Constitutional Possibilities:
An Inquiry Concerning Constitutionalism in British Columbia

by

Nathan Edward Hume

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Constitutional change is relentless. Today, states jockey with regional associations, international organizations, transnational networks and sub-state authorities to define the scope of legitimate political conduct and establish rival bases for political affiliation. Constitutional theorists must be resolute but they should not be rigid. Especially in such uncertain conditions, theories are best understood not as plans to be implemented but as hypotheses to be tested. Charles Sabel and David Dyzenhaus write separately but share this pragmatic orientation, in which doubt is indispensable and truth is the end of public inquiry. They also share a distinctive belief that constitutionalism serves a moral end: it is the project of cultivating citizens who conceive their political community in terms of the commitments revealed by its practices. Their position, which is well suited for contemporary challenges, warrants elaboration and examination.

British Columbia offers an ideal constitutional laboratory for that test. During the 1970s and 1980s, doubts mounted about the legitimacy of the constitutional settlement imposed by the Crown in the westernmost province of Canada. Legal, political and constitutional decisions raised the possibility that aboriginal rights and title survived colonization and Confederation. Since 1990, their existence has been confirmed in a cascade of constitutional experiments. Those initiatives can be distilled into four procedures: litigation, negotiation, consultation and collaboration. Although they have delivered practical benefits to some indigenous peoples, these procedures have not transformed provincial politics into a moral endeavour. The constraints on constitutionalism in British Columbia are both conceptual and institutional. Despite marginal improvements, those constraints endure and constitutionalism remains for now the sporadic pursuit of a small elite. To conceive
constitutionalism as a project is to set a sound but exacting standard. Although British Columbia falls short, its failure is informative: the theory is useful.
For Angie
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“I promise nothing complete; because any human thing supposed to be complete, must for that very reason infallibly be faulty.”

Herman Melville, *Moby Dick*
**Introduction**

This dissertation is an attempt to take constitutionalism seriously. It is a response to recent scholarship that treats constitutionalism either as an adjunct of politics or an extension of philosophy. It is a reaction to the glut of constitutionalisms, from European to theocratic to democratic and beyond, that have been conjured to defend or critique efforts to entrench particular political settlements against reform and that obscure constitutionalism itself. It is also a reply to theorists who treat constitutionalism as the institutional conclusion of a philosophical argument: of course we want to adopt the right institutional answer. It is an attempt to determine whether constitutionalism could be a distinct endeavour: a mode of conduct that requires a different orientation to constitutions, in which we ask not what we can do with them but what they require from us.

This dissertation develops a theory of constitutionalism as a project: an undertaking for which those involved are responsible, rather than something that simply results from politics or logic. More precisely, it defines constitutionalism as the project of cultivating a principled political community: a community that, given its conduct, can be understood in terms of its commitments. The basic activity of this project consists of reviewing and revising political practices in light of the principles they express, and *vice versa*.

This theory is based on the work of two theorists: Charles Sabel and David Dyzenhaus. They are contemporary, like the theorists to whom this dissertation responds. They are relevant, since they write about constitutionalism rather than one or more of its many variations. They are also intended to provoke debate, since they may appear to share little of substance, given their different research agendas and preoccupations. However, on closer look, their work reveals many mutual influences and promises a fertile common ground. Other theorists have complementary ideas about constitutionalism. Some of them are considered in the following chapters, while others may be canvassed in subsequent works. However, this dissertation is not concerned exclusively with theory. While it is important to know whether constitutionalism could be understood as a project, it is also important to know whether that understanding could be useful.

For this reason, it is necessary to test this theory of constitutionalism in a case study. Multiple case studies would have been preferable. Comparison facilitates the identification of outliers and the refinement of observations. However, practical considerations necessitated a single study. This approach to constitutionalism requires significant attention to detail and therefore a substantial commitment of time. The case selected was British Columbia, in particular the constitutional developments involving indigenous peoples in that Canadian province from 1990 through 2010. To do those developments justice, it was necessary to postpone comparative analyses,
although this theory is meant for general application. British Columbia is an exemplary case study. The developments in question are abundant, prominent and transparent: there is a lot of data and it is easily accessible. As important, the participants are struggling with very basic questions about the nature, content and legitimacy of the constitutional settlement in the province.

Charles Taylor once wrote that, “for all of the people east of the Rocky Mountains, British Columbia is a strange place, not quite believable.”¹ He exaggerated, but he did so in service of an important truth: British Columbians are separated from other Canadians by more than just geography. For example, they have borne, with pride and guilt and since long before such dysfunction became fashionable, a penchant for partisan politics and eccentric leaders. Many of them adopt (and some, via action movies, hydroponic marijuana, organic juices and tailored yoga pants, export) an air of enlightened hedonism that offends the traditional values that purportedly animate other parts of the country.

British Columbia is a rich province, blessed with natural resources and immigrant optimism. Yet it tolerates the highest rates of child poverty and some of the worst inequality in Canada. Railroads, highways and pipelines join with rivers to whisk the hinterland’s bounty to the coast and, from there, to mills and markets abroad. Investors scramble and tourists flock to shimmering Vancouver, where green glass condominium towers reflect the grime and despair of Canada’s poorest neighbourhood. Although the students and suburbs in British Columbia are cosmopolitan, so are the gangs.

Foreign influences and international connections are nothing new to British Columbia: before it was a Canadian province it was a British colony. Crown rule was imposed upon the indigenous peoples who welcomed, fought, ignored and traded with the Europeans when the latter arrived in their traditional territories. Very few treaties were signed and those that were signed were perfunctory. Yet Canadian courts have confirmed that aboriginal rights to land and resources survived colonization and Confederation and continue to exist in the province. Section 35(1) of the Constitution Act, 1982 recognizes and affirms those rights. Meanwhile, the federal Parliament retains jurisdiction over “Indians” and lands reserved for them.

The Canadian Constitution is both an expression of the Crown’s colonial legacy and an instrument to transform that legacy. Like any expression, it requires interpretation. Like any instrument, it has limitations. It is not a comprehensive program for good government. The Canadian Constitution does not, for example, tell indigenous, provincial and federal governments how to correct historical injustices. It does not specify how to transfer a forest licence or build a dam without unduly infringing aboriginal rights. It does not even stipulate how to make such

decisions. The Canadian Constitution does, however, oblige the Crown to respect the legal entitlements of indigenous peoples. More generally, it confirms the Crown’s commitment to the rule of law, which implies a commitment to determine what the rule of law requires from a sovereign: an inquiry complicated in British Columbia by the imposition of Crown rule.

Since 1990, a barrage of legal and political decisions has rocked the constitutional settlement in British Columbia. Indigenous peoples have not won each case, deal or vote, but the combined effects of those changes have destabilized a deeply unfavourable status quo. Constitutional experiments have multiplied, the rate of institutional change has increased and the situation has become quite messy. British Columbia is vast, and the indigenous peoples who live there are diverse, yet they are liable to combine and recombine in various patterns to make novel claims and seek ambitious results. The provincial and federal governments represent motley populations and enjoy an array of tools: preemptive, proactive, punitive and so on. As the parties acclimate to improvisation, the chaos is unlikely to abate. Nonetheless, it can be distilled into four model procedures: litigation, negotiation, consultation and collaboration.

Litigation and negotiation are stock responses to constitutional turmoil. They differ in many respects, but they share a basic rationale: to resolve the confusion. When parties litigate, they seek a legal conclusion to their dispute. When they negotiate, they seek a comprehensive political settlement expressed in a binding agreement: a treaty. In British Columbia, neither procedure has managed to restore constitutional certainty. Tidy results elude litigants for various reasons: complex doctrines of aboriginal rights and title; facts that are remote, obscure and difficult to establish; rhetoric that reduces legal principles to clichés; an emerging preference for interminable procedural skirmishes over decisive substantive battles. Further, since many judgments have latent and unintended effects, litigation has proven more effective as a catalyst for institutional innovation than as constitutional ballast. Indeed, it drove the rise and fall of negotiation in the province. A split 1973 decision of the Supreme Court of Canada made treaty talks in British Columbia a priority for Canada. By the early 1990s, indigenous and Crown authorities had overcome endemic prejudice, mistrust and inertia to develop an unsound treaty process, the structural defects of which have since been exacerbated by public ignorance, political fecklessness and a succession of trial and appellate judgments that have turned consultation into a more dynamic choice. After 18 years, the treaty process has produced only two treaties and is widely viewed as a disappointment.

In contrast to litigation and negotiation, consultation and collaboration are quick, flexible and limited affairs. Rather than conclusive answers, they favour provisional arrangements and incremental adjustments. The courts have found the Crown has a constitutional duty to consult when it contemplates conduct that could affect an aboriginal right, whether proven or claimed. That duty varies, based on the strength of the claim and the severity of the likely impact, from mere notice
to deep accommodation. Given ubiquitous indigenous claims and extensive regulatory schemes, consultation is rampant: communication protocols, decision-making frameworks and revenue-sharing arrangements proliferate, even as complaints about these targeted, provisional measures accumulate. Too often, consultation deteriorates into correspondence about the adequacy of prior correspondence and does not meaningfully address the interests it is supposed to preserve. Of course, this superficiality is also its strength because dedicated parties can address specific shared concerns, such as the path of a hydroelectric transmission line or the tailings from a copper mine, without being snared by more controversial issues.

Collaboration tempts controversy. Collaboration agreements, which bear various names, sometimes begin with parallel assertions of sovereignty by the Crown and the indigenous party. The most radical examples do not invoke the Canadian Constitution or doctrines developed under it, such as aboriginal rights or the duty to consult. Their indigenous signatories assert a degree of autonomy that pushes the limits of federalism by denying Crown authority over them and their lands. However, these agreements also contain practical measures like joint working groups that enable the parties to address concrete matters of common concern. Collaboration is the most rare of the four procedures; it is also the most unusual. It creates opportunities for participants to expound and examine their basic commitments, whether shared or separate, but also allows them to work together without dwelling on potentially fundamental differences.

These developments are compelling, but we must take care to not make a fetish of constitutional experimentation. After two busy decades, too many indigenous peoples remain poor and marginalized. The provincial political community is still fragmented and dissolute. Engagement with constitutional principle is rare outside the courtroom and intermittent within. Experimentation has become increasingly standardized and routinized, via template agreements and rote consultation practices. Further, the residents of British Columbia are divided and demobilized. Federal, provincial and indigenous authorities espouse different, and sometimes incompatible, conceptions of political community. Few non-indigenous residents are engaged with these constitutional experiments or concerned with the principles at stake. They are, in an important sense, estranged from their own constitutional tradition: unaware of the law and unconcerned with the practices that sustain it. Instead, there is a strong popular emphasis on formal equality among individuals that is inconsistent with the status, role and treatment of indigenous peoples in the Canadian Constitution.

More than two decades of constitutional experiments have yet to yield constitutionalism in British Columbia. The Crown regards indigenous peoples in the province as legitimate interest groups, but not as constitutional partners. Indeed, the rhetoric of interests stifles consideration of common principles: federal and provincial authorities emphasize the accommodation of diverse interests; judges often treat the fulfillment of constitutional duties as a matter of properly balancing
competing interests. To conceive constitutionalism as a project helps to identify and explain the shortcomings of these constitutional experiments. The theory is not complete. It requires elaboration and application across a wider range of experience, but it is useful.

Before examining this theory in greater detail, it will be helpful to introduce four points or themes that recur in this dissertation. First, constitutional theorists should be modest. Theory is not the same as practice. In other words, to theorize about conduct, from hitting a baseball to negotiating a treaty, is not to perform that conduct. This point may seem simple, but it can be slippery. A theory can influence practice, but to do so the persons involved in that practice determine how it relates to their own understanding of their conduct and then use it. A theory is an interpretation: an attempt to make sense of ideas and events by treating them as expressions of an intelligible whole. A theory is also a hypothesis: a proposition that requires inquiry to confirm or disprove it; a possible guide to action that puts the onus on those involved to implement it.

Therefore, the purpose of the case study is not to devise a program for constitutionalism or to develop a response to the constitutional doubts that haunt British Columbia. Rather, it aims to ascertain and assess the possibilities presented by those experiments. It seeks to determine what the participants were doing, what their conduct reveals about them and their beliefs, and what they might do differently. This approach is not utopian; it does not assume endless options. To theorize can involve rejecting certain possibilities. For example, comprehensive treaty settlements seem very unlikely for most indigenous peoples in British Columbia, especially given poor procedural design, inadequate finances and unproductive bargaining strategies.

Second, theorists should study institutional experiments. Most constitutional theories and theories of constitutionalism focus on the rights and institutions that will solve a stated problem (e.g. ethnic conflict) or satisfy specified conditions for legitimacy (e.g. equal concern and respect). Although the rights and institutions at which we arrive are important, theorists need to pay more attention to the conduct by which those rights and institutions are conceived, developed, established and revised. That conduct will ultimately determine whether we solve the problem or satisfy the conditions in question. This approach highlights the agency of individuals, who must develop alternative scenarios, choose among them and determine how they will allow themselves to act. Theorists who adopt this approach will be less likely to foreclose possibilities prematurely or to treat individuals as instruments for a grand plan discovered or devised by someone else. One advantage of understanding constitutionalism as a project is that it puts the burden on citizens and officials to foster that project. They must regard themselves as agents capable of deciding, for example, whether to act in terms of interests or principles.

