Constitutional Crossroads

Contents

Introduction

Complex Legacies: The Promise, Challenges, and Impact of the *Constitution Act, 1982*

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The entrenchment of Canada's *Constitution Act, 1982,*[1] containing the *Charter of Rights and Freedoms,* Aboriginal and treaty rights, and a new amending formula, signified many things to many people.

For some, it embodied the idea of patriation, a unique term for an exceptional situation: an otherwise independent country, unable to achieve major formal constitutional change without the legislative assistance of a foreign parliament, wresting domestic control of its constitutional future. On this score, 1982 represents, finally, the realization of a fully sovereign Canada.[2]

For others, it is synonymous with failure, a lost opportunity to bridge core societal cleavages and address inherent tensions in competing constitutional visions, from the dualist perspectives of a linguistic and cultural minority represented largely (though not exclusively) by Quebec to an intense regionalism in what had evolved into one of the most decentralized federations in the world. For all that was gained, attempts to address perceived inequities in Canadian federalism or to enact reform of central institutions proved unworkable. The aftermath was another decade of megaconstitutional politics, and more failure, all leading to the near breakup of the country and putting a powerful cultural chill on future efforts at formal constitutional change.[3]

For many, the 1982 achievement was a triumph in both substantive and symbolic terms, bestowing upon Canada a newly realized shared conception of nationality in the form of a rights document, soon to be enforced with ample zeal by an empowered judiciary. On the twin "political purposes" of the Charter – national unity and the protection of rights and freedoms – much might be said, but the Charter's enduring popularity in all parts of the country arguably speaks to its success on this front.[4]

For Indigenous peoples in Canada, it may be most accurate to say that 1982 represented a complex mix of hope and skepticism. Section 35's Aboriginal and treaty rights reflected the hard-fought battle for inclusion and recognition of the rights embodied in the treaties between the Crown and many of the pre-existing societies inhabiting the continent prior to European contact. These rights were recognized long ago in one of the founding elements of the Canadian Constitution, the Royal Proclamation of 1763, but their formal

entrenchment in the 1982 act opened a potential path to more robust judicial enforcement and a fundamental reorientation in the state-Indigenous relationship. Yet the wording of section 35, both limited by reference to the "existing" rights of Aboriginal people and open-ended in its lack of specificity, raised many questions.[5] The subsequent jurisprudence has been subject to important criticism.[6]

Now, four decades later, it is time to assess and analyze the legacy of the *Constitution Act, 1982*. As is evident from the contributions to this volume, the 1982 constitutional package raises questions relating to a host of fundamental issues: sovereignty and the legitimacy of various institutions in exercising authority, including the Crown and the courts; Canadian identity and pluralism within a multinational, multicultural, and diverse country struggling with historical and ongoing systems of oppression; the scope and limits of rights; competing constitutional visions and the place of Quebec within them; the relationship between the state and Indigenous peoples, particularly in a new era of reconciliation and the limits of consultation and accommodation within that context; and constitutional amendment, including the status of central institutions such as the Crown, the Supreme Court, and the Senate, the place of cities in our constitutional fabric, and the nature and method of constitutional change. Four decades after 1982, Canada is at a constitutional crossroads. Questions remain, and existing and emerging challenges must be confronted in light of how these issues, and more, have evolved.

With a focus on the themes of rights, reconciliation, and constitutional change, and offering insights into institutional relationships, public policy, and the state of the fields of law and politics, this book brings together an unprecedented assembly of established and rising stars in political science and law to analyze different aspects of Canada's constitution in the twenty-first century. Contributors participated in a three-day conference organized by the Courts and Politics Research Group. Founded in 2016 by Emmett Macfarlane and Kate Puddister, this group is a collection of Canadian scholars who study courts, constitutions, and the law from a political science perspective. We are pleased to note that this volume contains a mix of senior and junior scholars of the field, ensuring a wide-ranging set of diverse perspectives and insights brought to bear on the volume's core themes.

Eschewing purely historical or descriptive essays, the volume presents forward-looking, argumentative, and analytically reflective contributions. The goals of the collection are to provide a unique and robust account of the 1982 constitutional reform after forty years and to reflect on and analyze empirical and normative scholarship that has shaped our understanding of the Constitution.

