

**Redress Through Constitutional Change:
Reimagining the Canada Round for its Reparative Potential**

by

Jordan Sherbino
Bachelor of Arts (Honours), University of Saskatchewan, 2013

A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of

MASTER OF ARTS

in the Department of Political Science

© Jordan Sherbino, 2022
University of Victoria

All rights reserved. This dissertation may not be reproduced in whole or in part,
by photocopy or other means, without the permission of the author.

We acknowledge and respect the lək'wəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and WSÁNEĆ peoples whose historical relationships with the land continue to this day.

Redress Through Constitutional Change:
Reimagining the Canada Round for its Reparative Potential

by

Jordan Sherbino
Bachelor of Arts (Honours), University of Saskatchewan, 2013

Supervisory Committee

Dr. Matt James, Supervisor
Department of Political Science

Dr. Avigail Eisenberg, Departmental Member
Department of Political Science

Abstract

The Canada Round was a period of megaconstitutional politics where many of the perennial topics of Canadian politics were viewed through a constitutional lens. This research analyzes the Canada Round of negotiations for its potential to act as a project in historical justice to address the state's mistreatment of Indigenous peoples. By viewing constitutional change as a means of engaging in political redress, this research offers a corrective to understanding the dynamics of the Canada Round and provides an expanded understanding of redress to compensate for its limited and non-transformative nature in settler-colonial contexts by introducing the idea of *redress constitutionalism*. Through an analysis of the primary documents from the Canada Round, this research demonstrates that national Indigenous organizations—the Assembly of First Nations, the Métis National Council, the Inuit Tapirisat of Canada, and the Native Council of Canada—sought to employ constitutional change for its reparative potential to address long-standing injustices against Indigenous peoples in Canada caused or worsened by the constitution. Therefore, the failure to significantly renew the constitution was also a failure to significantly engage in redress, remedy their historical exclusion from decision making, and respond to the suppression of their self-determination.

Table of Contents

<i>Supervisory Committee</i>	<i>ii</i>
<i>Abstract</i>	<i>iii</i>
<i>Table of Contents</i>	<i>iv</i>
<i>Acknowledgements</i>	<i>v</i>
<i>Introduction: Constitutional Change as Political Redress</i>	<i>1</i>
<i>Affirmative versus Transformative Political Change</i>	<i>7</i>
<i>Redress Constitutionalism</i>	<i>18</i>
<i>Chapter Outline</i>	<i>25</i>
<i>Chapter 1: The Importance, History, and Potential of Constitutional Politics in Canada</i>	<i>27</i>
<i>1.1: The Relevancy of Studying the Canadian Constitution</i>	<i>27</i>
<i>1.2: Setting the Stage for the Canada Round: Redress During Patriation and Meech Lake</i>	<i>33</i>
1.2.1: <i>Entrenching the Charter</i>	<i>34</i>
1.2.2: <i>A Distinct Society Within (or Beyond) Canada</i>	<i>39</i>
1.2.3: <i>Indigenous Nationalisms</i>	<i>44</i>
<i>1.3: Popular Expectations versus Elite Practices</i>	<i>50</i>
<i>Chapter 2: Political Redress Through the Canada Round</i>	<i>55</i>
<i>2.1: Background and Rationale for the Canada Round</i>	<i>57</i>
<i>2.2: Redress Constitutionalism in the Canada Round</i>	<i>62</i>
<i>Conclusion: Redress as a Corrective in Understanding the Canada Round</i>	<i>112</i>
<i>Bibliography</i>	<i>124</i>

Acknowledgements

Going into graduate school, I had heard all the standard warnings and premonitions from those who had been through the fire—those who had been burnt badly, those who ended up shying away from the heat, and those who years later arose like a phoenix on the other side. However, being as stubborn as I was/am, I had assumed I would emerge from this experience both expeditiously and singe-free.

Naïveté is perhaps not something standard to admit in a context such as this, but it only seems right to be so honest.

Not only had I never assumed that life would call out in other ways during my program—to return home so quickly, to be fortunate enough to have remarkable career opportunities, and to find so many wonderful, fulfilling, and challenging distractions—but I also grossly underestimated the challenge that was in front of me with this research. So while I am by no means singe-free, I am positive that I would have been burnt to a crisp if it were not for the support that I have received.

In foraying into the murky and treacherous waters that is the intersection of Canadian constitutional, Indigenous, and redress politics, I am so indebted to the scholars and activists who have gone before me in this work. What I hope to humbly present in this research is not some ultimate culmination of thought, but rather another piece to this ever-evolving puzzle. For as difficult and challenging (and a whole host of other more nefarious descriptors) this work often was, I remained fascinated by the readings and enamored with the topic, and this is in no small part due to the enthusiasm with which others have tackled similar issues. In particular, I am indebted to Dr. Matt James of the University of Victoria, under whose supervision, cheerful encouragement, and wise counsel this research was conducted. This university is fortunate to have an impressive team of political scientists, and I have benefited immensely from their knowledge and passion.

I would also like to thank the University of Victoria for the financial assistance and support in completing this research. I treasured my time at this university and will proudly call myself an alumnus of this institution.

I am also thankful for being able to complete this research at home in Saskatoon, on Treaty 6 Territory and the Homeland of the Métis Nation. I'll be the first to admit that we have our flaws as a community, but this place is home to many amazing people doing tremendous and important work. Completely unknowingly, the people of this city—colleagues, volunteers, friends, Elders, community leaders, students—have all helped to ground this research and to reorient it toward what matters.

I would like to thank all the people that I have surrounded myself with who inspire and challenge me. Throughout my studies, my career, and the various organizations with which I have been involved, I have met some amazing people who have pushed me to be a better person. Although the divisiveness and chaos of the world may be reason for despondence and despair, my friends make me believe that a better tomorrow is possible and inspire me to work towards it.

I began my formal study of politics because I believed political action to be an important means of helping people. Several years later and after quite some time working and studying in the field, I remain resolute that at its best and at its core politics is—as it should be—fundamentally about people. This research is dedicated to those in my life who have neither forgotten nor forsaken this principle that I hold of the utmost importance.

First among these, naturally, is my partner, Mitchell. He held me up throughout this process and comforted me when I managed to find a new low. As much as I fancy myself one who has quite the way with words, I simply cannot find any that are powerful enough to describe what this has meant and continues to mean to me. I would not have been able to do this without his boundless optimism, his unrelenting care, and his love. He is better person than I could ever hope to be, and the best way I can think of repaying him is by promising that I have no immediate plans to return to school.

Introduction: Constitutional Change as Political Redress

In chronicling the storied past of Canada's megaconstitutional saga, Peter Russell describes the impetus for the Canada Round: "The Québécois and Canada's aboriginal peoples would demand another round of constitutional change whether the Rest of Canada liked it or not."¹ The Canada Round—the era of constitutional negotiations that took place from the failure of the Meech Lake Accord in June of 1990 and that ended with the failure of the Charlottetown Accord in a national referendum on October 26, 1992—came at the heels of abject constitutional failures for both of these constituencies. The Meech Lake Accord, representing the bare minimum of Quebec's demands for a more just and appropriate form of federalism, was not passed by all of Canada's legislatures. Additionally, the constitutional conferences on Aboriginal matters that were promised in the patriation package failed to substantively address the longstanding constitutional grievances and aspirations of Indigenous peoples and organizations.

This research will analyze the reparative potential of constitutional change as a means of responding to historical injustices by looking at this round of constitutional negotiations, with a particular emphasis on the aspirations of national Indigenous organizations during the Canada Round. In this research I demonstrate during the Canada Round the major national Indigenous organizations involved in constitutional negotiations sought to employ constitutional change for its reparative potential to address long-standing injustices against Indigenous peoples in Canada caused or worsened by the constitution.² This approach of embracing constitutional change as a means of redress was not fully adopted by state actors, although there was movement in this

¹ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed. (Toronto: University of Toronto Press, 2004), 154.

² The word 'constitution' will be used consistently with a lowercase initial *c*. There is no desire here to deify the existence of the written constitution. While this research has a demonstrably constitution-centred focus, it does not seek to make the constitution an object of reverence. The lowercase *c* also seeks to capture the unwritten practices and norms that form integral parts of Canada's constitution.

direction as the Canada Round continued. To substantiate this claim, I demonstrate that there is a long-standing history of different groups seeking to employ the Canadian constitution to address past wrongs and to enable them to participate more fully in the state. Through analyzing the primary documents from the Canada Round, I will show that national Indigenous organizations—the Assembly of First Nations, the Métis National Council, the Inuit Tapirisat of Canada, and the Native Council of Canada—sought to capitalize on the reparative aspect of constitutional change to rectify historical injustices. Therefore, the failure to significantly renew the constitution was also a failure to significantly engage in redress to transform Indigenous peoples’ political position in Canada, remedy their historical exclusion from decision making, and respond to the repression of their self-determination. I will ultimately conclude that this Indigenous-state disconnect is continuous with present-day politics.

In serving as a corrective for how the Canada Round is viewed, this research also challenges the scope of redress politics to explicitly include the prospect of constitutional change. In recent years, Canadian governments have been more actively engaged in projects of historical justice. Such evils that have warranted redress include the internment of Japanese-Canadians and the expropriation of their property during the Second World War, the forced relocation and subsequent starvation of Inuit communities, and the violent, genocidal goals and disastrous effects of the Indian residential school system.³ Expanding redress to include constitutional change is helpful because despite Canada’s proliferating “culture of redress,”⁴ observers of and participants in projects of redress have often been underwhelmed by the results,

³ For an overview of these and other apologies, see: Matt James, “Wrestling with the Past: Apologies, Quasi-Apologies, and Non-Apologies in Canada,” in *The Age of Apology: Facing Up to the Past*, ed. Mark Gibney (Philadelphia: University of Pennsylvania Press, 2008), 137-53.

⁴ Jennifer Henderson and Pauline Wakeham, “Introduction,” in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 5.

largely claiming the process to be overtly superficial and not completely beneficial. In recent years redress arguably has become more common because it is politically fashionable than due to altruistic goals of the state.⁵ Although the concerns of aggrieved Canadians are genuine, the manner of remedy can be insufficient, disingenuous, or even insulting. Essentially, there has been an increase in the scope and expectations of redress while there has not been a reciprocal enthusiasm and endorsement for the results of this work. This reality is important given the growth of redress politics. It is clear such issues will not disappear, states cannot hide from their pasts, and observers and marginalized groups have largely renounced the current methods of redress as insufficient.

This research is important for three interrelated reasons. First, viewing the Canada Round as a project in redress allows for a more thorough understanding of this era of Canadian politics and history. The Canada Round occurred at the end of a generation of constitutional wrangling and discussion; one commentator even quipped, “perhaps the eternal search for the perfect constitution will become the defining characteristic of Canada.”⁶ Although scholarship on the Canada Round was written during and immediately following this era, it remains an understudied aspect of Canada’s constitutional history. The Canada Round was a time in which the persistent and central issues of Canadian political life were debated simultaneously. This breadth created an immensely complex era of politics with tremendous potential to change the state. Studying this era of politics creates a greater understanding of the issues that continue to characterize the enduring questions of Canadian politics—those of regionalism, institutional design, human rights, colonialism, gender, language rights, and jurisdictional authority.

⁵ Ibid., 6-7; James, “Wrestling with the Past,” 137-53.

⁶ James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems, and Processes* (Ottawa: Minister of Supply and Services, 1996), 25.

Second, looking at the reparative potential of constitutional change is important given the spread of demands for justice by oppressed and marginalized groups and the often-unsatisfactory results of these efforts. Apologies, reparations, truth commissions, and memorials are increasingly common in Canada and across the world. However, the research here will challenge the sufficiency of these approaches by reconsidering the bounds of redress to include constitutional change. That is, by changing the structures, values, and power relations within the state, constitutional change can be a dynamic and transformative force that meaningfully addresses historical injustices through a reorganization of the state—something sought by the national Indigenous organizations involved in the Canada Round.

Canada's efforts in redress have been held back by an unwillingness to engage in a significant transformation of the Canadian state and its relationship with Indigenous peoples. The constitutional amendments of 1982 certainly altered these to an extent,⁷ but the *Indian Act* remained, "Indians and the Lands Reserved for Indians" was still an area of federal administration, Indigenous governance systems were still repressed, and the last residential school in Canada closed over a decade later. Rather, the dominant mode of redress in Canada fits within the narrow confines of the neoliberal state.⁸ Essentially, the state's power is not ultimately challenged and the processes of redress diminish and narrow the scope of redress struggles and

⁷ The impacts of section 35 of the *Constitution Act, 1982* remain an unfolding process in Canada. The 1982 constitutional amendments undoubtedly altered the relationship that Indigenous peoples have with the state and court rulings upholding Aboriginal and treaty rights since this time have substantiated this; however, to claim that section 35 somehow radically refounded the institutions of the state in a way that redressed Canada's colonial legacy would be dubious at best. For an understanding of the impacts (or lack thereof) the clause has had, see: Kiera L. Ladner, "Aysaka 'paykinit: Contesting the Rope Around the Nations' Neck," in *Group Politics and Social Movements in Canada*, ed. Miriam Smith (Peterborough: Broadview, 2008), 236; James (Sákéj) Youngblood Henderson, "Postcolonial Ledger Drawing: Legal Reform," in *Reclaiming Indigenous Voice and Vision*, ed. Marie Battiste (Vancouver: UBC Press, 2000), 161-71; and Ardith Walkem and Halie Bruce, ed., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003). For commentary on the underwhelming nature of section 35 or the irrelevance or negative impacts of the clause, see, in particular, the chapters by Mildred C. Poplar, Ardith Walkem, James Tully, and Lee Maracle.

⁸ Matt James, "Neoliberal Heritage Redress," in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 38-42.

the possible courses of action.⁹ In this research it is necessary, for example, to challenge the capacity of residential schools to be wholly representative of colonialism. This is not to take away from the meaningful work of the Truth and Reconciliation Commission of Canada nor the gravity of atrocities that defined the Indian residential school system, but is merely to demonstrate that the focus should not solely be on residential schools when redressing colonial injustices. Residential schooling was one aspect of a much larger project and was not an aberration from otherwise benign policy.¹⁰ Given the predominance of redress demands, it is important to understand how marginalized groups may seek redress without state-imposed limitations and myopia, and constitutional change poses one such way of doing this.

Finally, viewing constitutional reform as a means of political redress has important implications for understanding the role of the constitution. Since the introduction of the Charter, the constitution's role as means to enact political change in Canada has grown considerably. Individuals and groups have sought to effect political change through the courts and by appealing to the rights-friendly sensibilities of politicians. Having constitutional reform as an instrument of redress creates the possibility of substantive change and altering the governing framework. This method of political redress has many potential advantages over more superficial approaches, especially given the importance of a constitution in a state with increased constitutional supremacy and decreased Parliamentary supremacy such as Canada.¹¹

⁹ Eva Mackey, "The Apologizer's Apology," in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 50.

¹⁰ Leanne Betasamosake Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring, 2011), 22.

¹¹ For more information on the rise of constitutional supremacy, see: James (Sa'ke'j) Youngblood Henderson, "Incomprehensible Canada," in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 117; Alan C. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed. Douglas E. Williams (Toronto: McClelland and Stewart, 1991), 31; and Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 72. It should also be noted that there are other factors than constitutional supremacy that are eroding the power of Parliament. For an analysis of abuses of constitutional powers and Parliamentary democracy, see: Peter Aucoin, Mark D. Jarvis, and Lori Turnbull,

It is worth noting that this research is not concerned with the desirability of embarking on a renewed odyssey of megaconstitutional dealings in Canada. Many academics, politicians, and citizens would much rather Canada not even consider going down such a path. It is not my goal to engage in debates about the possibility or the political popularity of megaconstitutional politics. This research does not seek to be a roadmap to cure Canada's constitutional woes nor a call to arms to resurrect these debates and open old wounds. Rather, it provides fresh insights on the Canada Round, our understanding of the constitution more broadly, and the ongoing impacts of Canada's constitutional silence in relation to Indigenous peoples and issues. This research is about gaining a better understanding of the constitutional ambitions at the time and the implications of thwarting such ambitions. One could certainly argue megaconstitutional politics in Canada is dead, but this does not mean that the constitution is any less of a fundamental force shaping contemporary political life or that the failure of megaconstitutional reform does not continue to influence and inhibit present-day politics.¹²

Similarly, this research does not advocate for or against the Charlottetown Accord or any other set of constitutional amendments. It merely uses the negotiations and debates of the Canada Round as a case study in the potentialities of engaging in political redress through constitutional change. It analyzes the constitutional aspirations of Indigenous leaders and organizations at this time and how well these goals were actualized through the Charlottetown Accord. It is neither my place as an uninvited settler to this land nor is it the intent of my work to pass judgement on the desirability of their requests and the efficacy of their approach. In this sense, this research

Democratizing the Constitution: Reforming Responsible Government (Toronto: Emond Montgomery, 2011). For an analysis of the centralization of power with the prime minister and their office, please see: Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

¹² This line of argumentation will be taken up more fully in section 1.1 of this research.

does not make narrow normative assertions. Rather, I aim to challenge the confines of both redress and constitutionalism so we can begin to see the value of one in the other.

Viewing constitutional change as a project in redress has implications for both understandings of the constitution and the practice of political redress, and this is not fully appreciated in political science literature. This is a lacuna that this research seeks to fill, and the normative assertions in this research are limited to this sort of analysis. Whereas I am not saying the Charlottetown Accord should have been adopted or that Canada should engage in megaconstitutional politics once again, I am saying the Canada Round should be understood through the lens of redress as a way of making sense of this era of politics and appreciating the ramifications in failing to engage in constitutional renewal.

Affirmative versus Transformative Political Change

This research began by asserting the practices of redress politics are inadequate to address the severity of the injustices in question. To rectify this, we must alter our understanding of redress to expand beyond the practices of apologies, payments, truth commissions, and memorialization. To employ the vocabulary of Nancy Fraser,¹³ I seek to move beyond an understanding of redress that is merely *affirmative* and toward an understanding of redress that is more *transformative*:

Affirmative strategies for redressing for injustice aim to correct inequitable outcomes of social arrangements without disturbing the underlying social structures that generate them. Transformative strategies, in contrast, aim to correct unjust outcomes precisely by restructuring the underlying generative framework. This distinction is *not* equivalent to reform versus revolution, nor to gradual versus apocalyptic change. Rather, the nub of the contrast is the level at which injustice is addressed: whereas affirmation targets end-state outcomes, transformation addresses root causes.¹⁴

¹³ The research of Nancy Fraser has similarly been employed to understand the risks and shortcomings of the British Columbia treaty negotiations. See: Andrew Woolford, "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process," *Canadian Journal of Sociology* 29, no. 1 (Winter 2004): 111-44, <https://doi-org.ezproxy.library.uvic.ca/10.2307/3341947>.

¹⁴ Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange*, trans. Joel Golb, James Ingram, and Christiane Wilke (London: Verso, 2003), 74.

In this research, the dominance of affirmative redress is challenged and critiqued as constitutional reform is viewed as a transformative avenue for altering political relationships.

Fraser's distinction is of tremendous value to get a more fulsome understanding of precisely *what* is being redressed. It is necessary to understand if the symptoms or effects of injustice are being redressed or if it is the causes or "generative framework"¹⁵ that produced them. For this research, engaging in transformative political redress means looking at the core of the colonial relationship in Canada, while an affirmative approach would adhere to a symptom-based approach of redressing particular instances of colonial injustices. This is why the constitution is relevant. This is not to claim that the constitution is either the sole cause of or should be the lone target of blame for colonial injustices in Canada. Rather, it is to say that the constitutional framework is closer to the roots of these injustices than specific policies—that is, the constitution serves as the generative framework for such things as the Indian residential school system or the Indian Act. Because the constitution is so formative for politics and the governing arrangement in Canada, it can get closer to the cause of the problem instead of merely treating the effects of the injustices.¹⁶ As will be demonstrated in this research, the constitution's foundational nature was appreciated by Indigenous organizations during the Canada Round.

Fraser argues the transformative avenue for political change is vastly superior to the affirmative one. She favours a form of politics that not only challenges the status quo, but also the societal, economic, and institutional forces that led to the status quo in the first place. For example, on the issue of racial justice, Fraser argues against the utility of a liberal multicultural

¹⁵ Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age," *New Left Review* no. 212 (July/August 1995): 82, <http://search.proquest.com.ezproxy.library.uvic.ca/scholarly-journals/redistribution-recognition-dilemmas-justice-post/docview/1301909778/se-2?accountid=14846>.

¹⁶ Fraser does, however, note limitations on the efficacy of the state in a globalized world with transnational forces. Nancy Fraser, "Reframing Justice in a Globalizing World," *New Left Review* no. 36 (Nov/Dec 2005): 71-2.

approach because it is unable to challenge/change the status quo, and instead advocates for an anti-racist one that deconstructs ‘race.’¹⁷ Where I diverge from Fraser is that in advocating against an affirmative approach to political change she concludes it is necessary “that people be weaned from their attachment to the current cultural constructions of their interests and identities.”¹⁸ I argue this proposed devaluing and decentering of identity is not the appropriate avenue, but rather that the identity (and the people that comprise it) need to in fact be centered and valued more. In the research presented here, the issue is that Canada’s constitution has not appropriately recognized (and valued and centered) Indigenous identities, perspectives, and concerns. However, Fraser’s primary concerns with affirmative strategies is that they do nothing to challenge and destabilize structural issues and the “generative framework” of injustices. I argue that—although there is a retrenchment of identity through constitutional change—it in fact does alter the generative framework because constitutional change alters the state as a whole.

Additionally, specifically on political redress, I would not go so far as to entirely discredit the utility of affirmative redress. Affirmative redress has many success stories as a meaningful political endeavour for those affected by injustice.¹⁹ For Indigenous-state redress in Canada, I reiterate that it is not my goal to critique the work of the Truth and Reconciliation Commission, but rather the context in which it was occurring, the mandate it had, and the scope of its powers. The Commission—although it was something residential school Survivors advocated for—had bounds on its mandate that were at least partly state-imposed.²⁰ We can see these limitations

¹⁷ Fraser, “From Redistribution to Recognition,” 90.

¹⁸ *Ibid.*, 91.

¹⁹ Although this could be critiqued as being a neoliberal manifestation of attempted justice, I would not want to dismiss, for example, the affective change that an apology can have for someone impacted by an injustice.

²⁰ For a thorough analysis on the shortcomings of the context in which the Truth and Reconciliation Commission was operating, see: Matt James, “Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context,” *Les Ateliers de l'éthique* 5, no. 2 (2010), 23-35, <https://doi.org/10.7202/1044312ar>. As examples, some of these shortcomings are: the political context of the Commission, the ongoing power relations in the state, the nature of the injustice being redressed, and the powers and capacity of the Commission.

from the first line of the Commission’s mandate that sought to create a firm division between the injustices of the past and its goal of a better future: “There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future.”²¹ This mandate sought to historicize injustices and in so doing discredits claims of their ongoing nature. However, good work has come about from the Commission, and these positive impacts continue to this day, everything from shaping the discourses of politics in Canada to impacting programming at public libraries and from causing introspection and action in faith communities to altering the priorities of school curricula. Additionally, despite a more restrictive mandate, the Commission’s Calls to Action included some more transformative demands, such as implementing a new Indigenous justice system or adopting a new royal proclamation to reassert a nation-to-nation relationship between the Crown and Indigenous peoples. Because of this, I would rather view transformative political redress as something that can exist alongside affirmative redress as opposed to being entirely in lieu of or antithetical to it.

Not reinforcing a strict antagonistic relationship between affirmative and transformative redress builds on an approach put forward by Paul Muldoon and Andrew Schaap. They analyze two case studies relating to Indigenous peoples in Australia: removing Indigenous children from their families (which resulted in Prime Minister Rudd’s apology for the ‘Stolen Generation’) and the assertions of Indigenous sovereignty (which resulted in the protest ‘Aboriginal Embassy’ on the lawn in front of the Parliament building).²² Using Fraser’s terminology, these two

²¹ Truth and Reconciliation Commission of Canada, “Appendix 1: The Mandate of the Truth and Reconciliation Commission,” in *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (www.trc.ca, 2015), 339, https://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf. Also, the TRC did not have the power to subpoena, render judgements, or ‘name names’ of those directly responsible for individual abuses.

²² Paul Muldoon and Andrew Schaap, “Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia,” in *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair*, ed. Alexander Keller Hirsch (New York: Routledge, 2012), 185.

phenomena can be contrasted by “the level at which the injustice is addressed.”²³ The former is focused on the effects of injustice and the latter on the causes. In their analysis, Muldoon and Schaap do not “privilege the pursuit of sovereignty over the pursuit of reconciliation as a more ‘real’ or more ‘authentic’ expression of Aboriginal politics.”²⁴ Rather, they argue that these two political phenomena served different goals and that both were valid and important, but that it was the assertion of Indigenous sovereignty that ultimately forced the state to confront its own insecurity because this movement challenged the core of the state’s legitimacy. They were not critical of the apology, but they did recognize its shortcomings in being able to transform the relationship with the state. My approach will be similar: not to demonize or belittle affirmative redress, but merely to point out its limitations and how these limitations can be overcome.

Viewing affirmative redress as complementary to transformative measures also lessens the need to create a strict binary between the two, because despite Fraser’s distinction, these concepts surely exist on a spectrum.²⁵ There would be certain projects of redress that would simultaneously achieve both affirmative and transformational change. For example, constitutional change could transform the institutions of the state and make certain rights judiciable in the courts, but at the same time it could make symbolic changes that do nothing to alter the generative framework of an injustice. Conversely, it is imaginable that a prime minister or president could offer an appropriately crafted apology that has downstream transformative effects that would shape public discourse and public policy. I would not wish to preclude either of these scenarios (or anything akin to them). Viewing affirmative redress as (potentially) constructive also avoids the pitfall of professing that constitutional reform is some panacea for

²³ Fraser and Honneth, *Redistribution or Recognition*, 74.

²⁴ Muldoon and Schaap, “Confounded by Recognition,” 198.

²⁵ Perhaps the simplest demonstration of this spectrum would be monetary reparations, with payments on the lower end being affirmative and with larger payments better able to have transformative impacts for those aggrieved.

the ailments plaguing Canada or asserting that it is the best method of political redress. In many ways, using constitutional change as the means of redress embarks simultaneously on transformative and affirmative change. It is affirmative because it does further recognize and retrench identity, yet it is transformative because it does so by changing the generative framework of the injustice and altering the dynamics and decision-making structure of the state.

In order to understand how transformative redress could exist in addition to affirmative strategies, it is necessary to analyze the shortcomings of Indigenous-state redress in Canada. What follows is a cursory overview of secondary literature to draw out these shortcomings and further substantiate what an alternative (or additional) path forward may look like.

Jennifer Henderson and Pauline Wakeham argue the Canadian state has used a culture of redress to further embed the national myth Canada as a multicultural, peacekeeping country. Instead of meaningful political change and introspection, the state uses redress to reinforce the idealistic yet phantasmatic mythology of Canadian munificence.²⁶ They go on to assert that:

[T]he federal government's recent apology to Aboriginal peoples for residential schools has occluded broader consideration of the long history of colonial genocide and its other constitutive components such as the establishment of reservations, the expropriation of land and resources, the deliberate suppression and distortion of Indigenous languages, beliefs, and cultural practices, and the disruption of kinship networks, not to mention the present conditions of poverty, incarceration, and compromised health lived by many Aboriginal people in Canada.²⁷

They are also critical of the allowable scope of redress, arguing the politics of redress must appreciate the deep history of oppression: "a presentism that becomes myopic and overly celebratory risks occluding the complex history of struggle."²⁸ That is, by narrowing the possibilities of redress, you risk simplifying and devaluing the magnitude of injustices. This theme also comes up in a separate piece by Henderson: "Residential schooling was a project

²⁶ Henderson and Wakeham, "Introduction," 6-7.

²⁷ *Ibid.*, 12-3.

²⁸ *Ibid.*, 4.

fully continuous with the wider colonial project of dispossession and cultural genocide. The colonial project was much vaster than the institution of compulsory schooling designed to break kinship ties.”²⁹ That is, although the policy of residential schooling was horrific, egregious, and long-lasting, it still must be viewed within the greater context of colonial relations in Canada and as part of the colonial project, not as a simple policy anomaly.

Matt James has similar critiques on the limits that exist in the realm of redress politics. First, he is critical of redress for being moderated by the state, arguing that there is a “set of pervasive biases and taboos, which often constrain narrative revision projects in ways that insulate leading Canadian institutions and figures from scrutiny.”³⁰ This means that the state is unwilling to explore certain modes of redress, such as ones that seek to alter power relations within the state and the authority of the state. Without altering the state, there are limits on the efficacy and reach of redress politics. In a different piece, he argues a complementary line of reasoning: that ongoing colonial power relations in Canada hamper the ability to fully engage in redress. The same political system and institutions are still largely in place today as they were when the Indian residential school system was operating, and this hampered the Truth and Reconciliation Commission’s ability to fully engage in redress. The balance of power remains against those who have been wronged by those who continue to occupy positions of power, and the current manners of redress politics do nothing to alter these realities.³¹ Finally, James is also critical of the current dominant practices of engaging in political redress, arguing that redress in a neoliberal state is routinized and ritualized. As opposed to there being a full engagement by the

²⁹ Jennifer Henderson, “The Camp, the School, and the Child: Discursive Exchanges and (Neo)liberal Axioms in the Culture of Redress,” in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 66.

³⁰ Matt James, “Degrees of Freedom in Canada's Culture of Redress,” *Citizenship Studies* 19, no. 1 (2015): 36, <https://doi.org/10.1080/13621025.2014.883833>.

³¹ James, “Uncomfortable Comparisons,” 28.

state with the complexities of the past, redress politics is a formulaic procedure with a narrow range of eligible injustices and an emphasis by the state on cohesion and pacification.³² Again, the scope of redress is criticized for not being inclusive of the causes of injustice and because the state is not engaging in the full repertoire of potential ways to explore political redress.

Dale Turner (Temagami First Nation) is also concerned about the scope of the Truth and Reconciliation Commission. Turner argues a shortcoming of the Commission is that Indigenous self-government was not part of its mandate, and that “reconciliation must empower Aboriginal nations, and this empowerment necessarily involves opening the question of the sanctity of the Canadian state’s unilateral assertion of sovereignty.”³³ This would amount to a transformation of the state and a transformation of the relationship that Indigenous peoples have with it, but this was not something that the Commission was able to contemplate.