Another reason to scrutinize institutional experiments is that incumbent institutions struggle to solve many of the most pressing public problems, from environmental degradation to
unsustainable economic growth. Often, those institutions inadvertently either contribute to the problems they try to solve or cause new ones. Consider, for example, government programs to promote homeownership and stabilize the Canadian economy in the wake of the global financial crisis, which have stoked both development and speculation, fueled record household debt levels and produced a less balanced economy more vulnerable to the very shocks they were supposed to mitigate. Institutional experimentation is a reasonable and increasingly common response to perennial and seemingly intractable problems. We are not condemned to toil with only the institutions we inherited.

In British Columbia, the profound theoretical and moral questions raised by the imposition of Crown rule are inseparable from the mundane business of regulatory design, implementation and enforcement. Those questions cannot be answered in advance or in abstraction from the histories, cultures, industries and ecosystems of the parties involved in the projects that prompt such questions. In these circumstances, judges, legislators and regulators are not equipped to provide definitive answers: rules that will produce satisfactory results and that indigenous peoples will accept without dissent. Interested indigenous peoples must join the effort to determine what the Crown must do to fix its colonial foundations. They must share responsibility for elaborating the Canadian Constitution: extending its written provisions to new affairs, illustrating its unwritten principles and thereby enriching the whole. Although this work cannot proceed according to a plan, it need not be entirely spontaneous. Participants in one experiment can learn from efforts elsewhere in the province.

The four procedures introduced above involve different degrees of experimentation. Although its basic elements are familiar, litigation is fairly dynamic and can prompt innovative responses. Negotiation is less radical than it may seem because, among other things, the stunted structure of the Treaty Process has been stripped of its most transgressive elements. Consultation is fast and flexible but sometimes superficial and standardized. Of the four procedures, collaboration presents the most novel features: the parties express fundamental disagreements but do not succumb to them because they also establish procedures to make joint decisions on matters of common concern. Collaboration may represent a minimalist turn in constitutional experimentation, although it does give participants the means and the opportunity to reflect upon the nature and needs of their commitments, if so inclined. Further, if the institutions established by collaboration agreements endure, the may nurture new affiliations that upset and overshadow old differences.

Other developments in British Columbia fall outside these categories and are not considered in this dissertation for a combination of conceptual and practical reasons. Two examples merit

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mention: devolution and impact benefit agreements. The former involves legislation that transfers responsibility for delivering certain public services from Crown authorities to band councils governed by the federal Indian Act. Some of these laws are noted in passing below, but they are not emphasized because they operate entirely within the existing statutory and constitutional structure. They do not represent a form of constitutional experimentation. Impact benefit agreements are agreements between indigenous peoples and third parties, primarily natural resource companies, to share the economic benefits of projects within the traditional territories of the indigenous signatories. These agreements are not required by the constitutional duty to consult, but they are increasingly common as they are thought to facilitate development by mollifying indigenous opposition. Unlike devolution, impact benefit agreements actively avoid and suppress constitutional issues. Private companies have no constitutional duty to consult, and the key consideration given by the indigenous parties is a promise to refrain from challenging the regulatory approvals for the project in question on the basis of their rights or title. As important, these agreements are typically confidential and thus would make difficult subjects for study. The four procedures are, by contrast, much more suitable.

The third recurring theme is that courts can be catalysts of constitutional change. It is unpopular to put courts at the centre of constitutional conduct or design. Theorists acknowledge and judges admit that courts can no longer monopolize constitutional principle, if indeed they ever could. However, this observation should not obscure the fact that courts can still play an important role by instigating constitutional experimentation, and perhaps even constitutionalism.

A number of features distinguish courts from other potential constitutional forums, such as the legislature or the treaty table. Not all of these features are unique to courts, but their combination and significance set the judiciary apart. To begin, courts involve direct participation: individuals and groups can initiate litigation and exercise significant influence over the action and the outcome, for example by drafting the pleadings, swearing the affidavits and designing the strategy. Legal procedures, such as disclosure obligations, also offer the parties a measure of formal equality that can be absent in other contexts. Litigation culminates in a judgment rather than a bargain. The result is not negotiable: although prudence may inform a judge’s conclusion, right is expected to prevail. Finally, judgments are not isolated events; they are bound to other judgments by the legal reasons given to justify them. Their status enhances the regulatory effect they may have on the future conduct of other subjects to that legal order. As a result, their ultimate effects can be difficult to predict; depending on various material conditions and the reasons given for other judgments, they may reinforce or undermine an apparent equilibrium.

In British Columbia, the courts have contributed to constitutional experimentation, both deliberately and inadvertently. For example, they have greatly influenced the evolution of the duty to consult and thereby undermined the prospects for negotiation. Aside from entrenching the duty and
elaborating its various procedural elements, the courts have influenced the terms used in consultation agreements, as parties jockey over whether and how to insulate their agreements against challenge on grounds of inadequate consultation.

However, the courts have not yet galvanized the project of constitutionalism in the province. It remains an intermittent elite pursuit for interested lawyers and judges, as well as some officials and indigenous authorities. Indigenous governments are somewhat more likely to engage their members on potential matters of constitutional principle, such as consultation protocols, by calling community meetings and even requiring community ratification. By contrast, Crown officials and non-indigenous residents regard such matters, if they regard them at all, as technical concerns that do not engage, let alone imperil, any deeper values. Unfortunately, the courts rely too heavily on rhetoric and process. They have gradually debased the potentially powerful concept of reconciliation from a constitutional imperative for the Crown to an exercise in maximizing utility by balancing the interests of indigenous peoples and the “broader population.” Further, judges have diluted the duty to consult and its potential to disrupt unresponsive Crown routines. Rather than quash approvals granted without adequate consultation and order specific forms of accommodation, they typically order more consultation and allow the contentious conduct to continue. They may fear a form of backlash, whether political (i.e. a populist reaction by the large non-indigenous majority) or economic (i.e. a capital strike in which natural resource companies flee the province due to regulatory uncertainty). The latter, in particular, has been mentioned in many injunction cases. However, even assuming the risk of backlash is real, judges should give more weight to other considerations and commitments if British Columbia is to be about more than material prosperity.

Fourth, finally, and in line with that recommendation, this theory of constitutionalism requires the possibility of a principled community. It does not require consensus on those principles and, given the emphasis on experimentation, actually involves a measure of doubt and disagreement. However, it does require that participants entertain the prospect that they belong to the same community and that their community is defined by more than common interests. When understood as a project, constitutionalism is not about identity. The emphasis is on conduct: what we do, the terms in which we allow ourselves to act, and what that says about us. Constitutional experiments oblige participants to put elements of their identities at risk because the outcomes of these ventures cannot be foreseen and the beliefs and assumptions behind them can be proved wrong.

In British Columbia, different conceptions of political community inhibit constitutionalism. Some indigenous authorities talk and act as though they form separate communities, while others suggest the province is a composite community with overlapping affinities. Crown officials and judges, whether provincial or federal, tend to treat it as one large, homogenous collection of “British Columbians.” These divergent perspectives can make it difficult for the parties to discuss, let alone
agree upon, a common vision for their community. Perhaps that is a reason collaboration agreements are proving increasingly popular.

This dissertation does place a strong emphasis on official incidents of constitutional culture: influential beliefs about the nature, content and meaning of the constitution.\(^3\) There are practical reasons for this emphasis: given the volume of material and limited time available for study, official actions and declarations offer clear and relatively convenient expressions of the participants’ values and beliefs. However, there are also principled reasons. Official conduct provides the most common, prominent and important manifestations of constitutional culture in British Columbia. Indigenous leaders articulate their constitutional commitments in various political forums, but they also express their beliefs through the arguments they make in litigation and the terms they use in consultation and collaboration agreements. Contemporary laws, politics and technologies should assuage the concern that the official record might omit indigenous perspectives, since indigenous peoples have many more opportunities and much greater capacity to make their voices heard than in earlier times, when they lacked electronic media, specialized counsel and adequate English skills. As noted above, constitutional culture among non-indigenous laypersons is thin. Few of them have a meaningful connection with the Canadian Constitution, let alone the constitutional law expounded by the courts. Election results and mainstream political discourse disclose an abiding yet inarticulate fascination with equal individual rights, including a right to private property that is not enshrined in the Constitution. This inclination toward formal equality is accompanied by a corresponding suspicion of any measures, including aboriginal rights, that could be construed as “special treatment” for a racial minority. In general, these tendencies do not appear to be informed by a comprehensive constitutional theory or connected to a rigorous political program. They are fluid and subject to challenge and change. Instead of insulating such imprecise and unfortunate notions, judges and others should be looking for opportunities to stimulate public debate about the commitments that define their community.

Constitutionalism can be understood as the project of cultivating a principled political community. This theory is not complete, but it is worth further investigation. It can be used to assess the strengths and shortcomings of constitutional experiments in places like British Columbia, and such experiments are unlikely to abate. Understood as a project, constitutionalism is never secure or complete. It can be undermined by incompatible conceptions of the political community in question: a hostile or perhaps merely impoverished constitutional culture. It can also be hindered by incumbent institutions that, by design or by deed, foreclose discussions of constitutional principle.

However, its participants are expected to reflect and adapt, so any such constraints should be met by inquiry and improvisation, rather than resignation.

Nonetheless, the prospects for constitutionalism in British Columbia remain poor. After two hectic decades, too many indigenous peoples remain poor and marginalized. The provincial political community is still fragmented and dissolute. Constitutional theorists can only do so much, but I feel I must do what I can. I was born in British Columbia. So were my grandparents, my parents, my wife and my son. I live there now and I think it can and should be better than it is, but I am not optimistic. Constitutional theorists can identify possible improvements in structure and practice but cannot force anyone to adopt their recommendations. They can warn citizens and politicians against dangerous ideas but cannot force them to heed those warnings. Although I hope for a more principled approach to politics in the province, I must admit I have my doubts.
Chapter 1: Constitutional Theory and Constitutional Possibilities

“Hang ideas! They are tramps, vagabonds, knocking at the back-door of your mind, each taking a little of your substance, each carrying away some crumb of that belief in a few simple notions you must cling to if you want to live decently and would like to die easy!” Joseph Conrad, Lord Jim

It is a good time to be a constitutional theorist. Constitutional experiments abound from Brussels to Beijing, from Moscow to Marrakech. Documents and data regarding even the most remote and arcane developments are readily accessible. Controversial matters, such as economic globalization, theocratic governments and measures taken to combat terrorism, challenge familiar beliefs about constitutions and constitutionalism. Skilled, industrious colleagues enrich academic debate with multilingual, transnational and inter-disciplinary contributions. At the same time, rival theories and theorists jockey to define new developments and increase their own influence. Amid this riot of activity, ideas, proposals and paradigms, there is a lot of work to be done.

So it may seem a strange time to champion a cautious approach to constitutional theory. However, fundamental questions about constitutions and constitutionalism – what they are, how we can use them and what we can say about them – remain unresolved. For example, as constitutionalisms proliferate – African, Islamic, liberal, common law, popular, new, modern, democratic, and so on – they shed more light on the political ideals they are intended to serve than


on the nature of constitutionalism. The endeavour to understand the contribution of constitutionalism to a particular political program is different from the endeavour to understand constitutionalism. The former treats constitutionalism as a rarified register for familiar philosophical and political arguments, whereas the latter entertains the possibility that constitutionalism involves a distinct idiom in which such arguments do not resonate. This distinction has significant theoretical implications, for if constitutionalism is just a special mode of politics then it will be commensurable with ordinary political objectives and can support ambitious efforts to derive constitutional arrangements from beliefs about politics. However, if constitutionalism might be a discrete endeavour, then such commensurability cannot be assumed, constitutions cannot be understood as mere instruments of politics, and we must try to understand constitutionalism on its own terms.

This chapter seeks such an understanding of unvarnished constitutionalism. It does so by examining three competing contemporary conceptions of constitutionalism. Many theorists treat constitutionalism as an extension of philosophy: the effort to devise constitutional arrangements consistent with truths about humans and their endeavours. This is a fraught exercise for those theorists who must confront not only the indignities of unenlightened human behaviour but also persistent disagreement, even from sympathetic colleagues, on the nature, content and implications of those truths. Other theorists reject the search for a true and proper foundation for politics beyond politics. Instead, they look to the practice of politics to determine its normative and institutional postulates and understand constitutionalism as a mode of political activity by which these postulates are elaborated and established.