Institutional Relationships

The Charter ushered in a structural transition of Canada's system of government from one of parliamentary sovereignty to one of constitutional, if not judicial, supremacy. Debates over the Charter have spanned a host of issues, including normative contestation over the role of courts and the way in which judicial review of rights ushered in social change.[7] Concerns about judicial power or activism – and what segments of society were being privileged under the Charter – traversed both sides of the ideological divide.[8] Progressive critics cited early cases limiting labour rights, narrowing the scope of equality, or granting benefits to corporations, while conservative critics pointed to social changes wrought by Charter litigation in areas such as same-sex equality and abortion or the courts' significant expansion of rights for the criminally accused.

These normative debates also highlighted the discretionary and political nature of judicial decision making, perceived interpretative abuses against the text or purpose of specific provisions, and broader dissatisfaction with the legalization or judicialization of politics. They also mapped on to institutional analyses of the relationships at stake under the Charter, including significant attention devoted to the concept of a dialogue between courts and legislatures about the policies at stake. This aspect of the literature ultimately did little to move either the defenders of judicial power or the critics, as the debate over the empirical and conceptual usefulness of the concept remains unsettled (and has possibly exhausted its utility).[9] In a comparative perspective, Canada also came to exemplify a middle ground between parliamentary sovereignty and judicial supremacy or a "weak form" model of judicial review under the Charter, a debate that itself became mired somewhat in the question of whether Canada truly meets the conditions for this model or whether, in practice, it is a traditional strong form system.[10]

What did emerge from these debates was an increasingly rich empirical, theoretical, or nuanced account of the institutional dynamics under the Charter, from Janet Hiebert and Jim Kelly's works on the legislative and executive branches to Kent Roach's call for recognizing the complexity of some of the interinstitutional dynamics at play to Dennis Baker's work on coordinate constitutionalism.[11] This has been bolstered by new analyses of the executive-court relationship by scholars such as Matthew Hennigar that provide fresh insights into what motivates government decisions and better inform our understanding of the institutional dynamics at stake.[12] One example of this might be events analyzed by Hiebert that reveal the limited seriousness with which the federal Cabinet considers bureaucratic assessments of Charter compatibility of legislation, something that might temper advocates of a more assertive legislative or executive approach to the Charter or in responding to judicial decisions.[13]

Another example of this relationship concerns the use of references, or advisory opinions, which arguably allow governments to preserve political capital by strategically shunting controversial decisions to the courts. Recent books by Kate Puddister and Carissima Mathen shine new light on this process.[14] Many aspects of the institutional relationships under the Charter remain ripe for study, including the work of parliamentary committees in scrutinizing bills and the approach of different governments to rights issues.

The study of judicial decision making itself has made important advances in the last fifteen years. Dave Snow and Mark Harding describe the scholarly literature as becoming "less normative, more explicitly comparative, and committed to methodological rigor."[15] One area exemplifying this turn is studies of the Supreme Court analyzing judicial behaviour and the various factors informing judicial outcomes.[16] This work builds on earlier empirical analyses, especially by Peter McCormick, who is notable for his extensive investigation of judicial decision making by way of descriptive statistics.[17] Given the extensive legal scholarship on the growing body of jurisprudence under the Charter, it may be time to revisit some of the earlier normative debates. The last four decades have produced a wealth of scholarship and a profoundly better understanding of the work of the courts, the competing and complementary institutional roles at stake, and the scope and limits of rights. It is time to reflect on what we know, where we are, and where we are going.

Writing almost forty years ago, Peter Russell opined that the Charter would fundamentally change many aspects of Canadian politics, serving to "judicialize politics and politicize the judiciary."[18] In the opening chapter of this volume, Mark Harding revisits some of Russell's predictions from the early days of the Charter to assess how Canadian politics has changed in the Charter era through an examination of changes to the Supreme Court of Canada appointment process, the authoritative nature of judicial decisions, and the use (or disuse) of the notwithstanding clause. Harding concludes that as a student of Canadian federalism, parliamentary governance, and legal culture, Russell made many predictions about the political consequences of the Charter that have come to fruition; however, the manner in which governments have chosen to strategically embrace the judicialization of politics for political gain shows an impact of the Charter he did not fully anticipate.

