Understanding Constitutions: A Roadmap for Communities

By

John Graham & Elder C. Marques

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Institute On Governance
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INTRODUCTION

Given the drama that has accompanied the discussion of constitutional issues over the last thirty years, it should not surprising if many Canadians are weary of hearing about the importance of constitutionalism. There are important reasons, however, why citizens should attempt to understand constitutions and what they mean. In all communities, important decisions are made according to a set of explicit or implicit rules. Learning what those rules are, how they came to be, and how they can be altered is the first step in attempting to promote tangible political and economic change.

This paper will provide an overview of constitutions that includes an exploration of their content, their functions, their role in economic development, and the process by which they are created and amended. By exploring some of the key theoretical issues and offering relevant real-life examples, it may help serve to promote discussion and provide practical guidance to communities that are struggling with their own constitutional processes. In particular, it may help Aboriginal communities that are seeking to institutionalise their governance practices and respond to the challenges of self-government.

For a community, large or small, understanding constitutions and how they work can be an empowering experience. In Canada’s largest city, Toronto, the city council recently debated how its governance needs may require changes to its relationship with other governments. A staff report recommends that the city seek to formally “redfine” its relationship with the provincial and federal governments by seeking status as a “charter city” – one that enjoys a particular set of powers outlined in a stand-alone document. Charter cities, which in Canada currently include Saint John, Montreal, Winnipeg, and Vancouver, enjoy special autonomy in the areas of fiscal policy and governance that other cities do not. In Europe, individual regions within countries are also rising in prominence as separate communities requiring their own governance tools, including some forms of legislative or constitutional recognition. This movement, which has been termed the “rise of meso-level governance” is based on a certain understanding of the relationship between good governance and economic development.

Large urban centres are not the only communities that have begun to explore constitutionalism in an effort to operate more democratically and effectively. For Canada’s Aboriginal peoples, an exploration of how constitutional principles and practices can be applied to their situations is an essential component of the re-establishment of their own governance structures. In fact, self-government agreements...
include specific provisions dealing with the establishment of constitutions because of the vital role that they play in establishing how decisions are made in a community.

While constitutions are typically associated with the Enlightenment thinkers of Europe, it is important to recognise that they enjoy a long history among the Aboriginal peoples of North America. The Iroquois Confederacy’s Kaianerekowa, the “Great Law of Peace,” served as a constitution that expressed the Confederacy’s values and outlined the laws and practices that governed social and political relationships. Given Benjamin Franklin’s interest in Iroquois governance practices and similarities between the Great Law and elements of American constitutionalism, many believe that American constitutional founders borrowed heavily on Aboriginal ideas and practices.3

Constitutional theory may largely be derived from the Ancient Greeks and Romans and from liberal Europeans; that said, constitutions themselves can be found in vastly different societies. This paper sees constitutions in a broad sense, encompassing not only written documents but the traditions and practices that govern decision-making. Seen in this light, constitutions are far too important to be ignored or left to a small elite. They must be understood as living instruments that rely on popular support and have direct implications for the daily lives of citizens.

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PART I: What is a Constitution?

A community’s constitution should typically answer the most fundamental questions about the nature of its politics. Constitutions are composed of a political community’s most basic laws and procedures and generally embody the core values to which a regime is committed. A typical definition of constitutions sees them as “codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and offices of government, and to define the relationships between these and the public.”

The development of these codes relies on the existence of a minimum consensus among citizens on certain basic questions relating to the relationship between the state and its citizens. American scholar William G. Andrews writes:

At an undefinable point along the continuum from complete discord to unanimity, cohesion in the society becomes so broad and strong that force is needed by the regime only in exceptional circumstances rather than as a matter of course or of policy. This situation is a prerequisite for constitutionalism.

For Andrews, consensus is required, in order of importance, on the form of institutions and procedures, on support for the rule of law, on general social goals and philosophy of government, and possibly on lesser policy goals. Agreement on these first two – procedure and rule of law – creates the framework in which the other issues can be negotiated and debated.

What is perhaps most striking about this understanding of constitutionalism is its relative similarity to classical approaches. Aristotle’s classification of governments into three pairs of categories – monarchy and tyranny, aristocracy and oligarchy, constitutional government and democracy – can be regarded as the earliest scholarly attempt to identify and understand constitutionalism. His definition of constitutions is not unlike that of many twentieth-century theorists. For Aristotle, a constitution is “an organisation of offices in a city, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.”

Constitutionalism is directly associated with the liberal idea of “limited government.” Functional constitutions are typically seen as those that are successfully able to restrict the power of individual political actors in a given system. In political science, constitutionalism is regularly seen as a double-limitation on the power of governments:

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“Power is proscribed and procedures prescribed.” On one hand, the power of political actors is limited with respect to the observed rights of individual citizens. At the same time, the legitimacy of governmental activity also depends on its adherence to procedural and jurisdictional norms that govern the relationships between different governmental authorities.

Critics of the traditional study of constitutions have presented numerous arguments for a broader approach. They argue that the traditional focus on constitutions is incomplete because political systems may operate with little regard for their constitutional texts, because of the evolving role and the political implications of judicial review, and because of the importance of extra-constitutional groups and movements like non-governmental organisations (NGOs), political pressure groups, churches, etc. Given these valid critiques, it is important to understand that constitutions, even in cases where there is a single written primary text, are not limited to the words of a founding document.