Neither approach succeeds on its own terms. Understood as an extension of philosophy, constitutionalism cannot secure the consensus required to establish a constitutional foundation impervious to reasonable political contest. Disagreement is pervasive, and attempts to enshrine a philosophical vision in law invite demands for justification that perpetuate rather than conclude debate. Understood as a mode of politics, constitutionalism is not derived from the ambiguities of actual conduct but from an ideal conception of politics believed to be immanent in such conduct. It relies on controversial beliefs about the proper (and thus properly uncontroversial) form of politics:


10 For an influential illustration of this approach, see JAG Griffith, “The Political Constitution” (1979) 42:1 MLR 1.
exactly the sort of beliefs it purports to avoid. Beneath superficial differences, these two conceptions of constitutionalism share the rationalist assumption that we can identify clear principles upon which human associations can and should be based.¹¹

Theorists who understand constitutionalism as philosophy or politics also share an instrumental approach to law. They derive their understanding of law from the ideal it is supposed to serve, such that it neither influences their knowledge of that ideal nor impedes progress, at least when properly employed. More concretely, these theorists treat constitutional practice as an attempt to approximate an ideal of political justice revealed by prior reflection. Understood in this way, constitutional practice cannot tell us more about our ideals than we already know; it cannot change the debate. By disaggregating conduct, these theorists also diminish agency: individuals can match means to ends but they cannot otherwise determine the meaning of their actions, for example by eschewing instrumentalism and subscribing to a practice with no extrinsic purpose.¹² They treat the distinction between means and ends as more than a heuristic device.¹³ As a result, they obstruct efforts to learn from constitutional experience and thus impede innovation in constitutional theory.

One way beyond this impasse may be to pay more attention to our means. Constitutionalism can be understood as the project of elaborating a reciprocal relationship between law and politics. Law is not an instrument of politics, but this does not mean the reverse is true: that politics is the instrument of a clearly defined legal order. Rather, law provides the legitimate form for the exercise of political power, and politics expresses the values that law seeks to promote. Thus defined, constitutionalism can be seen as a project in two senses: first, it involves constant work, as changes to one element necessitate adjustments to the other; second, the very notion of constitutionalism as a distinct mode of conduct must be maintained against more familiar positions. Constitutional practice entails the use of constitutional resources such as text, principles and reasons. It illuminates the values served by constitutionalism, which in turn inform our understanding of the proper scope, form and manner of constitutional practice. Therefore, constitutionalism is also transformative in two senses: it continually evolves; and it seeks to assimilate notions of law and politics as distinct, even conflicting, practices.

This conception of constitutionalism as a project requires a more modest approach to constitutional theory: rather than propose solutions to our problems, these theorists can offer only responses to our predicament. Theorists who understand constitutionalism as philosophy or politics


assume that ideas can provide a firm and proper foundation for constitutional arrangements. Their
task is to discern correct ideas and draw appropriate institutional inferences. Done well, their
contributions will conclude the search for a just constitutional order. For theorists who approach
constitutionalism as a project, there is no such end in sight, only the next bend in the road. Their
ideas are provisional attempts to improve our understanding of an evolving practice. Their task is to
make sense of our interminable engagement in this constitutional project, not offer a way out of it.
Although their approach is tentative, it rests on firm convictions. Instead of an idea about
philosophy or politics, it relies directly on an idea about ideas with serious practical implications: if
ideas are makeshift guides to action, then to seek an ideal constitutional settlement is folly or worse.

This chapter illustrates these three conceptions of constitutionalism: as philosophy, as
politics and as project. It does so by examining the work of prominent constitutional theorists. It
does not seek to resolve all of the outstanding questions about constitutionalism. Rather, it aims to
foster a more careful investigation of constitutions and constitutionalism, both by illuminating
conceptual concerns and by establishing a theoretical platform for the inquiry that follows.

1. Constitutionalism as Philosophy

For theorists who understand constitutionalism as philosophy, truth provides an apolitical
foundation for politics. It elevates the corresponding conception of politics above ordinary political
objections; it requires constitutional arrangements to be tailored to philosophical insights. These
theorists assume that a political association can and should be remade – or perhaps just refined – to
reflect their ideal visions.¹⁴ Their tone, in general, is triumphant rather than tragic: to realize the truth
by adjusting the institutions of government is a valiant, if sometimes daunting, pursuit. They treat
constitutional rules and practices as vessels for truths derived from other aspects of human
experience. For them, the truth about constitutionalism is that it serves other truths.

This approach to constitutionalism is not limited to theorists who champion substantive
theories of justice.¹⁵ Sometimes, the truth can be contentious. In fact, Jürgen Habermas, the doyen
of discourse, and Jeremy Waldron, the don of disagreement, clearly illustrate this approach by
developing their constitutional theories from ideas about language and morality, respectively. By
treating law as instrumental and constitutionalism as incidental to these truths, they deny themselves
valuable resources for resolving the philosophical controversies they encounter.

Habermas offers a theory of constitutional democracy designed for contemporary life. He
sees a disenchanted and functionally differentiated world in which traditional ways of life and

¹⁴ See e.g. Bruce Ackerman, “The Rise of World Constitutionalism” (1997) 83 Virginia L Rev 771 at 780.
¹⁵ But see James Fleming, Securing Constitutional Principle: The Case of Autonomy (Chicago: University of Chicago
Press, 2006).
metaphysical arguments no longer suffice to integrate communities or justify authorities. This modern world is both liberating and disconcerting: it erodes established hierarchies and entrenched bureaucracies, but it also undermines familiar forms of legitimacy and solidarity. The burden falls on the inhabitants of this denuded realm to imbue their lives with legitimacy and meaning. More precisely, as substantive consensus is unavailable in such a world, that burden falls on the procedures by which individuals make decisions about their common lives. According to Habermas, politics depends on law for legitimacy, and the sole basis for the legitimacy of law is the democratic process by which law is made. Similarly, democracy is the only source of solidarity in a post-conventional world. But Habermas does not champion any particular institutional expression of democracy. In fact, he appreciates democracy because it can approximate an ideal form of discourse.

His theoretical enterprise is premised upon the distinction between strategic and communicative action. In the former, individuals merely observe one another as objects and seek success in self-interested endeavours. In the latter, they accord each other communicative freedom and pursue mutual understanding about something in the world. Habermas admits that communicative action presents an ideal. It postulates autonomous and sincere interlocutors who confer identical meanings on expressions and seek to articulate ideas that all conceivable individuals could accept on the basis of identical reasons. Actual communication is always ambiguous and real languages are the contingent results of interminable cultural exchanges and administrative interventions, but he insists that this ideal is intrinsic to any genuine effort to communicate. Individuals who wish to reach an understanding untainted by violence, power and inequality must adopt the “pragmatic presuppositions” of communicative action.

Rendered sufficiently abstract, these conditions of undistorted communication yield what he calls the “discourse principle”: “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.” In turn, the discourse principle provides

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18 See e.g. Habermas, *Beyond Facts and Norms*, supra note 16 at 189, 261 and 450.
19 Habermas, *The Postnational Constellation*, supra note 17 at 75 and 88. See also Jürgen Habermas, *The Divided West*, ed and translated by Ciaran Cronin (Cambridge, UK: Polity Press, 2006) at 78 [Habermas, *The Divided West*].
20 See e.g. Habermas, *Beyond Facts and Norms*, supra note 16 at 234.
21 Ibid at 18, 25-27 and 360-61. See also Habermas, *The Postnational Constellation*, supra note 17 at 151.
22 See e.g. Habermas, *The Postnational Constellation*, supra note 17 at 11; Habermas, *The Divided West*, supra note 19 at 18.
24 Ibid at 42 and Habermas, *The Postnational Constellation*, supra note 17 at 151.
the template for his procedural conceptions of law and democracy. For Habermas, democracy enables the production of legitimate law by establishing a process through which citizens can agree on the rules governing their association. Law enables democracy by enshrining those rights that individuals engaged in collective self-government would grant one another in order to institutionalize the forms of communication necessary to reach consensus. Just as communicative action is the only form of discourse that can generate truths to which all interlocutors can freely agree, democracy is the only form of politics that can generate laws to which all citizens can freely assent.

He has elaborated this “co-original” relationship between law and democracy in distinctive structural terms: the spontaneous communicative impulses of civil society depend on certain private rights protected by the state, while the formal processes of democratic will-formation that define and defend those rights are animated by the communicative flows of civil society passing through the rigid “sluices” of the state. He also has explored its potential contributions to European and global political identities. In each case, the normative content of democracy and thus the legitimacy of positive law ultimately derive from the same source: their affinity with the structure of communicative action.

Habermas treats law as a medium. In a concrete sense, it is the medium for the construction of political power; in an abstract sense, it is the medium for the transmission of the structure of communicative action. The basic “mechanism” of law is “the practice of argumentation demanding that each participant adopt the perspective of everyone else.” This mechanism is provided by communicative action. Constitutional rights and procedures serve merely to explicate this ideal form of democratic self-determination. Constitutional arrangements remain fallible and revisable, but such adjustments do not enhance our understanding of this ideal, which is given by the structure of language prior to any attempts to achieve it in words or approximate it in law. When constitutionalism aims at the “juridification” of political power, what it really seeks is a form of politics that resembles the ideal conditions for discourse. Participants in any legitimate constitution-making process must first identify, through “a kind of philosophical clarification” involving “inward reflection” on the idea of government by law, the basic content of the principle of constitutionalism.

26 Ibid at 127-28, 207 and 233.
27 Ibid at 84 and 110.
28 Ibid at 103-04 and Habermas, The Postnational Constellation, supra note 17 at 118.
29 See e.g. Habermas, Beyond Facts and Norms, supra note 16 at 307 and 356-68.
30 See, e.g., Habermas, The Postnational Constellation, supra note 17 at 74.
31 Habermas, Beyond Facts and Norms, supra note 16 at 297 and 409.
32 Habermas, The Postnational Constellation, supra note 17, at 64 and 113.
33 Habermas, Beyond Facts and Norms, supra note 16 at 318 and 437.
34 Ibid at 223.
35 Ibid at 261 and 384.
36 Habermas, The Divided West, supra note 19 at 138.
(i.e. the rule of law) before they can realize the principle of popular sovereignty (i.e. democracy) by translating their philosophical insights into constitutional provisions and legislation.\textsuperscript{37}

Habermas acknowledges that law is an imperfect medium for communicative action. In addition to the normative imperative imposed by the demands of discourse, law serves a functional imperative imposed by the demands of modern economic societies. To facilitate coordination among the many decentralized, independent decision-makers that comprise contemporary economies, law must take a form that promotes predictability, accountability and trust.\textsuperscript{38} This functional need for legal certainty may conflict with the normative need for legal responsiveness, but it only reinforces the instrumental character of law. Law serves multiple masters, but contributes no imperatives of its own.

Meanwhile, the ideal structure of communication remains controversial and its institutional implications remain unclear. For Habermas, law does not provide resources to resolve these essentially philosophical questions. For example, he has answered the charge (made most prominently by Frank Michelman) that his procedural account of constitutional democracy implicitly relies on a substantive commitment to certain liberal values by arguing that, although constitutional democracy must originate in a particular liberal culture, democratic procedures can subordinate that background national identity to a political culture based upon universal constitutional principles.\textsuperscript{39} Under the influence of democracy, the tacit, pre-political consensus on values and justice that Habermas attributes to national communities can yield an abstract and explicit civic solidarity, which in turn makes possible the formation of supranational political identities.\textsuperscript{40} However, civic solidarity always remains rooted in those prior collective identities, which provide the common norms and ideas about justice that individuals require to reach mutual understanding about universal principles.\textsuperscript{41} This nuanced response attempts to assimilate Michelman's critique by positing a reciprocal relationship of substance and procedure in a constitutional democracy. But in making this argument, Habermas concedes that explicit agreement on the meaning of universal principles is predicated upon the continued existence of a tacit local consensus on values and justice. This relatively minor concession implicates a general problem with the philosophical foundation of his constitutional theory: his ideal of communicative action is not only impracticable; it is incomplete because it presumes the consensus it must establish.


\textsuperscript{38} Habermas, The Postnational Constellation, supra note 17 at 123-24.


\textsuperscript{40} Habermas, The Divided West, supra note 19 at 76-80.

\textsuperscript{41} See e.g. Habermas, The Postnational Constellation, supra note 17 at 107-09.
According to Habermas, the *telos* of language is mutual understanding.\(^{42}\) Further, he assumes that this end can be precisely defined in advance of particular attempts to realize it: mutual understanding consists in different individuals accepting the same claim for reasons that all conceivable individuals could accept.\(^{43}\) In turn, this definition enables him to identify those conditions necessary to attain it: the pragmatic presuppositions of communicative action that permit individuals to overcome their parochial preferences in favour of universal truths. These conditions, which are required for interlocutors to reach a “jointly negotiated understanding” of their situation, cannot themselves be subject to negotiation without introducing an infinite regress: each negotiated understanding would rely on a prior negotiated understanding, and so on.\(^{44}\) Consensus on the conditions for communication must precede any communicative act. Just as agreement on the meaning of universal principles requires a prior normative consensus embedded in a particular community, mutual understanding requires this prior consensus embedded in the nature of language. The *telos* of language is mutual understanding because, for Habermas, mutual understanding is the basis of linguistic communication.