In Chapter 2, Emmett Macfarlane revisits judicial activism, a concept firmly entrenched in the normative and empirical debates over judicial review of the Charter. Judicial activism is a heavily contested and amorphous concept, and political scientists and legal scholars have disagreed over its definition and application as an empirical measure of court behaviour. Contra those who

advocate abandoning the concept, Macfarlane argues that a nuanced account of judicial activism can help frame key features of judicial decision making and calls for its application in light of advances made in recent years in understanding how courts operate.

When the *Constitution Act, 1982* was adopted, many feared that it (and particularly the *Charter of Rights and Freedoms*) would serve to centralize Canadian federalism, limiting the diversity and powers of the provinces. In Chapter 3, Gerald Baier provides a critical reflection on the legacy of the centralization thesis and argues that the Charter has not been the centralizing force some predicted. Baier suggests that any decline in provincial autonomy post-1982 has resulted from the provincial governments' failure to assert provincial difference and identity and from a tendency to favour the politics of intergovernmental relations as a means to navigate Canadian federalism.

In Chapter 4, Mark Tushnet examines the Charter's international influence. Tushnet raises a puzzle: the Charter's origins and unique design largely emanate from its domestic context and the complexity and challenges of Canadian plurinational diversity, yet its influence appears significant elsewhere. Tushnet's examination of section 33's notwithstanding clause (not adopted wholesale elsewhere but influential in balancing a middle ground between political and judicial constitutionalism) and structured proportionality through section 1's *Oakes* test suggests Canada provides "proof of concept" for the viability of certain constitutional features in other jurisdictions.

In Chapter 5, Andrew McDougall explores the success of the Charter as a national symbol, pointing especially to its widespread and enduring popularity, and he contrasts this popularity with the scholarly literature's focus on questions of legitimacy. McDougall highlights the rich and largely untapped potential of analyzing the Charter as a political document and an entrenched part of Canadian culture and national identity, aspects scholars have not properly reconciled in their focus on institutional debates.

The relationship between the public and the Charter is examined further by Erin Crandall, Andrea Lawlor, and Kate Puddister in Chapter 6. Using media reports on the Charter as a proxy for public conversation, the authors assess the nature of "Charter talk" through an empirical analysis of over twenty-five hundred news articles on the Charter over forty years. They find that early Charter coverage was driven by a court-focused narrative until the early 2000s, when the government became the key actor in Charter narratives, a change that reflected partisan and electoral politics. While the media consistently covered legal rights and fundamental freedoms, coverage of equality rights and the notwithstanding clause was more sporadic, driven by specific Charter cases or intergovernmental conflicts.

How the media frames coverage of the Charter's notwithstanding clause receives sustained focus by Dave Snow and Eleni Nicolaides in Chapter 7. Their analysis reveals the important effects of negative or positive assessments of the policy at stake and the ideological orientation of media outlets in the framing of the use (or the threat of use) of the notwithstanding clause. The study has significant implications for understanding how section 33 is conceptualized and understood by the public.

These chapters lend themselves to rich considerations for future research, including study of the internal dynamics of decision making that implicate Charter rights within specific institutions and branches of government and how particular institutional configurations – including federalism, parliamentary sovereignty, executive power, national identity, media coverage, and public opinion – shape public policy and the rights of Canadians.

Charter Rights

Critical engagement with specific sections of the Charter, specific rights, and specific policy issues is another fundamental area of scrutiny. Beyond the Charter's impact on institutional relationships, judicial power, national attitudes, or other influences, its substantive impact on rights and public policy has been an important area of study.[19] The evolution of the Supreme Court's jurisprudence relating to freedom of association,[20] freedom of expression,[21] or equality rights[22] demonstrates the oscillating forms of disagreement and politics at the heart of constitutional interpretation. The court's decisions have affected entire policy landscapes in areas from abortion to criminal justice.[23] The chapters in this section engage a broad range of Charter rights, and although not every section of the Charter receives focused attention,[24] the contributions to this section provide a thorough and substantial assessment of key components of the 1982 act and cover a broad terrain of topics and questions.