Instead, constitutions are made up of a set of norms that may include both written and unwritten elements and accepted practices. The existence of a written text, such as in the case of the United States, does not mean that it alone represents “the constitution.” Conversely, the absence of a comprehensive document known as “the constitution,” as is the case in the United Kingdom, does not mean that certain written documents cannot or do not enjoy constitutional status. In fact, it is generally accepted that the British constitution is made up of a combination of parliamentary traditions, recognised civil rights, and legislative documents that include, for example, the Magna Carta (1215), the Bill of Rights (1689), the Act of Settlement (1701), and the Act of Union with Scotland (1707).

Understanding that constitutions include both written and unwritten elements is insufficient to explain how they can shape a community’s political life in different ways at different times. Ultimately, constitutions are “living” documents that are almost always in a state of evolution. While this evolution manifests itself in many different ways - as will be explored later – it is justified by the idea of popular sovereignty. If constitutions are intended to be expressions of the sovereign will of “the people,” then a population must maintain the right to alter the fundamental laws of its regime.

The dynamic nature of constitutionalism is reflected in the difficulty with which researchers have sought to classify and study different constitutional experiences. Understanding the underlying principles and functions of different constitutions requires a framework that accommodates a wide range of different models and philosophies, and the irregularities brought on by particular historical developments. Thomas C. Grey proposes a comprehensive analytical framework that recognises the problems with traditional approaches to the constitutionalism. Rather than categorizing constitutions

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9 S.E. Finer, Vernon Bogdanor, and Bernard Rudden, pp. 1-2.
according to their written or unwritten status, their degree of flexibility, or their status as conventional or legislative, Grey proposes that constitutional norms be understood in the context of a more thorough system of classification that looks at three key issues, as summarized below.

An adaptation of Thomas C. Grey’s Analytical Framework

<table>
<thead>
<tr>
<th>STATUS</th>
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<tbody>
<tr>
<td><strong>Extra-legal</strong> norms are those which are considered part of the constitution, yet are not defined in legislation.</td>
<td></td>
</tr>
<tr>
<td><strong>Legal</strong> norms fall in one of two categories. They can be established by regular legislation (“ordinary law”) or some form of extra-ordinary law that enjoys a special status as a form of “fundamental law” to which regular legislation would be subordinate.</td>
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<table>
<thead>
<tr>
<th>ENFORCEMENT</th>
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<tr>
<td>Constitutional norms are enforced <strong>politically</strong> when final decisions about constitutionality are made by political institutions or mechanisms (for example, legislatures, executive vetoes, referenda).</td>
<td></td>
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<tr>
<td>Some norms face <strong>special</strong> enforcement, scrutinized by institutions that are recognised as having the power of judicial review.</td>
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<th>SOURCE OF AUTHORITY</th>
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<tr>
<td>Some norms derive their authority from their <strong>enactment</strong> by a legislative body or political process. This is the case for written constitutional norms.</td>
<td></td>
</tr>
<tr>
<td>Other norms are legitimized by their broad <strong>acceptance</strong> in a particular political community. This is the case for many unwritten “constitutional conventions.”</td>
<td></td>
</tr>
<tr>
<td>Finally, some constitutional norms derive authority from their status as <strong>moral or political truths</strong>. These norms appeal to a fundamental “natural law.”</td>
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What Grey’s framework demonstrates is that a single constitution may be the product of interaction between very different kinds of norms. The United States Constitution, for example, is made up of norms that would be categorized separately in the above framework. While American constitutionalism is known for its emphasis on judicial review (“special enforcement”), Grey points out that on certain important matters, constitutional enforcement is entirely political. It is Congress, for example, that decides which “high crimes and misdemeanours” warrant the impeachment of certain public officials, including the President, and it remains unclear to what degree its actions are limited.¹¹

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**What is a constitution?**

- A set of written and unwritten norms that govern decision-making in a political community

**What’s in a constitution?**

- The definition of the relationship between citizens and the state, particularly accountability mechanisms and the extent of the protection of the rights of citizens
- The definition of the relationship between different branches and agencies of the state
- An expression – implicit or explicit – of the regime’s key values

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¹¹ Thomas C. Grey, p. 257.
As “living” documents, constitutions do not stand in isolation from the uncertainties of complex political systems, but rather shape and are shaped by them. For this reason, they represent a necessary, but not sufficient, tool for understanding how political systems operate:

A constitution resembles a sharp pencil of light which brightly illuminates a limited area of a country’s political life before fading into a penumbra where the features are obscured – even if that surrounding darkness may conceal what are the most potent and significant elements of the political process.\(^\text{12}\)

Given the complexities of governance in the new millennium, it is not surprising that written constitutions are often characterized by incompleteness. Once the full picture of constitutionalism is revealed, however, it becomes clear that understanding the norms that govern key relationships in society is about more than satisfying academic curiosity.

\(^{12}\) S.E. Finer, Vernon Bogdanor and Bernard Rudden, p. 2.
PART II: Constitutional Functions

In complicated political systems that struggle to respond to a series of competing demands, constitutions can play key roles that either facilitate or hinder the successful transformation of those demands into effective decisions. This section will explore some of the principal functions that constitutions can exercise to facilitate “system maintenance.”

