

## Introduction

### *The Values of Canadian Constitutionalism*

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In an interview on Al-Hayat television in Egypt on 30 January 2012, US Supreme Court Justice Ruth Bader Ginsburg stirred some controversy in America. She remarked that “I would not look to the US Constitution, if I were drafting a constitution in the year 2012.”<sup>1</sup> Where would she look instead? To two countries, she said: Canada and South Africa.

Justice Ginsburg’s revelation did not come as a surprise to scholars of comparative public law. For years, the US Constitution has declined in its global influence, due in no small part to its exceptionalism on matters of rights and liberties.<sup>2</sup> In its place, Canada has risen to prominence on the strength of its modern *Constitution Act, 1982*, which after years of failed attempts finally entrenched a domestic amending formula as well as the now-celebrated *Canadian Charter of Rights and Freedoms*.<sup>3</sup> Admired abroad for its constitutional success, Canada has since become a model for the promise and possibilities of constitutionalism in the democratic and democratizing world.

#### A CONSTITUTIONAL MODEL FOR THE WORLD?

The global importance of the Constitution of Canada has grown as we have approached 2017. Since Confederation began with the *British North America*

<sup>1</sup> Adam Liptak, ‘*We the People*’ Loses Appeal with People around the World, NY TIMES, 6 Feb. 2012, available at: [www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html](http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html) (last visited 1 August 2016).

<sup>2</sup> See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

<sup>3</sup> *Canadian Charter of Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982*, c. 11 (UK).

Act, 1867,<sup>4</sup> Canada has evolved into a global economic, cultural and now constitutional force. The country has survived the Great Wars, the Great Depression, the internal challenges of regionalism, bilingualism, bijuralism and secession, and it has successfully managed the national security era in which we now find ourselves. By its resilient example, the Constitution of Canada has influenced the design of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights and the Hong Kong Bill of Rights.<sup>5</sup> The Constitution of Canada was perhaps fated to occupy this role in global constitutionalism given that the drafters of the *Charter* went to great lengths to incorporate international human rights principles.<sup>6</sup>

The 150th anniversary of Confederation in Canada offers an occasion both to reflect and to look ahead. There is of course much to celebrate about Canada and its Constitution, but triumphalism is not the spirit in which the scholars assembled for this volume have approached this project. We have taken an evaluative perspective on how the Constitution of Canada has influenced the world around it and how it has itself been influenced, with a view to examining the first 150 of Confederation through a distinctively comparative lens. Our collective effort to map and evaluate Canada's reach beyond its borders is therefore anchored in a critical approach, not a congratulatory one, although the group has not shied away from highlighting where a Canadian doctrine, practice or theory has been proven to work well.

### THREE CANADIAN VALUES

The authors in this volume gathered at the Yale Law School to present early drafts of their chapters in a conference held to mark the Sesquicentennial. Our point of departure for the program was the following excerpt from a speech given a few years earlier by The Rt. Hon. Beverley McLachlin, Chief Justice of Canada, who observed at the time, as she looked ahead to the year 2017, that the story of Canada's Constitution was one of peculiarly *Canadian* values:

In 2017, not so far off, we will celebrate the 150th anniversary of the Canadian Constitution. As I mused on the up-coming date, it occurred to me that our constitution can be understood as a series of stories that together recount our

<sup>4</sup> Since renamed to “*Constitution Act, 1867*”: *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK) [*Constitution Act, 1867*].

<sup>5</sup> Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 821–22 (1999).

<sup>6</sup> Claire L'Heureux-Dubé, *The Importance of Dialogue*, 34 *TULSA L.J.* 15, 24 (1998).

national odyssey. It is a story of how this country moved from a collection of colonies, to a dominion, to a fully sovereign nation. And it is a story of the gradual emergence of a unique *mélange* of values that we – and the world – see as distinctly Canadian.<sup>7</sup>

What are these Canadian values and how do we identify them? For the heralded sociologist Seymour Martin Lipset, the answer lies somewhere in Canada's beginnings. Born of counterrevolution, Canada has been engaged in "a long struggle" to reconcile its deeply rooted traditions of monarchy and responsible government inherited from Britain with the modern vanguard of constitutional democracy and popular sovereignty entrenched south of its border in the United States.<sup>8</sup> Yet what Canada has struggled to reconcile since Patriation is not only its external British and American influences but also a more complex interaction of internal forces that simultaneously pull and push Canada toward the particularistic political commitments of Confederation and the universalist aspirations of the *Charter*.<sup>9</sup> Keeping one eye on global norms and another on the local context is the challenge of modern constitutionalism – and the Canadian constitutional experience can help the countries of the world take steps toward meeting the demands of both.