Similarly, Rosemary Nagy is critical of projects in redress that do nothing to decolonize the Indigenous-settler relationship, saying these superficial attempts serve to distract from the greater issue at hand.³⁴ Instead of actions that are more theatre than substance, she is looking for change that addresses colonialism. She argues the intent of the Indian residential school system must be understood so as to not trivialize its true significance as a colonial project:

[R]esidential schools are neither an unfortunate historical exception in the Indigenous–settler relationship nor a simple case of ‘education policy gone wrong,’ as Aboriginal Affairs Minister John Duncan stated in 2011. Rather, residential schools were part of ‘the contagion of colonization,’ the effects of which Indigenous people still encounter in daily structures of oppression.³⁵

³² James, “Neoliberal Heritage Redress,” 38-42.

³³ Dale Turner, “On the Idea of Reconciliation in Contemporary Aboriginal Politics,” in *Reconciling Canada: Critical Perspectives on the Culture of Redress*, ed. Jennifer Henderson and Pauline Wakeham (Toronto: University of Toronto Press, 2013), 101.

³⁴ Rosemary L. Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” *International Journal of Transitional Justice* 7, no. 1 (2013): 54, <https://doi.org/10.1093/ijtj/ijts034>.

³⁵ *Ibid.*, 57.

Nagy, like James, Henderson, Wakeham, and Turner, is critical of the current bounds of redress in Canada and the symptom-based understanding of the injustices being redressed. She wants redress efforts to extend beyond the residential school system and include causes as well.³⁶

This theme is a recurring critique on the current status of redress politics in Canada. Leanne Simpson (Nishnaabeg) asserts that in order for true reconciliation to come to fruition, the Canadian state must be willing to make adjustments to the unjust arrangements currently in place—we cannot just alter the manifestation or the extent of the oppression, we must end it.³⁷ Simpson argues in favour of a more substantive transformation of the relations of power within the state and of the relationship the state has with Indigenous peoples:

If reconciliation is focused only on residential schools rather than the broader set of relationships that generated policies, legislation and practices aimed at assimilation and political genocide, then there is a risk that reconciliation will ‘level the playing field’ in the eyes of Canadians. In the eyes of liberalism, the historical ‘wrong’ has now been righted and further transformation is not needed, since the historic situation has been remedied.³⁸

The crux of Simpson’s argument is that Indigenous political movements challenge the very basis for the existence of the state, whereas other movements take the state for granted and either implicitly or explicitly work within these confines. This understanding of Indigenous social movements is also taken up by Kiera Ladner: “Indigenous movements contest the very foundation of the Canadian state as a colonial construction while most theories of group politics and social movements take the state for granted.”³⁹ She argues this is a common theme to Indigenous political movements because the state, as it exists, does not serve Indigenous peoples.

Glen Coulthard (Yellowknives Dene) has similar concerns, but he expands his argument to recognition politics more broadly, which he sees tied to a liberal multicultural framework that

³⁶ Ibid., 72.

³⁷ Simpson, *Dancing on Our Turtle’s Back*, 18-21.

³⁸ Ibid., 22.

³⁹ Kiera L. Ladner, “*Aysaka ‘paykinit*,” 228.

seeks to reinforce the state's legitimacy as opposed to challenging it. He rejects the scope of recognition politics because it operates in a liberal state that espouses and normalizes liberal values: "the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend."⁴⁰ He argues that such a form of politics is not in line with the aspirations of Indigenous peoples as it is not a path to overcoming these barriers, but is instead a means to continue to be implicated in the state's intransigence. For Coulthard, there is little emancipatory potential in the politics of recognition; he argues that the "liberal recognition approach serves to foster unfree and non-mutual relations instead of free and mutual ones."⁴¹ When discussing redress politics more specifically, he is similarly skeptical about the scope of projects in redress and what exactly is being redressed, claiming that "Indigenous subjects are the primary object of repair, not the colonial relationship."⁴² That is, instead of addressing the colonial relationship and the violence committed by colonial aggressors, the politics of redress is concerned with 'fixing' Indigenous peoples. For Coulthard, redress politics fails to challenge the generative framework for the injustice. It focuses on healing for those aggrieved as opposed to challenging the hierarchical and colonial structures that allowed the aggressors to cause harm in the first place. This form of politics does more to assuage settler guilt than to transform and ameliorate the socioeconomic position and political status of Indigenous peoples, while also doing nothing to hold perpetrators accountable.

⁴⁰ Glen Coulthard, *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 3. He goes on to argue that not only does the state place value on liberalism, but it also de-values and delegitimizes non-liberal or anti-liberal perspectives.

⁴¹ Glen Coulthard, "Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice," in *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations*, ed. Leanne Betasamosake Simpson (Winnipeg: Arbeiter Ring, 2008), 189.

⁴² Coulthard, *Red Skins, White Masks*, 127.

Courtney Jung argues there are broadly three main areas in which the goals of Indigenous peoples and the state may be at odds in transitional justice projects in non-transitional societies:

First, governments and Indigenous peoples may differ over the scope of injustices that transitional justice measures can address. Second, governments may try to use transitional justice to draw a line through history and legitimate present policy, whereas Indigenous peoples may try to use the past to critique present policy and conditions. Third, governments may try to use transitional justice to reassert their sovereign and legal authority, whereas Indigenous peoples may try to resist this strategy, and even make competing claims to sovereignty and legal authority.⁴³

This shows the starting points for Indigenous peoples and the state can be incredibly different. While the state looks narrowly at residential schooling, claims injustices are something that occurred in the past, and seeks to reassert its power, Indigenous peoples may be looking to rectify a broader set of injustices, recognize their ongoing nature, and contest the sovereignty of the state as a whole. Jung argues “the apology and the [Indian Residential Schools] Settlement Agreement have been used in part to limit Indigenous demands for social justice and constitutional transformation.” For the Canadian state, there are certain types of change that are neither possible nor desirable, and relinquishing some degree of power seems to be one of them.

This analysis of the secondary literature demonstrates that redress politics suffers from being ‘superficial and not completely beneficial,’ as this research began by asserting. These authors point to issues with the constellation of practices that comprise redress politics, the sincerity of these conversations, the scope of considerations of state redress, and the context in which this form of politics occurs. This is all to say that although the demands and aspirations have demonstrably necessitated sincere action by the state, there has been (and continues to be) reluctance by the state to meaningfully engage in redress. Employing the terminology of Fraser, many of these themes can be summed up thusly: redress politics in Canada does not involve

⁴³ Courtney Jung, “Walls and Bridges: Competing Agendas in Transitional Justice,” in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, ed. Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016), 358.

transformative change to alter the core of the Indigenous-state relationship, and the state offers only the prospect of *affirmative* change.

Redress Constitutionalism

The preceding analysis of secondary literature begs the question of how redress politics might overcome a symptom-oriented approach and create a forum amenable to transformative political change, especially one plagued by the power imbalances inherent to a settler-colonial state. I propose that renewed scholarly attention should be paid to constitutional change as a possible means of redress. This redress would be *transformative* because of the tremendous potential constitutional change has to alter political relationships and the functioning of the state.

To overcome a symptom-oriented approach to redress and rectifying historical injustices, I will again turn to Fraser. Fraser attempts to simultaneously place value on a politics of recognition and avoid what she perceives as the many pitfalls of identity politics. She does this by proposing an understanding of recognition as it relates to social status:

I shall consequently propose ... treating recognition as a question of social status. From this perspective, what requires recognition is not group-specific identity but the status of individual group members as full partners in social interaction. Misrecognition, accordingly, does not mean the depreciation and deformation of group identity, but social subordination—in the sense of being prevented from participating as a peer in social life. To redress this injustice still requires a politics of recognition, but in the ‘status model’ this is no longer reduced to a question of identity: rather, it means a politics aimed at overcoming subordination by establishing the misrecognized party as a full member of society, capable of participating on a par with the rest.⁴⁴

Using this framework, justice for a group occurs when there is an appropriate social, legal, political, and economic milieu in which they are able to participate on an equitable footing with others. Conversely, an injustice occurs when a group is subordinate and is thus unable to

⁴⁴ Nancy Fraser, “Rethinking Recognition,” *New Left Review* 3 (May/June 2000), 113, <https://newleftreview.org/issues/II3/articles/nancy-fraser-rethinking-recognition>. That is, being thought ill of is merely an *effect* of the *cause* of being denied the status of being a full partner.

participate “on a par with the rest.” Fraser’s understanding of justice—akin to her differentiation between affirmative and transformative change—is concerned with causes over effects:

To be misrecognized, accordingly, is not simply to be thought ill of, looked down upon or devalued in others’ attitudes, beliefs or representations. It is rather to be denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem.⁴⁵

Recognition is central to her understanding of justice because misrecognition is a demonstration of entrenched subordination, and entrenched subordination is a violation justice.

Fraser also provides an approach to rectify these injustices: “Redressing misrecognition now means changing social institutions—or, more specifically, changing the interaction-regulating values that impede parity of participation at all relevant institutional sites.”⁴⁶ This approach is highly congruous with the content of this research: that changing institutions—in our case the Canadian constitution—can enable and propagate justice within a state. Although Fraser speaks quite broadly about changing *social* institutions, this analysis is narrower and only considers *state* institutions since it is only *state* redress that is being analyzed.⁴⁷

For the constitution to be an instrument for engaging in state redress—or more precisely, for constitutional change to redress specific historical injustices and seek to rectify unjust constitutional arrangements—is what I call *redress constitutionalism*. Constitutional change allows for transformative change because of the social, political, and legal roles it has in a state. Although there is a symbolic element to the act of constitutional change, the transformative elements of constitutional change are what are of interest here: altering governance systems, a

⁴⁵ Ibid., 113-4.

⁴⁶ Ibid., 115.

⁴⁷ Fraser also argues that—in a globalizing work with transnational forces and the decline of the state—domestic politics are not always the ideal forum for rectifactory political change. Because the state “partitions political space in ways that block many who are poor and despised from challenging the forces that oppress them,” justice-seeking groups may have to look beyond the institutions of the state. While Fraser does not seek to dismiss the importance of the state, she does recognize that an over-reliance on the state for justice is out of synch with many complexities of the modern world. Fraser, “Reframing Justice in a Globalizing World,” 78 and 81.

reconfiguration of sovereignty, having different actors making the decisions of a state, and the different policies and laws that results from these changes.⁴⁸ We can identify four features of redress constitutionalism—it is *retrospective*, *regretful*, *reparatory*, and *constitutional*.

Redress constitutionalism is *retrospective* in that the constitutional vision/amendments are backward-looking and responding to some event or some constitutional arrangement in the past. The proposed changes must recognize and be in conversation with the past. This is in line with the United Nations resolution on reparations for victims of human rights violations, where it is explicit that a statute of limitations does not apply.⁴⁹ However, despite this requirement for retrospection, a constitution that embraces redress also has a forward-looking mandate to guide a political community to overcome past injustices. James Tully argues that Canadian constitutionalism is quintessentially in conversation with the past: “Canadian federalism consists of the continual negotiation ... that has been slowly woven together and worn smooth over centuries of criss-crossing and overlapping interactions, from the first Haudenosaunee (Iroquois)-Canadian federal treaty at Trois-Rivières in 1645 to the Charlottetown Accord of

⁴⁸ The point here is not to minimize the value of symbolic change, but just to stress that the purely symbolic aspect is not the primary focus of this analysis. The symbolic element of constitutional change is under consideration in this research in the sense that it is connected with the more transformative elements through the idea of recognition, as will be discussed later. As Tully argues, “a demand for recognition is never ‘merely symbolic’ It alters, in complex and even massive ways, the social, economic, and political relations of power.” James Tully, “Introduction,” in *Multinational Democracies*, ed. Alain-G. Gagnon and James Tully (Cambridge: Cambridge University Press, 2001), 15. Similarly, when discussing Quebec’s demands during the Meech Lake negotiations, Charles Taylor attests to the importance and the ramifications of symbolic constitutional change: “Anyone who can use the expression ‘just symbolic’ has missed something essential about the nature of modern society.” Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy Laforest (Montreal: McGill-Queen’s University Press, 1993), 194.

⁴⁹ United Nations General Assembly, Resolution 60/147, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” A/RES/60/147, 1 (December 16, 2005), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>.

1992.”⁵⁰ That is, Canadian constitutionalism is retrospective because constitutional conversations are imbricated in past negotiations and future changes connect with and build on this history.

Redress constitutionalism is also *regretful* of some element of the past. It not only is looking back at some injustice, but is also remorseful about it. The UN resolution refers to this as “keep[ing] faith with the plight of the victims,”⁵¹ in that the effects of the injustice must be centred and brought to light. Martha Minnow speaks of a need for projects in historical justice to “condemn”⁵² the past, serving to both acknowledge the damage of past wrongs and to help create a distinction from the unjust past and a newly just future. This requires the state—as the transgressor—assuming a responsibility for action.

In looking back at the past with regret, redress constitutionalism is also *reparatory* in that it seeks to correct the injustices that were perpetrated or the principles that were violated. The UN resolution speaks multiple times about the importance of corrective action. The resolution is premised on the importance of “Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels” and it later requires that any corrective actions must be “Adequate, effective and prompt.”⁵³ Making this reparatory action more distinctly constitutional, redress constitutionalism is premised on the idea that groups are not on an equal footing and that constitutional change is required to rectify this. This does not mean that all justice-seeking

⁵⁰ James Tully, “Diversity’s Gambit Declined,” in *Constitutional Predicament: Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen’s University Press, 1994), 161. Tully is using the word “federalism” not strictly to refer to the operation federal-provincial dynamics, but in the broader sense of how Canada’s diversity interacts with and comes to understand the breadth of actors and identities in Canada.

⁵¹ UN General Assembly, “Guidelines on the Right to a Remedy and Reparation,” 1.

⁵² Martha Minnow, “Historical Justice,” in *A Companion to Contemporary Political Philosophy*, 2nd ed., ed. Robert E. Goodin, Philip Pettit, and Thomas Pogge (Malden: Blackwell, 2007), 622.

⁵³ UN General Assembly, “Guidelines on the Right to a Remedy and Reparation,” 1 and 7.

constitutional change is an example of redress constitutionalism. Whereas conceivably all constitutional amendments would be aiming to correct some shortcoming or make some improvement to a state (or could at least be marketed as such), constitutional change oriented towards redress regrettably addresses one or more specific aspects of the constitutional arrangement that was an injustice against a specific group. Redress constitutionalism requires that different groups with different histories and needs are treated as such in the constitutional framework in order to rectify historical injustice. Tully refers to this as enabling “appropriate forms of self government” for groups seeking it.⁵⁴ What is appropriate looks different depending on their situations and aspirations. For example, nationalist and Indigenous groups might be seeking their own political institutions while multicultural groups and women might be seeking explicit inclusion in a manner that is reflective and supportive of their position in society.

Finally, redress constitutionalism—distinct from other projects in or methods of historical justice—is simply *constitutional*. The UN resolution speaks of the need for “non-repetition” and the “cessation of continuing violations,”⁵⁵ and constitutional change—through modifying the power relations within a state and serving to constrain government power—can help to achieve these goals. Because redress constitutionalism focuses on modifying a foundational institution to the state, it can serve as a way of overcoming the shortcomings of redress politics that were raised in the previous section. Jung concludes the success of transitional justice measures in non-transitional societies (such as Canada) must be “measured by [their] capacity to transform the playing field.”⁵⁶ Instead of being reinforced and legitimized through typical projects of redress,

⁵⁴ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 4.

⁵⁵ United Nations General Assembly, “Guidelines on the Right to a Remedy and Reparation,” 8. As will be discussed below, other UN documentation in fact speaks of the necessity of constitutional change in situations of transitional justice to achieve these goals.

⁵⁶ Jung, “Walls and Bridges,” 388.

the structure and functioning of the state must be addressed for them to be successful, and this is something that would be accomplished through constitutional change.

Although there will inevitably be detractors to the approach of classifying or even seeing the value of constitutional change in redress, treating constitutional change as a part of redress is ultimately a more appropriate understanding of the roots of historical justice. The discourses and practices of historical justice are deeply linked with those of transitional justice. Hannah Wyile, for example, notes: “the mechanisms typically associated with transitional justice—such as truth commissions, state apologies, reparations, and a variety of other forms of redress—are increasingly being invoked and implemented in established democracies that are not considered to be in the midst of political transformation.”⁵⁷ Stephen Winter analyzes how the practices of transitional justice play out in established democracies. He argues that even though these settler states have not recently undergone significant transitions, they are still using the practices and language of transitional justice. He argues “it is necessary to use the conceptual tools of transitional justice to describe redress politics in established settler polities”⁵⁸ even if there is no transition in the strictest sense of the word.

Moreover, constitutional change is viewed as a necessary part of transitional justice. In 2010 the United Nations issued a framework for states seeking to engage in transitional justice. The document outlined five components of this work: prosecution, truth seeking, reparations, national dialogue, and institutional reform. On the importance of institutional reform, it states:

Public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. By reforming or building fair and efficient public institutions, institutional

⁵⁷ Hannah Wyile, “Towards a Genealogy of Reconciliation in Canada,” *Journal of Canadian Studies/Revue d'études canadiennes* 51, no. 3 (Fall 2017): 602-3, <https://www.muse.jhu.edu/article/695715>.

⁵⁸ Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (London: Palgrave Macmillan, 2014), 5.

reform enables post-conflict and transitional governments to prevent the recurrence of future human rights violations.⁵⁹

Reforming the institutions of the state is therefore one of the necessary requirements for transitional justice to occur and help mitigate against the repetition of injustice. Constitutional change can facilitate the transformation of the state from an authoritarian to a democratic one and constitutions serve, at least in principle, to limit the overall authority of states. Constitutional change can provide safeguards to historically subordinated groups, such as through the protection of certain rights or the allocation of certain jurisdictional authority.

Even though there are similarities between historical and transitional justice and constitutional change is an integral part of the latter, constitutional change is not employed as part of the repertoire of historical justice. Winter puts forward a definition of redress as the assemblage of “practices of moral rectification in response to wrongdoing.”⁶⁰ *State* redress, more specifically, is that which is “directed by states towards those who are injured by state wrongdoing.”⁶¹ Despite this understanding of what redress could be, constitutional change is not viewed as necessary for a country that is already viewed as a democracy such as Canada. Without constitutional change, the constellation of practices available for redress is limited, and this must be challenged and corrected to more fully engage with the demands and aspirations of aggrieved groups. A common argument against redress is that there is “limited if any evidence that projects pursuing historical justice pay off in terms of preventing or deterring future atrocities,”⁶² but through using constitutional change, this can be actively worked for either by constraining the power of the state or altering decision-making processes.

⁵⁹ United Nations, “Guidance Note of the Secretary General: United Nations Approach to Transitional Justice,” (United Nations, March 2010), 9, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

⁶⁰ Winter, *Transitional Justice in Established Democracies*, 4.

⁶¹ *Ibid.*, 4.

⁶² Minnow, “Historical Justice,” 625.

The Canada Round serves as an excellent case study for viewing constitutional change as an exercise in redress. As will be demonstrated in the chapters that follow, the national Indigenous organizations involved in the Canada Round were deeply interested in transforming the place of Indigenous peoples within Canada. They were not seeking to work against the state, but were instead looking to work with government actors to alter the governing arrangements of Canada. They wanted these changes to rectify their exclusion from decision-making that directly affected their well-being. Broadly speaking, they viewed this exclusion as an injustice that resulted in the ongoing subordination of First Nations, Inuit, and Métis peoples in and by Canada. Constitutional change was an ideal way to bring about this change because it was already a preoccupation of Canada and because it allowed these groups to challenge the power and functioning of the state (as opposed to purely affirmative approaches to redress in which the state would seek to reassert its legitimacy, quell dissent, and manufacture a clear division between an unjust past and a newly-just future). The views of national Indigenous organizations during the Canada Round serve as a valuable foray into understanding the broader project of how constitutional change can serve to rectify historic injustices, thus expanding the scope of redress and better aligning it with the practices of transitional justice.

Chapter Outline

The body of this research will progress in two substantive chapters followed by a brief conclusion. The first chapter will provide an overview of constitutional change as an instrument of political redress in Canada. This overview will pursue two related objectives: first, it will explain the important place of the constitution within Canadian political life. The constitution's prominence, the rise of constitutional supremacy, the increasing predominance of constitutionally-oriented politics, and the constitution's durability all attest to this importance.

Second, there will be a brief history of the patriation and Meech Lake eras in order to demonstrate there is precedent in Canada for constitutional change to act as a means of redress. During patriation, the number of constitutional actors grew, rights were enshrined in the constitution, and the citizenry's relationship with the constitution changed. However, patriation and Meech Lake were also missed opportunities in serving as redress-seeking ventures. Put simply, the expectations placed upon the constitution during this period had changed and grown more than the constitution and the processes of constitutional change. This created the expectations for future changes and brought about the Canada Round.

In the second chapter I focus on the evolution of redress constitutionalism in the Canada Round through an analysis of primary sources. The Canada Round involved a recognition of the inherent right of Aboriginal self-government; a preamble that stated the values of the country; a commitment to Canada as a social and economic union; reforms to the Senate, House of Commons, and Supreme Court; and an increase in provincial powers, to name but a few of the proposed changes.⁶³ The proposed Charlottetown Accord—the end result of the Canada Round—came about after a citizens' forum, government reports, a parliamentary committee, numerous submissions from citizens and groups, and executive deliberations that included four national Indigenous organizations. In this chapter I demonstrate that over the course of the Canada Round there was a significant shift toward adopting the principles of redress constitutionalism, but not as significant of a shift as was desired by the four national Indigenous organizations. For these organizations, constitutional change clearly represented a tremendous opportunity to transform the political and socioeconomic standing of Indigenous peoples in Canada and to redress past injustices.

⁶³ Canada, Privy Council, *Consensus Report on the Constitution: Charlottetown, August 28, 1992, Final Text* (Ottawa: Privy Council, 1992).

Chapter 1: The Importance, History, and Potential of Constitutional Politics in Canada

A constitutional process dealing with issues of nationhood, survival, identity, and community at a time of crisis shakes the inertia and ongoing characteristic of society in normal times. When the dust has settled on such existential episodes, they should receive intense academic scrutiny for the light they may throw on what normality conceals.¹

In this chapter I demonstrate that constitutional change in Canada has long been imbricated with conversations of redress and therefore viewing constitutional politics through the lens of redress can be a useful corrective in understanding constitutional discourses and motivations. Many constitutional aspirations of governmental and social movement groups have sought to redress past injustices and allow different groups the ability to participate more fully “on a par with the rest.” Given the importance of the constitution in shaping the context of Canadian political life, the results of constitutional change have the potential to effect transformative redress for marginalized groups. However, I will also show that during the patriation and Meech Lake periods there were limitations on engaging in redress constitutionalism, hence a desire for further constitutional dialogue. To begin this analysis, I start with an explanation of the relevance of studying the constitution of Canada through a discussion of the continued importance of the constitution in Canadian political life, despite a notable hiatus from megaconstitutional² politics.

1.1: The Relevancy of Studying the Canadian Constitution

The quote from Alan Cairns that begins this chapter helps to establish the necessity and relevancy of this research: the dust, so to speak, has sufficiently settled on the tumultuous constitutional affairs that defined (and arguably plagued) Canadian politics for a generation.

¹ Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas Williams (Toronto: McClelland and Stewart, 1995), 280.

² ‘Megaconstitutional’ politics is defined here in the manner put forward by Russell: as an intense and enduring form of politics “concerned with reaching agreement on the identity and fundamental principles of the body politic.” Russell, *Constitutional Odyssey*, 75.

However, the academic work on Canadian megaconstitutional politics subsided with the decline of the practice of it. This research will re-center and re-scrutinize constitutional debates and documents to understand how constitutional change in Canada was viewed as a means to engage in political redress in response to historic constitutional exclusion and imbalance. It will look at the aspirations of (the expanded base of) constitutional actors to see what reparative goals they had and how constitutional change was viewed as a means to achieve them.

The Supreme Court of Canada has asserted “[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.”³ The “principles held as fundamental” in the Canadian constitution influence political decision making by defining the scope of political power and articulating by whom it can be used and how. For example, sections 28 and 15 of the Charter limit the ability of governments to enact policies that treat women as lesser, the principle of federalism prohibits the federal government from legislating in areas of exclusive provincial jurisdiction, and the treaties define the Crown’s relationship with many of the First Nations of this land. Although there are these “restrictive” elements to the Canadian constitution, there are concomitant empowering elements as well. For the examples listed above, women’s group (or individual women) have recourse in the courts should a government enact policies contrary to gender equality, the Province of Quebec—as the principal initiator of federalism—is able to legislate in certain areas, and the treaties grant both sets of signatories certain rights and abilities.

Redress constitutionalism relies on these empowering elements of a constitution—that groups seeking redress can attain justice through constitutional change such as a Charter

³ Re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 48.

provision, some degree of jurisdictional authority, or a constitutional recognition of distinctness. Changing an unjust constitutional arrangement therefore serves to challenge and change a group's subordinate status. This helps to overcome many of the shortcomings of redress politics identified and discussed in the introductory chapter.

This form of redress has the potential to be *transformative* also because of the constitution's durability. The great constitutional upheavals in Canada only came about after significant effort because substantive constitutional change in a democracy is not meant to be simple—a reality that Tully succinctly describes: “The reform of a constitution by agreement rather than force is the most difficult task in politics.”⁴ In particular, Canadian constitutionalism is marked by a tremendous propensity for stasis, a phenomenon referred to as “constitutional conservatism.”⁵ However, it is this conservative nature that helps to lend it such importance: any successful changes are granted semi-permanence both in the legal framework and the political bedrock of the country. Constitutions temper ephemeral wishes with the fundamental principles that underlie the state: “Constitutions reflect the heart and soul of a people. They embody the fundamental principles, and shared values and beliefs on which the citizens of a country base their political institutions and laws.”⁶ Due to this durability, changing a constitution can advance the interests and goals of groups of people, reflect certain ideas, and legitimate modes of

⁴ Tully, “Diversity’s Gambit Declined,” 151. This quote seems to be a direct reference to one by Machiavelli: “And one should bear in mind that there is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things.” Niccolò Machiavelli, “The Prince,” in *The Portable Machiavelli*, trans. and ed. Peter Bondanella and Mark Musa (New York: Penguin Books, 1979), 94.

⁵ Alan C. Cairns, “The Politics of Constitutional Conservatism,” in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen, 1983), 28. Cairns described that constitutional conservatism has a multitude of causes: the different views of the constitutional actors, the difficulties of fulfilling the requirements of an amending formula, and the unwillingness of actors and institutions to sacrifice power.

⁶ Brooke Jeffrey, *Strange Bedfellows, Trying Times: October 1992 and the Defeat of the Powerbrokers* (Toronto: Key Porter, 1993), 18.

governance by granting them institutional entrenchment in a way that (comparatively simpler) legislative or policy changes cannot.

The constitution creates a framework for intra-state and citizen-state relationships, relationships that are particularly relevant for redress. Because the constitution helps to set the stage in which politics occurs and defines the scope and legitimacy of political power, a change to the constitutional framework can transform these power relations and have substantial and long-lasting effects. As Fraser describes, injustices occur when groups are not able to participate in a society equitably, and so by altering the constitution this unequal participation can be addressed. To reiterate from the previous chapter, this is not to say that the constitution is the sole cause of any injustice or inequity, but merely that the constitution is closer to the roots of an injustice than the policies that result from the political processes that are enabled by and through the constitution. The Canadian constitution is not solely responsible for discrimination and inequality, but by legitimizing the authority and the formal mechanisms of the state, it privileges certain modes of governance while simultaneously ignoring and discrediting others.

The constitution is also important because of the role it plays in the lives of citizens in the post-Charter era. As Cairns argues: “The Charter brought new groups into the constitutional order.... It bypassed governments and spoke directly to Canadians by defining them as bearers of rights.... The Charter thus reduced the relative status of governments and strengthened that of the citizens who received constitutional encouragement to think of themselves as constitutional actors.”⁷ Regardless of one’s view on what the constitution *should* be, the role it *should* play in a state, and what relationship people *should* have with it, the Canadian constitution has demonstrably become increasingly pertinent to non-governmental actors since the Charter. This

⁷ Cairns, *Disruptions*, 109.

was not always the case in Canada, causing one commentator to quip: “if ordinary Canadians are not much interested in the constitution, it has been equally true that the constitution has not been much interested in Canadians.”⁸ Although to the Fathers of Confederation the relevancy of people to constitutional politics may have been “heretical,”⁹ in the post-Charter era, the constitution opened up new avenues for political action through lobbying, social movements, or seeking justice through the courts.¹⁰ As Ted Morton and Rainer Knopff attest, “the Canadian Charter of Rights and Freedoms is as much a political as a legal document.”¹¹

With the rise of constitutional supremacy in Canada, the Charter gave marginalized groups a chance to respond to the oppression, discrimination, and disenfranchisement that they faced.¹² There have been strong movements by marginalized groups—women, Indigenous peoples, national and ethnic minorities, the queer community—to get constitutional rights afforded to them through formal constitutional change or by using the judiciary to assert the existence of the penumbræ of rights. Constitutional recognition is not the end goal for these groups, but it can be a means to more substantive change in the lives of citizens. That is, groups seeking constitutional recognition were not seeking loose feelings of inclusion or superficial change, but rather wanted change because of the substantial benefits to constitutional recognition.¹³ In the context of this research, we will explore the regretful and reparatory

⁸ Reginald Whitaker, “Democracy and the Canadian Constitution,” in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen, 1983), 240.

⁹ Russell, *Constitutional Odyssey*, 3.

¹⁰ For views that this is for better or worse, see, respectively: 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, no. 1 (2002): 3-29, <https://www.jstor.org/stable/3233166>; and F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview, 2000).

¹¹ Rainer Knopff and F. L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), 1.

¹² Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: University of British Columbia Press, 2006), 2; and Douglas E. Williams, “Editor’s Preface,” in *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed. Douglas E. Williams (Toronto: McClelland and Stewart, 1991), 8.

¹³ James, *Misrecognized Materialists*.

prospects of constitutional change as the more substantive change being sought. Even the Supreme Court has stated: “with the adoption of the Charter the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.”¹⁴ This means the constitution occupies a special place in Canadian politics: “the goal of constitutional supremacy is to prevent constitutional reform from becoming or remaining a charade.”¹⁵

However, since the failure of the 1995 Quebec referendum, megaconstitutional change in Canada has been a nonstarter in Canadian politics.¹⁶ It is worth reiterating the goal of this analysis is not to prescribe a need to reengage in this form of politics but is rather an attempt to appreciate the Canada Round for its redress potential and to offer a corrective to our understanding of this era of politics and the differing goals of this time. Canada’s lackluster performance in the area of constitutional change does not mean there are not valuable lessons in the Canada Round, and nor does it discredit the transformative potential of constitutional change.

The following discussion in this research looks at constitutional change as a means to redress past injustices and exclusions—and to re-employ the terminology of Fraser—to serve as an instrument of transformative political redress that creates a milieu in which different groups are able to participate “on a par with the rest.” The remainder of this chapter provides an overview of the patriation and Meech Lake periods to provide context for the existence of the Canada Round and the utility of viewing it through the lens of redress politics.