- **Legitimization of the state authority.** Constitutions, by their very existence, establish a “people” to which a governmental authority is to apply. Despite nationalistic rhetoric that may include a founding myth, constitutional enactment can be seen as the key moment that establishes a political community. Functional constitutions not only create “the people” and define the state, but also justify and legitimize the political authority which assumes sovereignty over both. In this sense, political nations are not “natural,” but are instead invented and reinforced through a series of political tools, one of which can be a constitution.14

- **Recognition of the rights and freedoms of citizenship.** Most constitutions express limitations that are placed on the ability of the government to legislate or otherwise act against the rights of citizens. These “limitations,” however, can represent obligations on the part of governments to provide resources to ensure that these rights can be asserted in practice. For example, the right to peaceful assembly may often require police resources in order protect against those who would otherwise interfere with it. Seen in this light, these rights may be understood as “political” rather than “natural” rights.15

- **Delineation of the roles and the limits of the authority of different political actors.** Constitutions generally express the principal roles and functions of different political institutions and the procedural limitations that govern the relationships between different political actors. This typically means some form of separation of powers that clearly establishes the extent of authority belonging to any one branch of government or political office, as well as the formal mechanism for political recruitment (for example, popular election). In the case of a federal or a decentralised unitary system, this would typically include details about the distribution of jurisdictional responsibilities.

- **Establishment of mechanisms for adjudication.** In the event of conflict between political actors, a mechanism is required to render a final interpretation of

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constitutional norms. As indicated in Grey’s framework, that mechanism can
represent “special enforcement,” as in the case of a constitutional court, or
“political enforcement,” as in the case of a supreme parliament or referendum
process. In certain cases, this function also includes the mediation of disputes
between citizens. The Canadian constitution, for example, governs not only the
relationship between competing governmental authorities and between the state
and its citizens, but it also provides – through the Charter of Rights and Freedoms
– a mechanism through which the Supreme Court can make rulings that affect the
relationships among citizens that may have competing rights.

- *Expression of basic beliefs and symbolism.* Constitutions, either explicitly or
implicitly, provide a coherent reflection of the basic beliefs adopted by a regime.
For example, the preamble may outline a set of core values that are embraced by
the regime or a foundational narrative to stir an emotional reaction from the
citizenry and promote some form of nationalism. For example, constitutions
under the Soviet regime, which were not adhered to with great rigour,
nonetheless outlined the regime’s “official” understanding of class relations.
Some believe that the ability of constitutions to perform this function may
become more difficult in the West as traditional reference points, like ethnic or
religious allusions, are increasingly less likely to resonate with all segments of a
diverse population.  

- *Provision of the flexibility of amendment.* Given the likelihood that evolving
moral standards or regional development patterns will eventually result in new
political demands, functional constitutions provide a mechanism to allow
amendment. A lack of consensus surrounding the requirements for a successful
amendment, particular in the case of a federal state, may result in a deterioration
of the relationships between political actors, as seen in Canada in the lead-up to
the Constitution Act of 1982. In the absence of an amendment mechanism, this
function can still be performed if constitutional interpretation has legitimized a
high degree of flexibility.

- *Provision of a mechanism for effective citizen participation.* While the idea of
the constitution belonging to “the people” is a longstanding one, it is only in the
twentieth century that constitutions have begun to incorporate popular
participation into their amendment clauses, mostly in the form of referenda.  
In Canada, given the failure of post-1982 constitutional politics and widespread
complaints about the process which led to the Meech Lake Accord, the ability of
the federal and provincial governments to finalize an agreement without public
input has been put into question. Many believe that major constitutional changes

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16 For an analysis of the challenges associated with this function in the case of the preamble of the Parti
Québécois’ proposed Declaration of Sovereignty for Quebec in 1995, see Gilles Labelle, “Le ‘préambule’ à
la ‘Déclaration de souveraineté’: penser la fondation au-delà de la ‘matrice théologico-politique’?”
attempts to explain the cold reception that the preamble received when it was unveiled.

17 Thomas C. Grey, p. 261.

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in the foreseeable future would require approval by referenda, now that Canadians have “clearly established their constitutional sovereignty.” The first test of this more inclusive process, which produced the Charlottetown Accord and its subsequent defeat, demonstrates the complexities that arise when there are more seats around the negotiating table.

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PART III: Two Models: A Look at Canada and at Nisga’a

The Canadian Constitution

Many Canadians think only of the 1867 British North America Act and the Canadian Charter of Rights and Freedoms when they think about “the constitution.” In fact, the constitution is much more complex, and comes from a variety of different sources. In a pre-1982 overview of the Canada’s constitutional make-up, the Pépin-Robarts Task Force on Canadian Unity identified at least nine of these, which are identified below.19

<table>
<thead>
<tr>
<th>Sources of the Canadian Constitution</th>
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<tr>
<td>• The British North America (BNA) Act (1867);</td>
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<td>• Formal amendments;</td>
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<tr>
<td>• Constitutional Statutes (British ones, like the Statute of Westminster, and Canadian ones, like those that created provinces and territories);</td>
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<tr>
<td>• Orders-in-Council (both British and Canadian);</td>
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<tr>
<td>• Provincial statutes (those that are “constituting, amending and supplementing the provincial constitutions”);</td>
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<tr>
<td>• Court decisions;</td>
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<tr>
<td>• Conventions (such as those relating to parliamentary practice);</td>
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<tr>
<td>• Treaties (pre-Confederation ones such as the 1713 Treaty of Utrecht and the 1763 Treaty of Paris, as well as more contemporary ones dealing with land and maritime boundaries).</td>
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There is a reason, however, why many Canadians focus on the 1867 founding document and on the Charter. These two elements of our constitutional landscape lay the groundwork for many of the other constitutional components. The three principal elements of a constitution which were addressed in Part I (definition of the relationship between citizens and state; definition of the relationships between state branches and agencies; and an expression of core values) are each explicitly addressed in these two documents. A look at these two documents in greater detail can help provide an example of one constitutional model.

