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The Globalization of the Canadian Constitution

Sujit Choudhry, *Berkeley Law*



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BIOGRAPHY

Sujit Choudhry is the Cecelia Goetz Professor of Law and Faculty Director of the Center for Constitutional Transitions (www.constitutionaltransitions.org) at the New York University School of Law. He holds law degrees from the universities of Oxford, Toronto, and Harvard, was a Rhodes Scholar, and served as law clerk to Chief Justice Antonio Lamer of the Supreme Court of Canada. Professor Choudhry is one of Canada's leading constitutional scholars and an internationally recognized authority on comparative constitutional law. He has published over 60 articles, book chapters, and reports. Professor Choudhry is the editor of *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford University Press, 2008), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007) and *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (University of Toronto Press, 2006), sits on the board of editors of the *International Journal of Constitutional Law*, is a member of the editorial board of the *Constitutional Court Review*, and is on the board of advisers for *Cambridge Studies in Constitutional Law*. Professor Choudhry is extensively involved in public policy development. Internationally, he is a member of the United Nations Mediation Roster, has been a consultant to the World Bank Institute at the World Bank, has worked as a foreign constitutional expert in support of constitutional transitions in Egypt, Jordan, Libya and Tunisia (with the International Institute for Democracy and Electoral Assistance), Nepal (with the United Nations Development Program and the Nepal Bar Association), and Sri Lanka (with the Forum of Federations and the Center for Policy

Alternatives). In Canada, Professor Choudhry was a member of the Governing Toronto Advisory Panel, which proposed major reforms to the structure of municipal government in Toronto, and sat on the Board of Directors of Legal Aid Ontario, one of the largest publicly funded legal assistance programs in the world. He was counsel of record before the Supreme Court of Canada in *Charkaoui* (security certificates), and in *Khadr 1* and *Khadr 2* (Guantanamo detainees). He was named a Trudeau fellow in 2010 and he was named Practitioner of the Year by the South Asian Bar Association of Toronto in 2011.

ABSTRACT

It has been argued that the constitution of a country is the embodiment of, or a response to, its particular history, political values, culture, and, indeed, its very identity. But in the last two decades, we have witnessed a dramatic resurgence in the study of comparative constitutional law. How should we understand the relationship between the widely held view that constitutions are the quintessential national documents and the increasing migration of constitutional ideas across the globe? Sujit Choudhry examines the importance of comparative engagement in the drafting of the Charter, and the rise of the “Canadian model” for managing secessionist conflict in the 1990s. He also reflects on the way in which his immigrant identity—itsself the product of globalization—has shaped his scholarship on the Canadian constitution.

LECTURE

“The Globalization of the Canadian Constitution”

University of Alberta

APRIL 11, 2012

I once passed Pierre Trudeau while walking on Pine Avenue in Montreal on a wintry day in December 1991, and muttered good day. As fate would have it, he was very much on my mind. Canada was in the midst of one of its recurrent moments of constitutional introspection. The public engagement with these issues was particularly intense in Quebec. The Meech Lake Accord had failed in June 1990. The constitutional negotiations around the doomed Charlottetown Accord were underway.

I had arrived at McGill University in 1988 to study biology, set on a career in medical research. But being a student at McGill in the late 1980s and early 1990s was tantamount to taking a second degree in Canadian constitutional politics. We debated the finer points of the federal spending power, the technicalities of Senate reform, and the impact of the distinct society clause on the *Canadian Charter of Rights and Freedoms* (the Charter). The protests over the adoption of Quebec’s language legislation (Bill 178) closed downtown Montreal, and fuelled a heated debate on campus on the notwithstanding clause.

A few weeks before running into Trudeau, I spent a long evening poring over *Federalism and the French Canadians*.¹ I still remember

1. Pierre E. Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968).

my wonder at its erudition, confidence, range, and eerie pre-science. But what was particularly striking was how Trudeau placed Canadian constitutional politics in a broader global perspective. One chapter, “New Treason of the Intellectuals,” approached the constitutional politics of Quebec nationalism within the broader historical framework of state-directed projects of nation-building, the rise of minority nationalisms as defensive responses to these nation building projects, and constitutional politics as a product of these competing nationalisms. It was littered with illustrative examples from the new nations of Asia and Africa. The sense was that the Canadian dilemma was not just a Canadian issue.