However, it is possible to search for truths that exceed individual experience without succumbing to such an insular method. Habermas purports to employ a hermeneutic model of understanding, in which interlocutors “bridge the gap” between them by using communicative action to adopt each other’s perspective.\(^{45}\) His hermeneutic approach proves hermetic because he believes that understanding involves becoming identical: adopting the same idea for the same reasons as everyone else.\(^{46}\) Instead, understanding can mean making something or someone more intelligible: adjusting your ideas and revisiting your assumptions to accommodate your interlocutor’s description of her experience, which may in turn illuminate certain aspects of your own experience. This does not and cannot involve taking her perspective or seeing things as she sees them.\(^{47}\) Nor does it entail recourse to universally persuasive reasons, but rather attention to her arguments, anecdotes and allusions as expressions of a coherent world. Mutual understanding, in which this effort is reciprocal, results in persistent disequilibrium rather than convergence on a shared or even universal position. The “gap” between individuals is not closed by assuming an underlying symmetry. Instead,

\(^{42}\) Habermas, *Beyond Facts and Norms*, supra note 16 at 4.

\(^{43}\) Ibid at 11 and 339.

\(^{44}\) Ibid at 27.

\(^{45}\) Habermas, *The Divided West*, supra note 19 at 17-18.


interlocutors can maintain and exploit it as they learn about each other, themselves and their world by elaborating their differences.\textsuperscript{48}

This conception of understanding envisions the gradual expansion of intelligibility as new experiences demand the revision of existing conceptual frameworks and revised frameworks expose new aspects of experience.\textsuperscript{49} Intelligibility is an “end-in-view” that evolves during its pursuit.\textsuperscript{50} It cannot be specified in sufficient detail to dictate an ideal procedure for inquiry but it does require a practical attitude from participants, who must attend regularly to the activities and ideas by which they make sense of their experience. Nor can this conception of understanding yield an ideal constitutional scheme, such as the one intimated by Habermas. Instead, it suggests that theorists should routinely test their theories against diverse samples of constitutional practice and be willing to adjust even their most fundamental ideas in light of the results.

Jeremy Waldron has an ambivalent relationship with practice. He has led a sustained and increasingly refined campaign against judicial review and in favour of legislative supremacy.\textsuperscript{51} His argument has evolved in response to academic criticism and actual developments, but in doing so it has become more abstract: in a relatively recent iteration, Waldron elaborated his case against judicial review “independent of both its historical manifestations and questions about its particular effects.”\textsuperscript{52} He has sought to develop a general understanding of the basic problem with this practice from ideas about morality and its relationship with law.\textsuperscript{53} And while there is some evidence that his view of this relationship is changing, it has yet to alter his preferred constitutional arrangement.\textsuperscript{54}

Waldron is dedicated to disagreement. He believes political and legal theorists should embrace it as the essence of politics instead of regarding it as a suboptimal result attributable to human or institutional weakness.\textsuperscript{55} For him, disagreement is not merely an empirical phenomenon: the condition that consists in failure to reach consensus. It is an expression of the moral agency of individuals, who have the capacity to transcend their particular interests by considering the views of others and choosing to conduct themselves in accordance with general principles.\textsuperscript{56} This moral capacity means that persistent disagreements about policies, rights or justice can be reasonable and legitimate: individuals can be thoughtful yet intransigent, deliberation need not yield consensus, and

\textsuperscript{49} Geertz, \textit{Local Knowledge}, supra note 47 at 69.
\textsuperscript{52} Ibid at 1351.
\textsuperscript{53} Ibid at 1352-53.
\textsuperscript{56} See e.g. ibid at 250 and 282.
to impose a solution, interpretation or theory risks treating contenders unequally.\textsuperscript{57} It also means that politics can be principled: individuals and their representatives can pursue their ideas of the right alongside their own interests.\textsuperscript{58} Notwithstanding this discord, Waldron recognizes that sometimes individuals must decide a common course of action. In such circumstances, which are the circumstances of politics, majority decision is the procedure that best respects their equal moral status.\textsuperscript{59} The function of law is to facilitate collective action in those circumstances by establishing rules that individuals can accept because of their pedigree even as they disagree with their content.\textsuperscript{60}

Waldron’s ruminations on culture further illuminate his ideas about law, politics and morality. He defines culture as “an array of beliefs that are very deep-seated in a way of life and widely and robustly shared in a community.”\textsuperscript{61} He acknowledges that cultures are more than opinions, costumes or lifestyles: they are social solutions to serious social problems. Nonetheless, he argues that a democratic political process is the best way to accommodate cultural difference because “it treats culture for what it is – a set of deeply held beliefs rather than an identity.”\textsuperscript{62} Identity is prior to difference: it is “permeated” by culture and our various opinions “enter” into it.\textsuperscript{63} Waldron views all beliefs, whether cultural, religious or political, as resources to be deployed in “the political marketplace of ideas”: the democratic political process of public debate and majority vote that leads to the enactment of a law.\textsuperscript{64}

This perspective entails two important distinctions. First, Waldron separates beliefs from the political process that resolves contests between them. This implies that his conception of democratic politics is neutral among competing positions, although it ignores traditions in which a particular belief, rather than the ability to navigate among them, defines the individual. It also suggests that the political process is not based upon beliefs for, if it were, the resolution of conflicts between those beliefs would require a supra-political process, which itself would be based upon beliefs, and so on. Waldron avoids this infinite regress by making a second distinction, this one between beliefs and the individuals who hold them. According to him, individuals use their beliefs; they are neither defined nor exhausted by them. What seems to characterize individuals as such is their ability to choose their beliefs as well as the reasons for subscribing to them.\textsuperscript{65}

\textsuperscript{57} See e.g. ibid at 114-15, 243-44 and 304-05.
\textsuperscript{58} Ibid at 15-16.
\textsuperscript{59} See e.g. ibid at 102-05 and 109-15; Waldron, “The Core of the Case,” supra note 51 at 1388.
\textsuperscript{60} Waldron, \textit{Law and Disagreement}, supra note 55 at 7 and 247.
\textsuperscript{62} Ibid at 137.
\textsuperscript{63} Ibid at 142 and 154.
\textsuperscript{64} Ibid at 142-43 and 154.
\textsuperscript{65} Ibid at 152-154.
For Waldron, this ability is a matter not of belief but of reality. It is the basis of his epistemic account of democracy. It is also an expression of the equal moral agency that inspires his devotion to disagreement and informs his theory of law and politics. For him, the analysis is quite simple: “We all have the same moral status, the same standing or significance for moral purposes, and we should have the same legal, social and political status.” Only after “ascertaining what size everyone actually is” for purposes of morality can theorists define the parameters of appropriate legal and political arrangements. The “underlying personhood” of individuals is expressed in principles of legal and political equality that, in turn, are used to evaluate various techniques and practices. These principles strongly favour certain liberal constitutional arrangements, most notably a democratic legislature that enacts general laws upon majority decision, yet they are compatible with a range of institutional details. In this fashion, a definite yet flexible constitutional vision flows from Waldron’s perception of a basic moral truth.

The case against judicial review is another important component of this vision. As noted above, his argument has become less concrete as he has isolated his fundamental theoretical complaint. Waldron defines his target precisely. He critiques strong-form judicial review, in which a court may decline to apply a statute, declare a statute inapplicable or even strike a statute from the law, rather than weak-form judicial review, in which courts have recourse only to interpretive canons or declarations that a statute is incompatible with a rights instrument. Further, he is focused primarily on cases involving individual rights rather than federalism or the separation of powers, although he is aware that similar problems arise in each. Finally, his core case assumes a society in possession of legislative and judicial institutions in “reasonably good working order” and comprised mostly of individuals who are committed to the idea of rights yet divided on the meaning and implications of that commitment. He admits that many peripheral (or “pathological”) cases may exist, but argues that these assumptions sharpen debate about the relative merits of legislative and judicial solutions to disagreements about rights.

Waldron’s commitment to transparency is laudable yet imperfect, since he allows his most important assumption to remain implicit. His argument against judicial review is also an argument for democratic legislatures that make decisions by majority vote. It has two components: first, courts that decide by majority vote are no more likely to reach the right answer in a dispute about rights

66 Ibid at 129.
67 Ibid at 132.
68 Ibid at 140-41. See also, Waldron, “The Core of the Case”, supra note 51 at 1393.
70 Waldron, “The Core of the Case”, supra note 51 at 1357-58.
71 Ibid at 1360-69.
than are legislatures that use the same decision rule; second, legislative procedures demonstrate more respect for the political equality of individuals than do judicial procedures.\textsuperscript{72} The details of these claims are less significant than the assumption that drives them: the real issues at stake in disagreements about rights are moral not legal.\textsuperscript{73} This general truth about rights has serious ramifications for efforts to determine the truth about particular rights.

Under Waldron’s ideal conditions, the only way law can contribute to the settlement of these moral disputes is to establish a political process that reflects the equal moral agency of individuals and thus generates laws that a person can accept even if she opposes their content.\textsuperscript{74} Any other legal response to these moral controversies is doomed to fail: courts get distracted from the underlying moral issues by technical questions of interpretation and precedent; constitutional documents contain only those bland platitudes that survive political compromise and thus invite subsequent contests over their meaning.\textsuperscript{75} Law, and more precisely legal reasoning, obscures the moral issues at stake if it does anything more than guarantee democratic legislative proceedings.\textsuperscript{76} Yet again, a basic moral truth determines proper constitutional form.

For Waldron, moral truths exist and can be known apart from their expression in law. He believes that, absent the anticipation of judicial review, legislatures composed of elected representatives would be able to ignore specious legal concepts and discuss real moral issues directly. Citizens and their representatives presumably would draw instead on their innate moral capacity to adopt each other’s perspectives. However, Waldron acknowledges that, in practice, law depends on morality in at least three crucial respects. First, the equal moral agency of individuals creates the need for law as a means to settle disputes effectively (i.e. without direct reference to the substance of one of the competing positions, which would only reignite the dispute).\textsuperscript{77} Second, as noted repeatedly, equal moral agency also determines the proper procedure for making law: an elected legislature that decides by majority vote. Third, and most recently, he has argued that we can use “our basic moral sense” to identify structures within the law that are essential to our ability to do the things we expect to be able to do with law.\textsuperscript{78}

He calls these structures “archetypes”: particular rules, norms or judgments that have significance beyond their immediate content because they express the spirit of an area of law and thus inform our understanding of law itself.\textsuperscript{79} Archetypes, such as habeas corpus, the prohibition on

\begin{itemize}
  \item \textsuperscript{72} Ibid at 1375-76.
  \item \textsuperscript{73} See e.g. ibid at 1353, 1359 and 1383.
  \item \textsuperscript{74} Ibid at 1387-1395. See also Waldron, Law and Disagreement, supra note 55 at 310.
  \item \textsuperscript{75} Waldron, “The Core of the Case”, supra note 51 at 1379-84.
  \item \textsuperscript{76} Ibid at 1406.
  \item \textsuperscript{77} Ibid at 1371. See also, Waldron, Law and Disagreement, supra note 55 at 7.
  \item \textsuperscript{78} Waldron, “Torture”, supra note 54 at 1749.
  \item \textsuperscript{79} Ibid at 1723-24.
\end{itemize}
torture and even the doctrine of adverse possession, are legal structures: they are things we create by treating particular laws or cases as vivid manifestations of certain legal principles (i.e. liberty, non-brutality and predictability, respectively), which we then use to develop other rules. However, while each archetype is the product of human initiative, the formal character of an archetype is inherent in the mode of argument that characterizes and sustains the law. The practice of developing legal arguments by drawing analogies with prior legal decisions on the basis of general propositions or principles makes archetypes possible, which in turn make the law as we know it possible.

This practice explicitly orients law towards general commitments rather than the purely instrumental pursuit of results. To compromise or reject an archetype undermines not only the related principle but also the principled character of legal argument and law. Waldron even suggests that such corruption of the legal system is analogous to the moral corruption of an individual: as the law becomes less principled and more technical, it resembles an official who has suffered “an attenuation of moral insight” because he has decided to accept bribes and can no longer subscribe to a general principle of honesty. He submits that his argument, which implies that the formal structure of law resembles that of morality, provides a corrective to – not a repudiation of – modern legal positivism. Waldron claims that our moral sense helps to identify archetypes, which are both legal norms and part of legal structure, but by doing so it also contributes to the content of law because archetypes embody principles that we use to elaborate legal rules. He has yet to explore the implications of this more robust account of legal form and its more robust relationship with morality for his stark constitutional vision. But, if the “institutional matrix” that law provides for the social presentation and evaluation of arguments is valuable, in part because it resembles the formal structure of moral reasoning, then perhaps positive law is capable of doing more than distorting moral issues. Perhaps it is even capable of illuminating important moral commitments by providing a social medium in which to debate the role of general principles in our common lives, which might mean that courts and other bodies, such as administrative agencies, could play a more constructive constitutional role.