In Chapter 8, Tamara Small highlights an important tension in election law – lawmakers who create rules governing elections are also subject to those rules, thus creating the opportunity for election law to be created in partisan self-interest. In a review of section 3 jurisprudence, Small assesses how the Supreme Court of Canada renders decisions that limit partisan self-interest in election law. While partisan self-interest is certainly present in Canadian election law, Small concludes that the court rarely reviews the actions of political actors and its capacity to provide oversight for partisan self-interest has been quite limited. This is an important finding given ongoing and future debates over various aspects of electoral regulation, including those implicating electoral boundaries and the reapportionment of seats in Parliament and controversies over the regulation of third-party advertising in provinces such as Ontario. With potential

legislation designed to address misinformation, disinformation, and "false news" that might implicate the integrity of elections, this area of public policy can also have significant implications for free expression.

The impact of Charter litigation on public policy is perhaps most apparent in section 7 cases. Over the past forty years, the Supreme Court has given the principles of fundamental justice found in section 7 an expansive interpretation, far beyond what had been envisaged by the Charter's framers.[25] In Chapters 9 and 10, Matthew Hennigar and Brenda Cossman reflect on the impact of the court's interpretation of section 7 and consider how this section will shape future areas of litigation and policy debates. Hennigar evaluates some of the significant jurisprudential developments in the interpretation of section 7 and considers a variety of future directions for application, including positive socioeconomic rights (like a right to housing), access to medical procedures, and the ongoing litigation surrounding sex work. The political and jurisprudential regulation of sex work and sex workers is examined further in Cossman's contribution. Cossman argues that despite the perception that governance of sex work has become more liberalized, the regulation of sex work has ultimately been structured by abjection and disgust, which serve to perpetuate the exclusion of sex workers from social life.

Analysis of section 7 continues in Chapter 11, in Eleni Nicolaides's examination of medical assistance in dying policy and litigation post-*Carter*.[26] Moving away from a court-centred analysis, Nicolaides addresses the federal government's creation and subsequent reform of assisted dying policy, notable for its attempt to embrace a coordinate approach to constitutional interpretation and the balancing of rights. Nicolaides's analysis sheds light on the important role of government decision making in constitutional interpretation, contributing to our understanding of the relationship between the courts and Parliament.

While section 7 jurisprudence has embroiled governments and courts in fundamental and moralistic debates about the limits of government power, the impact of the Charter is perhaps most evident in the criminal justice system. Indeed, most Charter litigation arises in criminal proceedings, where courts are routinely asked to assess the limits of police powers, the admission of evidence, and the pretrial and trial rights of the criminally accused.[27] Although the Charter has had a profound impact on police powers and processes, it has provided little relief for those who are disproportionally targeted by police power, and much work remains in addressing the various insidious impacts of systemic discrimination in the Canadian criminal justice system.

In Chapter 12, Kent Roach examines the impact of the Charter on police powers and the RCMP in an analysis that explores the intersection of policing and race and the fundamental problems of systemic discrimination in the

Canadian criminal justice system. Through a review of the Supreme Court's jurisprudence regarding interrogation, search and seizure, and the court's attempts to regulate police misconduct, Roach demonstrates that the executive and legislature overwhelmingly rely on the courts to regulate and limit police powers. Because courts are limited to reviewing police conduct in individual cases, judicial decisions are constrained in their scope and capacity to effect changes in policing on a broad and systemic level. Considering the role of the RCMP as an agent of colonialism, evidence of gender-based violence within the ranks of the force, and increasing public scrutiny of how police interact with different communities (in particular Black and Indigenous communities), Roach argues that the legitimacy of the RCMP and policing in general are at a crossroads in Canada.[28] Roach's work highlights the need for scholars of law and politics to devote sustained attention to the study of policing.

Section 15 equality rights have been referred to as "the Charter's most conceptually difficult provision" by the Supreme Court of Canada, which also noted that equality itself is "an elusive concept."[29] Over the past four decades, the court's approach to section 15 and the wider impact of the right to equality have received much criticism for being restricted and ineffective for equity-seeking groups.[30] In Chapter 13, Joshua Sealy-Harrington assesses the Supreme Court's equality jurisprudence in *Andrews*[31] and *Fraser,*[32] illustrating the court's marginal engagement with racial discrimination claims for Black and Indigenous peoples. Sealy-Harrington makes it clear that the Charter has done little to address systemic and anti-Black and anti-Indigenous racism even though race is a protected ground under section 15. Building on Justice Abella's reasoning in *Fraser,* Sealy-Harrington calls on racial justice advocates to direct the Charter's substantive equality framework towards advancing both systemic and positive equality claims aimed at remedying the discrimination and structural conditions of Black and Indigenous peoples.

