, the critical orientation also rests in the argument that the various separations that liberal constitutional theory seeks to draw are incoherent. Accordingly, the liberal attempt to subject politics to law unravels when it is understood that relocating political decisions to judicial fora does not make them any less political. Similarly, critics attack the contrast between principled rights adjudication and policy-oriented majoritarian decision making by showing how consequentialist concerns inform both, giving content to the contingent form of constitutional rights.²⁴ They also depict the public/private divide as arbitrary and unstable, with the public seen simultaneously as a threat to private freedom, but also as its ultimate guarantor.²⁵

It is important to note that while these arguments have as their ultimate objective to reopen debate over the *Charter's* legitimacy at a meta-level, they do not together constitute some alternative meta-theory of constitutionalism; instead, they critique particular failings of *Charter* jurisprudence. The ultimate objective of this approach would presumably be realized when the accumulation of these shortcomings reached some critical mass. Crucially though, the liberal reply to this charge sheet has also been to respond at the level of particular indictments rather than to revise the liberal commitment to an entrenched bill of rights. Accordingly, in response to the attack on judicial objectivity, it adopts the insight that the obverse of the legalization of politics is the politicization of law.²⁶ This insight finds expression in constitutional theories that emphasize the

also Bakan, *Just Words*, *supra* note 15.

20. Allan C Hutchinson, "Mice under a chair: Democracy, courts and the administrative state" (1990) 40:3 UTLJ 374.

21. Harry Arthurs, "Constitutional Courage" (2003) 49 McGill LJ 1.

22. Bakan, *Just Words*, *supra* note 15 at 47.

23. *Ibid.*

24. Hutchinson, *Coraf*, *supra* note 16 at 35.

25. *Ibid* at 134-36.

26. See Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford: Hart, 2000) at 209.

dialogue between courts and legislatures under a bill of rights, thereby acknowledging the necessary value-judgments involved in carving out the appropriate bounds of judicial and legislative decision making.²⁷ The argument that rights obscure deeply political choices behind *a priori* assertions of natural law has been countered by underscoring the inherently argumentative nature of rights adjudication within liberal constitutionalism.²⁸ In this vein, any priority accorded to rights is not on account of their transcendent rationality but is only ever the revisable outcome of liberty being weighed against competing, and on occasion normatively more compelling, considerations, including the need to address social and economic inequality.²⁹ In connection with critique of the constitutional public/private divide, this approach acknowledges that a line-drawing exercise is involved, and so is by nature a construction. Accordingly, the task is to adduce persuasive, but necessarily “political and temporary”³⁰ arguments as to where the line should be drawn, which, absent a presumption in favour of negative liberty, can also bring about the publicization of the private.³¹

The point here is not to endorse these liberal responses, but to lay the groundwork for some of the pressing issues facing critical scholarship as it enters the third phase. This phase is characterized by a general reduction in direct attacks on the legitimacy of entrenching rights and by a reluctant acceptance that, notwithstanding the vigour of the critical enterprise, the *Charter* is now “the only game in town.” This shift in attitudes forces critics to reflect on whether their original hostility was to liberal constitutionalism *tout court*, or to its specific instantiation in the *Constitution Act, 1982*. For some critics, it is important to preserve their pristine opposition to any form of constitutionalism,³² while for others, more fertile ground is sought at the comparative³³ or transnational³⁴ level. For other critics though, the key consideration is pragmatic: Even if far from ideal, rights constitutionalism cannot simply be wished away, and it remains

27. See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

28. David Dyzenhaus, “Recrafting the Rule of Law” in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999) 1 [Dyzenhaus, *Rule of Law*].

29. David Dyzenhaus, “The new positivists” (1989) 39 UTLJ 361 at 368-69.

30. *Ibid* at 371.

31. See *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

32. See Michael Mandel, “Against Constitutional Law (Populist or Otherwise)” (2000) 34 U Rich L Rev 443 [Mandel, “Against Constitutional Law”].

33. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

34. David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, UK: Cambridge University Press, 2008).

a key site of democratic struggle.³⁵ On this view, the question is therefore not whether, but *what* constitutionalism. Moreover, to the extent that the liberal qualifications outlined above are deemed not to satisfy the initial critical concerns about constitutionalism's propensity to propitiate established power,³⁶ the third phase can be seen to present an opportunity to develop new modes of engagement, which can reconnect constitutional discourse to those concerns.³⁷

The concession that the justification for judicial review does not rest in it yielding 'right answers' in constitutional cases has encouraged a number of critics to take up Dyzenhaus's challenge, outlined in the Introduction, to demarcate the appropriate respective jurisdiction of state institutions. However, in contrast with liberal approaches to this issue, critics emphasize two key differences. First, the objective is to reclaim legitimacy for legislative decision making and so to recover some ground lost at the time of entrenchment.³⁸ Secondly, there is an attempt to spell out a positive conception of the courts' role within a constitution in which the balance has been shifted back towards legislative power—for example, that this role should be restricted to the enforcement of "absolute" rights rather than the interpretation of "qualified" ones.³⁹ A further noteworthy feature of the third phase has been the preparedness of some critics to eschew a former wariness with regard to proffering their own account of the interpretation of constitutional rights.⁴⁰ This development seems driven by greater acceptance of the instrumentality of rights talk⁴¹ and by the desire to steer this talk towards different—civil libertarian or social democratic, rather than classical liberal—ends.⁴² One crucial avenue for this approach is to recast the relation between rights and utility in the context of

35. Allan C Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in Dyzenhaus, *Rule of Law*, *supra* note 28 at 196.

36. Petter, *supra* note 15 at 142-44.

37. In the following passage, we also draw on debates relating to the *Human Rights Act 1998* (UK), c 42 where, perhaps due to the absence of a prolonged second phase, debate within the third phase is most developed.