For now, the liberal notion of equal moral agency continues to provide the basis for Waldron’s understanding of law, politics and the ideal constitutional form. Similarly, a particular conception of language determines Habermas’s discursive theory of law and democracy. Each treats law as an instrument of some privileged, yet eternally contested, truth about morality or language, respectively. Each also treats constitutionalism as a principle, something to be identified and

80 Ibid at 1722, 1724 and 1726.
81 Ibid at 1736-37.
82 Ibid at 1734 and 1737-38.
83 Ibid at 1750.
84 Ibid at 1736.
elaborated primarily through philosophical analysis and only approximated in law. As a result, constitutional practice has little to teach these two theorists and others who consider constitutionalism an extension of philosophy, since by definition such practice merely serves a truth that has already been revealed. Theorists who adopt this approach to constitutional theory do contend with philosophical problems, such as the meaning of understanding or the accessibility of moral truths apart from law, but these must be resolved without recourse to constitutional arrangements, experiments and results. Some theorists believe greater emphasis on practice is the proper response to this situation. The next section shows this is easier said than done.

2. Constitutionalism as Politics

Theorists who conceive constitutionalism as a mode of politics face a distinct challenge. They react against reliance on philosophical reflection: attempts to place certain ideas or arrangements beyond political contest are naïve, sinister or simply misguided. They purport to gaze into the depths of political practice and glimpse certain truths: politics is agonistic and pervasive; it tends towards conflict not consensus. These theorists embrace, if not celebrate, this harsh reality and eschew the pacifying assumptions of their colleagues. They are bold, but they risk the fate of Narcissus. What they claim to see in politics is only the reflection of their assumptions, and those assumptions threaten to drown their arguments.

Despite their best efforts, theorists such as Richard Bellamy and James Tully end up emulating their opponents as they elaborate a philosophical insight into a constitutional program. They also view law as an instrument of politics and prove unable to revise their ideas about law, politics and constitutionalism in light of experience. As a result, this political approach to constitutionalism is less a departure from than a variation on the rationalist dream of an apolitical account of politics: not an account that improbably abjures political implications, but one that seeks truth before political gain.

For Richard Bellamy, political constitutionalism is this dream incarnate. He has defined it as “the various political practices through which citizens constitute their relationships with each other.” More concretely, or perhaps just more polemically, according to political constitutionalism “the democratic process is the constitution.” Democracy generates all the familiar trappings of

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85 See e.g. Waldron, “The Core of the Case”, supra note 51 at 1368; Habermas, “Constitutional Democracy”, supra note 37 at 770.
constitutional government: rights, the rule of law, even democracy itself. Bellamy’s vision is Manichean: political constitutionalism exists in opposition to legal constitutionalism, which holds that a written constitution upheld by judicial review is necessary to generate and sustain democracy.

He believes that the purpose of constitutionalism in general is to prevent arbitrary rule, which he defines as “rule that can avoid being responsive to the interests of the ruled and fail to provide for the equal consideration of interests.” However, legal constitutionalism cannot help but botch this assignment. Political constitutionalism is “embodied” in elected legislatures, while legal constitutionalism manifests in judges who interpret and enforce the constitution. Democratic elections, by definition, show equal concern and respect for the interests of each citizen because voting gives each citizen the same opportunity to influence the terms of their association. In contrast, no matter how exhaustive the process or sensitive the judge, judicial proceedings culminate in a decision by one judge (or a majority of justices) that imposes his (or their) view on all other citizens. An imperfect process compounds this flaw, but even assuming a totally inclusive process could be designed and implemented, the form of judicial decision-making is simply incompatible with constitutionalism and thus with democracy. “Normal democratic procedures” turn out to be the only way to accord individuals equal concern and respect.

While elaborating political constitutionalism, Bellamy acknowledges his scholarly influences. Waldron in particular bears heavily on his arguments. For example, the two claims that motivate political constitutionalism resemble Waldron’s case against judicial review: individuals disagree (almost) all the way down about both the good and the right, and legislatures are better than courts at resolving these disagreements (or at least enabling us to take common action despite our persistent disagreements). Bellamy also adopts the positivist argument that the legal concepts employed by a bill of rights circumscribe and distort the moral debate that a policy decision properly involves. For Bellamy, the paradigm of law is legislation. Although legislation can be understood both as a process and as its product, he spends little time on the former and even less on the latter. He treats legislatures as a democratic black box rather than immersing himself in their structures, procedures and traditions; and while aware that legislation is often indeterminate and in need of implementation,

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88 See e.g. ibid at 49, 82, 140 and 141.
89 See e.g. ibid at 1, 100 and 261.
90 Bellamy, Political Constitutionalism, supra note 87 at 8.
91 Ibid at 3 and 7.
92 Ibid at 152 and 165.
93 See e.g. ibid at 38, 47, 166 and 243.
94 See e.g. ibid at 260.
95 See e.g. ibid at 66 and 163.
96 Ibid at 4 and 11 n.25.
97 Ibid at 37 and 49-50.
98 Ibid at 53.
he does not explore the role administrative agencies play in facilitating legislative compromises by wringing results from statutes that are often both complex and vague.99

As a result, his conception of law is entirely formal: law is the result of legislative processes. This formula enables him to equate democracy with the rule of law, albeit equivocally: “[I]n many respects, the rule of law simply is rule by democracy.” It would be more valuable to know the respects in which the two were not identical.100 This equation also raises questions about the legitimate role of courts in a democracy, since if law is just policy, then judicial decisions are just political decisions that employ an inferior procedure.101 Bellamy would like to see a balance of power among courts, but he does not discuss this arrangement in detail. However, the power he envisions being balanced seems limited to the interpretation of democratically enacted legislation and would not include the review of such legislation for compliance with constitutional provisions or principles.102 As noted above, Waldron has developed a more complex conception of law in which both courts and morality can play a constructive role, although it has yet to influence his constitutional vision.103 A more fundamental difference between these theorists is that Waldron expressly derives his constitutional theory from moral philosophy, whereas Bellamy bases his in political practice and tradition.

Specifically, he conceives his theory within a particular strand of the republican tradition, the most prominent contemporary proponents of which are probably Quentin Skinner and Philip Pettit.104 The telos of this tradition is to overcome domination: the relationship that emerges when a ruler has the power to ignore the interests of the ruled.105 According to Bellamy, it is identical to the purpose of both constitutionalism and democracy: all three seek a form of government that is equally responsive to the interests of each citizen.106 The republican tradition emphasizes two “mechanisms” that serve this end: self-government, which requires that individuals have a say in and over the political procedures that govern them; and the balance of power, which disperses political power horizontally among groups and institutions to give them incentives to consider the interests of their members and subjects.107 This tradition holds that the liberal ideal of freedom from government interference actually entails domination because any effort to demarcate and defend a realm of

99 See e.g. ibid at 83-84.
100 Ibid at 53.
101 See e.g. ibid at 169 and 180.
102 Ibid at 84-85.
103 See text accompanying notes 79-85, supra.
105 Bellamy, Political Constitutionalism, supra note 87 at 5, 32, 58 and 151.
106 See e.g. ibid at 8 and 240.
107 Ibid at 5, 154 and 196.
private liberty against legislation and regulation disrespects the opinions of citizens who would draw
the line differently.108 The only effective way to dispel domination is to grant citizens an equal right
to decide issues of constitutional process and substance via ordinary democratic procedures.109

Suitably inspired, Bellamy describes a form of politics characterized by inclusive yet truculent
dialogue, the central dynamic of which is “the further dispersal of power to preserve freedom from
domination and promote reciprocity and compromise.”110 To counter claims that politics requires a
legal foundation, he insists this dialogic form of democracy constitutes itself, but the resulting
theoretical position is ambiguous.111 He describes political equality, which is the status enjoyed by
citizens who see each other as equals, as both an ideal served by democracy and a prerequisite for
it.112 Further, he briefly acknowledges that actual democracies are “pre-constituted by agreement
between a given body of people possessing enough of a collective identity and interests to be able to
share common decision rules.”113 Not only does democracy rest upon a prior agreement, but that
prior agreement relies upon a common primordial identity. Like Habermas, Bellamy envisions such
pre-political identities unfolding in the “continuously reflexive process” established by political
constitutionalism.114 Unlike Habermas, he does not admit and then try to answer the conceptual
challenges this extrinsic element presents for his purportedly self-contained scheme. Bellamy
tolerates such problems because his primary aim is not to provide a seamless theoretical account of
political constitutionalism, which we can then work to realize. Rather, it is to demonstrate that
political constitutionalism is already present in actual practice.115

He calls this practice “real democracy.”116 For him, it is real in two distinct senses: it exists
and it embodies genuine democracy. In contrast, models of deliberative democracy are unrealistic
abstractions that employ indeterminate and controversial assumptions to generate indeterminate and
unhelpful principles.117 Real democracy is concrete and it has both positive and negative elements.
The positive elements can be summarized briefly as multiparty electoral democracy. Competition
among political parties is essential to governmental accountability.118 Representative democracy is
necessary to ensure that each citizen’s interests receive equal consideration.119 Although some
variations are observed and permitted, the ideal form of real democracy is a unitary association (i.e.

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108 Ibid at 153-155.
109 Ibid at 163.
111 See e.g. Bellamy, Political Constitutionalism, supra note 87 at 140.
112 Ibid at 4 and 49.
113 Ibid at 235.
114 Bellamy, “Constitutive Citizenship”, supra note 86 at 38. See also text accompanying notes 39-41, supra.
115 See e.g. Bellamy, Political Constitutionalism, supra note 87 at 260.
116 Ibid at 221 and 239.
117 Ibid at 222.
118 Ibid at 207 and 220-21.
119 Ibid at 146.
not federal) with a parliamentary system of government (i.e. no president) the members of which are elected by plurality (i.e. no proportional representation).  

The negative elements of real democracy are less clear but equally important. First, administrative agencies are insignificant. Bellamy rarely discusses regulation and the institutions responsible for it. When he does, the results are spare: an unsubstantiated claim that political constitutionalism involves both legislation and administrative action, or an offhand and dismissive reference to “the new governance agenda.” He is aware that some statutes are indeterminate or silent and that, in particular cases, agencies must exercise discretion to implement legislation. However, in practice, administration is not a mere instrument of legislation. Competent agencies enable legislators to employ the loose statutory language that is necessary to garner majority support in a diverse assembly but that requires subsequent elaboration to yield the desired results. Administration affects the creation and content of legislation, and vice versa. Of course, a more nuanced appreciation of the relationship between legislatures and agencies would detract from Bellamy’s heroic depiction of democratic elections and parliamentary decisions.

Second, courts have no legitimate constitutional role. In such matters, courts are either dangerous because their jargon and procedures distort political debate or redundant because they are comprised of political appointees who offer at best a circuitous route to outcomes a legislature could have reached directly. Bellamy seems unconcerned with the pace of legal and social change: even assuming that courts cannot influence the ultimate results of democratic politics, he ascribes no value to the detours and delays they can provide. For him, judicial review of legislation, with its cycles of argument and judgment, appeal and amendment, does not offer valuable opportunities for individuals, groups and institutions to adapt to inevitable outcomes; it only obstructs the just practice of democratic politics. Since the proper form of law is legislation, the sole legitimate judicial activity is derivative: applying legislative decisions to concrete disputes, and thus behaving as an extension of – rather than a foil for – the legislature.

Third, society contains no serious internal divisions. Disagreement permeates everyday life without jeopardizing it. Factions emerge, jostle, combine and dissolve without sundering the “collective identity” that is the basis of democracy. Citizens must regard each other as equals in order to practice democracy and enact legitimate laws. This perspective must be independent of the

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120 Ibid at 229 and 239-40.
121 Ibid at 145 and 263.
122 See e.g. ibid at 63-64.
123 Ibid at 41 and 257.
124 For the importance of the rate of social change and the role of government in regulating it, see e.g. Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (Boston: Beacon Press, 1944) at 36-37 [K Polanyi, The Great Transformation].
125 Bellamy, Political Constitutionalism, supra note 87 at 84-85.
126 Ibid at 235.
constitutional status quo, which as an assemblage of laws should always remain open to revision by majority vote.\textsuperscript{127}

Societies beset by ethnic, religious, linguistic or other politically salient cleavages, and thus composed of individuals who do not perceive themselves as equal to members of other groups within society (at least with respect to certain matters), appear ineligible for real democracy. The constitutional arrangements adopted in many such societies seek to keep the democratic peace by flaunting the basic normative and institutional premises of real democracy: they entrench regional autonomy, bespoke voting rules and amendment procedures that treat rival groups, rather than their members, as the constituent units of society. In a divided society, this constitutional status quo can be essential to preserving both the society and those democratic practices that survive within it. This settlement cannot be exposed to revision by majority vote because the constituent groups cannot agree on the relevant majority.\textsuperscript{128} Although Bellamy briefly considers the possibility of multiple demoi inhabiting a single political association, he offers no details about the requisite adjustments (if any) to the conceptual and institutional templates of real democracy.\textsuperscript{129} The irrelevance of federalism reinforces the irrelevance of courts, as they are no longer required to enforce the division of powers.