Kerri Froc continues the analysis of equality jurisprudence under section 15 in Chapter 14. In her analysis of women's sex-discrimination cases at the Supreme Court of Canada, Froc finds that women's claims have only been marginally more successful compared to men's, with a success rate of 28 percent compared to 26 percent, respectively. Froc argues that women's claims are focused on challenging laws that adversely impact women as a result of gendered conduct, rather than strictly biological sex, an approach that is often incompatible with the court's focus on a biological-based understanding of sex discrimination. To move towards achieving sex equality, Froc asserts that section 15 jurisprudence must recognize discrimination that results from both biological sex and how gender is practised in Canadian society.

In Chapter 15, James Kelly examines the legacy and policy impact of Quebec's Bill 101 (Charter of the French Language) and the Supreme Court's decisions in *Ford* and *Devine*.[33] Kelly finds that although the Quebec government modified its approach to promoting the French language in 1993 in a manner that appeared to comply with the court's decisions in *Ford* and *Devine,* the public face of commercial expression in Quebec remains overwhelmingly French. Kelly's analysis highlights the important role of private actors (such as commercial businesses) as agents of policy implementation.

Although specific constitutional rights protecting language were enshrined in sections 16 to 23 of the Charter, language rights in Canada have a long history. Because of this legacy, language protections in Canada have been rather piecemeal in nature. In Chapter 16, Stéphanie Chouinard examines the nature of language protection and the various Charter-based disputes that have occurred throughout the Charter's history. Looking to the future, Chouinard maps directions for language rights, including the extension of language protections beyond what is explicitly stated in the Charter, to the expansion of the *Indigenous Languages Act*. She cautions that Charter-protected language rights may be insufficient to respond to the evolving demands of official-language communities in years to come.

Along with codifying a series of rights, the Charter also includes remedial measures in section 24. Section 24(2) empowers courts to exclude evidence gathered by law enforcement in a manner that violated Charter rights. It has profoundly changed police practice and criminal trials in Canada. In Chapter 17, Lori Hausegger, Danielle McNabb, and Troy Riddell examine the impact of the 2009 *Grant* ruling, a Supreme Court case that modified the exclusion test for evidence.[34] The authors find that, post-*Grant,* evidence is slightly less likely to be excluded and extralegal factors such as political ideology only play a limited role in shaping judicial decisions regarding the exclusion of evidence. Perhaps their most interesting finding is significant variation in the exclusion of evidence across provincial courts of appeal, suggesting that Canada's penultimate appellate courts merit further attention from scholars.

Reconciliation

The entrenchment of Aboriginal and treaty rights under section 35 came with significant uncertainty given it was largely left to the courts to identify the content and scope of those rights. Jurisprudential developments, including the recognition of a duty to consult and accommodate, have had a systemic and profound impact on decision-making processes at all levels of government and across virtually every ministry and policy area. And yet the duty to consult has not lived up to the promise of fully protecting the rights at stake, as it has arguably failed

to empower Indigenous communities and to fulfill the requirements of either the historical or modern treaties or the right to self-government.

Scholarship on section 35 has examined jurisprudential and policy developments in relation to the state's obligations to uphold Aboriginal and treaty rights. Criticism of the courts includes their penchant for originalist and therefore narrow interpretations, freezing Indigenous rights in time, in stark contrast to the liberal and "living" interpretation granted to Charter rights.[35] Kiera Ladner and Michael McCrossan, on the occasion of the twenty-fifth anniversary of the *Constitution Act, 1982,* wrote that the courts "abandoned the path set before them in favour of sustaining Canada's colonial legacy."[36]

Intervening political events, including the Idle No More movement and the Truth and Reconciliation Commission, have placed a heightened emphasis on reconciliation and the development of a nation-to-nation approach to the Crown-Indigenous relationship. Scholars have only begun to analyze the role of the courts and section 35 in relation to these developments.[37] A similar body of work is developing on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada.[38] Many of these analyses identify the deficiencies of section 35 as a central impediment to progress. In the case of UNDRIP, Shiri Pasternak notes that "[b]oth the federal and provincial governments have stated that UNDRIP legislation will be interpreted in line with section 35 of the Constitution. This means that domestic legal precedents will be paramount over international principles. While this may protect Aboriginal and treaty rights in some cases, it also may narrow the realm of possibility from what is being imagined through UNDRIP."[39]