<table>
<thead>
<tr>
<th>Highlights of the Constitution Act, 1867 (British North America Act, 1867)</th>
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<td>• The preamble mentions the desire for union on the part of the provinces “with a Constitution similar in Principle to that of the United Kingdom.”</td>
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<td>• Sections 1-8 united three communities (Canada, Nova Scotia, New Brunswick) into “One Dominion under the Name of Canada” and divided this new dominion into four provinces (Ontario, Quebec, Nova Scotia, and New Brunswick).</td>
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<tr>
<td>• Sections 9-16 outline the “Executive Power,” which is vested in the Queen. These sections outline the role and duties of the Governor General and declare the Seat of Government to be Ottawa. No mention is made of the prime minister.</td>
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19 The following list is taken from Task Force on Canadian Unity, Coming to Terms: The Words of the Debate (Hull, QC: Minister of Supply and Services Canada, 1979) p. 33.
Sections 17-57 outline the “Legislative Power” by outlining provisions for the Senate of Canada and the House of Commons.
Sections 58-90 represent the provincial constitutions. For each province, details are provided about legislative procedure.
Section 91 outlines the powers of the federal Parliament.
Section 92 outlines the exclusive powers of provincial legislatures.
Section 93 outlines provincial responsibility for education, and provides guarantees for denominational schooling.
Sections 96-101 outline the judiciary, and give the federal Parliament the right to establish a “General Court of Appeal for Canada”

Highlights of the Constitution Act, 1982
- Part One – the Canadian Charter of Rights and Freedoms
  • The preamble states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”
  • Rights outlined in the Charter are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s.1). The Supreme Court of Canada has interpreted this and in a landmark case developed a “test” to determine whether or not restrictions are justifiable.
  • Section 2 outlines the “fundamental freedoms” of conscience and religion, thought, belief, opinion, and expression (including freedom of the press), peaceful assembly, and association.
  • Sections 3-5 outline the democratic right to vote and stand for election to the House of Commons or legislative assemblies, restricts the duration of legislative bodies to five years except in exceptional circumstances, and guarantees a sitting of a legislative body at least once every twelve months.
  • Section 6 outlines the mobility rights of Canadian citizens.
  • Section 7-14 outline legal rights, including the “right to life, liberty, and the security of the person.”
  • Section 15 outlines equality rights and protects affirmative action programmes.
  • Sections 16-22 deal with the Official Languages of Canada.
  • Section 23 deals with minority language educational rights.
  • Section 24 deals with the enforcement of Charter rights and the exclusion of illegally obtained evidence.
  • Sections 25-31 protect aboriginal rights, rights that are not outlined in the document, denominational rights, and the “the multicultural heritage of Canadians.”
  • Part Two recognises and affirms “existing aboriginal and treaty rights” and recognises the Indian, Inuit, and Métis peoples as “aboriginals.”
  • Part Three enshrines the principle of equalization payments to ensure that the provinces have “sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”
  • Part Four commits the first ministers to constitutional conferences that will address Aboriginal rights
  • Part Five outlines the amendment procedure, which had not been included in the 1867
Part Six amends the Constitution Act, 1867 to give the provinces the exclusive right to legislate on matters dealing with natural resources.

Part Seven asserts the primacy of the constitution and the authoritative nature of both English and French versions of the texts.

**The Constitution of the Nisga’a Nation**

Unlike the 1867 Act that outlines the basic division of powers in Canada, the Nisga’a constitution begins with an emotional and inspirational declaration. The constitution represents the nation’s “solemn promise to ourselves and our future generations.” The Declaration puts the document into a historical context and outlines the key values that it upholds.

**Highlights of the Constitution of the Nisga’a Nation**

- Chapter 1 identifies the nation as having existed from “time immemorial” and being “the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga’a and the Nass Area, and their descendents.” It also identified the particular tribes that make up the nation.
- Chapter 1 also expresses the “fundamental values” of the nation, the role of elders, the official languages, and the territory. It identifies the Constitution as the “supreme law” of the nation, subject only to the Constitution of Canada and the Nisga’a Treaty.
- Chapter 2 outlines a series of mobility, political, and privacy rights as an expression of Nisga’a “fundamental values.”
- Chapter 3 recognises the supremacy of the Nisga’a Treaty in the determination of land ownership and outlines certain governmental transactions relating to land and resources that require popular approval by referendum.
- Chapters 4-7 outline the governing principles of the Nisga’a nation, its “social and economic goals,” its governmental structures at different levels, and election procedures. These chapters also outline the executive branch of the Nisga’a Lisims Government, duties of particular officers, and its relationship to Village Governments.
- Chapter 8 provides for dispute resolution mechanisms for conflicts between Nisga’a governments.
- Chapter 9 outlines the principles of financial administration and the establishment of the Nisga’a Finance Committee.
- Chapter 10 outlines the five values of the Nisga’a nation public service.
- Chapter 11 offers a constitutional amendment procedure which culminates in a popular referendum requiring a 70% affirmative vote.

While the Nisga’a document begins emotionally, one can see that the rest of the document provides a relatively detailed description of Nisga’a governance structures, electoral processes, and financial control mechanisms. It also outlines the “social and economic goals” of the community in a way not found, for example, in the Canadian Constitution. This difference highlights the extent to which the Canadian Constitution includes a series of implicit values and traditions. In essence, the written document is not
the whole story. Canada is to be governed with a “Constitution similar in Principle to that of the United Kingdom,” a statement which constitutionalises the parliamentary practices and traditions, including the functioning of the prime minister and cabinet, which form the heart of political power in Canada. The Nisga’a Constitution’s recognition of the supremacy of the Canadian Constitution and the Nisga’a Treaty also formalises “constitutional baggage” that becomes part of the way the community is to govern itself. To understand constitutions as living instruments, it is important to identify the gaps that written constitutions almost always leave. The relationships between written documents, practices, traditions, and the interplay of different political institutions, are all vitally important parts of the web of constitutionalism.
PART IV: Constitutions and Economic Development

“If you’re not talking about constitutional reform, you’re not in the economic development ballgame.”