38. Petter, *supra* note 15 at 152-57. A corollary of Petter's argument is that dialogism exacerbates the courts' lack of democratic credentials by removing, as a justification for judicial review, the argument that judges arrive at correct decisions by applying principled reasoning: "By accepting judicial interference with democratic decisions in the absence of such an assurance, dialogue theory shows itself more willing to compromise democracy than its ... predecessors" (*Ibid* at 143).

39. Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60:1 UTLJ 1.

40. See e.g. Conor Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004).

41. Conor Gearty & Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart, 2011) at 22.

42. *Ibid* at 88.

the public/private divide⁴³ where, for example, it has been argued that ideas of social and economic rights should be extended into the sphere of private law in order to address the latter's failure to meet the demands of distributive justice.⁴⁴

The liberal modifications, together with the absence of critical intensity that characterized the second phase, may be evidence of the relative success of the critical agenda in permeating constitutional discourse.⁴⁵ No doubt the current state of debate would be quite different without that intervention; however, here we propose a different reading of events, namely that the move to the third phase indicates a major shift in critical ambition. Rather than seeking to transcend the law/politics, rights/utility, and public/private borders, the forms of engagement outlined above reaffirm them, in the process closing down room for critical manoeuvre. More significant than the liberal concessions is critical acceptance of *some* judicial circumscription of legislative activity, *some* priority of rights, and (particularly when in civil libertarian mode) *some* value in protecting the private sphere. This has a number of consequences. First, it opens critics to the charge that their previous stance against the viability of such an exercise was incoherent.⁴⁶ Second, and more crucially, it moves critical argument onto the ground of its erstwhile liberal opponents as critics now seek to redraw the borders with politics, utility, and the public respectively, rather than to transcend them. But once critics engage in the task of line-drawing, they are always subject to the argument that the line could be located in a different place—for example, closer to the law/rights/private pole. Moreover, the counter-arguments elicited maintain debate firmly within the parameters of liberal constitutionalism, requiring a substantive account of the very rights that were formerly the object of critique.⁴⁷ Perhaps most tellingly, the critics' principal technique can now be deployed against them; critique becomes a powerful weapon in liberal hands to show why, internal to the critics' own standards, the various lines that they themselves now propose could, and should, be drawn differently.⁴⁸

43. See Hirschl, *supra* note 33 at 127.

44. See Hugh Collins, "Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization" (2007) 30 Dal LJ 1.

45. See Mark Tushnet, "Survey Article: Critical Legal Theory (without Modifiers) in the United States" (2005) 13:1 J Pol Phil 99 at 100.

46. Hamish Stewart, Book Review of *The Politics of the Charter: The Illusive Promise of Constitutional Rights* by Andrew Petter (2011) 61 UTLJ 540 at 542.

47. See *e.g.* Hirschl, *supra* note 33 at 126-27.

48. Alison Young's engagement with Conor Gearty's work, while specific to the UK context, provides a helpful insight into the risks attendant on the critical enterprise in the third phase. See Alison L Young, "A Peculiarly British Protection of Human Rights?" (2005) 68:5 Mod L Rev 858.

To be clear, the foregoing passages should not be read as criticism of those who try to steer a difficult course in testing times. Rather, our objective has been to invite reflection on the direction that critical scholarship has followed over the past thirty years, on why this was the case, and on whether this could have been, and could yet be, otherwise. In this regard, the normative turn that characterizes the third phase could be seen as indicative of a critical resignation, affirming Dyzenhaus's analysis that critics will eventually return to the internal fold of the rule of law. We will, though, contest the conclusion that the most that we can expect, following the move to the third phase, is pragmatic moderation, rejecting excesses of enthusiasm and scepticism, as apparently foretold by Macdonald in 1982. However, before doing so, it is important to deepen our understanding of the nature of the difficulties facing critics upon entering the third phase by mapping the positions taken in debates on the *Charter* onto some key fault lines within critical theory more generally.

II. THE BORDERS OF CRITICAL THEORY: BETWEEN THE METAPHYSICAL AND THE SOCIO-HISTORICAL

In adopting a perspective internal to liberal constitutionalism's own framework of inquiry, critical *Charter* scholarship follows the long-standing tradition of immanent critique. Writing in the context of international law, Susan Marks suggests that this approach can be distinguished from "mere 'criticism.'"⁴⁹ For Marks, the latter evaluates facts in terms of their failure to correspond to external standards, whereas critique "juxtaposes the immanent self-understanding of its object to the material actuality of this object."⁵⁰ Critique seeks not just to explain, but also to change the world by "waking it from its dream about itself."⁵¹ The critical constitutional stances taken up with respect to the various borders under discussion can be characterized as directed towards that goal. Thus, the supposedly objective nature of judicial decision making is compared to the actual political vectors determining its outcomes.⁵² Against the idea that rights provide neutral baselines

49. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000) at 25.