This essay, and Trudeau’s life, raise a question. Trudeau famously left Canada to study abroad in the 1940s—at Harvard, Paris, and the London School of Economics—and then travelled around the world before returning in 1949. He described himself as a “citizen of the world,” a term that connotes a kind of rootless cosmopolitanism. But this stance is the antithesis of the dominant way in which constitutions are understood—as emerging from, and reflecting, a nation’s distinct history, culture, and identity. And indeed, Trudeau was at the very centre of our constitutional politics for a quarter-century.

So if I were to meet Trudeau today, I would ask him this question: is there a way to marry global constitutional engagement with a commitment to national constitutional distinctiveness? What motivates this question is my own academic career. I am a student of the Canadian constitution. But I am also a scholar of comparative constitutional law. The two main issues that have fascinated me are the role of comparative materials in constitutional drafting and interpretation, and the constitutional politics of nationalism and secession. I have tried to show that comparative engagement is helpful to better understand both phenomena, within Canada and beyond. Trudeau’s own life illustrates this point. The precursor to “New Treason of the Intellectuals” was a presentation Trudeau gave

at the École Normale in Paris in 1947.² I strongly suspect that being outside Canada, in a radically different political and constitutional context, made it easier for Trudeau to grasp the logic of Canada's multinational federalism.

In this lecture, I want to reflect on these two themes as well as a third. I am the child of immigrants who cannot trace their ancestry to any one of Canada's founding nations. I want to suggest that immigration, coupled with accelerating urbanization, is creating a host of new constitutional issues that will define Canada's constitutional agenda in the 21st century. The link with the overall theme for my lecture is that immigration is a manifestation of globalization, and will become another way to understand the globalization of the Canadian constitution.

The Migration of Constitutional Ideas

I became a scholar of comparative constitutional law by accident. At the same time that I decided to forsake a future in medical research for a career in the law, I won a Rhodes Scholarship to Oxford. I decided to begin my legal education there. I eventually ended up collecting law degrees from the United Kingdom, Canada, and the United States. In addition, I spent a summer as a student working on constitutional issues related to the South African transition. At each juncture in this journey, I naturally brought my constitutional training with me from my previous education and drew on it to better understand the problem at hand.

In microcosm my life reflected an important shift in constitutional practice. Political scientists conventionally argue that democratization has occurred in three waves. The first commenced in the 1800s in the United States and ended in 1926; the second ran from just prior to the Allied Victory in Europe and proceeded through

2. As revealed by Max and Monique Nemni in *Trudeau Transformed: The Shaping of a Statesman, 1944–1965* (Toronto: McLelland and Stewart, 2011).

the postwar period with decolonization until the mid-1960s; and the third began in the mid-1970s with the overthrow of Portugal's dictatorship, continued with the end of military dictatorships in Spain, Greece, and Latin America, reached the communist countries of Eastern and Central Europe, moved on to South Africa, and later spread to Asia and Africa. The Arab Spring may harken the beginning of the fourth wave of democratization, but it is far too early to tell.

Democratic transitions are usually accompanied by the adoption of new constitutions, and this process of constitution building is now thoroughly globalized. The globalization of contemporary constitutional practice means the reliance on comparative materials at all stages in the life cycle of modern constitutions—for example, during constitutional interpretation and the process of constitutional drafting.

The problem plaguing the field when I began to work in it is that students of comparative constitutional law had largely failed to ask the basic questions of what the point of comparative inquiry is, and how that enterprise is to be undertaken. There were two standard positions: particularism and universalism.

To particularists, the globalization of modern constitutional practice is wrong, because it contradicts the notion that a constitution of a nation emerges from, embodies, and aspires to sustain or respond to a nation's particular national circumstances. To participate in a national constitutional conversation is to engage in a particular and local political practice about *this* place, about who and what *we* are and want to become. Proponents of this view hold that constitutions should be framed and interpreted only by reference to sources internal to a nation's history and political traditions. Comparative engagement is a curiosity of no practical relevance, or even worse, is a form of legal imperialism.

At the other end of the spectrum are universalists, who posit that constitutional guarantees are cut from a universal cloth. An emerging

consensus among foreign legal systems is proof of a particular constitutional provision's truth or rightness. They exhort courts to regard themselves as interpreting constitutional texts that protect rights that transcend national boundaries. All constitutional courts are part of an interpretive community engaged in effecting the same set of principles.

This remains a surprisingly polarized debate, especially in the United States, where it has become yet another issue that divides conservatives and liberals. Conservatives accuse liberals of promoting a project of constitutional convergence that undermines American sovereignty. Liberals fuel these fears by viewing comparative engagement as a way of affirming America's membership in the community of liberal democracies. There is a transparently obvious politics to this.

