
Constitutional Politics in Canada after the Charter



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Patrick James

Constitutional Politics
in Canada after the Charter:
Liberalism, Communitarianism,
and Systemism



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To Carolyn

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Constitutional Politics in Canada after the Charter

1

Constitutional Politics in Canada: The Charter and Beyond

Our constitutional system was only modified, not overthrown by our recent constitutional renewal ... The limited nature of the change is readily apparent from several perspectives.

– Alan C. Cairns, “The Politics of Constitutional Conservatism”

This book identifies and evaluates theories about the evolution of constitutional politics in Canada that have emerged since the passage of the *Constitution Act, 1982* and the *Charter of Rights and Freedoms*. Given the central role that the *Charter* plays in the story to come, there is a touch of irony in the quote from Alan Cairns. Cairns, who at the time of the *Charter* did not see it as a major departure from what came before, is now perhaps the most distinguished advocate of the view that the *Charter's* adoption was a transforming event in Canadian history because the *Charter* was the first constitutional document to belong to the Canadian people rather than to their government alone.

Canada's *Charter* is now twenty-eight years old. Distance provides a vantage point that is sufficient to grant perspective but not so far away that it is difficult to sort out the effects of the *Charter* from other events. This assessment of constitutional politics takes the form of an interpretive essay that works toward a synthesis of insights from respective theories to enhance understanding and produce ideas for the future. This review of theorizing steps beyond much of the scholarship in the field, which is nested within the traditions of legal analysis, political theory, or some combination of the two. Its central premise is that the application of concepts derived from the social sciences – system-based theorizing and rational choice – can enhance understanding of constitutional evolution in Canada.

Evaluating constitutional evolution in Canada by necessity demands references to events from Confederation onward, but the focus of this book is the *Charter* and its aftermath. It begins with the questions: What constitutes a theory? How many are there? Do they tend to agree or disagree on the direction of constitutional affairs? It then asks: Is Canada headed toward some form of renewal? Is the end of Confederation in sight? Is the constitutional status quo the most likely future for a still-united Canada? Taken together, answers to these questions reveal where theorizing stands today and offer ideas about future directions for the theory and practice of constitutional politics.

Constitutional Politics in Canada after the Charter offers a relatively comprehensive yet brief introduction to the range of issues within Canadian constitutional politics. Any full-fledged theory must confront these issues and account convincingly for dynamics between and among them. The issues appear in no particular order, but those that are more general and government-oriented are addressed before those that are more specific and citizen-related. Discussions of federalism and constitutional uncertainty, along with the courts as a component of especially high interest within the government, are followed by an overview of national unity and the Quebec and western Canadian constitutional agendas. Overviews of major events such as the advent of the *Charter* itself, along with significant efforts to revise it (the Meech Lake and Charlottetown accords in 1987-90 and 1992, respectively) and the second Quebec Referendum on sovereignty association, are then followed by a discussion of political behaviour, economic considerations, and group communications (including citizens in general, women, Aboriginal peoples, and the media).¹ As will become apparent, the number of issues connected to constitutional politics is vast.

Some issues, such as federalism and constitutional uncertainty, are multifaceted, all-encompassing, and omnipresent.² Even though discord over the failed Charlottetown Accord occurred more than fifteen years ago, and even though a full decade has passed since the close call with the second Quebec Referendum, it is not certain that stability exists either in federal-provincial relations or the working of the Constitution. The federal government and the provinces continue to spar over jurisdictional issues and financial matters, and some of the conflict has brought into question the viability of the federal system itself. This is true even though the Canadian government of Stephen Harper disavows the centralizing agenda of its Liberal predecessors, particularly during the long reign of Pierre Trudeau. Over just the last few years, for instance,

the issues of health care and equalization payments for the provinces have produced intense disagreements between Ottawa and the provinces.