¹⁴ Reference re Secession of Quebec, para. 72.

¹⁵ Henderson, “Incomprehensible Canada,” 117.

¹⁶ Although there have been some desires to change the constitution in a more substantive way—such as the longstanding aspirations of the New Democratic Party for Senate abolition or the recent talk (and even a referendum) by certain ‘have’ provinces about a re-examination of the need for equalization—it has not been taken up earnestly and nor has it captivated the attention of the country in a manner akin to previous megaconstitutional dealings. Similarly, although there have been some changes to the constitution since 1995, they have in no way reached the ‘mega’ level.

1.2: Setting the Stage for the Canada Round: Redress During Patriation and Meech Lake

In this section I demonstrate that certain constitutional actors sought to use the constitution to redress past injustices during the patriation and Meech Lake eras of Canadian constitutional politics. These constitutional actors—both traditional governmental actors and a newfound class of constitutionally involved social movement and civil society groups—saw the existing constitutional framework as an injustice that required rectifactory interventions, such as a devolution of powers, constitutional recognition, or the entrenching of rights. These changes were pursued because of the important role of the constitution in Canada and the power of constitutional change. Throughout the following analysis the four features of redress constitutionalism—retrospection, regret, repair, and constitutionally focused¹⁷—will be used as lenses to view megaconstitutional¹⁸ dealings in Canada.

During patriation, the hopes of many politicians and citizens regarding the constitution were quite ambitious. The Pepin-Robarts Task Force on Canadian Unity issued a report in 1978 that stated “a large number of Canadians assume that it is in the political and constitutional arena that Canada’s problems will be primarily resolved. An expectation of this kind, when it grows strong enough, develops a momentum and integrity of its own.”¹⁹ The largest advocate for constitutional change at this time was Pierre Trudeau. Shortly after becoming prime minister, Trudeau released a document on his preferred constitutional arrangement:

¹⁷ The first two elements—retrospection and regret—help to differentiate a constitutionalism focused on *historical* justice from a constitutionalism focused on *social* (or other) justice. Historical justice explicitly (and regretfully) responds to a past injustice, while other forms of justice do not require an admission of wrongdoing.

¹⁸ Constitutional changes that never reached the ‘mega’ level, however, could also be viewed as responding to historical injustices and misrecognition and as seeking to create a more equitable playing field. This could include, for example, any of the constitutional amendments in Canada to reapportion seats in the House of Commons, establishing French and English as official languages of New Brunswick, and even changing the name of ‘Newfoundland’ to ‘Newfoundland and Labrador.’

¹⁹ Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, 1979), 5, <https://primarydocuments.ca/wp-content/uploads/2018/02/TaskForceUnity1979Jan.pdf>.

The Constitution ought also to reflect, in its statement of objectives, what Canadians expect of their country in the future: a country which will preserve its essential characteristics while accepting and nourishing the dynamics of change; a country which seeks both to enlarge and to make more nearly equal the opportunities available to all Canadians, wherever they live and whatever their background; and a country which seeks to contribute to the well-being of the peoples of the world, as well as to the interests of own citizens.²⁰

This vision of Trudeau for a centralizing, uniform constitution was tested by constitutional actors during patriation, and it was further challenged during the Meech Lake era.

1.2.1: Entrenching the Charter

The centerpiece of patriation was the Canadian Charter of Rights and Freedoms. Having an entrenched bill of rights had long been a desire of politicians who wanted to provide certain safeguards to the citizenry. After the human rights violations of the Second World War, it was believed that states needed to play an active role in protecting human rights. Moreover, this needed to be done in such a way that individual governments could not detrimentally interfere by instituting a political agenda based on the inferiority of certain persons. The institutions of the state, therefore, must constrain the powers of individual governments, so constitutional change was necessary.²¹ As it exists now, the Charter influences both federal and provincial laws.²² The ability of legislation to withstand a Charter challenge is something that factors into the scope and wording of a bill and it is a determiner of if it will even be pursued by a government.²³

²⁰ Pierre Elliot Trudeau, *The Constitution and the People of Canada* (Ottawa: Government of Canada, 1969), 6.

²¹ On the statutory side, in 1944 Ontario passed a bill against racial discrimination, the Douglas government of Saskatchewan passed a human rights code in 1947, and by the 1970s all ten provinces had human rights legislation in place. Federally, the Diefenbaker government passed a statutory bill of rights in 1960. For more, see: Roy J. Romanow, John White, and Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Thomson Carswell, 1984), 220-2

²² There are also symbolic differences, as has been demonstrated by empirical evidence showing that the Charter has become the defining national symbol Canadians most associate with, more so than the flag or the anthem. Statistics Canada, *Canadian Identity, 2013: Spotlight on Canadians: Results from the General Social Survey* (Ottawa: Minister of Industry, 2015), 4-5, <http://www.statcan.gc.ca/pub/89-652-x/89-652-x2015005-eng.pdf>.

²³ Janet L. Hiebert, "Governing Like Judges?" in *The Legal Protection of Human Rights: Sceptical Essays*, ed. Tom Campbell, K. D. Ewing, and Adam Tomkins (Oxford: Oxford University Press, 2011), 40-65.

Conversely, in the twenty-two years the federal statutory bill of rights was in effect prior to the Charter, only one aspect of a law was ever struck down for being in contravention to it.²⁴

Although there were arguments against constitutional entrenchment and the concomitant erosion of parliamentary sovereignty,²⁵ this mentality had generally lost in the court of public opinion. Even by 1972, a report of a parliamentary joint committee on constitutional affairs claimed: “We admit that an entrenched Bill of Rights would limit legislative sovereignty, but then parliamentary sovereignty is no more sacrosanct a principle than is the respect for human liberty which is reflected in a Bill of Rights.”²⁶ For the joint committee, it was clear that the trend to constitutional from parliamentary supremacy was a necessary tradeoff that enabled the state to better respect human dignity.

In debating the Charter, there was one point in the House of Commons where then-justice minister Chrétien made a statement that was retrospective, regretful, and reparatory. He remarked: “Part of our task is to recognize the injustice of the past, to say ‘never again shall rights be trampled upon’. Part of our task is to ensure that the enormous evolution in our values is reflected in our Constitution. That is what we are doing here today. We are building a modern Canada for tomorrow.”²⁷ This was a recognition that the Canadian constitution could play a role in rectifying injustices of the past and correcting unjust arrangements. Chrétien argued—albeit in a patriotic and idealistic way—that the constitution could seek to create a better future by being cognizant of historical (or current) injustices. However, Chrétien did not single out any group or

²⁴ This happened with the Drybones case, when the court struck down certain provisions of the *Indian Act* that made it illegal for status Indians to consume alcohol off reserve land. See: *The Queen v. Drybones*, [1970] S.C.R. 282.

²⁵ For example, Allan Blakeney and Sterling Lyon, the premiers of Saskatchewan and Manitoba (respectively) during patriation, argued that elected legislators—not unelected and unaccountable judges—should be the protectors of human rights in a democratic state. See: Russell, *Constitutional Odyssey*, 120.

²⁶ Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Final Report*, 28th Parl., 4th sess. (Ottawa: Queen’s Printer for Canada, 1972), 18.

²⁷ Canada, Parliament, House of Commons, *House of Commons Debates: Official Report*, 32nd Parl., 1st sess., vol., 7 (Ottawa: Queen’s Printer for Canada, 1981), 7379.

any injustice, and was thus more in line with the classically liberal and uniform aspirations of the Trudeau government. For example, Pierre Trudeau argued against apologizing for Japanese-Canadian internment. He stated in the House of Commons: “I do not think the purpose of a government is to right the past. It cannot rewrite history. It is our purpose to be just in our time.”²⁸ This approach is antithetical to being retrospective, regretful, and reparatory.

However, during patriation many constitutionally motivated actors took advantage of the opportunities presented with constitutional change to shift the priorities and direction of the state, and this challenged the idealized uniformity espoused by Trudeau. In many instances, these groups entered the constitutional arena not out of a desire to effect some grandiose political vision, but to repair the systems that resulted in systemic disenfranchisement and social subordination.²⁹ As James argues, “Trudeau’s attempt to promote national unity and civic pride by framing Canada as a multicultural country dedicated to human rights meant unprecedented official attention for movements employing discourses of equality and social justice.”³⁰

Many groups that presented to the Special Joint Committee on the Constitution of Canada hearkened back to the past in order to assert the legitimacy and the necessity of their constitutional claims. For example, Irwin Cotler of the Canadian Jewish Congress grounds his presentation in a discussion of the Holocaust: “It is that particular experience as victims and perhaps more importantly today our hopes and responsibilities as Canadians that inspire these remarks.”³¹ Similarly, Christine Bearehell of the Canadian Association of Lesbian and Gay Men

²⁸ Quoted in: Joan Bryden, “Not His Father's Son: With Apologies for Historic Injustices, Trudeau Goes Where His Dad Wouldn't,” *The National Post*, November 27, 2017, <https://nationalpost.com/news/politics/trudeau-makes-apologies-his-dad-wouldnt-for-historic-injustices>.

²⁹ James, *Misrecognized Materialists*, 12.

³⁰ *Ibid.*, 68.

³¹ Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st sess., (Ottawa: Queen’s Printer for Canada, 1981), issue 7: 80.

discussed the importance of an entrenched bill of rights in response to the state-led persecution and death of gay men in Nazi Germany.³² George Imai, Secretary of the Council of National Ethnocultural Organizations of Canada (CNEOC), told a personal story as a Japanese-Canadian who faced internment and who continued to face discrimination. For him, an entrenched charter was necessary because “our faith in our legislators is suspect even today”³³ and thus they could not be trusted to uphold basic human rights and dignity as they had failed miserably before. He wished for both regretful and rectifactory action by the state. Sebastian Alakatusery, Chairman of the Afro-Asian Foundation of Canada (AAFC), grounded his remarks in the “painful experiences ... endured by Afro-Asians on Canadian shores” such as the enslavement of Black people, racist immigration policies, Japanese internment, and racial segregation in Nova Scotia and Ontario.³⁴ Gordon Kadota of the National Association of Japanese Canadians (NAJC) echoed these themes to the committee: “Our history in Canada is a legacy of racism made legitimate by our political institutions, and we must somehow ensure that no group of Canadians will be subjected to the whims of political process as we were.”³⁵ He was therefore not just looking back at the past, but was seeking to create a more equitable future.

This emphasis on the past by “recounting past instances of Canadian discrimination and oppression”³⁶ helped create concrete constitutional visions for these groups. That is, there was a desire by many social movement groups to respond to and rectify the injustices of the past by creating a constitutional framework that would allow them participatory parity. For the NAJC, the Charter was a bare minimum: “A Charter of Rights entrenched in the constitution to prevent

³² Ibid., 24: 24-5.

³³ Ibid., 22: 76.

³⁴ Ibid., 32: 31.

³⁵ Ibid., 13: 5.

³⁶ James, *Misrecognized Materialists*, 69.

what we have gone through is the least that Canada can do to make amends for what has happened to us to and to ensure that such injustices will never be repeated.”³⁷ The CNEOC also spoke to the importance of the Charter in ensuring that a travesty such as what happened to Japanese-Canadians did not happen again. They compared Canada to the United States, and claimed that no Japanese-Americans were exiled because of the rights afforded to them in the American constitution.³⁸ The Ukrainian Canadian Committee used similar experiences—the internment of Ukrainian Canadians during the First World War—to advocate for a strong Charter, and they even argued against the proposed wording of the limitations clause for being “so broad in its application that it would do nothing to prevent a repetition of this kind of systematic abuse.”³⁹ Finally, both the AAFC and the National Black Coalition of Canada (NBCC) spoke about the importance of affirmative action in addressing the inequalities in Canada due to past and ongoing discrimination. Alakatusery advocated to the committee that: “Nonwhite Canadians continue to suffer discrimination in education, employment, job promotion, housing and recreational facilities, as well as unequal protection by law enforcement agencies.... The recommendations which we are presenting to you would allow the federal government to exercise a position of leadership in helping to redress this most unhealthy situation.”⁴⁰ One of his proposed ways of dealing with this was through entrenching affirmative action,⁴¹ something that did eventually come to fruition with section 15(2) of the Charter. Wilson Head, President of the NBCC, wanted affirmative action as opposed to simple equality to repair the past and work toward a more just future: “We believe that, in order to overcome the long,

³⁷ Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st sess., issue 13: 9.

³⁸ *Ibid.*, 22: 75-7.

³⁹ *Ibid.*, 14: 54.

⁴⁰ *Ibid.*, 32: 32.

⁴¹ *Ibid.*, 32: 33.

300-year history of discrimination against blacks in Canada, that affirmative action is a necessity.”⁴² All of these arguments reflected on past injustices and all of these groups sought to use constitutional change as a means of overcoming them. However, these arguments also posed a threat to Trudeau’s idealized uniform constitution because the groups were wanting their specific histories and realities to be explicitly and intentionally considered. Despite the progress that this advocacy made (such as a provision in the Charter that would require it be interpreted in a manner consistent with Canada’s multicultural heritage),⁴³ there was nothing explicitly regretful about the federal government’s concessions.

1.2.2: A Distinct Society Within (or Beyond) Canada

For Trudeau, patriation was a project in national unity, a symbol of connectedness and a way of binding the country’s disparate regions together in an increasingly globalized world. The Charter, as discussed above, was the centerpiece of this unity project. However, the entrenchment of equality provisions, legal rights, and fundamental freedoms was arguably not even the true core of Trudeau’s concerns. He cared deeply about the inclusion of Canada’s Francophone population within Canada, so language rights were of the utmost importance to his work. Even in the 1971 proposed set of constitutional amendments (the Victoria Charter), human rights provisions were relatively weak when compared to the present-day Charter, but the emphasis on language rights was very strong.⁴⁴

Broadly stated, there were two competing ideas for incorporating such rights. First, special status or additional legislative authority could have been given to the province of Quebec as the geographic and political home of the majority of Canada’s Francophone population,

⁴² Ibid., 22: 9.

⁴³ Russell, *Constitutional Odyssey*, 114.

⁴⁴ Deborah Coyne and Michael Valpy, *To Match a Dream: A Practical Guide to Canada’s Constitution* (Toronto: McClelland and Stewart, 1998), 126.

essentially creating a more robust form of asymmetrical federalism.⁴⁵ Second, the constitution could have granted language rights not to a province, but to all individuals by ensuring the equal status of French and English for those accessing services and programs of the federal government (and provincial governments, should they so choose). Trudeau was opposed to the former option because he saw granting special status to Quebec as a betrayal of the liberal ideal of equality, whether it be equality of individuals or equality of provinces.⁴⁶ The latter option—being both congruous with Trudeau’s liberal principles and contrary to Quebecois nationalism—became central throughout his patriation efforts.

Many leaders in Quebec, however, saw Canada-wide protection of the French language as neither an adequate solution for the security of Quebecois culture nor as an appropriate recognition of the role the government of Quebec has played (and should play) in this realm. This line of thought posed a direct attack on Trudeau’s preferred uniform, liberal constitution. It was unjust, Quebecois nationalists argued, for the constitution to not recognize the historic status that Quebec had within the British empire long before Confederation, being the government responsible for the preservation of French culture amid an environment deemed hostile to it—

⁴⁵ Quebec, of course, was not alone among the provinces in using patriation as a forum to address longstanding constitutional grievances and aspirations. Other provinces said that any constitutional change must be more than an attempt to appease Quebec. (Romanow, White, and Leeson, *Canada... Notwithstanding*, 16.) For example, there was a strong push (focused in Alberta) to reform the Senate and redistribute its seat allocation, and Allan Blakeney, the Saskatchewan premier, wanted assurances in section 92 of the *British North America Act* that provinces would get control of their natural resources, something denied to the Prairie provinces until 1930 despite all other provinces having this authority. (Allan Blakeney, “Speech by Allan Blakeney to Queen’s University Law Students – April 10, 1980,” in *Speeches and Interviews by Hon Allan Blakeney, Premier of Saskatchewan in the Course of a Trip to Ontario and Quebec, April 1980* (Regina: Government of Saskatchewan, 1980), 25.) Quebec is being highlighted here because of the central role they played in the patriation discussions, similar to the central role they played at the time of Confederation in requiring a federal system. (P. B. Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers and the Union of British North America* (Toronto: University of Toronto Press, 1964), 127 and 328; and Robert C. Vipond, “1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered,” *Canadian Journal of Political Science* 22, no. 1 (1989): 3-26, <https://doi.org/10.1017/S0008423900000810>.)

⁴⁶ However, the ultimately successful 1982 amendments did include a provision that English language education rights did not apply to Quebec unless the Quebec legislature voluntarily consented to it. See: Canada, *Constitution Act, 1982*, Part 2, s. 59, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, <http://laws-lois.justice.gc.ca/eng/const/page-16.html>.

something exacerbated with the post-war centralization of power that occurred in Canada. Put another way, for Quebec nationalists, a uniform constitution not only failed in being reparative, but it also served in being yet another injustice against the Quebecois.

In 1979, the (Parti Québécois) government of Quebec asserted they wanted a new deal between Quebec and the Rest of Canada (ROC), a deal based on a partnership between two equal nations that had not come to fruition within the federal framework.⁴⁷ They claimed the dualistic conception of Canada, in which two linguistic and cultural nations came together to form a single state, was not compatible with federalism. They viewed this as an injustice that hampered the Quebecois nation from flourishing and exercising more robust self-determination: “Nowhere in the British North America Act is there talk of an alliance between two founding peoples, or of a pact between two nations; on the contrary, there is talk of political and territorial unity, and of a national government which essentially dictates the direction the regional governments are to take.”⁴⁸ This lack of autonomy, according to the government of Quebec, had caused the ROC to continually aggrieve Quebec.⁴⁹

For the Parti Québécois, a sovereignty-association framework was a means of addressing their subordination and redressing an unjust constitutional arrangement. The status quo was deemed oppressive and unacceptable, incremental changes were inappropriate and insufficient, and a governing arrangement more suitable to their unique needs was proposed. In this sense, the Parti Québécois saw the sovereigntist movement as a redress endeavour: it was all about righting historical wrongs and creating a constitutional framework better suited to serve Quebec’s unique

⁴⁷ For a fulsome discussion and description of sovereignty-association, please see: Quebec, *Quebec-Canada: A New Deal: The Quebec Government Proposal for a New Partnership between Equals: Sovereignty-Association* (Quebec: Éditeur Officiel du Québec, 1979).

⁴⁸ *Ibid.*, 9. The validity of such a textualist take on the constitution would, however, be highly debatable.

⁴⁹ *Ibid.*, 11.

needs.⁵⁰ In their manifesto on the importance of increasing Quebec's powers there was a lot of retrospection on the past and the history of injustices faced by the Quebecois, and the Parti Québécois asserted that constitutional change could be a way of addressing this:

[I]t is important to remember that if, from the government's point of view, sovereignty-association is a necessary formula for the future, its necessity comes above all from the fact that it will enable Quebecers to manage their own affairs freely and use as they wish the instruments of sovereignty will give them. Sovereignty-association, in short, is *not an end in itself, but a means*.⁵¹

Although there was discontentment with the constitution in the ROC, the other premiers were generally suggesting comparatively moderate changes to federalism, not a more substantive overhaul to it: "the Government of Québec has reached the conclusion that our development as a people requires the transformation of today's federalism into an association in which Québec ... would have all the powers of a sovereign country, just like Canada."⁵² Therefore, through self-determination and increased jurisdiction, Quebec wished to end the subordination of a Francophone population that could easily outvote and ignore in federal institutions.

Ultimately, Quebec's referendum in 1980 on sovereignty-association failed, and the newly reinstated Trudeau government sought to constitutionally address the feelings of exclusion Quebec was facing. And as has been told and retold countless times in Canadian constitutional histories, the patriation package that eventually passed did so without the consent of René Lévesque and the Quebec government. Viewed through the lens of redress, patriation failed in being regretful and reparatory for Quebec nationalists, and it in fact constituted yet another injustice that required correction. Despite Trudeau's argument that Quebec had sent seventy-two Liberal members to the House of Commons federally, the absence of provincial actors from

⁵⁰ This is, of course, but one interpretation of the sovereigntist/separatist movement. It could also be argued that equitable frameworks can best be created by establishing linkages and mutual obligations between people(s), and this would of course be better substantiated under a federal or unitary system.

⁵¹ *Ibid.*, 65, emphasis added.

⁵² *Ibid.*, vii.

Quebec in approving of patriation was significant in a federal system of divided sovereignty where first ministers were prominent (and legally legitimate) constitutional actors.

This exclusion led to efforts by a new Brian Mulroney government to include Quebec in the constitutional fold.⁵³ This happened first in 1987 with the Meech Lake Accord, an attempt to redress not only Quebec's exclusion from patriation, but also the unequal historical status of Quebec vis-à-vis the ROC. As Patrick Monahan argues, the very existence of this Quebec round of constitutional negotiations was an admission by the ROC that Quebec was wronged during the patriation negotiations.⁵⁴ The Meech Lake Accord, similar to Quebecois nationalism more broadly, was antithetical to the uniformity previously espoused by the Trudeau government due to its Quebec-centric orientation. The accord was concocted by a political rival using a rival constitutional vision. Meech Lake was also premised on being regretful, and this too was also rival (if not antithetical) to Trudeau's approach.

The Meech Lake Accord is an example of redress constitutionalism attempting to respond to and repair past injustices. Not only had Quebec disapproved of patriation, but the province also felt aggrieved by other actions of the federal government that infringed upon their jurisdiction and nationhood. To address this, Meech Lake granted increased power over immigration matters and Supreme Court appointees while also recognizing Quebec as a distinct society within Canada.⁵⁵ This would have given Quebec greater control over its future while also explicitly recognizing the dualistic conception of Canada. The Meech Lake Accord further affirmed the nationhood of Quebec by granting it authority to promote the Quebec identity and

⁵³ Under section 37 of the *Constitution Act, 1982* there was a legal imperative to host a constitutional conference, but this was only required for "constitutional matters that directly affect the aboriginal peoples of Canada." Mulroney's actions went beyond what was constitutional necessary. Canada, *Constitution Act, 1982*, Part 2, s. 37.

⁵⁴ Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991), 23-6.

⁵⁵ Canada, Privy Council Office, *1987 Constitutional Accord* (Ottawa, Privy Council Office, 1987), s. 3, 6, and 1, respectively, <https://primarydocuments.ca/wp-content/uploads/2018/04/1stMinsConstMeech1987Jun3.pdf>.

by entrenching the importance of continuing the constitutional conversation by ensuring annual constitutional conferences.⁵⁶ Therefore, although not satisfying the more ardent Quebecois nationalists, Meech Lake did succeed in repairing past exclusion, historical non-recognition, and the failure of the constitutional status quo in living up to the promises of dualism.

1.2.3: Indigenous Nationalisms

The work by Indigenous nations and people to respond to the unjust constitutional arrangements impacting them and to create a more equitable political framework through patriation posed yet another threat to Trudeau's preferred constitutional vision. Indigenous leaders sought to assert their rights and nationhood through the constitution—something disallowed and violently denied through the existing constitutional framework. This search for Indigenous justice was not new, but it did shift the discourses and tactics employed: “As a result of mega constitutionalism, this once-grassroots movement faced momentous transformative change as the rights-based orientation was enhanced by the new language of constitutional rights.”⁵⁷ However, this was still being done within a colonial context, rife with power imbalances, ongoing dispossession, and acts of genocide. As Russell attests, the Canadian state has a long history of managing “nations within” in a particular way: “the justice involved is justice as understood by the dominant party: first, the British Crown; later, the English-speaking majority.”⁵⁸ This makes redress constitutionalism a difficult reality for Indigenous peoples in Canada.

In addition to this longstanding power imbalance, there was another significant factor working against Indigenous peoples during patriation: they were not a real priority. Although this

⁵⁶ Ibid., s. 1, 8, and 13.

⁵⁷ Ladner, “*Aysaka 'paykinit*,” 236. I would perhaps disagree with the use of the word “enhanced” in this quote, as it implies improvement. I might use the word ‘modified,’ a more neutral descriptor.

⁵⁸ Peter H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017), 46.

is especially true at the beginning of the patriation process when Quebec's concerns dominated, the Quebec-centric approach remained significant throughout. This second-tier status was not in line with how Indigenous organizations viewed themselves. The National Indian Brotherhood (NIB) created a substantial campaign to have their constitutional issues addressed, including international lobbying in Britain, national lobbying through the "Constitution Express," and creating the "Declaration of the First Nations" on Indigenous rights and sovereignty. When the NIB lobbied in London, they went there with the understanding that the constitutional talks were mainly focused on the distribution of powers, and that they needed to be involved so they could assert their claims to jurisdiction and inherent rights.⁵⁹ Additionally, patriation occurred after the now infamous and sharply rebuffed "White Paper" that sought aggressive assimilation of Indigenous peoples. An incidental effect of this is that it caused widespread politicization of Indigenous peoples and a sharpened interest in federal matters.⁶⁰

The advocacy of Indigenous organizations at this time was largely a response to past injustices Indigenous peoples faced in and because of the Canadian state. Indigenous leaders were looking at the past as a source of frustration and as rife with inequity and mistreatment. Harry Daniels, president of the Native Council of Canada (NCC), used the past to argue that Indigenous peoples should be formally recognized as founders of Canada: "the historical contributions of Native peoples [should] be recognized in the preamble to the constitution and that the Native collectivities be recognized as founding peoples."⁶¹ In speaking to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,

⁵⁹ J. Rick Ponting and Roger Gibbins, *Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980), 214.

⁶⁰ The preceding analysis was made possible due to the research found in: Douglas E. Sanders, "The Indian Lobby," in *And No One Cheered: Federalism, Democracy, and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto, Methuen: 1983), 301-32.

⁶¹ Harry W. Daniels, *Native People and the Constitution of Canada: The Report of the Metis and Non-Status Indian Constitutional Review Commission* (Ottawa: Mutual Press, 1981), 19.

Daniels spoke of how the past (and its failures) impacted his presentation: “We are first of all conscious of the historical significance of this session with a sense of history that is deep and pervasive. These feelings are accompanied by an equally profound mistrust and suspicion that is rooted not only in the past 400 years of false promises to Native people.”⁶² Eric Tagoona, Co-Chairman of the Inuit Committee on Constitutional Issues, also grounded his presentation to the joint committee in an appreciation of past injustices faced by the Inuit. In particular, he focused on Canada’s unilateral encroachment into Inuit territory along with the state’s assertion of sovereignty.⁶³ Delbert Riley, President of the NIB during patriation, spoke about oppression by the federal government and his desire to change this relationship: “Some of the problems that we have had in the past 100 years in working with—I should not say ‘working with’—is oppression by the present government and they are such that we do not want to continue with that type of relationship.” This is similar to the sentiment expressed by Noel Starblanket, President of the NIB during the Pepin-Robarts Commission. He too was frustrated about exclusion and expressed a desire to work collaboratively with and through the state to for a more just constitutional arrangement: “Indians are now prepared to consider the negotiation of the terms and conditions upon which we will develop our future relationship with Canada.”⁶⁴

These national Indigenous organizations sought to use constitutional change as a means to address these past injustices because they saw the constitution as being—at least in part—responsible for these injustices. Daniels advocated for a concrete change to address Métis rights: “We notice that the Manitoba Act is contained in Schedule I to the Constitution Act. However,

⁶² Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st sess., issue 17: 105.

⁶³ *Ibid.*, issue 16: 4.

⁶⁴ Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 30th Parl., 3rd sess., (Ottawa: Queen’s Printer for Canada, 1979), issue 5: 68.

we insist that the recognition of our land and aboriginal rights in this act be confirmed in the patriation resolution, because successive federal governments have consistently argued that these rights have been extinguished.”⁶⁵ Tagoona also held up the constitution as a source of injustice for the Inuit and directly tied the constitution to broader subordination: “The economic, social and political disadvantages we suffer are not mere coincidence. They are, at least in part, the consequences of perpetuating the uncertainty of our constitutional rights and status.... It is only through adequate constitutional protections that the Inuit can enjoy positive growth and deter the constant pressures of assimilation.”⁶⁶ Riley believed that the constitution could be a source of empowerment for Indigenous peoples and a way for the state to repair relations with Indigenous peoples: “We want change. We want a better future for our people and we think that through the constitutional process, through the changes that we request, through entrenchment of rights, will be formed the basis for the development of our people for the future.”⁶⁷ Some of the particular changes that the NIB advocated for include having a say in the amending formula, self-determination in defining who is an ‘Indian,’ and protection from discrimination.⁶⁸

Certain federal politicians also saw the constitution as having reparatory potential. Chrétien, in relation to the inclusion of Aboriginal and treaty rights in the constitution, said: “It is not possible to correct generations of injustice merely by adding words to a Constitution. But it is possible to take a giant step toward a new beginning so that, in the words of the hon. member for Nunatsiuk, ‘together we will build a great nation.’”⁶⁹ More in line with the goal of repair, Ed

⁶⁵ Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st sess., issue 17: 111.

⁶⁶ *Ibid.*, issue 16: 7.

⁶⁷ *Ibid.*, issue 27: 77.

⁶⁸ *Ibid.*, issue 27: 79-85.

⁶⁹ Canada, Parliament, House of Commons, *House of Commons Debates: Official Report*, 32nd Parl., 1st sess., vol., 7 (1981), 7375.

Broadbent, then-leader of the New Democrats, attested to the importance of a constitutionally entrenched bill of rights for rectifying discrimination and creating a more equitable country:

[M]ost important for all of us in this Parliament and elsewhere whose ancestors came from other continents, think of our aboriginal peoples and the abominable way they have been treated throughout our history.... Well, Madam Speaker, my party says now is the time to redress some of these injustices; now is the time to provide equality and freedom within the constitution; now is the time to entrench a Canadian charter of rights in a Canadian Constitution.⁷⁰

The constitutional amendments that did eventually pass during patriation were heavily influenced by this advocacy and mounting political pressure.⁷¹ The *Constitution Act, 1982* entrenched “existing aboriginal and treaty rights of the aboriginal peoples of Canada” and promised further constitutional conferences to address concerns from Indigenous organizations that were not dealt with at that time.⁷² However, despite the progress that Indigenous organizations made in asserting their constitutional aspirations and in substantiating changes to the patriation package, the document that passed in 1982 still fell short of their goals. As Douglas Sanderson puts it, due to the power imbalances and the intransigence of the state, the “process of political negotiation was never a real possibility.”⁷³ Ultimately, patriation went through without the approval of any national Indigenous organization.

Because of this advocacy by Indigenous leaders to address their outstanding constitutional concerns, further constitutional conferences were constitutionally mandated. However, these televised, high-profile conferences proved to be more spectacle than substance. The first of the four conferences did result in changes to gender equality and granting constitutional status to modern land deals, but the following three on self-government were unsuccessful in reaching agreement, with Indigenous leaders advocating that the right to self-

⁷⁰ Ibid., 7391.