This debate has become deadlocked, futile, and sterile. It also bears little connection to the real world. Over several years, I have closely examined how constitutional actors themselves—constitutional drafters, courts, and legal counsel—engage with comparative materials, and I have identified the reasons they give for comparative constitutional argumentation.³ I have pursued this line of research

3. See Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74 (1999), 819-92; S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism," *International Journal of Constitutional Law* 2 (2004), 1-55; S. Choudhry, "Worse Than *Lochner*?" in *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada*, eds. C.M. Flood, K. Roach, and L. Sossin (Toronto: University of Toronto Press, 2005), 75-100; S. Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Ideas*, ed. S. Choudhry (New York: Cambridge University Press, 2006), 1-36; S. Choudhry, "How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation," in *Comparative Constitutionalism in South Asia*, eds. S. Khilnani, V. Raghavanm, and A. Thiruvengadam (Oxford University Press: New Delhi, forthcoming).

with materials from Canada, India, South Africa, and the United States. What emerges is a third method of comparative engagement, which I term the dialogical model. The starting point is that a claim to constitutional distinctiveness of the kind the particularist would make is inherently relative; a constitution and its interpretation are only unique by comparison with other constitutions and interpretations. Comparative materials are interpretive foils, tools for constitutional self-reflection that help to identify what is special or distinctive about a constitutional order. If we engage comparatively and ask *why* a foreign constitution has been drafted and interpreted in a certain way, this better enables us to ask ourselves why *we* reason the way *we* do.

Constitutional actors may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant following a foreign model. However, constitutional actors follow that model not because they are bound by it, but because they are persuaded by it, in part because it coheres with national constitutional assumptions. Conversely, constitutional actors may conclude that comparative materials emerged from a fundamentally different constitutional order. A keener awareness and a better understanding of difference can be achieved through a process of comparison. Learning across jurisdictions does not simply mean transplanting positive constitutional models. Comparative constitutional experience can identify models of constitutional failure to be avoided.

I developed this framework in large part through a careful study of the history of the drafting of section 7 of the Charter. That provision guarantees everyone the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice. Over the course of nearly a decade and a half, what eventually became section 7 went through countless revisions. The constitutional experience of the United States loomed large to the Canadian drafters of the Charter, but in two very different ways.

The American analogues to section 7 are the due process clauses of the 5th and 14th amendments of the United States Constitution. They differ from section 7 by protecting property but not security of the person, and by subjecting deprivations of those interests to due process, not to the principles of fundamental justice. The United States Supreme Court has interpreted due process to encompass substantive restraints, but there are two lines of substantive due process cases: those that protect economic liberty from government regulation, and those that protect decisional autonomy over issues such as reproduction and child-rearing from government intrusion.

Canada experienced two competing sets of proposals, each of which took a different view of which parts of the American constitutional experience were to be avoided. One set of proposals argued that the Charter should avoid both the substantive protection of economic liberty and decisional autonomy, to deny the courts an open-ended power to second-guess legislative public policy judgments. The second—originally proposed by Trudeau—focused more narrowly on the potential danger posed by the Charter to economic regulation. Ultimately, the Charter is a composite of these proposals, and contains ambiguities that drove constitutional litigation for nearly two decades.

The broader point is that constitutional globalization need not deny the distinct character of national constitutional discourses nor homogenize political and legal order. As a practical matter, when foreign constitutional advisors support constitutional transitions, I think that they need to take the same approach. I have been fortunate to work on the ground in Sri Lanka and in Nepal, and will be soon providing expertise in support of transitions in Jordan, the broader Middle East and North Africa region, and Vietnam. The task of foreign experts is not to preach and promote an international best practice. Rather, our role is much more modest: to clarify the lessons

and implications of foreign constitutional experiences and options, in order to facilitate domestic constitutional choice.

Does the World Need More Canada?

In September 1996, I was a law clerk to Chief Justice Antonio Lamer of the Supreme Court of Canada. One day, the “Chief,” as we called him, summoned my fellow clerks and me to his office. He waved a piece of paper and said, “Look what Mr. Rock has sent us!” On the page was a set of reference questions concerning the legal framework for the secession of Quebec. This was the beginning of the famous *Quebec Secession Reference*⁴ that was handed down in 1998. I had nothing to do with the case while I was at the court. After my clerkship year, I went down to Harvard, become engrossed in my work, and did not give the case much thought.