The problem with real democracy is not, as Bellamy anticipates, that it is anachronistic: an artifact of simpler, heroic times unsuited to our frenetic and degenerate age.\textsuperscript{130} The problem is not even that real democracy is, if not extinct, then endangered. The problem is that, despite repeated protestations, Bellamy is not actually interested in practice.\textsuperscript{131} Instead, he is interested in “the underlying logic of existing practices.”\textsuperscript{132} Although he champions “the democratic arrangements of the world’s established working democracies,” these arrangements are neither the source nor the inspiration for the ideal of political constitutionalism expressed in real democracy.\textsuperscript{133} Like a theorist who conceives constitutionalism as an extension of philosophy, he derives this constitutional ideal from basic yet indeterminate ideas about equality. He then uses a stylized account of constitutional practice in the United States and the United Kingdom, which obscures the nature and foundation of his argument.

\textsuperscript{127} Ibid at 4-5 and 133-34.
\textsuperscript{129} Bellamy, Political Constitutionalism, supra note 87 at 234.
\textsuperscript{130} Ibid at 260.
\textsuperscript{131} See e.g. ibid at 5; Bellamy, “Constitutive Citizenship”, supra note 86 at 22 and 28-29.
\textsuperscript{132} Bellamy, Political Constitutionalism, supra note 87 at 12.
\textsuperscript{133} Ibid at 260.
In a more recent essay, Bellamy acknowledges but does not resolve the tensions between the descriptive and normative aspects of his work. He develops an elaborate “ideal type of political constitutionalism” primarily “to consider the plausibility of political constitutionalism in practice and only secondarily to defend its normative attractions.”134 However, he then deploys his creation to defend “the U.K.’s political constitution” and the crucial institution of Parliamentary sovereignty against the threat of legal constitutionalism posed by certain interpretations of the Human Rights Act (UK).135 Description succumbs swiftly and awkwardly to prescription because Bellamy presumes political constitutionalism defines the United Kingdom. Political constitutionalism, however, is defined by a series of beliefs held by scholars not an array of practices performed by citizens.136

The troublesome character of his approach emerges when Bellamy vacillates on important conceptual points. Three examples should suffice. First, although he regularly refers to democracy as a process, system or form of rule, he also defines it as “the power of individual citizens to claim and frame their rights and demand they be treated on equal terms with others.”137 If, as Bellamy argues, this power is responsible for generating and protecting political processes, systems and forms of rule, then it must exist separately from and prior to them. However, if democracy is an innate human power rather than a useful practice or tradition, then Bellamy is engaged in a different theoretical endeavour than he claims: rather than surveying actual political practice, he is elaborating the institutional implications of yet another truth about humans.

Second, he treats political equality as both a natural characteristic of individuals and an artificial status that they must ascribe to one another in order to foster democracy.138 This ambivalence reprises whether democracy is an expression of human nature or a matter of convention. Even if equality is conventional, we must determine why that convention is valuable. If the answer is that all individuals attribute identical status and importance to themselves and their views, then this convention remains rooted in nature.

Third, he hedges on whether democracy requires us to show equal concern and respect to individuals or to their interests.139 By failing to examine the relationship between individuals and their interests, Bellamy raises a number of philosophical questions that cannot be resolved by surveying practice: whether all individuals understand their actions in terms of interests, whether they must do so in order to consider themselves equal, and whether their understanding of their conduct is at all relevant; whether individuals can choose to use their interests as the basis for selecting a

135 Ibid at 87, 94 and 110-11.
136 Ibid at 90-93.
137 Compare e.g. Bellamy, Political Constitutionalism, supra note 87 at 141 and 212, 213 and 218.
138 Compare e.g. ibid at 49 and 218 with ibid at 4-5 and 211-12.
139 Compare e.g. ibid at 98 and 221 with ibid at 8, 66 and 151.
course of action, and if so on what basis can they make such a choice; whether it violates the
democratic commandment of equal concern and respect to tell me why I value democracy;
whether individuals can and do know their interests with sufficient precision to determine which
policies best promote them and which procedures show them equal concern and respect; and so
on. No matter the answers, it is clear we are no longer discussing political conduct.

In contrast, James Tully tries to anticipate these problems and clarify the relationship
between political theory and political practice, but he meets with scant success. He claims to develop
a new form of public philosophy that is both practice-based and practice-oriented. It is practice-
based in the sense that “it starts from and grants a certain primacy to practice.” It is practice-
oriented in the sense that it aims to identify and promote the freedom inherent in practice. He
takes the torch from Ludwig Wittgenstein and Michel Foucault when he asserts that the role of
philosophy is to determine whether and to what extent it is possible to think and act differently.
He treats theory and conduct as though they are complementary parts of a single endeavour. He
places philosophers alongside judges, legislators and other citizens on the front lines of history.

He hopes to foster a dialogue or “reciprocal relationship between academic research and
struggles on the ground,” but this formulation shows that he is not starting with practice, as he
claims, but with an idea of practice as the embodiment of the basic human struggle for freedom.
For all theorists, Tully included, theory always has the jump on conduct. Since he asserts
otherwise and argues that his approach works on practice itself, he distorts not only his own project,
which is not as dialogical as he would like, but also the actions and perspectives of the people he
studies. He regularly emphasizes the importance of listening to others in order to orient and adjust
our own beliefs, but suggests that theorists can do so by listening “to what people are trying to say in
actual cases.”

Some of the resulting distortions are relatively innocuous, as when he claims that
humans have understood communication in terms of networks “since time immemorial,” but others

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140 See e.g. Oakeshott, On Human Conduct, supra note 12 at 55, 93-94 and 113-15.
141 Bellamy, Political Constitutionalism, supra note 87 at 90 and 167.
147 Tully, Public Philosophy: Vol I, supra note 143 at 292.
149 Tully, Public Philosophy: Vol I, supra note 143 at 305 (emphasis added).
are egregious, such as the characterization of substance abuse and suicide among indigenous peoples as a form of resistance to imperialism.\textsuperscript{150} As such a bold claim appears even more extreme outside the context in which it was made, in the interest of fairness we turn now to the details of his arguments.

Like Bellamy, Tully is a democrat. In fact, he is probably correct when he suggests that political philosophers are all democrats now.\textsuperscript{151} But Tully does not champion a particular institutional expression of democracy. Rather, he believes democracy, or at least a potential for democracy, lurks in every use of a rule or institution to govern human conduct. He defines it as “just the basic Athenian idea that the people have a say in and over the rules by which they are governed and over the public goods the rules are enacted to bring about.”\textsuperscript{152} It is hardly as modest as this quotation implies. Democracy consists in the fundamental democratic freedom of citizens “having an effective say in a dialogue over the norms through which they are governed.”\textsuperscript{153} At one point, he suggests that this democratic freedom to change the way one is governed is freedom itself, but elsewhere he muses that it might only be based in the freedom inherent in human conduct.\textsuperscript{154} Either way, an effective exercise of democratic freedom requires knowledge of the field in which it is being exercised and he argues that this knowledge is at risk.\textsuperscript{155}

It is at risk because we lack a clear understanding of how contemporary political, economic, technological, military and cultural developments are simultaneously changing the way we are governed and perpetuating underlying practices that control our conduct in a more insidious way. Tully is concerned with what many would call globalization: the dispersion of state powers and responsibilities to international bodies, sub-national or indigenous authorities and even private organizations; the entrenchment of constitutional and international laws that facilitate international trade and investment; the proliferation of rapid communication technology; the increase in economic interdependence and cultural commingling; the myriad efforts to resist all of the above; and so on. As others have noted, these novel developments often shock incumbent conceptions of government and subvert attendant notions of how to challenge and change it. Tully is aware of such disruptions but he fears that they distract from deeper continuities that pose a more sinister threat to freedom.

He argues that these developments, however radical they may seem, comprise only the most recent version of an imperial order that has colonized our world during the last 500 years and has grown ever more effective as formal methods of colonization have yielded to informal techniques of

\textsuperscript{150} Ibid at 225-26 and Tully, \textit{Public Philosophy: Vol II}, supra note 144 at 170.
\textsuperscript{151} Tully, \textit{Public Philosophy: Vol I}, supra note 143 at 302.
\textsuperscript{152} Tully, \textit{Public Philosophy: Vol II}, supra note 144 at 188.
\textsuperscript{153} Tully, \textit{Public Philosophy: Vol I}, supra note 143 at 310.
\textsuperscript{154} Compare Tully, \textit{Public Philosophy: Vol II}, supra note 144 at 106 and 279.
\textsuperscript{155} See e.g. ibid at 186.
free trade, constrained constitutionalism and limited democratization backed by the implicit threat of military intervention for those who refuse to submit. This imperial order is in large part responsible for the gross economic inequalities, rampant environmental degradation and flagrant oppression of indigenous peoples with which we are all too accustomed today. To fret about the adequacy of familiar ideas and practices in unfamiliar circumstances misses the larger point: those ideas and practices were unable to diagnose and dispute our imperial predicament, and they were inadequate because they were forged within it. We should not seek to update or rehabilitate such products of imperialism. He despairs of the inability of even the most critical activists and theorists to develop ways to transform imperial relationships instead of simply modifying them: rather than bring those relationships under the shared democratic authority of their subjects, those hapless souls may inadvertently perpetuate their servitude. Yet he remains hopeful that we will be able to learn from those everyday practices, from entire indigenous forms of life to the burgeoning fair trade movement, that are beacons of democratic freedom in the long imperial night.

To determine what a political philosopher can contribute to these efforts, Tully turns to Wittgenstein and Foucault. From the former, he takes two arguments. First, to understand a word, such as freedom, power or democracy, consists in being able to use that word and explain that use in various contexts, rather than in being able to grasp and apply a rule regarding such use. Second, the uses to which a word can be put are too various and mutable to be governed by rules of grammar. According to Tully and Wittgenstein, the meaning of words consists in their use and their use is characterized by the freedom to use them differently. From these two arguments, he derives a sentiment: our understanding, whether of a word, a concept or a phenomenon, is always partial and provisional. He also derives a method: to improve our understanding of something means to address a particular misunderstanding, not to uncover a rule or theory that dispels all uncertainties about it, and we can do so by comparing our understanding with those held by others. We develop our understanding through dialogue rather than reflection. Tully, as a political theorist who wishes to identify and encourage efforts to imagine and pursue different ways of living, employs two complementary strategies to facilitate such a dialogue. He studies examples, both historical and contemporary, of practices in which diverse actors recognize each other, elaborate their similarities and differences, and seek to accommodate one another. He also aims to develop a way of writing

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156 Ibid ch. 5.
157 Ibid at 162-63 and 208.
158 Ibid at 72 (“the principle underlying the new and puzzling [features of democratic practices] appears to be an unsatisfied longing for a certain kind of democratic freedom of self-government. It seems to be a longing for concrete freedom within the diverse practices of government in which we find ourselves; a freedom to question and modify them en passant”) and 219-221.
160 See e.g. ibid at 103-16 and Tully, *Public Philosophy: Vol I*, supra note 143 at 26-27 and 49-55.
about such practices that is inclusive and adaptable yet still capable of exposing the constraints imposed by prevailing ideas and arrangements.

To assist in these matters, he draws on Foucault, whose analyses of power and freedom not only survey historical efforts to think and act differently but also embody such an effort. From Foucault, Tully adopts the notion that a practice can be studied from two perspectives: the forms of government that seek to organize conduct and the freedom with which those taking part in the practice comply, question, ignore, modify and otherwise respond to such forms. To focus exclusively on the former obscures the ways in which individuals are free to act within and against such relations of power. The power that governments and others wield acts upon actions, not persons. It treats persons as agents capable of choosing a course of action while limiting the field of possibilities from which they can choose. For Foucault as for Tully, power itself is not the problem, since power is a condition of freedom. The problem is the persistent failure to scrutinize the forms of power to which we are subject and to expose their contingencies. Both theorists are especially troubled by the resilience of the juridical mode of thinking and acting, pursuant to which “subjects coordinate their moral and political action by means of laws or norms.”

Juridical subjects behave and understand their behaviour as based on laws. They do not question their relation to law as a constitutive feature of their experience, and they fail to perceive the ways in which other possible relations are precluded. Juridical subjects may experience liberty, but they do not enjoy freedom: the former is the condition one enjoys in relation to a legitimate law; the latter is the ability to determine how one relates to a law and to law itself.

For Tully, law is not constitutive of freedom, for freedom is prior to law. Law is just one mode of government, one type of norm and thus one sort of power relation, within and against which individuals can exercise their freedom. It is a means by which freedom can assume a particular form. Individuals always remain free to contest the laws by which they are governed, including the procedures for contesting those laws, and thus remain free to question and change their relationship with law.