⁷¹ For a fulsome account of the ever-changing political dynamics at the time, see: Sanderson, “The Indian Lobby.”

⁷² Canada, *Constitution Act, 1982*, Part 2, ss. 35 and 37.

⁷³ Sanderson, “The Indian Lobby,” 324.

government is inherent.⁷⁴ Richard Hatfield, the New Brunswick premier, put the stagnation quite succinctly: “I can’t discuss self-government with any conviction or any heart, when I know we’re not going anywhere.”⁷⁵

A similar intransigence on moving forward on Indigenous issues was demonstrated with the Meech Lake Accord. As has been shown by others, throughout the Meech Lake process Canadians were increasingly demanding that they be involved in the constitutional processes, and the behind-closed-doors executive federalism of Meech Lake was antithetical to these expectations.⁷⁶ The Meech Lake Accord was heavily focused on Quebec’s concerns and creating a constitutional framework while it ignored, among other things, the concerns of Indigenous peoples and organizations due to the exclusionary processes that created it. While Meech Lake was regretful and reparatory for Quebec nationalists, the complete absence of Indigenous voices in its creation meant it failed in being an act of redress for Indigenous peoples and it in fact constituted another injustice. When Elijah Harper refused to provide unanimous consent in the Manitoba legislature to hold a special sitting to vote on the accord, he did so to protest the lack of consultation with Indigenous peoples and the failure of the constitutional conferences described above to address their grievances. The expectations that Indigenous peoples (as well as other aggrieved groups) had on what role the constitution served and their desire to be involved in its creation were growing and could not be ignored.

This overview of the shortcomings of patriation and Meech Lake demonstrates that there was an unreciprocated desire from the Indigenous organizations to change the constitutional

⁷⁴ Russell, *Constitutional Odyssey*, 130-2.

⁷⁵ Quoted in: Maurice Bulbulian, *Dancing Around the Table, Part Two* (National Film Board of Canada, 1987), https://www.nfb.ca/film/dancing_around_the_table_part_two.

⁷⁶ See, for example, Russell, *Constitutional Odyssey*, 3-7; and Simone Chambers, “Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis,” *Politics and Society* 26, no. 1 (March 1998): 143-6, <https://doi.org/10.1177/0032329298026001006>.

framework in a way that compensated for past failures of the state. Although patriation did make certain advancements, its success in truly rectifying injustices was hampered by the unwillingness of the federal government to deviate too far from its narrower predisposition.⁷⁷ Indigenous leaders were drawing on hundreds of years of history and colonialism in their constitutional demands and were pushing the state to incorporate this reality. Indigenous organizations' goals strongly challenged Trudeau's uniform vision and Mulroney's sole focus on Quebec during Meech Lake. Because of this, Indigenous organizations had unfulfilled expectations and aspirations for the constitution, and this became a defining feature of the Canada Round and the political milieu in which it took place. Viewing these constitutional negotiations through the lens of redress politics offers an insightful corrective to understanding the political dynamics at play leading up to the Canada Round: while Indigenous leaders were interested in redressing past wrongs, the state did not meaningfully share this goal.

1.3: Popular Expectations versus Elite Practices

This chapter provided an overview of how social movement actors, Quebecois nationalism, and Indigenous nationalisms all challenged and critiqued Trudeau's uniform constitutional framework. They did so, in part, by utilizing discourses and aspirations of redress constitutionalism—the use of constitutional change to respond to and rectify historical injustices. Broadly stated, for these groups a simple equality of opportunity was not sufficient in dealing with the depth and breadth of their demands and in dealing with the injustices inherent in past constitutional configurations. Rather, they wanted their specific histories and realities to be

⁷⁷ Michael Woodward and Bruce George argued that granting Indigenous peoples too much of a special status during patriation was a non-starter because Quebec could leverage any movement on this into further compromises that favoured their aspirations—something antithetical to Pierre Trudeau's vision. Michael Woodward and Bruce George, "The Canadian Indian Lobby of Westminster, 1979-1982," *Journal of Canadian Studies* 18, no. 3 (Fall 1983): 121, <https://muse-jhu-edu.ezproxy.library.uvic.ca/article/674784/pdf>.

incorporated into the constitutional framework. However, despite the vigour and optimism with which the patriation discussions began and the pockets of progress that were made, the end results fell short of the expectations of many groups held. The constitutional conversations of this era were more comprehensive than what came before it, both in the topics under discussion and in which people and groups were included, but the goals of the general public and interest groups also grew during this time and the approach of government did not keep up with the trends in public opinion and social movement pressures.

As Cairns argues, during this time a new class of constitutional actors was created. This means that certain groups were recognized in the constitution and then acted upon this newfound sense of constitutional (and political) legitimacy.⁷⁸ Upon becoming constitutional actors, groups have the constitution at their disposal to effect their own aspirations. After patriation, more citizens felt a sense of attachment with the constitution because the constitution now dealt directly with the people. The constitution became more than a document that set out the parameters of governments or even a document that protected rights in courts, and became, as Miriam Smith argues, a “structuring influence on Canadian political debate.”⁷⁹ The Charter influenced how issues were framed and how groups mobilized, and this gave a sense of greater political efficacy to groups and individuals that previously lacked certain political powers. Put another way, the Charter brought about changes that created opportunities for groups to seek greater participatory parity in the state and encouraged groups to do so.

As Kierra Ladner outlines, this is true for the mobilization for Indigenous peoples. She argues that there is a fundamental continuity amongst Indigenous political movements going

⁷⁸ Cairns, *Disruptions*, 109.

⁷⁹ Miriam Smith, “The Impact of the *Charter*: Untangling the Effects of Institutional Change,” *International Journal of Canadian Studies / Revue internationale d'études canadiennes* 36 (2007): 18. <https://doi-org.ezproxy.library.uvic.ca/10.7202/040775ar>.

back thousands of years, despite (superficial) surface-level changes. She says that the goals and issues of self-determination and good governance have remained constant over time, but that the particular ways which this has manifested have changed. Employing a social movement analysis, she goes on to say that certain opportunity structures influenced how Indigenous politics was conducted, but it remained defined by issues of sovereignty and nationhood. The patriation discussions were one such opportunity structure, and they required “increased organizational capacity [for Indigenous groups] and to structure Indigenous people’s relationship with Canada.”⁸⁰ This caused the framing of issues to change, but not the goals of the movement.

However, despite challenging and modifying Trudeau’s constitutional vision, Indigenous groups did not have their concerns fully addressed at this time. Only one federal or provincial Indigenous organization endorsed the patriation changes. Although Peter Russell argues that Indigenous peoples were the largest beneficiaries of the patriation discussions, this is largely due to the insignificance of their status at the beginning of these talks. That is, Indigenous peoples had been so constitutionally neglected and disenfranchised that any improvement was viewed as significant. So while the change was noteworthy, it still did not fulsomely address their concerns.⁸¹ Although the constitutional process had been opened up slightly, it still was not overly participatory—Russell refers to patriation as “spectator constitutionalism.”⁸²

This narrowed conversation was even more notable during Meech Lake because there was a more limited goal of addressing Quebec’s concerns. While the patriation amendments were debated in Parliament and there was some degree of public consultation, the mechanisms of executive federalism were used in the Meech Lake negotiations. These discussions, renowned for

⁸⁰ Ladner, “*Aysak’paykiniti*,” 236. The preceding analysis was made possible by the rest of this chapter.

⁸¹ Russell, *Canada’s Odyssey*, 353-90.

⁸² *Ibid.*, 373.

their elitist and exclusionary nature, did not fulfill the desires of citizens (and Indigenous peoples more specifically) who recently became constitutionally active as a result of the passage of the Charter. During the Meech Lake negotiations, the new constitutional actors were ignored:

The implicit constitutional theory behind Meech Lake assumed that the bringing back of Quebec back into the constitutional family was a federalism issue; that executive federalism backed by governments that controlled their legislatures by applying party discipline to one-party majorities was the vehicle for its achievement; and that the Quebec issue, with appropriate pay-offs to the other veto-possessing provincial governments, could be discretely handled without seriously upsetting the new constitutional groups that clustered around the Charter or the politically awakened aboriginal peoples. This theory was wrong on every count.⁸³

The “constitutionally self-conscious citizenry”⁸⁴ became legitimate constitutional actors with the rise of popular sovereignty and constitutional democratization. Meech Lake’s exclusion of Indigenous peoples, for example, reasserted that their concerns were irrelevant. Instead of continuing along the past of an increasingly open constitutional conversation that was in line with the shifting expectations of citizenry, Meech Lake reneged on this.⁸⁵ Instead of being retrospective, regretful, and reparative in response to the constitutional ambitions of Indigenous groups, Meech Lake served to further the injustices faced by Indigenous peoples.

Patriation, a precarious compromise between most of Canada’s first ministers that was entirely rejected by the province of Quebec, fell short of the breadth of topics that many were hoping to be included.⁸⁶ Similarly, Meech Lake’s goal of bringing Quebec into the constitution inherently excluded other priorities, such as those of Indigenous people. These unrequited

⁸³ Cairns, *Disruptions*, 255-6. I might add to Cairns’s analysis that the practice of and theory surrounding executive federalism also relies on the assumptions that the electoral system that brought certain parties and persons to power was an appropriate way to reflect the interests of Canadian citizens divided on a purely geographically basis.

⁸⁴ *Ibid.*, 247.

⁸⁵ Keith Banting and Richard Simeon, ed., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 20.

⁸⁶ Cairns, “Constitutional Conservatism,” 29.

expectations for an expanded constitutional conversation deepened the participatory parity divide as the process itself was not inclusive of Indigenous peoples and did not prioritize their concerns.

These missed opportunities for the constitutional conversation to consider the full breadth of constitutional actors created the opportunity for (and perhaps even demanded) further conversations that would be more comprehensive. The changes that occurred as a result of patriation—opening up the constitutional conversation, the creation of new constitutional actors, widening the scope of what is expected of the constitution—created a constitutional and political milieu that was favourable to further dialogue. This, coupled with the Mulroney government’s determination to create a legacy of a more inclusive constitutional framework, advanced more conducive conditions for the constitution to act as an avenue aimed at reconciliatory political engagement.

For our purposes, the disconnect between the aspirations put forward by Indigenous leaders and the actual constitutional visions of federal actors is most relevant. Although there were lovely platitudes put forward by politicians during patriation about addressing Indigenous peoples’ concerns, the fact that only one federal or provincial Indigenous organization endorsed the patriation package speaks volumes. The grievances of Indigenous peoples ran deep because the injustices against them—the multitudinous ways in which the constitution disallowed them from participating “on a par with the rest”—were so numerous and complex. The province of Quebec, being a singular political entity and (arguably) speaking for one group of people, had comparatively much simpler constitutional grievances for the rest of the state to manage. The heterogeneity of Indigenous peoples did not afford such a luxury, and the means of incorporating and addressing these varied aspirations would necessitate a much more complex form of constitutional politics. It is this new era of megaconstitutional politics to which I now turn.

Chapter 2: Political Redress Through the Canada Round

The past has not worked and therefore [we are] going to have to devise a new system. And that new system must grant two things: dignity and a dimension of equality that's been lacking since this country was founded.¹

The past chapter provided an overview of Canadian megaconstitutional politics in the patriation and Meech Lake periods to demonstrate that certain historical justice claims are deeply embedded in constitution-making. It showed that—despite successful challenges to instituting a dogmatically uniform constitution—Indigenous leaders had lingering constitutional grievances and unfulfilled aspirations that can be seen through understanding these periods through the lens of redress. For Indigenous groups, constitutional change was a way of repairing the injustices caused by previous decisions on the governing arrangements of Canada. The impacts of sections 25 and 35 in the 1982 amendment package proved to be underwhelming at best, the constitutional conferences produced very little substantive change, and the closed-door nature of Meech Lake seemed to destroy any previous gains in status made by Indigenous peoples in the constitutional arena as their concerns were completely neglected.

There was appetite for an expanded constitutional conversation, hence the so-called ‘Canada Round.’ To focus on the power of constitutional change to effect a substantial transformation in the colonial relationship between Indigenous peoples and the settler state, I will analyze the Canada Round through the lens of redress constitutionalism. During this time, Indigenous organizations sought to capitalize on the prospect of constitutional change to respond to the injustices of past constitutional decisions and transform their position in Canada.

The Canada Round is not the *perfect* example for such a goal, but it was a time in which the functioning of the Canadian state was up for debate in a very real way. The complexity of the

¹ Brian Mulroney, quoted in Bulbulian, *Dancing Around the Table, Part Two*.

Canada Round cannot be overstated: it was (and remains) the most comprehensive set of constitutional amendments since Confederation.² It came about after substantial negotiation, citizen involvement, and discussions amongst political leaders. The Canada Round was a microcosm of Canadian politics: it was a forum for the perennial questions that defined and plagued the history of Canada. These include: English-French dynamics, the inclusion/exclusion of women's voices, Western alienation, institutional design and regional representation, the place and predominance of liberalism within the state, the desire for social unity, the equality of the provinces, the distribution of jurisdictional authority, the role of Canada as a welfare state, and—most importantly for our purposes—the existence of Canada as an ongoing colonial project.

In this chapter I demonstrate the Canada Round was viewed by Indigenous organizations as a project in historical redress with desired retrospective, regretful, and reparatory elements. This view, however, was not as firmly held by government leaders. As such, the inability to appreciate the reconciliatory aspects of constitutional change during the Canada Round speaks to a greater disconnect between Indigenous and state leaders in the expectations of what constitutional change can mean and what can be achieved through it. I will demonstrate that—despite the persistence of lobbying by Indigenous organizations—the state was unwilling to embark on a path that would have truly transformed Canada and used the constitution to redress past wrongs and have Indigenous peoples participate “on a par with the rest.”

To begin this analysis, I provide a fuller explanation of the importance of the Canada Round before examining primary documents from this era of constitutional politics with a concerted emphasis on the features of redress constitutionalism.

² It could even be argued that if the Charlottetown Accord had been successful it would have been a greater change than Confederation. While an interesting exercise in alternative history, it is outside the context of this research.

2.1: Background and Rationale for the Canada Round

The Canada Round is the era of constitutional negotiations that took place from the failure of Meech Lake to the country-wide referendum on October 26, 1992. The Canada Round stands in stark contrast to the exclusionary, narrowly focussed, and legalistic Meech Lake process. Instead of being largely debated behind closed doors by eleven white men, the processes that created the Charlottetown Accord were arduously consultative and the final deliberations included the leaders of Canada's two territories and four of the national Indigenous organizations.³ Instead of being focussed solely on the concerns and constitutional status of Quebec, the Canada Round—a name given to this era of politics to directly contrast it with the 'Quebec Round' that created the Meech document—looked at a multitude of constitutional woes, which its proposed amendments were designed to address.⁴ Instead of being treated as a simple legal process, the Canada Round was highly consultative, responded to the growth in the number of constitutional actors, and sought to articulate the fundamental principles of Canada.

The Meech Lake Accord, requiring the consent of Canada's eleven legislatures, fell at the hands of Elijah Harper, an MLA in Manitoba. The accord had a three-year ratification window, and for the vote to happen in Manitoba in this time span unanimous consent of the legislature was required to forego giving two days' notice of the vote. Harper refused this, and because unanimity amongst Canada's legislative bodies was required, the accord was dead.⁵ However, this failure must be put into context. Ned Franks calls the processes that made the accord the

³ However, notably absent from these multilateral negotiations is the Native Women's Association of Canada (NWAC). NWAC launched a (not successful) court challenge regarding their exclusion from these discussions due to it infringing on their Charter rights of freedom of expression and equality. More information can be found at: *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627.

⁴ As Peter Russell has claimed: "Simply by calling the fifth round of mega constitutional politics the Canada round is to react to the previous round." Russell, *Constitutional Odyssey*, 154.

⁵ A more fulsome and nuanced account can be found in: *Ibid.*, 151-2.

politics of executive federalism “at their worst,”⁶ Cairns claims that Meech Lake “confirmed Aboriginal weakness,”⁷ and Monahan argues the Meech Lake failure demonstrated the lack of unity within the Canadian polity and that it underscores the complexities of governing diversity.⁸ This is all to say that the Meech Lake Accord was neither a universally adored document and nor was its supposed perfection thwarted by a solitary legislator from Manitoba. The Canada Round came about not only to rectify the failures of the form of politics Meech Lake represented, but also to address a plethora of other shortcomings of the document itself.

The form of megaconstitutional dealings for this new era had to be suited to the political realities of the day, and one of the most prominent realities was the increase in Indigenous activism. Less than a month after the Meech Lake failure, a particularly notable episode of Indigenous resistance commonly referred to as the ‘Oka Crisis’ began. I say that it was an ‘episode’ to imply that it was and is part of a greater movement; as Leanne Simpson and Kiera Ladner attest: “to the Kanien’kahaka (Mohawk) people of Kanehsatà:ke, who were living up to their responsibilities to take care of their lands, this was neither a ‘crisis’ at Oka, nor was it about the non-Native town of ‘Oka.’ This was about 400 years of colonial injustice.”⁹ This episode began when the municipality of Oka decided to expand its golf course into the heart of Kanien’kahaka territory and burial grounds. This resulted in massive political protest and the Canadian state responded by deploying 6,000 troops, armoured tanks, missiles, and provincial and Royal Canadian Mounted Police officers.¹⁰ Changes occurred to constitutional processes in

⁶ C. E. S. Franks, *The Myths and Symbols of the Constitutional Debate in Canada* (Kingston: Institute of Intergovernmental Relations, 1993), 64.

⁷ Cairns, *Disruptions*, 122.

⁸ Monahan, *Meech Lake*, 240-2.

⁹ Kiera L. Ladner and Leanne Simpson, “This is an Honour Song,” in *This is an Honour Song: Twenty Years Since the Blockades*, ed. Leanne Simpson and Kiera L. Ladner (Winnipeg: Arbeiter Ring, 2010), 1.

¹⁰ Arthur Kroker, “The Mohawk Refusal,” in *This is an Honour Song: Twenty Years Since the Blockades*, ed. Leanne Simpson and Kiera L. Ladner (Winnipeg: Arbeiter Ring, 2010), 271.

the Canada Round—in part—as a response to increased Indigenous mobilization that could not be ignored by the state. Although the amending formula did not require the approval of anything beyond legislatures, it was clear there was a political need to engage Indigenous nations and organizations to supplement what was legally required. There is a strong connection between the exclusionary Meech Lake Accord and the expansive Canada Round. The day after it was clear that Meech Lake was incurably dead, Mulroney gave a televised speech to Canada. Just a few seconds after stating that “Today is not the day to launch new constitutional initiatives,” his constitutional aspirations come through: “We must find a way to reconcile the need for public participation and open democratic process with the legal requirements now in the constitution.”¹¹

To begin the Canada Round, the province of Quebec was the first to formally propose amendments to the Canadian constitution. The (governing) Quebec Liberal Party created and adopted what became known as the Allaire Report, and the province itself created the Commission on the Political and Constitutional Future of Quebec (the Bélanger-Campeau Commission). Both of these were very Quebec-centric and articulated the terms on which Quebec wanted to proceed. The federal government began with a grass-roots approach through establishing the Citizens’ Forum on Canada’s Future, commonly known as the Spicer Commission. This commission set up a call centre for citizens to discuss the constitution, solicited feedback from civil society groups, and held hearings across the country. All in all, the group claimed to have heard from over 400,000 Canadians. Its report, along with the work of the Beaudoin-Edwards parliamentary committee that focused solely on the amending formula, informed the initial report of the federal government. This federal report, entitled *Shaping*

¹¹ Brian Mulroney, “An Address to the Nation by the Prime Minister, the Right Honourable Brian Mulroney.” Canadian Broadcasting Corporation: “The Consequences of Meech’s Failure,” <https://www.cbc.ca/player/play/1751912031>.

Canada's Future Together, like Spicer's report before it, had tremendous breadth with separate volumes on institutional reform, economic union, distribution of powers, Indigenous issues, and the Canadian identity. However, the Mulroney government's stances were not what was ultimately debated amongst first ministers, because the government proposals were again analyzed by another parliamentary committee, the Beaudoin-Dobbie committee.¹² This committee (again) traveled the country, held five conferences, requested the input of the provinces, and solicited feedback from organizations. The Assembly of First Nations was one of the organizations that came out with a constitutional vision. Its report, *To The Source*, was created through consultation with communities, Elders, and chiefs. Upon the completion of the work of the Beaudoin-Dobbie committee, the processes of an expanded and yet still in some ways limited executive federalism unfolded. It was expanded in the sense that territorial governments and four national Indigenous organizations were included, but it was limited because Quebec refused to participate until the Rest of Canada would offer its best-case scenario to Quebec. Following this, Quebec joined the multilateral discussions to create the final product, the *Consensus Report on the Constitution*, commonly referred to as the Charlottetown Accord.¹³

The *Consensus Report* was a complex and precariously balanced document. For the purposes of this research, there are three aspects of note. The first is the mere breadth of it. Over the course of twenty pages, the report covered a wide range of constitutional issues. To name but a smattering, there was: agreement on a statement of Canadian identities; reforming the Senate; guaranteeing Quebec twenty-five per cent of the seats in the House of Commons; limiting the

¹² This committee began by being co-chaired by Sen. Castonguay, but due to internal difficulties Sen. Beaudoin took over this role. See: Russell, *Constitutional Odyssey*, 175.

¹³ This paragraph was made possible with the research found in: Patrick J. Monahan, "The Sounds of Silence?" in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 222-48 and Russell, *Constitutional Odyssey*, 154-94.

federal spending power; granting provincial supremacy in the areas of culture, forestry, mining, tourism, housing, recreation, and municipal affairs; recognizing existing Indigenous sovereignties through a third order of government; creating a positive obligation to engage in land negotiations with Indigenous groups; and changing the amending formula. Second, it is important to understand the incompleteness of this report. Even though a lot was covered, not everything was final. Many details were left up to future political accords and many areas of disagreement were to be discussed at future constitutional conferences. These outstanding issues included Indigenous representation in the House and Senate, the role of Indigenous organizations in recommending Supreme Court justices, financing Aboriginal governments, including Aboriginal governments' in the amending formulas, and the manner in which Aboriginal governments would be included in discussions on the division of powers.¹⁴ Third, the report represented a delicate compromise of interrelated concessions and bargains. It was a carefully brokered deal in which groups made allowances in one area to find success in another. Because of this, the report needed to be taken in its entirety and could not be divided.

However, even with this consensus the Canada Round saga was not over. Although there was unprecedented agreement among Canada's eleven first ministers, two territorial leaders, and leaders of four national Indigenous organizations, a megaconstitutional round meant for all of Canada could not stop there: the consensus went to a country-wide referendum on October 26, 1992.¹⁵ Although this was less than two months after the release of the *Consensus Report*, this was also the date on which a second Quebec sovereignty referendum would have been

¹⁴ This information is taken directly from the *Consensus Report*. Canada, *Consensus Report on the Constitution*, ss. 9, 22, 20, 50, and 60.

¹⁵ After the failure of Meech Lake, certain provinces had enacted their own legislation that required a referendum prior to the legislature voting on any proposed constitutional amendments. It was decided that it would be politically untenable for certain citizens of Canada to be granted a say in a referendum while others did not, so one was initiated federally. Russell, *Constitutional Odyssey*, 218.

scheduled. The Province of Quebec agreed to postpone or cancel its own referendum if a new constitutional package—amenable to them—could be voted on instead.

Initially the support for the accord was quite high and some polls showed an approval rating of 70 per cent.¹⁶ However, this support did not hold. Even though the vast majority of Canada’s political leaders were on the side of the accord,¹⁷ it ended up failing with 54.4 per cent of voters against it. Although the political elite in Canada was gravely unpopular at the time—especially Prime Minister Brian Mulroney—survey research demonstrates that only 10 per cent rejected it because of political leadership, while three-quarters rejected it because of not liking one or more aspects of the accord.¹⁸ Because of the interrelated concessions within the accord and the all-or-nothing outcome of a referendum, Russell argues that the “sixty-section Accord, sprinkled with asterisks marking loose ends to be tidied up through future negotiations, was singularly ill designed for a referendum in which the people would have only the choice of voting yes or no.”¹⁹ With this failure at the hands of the electorate, the political leaders were impotent to continue and the Canada Round was forced to an abrupt halt.

2.2: Redress Constitutionalism in the Canada Round

What follows is an overview of the primary literature created during the Canada Round and an analysis of the ways in which these documents embraced or rejected redress constitutionalism. By looking at the evolution of the primary literature during this time we will be able to see that—through increased understanding and Indigenous advocacy—state actors moved further along to

¹⁶ Lawrence LeDuc and Jon H. Pammett, “Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum,” *Canadian Journal of Political Science* 28, no. 1 (March 1995): 9, <https://doi.org/10.1017/S0008423900018357>.

¹⁷ Notable exceptions being Pierre Trudeau, Preston Manning, the leaders of the Native Women’s Association of Canada, and the leaders of the National Action Committee. Russell, *Constitutional Odyssey*, 221-4.

¹⁸ Monahan, “Sounds of Silence,” 238.

¹⁹ Russell, *Canada’s Odyssey*, 415.

embrace the features of redress constitutionalism, but still ultimately fell short of addressing the aspirations and grievances of Indigenous groups. As Peter Russell argues, although most of the country would have been happy to never talk about constitutional reform again, this was not the case for the Indigenous pillar of Canada's mosaic (and nor was it true for French Canada).

Rather, Indigenous nations “still harboured strong and unsatisfied constitutional ambitions.”²⁰

Moreover, Russell says that these sources of constitutional discontent were “fueled ... by a sense of grievance over past injustice.”²¹ Similarly, Kathy Brock argues that constitutional change can serve as a means of helping the state chart a more just future: “by accepting Aboriginal self-government, non-Aboriginal Canadians could redress the wrongs of the past.”²²

The documents under consideration are, in order of release: *Report to the People and the Government of Canada*, the result of the Citizens' Forum on Canada's Future, commonly known as the Spicer Report; *Shaping Canada's Future Together*, a series of papers created by the Mulroney government in response to Spicer and a special joint parliamentary committee's report on the constitutional amendment process; *A Renewed Canada*, the result of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, commonly known as the Beaudoin-Dobbie Report; *To The Source*, the constitutional position document of the Assembly of First Nations; and finally the *Consensus Report on the Constitution*, the report that went to a referendum, more commonly known as the Charlottetown Accord.²³

²⁰ Ibid., 404.

²¹ Russell, *Constitutional Odyssey*, 156.

²² Kathy Brock, “Learning from Failure: Lessons from Charlottetown,” in *Constitutional Forum / Forum Constitutionnel* 2 (1993): 31.

²³ Notably absent from this list is the Beaudoin-Edwards Report, a report of a joint parliamentary committee that looked at the constitutional amending formula. Due to this much more restricted scope, it was omitted from this analysis. Also, the interim reports immediately before the final Charlottetown Accord created through multilateral negotiations that excluded Quebec and then later excluded the four national Indigenous organizations will be covered in the analysis of the *Consensus Report* and not treated separately.

Over the course of its eight-month existence, the Spicer Commission attempted to lay the foundation for the Canada Round by gleaning the constitutional sentiment of the citizenry. After the exclusionary executive federalism of Meech Lake, the Canada Round was to begin in a distinctly different way. Fraught with infighting amongst commissioners and besmirched by accusations of frivolous spending during a time of economic hardship, the commission embarked on a broad mandate to “listen to the people of Canada to find out what kind of country they wanted for themselves and their children”²⁴ and to “get Canadians talking among themselves about vital issues that faced a perplexed nation: Quebec’s quest for a new relationship with the rest of Canada; aboriginal grievances and aspirations; official languages; ethnic and cultural diversity; fundamental Canadian values; the economy; and Canada’s place in the world.”²⁵ The commission took pride in its expansiveness approach. It heard from over 75,000 people by phone, 315,000 people through over 13,000 facilitated discussions, garnered 10,000 written submissions, had 15,000 people participate in discussions at university campuses, held televised forums to incite discussion, and 13,000 classrooms participated involving more than 300,000 students.²⁶ This stood in stark contrast to the exclusionary practices of Meech Lake that centred on the particular grievances of Quebec.

However, although the breadth of responses was significant, the commission was not able to garner responses from the voices and concerns of all groups of Canadians. The report admits to not being scientifically compiled because the respondents were not randomly selected,²⁷ something notable in the dearth of Indigenous and Quebecois participants. As Russell notes, the

²⁴ Citizens’ Forum on Canada’s Future, *Report to the People and the Government of Canada* (Ottawa: Minister of Supply and Services Canada, 1991), 15.

²⁵ *Ibid.*, 16. The full mandate of the commission can be found on pp. 149-51 of the report in Appendix A.

²⁶ *Ibid.*, 18-22.

²⁷ *Ibid.*, 29.

Spicer Commission was conducting its work at the same time as the Allaire and Bélanger-Campeau commissions—the studies by the Quebec Liberal Party and the Quebec government, respectively—to consider their province’s constitutional future. Russell argues the Spicer process was conducted in a way that disregarded the particular political climate of Quebec, which caused Quebeckers to ignore the Spicer Commission in higher numbers.²⁸ Cairns notes that prior to the expanded multilateral negotiations, Indigenous peoples largely did not participate in the Canada Round. He argues that because the Spicer Commission made limited contact with Indigenous peoples and Quebeckers, in effect it became an ROC report, not a national report.²⁹ Although the commission asserted that “Aboriginal peoples were ... a high priority in our consultation,”³⁰ they readily admitted to failing in this area. They claimed: “We quickly realized that we had neither the time nor expertise to study longstanding aboriginal issues. We so advised the prime minister, who agreed.”³¹ Therefore, despite claiming Indigenous issues were a priority and a mandate that required an analysis of “the nature of the relationship among Canada's aboriginal and non-aboriginal citizens and institutions,”³² the Spicer Commission failed to reach Indigenous people. Due in part to the respondents being disproportionately non-Indigenous, the report noted that they—much like the commissioners’ themselves—were “very uninformed about aboriginal issues.”³³ The Spicer Report, therefore, was a settler ROC document, not a pan-Canadian one.

Due to the commission’s broad mandate and the ill-defined prompts respondents had, the resulting document was a high-level overview of the political climate rather than a specifically

²⁸ Russell, *Canada’s Odyssey*, 408.

²⁹ Alan C. Cairns, “The Charlottetown Accord: Multinational Canada v. Federalism,” in *Constitutional Predicament: Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen’s University Press, 1994), 29 and Cairns, *Reconfigurations*, 169.

³⁰ Citizens’ Forum on Canada’s Future, *Report to the People and the Government of Canada*, 4.

³¹ *Ibid.*, 16.

³² *Ibid.*, 149.