Back to the question: what are these distinctly Canadian values? In her address years ago, the Chief Justice identified three values that defined Canada at Confederation and that continue to endure today: "[C]anada's first and defining moment, Confederation, grounded the nation in three values that were to prove lasting – democracy, federalism, and respect for difference and diversity."<sup>10</sup> Representative and responsible government are of course the democratic foundations of the country, just as federalism was the only possible construction for the new union of colonies, each of them different yet united in a federalist arrangement under a national government. And diversity being a political and sociological fact at Confederation, the new constitutional arrangements had to offer a way to accommodate those differences, at the time principally linguistic and religious ones. Whether Canadian federalism has succeeded in managing the country's diversity consistent with the demands of democracy depends on what we measure and how. But these

<sup>7</sup> The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Defining Moments: The Canadian Constitution*, Remarks before the Canadian Club of Canada, 5 February 2013.

<sup>8</sup> Seymour Martin Lipset, *CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* (New York: Routledge, 1990) at 1.

<sup>9</sup> See Benjamin L. Berger, *Children of Two Logics: A Way into Canadian Constitutional Culture*, 11 *INT'L J. CONST. L.* 319, 321–22.

<sup>10</sup> McLachlin, *supra* note 7.

three values form a distinctly Canadian foundation for the Constitution of Canada, and together they tell the story of Canadian constitutionalism from Confederation through Patriation to the present day.

#### IDENTIFYING CONSTITUTIONAL VALUES

Constitutional values are often discernible in the procedures of formal amendment. There being no part of a constitution more important than the rules that authorize changes to its highest political commitments,<sup>11</sup> we can mine the design of formal amendment procedures for outright declarations or subtle hints about what is foundational in a constitutional community. In multinational polities, the rules of amendment are the place to look for the legal recognition of multinationality because these rules reveal the agents of legal change.<sup>12</sup> The amending formula in the Constitution of Canada reflects the country's multinationality, albeit imperfectly as the failures of the Meech Lake and Charlottetown accords and the resulting 1995 Quebec referendum show so clearly. Nonetheless in its design and in the attempts to improve it, the Constitution's amending formula suggests that these three values – democracy, federalism and respect for difference and diversity – sit at the base of the Canadian project of Confederation, so far an experiment that has endured for 150 years, more than 130 years longer than the average lifespan of the world's national constitutions.<sup>13</sup>

For over a century, Canada did not have the power to amend its own Constitution. With some limited exceptions, the power of formal amendment belonged to the Parliament of the United Kingdom. The provinces could amend their own provincial constitutions, and the Parliament of Canada could amend a narrow class of matters concerning courts and the purely federal subjects in the Constitution.<sup>14</sup> All other matters had to be amended at the request of Canada by the Parliament in London. These included matters of the first importance including the admission of new provinces, the administration of territories and changes affecting federal-provincial relations such as the transfer of jurisdiction over employment insurance and

<sup>11</sup> See John Burgess, *I POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW*, 137 (1891).

<sup>12</sup> Sujit Choudhry, *Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory*, 5 *INT'L J. CONST. L.* 606, 638 (2007).

<sup>13</sup> See Zachary Elkins et al., *THE ENDURANCE OF NATIONAL CONSTITUTIONS 2* (Cambridge: Cambridge University Press, 2009) (noting that the average lifespan of a national constitution has been 19 years).

<sup>14</sup> See *British North America Act, 1867*, ss. 92(1) [repealed], 101; *British North America (No. 2) Act, 1949*, 13 *Geo. VI*, c. 81 (UK).

pensions as well as changes to judicial tenure. It is unusual for one sovereign country to rely on another for amendments to its constitution. Yet this was the basic arrangement in Canada from 1867 until 1982, when Canada finally entrenched its own fully deployable domestic amending formula.