Controversy, for example, surrounded the entry of Ontario into national have-not status because of constitutional rules regarding equalization payments. On 13 April 2009 Ontario received its first-ever equalization payment. The province had always been the economic engine of Canada and normally helped to subsidize provinces with lagging performance. The change in Ontario's status is bound to prompt discussion about the nature of the equalization program itself, because it is "politically unpalatable to have smaller regions subsidize a province that accounts for 40 per cent of the country's economic output" (*Globe and Mail*, 13 April 2009). Indeed, Ottawa had already changed the rules for equalization payments on a previous occasion, in the 1970s, to stave off payments to Ontario. Ontario's status and the reform of existing rules for equalization payments, however, remain unresolved constitutional issues.

Among political institutions, the courts have emerged as the most prominent source of constitutional controversy in the post-*Charter* era (Malcolmson and Myers 1996, 164).³ Opinion is divided on whether the enhanced power of the judiciary, manifested most visibly in the Supreme Court of Canada, is a good thing for national integration. (As is discussed in Chapter 6, there is even disagreement about whether judicial power truly is enhanced by the *Charter*, at least in relation to the executive.) Pro-*Charter* analysts welcome the opportunity for the courts to take an active role in making restitution to what they perceive to be historically disadvantaged groups. They believe that these actions will make Aboriginal peoples, for instance, more inclined to identify with Canada. Critics emphasize the anti-democratic tendencies that may inhere in legislating from the bench rather than through Parliament. They fear a democratic deficit that could reduce the degree to which citizens identify with the Canadian state. On both sides of the debate, the *Charter* is regarded as a watershed that marks a change in the balance of power among Canadian institutions. In that sense, things have changed a lot since Cairns and others portrayed the *Charter* as something other than a momentous event at the time it came into being. The *Charter* is now regarded as a transformative event that has had a legacy of cooperation and conflict.

Other complex issues, visible at some times more than others, include crises of national unity and the role of Quebec and the West within Confederation.⁴ There is no obvious crisis in national unity at present,

but the federal electoral map as of 2008 reveals a great deal of regional voting – perhaps more so than at any other time since Confederation. And the Harper government continues to hold minority status. Neither of the two major brokerage parties, the Liberal Party and the Conservative Party, enjoys significant representation in every province and territory. Moreover, that observation can be applied to the last few federal elections. The Bloc Québécois, a party dedicated to Quebec sovereignty, shows great staying power in federal elections. (The term *Québécois* refers to those of francophone descent from the original settler group as opposed to residents of Quebec per se.) None of this bodes well for national integration.

Identity-related problems persist and could easily regain prominence if any large-scale efforts are made toward constitutional renewal. Many observers who lived through the period spanned by the governments of Pierre Trudeau and Brian Mulroney refer to that era (1980 to 1995) of major constitutional reform initiatives and referendums as being one of crisis (see, for example, Owrap 1991, 25-26; Schneiderman 1991, 3; Young 1991a, 1991b, 6). Although Quebec separatism remains at a relatively low ebb, its history is cyclical and the nationalist movement is still manifested in the Bloc Québécois' presence in federal politics, the Parti Québécois at the provincial level, and significant support from public opinion.⁵ Cairns's (1995, 18) call for efforts to find a middle ground "between realpolitik and abstract moralizing" rings as true now as it did at the time of the second Quebec Referendum. Many Canadians would prefer, but Canada seems unable to obtain, a more civil discourse and a more pragmatic approach, one that recognizes Quebec's special role in Confederation but falls short of the sovereignty association advocated by Quebec nationalists.

Prime Minister Harper's government commands only limited support in Quebec because it is seen as being generally responsive to western interests – but not without sympathy for the decentralizing agenda favoured in Quebec City. Unless his government's position changes in the next general election, it would not be out of bounds to predict a resurgence in sovereigntist thinking within Quebec and a return to confrontation politics with Ottawa. This would be true especially if the Conservative Party obtained a majority in Parliament that did not include significant Quebec representation. This situation, given that province's size, would be unlikely, but it is nevertheless a possibility.

