
Richard Albert*

The Challenges of Canadian Constitutionalism**

In an interview on Alhayat Television in Egypt on January 30, 2012, United States Supreme Court Justice Ruth Bader Ginsburg stirred some controversy in America. She remarked that 'I would not look to the U.S. Constitution, if I were drafting a constitution in the year 2012.'¹ 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 United States Constitution has declined in its global influence, due in no small part to its exceptionalism on matters of rights and liberties.² 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*.³ 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.

The global importance of the Constitution of Canada has grown as we have approached its sesquicentennial in 2017. Since Confederation began with the *British North America Act, 1867*,⁴ 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. 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.⁵ The Constitution of Canada

* Richard Albert is Professor of Law, University of Texas at Austin School of Law; Distinguished Visiting Professor of Law, University of Toronto, Faculty of Law (2017–2018).

** This comment is adapted from Richard Albert, 'The Values of Canadian Constitutionalism' in Richard Albert, David Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press 2017, Cambridge).

¹ Adam Liptak, 'We the People' Loses Appeal with People Around the World' N.Y. Times, Feb. 6, 2012, available at: <www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> accessed 1 August 2016.

² See David S. Law & Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 N.Y.U. L. Rev. 762.

³ *Canadian Charter of Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982*, c. 11 (U.K.).

⁴ Since renamed to '*Constitution Act, 1867: Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) [*Constitution Act, 1867*].

⁵ Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 Ind. L.J. 819, 821–822.

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.⁶

I A Country of Many Peoples

Yet 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 in many ways 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 its founding moment nor from its 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.

The Lockean formation of the constitutional consensus thought critical 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,'⁷ 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,'⁸ they strike an agreement that repudiates difference or accommodates it, but in either case it is an agreement that constitutes one new people.

The United States 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 defense 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

⁶ Claire L'Heureux-Dubé, 'The Importance of Dialogue' (1998) 34 *Tulsa L.J.* 15, 24.

⁷ John Locke, *Second Treatise of Government at 47–48* (§89) (Hackett Publishing Co., C.B. MacPherson ed. 1980, Indianapolis).

⁸ *Id.* at 77–78 (§149).

constitutional text, a new constitutional settlement that has governed subsequent generations of constitutional politics.⁹

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,¹⁰ 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.¹¹ 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.

II Unity in Dissimilarity

Some constitutional states manage difference in the construction of cultural homogeneity but this has never been the Canadian way.¹² As Lipset has argued, Canada has chosen instead 'to work out agreements among disparate cultures rather than assimilate them into one.'¹³ Since the founding of the dominion of Canada by British and French settlers, Canada has self-consciously understood and governed itself as a union of different peoples.¹⁴

The Canadian polity and its peoples constitute a multinational state composed of what Kenneth McRoberts has described as 'internal nations.'¹⁵ Canada is not a binational state, nor perhaps ever was despite the founding myth of Canada's English and French negotiated beginnings; it is rather an agglomeration of peoples whose shared interests bind them first to

⁹ See generally Bruce Ackerman, *We the People – Volume 1: Foundations* (Harvard University Press 1991, Cambridge, MA) (introducing theory of 'constitutional moments'); Bruce Ackerman, *We the People – Volume 2: Transformations* (Harvard University Press 1998, Cambridge, MA) (illustrating two major constitutional moments: Reconstruction and the New Deal); Bruce Ackerman, *We the People – Volume 3: The Civil Rights Revolution* (Harvard University Press 2014, Cambridge, MA) (arguing that the Civil Rights movement created a constitutional moment).

¹⁰ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke L.J.* 364, 370.

¹¹ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992, Toronto).

¹² Eva Mackey, *The House of Difference: Cultural Difference and National Identity in Canada 16* (University of Toronto Press 2002, Toronto).

¹³ Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada 79* (Routledge 1990, New York).

¹⁴ For a discussion of the dimensions of difference in Canada, see Daiva Stasiulis, Radha Jhappan, 'The Fractious Politics of a Settler Society: Canada' in Davia Stasiulis, Nira Yuval-Davis (eds), *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (SAGE Publications 1995, London – Thousand Oaks – New Delhi) 95–131.