-John Barrett, Chairman of the Citizen Potawatomi Nation (Oklahoma)

A commitment to dealing with governance issues in a community should not be seen as a purely symbolic process that is little more than an expression of values. Objectives such as the implementation of democratic processes and the establishment of conditions that are favourable to economic development are legitimate ones that have practical implications on the daily lives of citizens. Understanding the link between governance and development should transform the way that constitution-making is viewed by citizens and decision-makers alike.

In the developing world, many see the link between institutional governance and economic development as part of the explanation for failed development efforts in the past. “Given the paramount importance of the political system in providing leadership and direction for all other systems – economic, social, and administrative – the political system’s inability to fulfill its role adversely affects the performance of all other sectors.” Similar ideas have also been applied to Aboriginal communities in North America, which typically enjoy vastly different levels of economic development.

The Harvard Project on American Indian Economic Development, was founded in 1987 at the John F. Kennedy School of Government to explore why some American Indian nations appeared more able to attract and encourage economic development than others. The Project’s principal findings demonstrate the need for attention and resources to be diverted towards ensuring the development of effective, self-governing institutions in Aboriginal communities. As recently reported to the Canadian House of Commons by Project co-founder Professor Stephen Cornell, “After a dozen years, we have been unable to find a single case of an American Indian nation demonstrating sustained, positive economic performance in which somebody other than the Indian nation itself is making the major decisions about resources allocations, development strategy, and related matters.” At the same time, however, “self-rule is not enough to produce economic growth.”

The Project’s findings reveal that institutional development is required in order for communities to benefit from self-government. Effective institutions that provide non-politicised justice, discourage corruption, “place buffers between day-to-day business management and politics,” and provide opportunities to enhance the capacity of its

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21 Tri Q. Nguyen, as quoted in Gregory S. Mahler, p. 53.
23 Stephen Cornell, p. 3.
24 Stephen Cornell, p. 4.

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bureaucracies increase the chance of successful economic development.\textsuperscript{25} Good governance helps attract not only economic investors, but also those (including their own citizens) who are willing to contribute “ideas, energy, time, or any other resource that can be an asset to development.”\textsuperscript{26} Researchers found that political factors were much more effective predictors of economic performance than any one other variable, including the availability of natural resources, educational attainment, or market access. In essence, “Economic development is first and foremost a political problem.”\textsuperscript{27}

**THE BUILDING BLOCKS OF ECONOMIC DEVELOPMENT\textsuperscript{28}**

(\textit{The Harvard Project on American Indian Economic Development})

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\textsuperscript{25} Stephen Cornell, p. 4.
\textsuperscript{26} Stephen Cornell, p. 5.
\textsuperscript{27} Stephen Cornell, p. 7.
\textsuperscript{28} This figure has been developed from a similar one in “Sovereignty and Nation-building: The Development Challenge in Indian Country Today”, by Cornell and Kalt.
Theories about “meso-level governance,” which recognise the importance of regional coordination for effective economic development, recognise the link between political processes and successful economic development. The emergence of devolution as a pressing issue in Europe and also in major centres in North America is a signal that many large urban communities recognise that community development is dependent on their ability to develop their own governance practices using special tools. The City of Toronto’s call for greater autonomy was based on “fierce competition” among cities under NAFTA, its “unique” infrastructure needs as Canada’s largest city, the inadequacy of traditional revenue sources, and its inability to effectively legislate on certain important issues like housing. Understanding that effective decision-making processes – in essence, an effective constitution – is central to economic development means that constitution-making is a process in which all who are concerned with community development should have a stake. As will be seen in the next section, the broadening of the constitutional development process to include different groups is a phenomenon that is not driven only by economic reasons.


Constitutional Development

Although it is true that constitutions are intended to represent the basic values of a regime, historically they are the products of particular political conditions and represent the ability of political actors of a certain era to reach an acceptable consensus. Until recent times, public participation in the process has usually been limited to indirect participation through elected officials and social or religious elites. Even in some recent cases, citizens have enjoyed little say in the process leading to the drafting of the fundamental laws of “the people.”

Confederation in Canada, while notable for its development largely free of influence from the mother country, nonetheless fails to represent almost any kind of recognition of popular sovereignty. Struck among elites, it seems clear that public participation or even debate was seen as a costly risk for a precarious deal. For example, in the spring of 1866, Canadian leaders Macdonald and Cartier resisted an early meeting of the legislature for fear that providing clarity on constitutional issues could jeopardise the position of the Confederates in the New Brunswick election, which was already underway.\(^ {31}\)

Perhaps because of their constitutional elitism, the Canadian Fathers of Confederation have, for the most part, not demanded a degree of respect that may be expected considering the historical importance of their actions. Historian Christopher Moore complains that twentieth-century political leaders like Trudeau and Mulroney have encouraged a line of thinking that “we are wholly superior to those dead white males” and “our modern industriousness enables us to dismiss tradition and change our constitutions like hemlines.”\(^ {32}\) While acknowledging the absence of public input in the debates of the 1860s, Moore argues that the Fathers may still provide some democratic lessons for present-day reformers. Among these, it is noted that the negotiation process included both government and opposition members. The Fathers, he writes,