A considerable literature has developed around the duty to consult and accommodate under section 35 since its articulation in the 2004 *Haida Nation* case.[40] This research includes primarily legal assessments on jurisprudential issues or questions of sovereignty[41] and studies examining the policy process and policy impact of the principle.[42] The challenges of the duty to consult framework – and the *Constitution Act*'s role in affecting political, policy, or legal principles such as reconciliation, treaty federalism, the nation-to-nation relationship, and UNDRIP – are generational in nature. As Canada struggles to fulfill its responsibilities in a renewed era of reconciliation, the fortieth anniversary of section 35 provides an opportunity to critically assess the state-Indigenous relationship under the Constitution.

In Chapter 18, Peter Russell explores the central challenge of how Indigenous constitutional traditions, as well as Indigenous peoples' self-government and inherent sovereignty, might operate in a context where we are beginning to recognize the coexistence of more than one constitutional order. Implicit in this

analysis is the fundamental question of the extent to which Indigenous peoples live, or will live, within or outside the Constitution of Canada. Russell explores the progress made since 1982 on this front and the increasing acknowledgment that sovereignty over Canada will be shared between federal, provincial, and Indigenous orders of government.

In Chapter 19, Jeremy Patzer and Kiera Ladner examine the courts' record under section 35's Aboriginal and treaty rights and section 25 of the Charter. They find that while section 35 has brought protection for those rights, courts and governments have sought to limit the scope and purpose of what was entrenched to "manage" rather than transform the constitutional vision. In their analysis, the failure to fully acknowledge Indigenous peoples' sovereignty and their legal and constitutional orders equates to ignoring what was embedded in 1982. Given the greater attention paid to reconciliation in political discourse and the stated policy objectives of Canadian governments, Patzer and Ladner's conclusion serves as an important launching pad for future scholarship on what a more transformational policy agenda might look like and, more significantly, how it might be implemented.

In Chapter 20, Rebecca Major and Cynthia Stirbys analyze section 35 from the perspective of the Crown's quest for "certainty" regarding its obligations and the state-Indigenous relationship. The failure to add specificity to section 35 in subsequent constitutional conferences, in their view, puts power in the hands of Indigenous peoples. Even though the courts perpetuate colonialism, the progress that has been made to expand rights and title to land means Indigenous peoples are capturing control over certainty even as the Canadian state seeks to dominate. In this sense, section 35 is part of a toolkit used by Indigenous peoples to reclaim their own authority over Indigenous lands and resources.

In Chapter 21, Minh Do examines longer-term governance arrangements regarding the management of land and resources in the face of the famed duty to consult and accommodate. Do notes that the duty to consult is subject to criticism as an inadequate framework for protecting rights and argues that policy theories examining horizontal governance arrangements may be a useful lens through which to explore Indigenous-Crown partnerships in strategic land-use planning, while upholding the state's constitutional obligations under the duty to consult and accommodate doctrine.

In Chapter 22, Samuel LaSelva interrogates the legacy of Alan Cairns's work on the relationship between the state and Indigenous peoples. At once critical of the assimilationist perspectives that dominated so much of Canada's state policy and cautious about the nation-to-nation conception articulated in the Royal Commission on Aboriginal Peoples, Cairns's nuanced and penetrating scholarship is intensely controversial. By forcing us to think more specifically

about how Indigenous and non-Indigenous peoples can live together, and not simply next to each other, LaSelva notes that Cairns raised challenging and uncomfortable questions for which he did not have all the answers and on which important opportunities for future scholarship remain.

Constitutional Change

The patriation of the Constitution and the establishment of a homegrown amending formula arguably marked the final cementing of Canadian sovereignty and established the parameters for future constitutional change. Patriation also had an acute impact on Canada's constitutional culture, as subsequent events exacerbated national unity tensions and debates over the place of Quebec in Canada's federal system. The perception that Quebec never "signed on" to the 1982 constitutional compromise has blighted discussions of formal constitutional amendment ever since. The implications for Canadian constitutional change, arguably resulting in a formal constitutional stasis and a focus on informal reform, has had considerable consequences for the evolution of the Constitution and the politics surrounding reform. It also has implications for understanding Canada's constitutional identity. It is time to reflect on these various issues.