The judgment was handed down in August 1998. The Supreme Court had been asked three questions: whether unilateral secession by Quebec was legal under Canadian constitutional law; whether it was legal under international law; and, in the event of a conflict between Canadian and international law, which body of law would prevail. I had expected a short judgment of a few pages on the first question, because the answer was crystal clear. The Canadian constitution creates Quebec, defines its territory and borders, brings into being its legislative and executive branches, confers limited areas of jurisdiction on them, and asserts its supremacy over all exercises of public power. The Constitution does not grant any province the right to unilaterally secede from Canada. Secession would require a constitutional amendment. Our constitution possesses five amending formulas. Save for one, all require the consent of the federal government. There is one amending procedure that provinces can deploy unilaterally, but it is limited in scope to matters internal to

4. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, Supreme Court of Canada.

the province and its institutions, and does not extend to secession. So the answer to the first question should have been a brief, and firm, no.

The court's judgment was astonishing.⁵ It resolved the case not on the basis of the text of the Constitution, but on the basis of four underlying principles: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. The court used these principles to develop an unwritten, yet binding, constitutional framework for the secession of Quebec. If a clear majority of Quebecers votes in a referendum by a clear majority on a clear question in favour of secession, this would not have the effect of bringing about secession. Rather, this would trigger a reciprocal obligation on the other parts to Confederation to negotiate constitutional changes to respond to that desire. The four unwritten constitutional principles would have to be taken into account during the negotiations and would shape the final deal. Finally, the constitutional framework is legally binding but judicially unenforceable. The court clearly did not want to be drawn into this constitutional morass again.

This judgment is completely bizarre and departs from every convention of Canadian constitutional practice. The constitutional text is the starting point of all constitutional argument, and says nothing about referenda, clear majorities, clear questions, and secession. Moreover, the text offered a straightforward answer to question one. The only way to understand the judgment is that the court amended the constitution to create a secession clause. But under our constitution, the power of constitutional amendment rests with political institutions. So the real question raised by the judgment is why the court did not permit the political actors to amend the constitution, and took this task upon itself.

I spent a few years puzzling over the judgment. I ultimately concluded that the Court had acted in response to a deep and profound

5. Ibid.

breakdown in the Canadian constitutional order.⁶ To understand why this breakdown occurred, we need to delve deep into constitutional theory. In politics, we frequently disagree about the substance of public policies. One of the basic functions of a constitution is to channel these disagreements into institutions that reach decisions that members of the political community will accept as authoritative. But for institutional decisions to yield political settlement, those institutional decisions must be made in a certain way. They must be made in a way that is viewed as constituting and regulating political life while also being indifferent among the policy positions on the table. If the procedures to manage political disagreement were themselves politically disputed, it would be difficult for institutional settlement to translate into political settlement. In parallel fashion, the rules governing constitutional amendment are a set of

6. See Sujit Choudhry and R. Howse, "Constitutional Theory and the Quebec Secession Reference," *Canadian Journal of Law and Jurisprudence* 13, no. 2 (2000), 143-69; S. Choudhry, "Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities," *Connecticut Law Review* 37 (2005), 933-45; S. Choudhry, "Popular Revolution or Popular Constitutionalism? Reflections on the Constitutional Politics of Quebec Secession," in *Legislatures and Constitutionalism: The Role of Legislatures in the Constitutional State*, eds. T. Kahana and R. Bauman (New York: Cambridge University Press, 2006), 480-98; S. Choudhry and J.-F. Gaudreault-DesBiens, "Frank Iacobucci as Constitution-Maker: From the Quebec Veto Reference, to the Meech Lake Accord and the Quebec Secession Reference," *University of Toronto Law Journal* (2007), 165-93; S. Choudhry, "Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory," *International Journal of Constitutional Law* 5 (2007), 606-38; S. Choudhry, "Referendum? What Referendum?," *Literary Review of Canada* 15, no. 3 (2007), 7-9; S. Choudhry, "Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?," *International Journal of Constitutional Law* 6 (2008), 193-230; S. Choudhry and N. Hume, "Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism," in *Research Handbook on Comparative Constitutional Law*, eds. T. Ginsburg and R. Dixon (Edward Elgar Publishing, 2011).

procedures that cannot produce constitutional settlement unless they too are viewed as being impartial among the full range of substantive constitutional options at play.