#### DEMOCRACY IN CONSTITUTIONAL AMENDMENT

In those 125 years, Canadian political actors tried but failed over one dozen times to sever their reliance on London for amendments to the Constitution. In every instance but the last they could not agree on how to structure the rules of formal amendment, hitting an impasse when the time came to decide which parts of the constitution would be amendable by whom and with what threshold of provincial agreement. The default rule therefore remained in place: amendments would be made by the Parliament of the United Kingdom at the request of Canada in a joint address of both houses of Parliament.<sup>15</sup> By 1965, however, it had become an ordinary practice for the Parliament of the United Kingdom to enact any amendment requested by Canada and it had also become common for Canada to consult with provinces and secure their consent prior to requesting an amendment affecting federal-provincial relations with specific regard to provincial powers.<sup>16</sup> The *Patriation Reference* in 1981 would later recognize that this practice of securing provincial consent had over the years matured into a constitutional convention.<sup>17</sup>

Canada's long search for a domestic amending formula was a quest not only for legal independence but for democracy as well. At their core, the rules of constitutional amendment are necessary procedures for democratic constitutionalism. They are legal rules that authorize a formal process to alter the constitutional text. They are also political rules that can confer sociological legitimacy on the legal changes made by amendment. Their entrenchment into a codified constitution reflects a choice of constitutional design to enable the people and their representatives to exercise the democratic right to rewrite their basic rules of self-government when the required majorities coalesce behind a proposed change. The political struggle for an amending formula was an exercise in democracy and its culmination in the patriation of the Constitution with an entrenched amendment formula was a vindication of democracy as a constitutional value in Canada.

<sup>15</sup> Peter W. Hogg, *Formal Amendment of the Constitution of Canada*, 55 L. & CONTEMP. PROBS 253, 254 (1992).

<sup>16</sup> See Guy Favreau, *THE AMENDMENT OF THE CONSTITUTION OF CANADA* 11–16 (1965).

<sup>17</sup> See *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753.

## FEDERALISM IN CONSTITUTIONAL AMENDMENT

The *Constitution Act, 1982* establishes five different procedures in its amending formula. Each procedure is expressly designated for use in connection with a specific part, provision or principle in the Constitution. None has comprehensive application as a matter of law to all parts of the Constitution. One, for example, can be used only for the amendable matters assigned to it, and the others are legally disabled as to those matters. What is worth noting about these five procedures is the influence of federalism in their design both in the construction of each individual procedure and in their collective structure as an architectural whole across the entire amending formula.

The unilateral provincial procedure authorizes a majority of a provincial assembly to amend its own constitution to the extent the amendment does not affect matters of federal or federal-provincial interest.<sup>18</sup> There is a federal analogue to this procedure: the federal unilateral procedure authorizes a majority of Parliament to pass a law amending the Constitution in relation to the executive government or either house of Parliament, provided the subject of the amendment is not assigned to another procedure.<sup>19</sup> A third procedure – the bilateral amendment procedure – authorizes Parliament and a concerned province or provinces to amend the Constitution where the amendment affects “one or more, but not all, provinces.”<sup>20</sup> The general amendment procedure applies to amendments that have national scope; it requires both houses of Parliament to agree along with seven out of ten provinces whose total population equals at least half of the entire provincial population.<sup>21</sup> The fifth – the unanimity procedure – requires both houses of Parliament and each of the provincial assemblies to agree on the amendment,<sup>22</sup> something that the two major amendment failures in modern Canadian history have proven is much easier said than done.<sup>23</sup>

Canada’s commitment to federalism is reflected in this escalating structure of constitutional amendment. Each procedure in the amending formula is harder to satisfy than the previous, hence its escalation in terms of difficulty, the theory behind this design being that the more important or politically salient a subject, the greater should be the degree of political support for making changes to it. What makes a constitutional amendment more difficult as the subject of amendment rises in importance is the quantum of provincial

<sup>18</sup> See *Constitution Act, 1982*, s. 45.    <sup>19</sup> See *id.*, s. 44.    <sup>20</sup> See *id.*, s. 43.    <sup>21</sup> See *id.*, s. 38.

<sup>22</sup> See *id.*, s. 41.

<sup>23</sup> See Michael Lusztiq, *Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail*, 27 *CAN. J. POL. SCI.* 747, 748 (1994).

consent required across the five procedures in the amending formula. The unilateral provincial procedure requires nothing beyond a vote in the relevant provincial assembly. But the role of provinces rises steadily from little to large beginning with the federal unilateral procedure. Only indirect provincial approval is needed to use the federal unilateral procedure, since parliamentarians voting on the amendment may take into account their provincial interests to the extent the amendment affects in some way the provinces, even though the procedure is not supposed to be deployed but for narrow federal matters. The bilateral amendment procedure requires the affected province or provinces to approve the amendment in order for it to become valid. The general amendment procedure, for use in amendments of national interest, raises the degree of provincial agreement to a supermajority, while the unanimity procedure brings it to its highest level.