³³ *Ibid.*, 74.

constitutional document (thus hampering the document's ability to even live up to the "constitutional" element of redress constitutionalism). And the political climate of the time—among the settler ROC population Spicer reached—was decidedly anti-government. For example, although not a random sampling, the respondents' sentiment on the prime minister's leadership neared one hundred per cent negative.³⁴ The text of the report also tried to actively distance the work of the commission from the federal government. Despite the report being officially submitted to the Governor General in Council, the title given to the report was the "*Report to the People and Government of Canada*," with "government" coming second to "the people." In his introductory statements, the chair of the forum claimed the "consensual editing" of the report did not fully capture the anger directed toward the prime minister, and that "our report lets the PM off too lightly ... there is a fury in the land against [him]."³⁵ The report became an "instant lightning rod"³⁶ for this fury, and "One of the strongest messages the Forum received from participants was that they have lost their faith in both the political process and their political leaders."³⁷ To address this, the commission called for greater responsiveness, accountability, and direct citizen involvement in government decisions.³⁸

This particular sort of anger is often indicative of populism, a sentiment that recurred throughout the document. The Spicer Report rejected utility of cultural pluralism and put forward that Canadians were essentially a unitary group and venerated over or disregarded difference. In this vein, the report claimed there was a "deep similarity of values and ideals among Canadians," that "our hearts beat in closer harmony than we dare to hear," and that the respondents'

³⁴ Ibid., 168. The bar graphs provided in the report do not provide exact percentages and are difficult to accurately discern, but the graph still unequivocally shows that the number is perilously close to 100 per cent.

³⁵ Ibid., 6 and 6-7.

³⁶ Ibid., 25.

³⁷ Ibid., 96.

³⁸ Ibid., 101-6.

“positions were not ... polarized.”³⁹ However, such quotes must be understood in light of the commission’s failure at representativeness, notably the under engagement of Indigenous peoples and Quebeckers. As such, many recommendations of the report sought to retrench sameness. The first set of recommendations involved creating a “constitutional preamble enshrining simple, eloquent words that explain Canada’s past, its identity and values, and Canadians’ free commitment to the future.”⁴⁰ For the commission, this was intended to be a means of binding people together to reinforce commonalities. This desire for sameness also came up in the aspirations of respondents, such as through the desire for equality as the first Canadian value that needs to be upheld or the assertion that “Natives should become equal citizens not more than equal.”⁴¹ Such a denunciation of cultural pluralism is antithetical to redress constitutionalism, as inherent to redress is a belief that one group has been aggrieved and repair is necessary.

In failing to direct respondents to specific constitutional issues and in failing to reach beyond a disgruntled, settler constituency, the report did not encapsulate the complexities of Canada. As a populist document, diversity was only accepted or tolerated on terms that the majority population found permissible. For example, the report asserted that “Official bilingualism is divisive, unnecessary, impracticable, economically harmful.”⁴² A similar sentiment arose with multiculturalism: “The essential complaint is that ... [m]ulticulturalism is by itself divisive ... we spend too much time being different and not enough being Canadian.”⁴³ Reflecting the political debates of the time, the report also covered (on several occasions) the respondents’ views on Royal Canadian Mounted Police officers wearing turbans. Predictably,

³⁹ Ibid., 7, 11, and 9, respectively.

⁴⁰ Ibid., 122.

⁴¹ Ibid., 35 and 77.

⁴² Ibid., 68.

⁴³ Ibid., 85.

respondents much preferred having the RCMP uniform be a unifying symbol of Canada and not an instrument for having “their background pushed on us.”⁴⁴ With a not-so-subtle dog whistle statement against Indigenous peoples and concerns, one respondent even claimed: “We can not simply take one of our minority groups, however strong or noisy, declare it superior and set up legislative and socio-economical mechanisms to remake the entire population to compliance with its culture.”⁴⁵ Such examples demonstrate that respondents were unwilling to recognize difference because difference was seen as divisive. The commissioners concluded the “most arresting thing of all” they discovered was “a tension between their search for unity and the claims of various groups and collectivities is perceived as posing great threats to their sense of being a country.”⁴⁶ The commissioners noted that Canadians demonstrated a lack of understanding of Quebeckers, new immigrants, Indigenous peoples, and the concerns of other regions. There was therefore not only a hesitancy to recognize difference, but there was an inability to understand those differences in the first place.⁴⁷

This unwillingness to recognize or understand difference—alongside the (admitted) failure to make recommendations on longstanding concerns of Indigenous peoples—demonstrates that the Canada Round did not begin in a manner that prioritized redress. This non-recognition prohibited a regretful form of politics because difference was not valued. The report also contained a statement that almost seems to discredit the importance of constitutional change and the role it can play in shaping society. In his introductory comments, Spicer claimed:

Both structure and spirit combine to make a blueprint for a society. But the spirit — that is, shared ideas, ideals, dreams and confidence — will in the long run overwhelm any structure, however ingenious. The curse of our political system since the beginning has

⁴⁴ Ibid., 36.

⁴⁵ Ibid., 50. This comment, of course, completely misses the irony that the founding history of Canada is one where a small minority (of elites) imposed their will onto others.

⁴⁶ Ibid., 114.

⁴⁷ Ibid., 123. The commissioners do also optimistically note that “we found among participants an often hesitant eagerness to know real people from the ‘other’ side.”

been to put structures first, last and always — then to wonder why nobody believed Canada was anything more than amending formulas, notwithstanding clauses and an awful lot of jurisdiction-crazy bureaucrats. Now we face a spiritual crisis which demands we find, in a very short time, new structures we hope will last a very long time.⁴⁸

Apart from viewing the constitution merely as a document and not also the concomitant “spirit” that surrounds it, this statement dismissed the importance of constitutional change. On the potential of the constitution to redress the concerns of Indigenous peoples, the report said that they have been “‘commissioned-out,’ with no real hope of resolving their grievances,”⁴⁹ meaning the commissioners failed to even try to engage in a reparatory politics. It is worth reiterating that this was a conclusion reached after minimal discussion with Indigenous peoples and after admitting they did not have the expertise to understand their concerns.

Although there were some statements in the report, both from respondents and the commissioners’ analysis, that could be interpreted as responding to the concerns of Indigenous peoples, such statements must be understood in the greater context of the report serving as an anti-minoritarian and populist document. As demonstrated above, the report displayed and reflected a profound lack of knowledge of Indigenous issues—for both respondents and commissioners—as well as a belief that diversity was an affront to Canadian unity. So while there are findings in the report such as “Over and over, participants said our treatment of aboriginal peoples has been unfair, and it is this unfairness — in contravention of one of our fundamental principles — which brings Forum participants to near unanimous conclusions that these past injustices must be remedied” and “The degree of consensus which we heard on the issue of aboriginal land claims cannot be overemphasized. On no other issue did Forum participants demonstrate such clear-cut agreement,”⁵⁰ this greater context of the report and its

⁴⁸ Ibid., 8.

⁴⁹ Ibid., 25.

⁵⁰ Ibid., 36 and 80.

failure at representativeness must be centered in the interpretation of such statements. Ultimately, the failure of the commissioners to reach many Indigenous people and to understand the concerns of those they did reach showed that they did not have the capacity or knowledge to embrace redress constitutionalism and be adequately retrospective, regretful, and reparatory (and the document's breadth even hurts it in being truly constitutional).

The second text under consideration is a series of documents under the banner *Shaping Canada's Future Together*—the proposals from the Mulroney government. Different volumes covered the Canadian identity, Aboriginal self-government, the distribution of powers, economic union, creating responsive political institutions, Canadian constitutional history, a speech from the prime minister, and a summary of all recommendations. These proposals, while couched in some flowery, patriotic language, were substantially more concrete than those of the Spicer report. While the citizens' commission was an information-seeking endeavour and independent from government, the federal government had a greater impetus to put forward more concrete suggestions and to enact a particular constitutional vision. However, as Russell describes, these recommendations were intended as a starting point for a joint Parliamentary committee. The proposals were put forward “on a highly tentative basis,” both because the federal government was deeply unpopular and because of a desire to have the process be more consultative.⁵¹

Mulroney claimed in his speech in the House of Commons when the proposals were tabled that “The mandate is broad. The process is open, not closed; it is inclusive, not exclusive.”⁵² This breadth was replicated in the proposals themselves. Covering both constitutional and non-constitutional renewal, there were three main groupings of proposals

⁵¹ Russell, *Constitutional Odyssey*, 170-1.

⁵² Canada, *Shaping Canada's Future Together: Speech by the Prime Minister, House of Commons, September 24, 1991* (Ottawa: Minister of Supply and Services, 1991), 1.

under the following headings: “Shared Citizenship and Diversity” (Canada clause, Indigenous issues, Quebec distinctiveness, and property rights), “Responsive Institutions for a Modern Canada” (moderate reforms to the House of Commons, substantial reforms to the Senate, and changes to the Supreme Court and the amending formula), and “Preparing for a More Prosperous Future” (economic union, creating a common market, economic policy harmonization, changes to the Bank of Canada, reforming the division of powers, and constitutionalizing a Council of the Federation to manage economic matters).⁵³ There was, in the words of Peter Russell, “Something for everyone (well, almost everyone), but maybe not enough for anyone.”⁵⁴

The recommendations on economic matters stood out as a priority for the federal government’s particular constitutional vision for a few reasons. First, recommendations of this sort were not major priorities of the Spicer Report, so this direction was largely initiated by the federal government.⁵⁵ Second, these proposals were quite detailed, such as recommending changes to the regulatory framework of trust companies and better coordination of corporate securities regulations.⁵⁶ Finally, property rights and economic union were given prominence in this series of documents. The rationale for strengthening Canada’s economic union had an entire book dedicated to it that was almost twice as long as the companion piece on Indigenous matters, and the first amendment proposed was to enshrine property rights in the Charter.⁵⁷

Economic matters featured so prominently in a series of proposals ostensibly centred on constitutional reform because for the federal government the economy was part and parcel of the

⁵³ Canada, *Shaping Canada’s Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991), 51-9.

⁵⁴ Russell, *Constitutional Odyssey*, 173.

⁵⁵ Although there are economic concerns brought up by participants in the Spicer Report (pp. 89-92), the recommendations of the commission are notably lacking in this area (pp. 131-3) in comparison to the Mulroney recommendations. Citizens’ Forum on Canada’s Future, *Report to the People and the Government of Canada*.

⁵⁶ Canada, *Canadian Federalism and Economic Union: Partnership for Prosperity* (Ottawa: Minister of Supply and Services, 1991), 31.

⁵⁷ *Ibid.*, 3.

constitution. In Prime Minister Mulroney's tabling speech, he claimed "nothing would serve the economic interests of all Canadians more directly than clear resolution of our constitutional challenges."⁵⁸ This may have been a means to advance the government's own ideological agenda or a response to the "deep-seated insecurity about the current state and future prospects of the Canadian economy"⁵⁹ that was noted in the Spicer Report. Either way, the framing and emphasis tied the two issues together. Creating a stronger economic union free of internal trade barriers and with more harmonious economic policy was viewed as something that not only *can* come about through constitutional change, but as something that actually *demand*ed constitutional change: "Effective economic integration requires political integration."⁶⁰

Because of this preoccupation with a selective subset of economic matters that aligned with the neoliberal aspirations of the Mulroney government, the federal documents offer only a weak endorsement of redress constitutionalism. Despite the past exclusions of Indigenous peoples from constitutional talks and the recent events at Oka, the Mulroney government did not intend to use the Canada Round as a project of historical rectification. Redress constitutionalism requires the constitutional amendments to regretfully repair historical injustices committed by the state, and the government proposals did not do this.

The documents did, however, admit to both the failure of the constitution and of Canada more generally vis-à-vis Indigenous peoples and concerns. There were claims that "Canada has conferred great benefits on all of its citizens, but it was not created without cost to the aboriginal peoples" and that "The treatment of the aboriginal peoples within Canada represents one of the great failures in our caring for one another."⁶¹ Mulroney even touched on some common

⁵⁸ Canada, *Speech by the Prime Minister*, 8.

⁵⁹ Citizens' Forum on Canada's Future, *Report to the People and the Government of Canada*, 89.

⁶⁰ Canada, *Shaping Canada's Future Together: Proposals*, 29.

⁶¹ Canada, *Shared Values: The Canadian Identity* (Ottawa: Minister of Supply and Services, 1991) 3 and 19.

discourses of redress in his introductory speech: “This is a matter of human dignity, of justice and of fairness. We cannot repair the past. But we need not be condemned to re-live it either,”⁶² This mention of justice and fairness was a recognition that past failures must be addressed (although they cannot be fixed) to create a more just future. This was another move away from Trudeau’s idealized uniform constitution and towards using the past as a motivator for constitutional change. The government proposals also mentioned that “Canada’s aboriginal peoples ... were ignored in the original bargain of Confederation”⁶³ and the “paternalistic” and “assimilationist” Indian Act.⁶⁴ The report acknowledged the views of Indigenous leaders: “[Indigenous leaders] maintain that their people will not achieve social or political justice until their constitutional concerns are fully and adequately addressed.”⁶⁵ On a similar note, the report recognized the potential that constitutional change held for Indigenous peoples: “The current constitutional discussions provide an historic opportunity to address and resolve the constitutional concerns of aboriginal peoples” and “There is now an opportunity to address these issues and to lay a solid basis for the kind of future to which the first peoples of Canada aspire.”⁶⁶ Although lacking regret as a motivator, this was a move closer to the idea of redress because it sought to use constitutional change as a reparatory instrument.

However, the recommendations in this area ultimately failed to address the concerns of Indigenous peoples (perhaps a foregone conclusion, given the non-consultative nature of their creation). There was an ill-defined right to self-government included, but it was subject to a number of caveats—a ten-year delay, a need to negotiate specific terms, and a rejection that such

⁶² Canada, *Speech by the Prime Minister*, 2-3.

⁶³ Canada, *Shaping Canada’s Future Together: Proposals*, 49.

⁶⁴ Canada, *Aboriginal Peoples, Self-Government, and Constitutional Reform* (Ottawa: Minister of Supply and Services, 1991), 9.

⁶⁵ *Ibid.*, 1.

⁶⁶ *Ibid.*, 15; and Canada, *Shaping Canada’s Future Together: Proposals*, 6.

a right was inherent.⁶⁷ The assertion that “The Government of Canada has taken the position that aboriginal peoples should have the right to self-government within the Canadian federation”⁶⁸ demonstrated an underlying belief that such a right did not continue to exist and nor did it exist outside of Canada. Using the lens of redress, the federal government was not adequately retrospective as it ignored both longstanding Indigenous sovereignties and the grievances of Indigenous nations that arose from this systematic disregard. The federal proposals were not in conversation with the past but instead attempt to gloss over it: the proposed Canada clause only recognized that “aboriginal peoples were historically self-governing.”⁶⁹ Additionally, further weakness of the proposed self-government can be seen in the proposals, thus hurting the reparatory potential of the proposed constitutional changes. Although the specifics of jurisdiction and implementation were intended to be negotiated, there was little indication it would truly form a third order of government in Canada, complete with defined authority and a share in the sovereignty of the state. There was no mention of allocating Aboriginal governments any authority in the volume dedicated to the distribution of powers⁷⁰ and there was no mention of Aboriginal governments in the proposals on the amending formula.⁷¹ This meant there was no jurisdictional room—even on a tentative basis—made for Aboriginal governments and that these governments would not have had a formalized role in future constitutional changes. Given this complete lack of authority, the Aboriginal governments would not have had the capacity to get Indigenous peoples on an equal footing in a way that rectified historical imbalances as the recommendations only served to perpetuate imbalances and power differentials.

⁶⁷ Ibid., 9. See also: Canada, *Aboriginal Peoples, Self-Government, and Constitutional Reform*, 19-21.

⁶⁸ Ibid., 14.

⁶⁹ Canada, *Shaping Canada's Future Together: Proposals*, 52.

⁷⁰ Canada, *Distribution of Powers and Functions in Federal Systems* (Ottawa: Minister of Supply and Service, 1991).

⁷¹ Canada, *Shaping Canada's Future Together: Proposals*, 22-3.

Where the Mulroney proposals did make some improvements over the Spicer report was through embracing a more culturally pluralistic Canada. Although a recognition of difference alone is not a *sufficient* precondition for redress constitutionalism, it is a *necessary* prerequisite for a regretful form of politics that focuses on injustices done to a certain group. Although there were claims throughout these documents about the importance of unity and commonalities that Canadians share—“Yet what we have heard also makes up cautiously optimistic because, in the midst of these disagreements, there is much that binds us together,” “Canada is a country that, for all its diversity, has shared values,” and “Canadian citizenship is an emotional tie, a sense of shared values and commitments to our country”⁷²—there was a greater emphasis on difference:

Being Canadian does not require that we all be alike. Around a core set of shared values, Canadian citizenship accommodates a respect of diversity that enriches us all. Many Canadians have deep loyalties to their own communities — to a language, to a region, to an aboriginal group, to a distinct culture, to Quebec as a distinct society, or to ethnic roots.⁷³

The idea that group identities add to a pan-Canadian identity was a recurring theme: “Our Constitution recognizes that individuals live in, and derive their identity from, their communities” and “Accommodating diversity does not undermine our unity, but rather promotes it.”⁷⁴ While Spicer sought to completely disregard difference, the federal proposals at least left the door open for the possibility of a regretful form of politics by validating group differences.

Similar to how federalism constitutionally recognizes and affirms regional difference, the federal proposals argued that similar provisions needed to recognize the difference of Indigenous peoples. *Shaping Canada’s Future Together* argued federalism was a defining characteristic of Canada: “Federalism is one reflection in the Constitution of the fact that national majorities should not determine all issues, that it is more democratic to allow different communities to

⁷² Canada, *Shared Values*, 1 and 1; and Canada, *Shaping Canada’s Future Together: Proposals*, 1.

⁷³ *Ibid.*, 1.

⁷⁴ Canada, *Shared Values*, 10 and 13.

determine various issues.”⁷⁵ For the federal government, federalism endorsed the idea that diversity adds to Canadian unity as opposed to challenging it: “By empowering our country’s parts, we are empowering the whole” and “In the Canadian constitutional tradition there exists – side by side – protection for individual human rights and for the rights of people as members of communities.”⁷⁶ The root of the problem facing Indigenous peoples, therefore, was that their distinctiveness was not recognized in the constitutional framework: “Aboriginal Canadians are frustrated by a Constitution that does not fully recognize their special place in Canadian society.”⁷⁷ Therefore, from the federal government’s perspective, this was the shortcoming that must be rectified. In the words of Charles Taylor in writing on this saga of constitutional affairs, “Recognition withheld is portrayed as ... [an] act of discrimination, even violence.”⁷⁸ While the proposals did not fully address the constitutional aspirations of Indigenous groups, they did help lay a foundation that would be more amenable to constitutional change focused on redress by promoting recognition (and by further challenging Trudeau’s vision for a uniform constitution). That is, the recommendations at some level recognized the historic constitutional position of Indigenous peoples but did not take appropriate action to address and repair it.

The next federal document to come out was *A Renewed Canada*, the final report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (commonly called the Beaudoin-Dobbie Committee after the co-chairs). The proposals in *Shaping Canada’s Future Together* were sent to this committee for further analysis and consultation. This committee’s mandate was “to inquire into and make recommendations to Parliament on the Government of Canada’s proposals for a renewed Canada” and to “provide

⁷⁵ Ibid., 5.

⁷⁶ Canada, *Shared Values*, 24; and Canada, *Speech by the Prime Minister*, 2.

⁷⁷ Canada, *Shaping Canada’s Future Together: Proposals*, vi.

⁷⁸ Taylor, *Reconciling the Solitudes*, 193.

Canadians the opportunity to participate fully in the development of the plan proposed by the Government of Canada for a renewed Canada.”⁷⁹ Therefore—like the Spicer Report—there was consultation across the country. The committee got 3,000 submissions (a record at the time for a Parliamentary committee), held seventy-eight meetings over 227 hours, heard from 700 individuals, and had five conferences on specific topics. The final report diverged from the government proposals in several ways. Russell argues the Liberal and New Democrat members of the committee had greater sway because of the unpopularity of the Progressive Conservatives.⁸⁰ The results were greatly weakened economic union and common market provisions, eliminating property rights from the recommendations, and introducing a “Social Covenant” as a means of binding Canadians together.⁸¹

The report was framed to overcome two challenges with Canadian constitutionalism: the challenges of vision and inclusion. The challenge of vision was to “redefine ourselves around a new sense of purpose, and to give ourselves the tools that can make these goals a reality.”⁸² The committee believed the current constitution was largely directionless and failed to capture the imagination (or even the attention) of Canadians. There were four proposed ways of dealing with this challenge, the first of which was the introduction of the Canada clause, a statement of values and principles intended to describe “who we are as a people and what we aspire to be.”⁸³ The three other mechanisms were a “new social contract,” strengthening Canada’s economic union, and various changes to federalism.⁸⁴ The challenge of inclusion was “to ensure that individual

⁷⁹ Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on a Renewed Canada, *A Renewed Canada: Report of the Special Joint Committee on a Renewed Canada*, 34th Parl., 3rd sess. (Ottawa: Queen’s Printer for Canada, 1992), vii and ix.

⁸⁰ Russell, *Constitutional Odyssey*, 180. Notably, neither the Reform Party nor the Bloc Québécois—two parties with rapidly increasing (albeit regionally concentrated) popularity—were represented on this joint committee.

⁸¹ Canada, *A Renewed Canada*, 86, 87, and 35.

⁸² *Ibid.*, xii.

⁸³ *Ibid.*, 21.

⁸⁴ *Ibid.*, xii-xiii. Generally stated, these changes sought to empower provinces.

Canadians and Canadian communities have access and opportunity to participate as fully as they choose in our common life and institutions, that they feel respected and that their distinctive contribution is valued and welcome.”⁸⁵ The committee wanted to reconcile Canada’s diversity with the goal of a unified vision. Again, there were four avenues for addressing this challenge, of which “The first priority is to ensure that Quebec feels itself a full and willing partner in the constitutional family once again.”⁸⁶ The second aspect of the challenge of inclusion was to include Indigenous peoples within Canada. According to the committee, “the inherent right of aboriginal peoples to self-government within Canada should be recognised and entrenched in the Canadian Constitution.”⁸⁷ Indigenous issues were thus a fairly significant priority of the committee. The other two challenges of inclusion were about including Western and Atlantic Canada and including women.⁸⁸ The committee ultimately asserted their proposals succeeded in addressing the challenges of vision and inclusion with “imaginative and coherent” responses.⁸⁹

The committee’s focus on vision and inclusion helped orient their proposals to be more conducive to redress constitutionalism than the federal government’s proposals. The committee believed a constitution served two interrelated goals. First, the constitution was “the legal and political foundation upon which a nation rests.”⁹⁰ Second, “a constitution is but the expression of the values and principles which are at the root of our nationhood.”⁹¹ The committee recognized the symbolic importance of the constitution and the role that a constitution had beyond the legal realm. Appreciating both the legal and symbolic elements of a constitution, the committee

⁸⁵ Ibid., xiii.

⁸⁶ Ibid., xiv. This was done primarily through the recognition of Quebec’s distinct society and certain jurisdictional changes.

⁸⁷ Ibid., xiv. Note that for the first time there was a stated inherency to this right.

⁸⁸ Ibid., xiv-xv.

⁸⁹ Ibid., 99.

⁹⁰ Ibid., 4.

⁹¹ Ibid., 5.

argued the constitution shaped how we relate to one another: “It has been the blueprint for building our country, establishing how we govern ourselves and providing the foundation for our sense of justice and mutual respect.”⁹² Changing the constitution can therefore change our sense of justice and mutual respect by altering patterns of domination and subjugation. As such, the committee claimed: “We are convinced that we can significantly advance the cause of social justice in our time and in the future: justice for ... the aboriginal peoples ... and for all those who have not been able or allowed to play their full part in Canadian life.”⁹³ This was an endorsement of the transformative nature of constitutional change in altering political relationships. This was a desire to look to constitutional change for its reparative potential to address long-standing injustices that were actualized through the constitution. This sentiment was furthered in the statement that the constitution can be used in “establishing with them relations of equity and justice consistent with the dignity of their status as the first peoples of Canada.”⁹⁴

Like the federal proposals that came before it, the committee viewed Canada’s diversity as a means of creating unity. The committee argued diversity was deeply embedded in Canadian constitutional culture, tracing this back to the Royal Proclamation of 1763 (which recognized the autonomy of certain Indigenous nations), the Quebec Act of 1774 (which allowed for the diversity of French-speaking Catholics), and the intercultural collaboration of Louis-Hippolyte La Fontaine and Robert Baldwin in attaining responsible government.⁹⁵ The committee said this respect for difference was a uniting feature of Canada: “We are bound together by the things we have in common. One of these things, perhaps the most important of them, is the mutual respect

⁹² Ibid., 21.

⁹³ Ibid., 8.

⁹⁴ Ibid., 17.

⁹⁵ Ibid., 6-7. In this sense, the committee was adequately retrospective and considered the long history of Canada.

we share for the diverse characteristics of individuals and communities.”⁹⁶ This was in opposition to Spicer’s emphasis on a strong federal government and a rejection of multiculturalism. The committee went on to assert that “Canadians do not want identical lives, cultures or beliefs” and that subnational identities can complement a national one.⁹⁷ Aboriginal self-government was viewed as a way to create a more united Canada, addressing the challenges of inclusion and vision.⁹⁸ The Beaudoin-Dobbie committee advised that incorporating difference—in this instance, Indigeneity—into the constitutional framework was important for the strength of the federation. They asserted that rebuilding Indigenous-state relations must be done through constitutional change: “Only through fundamental renewal can we achieve a strong and united nation, with all residents opting in to the renewed Canada” and “The first building block is mutual recognition.”⁹⁹ The committee also recognized the growing support for changes to the relationship that Indigenous peoples had with the state: “Across this land ... there is a call for a fundamental change in the way governments and aboriginal peoples relate to one another,” and “The old, colonial, paternalistic ways and institutions must be swept away, replaced by new institutions built on the recognition of inherent rights.”¹⁰⁰

In certain respects, the committee’s proposals lived up to these lofty aspirations of repair. As Russell argues, the proposals were much bolder than the federal government’s and they reflected a growing consensus in Canada that the right to self-government was inherent.¹⁰¹ Although the terms of self-government were not defined (sans a mention that the authority of Indian Affairs “should” be devolved to these governments),¹⁰² adding the word *inherent* marked

⁹⁶ Ibid., 21.

⁹⁷ Ibid., 10. This is also very prominent in the special consideration and power the committee granted Quebec.

⁹⁸ Ibid., 30.

⁹⁹ Ibid., 27.

¹⁰⁰ Ibid., 27.

¹⁰¹ Russell, *Constitutional Odyssey*, 182.

¹⁰² Canada, *A Renewed Canada*, 32

a substantial shift in Canada's constitutional discourse and responded directly to the wishes of Indigenous leaders with an understanding of enduring Indigenous sovereignties. The committee also proposed that self-government be implemented without delay.¹⁰³ The committee's proposals indicated a willingness by the parliamentarians to "share constitutional sovereignty as citizens of a multinational state"¹⁰⁴—a state composed of Quebec, Indigenous nations, and the ROC.

However, there were significant shortcomings in these proposals. The committee placed bounds on what the inherent right to self-government meant, and when introducing this concept it set out a clear disclaimer that it did not entail claims to statehood or legitimacy in the international arena.¹⁰⁵ This is not to say there was a widespread desire among Indigenous leaders to continue to pursue the international avenue as they had in the patriation discussions, but it does speak to—as Mary Ellen Turpel-Lafond puts it—the “prominent racist belief that Aboriginal peoples were not capable of governing themselves.”¹⁰⁶ Aboriginal governments were also not included in the newly constitutionalized Conference of First Ministers, which was exclusive to the federal government and the provinces.¹⁰⁷

To better understand how the recommendations of the joint parliamentary committee responded to the aspirations and frustrations of Indigenous peoples, we must look to the proceedings of the committee. Part of the committee's mandate was to “develop procedures to ensure aboriginal peoples participate fully in the development of the Government of Canada's plan for a renewed Canada and, in particular, on issues of special interest to them.”¹⁰⁸ However,

¹⁰³ Ibid., 29.

¹⁰⁴ Russell, *Constitutional Odyssey*, 180.

¹⁰⁵ Canada, *A Renewed Canada*, 29.

¹⁰⁶ Mary Ellen Turpel, “The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change,” in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 124.

¹⁰⁷ Canada, *A Renewed Canada*, 32.

¹⁰⁸ Ibid., vii.

the committee's response to Indigenous issues was not as robust as originally planned. In addition to soliciting submissions and listening to testimony, the committee was to host six conferences across the country on various topics: the division of powers in Halifax, institutional reform in Calgary, economic union in Montreal, the Canada Clause in Toronto, Indigenous issues in Vancouver, and the final one was to give participants the ability to respond to the themes that emerged from the previous conferences. However, the Vancouver conference ended up being concluding the process and did not discuss Indigenous issues.¹⁰⁹ A conference on Indigenous issues did end up being held, but it occurred a month after the committee concluded its work, meaning the findings were not incorporated in the committee's report.¹¹⁰ Furthermore, the Canada Round was bound by restrictive timelines (imposed by a potential Quebec referendum on separation) and was inadequate to fully and appropriately address many issues, especially given the complexity and ambiguity of creating a third order of Aboriginal self-government. Collectively, these factors limited the overall effectiveness of the committee in responding to Indigenous constitutional concerns.

The committee did, however, make concerted efforts to meet with Indigenous organizations. Notably, the Assembly of the First Nations (AFN), the Métis National Council (MNC), the Native Council of Canada (NCC), and the Inuit Tapirisat of Canada (ITC) all had the opportunity to meet on multiple occasions with the committee.¹¹¹ However, these meetings

¹⁰⁹ Russell, *Constitutional Odyssey*, 180.

¹¹⁰ Russell, *Canada's Odyssey*, 412.

¹¹¹ Although other Indigenous organizations and nations were present before the committee, the analysis will focus on these organizations for three reasons. First, these organizations (or precursors to them) were participants at the 1980s constitutional conferences on Aboriginal issues. Second, these four organizations were later invited to participate in the first ministers' meetings on the constitution later on in the Canada Round. Third, these organizations were provided with federal funding to complete their own parallel processes on constitutional consultation. See: Radha Jhappan, "Inherency, Three Nations and Collective Rights: The Evolution of Aboriginal Constitutional Discourse from 1982 to the Charlottetown Accord," *International Journal of Canadian Studies: The Charter, Federalism, and the Constitution* no. 7-8 (1993): 227, <https://www.iccs-ciec.ca/documents/70.pdf>.

occurred amid the 281 other groups and persons that presented to the committee. In fact, Indigenous-specific organizations totaled only fifteen, and were thus roughly 5.34 per cent of total presenters. In terms of submissions and briefs received by the committee, the numbers were even less convincing. The committee received 3031 written submissions, and only twenty-three came from Indigenous groups or nations (roughly 0.76 per cent of total submissions).¹¹² Even though the Canada Round happened in the context of the Oka Crisis, it was not intended to respond solely to Indigenous concerns in the same way Meech Lake had been a direct response to the concerns of Quebec. As already demonstrated in this research, the Mulroney government did not intend to use constitutional amendments to atone for or respond to past wrongs. Rather, the Canada Round was a time for any constitutional woe to be brought to light and debated, so it expanded far beyond the constitutional aspirations and concerns of Indigenous peoples.