¹⁵ Kenneth McRoberts, 'Canada and the Multinational State' (2001) 34 *Can. J. Pol. Sci.* 683, 688.

themselves, and also, though loosely, to Canada, the result being that the country is a nation of nations.

The consequences of Canada's multinationality were evident in the outcome of the Charlottetown Accord in 1992. The package of comprehensive constitutional reforms may have been doomed to failure in light of the varied and competing demands of Canada's diverse peoples. As Michael Behiels explains, 'virtually every dimension of the Charlottetown deal had its staunch defenders and its vociferous critics',¹⁶ making the package unlikely ever to be accepted. In addition to the complexity of the package – complexity occasioned by the need to speak to the interests held by many of the peoples of Canada – there was an additional problem, writes Richard Johnston:

The package Canadians rejected was formidably complex. It became so by a decade's accretion of elements, each calculated to appeal to, or to offset concessions to, groups excluded at an earlier stage – Quebec, the western provinces, and aboriginal peoples. Negotiators hoped that by 1992 they had finally found an equilibrium, a logroll sufficiently inclusive to survive referral to the people. Instead they seem to have gotten the logic of the logroll upside down: they may have overestimated both how much each group wanted what it got and how intensely some groups opposed key concessions to others.¹⁷

There is another observation worth making. Canada's Constitution has not only recognized a multiplicity of peoples but it has also created the possibility of recognizing new peoples, a group that Behiels identifies as 'Charter Canadians' – peoples different from those historically recognized.¹⁸

English and French Canada have always been the dominant actors in constitutional politics, and so too the provinces. But Indigenous peoples, territories and the 'Charter Canadians' whom Behiels identifies in passing have not traditionally had a seat at the table. That changed in 1982, when the *Charter* constitutionalized their rights, and it changed once again ten years later in 1992 with the demise of the Charlottetown Accord, when these groups gathered alongside traditionally empowered groups to negotiate the future of Canada. The Charlottetown negotiations included the federal government, nine provincial governments, territorial governments, and four major national organizations of Indigenous peoples; Quebec joined in late and women's groups were consulted throughout.¹⁹ All told, the Special Joint Committee of the House of Commons and the Senate responsible for shepherding the proposals for reform heard testimony from 700 individuals and received 3,000 submissions.²⁰ It is hard to imagine such broad consultation without the impetus of the *Charter*.

¹⁶ Michael D. Behiels, 'Charlottetown: The Anatomy of Mega-Constitutional Politics' Policy Options (Dec. 2002 – Jan. 2003) 65, 66.

¹⁷ Richard Johnston, 'An Inverted Logroll: The Charlottetown Accord and the Referendum' (1993) 26 Pol. Sci. & Pol. 43, 43.

¹⁸ Behiels (n 16) at 65.

¹⁹ See Kathy L. Brock, 'Learning From Failure: Lessons from Charlottetown' (1993) 4 (2) Const. Forum 29; Richard Albert, 'The Conventions of Constitutional Amendment in Canada' (2016) 53 Osgoode Hall L.J. 399, 404–412.

²⁰ *Consensus Report on the Constitution*, August 28, 1992, at Preface.

The enactment of the *Canadian Charter of Rights and Freedoms* brought with it recognition and accommodation for many of the peoples of Canada.²¹ In addition to affirming language rights,²² the *Charter* recognizes Aboriginal rights and freedoms,²³ as well as gender equality,²⁴ territorial rights and privileges,²⁵ and it insists that the *Charter* 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'²⁶ The Supreme Court's recent recognition of Métis and non-status Indians is a step in this direction.²⁷

The freedoms entrenched in the *Charter* also created new groups of Canadians bound neither by geography nor language nor culture but rather by interest and commitment. For example, the fundamental freedoms of conscience and religion have served as a focal point for the mobilization of religious groups.²⁸ The same is true of the entrenchment of the 'freedom of the press and other media of communication,' which has given the Fifth Estate a textual referent in which to ground its claims.²⁹ These are some of the 'Charter Canadians' to which Behiels referred as groups that now have constitutional rights to protect and indeed to seek to expand. The same may be said of the interests of criminal defendants, now entrenched in the *Charter*.³⁰ Just as important is the recognition of rights and freedoms that are not currently entrenched in the *Charter* but that may in the future be enforced.³¹ The most generative source of new protected classes of Canadians, however, each of whom now has interests to defend in the context of any effort to comprehensively reform the Constitution, is Section 15, the locus of equality rights.³²

