Introduction

Inspirations for books come from many sources. Sometimes it is a single idea that the author feels passionately about. Sometimes it is a series of conversations, prompting the writer to work through her views on an issue in extended form, or it is the culmination of a group of articles developing a perspective that requires full-length treatment.

Sometimes one book inspires another. So it is with this one. I have long been interested in assessing the interaction of law and social issues. There are many aspects to this interaction. An important one is the growing influence of rights and the ascendance of courts as arbiters of myriad issues confronting postindustrial societies. While at work on my last book, I read Michael Schudson’s *The Good Citizen: A History of American Civic Life.*

*The Good Citizen* is an eloquent but disturbing account of the widespread turning to the courts in America as a reaction to the decline of popular politics. As the title suggests, the book recounts the different understandings of what has constituted desirable roles for individuals in public life at different periods in the history of the United States. The colonial period was associated with a citizenship founded on social hierarchy; the nineteenth century emphasized mass political participation; the Progressive Era’s ideal was the informed citizen. What is most relevant for our purposes is Schudson’s assertion that the latest era is that of the “rights-regarding citizen.” In this depiction, the decline in voting, the lack of trust in government, and the dissatisfaction with popular politics are indicators not of the enervation of public life but, rather, of its transformation; “rights and rights-consciousness have become the continuous incitements to citizenship in our time.”

Schudson’s book is important for many reasons, and I return to a discussion of it in Chapter 2. Its message jolted me. Yes, it was a depiction of the citizen in America – and maybe not an accurate assessment for even that society. Still, what does it mean for the idea of the citizen to be bound up in rights claiming? How does such a concept of the citizen actually work in terms of the
necessary adjustments, modifications, and trade-offs that societies inevitably face as they navigate the complex world of the twenty-first century?

Rights are a good and noble thing. Yet, whether a society should so immerse itself in rights and in going to court that the concept of citizenship, the very notion of what constitutes public life, becomes embodied in rights-regarding individuals, is a question that needs urgent attention. After much study and writing a very long book, I concluded that such discussion probably comes too late for American society – its commitment to courts is just too strong. A society that believes an effective response to crime is tort suits against gun manufacturers has likely gone too far down the litigation path.

My strong reaction to Schudson’s book prompted me to contemplate to what extent his account was applicable to Canada. Is our society being transported on the “wing of rights”? Has “rights-consciousness place[d] the courtroom along-side the polling place in the practice of public life”? My drive to answer these questions was made more intense because, about ten years previously, I had written a book warning of over-reliance on litigation in tackling the hard questions faced by Canadian society. Schudson’s eloquent and disturbing depictions compelled me to look at what had happened to Canada in the last decades of the twentieth century and what is occurring as the new century unfolds.

This book’s title reflects its focus on what constitutes the “good citizen” in a rapidly changing Canadian society. The title also underscores a central argument of this book: that the founding words of this society regarding “peace, order, and good government” are goals that are still critical in the life of the “good citizen” in this country. Good Government? Good Citizens? is written by a political moderate, one who believes that good public goods are foundational for civic society.

A number of significant institutional changes have occurred in Canada over the last few decades. There is no doubt that a turning to litigation and an assertion of rights in courts, as well as in the legislatures, the media, and the streets, have been an important part of the transformation of this society. A comparative study has characterized litigation and related developments under the Charter as “Canada’s Dramatic Rights Revolution.” Judges are asked to respond to complex issues even as their stature in the eyes of the public reaches new heights. But there have been other powerful forces at work that have fundamentally altered Canadian society.

The roles not only of courts but also of politics and of markets have been transformed and have changed the concept of the individual and her place in society. Technology, particularly the communications revolution, has spelled the “death of distance.” There are boasts about technological capacities, from turning knowledge into an inexhaustible resource to enabling direct democracy. Representative democracy is suffering a loss of confidence in many
countries. Canada has its own tale of dishevelment of popular politics. In 2002 almost 70 percent of those who were asked agreed that government in this country is “corrupt.” This spurning of politics and its agents is establishing the citizen as an exerciser of choice in the marketplace and as a bearer of rights against government.

The state is now suspect – as a mangler of free markets and as a denier of constitutionalized rights. Courts and markets have overtaken representative politics and government in the determination of many fundamental choices for society. Courts and markets advance in an uneasy alliance. Their core functions are, of course, different: courts focus on the creation of rights; markets on the creation of wealth. Yet, both can deliver the same fundamental message: Government can’t be trusted.

How has Canadian society actually been transformed? Is the state truly in retreat? Do individuals, in fact, have a fundamentally altered sense of their relationship to the government and to each other? Have courts and markets supplanted representative politics regarding the expression of basic values? Must judicialized protection of human rights and minority interests mean a diminished concern for the common good on the part of representative politics? To what extent should markets and representative politics maintain a role in the protection of human rights and minority interests? Will popular politics ever hold the public trust again?