The reaction in Quebec to a possible re-enactment of the Battle of the Plains of Abraham is a recent example of nationalism coming to the

surface. Because of the protest generated by the proposed re-enactment, the National Battlefields Commission is still trying to decide on an alternative site for the historic battle, which served as the point of culmination for the British Conquest of the French colony. In addition to various individuals and groups, the Parti Québécois and Bloc Québécois have denounced the plan. The event may even take place outside of Canada itself, possibly in upstate New York, to stem the tide of criticism (*National Post*, 10 February 2009).

Western alienation is yet another on again, off again aspect of constitutional life and politics in Canada.⁶ Fuelled by anti-eastern sentiments, waves of populism swept through the western provinces throughout the twentieth century. Western alienation may once again be on the rise because of more than a decade of uninterrupted Liberal majority governments (between 1993 and 2004) that had caucuses dominated by Ontario and, to a lesser degree, Quebec. (Prime Minister Paul Martin headed a brief minority government at the end of the Liberal era.) The new and even transformed Conservative Party under Harper represents the rising power of the West, its wealth, and its expanding population. One example of this shift, currently in progress, is the proposal from Prime Minister Harper to increase the representation of Alberta and British Columbia in the House of Commons to match their share of national population as of the 2011 census (*Hill Times*, 23 July 2007).

Today's Tories do not show the "Red" tinge of years past, when more ideologically liberal sentiments, held primarily by members from central Canada, played a significant balancing role within the party. Instead, the Conservative Party today embodies the West's traditionally "Blue" preference for smaller government and individualism at a national level. Ironically, if the Harper government fails to secure a majority or, at minimum, pass a significant amount of its platform, it may exacerbate Western alienation. This would constitute, in effect, a failed experiment. Westerners, who constitute the majority of support for the Conservative Party, could conclude that no government adopting their philosophy will ever be given a chance by eastern Canada to effect change within the boundaries imposed by Confederation. The next step could be renewed popular support for greater autonomy from Ottawa.

Theories of constitutional evolution must also take into consideration the high-profile events that accompany the politics of package deals. Perhaps the most prominent example is the signing into law of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*, which stimulated controversy and strife that reverberate to this day,

most notably in Quebec and the West.⁷ The *Constitution Act, 1982* and the *Charter* constitute the only major constitutional package deal to pass into law since Confederation. Efforts to complete the founding of Canada, which did not include a domestic formula for constitutional amendment, accelerated in the latter part of the twentieth century.⁸ The failure of the Meech Lake (1987-90) and Charlottetown accords (1992), initiatives intended to complete the made-in-Canada process that began with the *Constitution Act, 1982* and *Charter*, also had lasting and significant effects.⁹ Those efforts at revision, as described by one observer, “were immensely destructive in terms of creating bitter feelings and harmed their intended goal of national unity” (Franks 2000, 118). Quebec did not sign the *Constitution Act* and *Charter* because its representatives felt they had been deliberately excluded from the decisive negotiations that led to patriation on 1 July of that year. (Prior to patriation, Canada had no domestic procedure for constitutional amendment; ultimate authority still resided with the British Crown.) Thus Meech and Charlottetown, the failed efforts to bring Quebec into the constitution, exacerbated Quebec’s sense of isolation from the rest of Canada and heightened interest in sovereignty association and even outright secession. The Quebec Referendum of 1995, whose defeat generated considerable ill will among francophone nationalists, likewise continues to exert an influence on politics in Quebec.¹⁰ The idea of Quebec holding another referendum on sovereignty association seems remote at present, given that the Parti Québécois is out of power, but it never entirely goes away.

The issue of political behaviour – voting and public opinion – and its constitutional implications is more specific but still quite encompassing.¹¹ Discussions of the issue recognize the potential for bottom-up as well as top-down change in the constitutional order. The geographic distribution of political partisanship, along with the degree of alienation from the system, can have a cumulative effect on national cohesion. The system has been challenged by the decline of nationally competitive, brokerage-style parties on the one hand and the rise of regionally oriented, autonomist parties on the other.