The problem is that political procedures, including the procedures for constitutional amendment, are not substantively neutral. By determining which individuals and communities can participate in political decision making, and what role those individuals and communities may play, constitutional amending rules stipulate the ultimate locus of political sovereignty and are the most basic statement of a community's political identity. In debates over constitutional change, when the proposal at issue challenges the conception of political community that underlies the rules governing constitutional amendment, those rules will be drawn into constitutional politics and cannot do the work we expect of them. I coined a term for this type of situation: these are moments of *constitutive constitutional politics*. In these moments, maintaining agreement on the procedural rules of constitutional change among constitutional actors who disagree on what that change should be is very difficult. Indeed, the constitutional system as a whole may collapse.

This, in a nutshell, is what happened in Canada in the mid-1990s. The federal government's view was that secession required constitutional amendment. Quebec sovereignists responded by challenging the assumption that independence could be governed by the amending rules. Those rules presuppose that Quebec is a constituent component of the Canadian federation, functioning as a subnational political community with extensive but limited rights of self-government within Canada. But it is precisely this constitutional vision that the Quebec sovereignty movement challenged, because it raised the substantive question of whether Quebec should remain a part of Canada or become an independent state. Since the sovereignists wished to make a radical break from the Canadian constitutional order, it is hard to imagine them subscribing to a process governed by it.

The *Quebec Secession Reference* helps us to change our understanding of the Canadian constitutional crisis of the 1990s. The conventional wisdom is that the crisis was *substantive*—a struggle among the competing constitutional logics of the Charter, provincial equality, and Quebec’s distinctive identity. But the *Quebec Secession Reference* points toward a procedural account of that crisis, in which the near-collapse of Canada’s constitutional system can be traced to the lack of a shared agreement on the rules governing constitutional amendment.

There is an important global dimension to this story. In the early 1990s, the so-called Canadian model of multinational federal democracy began to be promoted internationally by Canadian political theorists such as Will Kymlicka and Charles Taylor, and later by the federal government through the establishment of the Forum of Federations. The rise of the Canadian model was precipitated by events in Eastern and Central Europe. The collapse of the communist dictatorships was followed by the rise of profound ethnic conflict within these democratizing states between national majorities and minorities. In the search for solutions, multinational federalism was an obvious candidate.

But the advocates of multinational federalism were confronted with a major problem. Three of the former communist dictatorships of Eastern and Central Europe—Yugoslavia, the Soviet Union, and Czechoslovakia—had already been multinational federations prior to the transition to democracy, and all three began to disintegrate shortly after the transition. By contrast, unitary states in which nationalism served as the cleavage of internal political conflict did not fall apart. So, far from being the solution, multinational federalism may have done little or nothing to prevent state dissolution. Moreover, since only multinational federations broke up—and all of them did—multinational federalism may have had the perverse effect of fuelling the secession it was designed to prevent. The essence of the argument is that federal subunits provided an institutional

power base for national minorities that served as a springboard to statehood.

The region's experience posed a fundamental challenge to multinational federalism as a viable constitutional strategy in Eastern and Central Europe and elsewhere. The best way to respond to the negative examples of the failed multinational federations of Eastern and Central Europe was to identify places where multinational federalism had actually worked—such as Canada. The success or failure of Canada became a critical element in a global debate regarding the mere possibility of crafting an accommodation between majority and minority nationalisms within a single state.

What perplexed me was that the rise of the Canadian model in political theory and constitutional politics coincided with Canada's worst constitutional crisis. I concluded that this was not a coincidence. Many proponents of the Canadian model not only recognized the crisis gripping the Canadian constitutional order, but also viewed the international promotion of the Canadian model as an important element in resolving problems at home. Arguing for the necessary success of the Canadian model was a political intervention in two different but interrelated arenas. It was an intervention in international politics—to offer a practical, viable model dealing with the issue of minority nationalism, which had become a source of political instability in Eastern and Central Europe and beyond. Kofi Annan's and Mikhail Gorbachev's public interventions in the Canadian national unity debate demonstrated how important the success of the Canadian model was to an international community struggling with the destructive potential of nationalism.

But it was also an intervention in domestic constitutional politics—to argue that Canada had hit upon one of the few workable solutions to the accommodation of minority nationalism within a liberal democratic constitutional order, and that this was a reason for us to make our arrangements work. From time to time, Canada's politicians have sought to place the Canadian example at the heart

of Canada's foreign policy by offering it as a pillar of development assistance to deeply divided societies. Part of the motivation is to increase Canada's influence abroad through the exercise of soft power. But there a domestic agenda is at work here as well. As the prestige of the Canadian model is enhanced abroad, so too is its prestige at home.