The *Charter* has therefore entrenched, expanded and revolutionized the meaning of citizenship in Canada, giving rights and recognition to classes of Canadians, old and new. As Alain Cairns has observed, the Canadian Constitution is a 'citizens' constitution' that identifies and empowers the peoples of Canada:

The Charter brought new groups into the constitutional order or, as in the case of aboriginals, enhanced a pre-existing constitutional status. It bypassed governments and spoke directly to Canadians by defining them as bearers of rights, as well as by according specific constitutional recognition to women, aboriginals, official language minority populations, ethnic groups through the vehicle of multiculturalism, and to those social categories explicitly listed in the equality rights

²¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the 'Charter').

²² See *id.* at ss. 16–23.

²³ See *id.* at s. 25.

²⁴ See *id.* at s. 28.

²⁵ See *id.* at s. 30.

²⁶ See *id.* at s. 27.

²⁷ See *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

²⁸ See *Charter*, s. 2(a).

²⁹ See *id.* at s. 2(b).

³⁰ See *id.* at ss. 7–14.

³¹ See *id.* at s. 26.

³² See *id.* at s. 15.

section of the Charter. The Charter thus reduced the relative status of governments and strengthened that of the citizens who received constitutional encouragement to think of themselves as constitutional actors.³³

All of these peoples, established and nascent both, makes it is no surprise that the grand political settlement that drives the march to constitutionalism has continued to elude Canada. And yet it is in this very unsettled state that we may find the core of the legitimacy that sustains the Constitution.

III Constitution as Noun and Action

In Canada, ‘constitution’ is a verbal noun that reflects ‘the action or activity of constituting.’³⁴ Constitution, in this sense, never ends, is never complete, and no final settlement is attainable, nor perhaps even desirable since it could entail the extinguishment of the equally valid claims of others. The peoples of Canada constitute and reconstitute themselves in their daily interactions and in the intermediated politics of parliamentary and legislative lawmaking. Though Canada may one day return to mega constitutional politics, today Canada remains in the necessary yet unsettled state of recognized and unrecognized difference, sometimes celebrated sometimes not, but always at the foreground of the peoples’ conscious self-understanding as a polity.

Canadian constitutional politics are therefore open to possibilities that are not always available in states bound by a final settlement. The Constitution of Canada is a constitution ever in constitution, in which the people remain in conversation, contested to be sure, with each other, looking ahead to what shape an eventual political settlement might take but knowing that it remains as elusive as ever before. This conversation and the contestability of the Constitution is what gives its peoples validation as participants in the project of constitution and reconstitution, and also what breathes legitimacy into the constitutionalized agreements that to this day remain unfinished. Perhaps the future will bring some resolution, some settlement, however difficult this may be to envision in the present day.

Of course no constitution is ever finished. Even where its text does not change, the meaning of a constitution evolves over time through judicial interpretation, the enactment of statutes, the accretion of political practices, and the evolution of societal norms. All of these change constitutions in ways that may be stronger than a formal amendment. In Canada, judicial interpretation has been the most common way – and by comparison to the stringency of the amending formula, the easiest as way as well – to update the meaning of the

³³ Alan C. Cairns, ‘Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake’ (1988) 14 *Can. Pub. Pol. Supp.*: Meech Lake Accord S121, S122.

³⁴ Hanna Fenichel Pitkin, ‘The Idea of a Constitution’ (1987) 37 *J. Leg. Ed.* 167, 168 (1987); see also Richard Albert, ‘Counterconstitutionalism’ (2008) 31 *Dalhousie L.J.* 1, 3 (comparing constitution as both ‘noun’ and ‘verb’).