In Chapter 23, Richard Albert provides an analysis of the way the constitutional amending formula has been changed, not through formal modifications to its text but by judicial decisions, new legislated rules at the federal and provincial levels, and political culture around constitutional reform. The disjuncture between the requirements of the constitutional text and the reality of amendment in practice leaves Canada virtually unable to achieve formal constitutional change, a development that threatens, in Albert's view, the democratic rule of law values of predictability, transparency, and accountability.

In Chapter 24, Félix Mathieu and Dave Guénette examine the constitutional changes of 1982 from the perspective of Quebec and the rejection of a constitutional dualism that many in Quebec view as fundamental to the original founding compact. In elaborating on this perspective, the authors advance an understanding of Quebec's long-standing refusal to accept the 1982 act to the extent it represented a rupture of Quebec's sociopolitical myth and the legitimacy with which it conceives of the constitutional order.

In Chapter 25, Philippe Lagassé critically analyzes the evolution of the Crown and key jurisprudential developments in characterizing the meaning of "the Queen." These interpretations, in Lagassé's view, expose a constitutional abeyance with considerable consequences for how we conceive of a Canadian Crown distinct from the Crown of the United Kingdom. In Lagassé's view, the Supreme Court has delayed an inevitable debate about how Canada identifies or selects its monarch, who is the personification of the Canadian state and sovereign authority.

In Chapter 26, Ran Hirschl explores the Constitution's deficiencies as it relates to cities and municipalities, which, by virtue of their lack of constitutional status, remain entirely dependent on provincial legislation for their powers and revenue. The rigidity of the 1982 amending formula makes formal changes to this status quo unlikely, but the political reality has long outgrown its 1867 entrenchment. This, Hirschl argues, encourages stagnation and places great pressures on municipalities to deliver core services, live up to the values of the Charter, and manage front-line responsibilities pertaining to social integration and multicultural accommodation. Hirschl suggests several potential tools – including city charters, electoral reform, and bolstered cooperative federalism – to strengthen the place of local government in Canada's constitutional arrangements.

Each of these chapters is replete with nuanced accounts of the challenges presented by constitutional change in Canada, challenges that remain, or are increasingly becoming, critically urgent. Together, the contributors make clear that more research is needed.

Canada stands at a constitutional crossroads. The chapters that follow bring together a diverse and exceptionally talented group of scholars from the fields of law and politics to contemplate, interrogate, and engage in analytical reflection on the *Constitution Act, 1982* on its fortieth anniversary. The contributions to this volume provide an unparalleled and thorough account of the Constitution and its impact after forty years, with a focus on the themes of rights, reconciliation, and constitutional change, offering rich insight that will undoubtedly inform public and scholarly conversations about the Constitution in years to come.

Notes

1 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
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3 Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983).
4 Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983): 30–54.
5 Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," *American Journal of Comparative Law* 32, 2 (1984): 361–91.
6 John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, the Trickster, and Originalism," *Canadian Historical Review* 98, 1 (2017): 114–35.
7 F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," *Canadian Journal of Political Science* 35, 1 (2002): 3–29.

8 Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Morton and Knopff, *The Charter Revolution and the Court Party;* Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2nd ed. (Oxford: Oxford University Press, 2001); Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

9 Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)," *Osgoode Hall Law Journal* 35, 1 (1997): 75–124; Christopher P. Manfredi and James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell," *Osgoode Hall Law Journal* 37, 3 (1999): 513–27; Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright, "Charter Dialogue Revisited: Or 'Much Ado about Metaphors,'" *Osgoode Hall Law Journal* 45, 1 (2007): 1–65; Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on Charter Dialogue Revisited," *Osgoode Hall Law Journal* 45, 1 (2007): 125–46; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights," *International Political Science Review* 34, 1 (2012): 39–56; Emmett Macfarlane, "Conceptual Precision and Parliamentary Systems of Rights: Disambiguating 'Dialogue,'" *Review of Constitutional Studies* 17, 2 (2012): 73–100; Aileen Kavanagh, "The Lure and the Limits of Dialogue," *University of Toronto Law Journal* 66, 1 (2015): 83–120.

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11 Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal/Kingston: McGill-Queen's University Press, 2002); James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?*, rev. ed. (Toronto: Irwin Law, 2016).

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