The choice whether to regard law as constitutive of one’s experience and one’s association with others is a choice that must be made without recourse to law. To adopt the perspective of the juridical subject is unreflective; to commit to law unconditionally is unbecoming a free person, for it

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161 Ibid at 22-24 and 77.
162 See e.g. ibid at 122.
163 Ibid at 113.
164 Ibid at 113-19.
165 Tully, Public Philosophy: Vol II, supra note 144 at 272.
166 Ibid at 108 and Tully, Public Philosophy: Vol I, supra note 143 at 294.
requires the embrace of arbitrary constraints on one’s thought and action and it denies the truth that laws do not guide or determine one’s conduct any more than one allows them.\textsuperscript{167}

Nor is law constitutive of democratic freedom. Recall, democratic freedom is not associated with any particular institutional settlement, because democratic freedom entails having an effective say over every such settlement.\textsuperscript{168} The freedom of citizens in a representative democracy and of subjects to the rule of law is just one form that this “concrete” democratic freedom can take.\textsuperscript{169} However, democratic freedom may not be very concrete at all, since it “seems to be a fairly general human activity, which takes different forms in different times and cultures.”\textsuperscript{170} Tully fully exploits the ambiguous status of democratic freedom: he claims that various activities exercise it, but declines to analyze them closely or to consider expressly the accounts, if any, provided by individuals engaged in them.\textsuperscript{171} Despite his professed desire to establish a dialogue between theory and “struggle,” he seems content to speak for both sides. Further, law is not constitutive of democracy, according to Tully. In a democracy, the people who constitute the political association impose the constitution, which includes the rule of law, on themselves. They may do so by exchanging public reasons, but these reasons need not concern or contribute to the rule of law.\textsuperscript{172}

Finally, Tully’s preferred model of constitutionalism is simply what results when we acknowledge the truth about freedom. He is a longstanding critic of modern constitutionalism. His earlier work sought to rehabilitate it by excavating the more democratic and just conventions of an ancient constitutionalism immanent in the practices of indigenous peoples.\textsuperscript{173} He now frames modern constitutionalism as an important part of contemporary informal imperialism and champions theories and practices that seek to transform constitutional democracy into democratic constitutionalism.\textsuperscript{174} The former operates within a web of national, international and global regimes to generate political, economic and military arrangements over which the governed have “no or little say.”\textsuperscript{175} The latter consists of “democratic efforts to de-imperialize the imperial dimensions of modern constitutional democracy, that is, to bring them under the shared democratic authority of the peoples who are subject to them.”\textsuperscript{176} While Tully may seem more pessimistic, he has not abandoned his rehabilitation effort, only modified it. He has ramped up his rhetoric to emphasize the severe

\textsuperscript{167} See e.g. Tully, \textit{Public Philosophy: Vol II}, supra note 144 at 64.
\textsuperscript{168} See e.g. ibid at 310.
\textsuperscript{169} Ibid at 72.
\textsuperscript{170} Ibid at 117 n.48.
\textsuperscript{171} See e.g. ibid at 53 and 217-21. The life of Gandhi receives approximately one page at 308-09.
\textsuperscript{172} Ibid at 93.
\textsuperscript{173} See Tully, \textit{Strange Multiplicities}, supra note 159.
\textsuperscript{174} See Tully, \textit{Public Philosophy: Vol II}, supra note 144 at ch 5 and 7.
\textsuperscript{176} Ibid at 316-17.
poverty, inequality and oppression suffered by subaltern peoples. He also has clarified the source of salvation, which is not the concrete practices that “expand the existing yet severely limited field of possibilities of direct participatory freedom,” but the end such practices by definition serve: the “basic idea of democratic freedom.”

Of the eight aspects of modern constitutionalism that he identifies, two are most relevant here: constitutional form and constituent power. He defines constitutional form by distinguishing “formal” modern constitutions, which employ this concept, and “customary” indigenous and ancient constitutions, which do not. Constitutional form consists of explicit rules, norms, principles and procedures that are separated (or “disembedded”) from practice and are thought to establish “the field of recognition and interaction of the people subject to it.” Tully recognizes the familiar critique of this understanding of rules, since he has made it elsewhere: by privileging their formal expression, it obscures the living practices within which rules are used, encourages the unhelpful belief that rules ground our activities and promotes misguided attempts to revise society by enacting new rules. The notion that form exists separately from and somehow determines practice is reductive, rationalist and false. Yet Tully retains this hollow conception of constitutional form because it permits him to define constituent power in a way that yields the democracy he desires.

He understands constituent powers as “the powers of humans (individually and collectively) to govern themselves.” These powers exist separately from any form they take in order to be exercised. Constituent power promises radical political change in two senses. First, as a normative matter, the inherent human power of self-government presents an ideal against which existing political practices can always be challenged. Second, as a practical matter, constituent power is never exhausted by constitutional form, so the latter remains open to perpetual contest and revision by a power that resides beyond its reach. This modern concept of unformed constituent power is the condition of the idea of popular sovereignty, which Habermas has identified as one of the two co-equal principles of constitutional democracy. Popular sovereignty, in turn, is democratic freedom. Finally, democratic freedom is the generic freedom of individuals faced with an exercise of power that seeks to govern them by defining a range of possible responses: the freedom to accept that range and find a way to act within it or to question it and seek a different set of possibilities. For Tully, “democratic constitutionalism” is just another way of saying “democracy,” which is just

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177 Ibid at 334-35.
178 Ibid at 318.
179 See e.g. ibid at 321.
180 Ibid at 320.
181 Ibid.
182 Ibid at 334.
183 Tully, Public Philosophy: Vol II, supra note 144 at 200.
184 Ibid at 93-94 and 119.
185 See e.g. ibid at 310.
another way of saying “freedom.” Constitutional democracy, which treats the rule of law on par with democracy, is an unnecessary constraint on that freedom.

So despite their best efforts, neither Bellamy nor Tully find what they are looking for in the depths of political practice. Bellamy’s ideals of real democracy and political constitutionalism are not the product of a careful survey of actual arrangements, conventions and experiments but the result of reflections on ideas about equality that he believes are implicit within the constitutional practices of certain countries. Tully’s notions of democracy and constitutionalism emerge from the irreducible, and utterly theoretical, human freedom to act otherwise. Each invokes examples to support his account, but these receive only superficial attention: they are used to confirm ideas generated elsewhere, which might be unmoored by a more thorough engagement. Each also treats law as an instrument for his preferred conception of democratic politics: in Bellamy’s case, law is whatever emerges from democratic procedures; in Tully’s, it is but one more foil for freedom. Similarly, constitutionalism is just along for the ride: it is derived from more basic ideas about equality and freedom, respectively.

In sum, theorists who treat constitutionalism as a mode of politics only appear to differ from those who treat it as an extension of philosophy: they share the belief that theory can reveal the truth about constitutionalism, to which constitutional law and practice should cohere. But these efforts cannot secure the firm foundation they seek. They succumb to ambiguity and dissent; each answer they provide only provokes more questions. They fail not because they misunderstand constitutionalism (although they do), but because they misunderstand constitutional theory.

They believe constitutional theory reveals the foundations of constitutional practice. However, constitutional practice already demonstrates all the foundation it requires. Individuals who draft, adopt, critique, interpret, apply, challenge, amend or otherwise use a constitution do not need to know what permits that use. The foundation of those activities is not in question: to act is to know the conditions for that action are present. A theoretical conception of constitutionalism is not required to engage in constitutionalism, but it is required to theorize about constitutionalism. If constitutions and constitutionalism could not be understood in terms of their conditions, then constitutional theory would be impossible. We would be unable to ask the basic question: given that we are using constitutions in the following ways, what must be true? Their amenability to being understood in this way is a condition of constitutional theory, and cannot be established by it, because constitutional theory is just another form of conduct: its connection with practice must be presumed. In sum, constitutional theory exposes the foundations of constitutional theory.

186 See e.g. Oakeshott, On Human Conduct, supra note 12 at 8-9.
Constitutional theorists, like all theorists, do not identify constitutional foundations; they deduce constitutional possibilities.\(^\text{188}\) They do not extract the truth about constitutionalism by refining assumptions about it. Instead, they interpret our experience of it. At best, constitutional theory helps to make sense of that experience. It connects events and impressions with ideas that may provoke other events and other conceptions of them. The next section elaborates this interpretive mode of constitutional theory, examines its conditions and considers two of its leading proponents.

3. Constitutionalism as Project

Interpretation amplifies: it expands its object, whether a tradition, text or transaction, by treating it as an expression of something else, such as a value, belief or desire. Interpretation also illuminates: it renders both the expression and the thing expressed more intelligible by positing and elaborating their relationship. In this fashion, meaning is made. However, the ability to make meaning from experience is premised upon the intelligibility of experience: interpretation cannot establish its own conditions, and we cannot interpret things we cannot understand.\(^\text{189}\) When we interpret, we strive to speak more clearly about an articulate world which exists apart from our efforts to discuss it. As a result, interpretation is interminable. No matter how eloquent, no account can offer the final word: interpretation cannot overcome its own conditions, for each attempt to understand the world not only seeks to be understood but also forms part of the world that we wish to understand.\(^\text{190}\) Interpretation augments experience and thus requires the perpetual recalibration of ideas.

However, there is another, more profound, reason why interpretation never ends. Interpretation entails the existence of a world amenable to interpretation: a world about which we can say something true when we entertain a relationship we perceive between some of its aspects.\(^\text{191}\) In turn, the possibility of truth entails the curse of fallibility: each interpretation presumes and cannot confirm its own validity. An interpretation is just one possible account of the actual state of affairs: a hypothesis. Interpretation awaits inquiry, in which the inquirer accepts an interpretation as a

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\(^{189}\) See e.g. Oakeshott, *On Human Conduct*, supra note 12 at 1. For a more cryptic account, see Wittgenstein, *Philosophical Investigations*, supra note 11 at §201 (interpretation is substitution).


\(^{191}\) Michael Polanyi, *Knowing and Being* (London: Routledge & Kegan Paul, 1969) at 123 and 133 [M Polanyi, *Knowing and Being*].
plausible description of the world and employs it to guide his conduct.\textsuperscript{192} Inquiry, which is action that relies on an interpretation instead of reflecting upon it, contains the possibility of surprise: since a hypothesis cannot establish its own truth, the world may turn out different.\textsuperscript{193} By testing an interpretation in the world it describes, inquiry yields new knowledge.\textsuperscript{194} Whether they confirm the hypothesis or not, the effects of each inquiry can be understood alongside other aspects of experience and used to revise a flawed interpretation or to formulate new hypotheses that trace the implications of a discovery.\textsuperscript{195} Despite the appearance of progress, these consequences can be ambiguous. New knowledge, whether about nuclear physics or human equality, often facilitates more complex endeavours and thus creates new frontiers of ignorance even while illuminating other aspects of experience.\textsuperscript{196} We can learn, but we can never learn enough to alleviate the need to learn more.\textsuperscript{197}

The impact of this interpretive stance on theory, including constitutional theory, is at once modest and radical. On the side of modesty, interpretations offer at most a fruitful orientation for further analysis and action. As they anticipate further interpretation and invite inquiry, they cannot establish or uncover a firm foundation for human behaviour.\textsuperscript{198} Theory is an incomplete form of knowledge, as it presumes a relationship with the world it describes that can only be demonstrated through more precise theorizing. Theorists who adopt an interpretive stance, whether towards constitutions or some other aspect of experience, must curtail their ambitions accordingly. However, interpretation is not just an activity. In fact, it denies that anything is just anything, as it renders the world and the things therein more intelligible by explaining the connections between them.\textsuperscript{199} Interpretation is a worldview. Its vista is experience, which includes the distinctions drawn between disciplines and modes of conduct. Even the familiar divide between theory and practice becomes a matter of and for interpretation.\textsuperscript{200}

Once we acknowledge that meaning is made, it can no longer be taken for granted. This includes our ability to make meaning (i.e. to interpret) which is also part of our experience. Thus, interpretation involves both ability and responsibility: if we wish to continue interpreting, we must

\textsuperscript{192} M Polanyi, \textit{The Tacit Dimension}, supra note 142 at 21 and 76-77. See also Ludwig von Mises, \textit{Human Action: A Treatise on Economics}, New Rev ed (Yale: Yale University Press, 1963) at 177 (“Thinking and acting are inseparable”).

\textsuperscript{193} Michael Polanyi, \textit{The Logic of Liberty: Reflections and Rejoinders} (London: Routledge & Kegan Paul Ltd., 1951) at 24-25 [M Polanyi, \textit{The Logic of Liberty}].

\textsuperscript{194} Hayek, \textit{Studies}, supra note 188 at 4-5 and 9-11.

\textsuperscript{195} M Polanyi, \textit{The Logic of Liberty}, supra note 193 at 19 (“there is always a measure of choice in our manner of perception.”). See also, M Polanyi, \textit{Knowing and Being}, supra note 191 at 128.