Constitution.³⁵ The Supreme Court of Canada has been the subject of criticism for what is labelled its judicial activism,³⁶ yet it is important to remember that it is through its politically deft if sometimes purposefully ambiguous judgments that Canada has most clearly advanced its ethic of accommodation, and with it, the country's reputation as a constitutional model.

IV A Moment for Reflection

The stakes are high in this anniversary project just as they are in many anniversary specials. In the bicentennial year of the United States Constitution, Supreme Court Justice Thurgood Marshall observed that the object of their celebration had grown 'vastly different from what the framers barely began to construct two centuries ago.'³⁷ Justice Marshall declined the invitation to join the chorus of good cheer for a document that had been enacted to exclude many from the rights and privileges of citizenship:

The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it is said we now enjoy. I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.³⁸

There is nuance in Justice Marshall's words. His message was not that the Constitution was not worth celebrating. It was that the Constitution as designed in 1787 was intrinsically unjust, but through war and sacrifice it had earned its status as a national symbol worthy of pride. The true miracle, he stressed, 'was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.'³⁹ For Justice Marshall, it was the transformation of the Constitution, not its founding text, that the bicentennial anniversary ought to celebrate. Rather its adaptive capacity to accommodate profound social change than its inegalitarian foundations. Justice

³⁵ Allan C. Hutchinson, 'Constitutional Change and Constitutional Amendment: A Canadian Conundrum' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (1st edn, Routledge 2013, London – New York) 51 1 at 57; Richard Albert, 'The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada' (2015) 41 *Queen's L.J.* 143, 167–176.

³⁶ See, e.g., Rory Leishman, *Against Judicial Activism: The Decline of Freedoms and Democracy in Canada* (McGill-Queen's Press 2006, Montreal); Robert Ivan Martin, *The Most Dangerous Branch* (McGill-Queen's University Press 2003, Montreal); F.L. Morton, Rainer Knopff, *The Charter Revolution and the Court Party* (University of Toronto Press 2000, Toronto).

³⁷ Thurgood Marshall, 'Reflections on the Bicentennial of the United States Constitution' (1987) 101 (1) *Harv. L. Rev.* 1.

³⁸ *Id.* at 1–2.

³⁹ *Id.* at 5.

Marshall saw something to celebrate in the redemptive possibilities of a constitution that would have been unrecognizable to those who had written it two hundred years prior. I take another message from Justice Marshall's reflections: that we must understand what it is we are doing when we mark an anniversary and also how our marking of it will be perceived. For us, as we mark the sesquicentennial of Confederation in Canada, the task is no different.

I am reminded of a powerful exchange between Mary Ellen Turpel-Lafond and Patricia Monture in the aftermath of the failure of the Meech Lake Accord in 1990.⁴⁰ Turpel-Lafond (then Turpel) suggested as they opened their public conversation that they start by identifying a period of time or a year to trace aboriginal history in the land now identified as Canada. One option was 'first contact 500 years ago', suggested Turpel-Lafond, or 'if not there, at least we have to mention 1867, a date which I hate to use.'⁴¹ Monture responded in no uncertain terms that the year 1867 was not one she believed was worth celebrating:

I do *not* want to start with 1867. Canada's birth is not something I celebrate; anymore than I believe the history of the country dates back to 1763 and the *Royal Proclamation*, or when the first European stepped onto the shores of what First Nations know to be Turtle Island.⁴²

Despite the accolades Canada has earned abroad for the theory and doctrine of its constitutional law, the lived experience of many of the peoples of Canada remains one of misgiving, disenchantment and also of anger for a past that remains unreconciled with the present. This anniversary presents an opportunity for the stewards of Canada's Constitution to reach righteous and just resolutions to longstanding internal challenges – both because the time is long past and because the world is now watching. How and whether public law succeeds in repairing what remains broken in Canada may well determine whether the Constitution of Canada will continue to be as influential in the world when the time comes to mark its bicentennial.

⁴⁰ See M.E. Turpel, P.A. (Trisha) Monture, 'Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord' (1990) 15 Queen's L.J. 345.

⁴¹ *Id.* at 346.

⁴² *Id.*