As Cairns argues, the advent of the Charter created more constitutional actors and more issues were deemed ‘constitutional’ in nature and thus became part of constitutional discussions. Because of this, the “constitutionally significant past” was expanded and “past inequities and injustices, previously overlooked or downplayed, were researched and publicized to become the basis for redress claims.”¹¹³ Indigenous organizations saw constitutional change as an avenue for creating a system that would no longer deny them equal participation in shaping society—it was a means of responding to and repairing unjust constitutional arrangements that had far-reaching effects for Indigenous peoples. What follows is an overview of testimony provided by the MNC, NCC, ITC, and AFN; what they prioritized during the negotiations; and how they wanted constitutional change to serve their purposes.

¹¹² Canada, *A Renewed Canada*, 131-65 and 167-201. For greater clarity, the list of witnesses can be found in Appendix C (pp. 131-65) and the list of those who made a submission can be found in Appendix D (pp. 167-201).

¹¹³ Cairns, *Reconfigurations*, 22.

The MNC spent a great deal of time grounding their presentation in the past to inform the committee of the specific history of the Métis. This included an overview of the Métis nation in the fur trade, the development of a distinct language and way of life, the unilateral transfer of Rupert's Land to the Dominion of Canada, the Métis resistances against Canada, and the abrogation of federal responsibility for the Métis.¹¹⁴ This emphasis on the past demonstrated that history was deeply connected with the present for the MNC, and they wanted to be very deliberate about describing their particular history and the Métis nation's relationship with the state. Multiple MNC representatives spoke about the need for committee members to appreciate the specific violences to which they have been subjected: "we need to be at least on a level playing field with other aboriginal groups" and "the abdication of the federal fiduciary or trust responsibility have led to many, many inequities for the Métis people."¹¹⁵ The MNC representatives argued that the federal government had reneged on their fiduciary responsibility and were thus excluded by successive governments in ways that other Indigenous groups were not. Harry Daniels, then serving as the chief constitutional negotiator for the Ontario Métis and Aboriginal Association, described the violence of non-recognition as such: "Rather than viewing the Métis as a distinct aboriginal people, they started to deal with us as people with social problems. Successive federal governments implemented a policy of non-recognition of Métis by acts of omission rather than commission."¹¹⁶ Durocher described that this non-recognition was not merely a historical phenomenon, but that it remained ongoing in contemporary Canada:

You have just witnessed a brief history of the Métis nation. It is a history of non-recognition and it is a history of denial. We all seem to think that things must be different today, but I want to state unconditionally that nothing has changed. We continue to suffer from non-

¹¹⁴ Canada, Parliament, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, 34th Parl., 3rd sess. (Ottawa: Queen's Printer for Canada, 1991-2), issue 36: 6-25.

¹¹⁵ *Ibid.*, issue 36: 18 and 20. These quotes were provided by Jim Durocher, President of the Métis Society of Saskatchewan and Gary Bohnet, President of the Métis Nation of the Northwest Territories, respectively.

¹¹⁶ *Ibid.*, issue 36: 14.

recognition and numerous inequities, and as a nation we continue to stare cultural genocide in its ugly face.¹¹⁷

To change this, the MNC wanted constitutional change to repair the wrongs of the past because the state had a responsibility to do so. For example, Norman Evans, President of the Pacific Métis Federation, said “As the Prime Minister said at one time, he would like to see the Canadian pie complete. But it cannot be complete until these historical events are righted;” Olaf Bjornaa, President of the Ontario Métis and Aboriginal Association said “To me and to a lot of our people it feels as if they never took the rope off Louis Riel’s neck. When we come to these committees, to government, the rope is still there. It’s time to take this rope off and let our people do things;” and Yvon Dumont, spokesperson for the MNC, argued in favour of regaining a cooperative relationship with the Crown once enjoyed by the Métis: “These rights continue to be suppressed today and it appears they will continue to be suppressed unless these talks on the Constitution address them and recognize them.”¹¹⁸ This desire to use constitutional change as a regretful way of repairing injustices that faced the Métis was perhaps put most powerfully by Larry Desmeules, President of the Métis Nation of Alberta:

You have heard of the persecution and the hardships that our people have endured. You have heard of the problems and the lack of opportunity and the rights that have still not been acknowledged today.... We must believe in the political will of the government and its commitment to right these wrongs.... Through this [constitutional] process the wrongs of the past can be righted, the problems of the present can be resolved, and our vital place in a Canada of the future can be assured.¹¹⁹

Due to this history of exclusion and the federal government’s abdication of responsibility, the primary concern of the MNC was to be included in a meaningful way in the constitutional framework. Inclusion was a way to repair inequities and legitimate the aspirations of the MNC. Dumont argued that the Métis had been nation builders in the past and wanted to continue with

¹¹⁷ Ibid., issue 36: 17.

¹¹⁸ Ibid., issue 36: 7, 33, and 39.

¹¹⁹ Ibid., issue 36: 31.

this tradition: “the Métis want to continue as nation builders. They want to be involved in the development of this constitutional document. We’re not going to sit outside the process; we want to be right in it.”¹²⁰ This type of nationalism was in contrast to the Quebecois nationalism that dominated Canadian constitutional negotiations. Instead of discussions predicated on a threat of separation, the MNC was advocating for inclusion within the state: “We are not seeking sovereignty from Canada, we are not seeking separation; we are seeking recognition within the Canadian federation.”¹²¹ The MNC representatives advocated for having a seat at the table and wanted to negotiate with Canada to achieve justice and recognition for their people.

This desire for inclusion influenced the specific constitutional recommendations put forward by the MNC to repair the relationship with the state. Multiple representatives advocated the need for the federal government to assume responsibility for the Métis under section 91(24), arguing this exclusion resulted in further injustices for their people by omitting them from consideration. As described by Durocher, “we need to be at least on a level playing field with other aboriginal groups.”¹²² Representatives also expressed a desire to be included in pre-existing institutions. They argued in favour of a reformed Senate with Métis representation, for involvement in the amending process, and to be a part of the discussions on altering the division of power. They argued the Halifax conference on the division of powers did not adequately describe an arrangement with a true third order of government.¹²³ For the MNC, the way of repairing the failures of the past was by being included in the constitution and involved in the ongoing decision making of the state so their history would not continue to be overlooked.

¹²⁰ Ibid., issue 14: 30.

¹²¹ Ibid., issue 36: 41.

¹²² Ibid., issue 36: 18. For other examples of this argument, refer to issue 14: 36 and issue 36: 20.

¹²³ Ibid., issue 65: 4-6.

The NCC spoke of the need for the Canada Round to address historical inequities faced by Indigenous peoples in Canada by treating Indigenous groups/nations as equal partners in Confederation. Ron George, President of the NCC, viewed constitutional change as a vehicle for redressing the errors of non-recognition by the Canadian state. He advocated for a new covenant between Indigenous peoples and Canada based on consent. He said that a new covenant was a way to ensure that all partners were willingly entering Confederation: “In other words, we are rolling the clock back 125 years and a day, to before the British North America Act was signed, and including the aboriginal people in the process as one of the founding nations.”¹²⁴ This was a clear indication that George wanted constitutional change to respond to and repair injustices of the past by “rolling the clock back.” He also wanted the process of constitutional change itself to reflect and correct the errors of non-recognition by being a nation-to-nation agreement: “We proposed and now we insist that a treaty approach of reconciliation be used in 1992.”¹²⁵ He argued the constitutional arrangement was and continued to be a source of injustice, and that a new covenant between Indigenous peoples and the Crown was a way to overcome this: “I will not support a constitutional package that forces aboriginal people to tolerate for one more year the kind of repression and denial that we have witnessed for the last 500 years.... We want to invite Parliament and Canadians to join with aboriginal peoples in a new covenant.”¹²⁶ Like the MNC, the NCC drew upon a long history of injustices to both make their case to the committee and to describe the depth of what needed to be corrected. However, the NCC did not speak as strongly about the need for *regretful* action.¹²⁷

¹²⁴ Canada, Parliament, Aboriginal Liaison Committee of the Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, 34th Parl., 3rd sess., vol. 1 (Ottawa: Queen’s Printer for Canada, 1992), 209.

¹²⁵ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 64: 29.

¹²⁶ Canada, *Minutes of Proceedings of the Aboriginal Liaison Committee*, 181.

¹²⁷ Part of the NCC’s testimony was *in camera*, so it is possible that these sentiments were not expressed publicly.

The NCC sought this new national covenant to establish a strong partnership between Indigenous peoples and the Crown. This covenant, to be given constitutional status, was viewed as a way of reconciling the sovereignty of the Canadian state with the sovereignties of Indigenous nations.¹²⁸ The themes of partnership and working together come up several times in the NCC's testimony, such as: "I hope we'll end up having a true partnership when self-government is finally entrenched in the Constitution," "So we don't know what's going to happen after March, but I sure hope it's a climate where we can work together," and "I am not ashamed to speak of unity. I want it and I'm sure everyone around this table wants it."¹²⁹ This idea of partnership was also evident in some of the more concrete proposals put forward by the NCC. For example, George advocated for Indigenous representation at First Ministers' Conferences when Indigenous interests were being discussed, inclusion in the proposed Council of the Federation, and involvement in discussions about the division of powers (especially since the federal proposals only put forward a two-way division of powers).¹³⁰ Partnership and a new covenant were viewed as means to achieve unity—George wanted to build interconnections between the state and Indigenous peoples: "It is not by choice that we are on the outside. We wish to come in.... We want to complete Confederation, not bury it."¹³¹ George criticized the current status of the federal proposals for the impotence of the Canada clause's recognition of Indigenous peoples, especially when compared to Quebec. He advocated for stronger recognition "to preserve and promote the inherent and fundamental characteristic"¹³² of Indigenous nations. For the NCC, constitutional change was a way to overcome the injustices inherent to the current

¹²⁸ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 64: 29.

¹²⁹ Canada, *Minutes of Proceedings of the Aboriginal Liaison Committee*, 140, 141, and 181.

¹³⁰ *Ibid.*, 184-5.

¹³¹ *Ibid.*, 182.

¹³² *Ibid.*, 185.

constitutional arrangement. George was optimistic that a new covenant and a re-founded partnership could undo the impacts of historic injustices and non-recognition.

The ITC had three constitutional imperatives that, collectively, were intended to respond to the injustices that impacted Inuit communities:

The Inuit position focuses on three constitutional imperatives. First is the constitutional entrenchment of the inherent right of aboriginal peoples to self-government. Second is the recognition of Aboriginal peoples as distinct societies. Third is guaranteed representation of aboriginal peoples at all first ministers conferences and other federal-provincial processes on the Constitution, the economy and other fundamental matters.¹³³

On the first imperative, President Kuptana argued it was inadequate for Aboriginal governments to legislate just in specific areas that had been delegated to them, but that there must be an actual and substantive transfer of jurisdiction. Unlike provinces that entered Confederation willingly with a defined jurisdiction, Indigenous peoples were never able to negotiate their own terms of entry into Canada. This is particularly true for much of northern Canada, which was transferred to Canada from the United Kingdom by a mere act of Westminster. The notion of *inherency* in this imperative was also very important for the ITC. As noted by political scientist Radha Jhappan, “The language of inherency has much more than merely symbolic importance. It recognizes the fact that Aboriginal peoples were historically self-governing, that they never gave up the right to govern themselves, and that the right is not granted by any other government or legislative or constitutional enactment.”¹³⁴ The second imperative was about recognition, and on this the ITC wanted “a matter of simple co-existence, one of mutual respect and mutual recognition.”¹³⁵ Kuptana told the committee that the myth of Canada as having two founding nations—English and French—ignored the contributions of Indigenous peoples, and that this

¹³³ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 64: 48-9. See also: Rosemarie Kuptana, “The Canadian Inuit and the Renewal of Canada,” *Études/Inuit/Studies* 16, no. 1/2 (1992): 40. <https://www.jstor.org/stable/42869730>.

¹³⁴ Jhappan, “Inherency, Three Nations and Collective Rights,” 235.

¹³⁵ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 64: 58.

history must be understood and incorporated. The ITC's third imperative was similar to the desires of the MNC and the NCC for inclusion and to be present throughout the process.

These imperatives reflected the idea of using constitutional change to redress for past failures of the state. To move forward with repair, Kuptana argued that "Inuit have not been well-served in the past by the application of the laws made by outside government bodies. Inuit self-governing institutions will be able to correct the failures of the past system and better provide for the present and future needs of Inuit."¹³⁶ Constitutional recognition of the inherent right to self-government would allow Inuit to have the jurisdictional authority to preserve Inuit culture: "Constitutional reform is necessary to achieve these objectives [of protecting language and culture] and to correct the injustices and inequities that exist in the present system of government." The ITC delegation claimed that although there were numerous issues that faced the Inuit, constitutional change could be a means to address all of them: "The source is always the same: that the best way to deal with these issues is to have self-government."¹³⁷ The ITC argued Canada needed to overcome the racist intransigence that has held back a more robust form of self-government: "there is nothing to fear in permitting Inuit the same degree of collective freedom as you, as non-Inuit, have allowed yourselves."¹³⁸ The issue of self-government was deeply intertwined with the second imperative of constitutional recognition. The ITC saw constitutional recognition as connected with political power: "The only remedy to our current situation, a condition that day by day erodes the vitality of Inuit culture, is the recognition of our equality, of our inherent right to self-government."¹³⁹ The third imperative about Inuit involvement in the first ministers' conferences was a concrete suggestion to provide Inuit self-

¹³⁶ Ibid., issue 64: 50.

¹³⁷ Ibid., issue 37: 28. This quotes John Amagoalik, constitutional advisor of the Tungavik Federation of Inuvit.

¹³⁸ Ibid., issue 37: 12.

¹³⁹ Ibid., issue 37: 10.

government with a say in the greater federation and more political power. Such power was previously denied to the Inuit (something especially true in a pre-Nunavut Canada), and the ITC wanted to change this.

Finally, the AFN put forward a constitutional vision grounded in an understanding of and a desire to redress the past. Like the MNC, the AFN emphasized the importance of being retrospective in understanding the contemporary plight of Indigenous peoples. In the first presentation of the AFN to the joint committee, they brought along historian Tony Hall to provide an overview on a wide range of topics including the exclusionary elements of Confederation, historical and modern treaties, the evolution of the Indian Act, treaty and collective rights, and Crown-First Nations relations.¹⁴⁰ He explained that recognizing collective identities had long been a principle of Canadian constitutionalism as an important means of protecting minority interests: “We need to do better to explain and to interpret that there is a strong tradition in our constitution of respecting collective identities and collective rights, and that the power of the majority is not always the only dimension of our democracy that need be respected.”¹⁴¹ Constitutional recognition—such as in a Canada clause—was thus not an aberration from previous constitutional development but would instead be a continuation of constitutional minoritarianism that was evident with the Quebec Act, the establishment of treaties, the Charter, and specific provisions for the entrance of individual provinces into Confederation. Therefore, for the constitution to not fully recognize the distinctiveness of First Nations would be a continued injustice that betrayed fundamental characteristics of Canadian

¹⁴⁰ Ibid., issue 35: 34-43. The reference here to Hall’s involvement in the AFN delegation is in no ways an endorsement of or meant to imply that the AFN ascribed (or presently ascribes) to his promotion of conspiracy theories and expressions of Holocaust denial, as reported in Canadian news media. See: CBC News, “Controversial University of Lethbridge Professor to Retire This Fall,” Canadian Broadcasting Corporation, August 8, 2018, <https://www.cbc.ca/news/canada/calgary/university-lethbridge-anthony-hall-retire-1.4778277>.

¹⁴¹ Ibid., issue 35: 36.

constitutionalism. Tom Porter, Sub-Chief of the Mohawk Nation Traditional Council, argued for the importance of considering history and said “this gathering should have occurred 300, 400, 500 years ago” because “[t]hat’s how far behind we are in terms of catching up.”¹⁴² The importance of the past was furthered by Moses Okimaw, legal advisor to the AFN:

We are treated only as a subject-matter, not as a people, something to be governed, to be legislated, to be regulated, and so on and so forth. We are not treated as a people, and that is the reason why all of us do not consider ourselves to be citizens of Canada. The other reason why we don’t consider ourselves to be citizens of Canada is because we have never been asked to be citizens of Canada. We were decreed to be of this Canadian state that you’ve developed.¹⁴³

Okimaw’s statement spoke to the importance of understanding the historical non-recognition and exclusion that First Nations peoples were subjected to by the state—non-recognition and exclusion the AFN sought to repair in the Canada Round. National Chief Ovide Mercredi claimed the Canada Round was a historic opportunity to repair the failures of the past: “It seems to me we have an opportunity we have not had for a long time to set the record straight, to amend the Constitution in a manner that does justice to our people.”¹⁴⁴ Mercredi spoke of an extreme willingness to work with the state to remedy a history of exclusion and paternalistic policy decisions. For Mercredi—similar to other Indigenous leaders—exclusion was an injustice, and he wanted the state to take responsibility for repairing this:

If people persist in defining who we are, in defining what our rights are, in trying to make us fit into their mold of the world, we will never feel welcome. We will always feel a sense of grievance. So we hope we can eliminate our experience of exclusion in dealing with the development of this country, and we sincerely hope Canadian people and their governments will agree with us when we say the time has come to make the aboriginal people, the First Nations of Canada, feel welcome.¹⁴⁵

¹⁴² Ibid., issue 35: 7.

¹⁴³ Ibid., issue 35: 51.

¹⁴⁴ Ibid., issue 62: 40.

¹⁴⁵ It should be noted that there were media reports during this time with Mercredi threatening “independence” if Indigenous sovereignties were not recognized. However, this was not his preferred option. See, for example: Andre Picard, “Mercredi Warns of Native Independence: ‘Not very Likely’ Indians Will Stay in Canada if Sovereignty Not Recognized,” *The Globe and Mail*, October 22, 1991. <http://search.proquest.com.ezproxy.library.uvic.ca/historical-newspapers/mercredi-warns-native-independence/docview/1143972528/se-2?accountid=14846>.

Mercredi's goal was to "be able to preserve a way of life, to be able to use our own institutions of self-government to deal with the social and economic needs of our people, to heal our communities, to make some progress so that we have vibrant societies."¹⁴⁶ He said constitutional change was a means of achieving this because "in your society the rule of law is supreme."¹⁴⁷ This sentiment on the prospect of repair also occurred in Turpel-Lafond's description of why the AFN was interested in constitutional change. She argues that because the state was already interested in changing the constitutional framework, Indigenous organizations (such as the AFN) seized this opportunity as a way of effecting change favourable to them.¹⁴⁸

Prominent in the AFN's constitutional vision was their desire for substantive change. Representatives from the AFN spoke about the need for a re-founding of Canada that would lay the foundation for new relations between Indigenous peoples and the Canadian state. For example, Grand Chief of the Mohawk Council Mike Mitchell made this clear when he asserted: "Part of what we are talking about now in the constitutional discussions is that we have to establish a new relation. In those new relations, legislation that delegates a lot of authority and that treats us like children has to go. We have to go back to the principle that we are brothers, that we are equals."¹⁴⁹ Mitchell went on to argue that any new relationship should be based on the historic relationship that focused on brotherhood as opposed to paternalism.¹⁵⁰ Chief Mercredi summed it up quite simply: "First Nations want to build a new Canada and a new Confederation."¹⁵¹ Thus their aspirations were not for simple tweaks, but they wanted to bring First Nations people into the constitutional framework in a way that would have re-founded the

¹⁴⁶ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 62: 51.

¹⁴⁷ *Ibid.*, issue 62: 52.

¹⁴⁸ Turpel, "The Charlottetown Discord," 120-4.

¹⁴⁹ Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 35: 28.

¹⁵⁰ For an overview of the evolution of this relationship, see: Russell, *Canada's Odyssey*.

¹⁵¹ Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 62: 43.

country. Leroy Littlebear, a professor of Native studies and part of the AFN delegation, said the current constitutional framework and even the approach to constitutional change in Canada was ill-suited to deal with the scope and intent of the AFN's aspirations. Littlebear argued for a visionary approach to address the weight of the situation as opposed to an administrative one. Littlebear said a visionary approach was necessary to achieve a transformative form of self-government. A true self-governing arrangement must fundamentally reshape relations: "All these government initiatives with regard to Indian self-government really are administrative approaches. Those administrative approaches do not resolve the very fundamental underlying differences."¹⁵² The AFN was seeking to transform the Canadian state as a means to address the paternalism, exclusion, and repression faced by First Nations to repair their historic position in Canada's constitutional framework.

Although the ITC, AFN, MNC, and NCC all advocated to the committee with slightly different priorities and principles, all four organizations pushed for substantial changes to Canada's constitutional framework. Whether the specific priority was a re-founding of Canada, a national covenant, inclusion at all stages of the process, or the inherent right to self-government, all organizations wanted significant constitutional changes to respond to the exclusion and injustices that faced Indigenous peoples. There was a desire for the constitution to grant Indigenous peoples jurisdictional power as a means of addressing their subordination. Although the arguments these organizations made relating to the importance of inherency were taken well by the joint committee and were included in the final report, the arguments relating to the importance of the quality and strength of self-government were not. As has already been described, the Beaudoin-Dobbie Report did not explain the powers of the new self-governing

¹⁵² Ibid., issue 35: 45.

arrangements and nor did it include a process by which jurisdiction would be allocated to it.¹⁵³

This desire for change was also found in the AFN's constitutional position paper: *To The Source*. *To The Source* was created as part of the parallel processes to the Beaudoin-Dobbie Committee with funding provided by the federal government, but due to time constraints, *To The Source* was released after the committee issued its final report. To create this document, the AFN established a group of commissioners called the First Nations Circle on the Constitution, co-chaired by Rosie Mosquito and Konrad Sioui.¹⁵⁴ Mercredi later endorsed the report of this arm's-length body. The commissioners of *To The Source* were mandated to "[go] to the source, back to the people and the cultural values."¹⁵⁵ They held eighty hearings and four major conventions with key stakeholders. They asked questions about what First Nations wanted from a constitution and what role, if any, they wanted to have in the Canadian state.¹⁵⁶

The main text of *To The Source* is composed roughly half of direct quotes of participants from the meetings and conventions. According to the commissioners, "who can speak better to the leaders than the people themselves?"¹⁵⁷ The commissioners saw it as their role merely to contextualize the thoughts of others with interlocutory and introductory comments. The document was not intended to create a cohesive constitutional prescription; rather, it propagated a diverse and pluralistic expression of Indigeneity. Although it was possible for the commission (and for any commission of this type) to engage in substantial selection bias when choosing

¹⁵³ Canada, *A Renewed Canada*, 32 and 109.

¹⁵⁴ Assembly of First Nations, First Nations Circle on the Constitution, *To The Source: Commissioners' Report* (Ottawa: Assembly of First Nations, 1992), iv.

¹⁵⁵ *Ibid.*, i.

¹⁵⁶ *Ibid.*, iii.

¹⁵⁷ *Ibid.*, xi.

which quotes to include, this did not seem to be an issue in *To The Source*. Many of the quotes contradict one another, presenting a multiplicity of voices from Indigenous communities.¹⁵⁸

To The Source, like the AFN's testimony to the committee, expounded the value of redress constitutionalism. One of the recommendations that the authors had for the constitution was to recognize "[t]hat past injustices to First Nations and their members be acknowledged and admitted."¹⁵⁹ This was an explicit demand for regretful constitutional change to ensure the history of injustices and exclusion did not continue. In the words of Chief Wendy Grant, "The times has come for us to seize the initiative and ensure that never again will our people have to endure what we suffered in the past."¹⁶⁰ The Canada Round of constitutional negotiations was seen by the AFN as a tremendous opportunity to bring about positive changes for First Nations people and repair past injustices. As Mary Ellen Turpel-Lafond—then advisor to the AFN—argues, the Canada Round was intended to bring about "fundamental changes in the status-quo relationship with the governments of Canada in order to improve the Aboriginal situation."¹⁶¹ This imbalance could not be rectified unilaterally, for this would only perpetuate the colonial approach that needed to be transcended. Rather, this work had to be done in partnership, a possibility provided by the Canada Round. Turpel-Lafond argues this was the "first opportunity, outside of the early treaties, in the history of Canada where change was discussed with Aboriginal peoples, based on Aboriginal ideas for a new relationship."¹⁶²

To The Source argued that it was imperative for the Canadian state to recognize Aboriginal self-government, but that the right to Aboriginal self-government existed irrespective

¹⁵⁸ It is worth noting this analysis is in stark contrast to what Cairns says about *To The Source*. He claims it puts forward a "profound sense of cultural singularity to its people." My analysis does not support and in fact heavily refutes this assertion. See: Cairns, "Multinational Canada v. Federalism," 45.

¹⁵⁹ Assembly of First Nations, *To The Source*, 23.

¹⁶⁰ *Ibid.*, 4.

¹⁶¹ Turpel, "The Charlottetown Discord," 118.

¹⁶² *Ibid.*, 121.

of such recognition. This was articulated quite pithily in the report: “The Federal government cannot grant self-government to the First Nations any more than the mayor of Sudbury can declare war on Japan.”¹⁶³ The report spoke unequivocally about the need for self-government to be powerful enough to fundamentally reshape the political processes that occur in the territory occupied by Canada: “Our concern is not just constitutional change or new legislation; our goal is to deal on a government-to-government basis.”¹⁶⁴ The document called for Aboriginal self-government that would have actually created the conditions for a true third order of government. *To The Source* recommended that “First Nations, federal, provincial, territorial, and municipal jurisdictions be reexamined” and that “First Nations’ relationships with federal and provincial governments be on a nation-to-nation basis.”¹⁶⁵ Taken together, these constitute the creation of an order of government with actual jurisdictional authority and an ability to engage with other orders of government in the Canadian state, something that did not exist in the Beaudoin-Dobbie report. Similar to the AFN representatives before the joint committee, *To The Source* pushed for a robust self-government framework that went beyond self-administration and toward a governing arrangement that reflected Indigenous values and the diversity of First Nations.¹⁶⁶

The recommendations in *To The Source* and the testimonies that the commissioners gathered from across the country demonstrated the important role constitutional change can play in reparatory politics. Even though Mercredi was not involved in the creation of the report, in many ways the findings reflected his belief that constitutional reform was the strongest way of dealing with First Nations’ issues and improving the conditions in which many First Nations

¹⁶³ Assembly of First Nations, *To The Source*, 15.

¹⁶⁴ *Ibid.*, 13.

¹⁶⁵ *Ibid.*, 54.

¹⁶⁶ *Ibid.*, 16-22.

lived.¹⁶⁷ Mercredi argued that “Canadians have come to see that the hurt we experienced is a burden that needs to be removed,”¹⁶⁸ and viewed constitutional change as an important way of engaging in this regretful repair. The recommendations put forward in *To The Source* were not about being included into the Canadian federation as it existed, they were about reshaping the polity as a whole to become more just and to address ongoing social subordination. The AFN was looking to be included in this work and to be a part of the decision making that affected the lives of First Nations people: “Above all, the people say, the constitutional process should be inclusive, not exclusive.”¹⁶⁹ Changing the constitution of the state was seen as a way of changing the lives of people and of overcoming the failures of past government (in)action.

The final document of the Canada Round was the *Consensus Report on the Constitution*—more commonly referred to as the Charlottetown Accord—the report that went to and failed in a country-wide referendum. This text was created through a form of multilateral negotiation unprecedented in Canadian megaconstitutional politics. The process involved Canada’s eleven first ministers, two territorial leaders, and the leaders of the AFN, ITC, MNC, and NCC. Cairns argues these negotiations were the first forum that included the true breadth of Canada’s diversity in the Canada Round—there was a lack of Indigenous and Quebecois representation during Spicer, Beaudoin-Dobbie, and the constitutional conferences.¹⁷⁰ Russell argues the presence of Indigenous leaders in these discussions made the *Consensus Report* so different from past documents.¹⁷¹ The final text was a tenuous and delicate balance of competing interests. However, the use of the word ‘consensus’ was in and of itself a misnomer. Although

¹⁶⁷ Ovide Mercredi and Mary Ellen Turpel, *In The Rapids: Navigating the Future of First Nations* (Toronto, Penguin Books: 1993), 208. Mercredi came to this conclusion because he recognized the power of the constitution and he believed that constitutional change would remain an important topic of discussion in Canada.

¹⁶⁸ *Ibid.*, 47.

¹⁶⁹ Assembly of First Nations, *To The Source*, 28.

¹⁷⁰ Cairns, “Multinational Canada v. Federalism,” 29.

¹⁷¹ Russell, *Constitutional Odyssey*, 193-4 and 203.

the negotiators presented a united front in favour of the accord, there were dissents on some of the particular clauses: “In areas where the consensus was not unanimous, some participants chose to have their dissents recorded. Where requested, these dissents have been recorded in the chronological records of the meetings but are not recorded in this summary document.”¹⁷²

The report was drafted in three stages. The first stage was undertaken by the ROC—the governments of Canada, minus that of Quebec—and the four national Indigenous organizations. A series of meetings were held from March to June of 1992, and the work was split between a coordinating committee and four different working groups.¹⁷³ The Quebec government was not willing to participate until the ROC had presented its “best effort”¹⁷⁴ to meet their constitutional aspirations. This approach of not engaging was in sharp contrast to the approach taken by all four national Indigenous organizations who sought inclusion in both the process and the resulting constitutional framework.¹⁷⁵ In the second stage the Indigenous organizations took on a lesser role and Quebec was still absent, and the primary objective was to reach agreement on the Senate. During this time—and without Indigenous representation present—the ROC first ministers also agreed that the delay in justiciability for Aboriginal self-government should be extended from three to five years.¹⁷⁶ In the third and final stage, there were further constraints placed on the Aboriginal self-government provisions. A contextualizing statement was included that explicitly said that the recognition of this inherent right would not create any additional land rights. Most significantly was the addition that laws by Aboriginal governments would be invalid

¹⁷² Canada, *Consensus Report on the Constitution*, ii.

¹⁷³ *Ibid.*, ii.

¹⁷⁴ Cairns, “Multinational Canada v. Federalism,” 31.

¹⁷⁵ This desire for inclusion was not confined to the four organizations under analysis here. The Native Women’s Association of Canada launched a lawsuit because they believed that their exclusion from the process was an infringement on their Charter rights. Russell, *Constitutional Odyssey*, 194-5.