50. *Ibid* (quoting Seyla Benhabib).

51. *Ibid* (quoting Karl Marx).

52. Examples of this argument in the literature are too numerous to catalogue. Prominent among them is the claim that language rights litigation should be seen as less about the protection of individuals' freedom of expression than about the shoring up of the interests of the economically powerful (see Mandel, *Legalization of Politics*, *supra* note 18 at 144); or that the Supreme Court's 'vulnerable groups' doctrine often resulted in the protection of those with

for debating competing (and presumptively valid) visions of the good society, the substantive uses to which they are put in closing off redistributive political options are outlined.⁵³ Additionally, it is the courts' attempts to demarcate the *Charter's* public zone of application from its private sphere of protection that are deconstructed to show that any supposed bright line between the two is inherently malleable, and could always be otherwise.⁵⁴

According to Emiliios Christodoulidis, the principal objective of immanent critique should be regarded as producing “rupture,” whereby the various contradictions identified—for example, that the liberal preference for law cannot expunge politics from constitutional adjudication—are transcended, not clarified or restored.⁵⁵ However, as we have detailed, the story of the *Charter* so far has not been one of rupture, but rather one that is fraught with the danger of critics being “absorbed, integrated or co-opted”⁵⁶ into the liberal constitutional discourse that, in the first phase, they initially sought to oppose, and indeed to replace. This reality may in part be attributed to a lack of tactical *nous* in seeking to make advances through their opponents' preferred mode of engagement. However, there is more to the critical impasse reached in the third phase than liberals simply being better versed in the art of toe-to-toe normative combat, and there is the growing suspicion that the form of immanent critique undertaken to date itself embodies some strategic weaknesses.

To consider what these might be, and how they could be addressed in the present context, it is helpful to introduce a distinction drawn by Alan Norrie between metaphysical (or ethical) and socio-historical approaches to critical theory. His point of departure is to unpack Jacques Derrida's account of a “critique of law’ that is ‘possible and always useful.’”⁵⁷ Echoing the discussion in the Introduction, the object of this critique is to uncover “the superstructures of law that both hide and reflect the economic and political interests of the dominant forms of society.”⁵⁸ This, for Norrie, represents the nub of a socio-historical critical theory; in practice, though, he finds that Derrida (and others) adopt what he describes as a “metaphysical-ethical” approach, which is more concerned with applying deconstructive techniques to the intrinsic structures of law. For Norrie, this “deeper critique” comes at a cost: To the extent it is

most economic and social power (Bakan, *Just Words*, *supra* note 15 at 98-100).

53. See Hirschl, *supra* note 33 at 153-68.

54. Hutchinson, *Coraf*, *supra* note 16 at 134.

55. Emiliios Christodoulidis, “Strategies of Rupture” (2009) 20 *Law & Critique* 3 at 6.

56. *Ibid* at 5.

57. Norrie, *supra* note 8.

58. *Ibid*.

developed on a stand-alone basis, it “does not relate deconstruction as an ethical project to the ‘possible or useful’ socio-historical project.”⁵⁹ His reading of the history of critical theory is that the socio-historical approach has been—unfairly—marginalized by its metaphysical successor.

The difficulties identified above during the third phase can in large part be linked to critical scholarship becoming increasingly distanced from the socio-historical approach; we canvass here what may be gained by re-establishing this connection. That is not to say that deconstructive analyses have not been effective weapons in the critical armoury, particularly during the second phase. However, elevating the metaphysical approach as the principal or sole critical *modus operandi* can also, more significantly, be seen as undermining attempts to engage in the task of reconstruction. There is a tendency within critical theory for deconstruction to be viewed as a means of critique in and of itself,⁶⁰ with the critical task achieved once a particular doctrine, such as the public/private divide, is analytically worked over and dissected. Thus, while directed to highlighting and disturbing the contradictions of liberal constitutionalism, there is a real risk that the deconstructive approach in fact sustains the object of its critique. This occurs when the frame of debate over the contradictions takes on an existence of its own, apart from the social forces that produced them (and that they continue to serve). In this context, the various poles of the contradictions become reified, if not ossified, with the resultant debate oscillating between them. In other words, in the absence of a socio-historical understanding, the metaphysical approach can be seen as prefiguring the normative turn adopted by critics during the third phase.

The concern underlying the foregoing is that, taken to its conclusion, the metaphysical approach can disable attainment of the objective underpinning immanent critique, namely to remake the world. There is an attendant danger here of discounting narratives of social emancipation through a “celebratory post-modernism” where the groundlessness revealed by deconstruction leads to “disenchantment” with any reconstructive political project.⁶¹ In this regard, Norrie commends a sociologically informed approach to legal theory, which mediates between the “autonomisation of law” propounded by liberals and the reductionism

59. *Ibid.*

60. See Alan Hunt, “The Theory of Critical Legal Studies” (1986) 6:1 Oxford J Legal Stud 1 at 32.

61. See Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, And Emancipation*, 2d ed (London, UK: Butterworths, 2002) at 18 [Santos, *Common Sense*].