> were much more aware that a voting population is represented in legislatures, not in any particular first minister or party leader. Constitution-making in the 1860s was ultimately a legislative, rather than an executive, responsibility, and could not have succeeded otherwise.\(^ {33}\)

In the United States, the development of a constitution to replace the loose arrangement under the Articles of Confederation was complicated because it was essentially an


\(^ {33}\) Christopher Moore, p. xiii.
attempt at “grafting a federal government on to thirteen flourishing and well-establishing states, each with its own constitution, legal system, and political institutions.” The famous three words “We the people,” while serving a legitimizing function, in reality do not reflect the process through which the Federalists performed an “end run” around the ratification procedures of individual states. Despite this inauspicious beginning, however, the American documentary constitution is notable for its formal stability over more than two centuries and its lack of constitutional crises in recent years. The extent to which the constitution as a political idea has permeated political debate is also remarkable. As one expert has noted:

the tendency for political controversies to be cloaked in constitutional arguments is an indication of the pervasiveness and depth of public consensus on the desirability of maintaining established constitutional norms. Furthermore, cogent constitutional arguments can be raised only if a firm constitutional foundation is available as a fulcrum.

Reverence for the American constitutional framers, in a reversal of the situation in Canada, places them on an almost “unapproachable pedestal” which some scholars have critiqued.

The twentieth century has not, even in democratic states, necessarily produced a greater commitment to a popular role in constitution-making. The French constitution of 1958, which established the Fifth Republic, was the direct product of an unusually unstable political situation. Two factors combined: a threatened army coup, which was the result of uncertainties about the French role in Algeria, and the effective consolidation of power and influence by Charles de Gaulle, who had long expressed his view that the post-Second World War constitution failed to provide the institutional foundation for strong executive leadership. While the final constitutional package was approved in a national referendum, its drafting process was contested not only because of its absence of broad-based citizen participation, but also because of questions about its legality. It has been argued that when the National Assembly, fearing civil strife, accepted de Gaulle’s return to power and empowered him to oversee the drafting of the new document, it violated provisions of the constitution of the Fourth Republic. For anti-Gaullists, the constitution that emerged represented a “coup d’état that had only a thin veneer of legality.” Whether or not the process was technically legal or not, politically it was clearly “drafted under threat of force” in an atmosphere of crisis.

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34 S.E. Finer, Vernon Bogdanor, and Bernard Rudden, p. 7.
37 Bruce Ackerman and Neal Katyal, p. 569.
39 S.E. Finer, Vernon Bogdanor, and Bernard Rudden, p. 8.
Despite its tumultuous beginnings, the French constitution has endured over forty years in a country that has seen more than a half dozen major regime changes since the 1789 revolution. An amendment only twenty months after the adoption of the constitution also set the stage for the constant tinkering that has witnessed constitutional changes being made on a regular basis. In the 1990s alone, the constitution was amended in 1992, twice in 1993, and once in each of 1995, 1996, and 1999. While often the survival of a regime is threatened by a constitution that is too rigid, in the French case some fear that the regular implementation of minor amendments while major issues remain unresolved may lead to weariness and dissatisfaction among a public who may see little value in the elite-driven process.\(^\text{40}\)

Since the creation of the Israeli state, popular constitutional concerns have been, in many cases, subordinated to real or perceived national security threats.\(^\text{41}\) The Declaration of Independence empowered the Constituent Assembly to draft a constitution, but this body instead passed the Transition Law in 1949, which changed its status (it became the First Knesset) without the adoption of a written constitution. Since that time, the Israeli constitution has evolved through the adoption of certain pieces of legislation and the acceptance of particular parliamentary practices.

The High Court of Justice has provided some protection for civil rights, but is weakened by the absence of a judicial review mandate and by its appointment process, which is politicised.\(^\text{42}\) Increased pressure by the media, NGOs like civil rights and women’s organisations, academia, and the Bar Association have not historically resulted in substantial progress towards a more entrenched form of constitutionalism.\(^\text{43}\) The complexities brought on by the delicate military and political situation in the Middle East, combined with a proportional representation electoral system which produces coalition governments, has hindered efforts to articulate protected rights in Israel. These two factors also allow political elites to explain inaction and use rights issues in coalition bargaining.

South Africa’s constitutional overhaul between 1994 and 1996 represents a recent example of a more popular constitutional development process. Prior to 1994, the constitutions of 1910, 1961, and 1983 had catered to racial minority interests and had resulted in a social polarisation, widespread human rights violations, and institutionalised socio-economic inequality.\(^\text{44}\) The first step in the democratization of South Africa was undertaken by a group representing twenty-six different political groupings, parties, and ‘governments’ representing the homelands. This group, without public input, developed an Interim Constitution, adopted in 1994, which laid the groundwork for the


\(^{41}\) For an analysis of the debate about constitutionalism in Israel, see Daphna Sharfman, Living Without a Constitution: Civil Rights in Israel (Armonk, NY: M.E. Sharpe, 1993).

\(^{42}\) Daphna Sharfman, pp. 93-95.

\(^{43}\) Daphna Sharfman, pp. 177-180.

Constitutional Assembly (CA) to produce a final constitution. The group also negotiated 34 principles with which the new constitution would need to comply.