¹⁷⁶ Russell, *Constitutional Odyssey*, 211.

if they conflicted with federal or provincial laws that were necessary for the “preservation of peace, order and good government in Canada.”¹⁷⁷

If we view the Canada Round as a microcosm of the perennial issues that defined and plagued Canadian politics, the *Consensus Report*—the culmination of this messy, expansive work—was also reflective of this reality. The motley nature of the *Consensus Report* was indicative of the diverse voices that influenced it, the less-than-ideal circumstances from which it arose, and the ambitious mandate it had. As Brooke Jeffrey attests: “The Charlottetown Accord can be seen, and has often been presented, as an attempt to correct the flaws in the Meech Lake agreement, which, in turn, was an attempt to address the flaws of the constitutional amendment package of 1982.”¹⁷⁸ The economic priorities of the Mulroney government were all but abandoned in the final text. The federal government did not get its constitutional imperative to eliminate interprovincial trade barriers.¹⁷⁹ Additionally, property rights were not even discussed in the multilateral negotiations, despite this being another priority of the federal government.¹⁸⁰ The economic union was coupled with language about a social union, and neither was to be a justiciable element of the constitution.¹⁸¹ Russell argues that the provinces dominated these negotiations, and the federal government “lacked any agenda of its own” other than conciliation and consensus.¹⁸² This was reflected with an overall decentralization of power to the provinces in areas of culture, labour market training, municipal affairs, recreation, housing, tourism, mining, forestry, limitations on the federal declaratory power, and eliminating the federal reservation and

¹⁷⁷ Ibid., 216.

¹⁷⁸ Jeffrey, *Strange Bedfellows*, 55.

¹⁷⁹ Canada, *Consensus Report on the Constitution*, 3.

¹⁸⁰ Ibid., 20.

¹⁸¹ Ibid., 2.

¹⁸² Russell, *Constitutional Odyssey*, 196.

disallowance powers.¹⁸³ A triple-E Senate came largely to fruition, with the caveat that the ‘e’ for ‘effective’ was not fully developed as there were limitations on its power and the power of its individual members.¹⁸⁴ An equal distribution of Senate seats was tempered with changes to the House of Commons, including a guarantee to Quebec of twenty-five percent of the seats in the House.¹⁸⁵ Russell argues that the *Consensus Report* simultaneously did too much and not enough: too much to appease the West or Quebec for people outside those regions, but not enough for the people within those regions to fulfill their ambitions.¹⁸⁶

One of the most significant proposals articulated in the *Consensus Report* was a justiciable Canada clause to guide courts in constitutional interpretation. A clause to reflect and assert Canadian values was discussed throughout the Canada Round, beginning with the Spicer Report which recommended that “Anyone trying to frame a new constitution should seriously consider a constitutional preamble enshrining simple, eloquent words that explain Canada's past, its identity and values, and Canadians’ free commitment to the future.”¹⁸⁷ The final text of the Canada clause covered several areas: democratic institutions, Indigenous peoples’ rights, Quebec’s distinctiveness, commitment to linguistic minorities, racial and ethnic equality, individual and collective rights, gender equality, and the equality of the provinces. The clause was also written as affirming Canadians’ commitments to these principles—not Canadian governments—indicative of the trend toward popular sovereignty. All of these proposals in the *Consensus Report*—the recognition of difference, a weakened federal government, the creation

¹⁸³ Canada, *Consensus Report on the Constitution*, 10-2. The declaratory power in the *Constitution Act, 1867* stated that the federal government could infringe upon provincial jurisdiction and take control of local works if deemed to be of significance for the country or multiple provinces. The reservation power and the disallowance power are, respectively, the rarely-used abilities of the federal government to delay or overrule provincial legislation.

¹⁸⁴ *Ibid.*, 4.

¹⁸⁵ *Ibid.*, 8.

¹⁸⁶ Russell, *Constitutional Odyssey*, 226; and Russell, *Canada’s Odyssey*, 417.

¹⁸⁷ Citizens’ Forum on Canada’s Future, *Report to the People and the Government of Canada*, 122.

of Aboriginal self-government—were a huge divergence from Trudeau’s idealized uniform constitutional framework.

The response to the Canada clause in the literature is varied. Cairns claims that a “rambling, chaotic, yet incomplete inclusiveness” defined the Canada clause.¹⁸⁸ Although he argues in favour of the principles of “constitutional minoritarianism”—the assertion of minority rights and recognition in the constitutional arena—he argues against the particulars of how the Charlottetown Accord manifested these aspirations.¹⁸⁹ Similarly, Russell calls the clause “an essay in ambivalence” and that “No one in their right mind could seriously believe that the list would provide useful guidance to the judiciary in interpreting the Constitution.”¹⁹⁰ He even claims it was detrimental to the success of the overall accord: “Could there be any better way of stirring up suspicion and resentment that handing out dollops of ill-defined constitutional status to certain segments of the population at the beginning of a revised constitution?”¹⁹¹ In contrast to this, Tully argues the Canada clause was a painstakingly intentional articulation of Canadian values and the fundamental characteristics of the country. Each line was tempered by the others in such a way that the demands of one group would not usurp the aspirations of another; in this vein, it was an exercise in compromise. Its elements were not random, but instead were common and important themes from previous constitutional documents, emerging jurisprudence, studies, and ongoing debate. The heterogeneity of the of these characteristics was not a shortcoming of the clause, but was instead a reflection of the true diversity of Canada. This true diversity of

¹⁸⁸ Cairns, *Reconfigurations*, 29.

¹⁸⁹ *Ibid.*, 138. On this page, Cairns argues in favour of the idea of the principles of this form of politics for its democratizing effects, concluding: “no matter how much our existence may be disturbed by what I have called an emergent minoritarianism, surely its appearance is to be welcomed.”

¹⁹⁰ Russell, *Constitutional Odyssey*, 203.

¹⁹¹ *Ibid.*, 204.

Canada has been difficult to fully comprehend due to what Tully terms “diversity blindness,”¹⁹² or our tendency to mistake our limited perspective as being representative of the whole, but the creation of the Canada clause worked to alter this and fully express the diversity of Canada. Because the Canada clause defined the fundamental characteristics of the country, all subsequent amendments were intended to actualize these characteristics.¹⁹³ Turpel-Lafond also supported the clause and argues the part on Indigenous rights was a major win for the AFN.¹⁹⁴

The greater question remains, however, of how well the aspirations for a constitutionalism focused on redress—something that advocated for by the four national Indigenous organizations—came to fruition in the accord. Previous analyses of the *Consensus Report* have alluded to a desire to rectify historical mistreatment as being a contributing factor to the specific constitutional amendments. This is in sharp contrast to the populist and anti-pluralist beginnings of the Canada Round and the initial priorities of the federal government. There was such a shift in approach and priorities that Johnston, Blais, Gidengil, and Neviite claim that Indigenous peoples had succeeded tremendously at the negotiations by gaining what was inconceivable just a short while ago.¹⁹⁵ They claim that one of the key questions of the Charlottetown Accord was: “Did the Accord finally bring justice to Aboriginal peoples and enable them to resurrect indigenous forms of government?”¹⁹⁶

The idea of redress through constitutional change is echoed (albeit far from unanimously) in the literature. Kathy Brock puts a large emphasis on the importance and reparative potential of Canada’s constitution in helping the state to chart a more just future: “by accepting Aboriginal

¹⁹² This term will unfortunately be used as it was the specific phrase used in this piece on the Canada Round. I recognize the ableist and problematic nature of the term and apologizes for its continued use in this research.

¹⁹³ Tully, “Diversity’s Gambit Declined,” 153-62.

¹⁹⁴ Turpel, “Charlottetown Discord,” 130.

¹⁹⁵ Richard Johnston, André Blais, Elisabeth Gidengil, and Neil Neviite, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 58 and 277.

¹⁹⁶ *Ibid.*, 59.

self-government, non-Aboriginal Canadians could redress the wrongs of the past.”¹⁹⁷ Tully argues that the amendments concerning Indigenous peoples should be viewed as an attempt at reconciling the increasing divergence between Indigenous and newcomer constitutional paths.¹⁹⁸ As such, he argues “The aim of the Canada Round was to redress the injustices of patriation, the failure of the four First Ministers’ Conferences on aboriginal self-government, and the exclusions of Meech Lake” that had caused injustices for Indigenous peoples.¹⁹⁹ Cairns, even when arguing against the “incoherence” of what a third order of government would actually mean, recognizes “the legacy of injustice [Aboriginal self-government] sought to rectify.”²⁰⁰ The marginalization facing Indigenous peoples was indefensible, and this created both the onus and the room for significant change.²⁰¹ Turpel-Lafond argues the expansiveness of the accord was necessary because Indigenous constitutional needs and aspirations had been neglected for so long and there was so much work that had compiled and compounded over the years.²⁰²

The *Consensus Report* was full of examples of constitutional changes meant to repair this mistreatment and exclusion. The section on First Peoples was over five of the twenty pages of the document dedicated to amendments and covered a wide range of constitutional concerns: Aboriginal representation in the Senate, potential input into Supreme Court nominees, potential representation in the House of Commons, a commitment to negotiate with Indigenous peoples (and provisions to make negotiations easier, more equitable, and more responsive), a commitment to future Aboriginal constitutional conferences, and the explicit recognition of the Métis as a federal responsibility alongside a commitment to negotiate with the Métis.²⁰³

¹⁹⁷ Brock, “Learning from Failure,” 31.

¹⁹⁸ Tully, “Diversity’s Gambit Declined,” 177-8.

¹⁹⁹ *Ibid.*, 182.

²⁰⁰ Cairns, “Multinational Canada v. Federalism,” 46.

²⁰¹ *Ibid.*, 51-3 and 60.

²⁰² Turpel, “Charlottetown Discord,” 124.

²⁰³ Canada, *Consensus Report on the Constitution*, 4, 7, 8, 15-6, 18, and 18-9, respectively.

Additionally, the accord recognized the distinctness of Indigenous peoples through the Canada clause: “the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada.”²⁰⁴ Cairns argues that movement in this direction was because of Indigenous advocacy: “the drive for differential constitutional status embodied in the Accord comes from Aboriginal peoples.... The constraints or limits come from non-Aboriginal governments.”²⁰⁵ Many of these proposals were explicitly called for by Indigenous organizations during the committee hearings. The MNC was adamant about the Métis no longer being neglected by the federal government, the ITC prioritized constitutional recognition of the Inuit, and the AFN and NCC wanted an unprecedented level of inclusion in the institutions of government to compensate for generations of exclusion.

However, the *Consensus Report* had considerable shortcomings as an instrument of redress. This is not to take away from the progress that occurred between Spicer and the final text, but is meant to contextualize the proposed amendments found in the *Consensus Report* with the aspirations of the four national Indigenous organizations. There were considerable constraints placed on the third order of government. First, there was a contextualizing statement:

The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
- (b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.²⁰⁶

²⁰⁴ Ibid., 1.

²⁰⁵ Cairns, *Reconfigurations*, 246.

²⁰⁶ Canada, *Consensus Report on the Constitution*, 14.

This clause was intended to limit this right and place parameters on its use. Second, and more significantly, was the provision that Aboriginal governments would not be able to pass legislation that was “inconsistent with those laws which are essential to the preservation of peace, order and good government in Canada.”²⁰⁷ That is, federal and provincial laws could usurp Aboriginal laws, regardless of which order of government had constitutional authority in the area. Therefore, even with a future agreed-upon division of powers, this agreement could be rendered moot and laws passed by Aboriginal governments could be overridden—as opposed to Aboriginal self-government becoming a means of addressing social subordination, the form that was proposed would further entrench subordination. Additionally, no such limitations were proposed for the federal or provincial governments, thus creating a hierarchy in which Aboriginal governments were lesser than the other two orders. In fact, not only were there no such limitations for the federal or provincial governments, but the *Consensus Report* actually sought to get rid of the federal powers of reservation and disallowance—long viewed as unjust encroachments of the federal government into areas of provincial jurisdiction.

The *Consensus Report* had further indications of the relative weakness of Aboriginal governments compared to their federal and provincial counterparts. The report was notably scarce on details about the legislative authority of a third order of government. Although there was considerable detail on which legislative areas were to be decentralized from the federal to provincial spheres, there was not a concomitant consideration of the legislative authority of Aboriginal governments. As part of the MNC’s testimony to the Beaudoin-Dobbie Committee, Evans asserted “The Halifax conference [on the division of powers] did not adequately reflect the fact there is a third order of government,”²⁰⁸ and it seems this was not rectified in the

²⁰⁷ Ibid., 16.

²⁰⁸ Canada, Special Joint Committee on a Renewed Canada, *Minutes of Proceedings and Evidence*, issue 65: 4.

Consensus Report several months later. There was discussion in the multilateral negotiations about how Indigenous representatives would participate in agreements regarding the division of powers, but even this was not decided upon, let alone the contents of such agreements.²⁰⁹

Additionally, there was only to be Aboriginal representation at First Ministers' Conferences on matters "that directly affects the Aboriginal peoples."²¹⁰ Russell argues that this restriction is indicative of their status as less-than-full partners in Confederation.²¹¹

The preceding analysis of the primary literature demonstrates there was a considerable yet incomplete shift by state actors toward a transformative redress constitutionalism over the course of the Canada Round. Using the lens of redress offers valuable insights into understanding the goals and motivations of constitutional actors during this time. Given the anti-pluralist and anti-minoritarian genesis of the Canada Round through Spicer and the economy-centred focus of the federal government's initial proposals, for there to have been any move at all toward using the constitution to redress past injustices against Indigenous peoples is significant. Christopher Manfredi argues that the Charlottetown Accord was expounded by its proponents to "resolve every constitutional grievance ever expressed by any government or interest group."²¹² Through Indigenous advocacy, one of the most significant constitutional grievances of the time was undoubtedly the injustices faced by Indigenous peoples and their historical exclusion from and subordination through the constitution. Errol Mendes claims that including Indigenous groups in the negotiating processes gave them a substantive role in constitutional affairs, stating the "Aboriginal package [in the *Consensus Report*] was an essential beginning to the restoration

²⁰⁹ Canada, *Consensus Report on the Constitution*, 20.

²¹⁰ *Ibid.*, 8.

²¹¹ Russell, *Constitutional Odyssey*, 204.

²¹² Christopher P. Manfredi, "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord," in *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform*, ed. Anthony A. Peacock (Don Mills: Oxford University Press, 1996), 47. Although perhaps self-evident from the title, suffice it to say that Manfredi did not personally hold such a belief and instead advocated for a limited constitution.

of group dignity to the Aboriginal peoples of the land,” and he laments the failure of the accord as a “missed historic opportunity to build a base of justice for our Aboriginal peoples.”²¹³ This move toward redress constitutionalism showed both a shift away from the diversity-indifferent constitutionalism of Trudeau and the redress-indifferent constitutionalism of Mulroney.

This shift also demonstrated how deeply imbricated the past *is* and *must be* in constitutional discussions. This imperative stems from the fact that a constitutional arrangement—being a powerful institution of determining the power relations in a polity—creates both winners and losers, and in so doing creates concomitant grievances that cannot be ignored. This retrospective element was made clear by the MNC, NCC, ITC and AFN in their presentations to the Beaudoin-Dobbie Committee. The injustices of the past brought about by constitutional exclusion or authoritarian control were used to ground arguments for significant, transformative change. Cairns argues the past is fundamental to shaping constitutional debates, describing the past as a “brooding visitor, shaping the issues we confront, influencing the criteria and processes by which we respond, defining the communities that struggle for constitutional living space, or surviving as memories in the minds of constitutional participants,”²¹⁴ and this was certainly the case for Indigenous groups in the Canada Round. The past influenced who was involved in the debates, what was discussed, and how they were performed: the “Canadian state manoeuvres gingerly through the minefield of its own past decisions.”²¹⁵

The shift toward redress constitutionalism is noted by other (settler) scholars, with Peter Russell arguing that the Canada Round represented a move towards a different understanding of

²¹³ Errol P. Mendes, “Sinking Again into the Quagmire of Conflicting Visions, Groups, Underinclusion, and Death by Referendum,” in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 169.

²¹⁴ Cairns, *Reconfigurations*, 15.

²¹⁵ *Ibid.*, 58.

sovereignty in Canada. According to Russell, the initially fraternal relationship between the Crown and Indigenous nations began to change after the War of 1812. Following this, Indigenous nations were unilaterally on the receiving side of British policy, a trend that would continue for most of Canada's history.²¹⁶ He argues this trend of subjugation began to change sharply with the Canada Round: "It had taken five mega rounds of constitutional politics, but Canada's aboriginal peoples were at last winning recognition of their right to government by consent."²¹⁷ This was a sharp divergence from even the previous round of constitutional politics where Indigenous nations/groups were excluded from first ministers' conversations or the prior constitutional conferences on Aboriginal self-government in the 1980s, which Russell claims were "exercises in mutual frustration."²¹⁸ Russell argues that the ultimate inclusion of Aboriginal self-government in the Charlottetown Accord represented the growing consensus in the country that this was necessary. The status of Indigenous issues and nations was further elevated by including the leaders of four national Indigenous organizations in the final multilateral negotiations and by getting a veto on constitutional changes affecting them, not mere consultation. This was all a recognition of their share of sovereignty in the state.²¹⁹

However, despite the aspirations and advocacy of Indigenous groups, the change in

²¹⁶ This includes, for example: ignoring its obligation for treaty making and instead merely pushing aside First Nations; treating "Indians and the Lands Reserved for Indians" as a mere subject of jurisdiction in a legislature in which they had no control; appointing William McDougall, an Anglo-Protestant Canadian nationalist who despised the Métis, as the lieutenant-governor for the area covering the Red River; the text of the numbered treaties assuming that signatory First Nations were subjects of the Crown; a disconnect between the negotiations of the treaties and the formal text (as the text formally ceded land); creating the Indian Act, which, among other things forced a certain form of government on First Nations, forcibly removed Indian status for certain persons working for the betterment of their people, banned certain cultural practices, controlled commerce, reduced land holdings, and created the residential school system; relocating entire Inuit communities in the 1950s to assert Canada's claims to the Arctic; and forcing First Nations to forfeit claims to Aboriginal title when engaging in the comprehensive land claims process. From: Russell, *Canada's Odyssey*, 85, 10, 170, 186-8, 189-91, 209 and 333, respectively.

²¹⁷ Russell, *Constitutional Odyssey*, 169. It should be mentioned that in a later book Russell notes another (comparatively minor) blip in Canada's relationship with Indigenous peoples. In 1951, nineteen First Nation leaders worked with parliamentarians on a review of the *Indian Act*. See: Russell, *Canada's Odyssey*, 313-4.

²¹⁸ Russell, *Canada's Odyssey*, 393.

²¹⁹ Russell, *Constitutional Odyssey*, 182-203.

constitutionalism that took place throughout the Canada Round cannot be fully endorsed as a complete shift toward redress—the constitutional change (had it been successful) could not act in a similar way it does in instances of transitional justice. As already stated, the *Consensus Report* had significant shortcomings and limitations in fully addressing the goals of Indigenous groups and redressing the constitutional injustices that faced Indigenous people. This hesitancy to embrace the reparative potential of constitutional change was shared by federal and provincial politicians because the AFN and other national Indigenous organizations were met with intransigence and racism. The unwillingness to fully engage in these issues in the four constitutional conferences on Aboriginal matters in the 1980s continued into the Canada Round.²²⁰ Although there was significant progress made in the Canada Round—such as the recognition of the *inherent* right to self-government—Turpel-Lafond admits that the demands and expectations of the national Indigenous organizations were “transformed in significant ways”²²¹ in the final text of the accord. For her, the concessions that the federal and governments demanded created a major problem for the accord as a whole. She argues that these concessions were required due to the “prominent racist belief that Aboriginal peoples were not capable of governing themselves.”²²² This is evidenced by the fact that Aboriginal self-government was only inherent “within” Canada, that federal and provincial laws were still to be supreme, and that it would create the basis for no new land claims.²²³ Similar to the progress made during patriation, the progress made during the Canada Round on Indigenous issues is largely only noteworthy because of the abysmal place it began.

Constitutional change is a powerful means to transform a polity, and this is especially

²²⁰ Mary Ellen Turpel, “The Charlottetown Discord,” 118.

²²¹ *Ibid.*, 124.

²²² *Ibid.*, 124.

²²³ *Ibid.*, 126.

true when a state has a formidable fascination with their constitution (such as Canada) and when the constitutional conversation is notably comprehensive (such as the Canada Round of negotiations). This was a time when all things were on the table and when there was the possibility of immense change within the state. During the Canada Round the very fabric of Canada was being debated, and because the constitution is closer to the roots of injustice there was potential to go beyond superficial changes and to really alter the political dynamics within the state. This was something that gave a great deal of hope to the four Indigenous organizations and there was a desire to use constitutional change as a way of transforming their relationships with and within the Canadian state. To a certain extent this sentiment was shared by federal and provincial political leaders, but as the preceding analysis has shown, there was an unwillingness to fully understand the breadth of injustices, engage with the aspirations of Indigenous peoples, and there was ultimately an aversion to really relinquish power. The weaknesses inherent to the third order of government proposed in the Charlottetown Accord attest to the inability and unwillingness of the Canadian state to substantively transform the colonial relationship within the state. This disconnect offers a valuable insight into understanding the political dynamics of this time—it was a missed opportunity in the Canadian federation to drastically alter the relationship between the state and colonized peoples and transition the state into a new mode of existence.

Conclusion: Redress as a Corrective in Understanding the Canada Round

“Canada has ... a capacity to engage in the world in difficult places without some of the baggage that so many other Western countries have, either colonial pasts or perceptions of American imperialism...”¹

– Prime Minister Justin Trudeau, 21 April 2016

“We also have no history of colonialism...”²

– Prime Minister Stephen Harper, 25 September 2009

“[The] great aim of our legislation ... has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change.”³

– Prime Minister Sir John A. Macdonald, 2 May 1887

A seminal text on patriation, *And No One Cheered*, has a rather ominous dedication: “To our children, who will live with the consequences.”⁴ These foreboding words serve to highlight a central theme of the text—and arguably a central theme of patriation more broadly—that was put quite succinctly by Patrick Monahan. Monahan says although there was a wide diversity of topics in the book, “they all seem agreed in their verdict on Canada’s constitutional labors: this moment in the nation’s collective history has been a time of lost opportunities and shattered illusions rather than of vision and rebirth.”⁵ Monahan goes on to say: “Not only have Canada’s underlying political tensions remained unresolved but, arguably, they have been exacerbated by the bitterness and polarization created by the reform process.”⁶ If this is the verdict that was reached on patriation—a round of megaconstitutional politics that at least successfully amended

¹ Quoted in: Amanda Robb, “A Journey with Trudeau from NYU to Brooklyn,” *Canada’s National Observer*, April 21, 2016, <https://www.nationalobserver.com/2016/04/21/opinion/journey-trudeau-nyu-brooklyn>.

² Quoted in: Derrick O’Keefe, “Harper in Denial at G20: Canada Has ‘No History of Colonialism’,” *rabble.ca*, September 28, 2009, <http://rabble.ca/blogs/bloggers/derrick/2009/09/harper-denial-g20-canada-has-no-history-colonialism>.

³ Quoted in: J. R. Miller, *Skyscrapers Hide the Heavens: A History of Native-Newcomer Relations in Canada* (Toronto: University of Toronto Press, 1989), 254.

⁴ Banting and Simeon, *And No One Cheered*, v.

⁵ Patrick J. Monahan, review of *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon, *American Journal of Comparative Law* 32, no. 2 (Spring 1984): 393. <https://www.jstor.org/stable/840474>.

⁶ *Ibid.*, 393. It is also worth noting that Monahan concludes his review by saying that the failures of patriation should serve as a “springboard” for further action (p. 400).

the constitution—the diagnosis for the Canada Round should be even bleaker. Not only did the Canada Round culminate with a divisive country-wide referendum campaign after a multi-year consultative process of “open-soul surgery on 26 million Canadians,”⁷ but the zero-sum nature of the referendum on the constitutional amendment package meant that those seeking even the most modest change had their aspirations simultaneously and decisively dashed.

Indigenous organizations—namely, the AFN, MNC, NCC, and ITC—were some of the groups left with unfulfilled constitutional ambitions due to the failure of the Charlottetown Accord. As has been demonstrated in this research, their constitutional ambitions were born out of a desire to transform the political position of Indigenous people and to rectify the historic injustices Indigenous peoples faced due to unjust constitutional arrangements. Their vision for change was one of redress—*retrospective, regretful, reparatory, and constitutional*. These organizations believed constitutional change could have transformative effects for Indigenous peoples in Canada and could transition Canada into something new. This corrective to understanding the Canada Round—that is, employing the lens of redress and seeing the value of constitutional change in redress politics—provides a more fulsome understanding of both the aspirations of Indigenous organizations during this time and what exactly was on the line for them in the negotiations. It was not simply about achieving Aboriginal representation in the Senate or having their inherent right to self-government acknowledged, it was about using these changes as means of redressing for past failures and using newfound political power to effect positive future developments for Indigenous people with a level of self-control previously denied to them by the constitution. To employ the words of Fraser, Indigenous organizations viewed constitutional change as a means of becoming “full partners in social interaction.”⁸

⁷ Citizens’ Forum on Canada’s Future, *Report to the People and the Government of Canada*, 1.

⁸ Fraser, “Rethinking Recognition,” 113.

Because of this approach taken by Indigenous organizations there was a large emphasis placed on the Canada Round—especially after the exclusion of Indigenous leaders from Meech Lake and the intransigence of Canada’s first ministers during the Aboriginal constitutional conferences of the 1980s. Leanne Simpson argues that “Reconciliation must ... come to mean a collective re-balancing of the playing field,” and for the national Indigenous organizations during the Canada Round, constitutional change was a means of doing this work. It held the potential of changing the relationship between oppressor and oppressed. For these groups, the failure of this round of was thus a failure to radically transform the colonial relationship between Indigenous peoples and the Canadian settler state and to begin to rectify years of injustice and inequity.

James Tully’s analysis of the Canada Round can provide a more fulsome understanding of the dynamics at play and the evolution of Canadian constitutionalism during this era. He argues “What lies at the bottom of the Canadian federation is neither a unifying constitution nor a common vision, but the multiplicity of activities of multilateral negotiation itself.”⁹ Tully says Canada is composed of numerous competing groups with various intersecting and conflicting constitutional visions that are always being (re)negotiated and (re)contested, and this heterogeneity was on full display during the Canada Round. He uses and defines the word “vision” very intentionally: a vision appears complete in and of itself, and as such it seeks to perpetuate itself and judge other perspectives through its particular lens and on the merits the vision espouses. However, the constitutional visions in Canada (for example, the vision of ten equal provinces with legally equal individual citizens or the vision of a compact between two founding nations) are actually limited perspectives masquerading as more comprehensive visions. Tully terms the inability to see and appreciate visions beyond our own “diversity

⁹ Tully, “Diversity’s Gambit Declined,” 162.

blindness,” and in order to overcome this we must develop what he calls “federal abilities.” If we—both citizens and constitutional actors—fail to develop federal abilities to overcome diversity blindness we will continue to only see and appreciate Canada from our own limited perspective. Without federal abilities, we continue to translate the true diversity of Canadian constitutional visions into the language of our own, and thus only serve to reinforce the hegemonic status of our own vision while failing to grasp other perspectives. For Tully, the failure of the Canada Round was thus due in a large part to a failure in understanding—a failure in having fully developed federal abilities to appreciate others’ constitutional visions.¹⁰

As this research has demonstrated, core to the constitutional visions put forward by the national Indigenous organizations involved in the Canada Round was the idea of redress constitutionalism. Redress constitutionalism is the approach that seeks to use the constitution as a means of rectifying imbalances and inequities by addressing historical injustices caused or exacerbated by the constitution. The state actors at the time, however, failed to understand this redress orientation and what was truly at stake for the Indigenous organizations—put another way, they had diversity blindness and were unable to appreciate the constitutional visions of these groups. For Indigenous organizations during the Canada Round, constitutional change was a means of redressing the historical positions and subordination of Indigenous peoples. Although the specific priorities of the organizations differed (for example, the NCC was proposing a national treaty/covenant, the ITC emphasized self-government, and the MNC wanted to address the particular impacts of the Métis being excluded from consideration), they were united in their

¹⁰ Ibid., 157-62. For a robust exploration of the merits of overcoming diversity blindness and engaging in mutual recognition, see also: Tully, *Strange Multiplicity*. In particular, pp. 24-9 provide an overview of treating Bill Reid’s *The Spirit of Haida Gwaii* as a metaphor of and case study in such a constitutional multilogue/dialogue.

desire to create a new constitutional framework that would include and serve Indigenous peoples.¹¹ The hopes for positive change were high, and so too were the consequences of failure.

Because of the different approach and their redress-oriented priorities, the consequences of an unsuccessful amending package were not the same for Indigenous organizations as they were for state actors. The failure of Indigenous organizations to have their concerns addressed by government actors and incorporated into the document was a failure in repairing unjust constitutional arrangements through constitutional change. Instead of being a regretful response to past injustices, the underwhelming response of the Charlottetown Accord to Indigenous concerns constituted yet another way that the state belittled and ignored them. The infrastructure and functioning of the AFC, ITC, MNC, and NCC was oriented toward effecting positive constitutional change, demonstrating the degree to which these groups emphasized this issue.¹² For first ministers, Indigenous issues were one of many different considerations, and whereas Indigenous concerns did represent a considerable injustice facing Canada, they did not threaten the future of the country in the same way the concerns of Quebec did. This is not to say Indigenous organizations entered into constitutional negotiations with narrower concerns or perspectives than their government counterparts, but rather that there was a disconnect between the first ministers and Indigenous leaders in their understanding of the impacts of successful or unsuccessful constitutional amendments that dealt directly with Indigenous issues.

Using redress constitutionalism as a lens for understanding the constitutional visions of Indigenous organizations helps to highlight this disconnect and elucidate what was at stake for

¹¹ It is worth reiterating that this is not to say that there was a complete homogeneity amongst Indigenous peoples as a whole on this issue, but merely that there was agreement amongst the four national Indigenous organizations involved in the multilateral negotiations of the Canada Round. To use the terminology of Tully, this was one “vision” of many, but there is a tremendous diversity of perspectives within Indigenous groups/nations on these matters, something demonstrated in the pluralistic depiction of voices presented in *To The Source*.

¹² Ladner, “*Aysaka 'paykinit*,” 237.

them. Although there was a growth in the federal abilities of the negotiators throughout the Canada Round—something Tully argues and this research demonstrates through analyzing the evolution of redress constitutionalism in primary documents—there was still not a complete understanding of the concerns raised by Indigenous organizations. While the idea that constitutional change could redress generations of injustice was central to the visions put forward by the ITC, AFN, MNC, and NCC, such a vision was not central to the first ministers, as sympathetic as they might be.¹³ For first ministers, justice for generations of a colonial relationship was not on the line in the Canada Round, but it was front and centre for Indigenous organizations in these negotiations. Although there was a general trend of state actors toward appreciating this constitutional vision, it was not fully understood due to diversity blindness.