of metaphysical critique.⁶² On this approach, law is viewed as an historical practice operating “through particular forms and mechanisms,” which themselves are “related but irreducible to broader social relations.”⁶³ This emphasis on the specificity of law in its social setting both counters the abstraction characteristic of the metaphysical approach and reconnects critique to the task of uncovering alternative futures within the contingency of what the present conjuncture “represses” as well as “represents.”⁶⁴ As such, the sociological approach should not be equated with a positive descriptivism, with the former’s critical purchase obtained through the “ethical standpoints [that] emerge historically in society.”⁶⁵ Moreover, it counsels against erecting a sharp divide between discourse and practice and instead regards the theoretical and the social as “inseparably intertwined,” with ideas and the prevailing economic and social conditions constituting a mutually productive relationship.⁶⁶

In the remainder of this article, we consider the implications of extending the socio-historical approach to critical theory in the specific context of debates on constitutionalism. We suggest that the new borders of the constitutional will not be formed by drawing fresh lines across familiar territory, but will rather be staked out over quite different ground. Applying the sociological method enables us to interrogate how far the critical assault on liberal constitutionalism left unexamined—because it shared them—a number of crucial assumptions about the framework for conducting constitutional debate. A major consequence of this line of inquiry is to undermine the presumed singularity of the normative enterprise: As a result, the key question for debate shifts from *what* constitutionalism?—a question decided by competition amongst normative principles—to *why* constitutionalism?—a question requiring “sociological explanations of the grammar of legitimacy in constitutional laws.”⁶⁷ This crucial move, it will be argued, lays the foundations for the fourth phase of critical constitutional scholarship, which reconnects with the original, transformative motivations of critical theory. Moreover, redirecting our focus to this question shows that the scope of the fourth phase is necessarily broader than

62. Norrie, *supra* note 8 at 29.

63. *Ibid* at 30.

64. *Ibid* at 4.

65. *Ibid* at 6-7.

66. *Ibid* at 19. Norrie elaborates that the intellectual ideas of any given period are themselves “mediated and redirected according to the preoccupations of the here and now” (*ibid* at 20).

67. Jiří Přibáň, “Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner’s *Constitutional Fragments* and Thornhill’s *A Sociology of Constitutions*” (2012) 39:3 *JL & Soc’y* 441 at 458 [Přibáň, “Comparative Analysis”].

before, no longer addressing the role that constitutional discourse plays in particular Western societies, but also its wider geopolitical context. To set the groundwork for this argument, we now advert to some recent pioneering scholarship, which has sought to map out the implications of the sociological method for constitutional theory.

III. CONSTITUTIONAL SOCIOLOGY

Over the past few years, an innovative body of research has emerged, which for some embodies a distinct school of “constitutional sociology,”⁶⁸ and which has gone some way to redirecting the inquiry to what it is about constitutionalism that explains its continuing salience for the distribution of power in society. This school self-consciously differentiates itself from the normative deductivism associated with Enlightenment theorists of constitutionalism, and so rejects the idea that the primary task of the constitutional scholar is to rationalize those principles that best govern the operation of political institutions, their relations with each other, and with citizens. While this deductivist approach was the predominant mindset of the post-1945 explosion of constitutionalism, it is said to hinder comprehension of the motivation behind the enduring recourse to the constitutional form as a means of “producing, restricting and refining”⁶⁹ political power. Enhancing this understanding, according to Christopher Thornhill, recovers a “proto-sociological perspective,” which raises the “most profound questions” about “the political conclusions that supported the normative doctrines of the Enlightenment.”⁷⁰ Thus, against the ostensible triumph of liberal normativism, there may be another story to be told.

Adopting a functionalist outlook, Thornhill attributes the appeal and longevity of constitutions to

their efficacy in enabling societies at once objectively and positively to reflect and control the differentiation of their diverse spheres of social exchange, and to simplify and consistently to distinguish the complexly interwoven functions resulting from their differentiated and pluralized evolutionary form.⁷¹

68. Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge, UK: Cambridge University Press, 2011) at 3 [Thornhill, *Sociology*].

69. *Ibid* at 11.

70. *Ibid* at 1-2.

71. *Ibid* at 13.

On this basis, the history of constitutionalism is viewed through processes of abstraction and generalization of political power, and through its consequent transmission into positive (public) law and formal declarations of rights. Crucially though, this provides a quite different account of constitutional legitimacy to that preferred by normative constitutional theory. Here, legitimacy does not depend upon the consonance between political action and an *ex ante* list of rational precepts.⁷² Instead, the legitimacy of constitutional law is inherently contingent, necessarily *ex post*, and attained to the extent that it “facilitates the processes of political abstraction, generalization, selective de-politicization and positivization,” which provide the conditions under which political power can function efficiently.⁷³

We can develop a number of points of interest to the present discussion from the sociological turn. First, insofar as sociological analyses emphasize that constitutional structures have emerged in response to various societal needs and pressures, this Part questions whether it is coherent, as some critics suggest, to see constitutionalism and politics as a zero-sum game in terms of the prospects for procuring progressive change.⁷⁴ Regarding “constitutions as institutions of structural coupling between law and politics”⁷⁵ implies that giving up on constitutionalism also entails giving up on politics. In other words, as an integral part of our collective engagement with social life, the constitutional may be inescapable. Moreover, hegemonic forces are always ready to occupy any constitutional ground that may be vacated.