Concrete matters such as economics also can play a role in constitutional affairs.¹² For example, the degree to which a province perceives itself as a financial winner or loser within Confederation can affect its receptiveness to regionally oriented or even separatist political messages. Harsh criticism of the federal system, especially from Quebec, is far from exceptional (see, for example, Fortin 1991, 38-39, 41). The present decade has witnessed a great deal of conflict over federal expansion into

previously provincial domains of policy, along with periodic eruptions over equalization payments and fiscal imbalance (Brock 2005, 2006, 2007). Federal-provincial strife over economic issues therefore can generate more fundamental disagreement at the constitutional level vis-à-vis the division of powers, the degree of permissible provincial autonomy, and like matters.

Interest groups and communications technology likewise exert an influence on constitutional affairs. In an era of identity-oriented politics, citizens and interest groups, particularly women and Aboriginal peoples, have emerged as key actors in struggles over constitutional continuity and change.¹³ Social movements became prominent in Canadian law and politics even before the *Charter*, but such processes gained momentum in the decades thereafter. Newer movements, with gay rights and environmental activism at the forefront, have joined the constitutional fray, and vocal responses can be expected from those left out of a given constitutional process. Opposition language groups from Meech Lake serve as just one prominent example. The media and commissions and task forces have also influenced the process of constitutional evolution.¹⁴ One prominent example is the way in which television coverage of executive federalism during the Meech Lake ratification crisis of 1990 brought attention to its top-down and exclusive nature. Another instance, from that same era, is the publicity given to former prime minister Trudeau's intervention against the accord.

It is clear that a full-fledged theory of constitutional politics must take multiple issues into consideration. It might emphasize some issues more than others, but in principle it would need to consider cause and effect across the board. It can therefore be expected that only a small number of theories are suitable for comparison. In fact, Chapter 3 reveals that only five theories meet these criteria.

This book extends scholarly discussion and debate in at least three areas. First, by reviewing the first twenty-five years of post-*Charter* scholarship, it serves as a springboard for further study of Canadian constitutional politics. Its verdict on the state of theory should ignite debate, at the level of theory and of observation, about the priorities for the next round of scholarship on federalism, federal-provincial relations, and other matters. Second, its findings enhance understanding of state-society relations in Canada (Pal 1990). By doing so, it facilitates the study of the Canadian case in a comparative context (Landes 1998; Motyl 1999). Third, it links rational choice (that is, self-interest understood in rigorous terms) to an approach, namely, systemism, to increase

the latter's range of application to the study of Canada and even other political systems. This book therefore contributes to the applied literature on systemism that assesses and facilitates progress in the social sciences (Bunge 1996, 1998; James 2002). Case studies in the present context are theories about Canadian constitutional politics.

This book should appeal to and resonate with policy makers as well as scholars. The theories identified should generate, at least implicitly, a sense of Canada's future prospects. By specifying the overall configuration of forces – integrative or disintegrative, centripetal or centrifugal – this study may help to identify priorities for policy in the area of constitutional politics. Suppose, for example, that the key events and processes driving Canada in a centrifugal (or, for that matter, centripetal) direction turn out to be at a highly aggregated, macro level and reside within the Supreme Court. (That outcome would strongly confirm one of the theories articulated in Chapter 4.) This result would encourage further thinking about the role of the judiciary, and the nature of proposed changes would depend on the observer's normative point of view. Advocates of either renewed federalism or decentralization could use the findings to formulate policy recommendations as they see fit.

Each of the six subsequent chapters furthers the book's overall goal to employ individual and collective insights from various theories to explain the evolution of constitutional politics in Canada in the post-*Charter* era. Concepts and theories at a general level are explained, specific theories that have liberal and communitarian tendencies are introduced, theories are criticized and compared, and the book ends by answering major questions about the direction of constitutional politics and offering policy-oriented recommendations.