This failure of governmental actors to fully appreciate and understand the breadth of constitutional visions proposed during the Canada Round is indicative of an ongoing Indigenous-settler disconnect that continues to reverberate throughout Canadian political life. The dedication of *And No One Cheered* reminds us we must live with the consequences of constitutional change, and it is equally true that we must live with the consequences of failed constitutional change. This is not to say that there is a direct causality between the failure of the Charlottetown Accord and the specifics of our current political circumstances, but merely to say that there is a continuity of concerns from this era of failed constitutional transformation. The preferred option of the national Indigenous organizations was to have an amended constitution to enable Indigenous nations to enter into the state on their own terms, similar to the agreements made with the provinces for entry into Confederation. This would have been in sharp contrast to the

¹³ For an analysis of the role of the New Democratic Party on this matter, see: John Richards, “The NDP in the Constitutional Drama,” in *Canada: The State of the Federation 1992*, ed. Douglas Brown and Robert Young (Kingston: Institute of Government Relations, 1992), 164-5.

authoritarian approach taken by Parliament in assuming jurisdiction over “Indians, and Lands reserved for the Indians,”¹⁴ the non-consultative manner of Canada unilaterally being granted sovereignty of Rupert’s Land and much of the Arctic Archipelago, and the disregard and neglect shown for the Métis nation. The Indigenous organizations were looking to change the state structures that had permitted and actualized this colonial relationship, and in so doing transform the Canadian state and the relationship that Indigenous nations would have with it.

What is particularly notable about this disconnect is that the constitutional visions of the Indigenous organizations were being articulated in such a way that the state actors should have been able to understand them. Kierra Ladner argues that there is a continuity amongst Indigenous social movements that has been ongoing since before colonization. She describes how the movements and the aspirations of Indigenous social movements might seem disconnected, but how at a deeper level “the goals and the issues have remained constant among the various actors, nations, and organizations involved.”¹⁵ The issues that have remained constant are nationhood and (de)colonization. Ladner describes how the assertion of nationhood and creating a decolonized relationship is manifest through movements with goals of good governance, self-determination, and sovereignty—and that this has appeared in areas as diverse as the establishment of the Haudenosaunee Confederacy, early Indigenous-settler treaty talks, and First Nations involvement in patriation. In turn, the goals of good governance, self-determination, and sovereignty are seen as means of enabling improvements to more concrete issues such as education, child protection, housing, water quality, and language preservation. So while there is a diversity of forms and priorities in Indigenous social movements, nationhood and decolonization

¹⁴ Canada, *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, no 5., section 91(24), <https://laws-lois.justice.gc.ca/eng/const/>.

¹⁵ Ladner, “*Aysaka 'paykinit*,” 240.

underlie them all.¹⁶ Therefore, the concerns raised during the Canada Round by Indigenous organizations were not unheard of, but these demands and desires were continuous with generations of history: “Indigenous people are still making the same demands today that were advanced by the Nehiyaw in the 1870s. This is because there has been little effort to address the underlying issues that form the foundation of the discontent—nationhood and (de)colonization.”¹⁷ More directly on the Canada Round, Turpel-Lafond makes a similar argument about the continuity of grievances that Indigenous organizations raised: “its vision for change largely reflected the proposals that Indigenous peoples had been advancing in Canada for twenty years.”¹⁸ Although the forum and the specific mechanisms at play during the Canada Round were novel, the aspirations presented by Indigenous representatives were not.

Moreover, Indigenous organizations tailored the framing of their demands to fit with the particular political climate of the time. During the patriation discussions, Indigenous organizations “jumped at every opportunity to pressure Canadian governments into accepting their vision.”¹⁹ As described by Arthur Manuel and Grand Chief Ronald Derrickson, the Indigenous movement during patriation coalesced around the constitution because “The protection of our Aboriginal and treaty rights in the new constitution was a question of our very survival.”²⁰ Indigenous leaders were playing the same game as the rest of the country, so to speak, so they would not be ignored or dismissed. As the first chapter demonstrated, even at this time there was an incipient move toward using constitutional change as a means of redress, although the disaster of Meech Lake ended up creating further exclusion that required repair. As

¹⁶ Ibid., 240-4.

¹⁷ Ibid., 247.

¹⁸ Turpel, “The Charlottetown Discord,” 124.

¹⁹ Ladner, “*Aysaka 'paykinit*,” 235.

²⁰ Arthur Manuel and Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015), 67.

the second chapter demonstrated, during the Canada Round, the prospect of constitutional change was seized upon by Indigenous organizations. It was viewed as an ideal way of dealing with long-standing concerns because the state was already going to be engaging in this work.²¹ Indigenous organizations—while certainly at times at odds with the particular opinions of state actors—were not seeking to work *against* the state, but were instead working within the constitutional change processes of the state and were looking to be robustly included in the discussions and the resulting renewed constitutional framework. Put another way, the demands and aspirations were presented by Indigenous organizations in a way that was conducive to the political climate of the time. Again, Indigenous leaders were trying to play the same game and speak the same language as the rest of Canada.

This analysis begs the question: what is the cause of the disconnect between Indigenous and settler Canada if Indigenous organizations were voicing perspectives that were continuous with their past concerns and if their visions were being presented in a way that was congruous with the political realities of the day? Perhaps it is not a failure on the part of Indigenous organizations at being heard, but an unwillingness on the part of state actors to even listen in the first place. Sákéj Henderson (Chickasaw) provides a useful analysis for understanding the depth of the state's intransigence in actualizing substantive reform. He asserts that:

The governments of the day, our legal guardians and fiduciaries, do not want to discuss the transforming of legal or political institutions to include Aboriginal peoples in the nation. They do not want to end their national fantasies, artificial constructs, or myths about their nation, nor do they want to expose the injustice that informed the construction of their national and state institutions and practices. They do not want to create a postcolonial state or sustain these efforts at institutional reform. They reject a hybridized state and any insurgent indigenization of the political or adjudicative realm.²²

²¹ Mercredi and Turpel, *In The Rapids*, 208. This particular passage was written by Mary Ellen Turpel-Lafond.

²² Henderson, "Postcolonial Ledger Drawing," 164.

Henderson argues the patriation of the Canadian constitution in which “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”²³ *should* have been enough to radically transform Canada, with a decolonized relationship and the basis for a robust form of self-government. However, he argues that the colonialist mentality of Canada had not transformed and as such the state was largely unchanged. He argues the changes brought about through patriation “insist on the end of colonization in Canada and the development of a more equitable society,”²⁴ but that such changes would involve a sacrifice of power and a belief that Indigenous peoples were capable of governing their own affairs—two things that the state could not do.

Turpel-Lafond provides a first-hand account of this mentality during the Canada Round. She argues that there was a “prominent racist belief”²⁵ that Indigenous peoples were incapable of governing themselves, so it became necessary in the minds of state actors to put limitations on this inherent right (such as the contextualizing statement on the purpose of the right or the restriction that laws stemming from Aboriginal governments had to be in line with provincial and federal laws). State actors were unwilling to incorporate, understand, or appreciate the constitutional visions put forward by Indigenous organizations because to do so would be antithetical to the racist, colonial mentality and foundation of settler Canadian society—this was the source of the diversity blindness. Ultimately, the state was not willing to engage in the sort of change sought by Indigenous organizations and had to place limits on the exercise of self-government. The constitutional visions of Indigenous leaders were contorted not out of compromise and negotiation, but because state actors suffered from a colonial, racist diversity

²³ Canada, *Constitution Act, 1982*, Part II, s. 35.

²⁴ Henderson, “Postcolonial Ledger Drawing,” 167.

²⁵ Turpel, “The Charlottetown Discord,” 124.

blindness that prohibited taking such perspectives seriously or understanding them. Those with state power in the negotiations were able to take advantage of an imbalanced relationship and could unilaterally determine the validity and importance of marginalized groups' demands. Instead of having an equitable dialogue, Indigenous organizations had to seek approval from those with power and on terms set by those with power.²⁶ The introduction to this research set forth some noted shortcomings in the politics of redress that centred largely on the unwillingness or the inability of the state to engage in transformational change and proposed constitutional reform as a way of overcoming this. However, as is demonstrated by the Canada Round, constitutional change (even if it was successful) is not some automatic means of transformation as even it can be superficial or fail to radically alter political relationships. If the state is still dictating the terms of the redress and fails to overcome its racist intransigence and diversity blindness, then the constitutional change cannot fulfill its truly transformational potential.

A failure to listen during the Canada Round—a failure predicated on deep-seated colonialism and racism and that resulted in a lack of shared understanding between Indigenous and state leaders—is an uninterrupted theme in Indigenous-state relations. This is not to draw a causal link between the Canada Round and such movements as Idle No More, #JusticeForColten, Mi'kmaq fishing rights, the push for justice for missing and murdered Indigenous women and girls, or All Eyes on Wet'suwet'en, but rather to describe how the basic relationship between the state and Indigenous nations has been unaltered since this time. The disconnect of priorities and perspectives that was on display during the Canada Round negotiations, while prominent and important in understanding this period of Canadian politics, was neither unprecedented nor exceptional. Rather, it was continuous with Canada's ongoing colonial relationship and the

²⁶ This analysis has been adapted from Himani Bannerji's classic critique of Charles Taylor's essay, "The Politics of Recognition." See: Himani Bannerji, *The Dark Side of the Nation* (Toronto: Canadian Scholars' Press, 2000).

enduring reluctance by the state to transform it. This disconnect means there are ongoing inequities, such as those in suicide rates, incarceration, poverty, high school graduation, and health outcomes.²⁷

Given the deep-seated nature of this disconnect between Indigenous peoples and the state—and how integral it is to sustaining Canada’s colonial project—it seems unlikely that this feature of Canadian politics will be going away any time soon. John Torpey, in discussing how states engage in projects of historical justice, asserts that “All politics is always and inevitably about the past to some degree.”²⁸ This truth of this statement is very apparent for Canada—as put by Turpel-Lafond: “For First Nations peoples, history keeps coming up and it probably always will.”²⁹ Canadian politics will continue to be shaped and limited by the past—the past failures of constitutional renewal, the work of Indigenous peoples in trying to rectify the injustices that constitutional change was meant to address, and the consequences of not transforming the colonial relationship that defines Indigenous-state relations.

²⁷ For an analysis of the federal government’s apology for residential schools and its failure to engage in transformation, see: Jung, “Walls and Bridges,” 357-88.

²⁸ John Torpey, “Introduction: Politics and the Past,” in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (Lanham: Rowman and Littlefield, 2003), 26.

²⁹ Mercredi and Turpel, *In The Rapids*, 13-4.

Bibliography

- Assembly of First Nations. First Nations Circle on the Constitution. *To The Source: Commissioners' Report*. Ottawa: Assembly of First Nations, 1992.
- Aucoin, Peter, Mark D. Jarvis, and Lori Turnbull. *Democratizing the Constitution: Reforming Responsible Government*. Toronto: Emond Montgomery, 2011.
- Bannerji, Himani. *The Dark Side of the Nation*. Toronto: Canadian Scholars' Press, 2000.
- Banting, Keith and Richard Simeon, ed. *And No One Cheered: Federalism, Democracy and the Constitution Act*. Toronto: Methuen, 1983.
- Blakeney, Allan. "Speech by Allan Blakeney to Queen's University Law Students – April 10, 1980." In *Speeches and Interviews by Hon Allan Blakeney, Premier of Saskatchewan in the Course of a Trip to Ontario and Quebec, April 1980*. Regina: Government of Saskatchewan, 1980.
- Brock, Kathy. "Learning from Failure: Lessons from Charlottetown." *Constitutional Forum / Forum Constitutionnel* 4, no. 2 (Winter 1993): 29-33.
<https://heinonline.org/HOL/P?h=hein.journals/consfo4&i=33>.
- Bryden, Joan. "Not His Father's Son: With Apologies for Historic Injustices, Trudeau Goes Where His Dad Wouldn't." *The National Post*. November 27, 2017.
<https://nationalpost.com/news/politics/trudeau-makes-apologies-his-dad-wouldnt-for-historic-injustices>.
- Bulbulian, Maurice. *Dancing Around the Table, Part Two*. National Film Board of Canada, 1987. https://www.nfb.ca/film/dancing_around_the_table_part_one.
- Cairns, Alan C. *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, edited by Douglas E. Williams. Toronto: McClelland and Stewart, 1991.
- Cairns, Alan C. "The Charlottetown Accord: Multinational Canada v. Federalism." In *Constitutional Predicament: Canada after the Referendum of 1992*, edited by Curtis Cook, 25-63. Montreal and Kingston: McGill-Queen's University Press, 1994.
- Cairns, Alan C. "The Politics of Constitutional Conservatism." In *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon, 28-58. Toronto: Methuen, 1983.
- Cairns, Alan C. *Reconfigurations: Canadian Citizenship and Constitutional Change*, edited by Douglas Williams. Toronto: McClelland and Stewart, 1995.
- Canada. *Aboriginal Peoples, Self-Government, and Constitutional Reform*. Ottawa: Minister of Supply and Services, 1991.

- Canada. *Canadian Federalism and Economic Union: Partnership for Prosperity*. Ottawa: Minister of Supply and Services, 1991.
- Canada. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, no 5., section 91(24). <https://laws-lois.justice.gc.ca/eng/const/>.
- Canada. *Constitution Act, 1982*, Parts I and II, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. <http://laws-lois.justice.gc.ca/eng/const/page-16.html>.
- Canada. *Distribution of Powers and Functions in Federal Systems*. Ottawa: Minister of Supply and Services, 1991.
- Canada. *Shaping Canada's Future Together: Proposals*. Ottawa: Minister of Supply and Services, 1991.
- Canada. *Shaping Canada's Future Together: Speech by the Prime Minister, House of Commons, September 24, 1991*. Ottawa: Minister of Supply and Services, 1991.
- Canada. *Shared Values: The Canadian Identity*. Ottawa: Minister of Supply and Services, 1991.
- Canada. Parliament. Aboriginal Liaison Committee of the Special Joint Committee on a Renewed Canada. *Minutes of Proceedings and Evidence*. 34th Parl., 3rd sess., vol. 1. Ottawa: Queen's Printer for Canada, 1992.
- Canada. Parliament. House of Commons. *House of Commons Debates: Official Report*. 32nd Parl., 1st sess., vol., 7. Ottawa: Queen's Printer for Canada, 1981.
- Canada. Parliament. Special Joint Committee of the Senate and of the House of Commons on a Renewed Canada. *A Renewed Canada: Report of the Special Joint Committee on a Renewed Canada*. 34th Parl., 3rd sess. Ottawa: Queen's Printer for Canada, 1992.
- Canada. Parliament. Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. *Final Report*. 28th Parl., 4th sess. Ottawa: Queen's Printer for Canada, 1972.
- Canada. Parliament. Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. *Minutes of Proceedings and Evidence*. 30th Parl., 3rd sess. Ottawa: Queen's Printer for Canada, 1979.
- Canada. Parliament. Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. *Minutes of Proceedings and Evidence*. 32nd Parl., 1st sess. Ottawa: Queen's Printer for Canada, 1981.
- Canada. Parliament. Special Joint Committee on a Renewed Canada. *Minutes of Proceedings and Evidence*. 34th Parl. 3rd sess. Ottawa: Queen's Printer for Canada, 1991-2.

- Canada. Privy Council. *Consensus Report on the Constitution: Charlottetown, August 28, 1992, Final Text*. Ottawa: Privy Council, 1992.
- Canada. Privy Council Office. *1987 Constitutional Accord*. Ottawa, Privy Council Office, 1987.
<https://primarydocuments.ca/wp-content/uploads/2018/04/1stMinsConstMeech1987Jun3.pdf>.
- CBC News. "Controversial University of Lethbridge Professor to Retire This Fall." Canadian Broadcasting Corporation. August 8, 2018.
<https://www.cbc.ca/news/canada/calgary/university-lethbridge-anthony-hall-retire-1.4778277>.
- Chambers, Simone. "Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis." *Politics and Society* 26, no. 1 (March 1998): 143-72,
<https://doi.org/10.1177/0032329298026001006>.
- Citizens' Forum on Canada's Future. *Report to the People and the Government of Canada*. Ottawa: Minister of Supply and Services, 1991.
- Coulthard, Glen. "Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice." In *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations*, edited by Leanne Betasamosake Simpson, 187-203. Winnipeg: Arbeiter Ring, 2008.
- Coulthard, Glen. *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press, 2014.
- Coyne, Deborah and Michael Valpy. *To Match a Dream: A Practical Guide to Canada's Constitution*. Toronto: McClelland and Stewart, 1998.
- Daniels, Harry W. *Native People and the Constitution of Canada: The Report of the Metis and Non-Status Indian Constitutional Review Commission*. Ottawa: Mutual Press, 1981.
- Franks, C. E. S. *The Myths and Symbols of the Constitutional Debate in Canada*. Kingston: Institute of Intergovernmental Relations, 1993.
- Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* no. 212 (July/August 1995): 68-93.
<http://search.proquest.com.ezproxy.library.uvic.ca/scholarly-journals/redistribution-recognition-dilemmas-justice-post/docview/1301909778/se-2?accountid=14846>.
- Fraser, Nancy. "Reframing Justice in a Globalizing World." *New Left Review* no. 36 (Nov/Dec 2005): 69-88.
- Fraser, Nancy. "Rethinking Recognition." *New Left Review* 3 (May/June 2000): 107-20.
<https://newleftreview.org/issues/II3/articles/nancy-fraser-rethinking-recognition>.

- Fraser, Nancy and Axel Honneth. *Redistribution or Recognition: A Political-Philosophical Exchange*. Translated by Joel Golb, James Ingram, and Christiane Wilke. London: Verso, 2003.
- Henderson, James (Sa'ke'j) Youngblood. "Incomprehensible Canada." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 115-128. Toronto: University of Toronto Press, 2013.
- Henderson, James (Sákéj) Youngblood. "Postcolonial Ledger Drawing: Legal Reform." In *Reclaiming Indigenous Voice and Vision*, edited by Marie Battiste, 161-71. Vancouver: UBC Press, 2000.
- Henderson, Jennifer. "The Camp, the School, and the Child: Discursive Exchanges and (Neo)liberal Axioms in the Culture of Redress." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 63-83. Toronto: University of Toronto Press, 2013.
- Henderson, Jennifer and Pauline Wakeham. "Introduction." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 3-30. Toronto: University of Toronto Press, 2013.
- Hiebert, Janet L. "Governing Like Judges?" In *The Legal Protection of Human Rights: Sceptical Essays*, edited by Tom Campbell, K. D. Ewing, and Adam Tomkins, 40-65. Oxford: Oxford University Press, 2011.
- Hurley, James Ross. *Amending Canada's Constitution: History, Processes, Problems, and Processes*. Ottawa: Minister of Supply and Services, 1996.
- James, Matt. "Degrees of Freedom in Canada's Culture of Redress." *Citizenship Studies* 19, no. 1 (2015): 35-52. <https://doi.org/10.1080/13621025.2014.883833>.
- James, Matt. *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics*. Vancouver: University of British Columbia Press, 2006.
- James, Matt. "Neoliberal Heritage Redress." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 31-46. Toronto: University of Toronto Press, 2013.
- James, Matt. "Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context." *Les Ateliers de l'éthique* 5, no. 2 (2010): 23-35. <https://doi.org/10.7202/1044312ar>.
- James, Matt. "Wrestling with the Past: Apologies, Quasi-Apologies, and Non-Apologies in Canada." In *The Age of Apology: Facing Up to the Past*, edited by Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud, and Niklaus Steiner, 137-53. Philadelphia: University of Pennsylvania Press, 2008.

- Jeffrey, Brooke. *Strange Bedfellows, Trying Times: October 1992 and the Defeat of the Powerbrokers*. Toronto: Key Porter, 1993.
- Jhappan, Radha. "Inherency, Three Nations and Collective Rights: The Evolution of Aboriginal Constitutional Discourse from 1982 to the Charlottetown Accord." *International Journal of Canadian Studies: The Charter, Federalism, and the Constitution* no. 7-8 (1993): 225-59. <https://www.iccs-ciec.ca/documents/70.pdf>.
- Johnston, Richard, André Blais, Elisabeth Gidengil, and Neil Nevitte. *The Challenge of Direct Democracy: The 1992 Canadian Referendum*. Montreal and Kingston: McGill-Queen's University Press, 1996.
- Jung, Courtney. "Walls and Bridges: Competing Agendas in Transitional Justice." In *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, edited by Patrick Macklem and Douglas Sanderson, 357-88. Toronto: University of Toronto Press, 2016.
- Knopff, Rainer and F. L. Morton. *Charter Politics*. Scarborough: Nelson Canada, 1992.
- Kroker, Arthur. "The Mohawk Refusal." In *This is an Honour Song: Twenty Years Since the Blockades*, edited by Leanne Simpson and Kiera L. Ladner, 271-4. Winnipeg: Arbeiter Ring, 2010.
- Kuptana, Rosemarie. "The Canadian Inuit and the Renewal of Canada." *Études/Inuit/Studies* 16, no. 1/2 (1992): 39-42. <https://www.jstor.org/stable/42869730>.
- Ladner, Kiera L. "*Aysaka 'paykinit*: Contesting the Rope Around the Nations' Neck." In *Group Politics and Social Movements in Canada*, edited by Miriam Smith, 227-49. Peterborough: Broadview, 2008.
- Ladner, Kiera L. and Leanne Simpson. "This is an Honour Song." In *This is an Honour Song: Twenty Years Since the Blockades*, edited by Leanne Simpson and Kiera L. Ladner, 1-9. Winnipeg: Arbeiter Ring, 2010.
- LeDuc, Lawrence and Jon H. Pammett. "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum." *Canadian Journal of Political Science* 28, no. 1 (March 1995): 3-33. <https://doi.org/10.1017/S0008423900018357>.
- Machiavelli, Niccolò. "The Prince." In *The Portable Machiavelli*, edited and translated by Peter Bondanella and Mark Musa. New York: Penguin Books, 1979.
- Mackey, Eva. "The Apologizer's Apology." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 47-62. Toronto: University of Toronto Press, 2013.

- Manfredi, Christopher P. "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord." In *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform*, edited by Anthony A. Peacock, 40-59. Don Mills: Oxford University Press, 1996.
- Manuel, Arthur and Grand Chief Ronald M. Derrickson. *Unsettling Canada: A National Wake-Up Call*. Toronto: Between the Lines, 2015.
- Mendes, Errol P. "Sinking Again into the Quagmire of Conflicting Visions, Groups, Underinclusion, and Death by Referendum." In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 163-70. Toronto: University of Toronto Press, 1993.
- Mercredi, Ovide and Mary Ellen Turpel. *In the Rapids: Navigating the Futures of First Nations*. Toronto: Viking, 1993.
- Miller, J. R. *Skyscrapers Hide the Heavens: A History of Native-Newcomer Relations in Canada*. Toronto: University of Toronto Press, 1989.
- Minnow, Martha. "Historical Justice." In *A Companion to Contemporary Political Philosophy*, 2nd ed., edited by Robert E. Goodin, Philip Pettit, and Thomas Pogge, 621-7. Malden: Blackwell, 2007.
- Monahan, Patrick J. *Meech Lake: The Inside Story*. Toronto: University of Toronto Press, 1991.
- Monahan, Patrick J. Review of *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon. *American Journal of Comparative Law* 32, no. 2 (Spring 1984): 393-400. <https://www.jstor.org/stable/840474>.
- Monahan, Patrick J. "The Sounds of Silence?" In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 222-48. Toronto: University of Toronto Press, 1993.
- Morton, F. L. and Rainer Knopff. *The Charter Revolution and the Court Party*. Peterborough: Broadview, 2000.
- Muldoon, Paul and Andrew Schaap. "Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia." In *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair*, edited by Alexander Keller Hirsch, 182-200. New York: Routledge, 2012.
- Mulroney, Brian. "An Address to the Nation by the Prime Minister, the Right Honourable Brian Mulroney." Canadian Broadcasting Corporation: "The Consequences of Meech's Failure." <https://www.cbc.ca/player/play/1751912031>.

- Nagy, Rosemary. "The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission." *International Journal of Transitional Justice* 7, no. 1 (2013): 52-73. <https://doi.org/10.1093/ijtj/ijts034>.
- Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627.
- O'Keefe, Derrick. "Harper in Denial at G20: Canada Has 'No History of Colonialism'." *rabble.ca*, September 28, 2009. <http://rabble.ca/blogs/bloggers/derrick/2009/09/harper-denial-g20-canada-has-no-history-colonialism>.
- Picard, Andre. "Mercredi Warns of Native Independence: 'Not very Likely' Indians Will Stay in Canada if Sovereignty Not Recognized." *The Globe and Mail*, October 22, 1991. <http://search.proquest.com.ezproxy.library.uvic.ca/historical-newspapers/mercredi-warns-native-independence/docview/1143972528/se-2?accountid=14846>.
- Ponting, J. Rick and Roger Gibbins. *Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada*. Toronto: Butterworths, 1980.
- Quebec. *Quebec-Canada: A New Deal: The Quebec Government Proposal for a New Partnership between Equals: Sovereignty-Association*. Quebec: Éditeur Officiel du Québec, 1979.
- Re Manitoba Language Rights, [1985] 1 S.C.R. 721.
- Reference re Secession of Quebec, [1998] 2 S.C.R. 217.
- Richards, John. "The NDP in the Constitutional Drama." In *Canada: The State of the Federation 1992*, edited by Douglas Brown and Robert Young, 159-82. Kingston: Institute of Government Relations, 1992.
- Robb, Amanda. "A Journey with Trudeau from NYU to Brooklyn." *Canada's National Observer*, April 21, 2016. <https://www.nationalobserver.com/2016/04/21/opinion/journey-trudeau-nyu-brooklyn>.
- Romanow, Roy J., John White, and Howard Leeson. *Canada... Notwithstanding: The Making of the Constitution, 1976-1982*. Toronto: Thomson Carswell, 1984.
- Russell, Peter H. *Canada's Odyssey: A Country Based on Incomplete Conquests*. Toronto: University of Toronto Press, 2017.
- Russell, Peter H. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed. Toronto: University of Toronto Press, 2004.
- Sanders, Douglas E. "The Indian Lobby." In *And No One Cheered: Federalism, Democracy, and the Constitution Act*, edited by Keith Banting and Richard Simeon, 301-32. Toronto, Methuen: 1983.

- Savoie, Donald J. *Governing from the Centre: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.
- Simpson, Leanne Betasamosake. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Winnipeg: Arbeiter Ring, 2011.
- Smith, Miriam. "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," *Canadian Journal of Political Science* 35, no. 1 (2002): 3-29. <https://www.jstor.org/stable/3233166>.
- Smith, Miriam. "The Impact of the *Charter*: Untangling the Effects of Institutional Change." *International Journal of Canadian Studies / Revue internationale d'études canadiennes* 36 (2007): 17-40. <https://doi-org.ezproxy.library.uvic.ca/10.7202/040775ar>.
- Statistics Canada. *Canadian Identity, 2013: Spotlight on Canadians: Results from the General Social Survey*. Ottawa: Minister of Industry, 2015. <http://www.statcan.gc.ca/pub/89-652-x/89-652-x2015005-eng.pdf>.
- Task Force on Canadian Unity. *A Future Together: Observations and Recommendations*. Ottawa: Minister of Supply and Services Canada, 1979. <https://primarydocuments.ca/wp-content/uploads/2018/02/TaskForceUnity1979Jan.pdf>.
- Taylor, Charles. *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, edited by Guy Laforest. Montreal: McGill-Queen's University Press, 1993.
- The Queen v. Drybones, [1970] S.C.R. 282.
- Torpey, John. "Introduction: Politics and the Past." In *Politics and the Past: On Repairing Historical Injustices*, edited by John Torpey, 1-34. Lanham: Rowman and Littlefield, 2003.
- Trudeau, Pierre Elliot. *The Constitution and the People of Canada*. Ottawa: Government of Canada, 1969.
- Truth and Reconciliation Commission of Canada. "Appendix 1: The Mandate of the Truth and Reconciliation Commission." In *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (www.trc.ca, 2015): 339. https://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf.
- Tully, James. "Diversity's Gambit Declined." In *Constitutional Predicament: Canada after the Referendum of 1992*, edited by Curtis Cook, 149-98. Montreal and Kingston: McGill-Queen's University Press, 1994.
- Tully, James. "Introduction." In *Multinational Democracies*, edited by Alain-G. Gagnon and James Tully, 1-34. Cambridge: Cambridge University Press, 2001.

- Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press, 1995.
- Turner, Dale. "On the Idea of Reconciliation in Contemporary Aboriginal Politics." In *Reconciling Canada: Critical Perspectives on the Culture of Redress*, edited by Jennifer Henderson and Pauline Wakeham, 100-14. Toronto: University of Toronto Press, 2013.
- Turpel, Mary Ellen. "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change." In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 117-51. Toronto: University of Toronto Press, 1993.
- United Nations. "Guidance Note of the Secretary General: United Nations Approach to Transitional Justice." (United Nations, March 2010).
https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.
- United Nations General Assembly. Resolution 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," A/RES/60/147, 1 (December 16, 2005). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>.
- Vipond, Robert C. "1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered." *Canadian Journal of Political Science* 22, no. 1 (1989): 3-26.
<https://doi.org/10.1017/S0008423900000810>.
- Waite, P. B. *The Life and Times of Confederation, 1864-1867: Politics, Newspapers and the Union of British North America*. Toronto: University of Toronto Press, 1964.
- Walkem, Ardith and Halie Bruce, ed., *Box of Treasures or Empty Box? Twenty Years of Section 35*. Penticton: Theytus Books, 2003.
- Whitaker, Reginald. "Democracy and the Canadian Constitution." In *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon, 240-60. Toronto: Methuen, 1983.
- Williams, Douglas E. "Editor's Preface." In *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, edited by Douglas E. Williams, 7-12. Toronto: McClelland and Stewart, 1991.
- Winter, Stephen. *Transitional Justice in Established Democracies: A Political Theory*. London: Palgrave Macmillan, 2014.

Woodward, Michael and Bruce George. "The Canadian Indian Lobby of Westminster, 1979-1982." *Journal of Canadian Studies* 18, no. 3 (Fall 1983): 119-43. <https://muse-jhu-edu.ezproxy.library.uvic.ca/article/674784/pdf>.

Woolford, Andrew. "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process." *Canadian Journal of Sociology* 29, no. 1 (Winter 2004): 111-44, <https://doi-org.ezproxy.library.uvic.ca/10.2307/3341947>.

Wyle, Hannah. "Towards a Genealogy of Reconciliation in Canada." *Journal of Canadian Studies/Revue d'études canadiennes* 51, no. 3 (Fall 2017): 601-35. <https://www.muse.jhu.edu/article/695715>.