Second, the sociological method illustrates how normative approaches undermine the initial critical concern with constitutionalism and power by distorting the nature of this relationship. Constitutional sociology focuses attention on the “functional reality” of political power to emphasize that the latter cannot be reduced solely to semantic, theoretical constructions.⁷⁶ Rather, there is always a “paradoxical displacement between power and the concepts and institutions in which it is vested”; accordingly, we should be wary of those normative approaches that regard themselves as providing “external and objectively valid descriptions of power and its legitimacy.”⁷⁷

72. See Přibáň, “Comparative Analysis,” *supra* note 67 at 464.

73. Chris Thornhill, “Legality, legitimacy and the constitution: A historical-functional approach” in Thornhill & Ashenden, *supra* note 10 at 53.

74. See Mandel, “Against Constitutional Law,” *supra* note 32.

75. Přibáň, “Comparative Analysis,” *supra* note 67 at 466.

76. Chris Thornhill, “The Future of the State” in Poul F Kjaer, Gunther Teubner & Alberto Febbrajo, eds, *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011) 357 at 373.

77. *Ibid.*

These insights appear to direct a renewed critical constitutional project away from elaborating the normative principles that should guide political conduct and towards a genealogical study of power.⁷⁸ Thus, a sociological approach is attuned to the ways in which power operates through constitutional discourse, and in particular to how the conceptual structures generated by normative theories are themselves articulations internal to power, reinforcing the connections between the theoretical and the social discussed above in this Part.

Thirdly, a sociological approach potentially reconnects constitutional scholarship with the distributive aspects of power while avoiding some of the pitfalls of the normativist approach encountered during the third phase. It should be emphasized again that constitutional sociology is not simply concerned with description for its own sake. Rather, moving from the study of “constitutions *in* society” to “the constitution *of* society”⁷⁹ focuses attention on how the latter distributes power and resources in an asymmetrical manner between a “generating centre” and a “receiving periphery.”⁸⁰ However, any “value consensus” proposed or imposed by the centre is potentially limited in its validity.⁸¹ In this way, the sociological method highlights the danger that the “self-legitimation of power through its constitutionalization” might become part of the “general tendency to self-justification” and so a means of rationalizing and ratifying the status quo.⁸² In this regard, while eschewing normative approaches in general, Thornhill nonetheless warns that the “re-patrimonialisation of state power” is an enduring risk faced by society, which, if not checked, would lead to a signal loss of freedom.⁸³ Jiří Přibáň, though, suggests that this stance should not be seen as contradictory, but rather as following from the sociological method itself, and the method’s emphasis on the dynamic nature of constitutional norms producing necessarily contingent outcomes. As such, only constitutional sociology can account for the apparent paradox of (some) societies producing high levels of liberty while at the same time presiding over ever-greater concentrations of power.⁸⁴ Thus, constitutional sociology relocates questions of validity to analysis of “the outcome of the societal functions of normative political forms.”⁸⁵

78. See Přibáň, “Comparative Analysis,” *supra* note 67 at 467.

79. *Ibid* at 465 [emphasis in original].

80. Jiří Přibáň, “Multiple Sovereignty: On Europe’s Self-Constitutionalization and Legal Self-Reference” (2010) 23:1 *Ratio Juris* 41 at 51.

81. *Ibid*.

82. Přibáň, “Comparative Analysis,” *supra* note 67 at 470.

83. Thornhill, *supra* note 76 at 387.

84. Přibáň, “Comparative Analysis,” *supra* note 67 at 464.

85. *Ibid* at 465.

By encouraging reflection on the limited utility of the normative turn for critical scholarship, constitutional sociology provides an important start in gaining perspective on the difficulties encountered in transiting from the second to the third phase. However, there remains concern as to whether this scholarship, as it currently stands, is able to ground the development of a fourth phase that transcends these limitations. This concern rests on two related considerations. First, while the sociological method is to be welcomed in shifting the object of critical inquiry to concrete outcomes, to the extent that its analysis of these outcomes is refracted through examination of the social motives that produced the particular institutions of contemporary society, it is potentially circular and self-referential.⁸⁶ Thus, while it does not shy away from discussing the validity of constitutionalism's contingent outcomes, the criteria by which this is to be assessed are somewhat elusive, leading to disquiet that the deeply political dimension of this enterprise is lost beneath a discourse of efficiency. Secondly, it is striking that in the present literature the focus of sociological inquiry rests almost exclusively upon the development of Western constitutionalism. Even when addressing the global context,⁸⁷ there is a very palpable sense that this is an extension of constitutional discourse as it originated in the Western nation-state.⁸⁸

What is generally underdeveloped in this analysis is the extent to which the history of Western constitutionalism can be told as a "story of expansion through imperialism," which in practice entailed the exclusion of "the oppressed voices of non-Western cultures."⁸⁹ As a result, missing from the discussion is the rich vein of scholarship motivated by what it sees as this mindset continuing today, and which, with reference to insurgent developments in the global South, argues that the key to "reinvent[ing] social emancipation" lies in going "beyond the critical theory produced in the North."⁹⁰ In the following Part, we assess the potential

86. See Thornhill, *Sociology*, *supra* note 68 at 7.

87. See David Sciulli, "Societal constitutionalism: Procedural legality and legitimation in global and civil society" in Thornhill & Ashenden, *supra* note 10 at 103.