The CA was made up of all elected members of the National Assembly and the Senate. For what was a complicated process in a country that had not been a model of participatory democracy, the citizen participation work of the CA is remarkable. In the first phase alone, it generated over 1.7 million submissions, many in the form of petitions, and ensured that millions of copies of draft documents were distributed to the public.\(^{45}\) Between 1994 and 1996, the CA undertook a series of public education campaigns, held 486 “constitutional education workshops,” and provided regular progress reports. In the final stages of the initial negotiation, and in the second round of talks aimed at ensuring compliance with the 34 principles, fears grew that party politics began to dominate the process at the expense of genuine citizen input; the extent to which the input of individual citizens may have contributed to the final document remains unclear.\(^{46}\) What is certain, however, is that the public consultation and education programme undertaken during the 1994-1996 period represented, at least in part, a genuine attempt to include citizens in the constitution-making process.

‘The People’ and Constitutional Amendment

Constitutionalism in the eighteenth and nineteenth centuries, particularly as manifested in single, written documentary constitutions, became associated with a certain degree of sanctity. They became, in the words of Thomas Paine, “the political bible of the state” and some have even drawn a link between the clarity of governmental organisation in written constitutions and the “Protestant belief in the authority of Scripture.”\(^{47}\) The idea that natural laws could be identified and then protected from the powers of the state is an important part of the classical liberalism that helped drive and shape the constitutional movement.

The other principal association to which constitutionalism was subjected was the idea of popular sovereignty. Rousseau wrote that the “real constitution” contained all the most important laws, those that were “not graven on tablets of marble or brass, but on the hearts of the citizens.”\(^{48}\) As the ultimate expression of the people’s will, constitutions are seen as reflections of some kind of “general will.”

Ulrich K. Preuss identifies the paradox in the identification of constitutions with popular sovereignty and simultaneously with a certain expectation of “lasting, perhaps even eternal, duration.”\(^{49}\) Preuss points out that John Locke’s revision of the Fundamental Constitutions of Carolina of 1669 characterized them as “sacred and unalterable…forever” just as the United States Constitution seeks to “secure the

\(^{45}\) Jeremy Sarkin, p. 70.
\(^{46}\) Jeremy Sarkin, p. 72.
\(^{47}\) Ulrich K. Preuss, p. 32.
\(^{48}\) As quoted in Carl J. Friedrich, p. 133.
\(^{49}\) Ulrich K. Preuss, p. 34.

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Blessings of Liberty to ourselves and our posterity.\textsuperscript{50} The contradiction of a static document reflecting an ever-changing popular will until the end of time makes little sense, but most constitutions are appealing because they reflect popular values while offering some level of permanence.

To this day, that paradoxical relationship continues to manifest itself in constitutionalism, but it is generally accepted that constitutional modifications will eventually become necessary and that mechanisms for amendment are needed. Two principal philosophical objections to an unchangeable constitution were raised. First, as expressed on the French Jacobin constitution of 1793, a liberal understanding of rights meant that “one generation cannot submit the future generation to its will.”\textsuperscript{51} Second, the liberal belief in human progress also required the ability to improve institutions. Immanuel Kant and later Thomas Jefferson both argued that a constitution that could not change would hinder the acquisition of knowledge and the application of that knowledge to improve established institutions.\textsuperscript{52}

Most modern constitutions provide some form of amendment mechanism or, in some cases, several different mechanisms for different kinds of changes. Some constitutions, particularly those in countries that have faced foreign occupation, also forbid constitutional amendments in case of a violation of territorial integrity.\textsuperscript{53} Formal amendment, however, is not the only way in which constitutional changes can be made. Accepted practices can become recognised constitutional norms and even replace written norms, as in the case of some of the Canadian federal government’s powers over provincial legislatures.

Under the British North America Act, the federal government could exercise the power of disallowance, which allowed it to invalidate provincial legislation, and the power of reservation, which allowed Lieutenant-Governors to defer to the federal government rather than approving a bill that had passed through the provincial legislature. In the case of the power of disallowance, it was used 112 times between 1867 and 1943, but not once since then. Similarly, 70 bills have been “reserved” since 1867, but that power hasn’t been used since 1961. In both of these cases, many experts believe that these powers would no longer be considered constitutional because they haven’t been used in decades and because they violate principles of federalism, an important cornerstone of the Canadian political community.\textsuperscript{54} Social, economic, and political forces can also transform the way constitutions are understood and the way that power is distributed without requiring formal amendments.

In the United States, a relatively stable written constitution should not be interpreted as a static constitution in practice. Bruce Ackerman and Neal Katyal, in an analysis of

\textsuperscript{50} As quoted in Ulrich K. Preuss, pp. 34-35.
\textsuperscript{51} Ivo D. Duchacek, p. 211.
\textsuperscript{52} Ulrich K. Preuss, pp. 35-36.

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\textit{Institute On Governance, Ottawa, Canada}
American constitutional evolution, have argued that traditional interpretations have failed to realize the extent to which political movements have transformed constitutional realities. They argue that “we should learn to look upon the Federalists as pioneers of an ongoing tradition of revolutionary reform.”55 They point to Reconstruction Republicans and New Deal Democrats as embodying the same spirit of revolution that characterized the constitutional framers. By effectively mobilizing political opinion and capturing the popular imagination, they were able to fundamentally alter the constitution despite the reaction of conservatives.

In Canada, without major alterations to the division of powers, the federal and provincial governments have each enjoyed widely varying degrees of power, as indicated in the chart below.56 Political events and economic trends can radically alter the balance of power without requiring or producing a formal constitutional amendment.