Contextualizing the rise of the Canadian model against the backdrop of Canada's constitutional crisis has an important practical implication. When we promote the Canadian model abroad, there is the danger of lapsing into "peddling Canada"—to sanitize our constitutional experience and offer Canada as a perfect constitutional role model that all countries with similar problems would be wise to emulate. To be sure, Canada is a success story—it is one of the oldest countries in the world, it has responded imaginatively to forces that have torn other countries apart, and it has achieved a remarkable degree of prosperity and freedom. But our history shows us that we have had our existential crises as well. When Canadian experts go abroad, we should discuss these facets of the Canadian experience openly and courageously. It is simply not credible to do otherwise with foreign audiences, who are often very well informed of Canadian developments.

Ethnic Immigrants and the Canadian Constitution

In 1984, Ontario Premier Bill Davis rose in the Ontario legislature to announce a major shift in educational policy. For several decades, Ontario had funded Roman Catholic schools until the end of Grade 10, but not other religious schools. Premier Davis announced the expansion of public funding for Roman Catholic schools until the end of high school, while continuing to deny funding to other religious schools. The leaders of the opposition parties rose in the legislature to announce their support for the extension of full funding, making it a *fait accompli*. The measure became law the next year, and remains in place to this day.

I was in Grade 9 at the time and vividly recall my outrage. The existing arrangement discriminated on the basis of religion, and the extension of public funding merely amplified that discrimination. It was argued that the funding of Roman Catholic schools violated the Charter's equality rights provision, section 15, which was to come into effect the next year. The potential unconstitutionality of the policy led the provincial government to pose a set of reference questions to the Ontario Court of Appeal, and the case ultimately ended up before the Supreme Court of Canada.

The *Bill 30 Reference* was the first constitutional case I was ever interested in.⁷ When the Supreme Court's judgment was handed down in 1987, I carefully read an extract in the *Toronto Star*. The decision rested on two grounds. First, while s. 15 applied to legislation, it did not apply to the Constitution itself. The Court held that full funding for Roman Catholic schools was required by the Constitution, and was a constitutionally mandated form of religious discrimination immune from Charter scrutiny. Second, the Court held that even if there was no constitutional duty to provide full funding for Roman Catholic schools, the provincial power to confer such funding was so fundamental to the Confederation compromise that it survived the enactment of the Charter.

What stood out in my mind was the way in which the Court conceptualized the discrimination at issue. To be sure, Ontario's funding arrangements discriminate on the basis of religion because they exclude schools operated by Protestants, Jews, Muslims, Hindus, and other non-Catholics. But many of these faiths are new to Canada, as a result of immigration. This means the policy also has the effect of discriminating against new Canadians, on the basis of immigrant status. Moreover, because the Court held that these obli-

7. *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

gations were constitutionally entrenched, they cannot be changed through the ordinary legislative process.

The last point has important political implications. Demography is destiny. Demographic change eventually leads to shifts in political power. Absent constitutional barriers, demographic change would eventually lead to a change in the arrangements surrounding the funding of religious schools in Ontario. The constitutional entrenchment of these policies insulates them against changes that reflect the evolving nature of Canada.

But the lesson of Canadian history is that if we do not adapt our constitutional arrangements to respond to new demographic realities, we do so at our peril. Consider 1867. Confederation was the coming together of the separate colonies of British North America. But it also involved the division of one of those colonies, the United Province of Canada. That province was created in 1840, through the union of Lower and Upper Canada. Each half of Canada was represented by equal numbers of members in the Legislative Assembly. Initially, Canada East's population was larger than that of Upper Canada's. It opposed this system of representation, in the name of representation by population (rep by pop). A decade later, the positions had reversed, and Canada West had the greater population and was demanding rep by pop. Disagreement on this basic issue ultimately led to legislative deadlock in 1864. A new constitutional dispensation was needed to end political paralysis. Cartier and the Bleus initially opposed rep by pop. But they eventually came to see that the demographic trends that fuelled this demand were inevitable and irreversible.

What is the lesson of 1867? Above all, Confederation was a moment of clear-sightedness driven by demographic change that led us to adapt our institutions to better deal with the future. The clash between constitutional arrangements rooted in Canada's past on one hand, and Canada's changing demography on the other, is far from over.

These issues have become a major preoccupation of my scholarship for the last several years, but I frame the constitutional issues raised by demographic change somewhat differently from others. The dimension I want to add is Canada's ethnic diversity, which is largely a product of immigration, and is another way in which globalization will shape our constitutional development.

Our constitution is increasingly out of sync with some key demographic facts.