88. See Gavin W Anderson, "Beyond 'Constitutionalism Beyond the State'" (2012) 39:3 *JL & Soc'y* 359 at 370.

89. Hauke Brunkhorst, "Constitutionalism and Democracy in the World Society" in Petra Dobner & Martin Loughlin, eds, *The Twilight of Constitutionalism?* (New York: Oxford University Press, 2010) 179 at 179.

90. Boaventura de Sousa Santos, "From the Postmodern to the Postcolonial – and Beyond Both" in Encarnación Gutiérrez Rodríguez, Manuela Boatcă & Sérgio Costa, eds, *Decolonizing European Sociology: Transdisciplinary Approaches* (Farnham: Ashgate, 2010) 225 at 227.

rewards to be gained by orienting the fourth phase of critical scholarship around an openness to learning from the global South.

IV. TOWARDS PHASE FOUR: CONSTITUTIONAL SOCIOLOGY IN POSTCOLONIAL PERSPECTIVE

There is a tendency within mainstream constitutional discourse, if not to treat colonialism as pertaining to a different time and place, then to regard its legacy as raising questions of a highly specialized nature of interest primarily to those seeking to accommodate cultural diversity. This approach, though, has been the subject of a sustained challenge within postcolonial studies, which emphasizes that modernity should not be regarded as something that originated in the West and was brought from there to its colonies, but rather was itself created and given meaning through the colonial experience.⁹¹ Moreover, in order to understand the artefacts of Western modernity, not least constitutionalism, engagement with the colonial must no longer be seen as marginal but as “unavoidable.”⁹² According to Boaventura de Sousa Santos, the present global age marks a “return of the colonial,” both through the latter’s renewed connections with metropolitan societies, but also, perhaps more significantly, as a result of its increasing presence within these societies.⁹³ He warns that so long as critical theory retains a narrow, Western-focused viewpoint and fails to give these developments sufficient weight, it risks missing some of the key “transformative practices going on in the world.”⁹⁴ Thus,

91. Peter Fitzpatrick & Eve Darian-Smith, “Laws of the Postcolonial: An Insistent Introduction” in Eve Darian-Smith & Peter Fitzpatrick, eds, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) 1 at 2.

92. Walter D Mignolo, “The Geopolitics of Knowledge and the Colonial Difference” (2002) 101:1 *S Atlantic Q* 57 at 86.

93. “Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges” (2007) 30:1 *Review (Fernand Braudel Center)* 45 at 55 [Santos, “Abyssal”]. Santos gives as an example of the former “the case of the undocumented migrant worker . . . hired by one of hundreds of thousands of sweatshops operating in the Global South subcontracted by metropolitan multinational corporations.” The latter is manifested by a redrawing of the line between the metropolitan and the colonial in response to the colonial “intruding or trespassing on the metropolitan spaces” as a result of the former’s now “superior” mobility compared with previous eras. Examples of this line drawing are given as the segregation wall in Gaza, and the development of the category of the “unlawful enemy combatant” (*ibid* at 56, references omitted). Santos acknowledges that what emerges is a somewhat “messy cartography” (*ibid* at 57).

94. “Public Sphere and Epistemologies of the South” (2012) 37:1 *Africa Dev’t* 43 at 48. Thus, while sociological analyses have highlighted the ways in which globalization has reinforced hegemonic power relations between North and South, and the role which the spread of liberal constitutional forms has played in those processes (see Santos, *Common Sense*, *supra*

at the heart of postcolonial theory is a call for an “understanding of the world [that] by far exceeds the Western understanding of the world.”⁹⁵ Adapting this to the present context, we argue in this final Part that any sociology of constitutionalism, if it is to contribute to a reformulated critical constitutional project, must be located within a sociology of Western modernity itself. This brings into sharp focus the crucial issue, laid bare once we begin to question the necessary equation of constitutionalism with Western constitutionalism, of what is at stake in the division drawn by predominant forms of constitutional discourse between the constitutional and the non-constitutional.

We can approach the implications of adverting to postcolonial studies for critical constitutional theory through the work of Partha Chatterjee on the genealogy of political society. In an echo of Macdonald telling backwards the history of critical debate under the *Charter*, Chatterjee suggests that “it is as if all the major political developments of the modern world were anticipated, indeed foretold, at the birth of modern political theory.”⁹⁶ This is reinforced by a “historicizing strategy,” in which politics is conceptualized within a singular worldview, regarded as the same everywhere, and taking place simultaneously.⁹⁷ This “homogeneous time” is the time-space of Western modernity and is characterized by abstraction: It is what people imagine, not where they live. In contrast, the time that people actually experience is “heterogeneous, unevenly dense.”⁹⁸ For Chatterjee, the puzzle is the durability of the abstract normative theory of empty homogeneous time, notwithstanding the intense struggles over, for example, class conflict and colonialism, which have marked the “real history” of past centuries.⁹⁹

Chatterjee finds part of the answer in the development of “norm-deviation and norm-exception structures,” which sought to retain the universalist narrative of modernity while adapting to the fact of social plurality. The norm-deviation structure operated at the level of empirical comparison of a particular social

note 61 at 313-51), they have at the same time drawn attention to ongoing practices of resistance, and have sought to engineer a reverse transmission of global power, often captured under the rubric of “globalization from below.” See Boaventura de Sousa Santos & César A Rodríguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, UK: Cambridge University Press, 2005).