### Centralisation and Decentralisation in Canada

<table>
<thead>
<tr>
<th>ERA</th>
<th>YEARS</th>
<th>DOMINANCE</th>
<th>KEY EVENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confederation</td>
<td>1867-1883</td>
<td>Federal</td>
<td>British North America Act</td>
</tr>
<tr>
<td>Dual Federalism</td>
<td>1883-1910</td>
<td>Provincial</td>
<td>Rise of Premiers Mowat and Mercier; rulings of the Judicial Committee of the Privy Council in London</td>
</tr>
<tr>
<td>Cooperative and Executive Federalism</td>
<td>1910-1960</td>
<td>Federal</td>
<td>First and Second World Wars; Great Depression; rise of the welfare state</td>
</tr>
<tr>
<td>Contested Federalism</td>
<td>1976-present?</td>
<td>Provincial</td>
<td>Quebec nationalism; failure of the Meech and Charlottetown accords; 1980 and 1995 referenda</td>
</tr>
</tbody>
</table>

In other cases, a single change to the constitution may also bring about unintended consequences that can affect how power is distributed. Some argue that the adoption of the Canadian Charter of Rights and Freedoms in 1982 had the secondary effect of centralizing the federation and providing the federal government with the means to affect policy change in areas outside its jurisdiction.57 Whether or not this is true, it is clear that

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55 Bruce Ackerman and Neal Katyal, p. 569.
56 Adapted from a graphic in Robert J. Jackson and Doreen Jackson, p. 205, which was based on an idea by Howard Cody in “The Evolution of Federal-Provincial Relations in Canada,” America Review of Canadian Studies, vol. 7, n. 1, 1977.
in the last two decades, citizenship has emerged as a new constitutional category in Canada.

Alan C. Cairns has written that Canada’s constitutional make-up has changed because citizens have articulated new demands for the recognition of their sovereignty and rights:

Accordingly, we now confront the unfinished business of working out a modus vivendi between the inescapable role of governments in constitutional reform and the equally inescapable necessity for serious public involvement if the resulting constitutional product is to be considered legitimate. Citizenship has become a constitutional category with constitutional rights and obligations. It takes its place with the other pillars of our constitutional order – federalism, parliamentary government, an independent judiciary, and the Charter.58

The evolving role of Aboriginal peoples in constitutional reform also represents a fundamental change from historic attitudes of Canadian governments. It now seems clear that Canadians from all groups seem increasingly less willing to accept executive federalism as a satisfactory mechanism for constitutional change. It remains unclear, however, how these new attitudes will affect the process of change on a practical level.

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CONCLUSION

The lessons to be drawn from an understanding of different constitutional experiences may not be easy to delineate, and in some cases even seem contradictory. Well articulated constitutions can be a source of national unity, yet constitution-making can often be a divisive process. Written constitutions can provide effective mechanisms to ensure accountability, yet many of the accountability processes in Canada rely simply on tradition or are defined only in ordinary legislation.

Among these contradictions, however, lie important lessons for communities that are looking to formalise their constitutional landscape. First of all, constitutions matter. Governance issues are not simply about symbolism or personal power. In the end, they shape the way that policy decisions are made, decisions that significantly impact on citizens. Whether or not citizens feel a sense of ownership, and whether or not they participate, decisions are taken on their behalf that have real consequences. Understanding how those decisions are made, and how that process could be improved, is a task worth undertaking.

Constitutions matter for other reasons as well. The strong connection between good governance and the socio-economic health of a community places an important burden of responsibility on political actors. Policy makers and citizens alike need to recognise that a well-crafted constitution is an essential building block to good governance and, as such, it deserves the best of the intellectual resources and political goodwill that a community can offer.

Second, most communities already adhere to an unwritten constitution that provides the cultural parameters for political action. The process of codifying these parameters can help communities to recognise the values that have historically been celebrated, or quietly adhered to without reservation, and determine whether or not they deserve continued loyalty. An effective constitution-making process can help renew citizen loyalty to the political community, provide real-life civics education, and encourage greater political participation. A failed constitution-making process, on the other hand, can also deepen resentments and cause a crisis of trust in the political system. Determining when and how to embark on such a process requires careful consideration and the recognition that there is never a “perfect time” for constitutional renewal in which success will be guaranteed.

Third, communities need to understand the key elements of a constitution and the principal functions that they can serve, and at the same time understand their limits. Constitutions should not be collections of job descriptions for political actors, but rather provide the framework in which political activity can take place, rights can be protected, accountability can be maintained, and conflicts can be adjudicated. Similarly, with ideological issues, constitution-makers must be sure that proclamations about “fundamental values” are not so comprehensive as to render the document meaningless.
Key principles should be expressed, but particular community goals should be outlined in separate documents.

Fourth, constitutions must be accessible. They can take many forms, as was noted above, and include a combination of norms from many sources, some written and others not. A rich constitutional history can be a benefit, but only if citizens can understand at a basic level what it means for them. A successful constitution is one that resonates with citizens, recognising their basic rights and responding to their notions of fairness.

Finally, the process of constitution-making can be as important as the result. If members of particular groups feel that their participation has not been taken seriously, or if they feel excluded from the process altogether, constitutions will not be able to perform their legitimisation function. The raised expectations created by attempts at constitutional change can, in the end, contribute to an increasingly dysfunctional political system. Historian Christopher Moore’s lesson about the inclusion of opposition members in constitutional negotiations may represent a taste of what is to come. In Canada, at least, many doubt the ability of the first ministers to undertake formal constitutional reforms without a comprehensive process open to differing points of view and ideologies. Given the high stakes that are involved in constitution-making, this difficulty may yet prove to be a blessing.
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