The central point of distinction among these five procedures is the involvement of provinces. As the amendable subject moves from involving strictly provincial interests to matters of national interest, the influence of provinces increases in two ways: first, the number of provinces whose approval is needed jumps from zero to unanimity; second, provinces are given the power to veto important amendments passed using the general or unanimity procedures.<sup>24</sup> This feature of escalation in the amending formula is only one of the federalist commitments evident in the rules of constitutional amendment. The *Constitution Act, 1982* also gives provinces the right in some cases to dissent and to opt-out from successful amendments.<sup>25</sup> These two features join with the escalating structure of the amending formula to reinforce the federalist values of the Constitution – the second of three distinctly Canadian values highlighted by the Chief Justice.

#### DIFFERENCE AND DIVERSITY IN CONSTITUTIONAL AMENDMENT

The amending formula also reflects the respect for difference and diversity upon which the Chief Justice observed Confederation was built. Beyond the federalist foundations of the amending formula – which represent nothing if

<sup>24</sup> The Regional Veto Law, passed in 1996, supplements Part V. It requires Ministers to first secure the consent of each of Canada's regions before introducing a motion to amend the Constitution using the general amendment formula. See An act respecting constitutional amendments, S.C. 1996, c. 1 (1996). I have argued elsewhere that this law is unconstitutional. See Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALBERTA L. REV. 85, 111 (2015).

<sup>25</sup> See *Constitution Act, 1982*, ss. 38(3)-(4), 40.

not the recognition of differences among the various regions of Canada – there is an underappreciated provision in the *Constitution Act, 1982* located outside of the amending formula itself that nonetheless forms an integral part of the rules of constitutional change. Section 35.1 commits the Government of Canada and provincial governments to invite representatives of the aboriginal peoples of Canada to a constitutional conference of first ministers, convened by the Prime Minister, when a proposed amendment affects the rights of aboriginal peoples. The Constitution identifies three classes of provisions that trigger this commitment: a proposed amendment to Class 24 of section 91 of the *Constitution Act, 1867*, or to section 25, or to Part II of the *Constitution Act, 1982*. This commitment springs from the Canadian constitutional value of respect for difference and diversity. Yet there is reason to argue that the Constitution does not go far enough to bring aboriginal peoples to the table. First Ministers are required only to “invite” representatives of the aboriginal peoples when a proposed amendment is thought relevant. Well intentioned though it may be, this constitutional provision and others like it have the potential to further sharpen the divisions among the many peoples of Canada.

#### A LAND OF MANY PEOPLES

Yet the success of the Canadian model derives more from the aspiration of accommodation that shapes its constitutional politics than from its constitutional design. There is a reason rooted deeply in history why the will to accommodate difference is baked into Canada’s DNA as a country: the diversity of Canada requires it. For all of its successes, the Constitution has yet to constitute Canadians into one people. Instead, it accommodates and recognizes different peoples, and in some cases even creates new categories of peoples. Many of these peoples continue to challenge of the legitimacy of the very Constitution that binds them under law. The Constitution of Canada therefore defies the conventional theory of democratic constitutionalism that a constitution, in order to endure, should concretize a political settlement that is seen as legitimate and is in fact legitimated in a single democratic moment by the consent of the governed.

The remarkable endurance of the Constitution of Canada suggests that its legitimacy derives neither from a founding moment nor from sociological veneration but rather from its continued contestability. The Canadian commitment to the living constitution entails the political reality that the Constitution is both an unfinished and an unfinishable project of self-government. It is a political arrangement that is not quite settled nor perhaps ever will be. This unsteady state invites both challenges and opportunities.



In the public imagination, modern constitution-making has become deeply interconnected with revolution, the former consolidating the achievements and ideals of the latter. Hannah Arendt twinned the two concepts of constitution and revolution as “correlative conjunctions.”<sup>26</sup> The moment of constitutionalization that follows revolution is a triumph for challengers over incumbents in a contest for control, often a violent struggle.<sup>27</sup> There is, in the path to revolutionary victory, a cataclysmic character to the “sweeping, sudden and violent” change that attends the formation of a new constitutional order. For some revolutions, the transformation may be totalizing, embracing all manner of law and society, resulting in what Samuel Huntington has defined as a “violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership, government activity and policies.”<sup>28</sup>

A revolution, then, marks a new beginning, the end of a prior regime and the installation of new leaders who bring with them new values to be marshalled in the creation of a new constitutional order. In the conventional theory of constitutionalism, what legitimates this new regime is the consent of the governed. The people, acting through their constitution-making representatives,<sup>29</sup> reject the old and embrace the new, authorizing their agents in the constituted branches of government to act in their name.