*Good Government? Good Citizens?* responds to these questions. It does so by examining the altered roles of courts, politics, and markets over the last two decades. It evaluates the roles of these three institutions. It then examines a number of areas in order to gauge the extent of the evidence of changes that have occurred because of these altering roles. There are chapters on the First Peoples, cyberspace, education, and an ageing Canada. The book concludes with reflections on the “good citizen” at the dawning of the new century.

*Good Government? Good Citizens?* does not assert that the judges are primarily responsible for the fundamental issues we face as a society, that our quandaries can simply be attributed to “rights talk.” The problem is not that we have a *Charter* and an enlarged role for the judiciary. The dilemma that confronts us is that we have the *Charter*, greater judicial power, and more rights talk at the same time as we have expanding markets and a marked decline in faith in representative politics’ capacity to forge the common good.

Consider the First Peoples (discussed in detail in Chapter 5). Three main positions are advanced regarding Aboriginals. First, there are those who urge assimilation: both Aboriginals and the rest of the country would be best served by the First Peoples being treated essentially the same as other citizens. They ought to be integrated into mainstream society. Aboriginals are expected to cease their demands for special treatment and recognize the futility of dreams of a separate, land-based economy. They should take their place in Canada’s globalizing market economy.
Second, there are those who view First Peoples as primarily belonging to nations: the governments of Canada should recognize the status of Natives by honouring treaties, affirming constitutional rights, and conferring other legal entitlements. Their hope is that courts and legislatures will recognize rights guaranteeing Aboriginals’ claims to nation status and to necessary remedial measures.

Third, in between these two positions, are those who see the First Peoples as “citizens plus”: Aboriginals are citizens of this society; their historical mistreatment and the horrible conditions of life experienced by many Aboriginals justify programs of support intended to enable First Peoples to take their full place in this country. This view is based on the belief that representative politics can reflect understandings of the good citizen.

What will these three, largely irreconcilable positions lead to in the initial decades of this century?

There is a role for courts, for markets, and for cyberspace in the making of the good citizen. Markets are necessary to create wealth; courts, to protect fundamental freedoms; and the Internet, to exploit knowledge as the inexhaustible resource. The problem is with the “myth of exit.” The market, courts, and cyberspace are touted as offering alternatives that can be turned to as the population resiles from dishevelled politics. Yet, for most people, these alternatives do not respond to many important issues in their daily lives. Education is a public good that must be supplied by representative politics and its agencies (an issue I discuss in Chapter 7). Claims that courts, markets, or technology can do this are corrosive fables.

Consider the Internet, a revolutionary development that has become widely available over the last decade (see Chapter 6). Despite its origins in government-sponsored research, the Net is now being propelled largely by the market. Because of its facility in linking users directly, the Internet can result in disintermediation – the reduction or elimination of agents. One of the claims made on behalf of cyberspace is that it will result in direct democracy: citizens will no longer be dependent on politicians to forge and implement policy.

Even enthusiastic boosters of the communications revolution admit that its claims about direct democracy are unlikely to be fully realized, and they acknowledge the harms that could occur if they did. Yet, even more modest forms of disintermediation and other effects of the Internet pose problems for representative politics. The greatest danger may be not that they offer a real alternative to deliberative politics but that they seem to. Such apparitions can lure people farther away from a representative politics that is already in tatters.

A vibrant role for politics with a reinvigorated sense of its representative capacity and its ability to forge consensus is essential. Yet, renewing politics is not an easy task. There are two important points of departure. One is recognizing the limits of the judicial role and that “rights are not enough.” A rights
activist has recently charged that “the critique of judicial activism in Canada ... is the expression of deep anguish by the stakeholders of a world view in demise.” I will talk a great deal about “judicial activism” in a number of places in this book. But it is the phrase “world view in demise” that I found striking – and disturbingly ambiguous. Which world view?

The world view in which only a handful of people were politically empowered and in which many – women, Aboriginals, the disabled, and others – were marginalized, was one that needed to go. It is little wonder that rights claiming should have focused on such exclusion. Yet, for many, another world view, the one that promoted a temperate politics in Canada in order to produce an internationally recognized record for respect for human rights, universal health care, and a commitment to achieving excellent public education, basic income entitlement, and a stewardship of the environment, needs to be reinvigorated. If it is that world view that is being referred to as “in demise,” some of us will plead guilty to an “expression of deep anguish.” The angst is that judicial activism and extravagant rights claiming in the courts, legislatures, media, and streets have rightly helped to banish the former world view even as they have enervated the latter one.

The other point of departure for attaining a vibrant role for representative politics and proactive government must be a widespread insistence that markets cannot be hostile to shared entitlements such as excellent health care, quality education, an adequate social safety net, a healthy environment, and vigorous protection of human rights. Wealth creation and governments that provide a wide range of services are not inevitably opposed.22 The market is essential. It creates the wealth that is a reward for individual achievement and that is a precondition for the provision of good public goods. It is the market triumphant, with its relentless demands to be the sorter and distributor of everything, that needs to be resisted.

Good citizens forging good government and relying on it should be a central goal of Canadian society at the beginning of the new century. This will not be easily accomplished. A critical place to begin is to acknowledge that representative politics still has a vital role to play in our lives. Lives that are about more than rights bearing and consuming.