Chapter 2 introduces the concepts of systemism and of self-interest (that is, rational choice) and provides a micro foundation for a review of the field of Canadian constitutional politics in the *Charter* era. Systemism is an organizing principle that stresses theoretical completeness as a key criterion for progress in scientific explanation.¹⁵ The four kinds of linkages found in systemism – macro-macro, macro-micro, micro-macro and micro-micro – are illustrated through an example from Canadian politics, namely, Quebec's use of the notwithstanding clause (section 33 of the *Constitution Act, 1982*) in 1988. The example reveals that a satisfactory explanation of Premier Robert Bourassa's use of the clause, including its causes and consequences, requires reference to each of the four kinds of connection. Substantive matters addressed by theories of

Canadian constitutional politics are then summarized in the context of systemism to demonstrate what a full-fledged theory of the evolution of constitutional politics must entail.

Chapter 3 identifies concepts and the origins of theories, and it defines *constitution* and *constitutional system* from a systemist perspective. Equilibrium analysis, which is borrowed from the discipline of economics, is introduced as a metaphor for political interaction and is applied in later chapters to the empirical and normative assessment of theories about Canadian constitutional evolution. Definitions of partial and general-equilibrium theories of constitutional evolution are accompanied by an example of the former, which is used to help outline the differences between the two approaches. Because they are at the forefront of theorizing about state-society relations and political development, the concepts of social capital and generalized trust are used to assess the normative desirability of the equilibria identified by each type of theory. Explorations of the origins of these five theories – three are associated with the liberal paradigm and two are linked to the communitarian paradigm – set the stage for the chapters that follow.

Chapter 4 provides an exegesis of three theories that are closely associated with liberal understandings of the evolution of constitutional politics in Canada: negative identity, megapolitics, and institutional imbalance. These theories tend to emphasize the role of individual agency and identify equilibria that are conflict-prone and generally unattractive. Diverse in terms of the causal stories they tell, the theories tend to emphasize different variables, including the lack of a sovereign founding event, the pernicious effects of the politics associated with constitutional package deals, and the enhanced power of the judiciary within the system. Given the broadness of the liberal paradigm, this diversity is to be expected.

Chapter 5 presents theories that are closely connected to communitarian understandings of the evolution of constitutional politics: asymmetrical federalism and the citizens' constitution. Both theories emphasize in their explanations of unfolding events the role of collectivities and their struggle for recognition. Both theories seek to resolve basic conflicts between and among governments, energized *Charter* groups, and collectivities that continue to feel marginalized in constitutional terms. The theories do, however, identify different equilibria: asymmetric federalism points in a more favourable direction than the citizens' constitution. As would be expected in an inclusive paradigm,

the theories linked with communitarianism stress different causal variables, including tension in symmetrical federal institutions, status-seeking by excluded territorial interests, and the mixed effects of the *Charter* on provincial versus citizen-based interests.

Chapter 6 offers a comparison and critique of the theories associated with these two paradigms. Debate in the literature on theories with a more liberal orientation, for instance, focuses overwhelmingly on institutional imbalance – for example, an imbalance in favour of the judiciary or even an imbalance within the power wielded by various components of the federal government. To reach a bottom-line understanding of constitutional evolution, all of the theories are compared along the following dimensions: primary means of location vis-à-vis origin, key causal variable, equilibrium identified (in terms of existence, stability, and normative desirability), overall position on national (dis)integration, and major challenges to meet.

Chapter 7 provides a tentative answer to the basic questions that motivate this study: When international imperatives and the four kinds of internal connections or linkages are put together, what theories about the Canadian constitutional system can be identified? How well do they account for events in the post-*Charter* era? It also explores the implications of theories for the centripetal or centrifugal movement of Canada's political system and the significance of the country's experience for the rest of the world. It shows that systemism, when used to bring competing theories into bold relief, can help to produce a more compelling response to the question, whither Canada?