First, Canada's population is increasingly urbanizing, but is concentrated in a small number of provinces and major urban areas. Eighty-one percent of the population lives in urban areas (Census Agglomerations, or CAs), while 69 percent live in the largest urban areas (Census Metropolitan Areas, or CMAs). Forty-six percent live in metropolitan Toronto, Montreal, Vancouver, Calgary, and Edmonton. Between 1981 and 2011, the country's population grew from 24.3 million to 33.5 million. Of the total growth, 80 percent occurred in Alberta, British Columbia, and Ontario. Every other province has seen its share decline over the same period.

Second, Canada's population is being transformed by visible minority immigration. Between 2001 and 2011, two-thirds of Canada's population growth was due to immigration. Projections indicate that nearly all population growth will be due to immigration by 2031. The proportion of foreign-born residents in Canada is approximately 20 percent and will continue to increase. These immigrants are primarily visible minorities, reflecting a shift in the source countries for immigration to Canada. In 2006, 16 percent of the population consisted of visible minorities, a figure that is projected to grow to 33 percent by 2031.

Finally, urbanization and visible minority immigration are intertwined. Between 2001 and 2006, 97 percent of immigrants chose to settle in CMAs, with 69 percent settling in the three largest metropolitan areas of Toronto, Montreal, and Vancouver. Patterns of immigrant settlement are creating a demographic divide between

urban and rural Canada. Some 95 percent of the foreign-born live in CMAs or CAs, versus 78 percent of the Canadian-born. Ninety-six percent of visible minorities live in CMAs, compared to 68 percent of the general population.

These demographic trends are now firmly set. In the short term, some variation may occur. But the long-term trend is clear and inevitable. A new issue for constitutional politics in the 21st century is how our institutions will respond to these profound demographic changes. At the most fundamental level, the question is this: will votes, political power and public expenditure follow people as they make choices about where to work and live, fundamentally altering the geographic distribution of Canada's population in the process?

The immigrant dimension of this new kind of constitutional politics is crucial. Canada's constitutional arrangements are legitimized by narratives that are firmly anchored in our constitutional past. These narratives are built around a set of historical agreements, compacts, and legal texts among Canada's founding nations, which constitute a kind of common sense of the purpose of the Canadian constitutional project. The Supreme Court's decision in the *Bill 30 Reference* is a reflection of this way of comprehending and articulating the logic inherent in our constitutional arrangements and political practices.

But to many new Canadians, this constitutional common sense does not resonate.⁸ Employing the liberal values of equal dignity and non-discrimination, they have increasingly challenged these narratives in a number of areas. One example is the debate over the Distinct Society Clause in the Meech Lake Accord, and its replacement by the Canada Clause in the Charlottetown Accord. New Canadians have a distinctively modern stance toward Canada and

8. I first set out the theoretical basis for these arguments in S. Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology," *Journal of Political Philosophy* 10 (2002), 54-78.

its constitutional order that treats the past as undeserving of respect simply because of its “pastness.” They feel that to be legitimate and relevant, Canada’s fundamental law should reflect our nation’s contemporary needs and sense of self. I am quite confident that I am not alone in sharing this view, and that an increasing number of Canadians of my demographic—urban, ethnic, immigrant—hold it as well. As immigration accelerates, this critical stance toward Canada’s constitutional arrangements will only increase.

I have tried to bring these concerns to bear on the analysis of two sets of issues: *political representation* and *social policy*.⁹

First, consider political representation. The rules governing the allocation of seats in the House of Commons, both across and within provinces, have produced enormous disparities in the sizes of ridings. Although all adult Canadians enjoy formal equality with respect to the right to vote, the weight of their votes varies widely. These variations are deliberate. The traditional justification for the rules governing the allocation of seats is that they protect the minority of voters who live in smaller provinces and rural areas from being outvoted by urban voters and the residents of the larger provinces. I have argued that bringing visible minority status into