This Lockean formation of the constitutional consensus required to legitimate the new order concretizes a settlement among the people. The people, as Locke understands it, “enter into society to make one people, one body politic, under one supreme government,”<sup>30</sup> and though “there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them,”<sup>31</sup> they strike an agreement that repudiates difference or accommodates it, but in either case it is an agreement that constitutes one new people. Nowhere is this Lockean theory of constitutional settlement more evident than the people’s

<sup>26</sup> Hannah Arendt, *ON REVOLUTION* (London: Penguin Books, rep. ed. 1990), 126.

<sup>27</sup> Harold J. Berman, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (Cambridge: Harvard University Press, 2009), 21.

<sup>28</sup> Samuel P. Huntington, *POLITICAL ORDER IN CHANGING SOCIETIES* (New Haven: Yale University Press, rev. ed. 2006), 264.

<sup>29</sup> See Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 *CARDOZO L. REV.* 191, 197–201 (1995) (outlining models of democratic constitution-making).

<sup>30</sup> John Locke, *SECOND TREATISE OF GOVERNMENT* AT 47–48 (§89) (Indianapolis: Hackett Publishing Co., C.B. MacPherson ed. 1980).

<sup>31</sup> *Id.* at 77–78 (§149).

charter written by Locke himself in 1669,<sup>32</sup> *The Fundamental Constitutions of Carolina*, which committed the people of North Carolina to a settlement that “shall be and remain the sacred and unalterable form and rule of government of Carolina forever.”<sup>33</sup>

The US Constitution is born of a revolutionary democratic moment. Since its adoption, it has been the battleground for the formation of a new constitutional settlement, or for the defence of the old. The Constitution, deeply imbedded within a tradition of revolutionary constitutionalism, has been transformed by dialogic interactions among the constituted branches of government, civil society groups and movement parties that have struck a new agreement, whether at the founding, the Reconstruction, the New Deal or the Civil Rights era. Each of these “constitutional moments” has resolved an open question of polity and identity, concretizing though not necessarily formalizing in a new written constitutional text a new constitutional settlement that has governed subsequent generations of constitutional politics.<sup>34</sup>

The Canadian Constitution, however, is something of a departure from the conventional theory of constitution-making. Neither prompted nor attended by revolution, nor rooted in a tradition of revolutionary constitutionalism, the Constitution of Canada is not the product of the kind of settlement we commonly associate with constitutions,<sup>35</sup> and indeed has spent much of its life in search of one. For Canada’s leading scholar of constitutional politics, this is the story of the country’s “constitutional odyssey,” a journey that has taken its peoples through multiple rounds of mega constitutional politics that have on each occasion failed to bring constitutional peace.<sup>36</sup> Worse still, these recurring periods of mega constitutional politics have hardened the differences that define the many peoples of Canada and indeed have deepened the fault lines that divide them.

<sup>32</sup> For a careful study of Locke’s involvement in writing the North Carolinian Constitution, see David Armitage, *John Locke, Carolina, and the “Two Treatises of Government,”* 32 *POL. THEORY* 602 (2004).

<sup>33</sup> *FUNDAMENTAL CONSTITUTION OF CAROLINA*, art. 120 (1669).

<sup>34</sup> See generally Bruce Ackerman, *WE THE PEOPLE – VOLUME 1: FOUNDATIONS* (Cambridge, MA: Harvard University Press, 1991) (introducing theory of “constitutional moments”); Bruce Ackerman, *WE THE PEOPLE – VOLUME 2: TRANSFORMATIONS* (Cambridge, MA: Harvard University Press, 1998) (illustrating two major constitutional moments: Reconstruction and the New Deal); Bruce Ackerman, *WE THE PEOPLE – VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (Cambridge, MA: Harvard University Press, 2014) (arguing that the Civil Rights movement created a constitutional moment).

<sup>35</sup> Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 370 (1995).

<sup>36</sup> Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1992).