95. Santos, “Abyssal,” *supra* note 93 at 64.

96. Partha Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (New York: Columbia University Press, 2011) at 2 [Chatterjee, *Lineages*].

97. Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (New York: Columbia University Press, 2004) at 6.

98. *Ibid* at 7.

99. *Supra* note 96 at 3.

exemplar to a notional mean, while the norm-exception structure informed policy, including the possibility of intervention to redress the initial deviation.¹⁰⁰ The colonial context is the key to understanding these structures. For example, not extending representative government to colonial dependencies would not contradict representative government's status as a universal ideal so long as its absence could be attributed to the colonies' exceptional characteristics (such as their lack of readiness for such government at this stage in their history).¹⁰¹ Homogeneous time maps onto the assumption that modernity should develop in a symmetrical fashion, closing down the gap identified by the norm-deviation strategy, while heterogeneous time implies a sequential theory of development in which the various processes that occurred in Western history need not be replicated in other places.¹⁰²

Applying Chatterjee's analysis to constitutional sociology in its current form, we can locate within the latter an understanding of the development of Western constitutionalism in symmetrical terms. Thus, for example, Thornhill's historical narrative is one of the unfolding of legal constraints on arbitrary official conduct, leading to political power being organized in ever more functional terms. But Chatterjee's point is that for most inhabitants of the planet most of the time, the sequential theory corresponds to their way of life. This reality in fact raises general levels of arbitrariness as, in response to the pressures of popular politics, the persistence of norm-deviation strategies has by now accumulated a large number of exceptions.¹⁰³ Whereas the symmetrical approach sees this proliferation of exceptions as a "perversion" of democratic politics, a sequential perspective takes it very seriously indeed (as a "potentially richer development of democracy"¹⁰⁴), and views the "theorization of these improvisations" as a core task of postcolonial scholarship.¹⁰⁵ For Chatterjee, bringing to light the depth and extent of "the real heterogeneity of power relations in society" is central to "break[ing] the abstract homogeneity of the mythical time-space of Western normative theory."¹⁰⁶ The new borders of the constitutional in the twenty-first century accordingly coalesce around attitudes to the framework of Western modernity, and in particular whether constitutionalism is seen as developing in a teleological manner along the lines suggested by the symmetrical account, or

100. *Ibid* at 10-11.

101. *Ibid* at 10.

102. *Ibid* at 12.

103. *Ibid* at 19.

104. *Ibid* at 15.

105. *Ibid* at 19.

106. *Ibid* at 22-23.

whether that assumption itself should be subject to challenge and scrutiny.

The constitutional position of Indigenous peoples in settler societies such as Canada provides a powerful example of the critical potential of the second option in highlighting the partiality underlying Western constitutionalism's impetus towards symmetry. In an insightful and helpful analysis, Michael Asch investigates the legitimacy narratives of the present-day Canadian state. Adopting Foucauldian terminology, he identifies the major problem these narratives have had to overcome as the longer-standing "historical-political" discourse of Canada's original inhabitants, the First Nations.¹⁰⁷ The attempt to do so rests on two bases, he argues, by combining the "juridical-philosophical" principle of majority rule ("deduced through 'Reason'" according to the tenets of the Enlightenment) with a reformulation of historical-political discourse to claim that Canada was not occupied by political society before European settlement.¹⁰⁸ Both find practical expression in the *terra nullius* doctrine, which continues to ground the sovereignty of the Crown. In other words, Canada's "origin myth" is restarted so that it can unfold within the homogeneous time of Western modernity. However, as Asch points out, the alternative, and for him more compelling, First Nations historical-political discourse continues to get in the way,¹⁰⁹ and alongside the hegemonizing sway of modern constitutionalism is a story of "resist[ance to] the colonial positioning proffered for us, as citizens and academics, by the liberal state."¹¹⁰ The emergence of a distinct theory and practice of Indigenous constitutionalism has in this regard provided an important focus for confronting assumptions about the singular nature of Western constitutionalism by highlighting the latter's sequential origins through its encounter with non-modern constitutional traditions in colonized lands.¹¹¹

It is important to realize that this challenge to the symmetrical reading of constitutionalism goes beyond the immediate postcolonial context. In that regard, there is much for reflection in Asch's observation that "it will likely prove impossible to create a just relationship with First Nations without also decolonizing ourselves."¹¹² This statement suggests that a principal objective of critical constitutional theory is to uncover other ways in which the assumptions of

107. *Supra* note 11 at 282.

108. *Ibid* at 281-82.

109. For example, Asch notes that Indigenous peoples have remained "reliant for their livelihood on the foraging mode of production" so "put[ting] to rest forever the truth-claim proffered by government and capital that they [have] been absorbed by the world economy" (*ibid* at 283).

110. *Ibid*.

111. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

112. *Supra* note 11.

uniform societal development underpinning Western modernity (not least the view that liberal capitalism represents the optimum form of socio-economic organization) also produce highly partial constitutional logics. Building on ideas of legal pluralism,¹¹³ this approach highlights the power of naming what is habitually excluded, and of positing this as an integral aspect of constitutional discourse. We can see the potential value of this approach in the context of contemporary economic globalization, which critical constitutional analyses have characterized as a drive towards worldwide uniformity of neoliberal political and economic models.¹¹⁴ However, expanding the constitutional canon to include those normally marginalized brings widespread practices of resistance, often located outside institutional milieu, into the picture,¹¹⁵ showing that as well as its top-down, hegemonic dimension given priority in the literature, global constitutionalism can also operate in a bottom-up, insurgent mode.¹¹⁶

To return to Dyzenhaus's dilemma, we can now see that the old borders, which he assumes as the necessary framework for debate, do not exhaust the options for critical scholars. Accordingly, the new borders of the constitutional proposed here stake out a broader conception of constitutionalism implied by its alternative histories, as outlined above. The task of harnessing this conception to a different constitutional future is neither easy nor straightforward; the critical dilemma retains its power by speaking to deeply embedded ideas in the Western constitutional mindset. Moreover, since what is being recovered is itself a critique of the existing vocabulary of Western political and constitutional theory, we cannot resort to a further refinement of its well-established principles. Doing so would undo the advances of constitutional sociology. Chatterjee himself suggests a potential way of reconciling wariness over the normative nature of constitutional discourse with critique of the power relations sustained by dominant readings of Western modernity within that discourse. He asks, "Could the accumulation of exceptions justify a redefinition of the norm?"¹¹⁷ In that regard, a critical research agenda in part seeks to overcome the limits of

113. See e.g. Martha-Marie Kleinhaus & Roderick A Macdonald, "What is a *Critical Legal Pluralism*?" (1997) 12:2 CJLS 25. In an interesting coda to the earlier discussion, it is noteworthy that Macdonald's scholarly trajectory since his 1982 article on the *Charter* itself reflects a sociological turn, and has played a leading role in bringing to light the asymmetries endemic in "everyday law." See Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002).

114. See Schneiderman, *supra* note 34.

115. See Santos & Rodríguez-Garavito, *supra* note 94.

116. See Anderson, *supra* note 88 at 380-83.

117. *Lineages*, *supra* note 96 at 24.

exclusively institutional analyses by depicting the actual practices of governance where colonial and postcolonial struggles are played out.¹¹⁸ It also addresses the possibilities of valorizing the asymmetrical and the marginal within current institutional fora; there may be much to be learned in this regard from recent developments in Latin America where courts are seen by social activists as one (sometimes useful) tool among many in advancing their various struggles.¹¹⁹ Thus, it is the fact of divergence from the norm assumed by Western theory, not the norm itself, which provides the basis for evaluating the ‘validity’ of the contingent outcomes of modern constitutionalism.

V. CONCLUSION

Over twenty years ago, while commenting on critical scholarship’s general distrust of normative legal argument, Mark Tushnet suggested that normative discourse could one day be replaced by “something like sociology.”¹²⁰ In this article, we have taken up Tushnet’s challenge, to argue that a sociological outlook is vital to the task of renewing critical constitutional theory in demanding times. This argument highlights the imperative of repositioning critical theory around new borders of the constitutional that bring to the fore the question of what was not debated within the old borders that can now be included within the new. This entails an appraisal of the extent to which critical theory had previously assumed a framework of inquiry that left in place the hegemonic reading of Western modernity. Perhaps the most striking feature of debate under the old borders was the belief, by liberals and critics alike, in modernity as “the story of reason circumscribing power,”¹²¹ and in the ability of constitutional law to bring this about, once fastened to the requisite normative co-ordinates. If such an approach reinforced a singular account of modernity, then the pressing challenge for critical theory is to bring to light developments that reflect ideas of multiple, or even counter, modernities. One such opportunity takes up Chatterjee’s observation that “differentiated citizenship” is now empirically the norm for most societies, even in the West.¹²² For some, the attendant move away from modernist conceptions of political equality is not a cause for concern or regret but to be

118. See Asch, *supra* note 11 at 283.

119. See César Rodríguez-Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America” (2011) 89 *Tex L Rev* 1669 at 1676.

120. Mark V Tushnet, “The Left Critique of Normativity: A Comment” (1992) 90:8 *Mich L Rev* 2325 at 2330.

121. Shai Lavi, Yishai Blank & Roy Kreitner, “Introduction” (2007) 8:1 *Theor Inq L* 1 at 1.

122. *Supra* note 96 at 24.

welcomed as an opening in rights discourse towards “the exploited, the excluded, the nonequals.”¹²³ Another promising avenue is the potential role of globalization from below in providing the elusive agency for transformative constitutional practice.¹²⁴ The precise direction in which this takes us will be established in the years to come; however, it is clear that for any critical constitutional project to flourish, it is important that this takes us beyond the “confines of modern constitutionalism.”¹²⁵

123. Enrique Dussel, *Twenty Theses on Politics* (Durham: Duke University Press, 2008) at 122.

124. See e.g. Santos, *Common Sense*, *supra* note 61 at 465-71.

125. David T. Butler-Ritchie, “The Confines of Modern Constitutionalism” (2004) 3:1 *Pierce L. Rev.* 1.