9. See S. Choudhry, “What Is a Canadian?,” in *What Is a Canadian?*, ed. I. Studin (Toronto: McLelland & Stewart/Douglas Gibson Books, 2006), 117-23; S. Choudhry, “Redistribution in the Canadian Federation: The Impact of the Cities Agenda and the New Canada,” in *Dilemmas of Solidarity: Redistribution in the Canadian Federation*, eds. S. Choudhry, J.-F. Gaudreault-DesBiens, and L. Sossin (Toronto: University of Toronto Press, 2006), 45-56; S. Choudhry and M. Pal, “Is Every Ballot Equal? Visible Minority Vote Dilution in Canada,” *IRPP Choices* 13 (2007), 1-30; S. Choudhry, “Constitutional Change in the 21st Century: A New Debate over the Spending Power,” *Queen’s Law Journal* 34 (2008), 375-90; S. Choudhry and M. Mendelsohn, *Voter Equality and Other Canadian Values: Finding the Right Balance* (Toronto: Mowat Centre for Policy Innovation, 2011); S. Choudhry and M. Pal, *The Impact of Regionally Differentiated Entitlement to EI on Charter-Protected Canadians* (Toronto: Mowat Centre Employment Insurance Task Force, 2011).

the equation complicates this picture considerably. Members of visible minority communities overwhelmingly reside in urban areas in Canada's most populous provinces. The implication for the debate over electoral reform is that promoting the interests of Canada's rural minority and the minority of Canadians who live in smaller provinces comes at the cost of the interests of a visible minority, which are also worth protecting.

In the social policy arena, I have argued that these demographic shifts could play out in the following way. I have described the federal-provincial transfer system as Canada's 20th-century fiscal constitution, layered on top of our 19th century political constitution. This system is sustained by narratives of solidarity with the "Other Canada"—the idea that our fellow citizens in all parts of the country deserve a basic level of services, no matter where they are born or where they live. For a generation, the Other Canada was Corner Brook, Prince George, Rimouski, and Yellowknife. But increasingly, the Other Canada is also to be found closer to home, in the growing enclaves of poverty in urban areas that are taking on an increasingly racialized character, and that are at least partly a function of the well-documented difficulties that recent immigrants face in integrating into the labour market. If narratives of social citizenship undergird the federal-provincial transfer system, then changes to those narratives that emphasize bonds of solidarity that are much more local could have dramatic implications for Canada's fiscal constitution. There may be a demand that the kind of energy and resources we have long invested in regional development projects in Northern and Atlantic Canada now be directed to our deprived inner cities and immigrant populations. The growing chasm between our institutions of representation and the emerging patterns of political identity would be manifest in a new type of debate over fiscal federalism—a debate that would give voice to the larger demographic pressures that are building for constitutional change.

I have come to appreciate that these positions cut deeply against the grain of much of our way of constitutional thinking. As is so often the case, I had to leave Canada to grasp this. My moment of constitutional revelation occurred in Sri Lanka, where I was on mission as a foreign constitutional expert. My suggestion was that the Canadian system of ethnocultural accommodation was a potential model for Sri Lanka to deal with its own ethnic conflict among the Tamils and Sinhalese.

A common theme in our presentations was some form of territorial autonomy for the Tamil minority in the north-east of the island within a united Sri Lanka, analogous to Quebec's position in Canada. In the process of explaining why federalism was a potential solution to Sri Lanka's problems, we were often met with the objection that federalism in Sri Lanka would set the stage for secession. In response, I found myself making the case for Canadian federalism with gusto, through simultaneous translation into Sinhalese. Far from Quebec posing a threat to Canada's viability, had Quebec not been created in 1867, there would likely be no Canada today.

Over the course of my visit to Sri Lanka, I found myself repeating this argument time and time again. This was one of the most astonishing experiences of my academic career.

My own experience tells us something in microcosm about constitutional culture writ large. When citizens live under a constitutional order, we are engaged in highly complex and elaborate social practice. That practice emerges from the concrete political history of a society, a history that explains the origins of our governing institutions, why we have them, and how they operate. This practice is the beginning point of any constitutional conversation.

But the question is this: are Canadians forever doomed to move along the paths charted by our constitutional past?

Let me answer this question by returning to Trudeau. Trudeau burst onto the political scene in Quebec with the publication of

his landmark work, *The Asbestos Strike*, in 1956.¹⁰ He offered an unapologetically modern critique of Quebec's elites, whom he accused of failing to grapple with the new realities of industrialization and urbanization. Trudeau's modernism was closely linked to his global outlook. He argued that Quebec should be open to new ideas: ideas from around the world, ideas that would challenge the veneration of tradition for the sake of tradition. I have no doubt that Trudeau would endorse a modernist critique of our constitutional framework. And as the champion of an open, tolerant, and welcoming Canada, he would welcome the right of all Canadians, both old and new, to engage actively in that constitutional conversation.

10. Pierre E. Trudeau, "The Province of Quebec at the Time of the Strike," in Pierre E. Trudeau, ed., *The Asbestos Strike* (Toronto: James Lewis & Samuel, 1974).