\textsuperscript{197} See e.g. M Polanyi, \textit{The Logic of Liberty}, supra note 193 at 197-98.

\textsuperscript{198} See e.g. C Geertz, \textit{Local Knowledge}, supra note 47 at 186-87.

\textsuperscript{199} See e.g. Dewey, “Experience, Nature and Art”, supra note 13 at 217.

\textsuperscript{200} See e.g. Oakeshott, \textit{Experience and its Modes}, supra note 148.
commit to maintaining a world in which interpretation is possible. We either use it, carefully, or we lose it. For constitutional theorists who accept this charge, interpretation affects both substance and method. Law cannot be a mere vessel for politics because, for that to be true, politics must be capable of being conducted in accordance with law and, in turn, law must be capable of telling us something about politics. Similarly, constitutionalism cannot be a principle or ideal awaiting realization, because a principle cannot emerge unscathed from such efforts: it is an evolving project that can only be understood through the constitutional practices that express it. Interpretations need not be tentative: they can and often should be both provisional and bold. However, theorists must be sensitive to the inscrutable relationship between constitutional theory and practice. They need to anticipate and remain accountable for the effects of actions taken in reliance upon their arguments. They also need to respond to unanticipated developments by revising and even repudiating flawed ideas. Two theorists who embrace the restraints and rewards of interpretation are Charles Sabel and David Dyzenhaus.

A. Sabel

In fact, Sabel often refers to his analyses of new regulatory practices and political institutions as interpretations. More precisely, they are interpretations “with a practical intent.” They are not intended to be implemented but rather to help us think about how we ought to proceed if we wish to preserve certain things that we value, such as democracy, constitutionalism and accountability. He tries to make sense of legal and constitutional novelties by adapting incumbent ideas to unfamiliar arrangements and tailoring his explanation of those arrangements to the refashioned ideas. This devotion to regular revision is evident even in his penchant for collaborative projects, which collapse the distinction between writing and editing by making each draft part of a dialogue between the authors.

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201 See e.g. Oakeshott, On Human Conduct, supra note 12 at 1-2; M Polanyi, Tacit Dimension, supra note 142 at 87.  
Sabel aims to clarify the connections between past choices, present dilemmas and future prospects. He knows that theory has a limited but important role: it can illuminate (or obscure) the alternative beliefs, ideas and arrangements implicated by legal, political and constitutional practices, and thus make conduct more (or less) prudent and willful. This may not be much, but it does give theory a distinct role. Although theory cannot determine the best course of conduct, it can expand or contract the realm of possibilities perceived by those who must make that decision. As a result, theorists face their own decision: they must decide how they will perform this role, whether they will reveal or conceal the strategic and fallible character of their contributions.

For his part, Sabel explicitly bases his arguments on ideas, premises and presumptions, not facts or reality. When he does use facts, he employs a “stylized” sketch of them: an abstraction. He does not invoke truth to support his theories, nor does he claim direct access to the foundation of experience. Consider the influential model of democratic experimentalism he developed with Michael Dorf. They studied adjustments made in various departments of American government that enabled diverse citizen coalitions to begin tackling previously intractable public problems, from environmental degradation to police discrimination. Those novel practices harnessed ambitious yet indeterminate objectives to procedures that authorized local actors to experiment with standards and strategies in exchange for detailed reports on their activities and results. They helped participants expand the range of possibilities for both technical achievement and civic engagement, as regular comparisons of actual outcomes generated new regulatory benchmarks and reduced the relevance of traditional legislative, judicial and administrative interventions. Perhaps anticipating methodological, epistemological and even internecine ideological critiques, Sabel and Dorf acknowledged that their model was “instigated” by those innovations, which were in turn “inspired” by Japanese techniques of flexible production. It was not determined in any sense: imagination and fallibility intruded at every step.

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207 Cohen & Sabel, “Extra Rempublicam”, supra note 205 at 150.


209 For ideas, see e.g. Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 316; Simon & Sabel, “Destabilization Rights”, supra note 202 at 1019.

Sabel admits that the implications of his arguments remain unclear. He warns that certain institutional experiments may shock established conceptions and practices of democracy, law and constitutionalism, but claims that the result of such turmoil is not for theory to decide.\(^{211}\) He sees a world of endless possibility: not in the sense that at any moment anything is possible, but rather that things can always be different than they are. We cannot exhaust the possibilities of this world, but we must work to perpetuate the ones that matter to us.

What matters to Sabel is democracy. In particular, he aims to maintain democracy against the encroachments of expertise in a world growing ever more technical and complex.\(^{212}\) More precisely, Sabel does not disparage the scientific expertise of the medical doctor, the nuclear physicist or the civil engineer. Rather, he combats the privilege accorded to what Alasdair Macintyre has called the “managerial” expertise of the career bureaucrat, the appellate judge or the social scientist: knowledge of general rules that purportedly govern human affairs and thus render our behaviour not only predictable but also amenable to rationalization in those terms (i.e. manageable).\(^{213}\) He does so not by demonstrating the normative superiority of canonical democratic devices such as majority voting but by analyzing actual practices to show that democracy, in both practice and theory, entails the deliberate use of the uncommon knowledge possessed by citizens.\(^{214}\) Despite the uncertainty and unfamiliarity of contemporary life, citizens possess the conceptual and organizational resources to define and address the problems that arise without abandoning the democratic ideal of governing their own affairs. New challenges require new responses. The effort to preserve democracy against expertise may require adjustments to how we think about each.

Sabel’s conception of democracy is inspired by that of John Dewey, for whom democracy was “a method for identifying and correcting through public debate and action the unintended consequences of coordination among private actors.”\(^{215}\) Dewey saw elections as only one part of democracy. They are a tool to promote public deliberation: the generation, exchange and debate of ideas concerned with social problems. They also serve to create a majority sentiment in favour of both the outcomes and the endeavour to define them in this fashion.\(^{216}\) Arguments that equate democracy with elections, however orchestrated or supplemented, provide an unfortunate and ironic

\(^{211}\) Sabel & Zeitlin, “Learning from Difference”, supra note 202 at 313.
\(^{212}\) See e.g. Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 415-17, note 468.
\(^{214}\) Compare, e.g., the arguments of Waldron and Bellamy, supra notes 66-76 and 110-120, respectively. Contrast also Weberian rationality, in which the manner in which means and ends are to be related is given in advance: the relationship is supposed to maximize efficiency (i.e. even the act of relating ends and means has a predetermined end: efficiency).
\(^{215}\) Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 286.
case of confusing a means for an end. For Sabel as for Dewey, democracy is not exhausted by or identified with any institutional settlement because attending to what we do and how we do it requires attending to the ways in which we decide such matters, from procedures to sentiments.\footnote{217} Democracy does entail certain elements (e.g. members of a community discussing and deciding matters that concern them) but these elements do not reduce to a simple institutional formula.\footnote{218}

Instead of a technocratic excuse to limit the legitimate scope of democracy, Sabel treats expertise as a dispersed public resource that citizens must embrace, pool and deploy in order to solve their common problems.\footnote{219} Rather than an elite attribute associated with exceptional experience or education, expertise is just one form of local knowledge, which is something that all individuals acquire in different forms and amounts.\footnote{220} Under contemporary conditions, local knowledge is essential to effective government: it is required to implement the broad standards and responsive rule-making frameworks regulators deploy when they cannot be sure of how best to pursue their objectives or even how best to define them.\footnote{221}

This knowledge, while local, is communicable. Individuals can elaborate and exchange it, and they may even learn something new while doing so: local knowledge is neither irredeemably implicit nor absolutely esoteric.\footnote{222} It is not a collection of concrete facts about a particular setting that await the sense imparted by abstract principles or universal truths. Local knowledge is the knowledge that we inhabit a meaningful world that exceeds our experience: the knowledge that aspects of our experience are connected in ways that we do not yet appreciate but can come to understand. It is manifest in the ability to articulate (and thus enrich) that experience by using facts and principles to improve our understanding of the connections between them. Local knowledge is a form of what Michael Polanyi called tacit knowledge. It is the foundation of explicit knowledge and thus always employed but never exhausted.\footnote{223}

Sabel burnishes his pragmatist credentials by generally eschewing such abstract musings in favour of examining novel institutions that put such insights to use. Much of his work concerns recent developments in the United States of America. For example, he and James Liebman have studied the efforts by clusters of parents, teachers, judges, administrators and politicians to address the legacy of segregated public education, which includes the unintended consequences of

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\item \footnote{217} See e.g. Sabel & Zeitlin, “Learning from Difference”, supra note 202 at 277.
\item \footnote{218} See e.g. ibid at 312; Cohen & Sabel, “Global Democracy?”, supra note 208 at 766 and 784-94; Cohen & Sabel, “Sovereignty and Solidarity”, supra note 203 at 729-30.
\item \footnote{219} See e.g. Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 304-05.
\item \footnote{220} See e.g. ibid at 316-18 and 328. For a general account of local knowledge, see Geertz, Local Knowledge, supra note 47.
\item \footnote{222} Gerstenberg & Sabel, “Directly Deliberative Polyarchy”, supra note 202 at 340.
\item \footnote{223} M Polanyi, The Tacit Dimension, supra 142 at 20; Taylor, Philosophical Arguments, supra note 48 at 68-70.
\end{itemize}
desegregation. As the constitutional ideal of an equal education for every student faltered in the face of intransigence and indeterminacy, attention in legislatures, courtrooms and school districts scattered across the country shifted to ensuring that every student receives an adequate education. The latter debate also evolved from an unproductive emphasis on adequate funding to a more fruitful focus on adequate outcomes: students capable of satisfying the contemporary needs of their society.224

After years of mobilization, litigation and legislation, the two states on which they concentrated embarked on radical experiments, equally bold and desperate, to learn what an adequate education entails and how to deliver such an education to every student in their sprawling public school systems. To overcome their ignorance, Texas and Kentucky had to start somewhere, so they granted teachers, schools and school districts greater autonomy in exchange for greater accountability. As they began to collect more (and more nuanced) information about student performance, they became better equipped to define more precise objectives and make more relevant comparisons between schools, districts and segments of the population. Thus, the pursuit of an adequate education for all indirectly promoted the original objective of an equal education for all, as these practices helped participating individuals and institutions learn to identify, refine and disseminate those administrative and pedagogical practices that ameliorate discrepancies in academic performance between racial, linguistic and socio-economic groups.225

For Sabel and Liebman, these experiments in school reform confirm the vitality of American democracy, as citizens remain capable of casting new problems in terms of their common values, charting a course and venturing forth. Similar, albeit shorter, vignettes animate the more abstract and prescriptive elements of Sabel’s work, from the account of democratic experimentalism he developed with Dorf to the idea of destabilization rights he and William Simon have proposed. The latter are legal entitlements, increasingly articulated by courts involved in complex civil rights cases, to disrupt “public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of public accountability.”226

Since institutions like prisons and mental health facilities are often as complex and stubborn as the problems they are intended to solve, the effects of reform are difficult if not impossible to predict. Destabilization rights anticipate this difficulty by abandoning the effort to tailor a remedy to each infraction, whether of a state regulation or the federal constitution. Instead, the court obligates the offending institution to search for changes in policy or protocol that suffice to fix its failures, either by explicitly mandating such a search or by simply declaring existing arrangements

225 Ibid at 239-50 (Texas) and 257-66 (Kentucky).
 unacceptable. To succeed and thus avoid the imposition of an insensitive default remedy that threatens even greater disruption, the dysfunctional institution must learn to work with the court, the persons affected by its conduct and perhaps other interested parties to define appropriate standards for its activities, monitor its performance and adjust both those standards and the attendant processes as new information emerges.

Sabel uses ideas like destabilization rights and democratic experimentalism to dramatize a raft of American innovations that promise to replace the traditional “command” model of regulation: a caricature according to which savvy government officials exercise delegated authority to establish and enforce precise regulations with no need or opportunity for meaningful participation by those affected. These novel practices also spurn the most prominent alternative to the command model: arrangements that approximate a market in order to generate financial incentives sufficient to spur the development and diffusion of efficient responses to those elusive challenges that can be defined with enough precision to identify the necessary conditions for solution but not enough precision to define a solution directly. Instead, the practices Sabel examines treat citizens as partners in regulation and problems as opportunities for experimentation. Citizens possess the specialized knowledge required to pursue common regulatory objectives across diverse and volatile local conditions. Public participation, whether driven by personal interest, political commitment or professional obligation, provokes the ongoing review and revision of these objectives and activities alike. By acknowledging the expert within each citizen, these experiments fuse familiar roles while repudiating the hubris of the command and market models, which assumed that isolated technocrats could design effective solutions to public problems (or at least the mechanisms to produce such solutions) at the outset.

He treats judicial expertise as just one more variation on this theme and so does not share the primary obsession of American constitutional theorists. Rather than ponder whether and how theorists can reconcile the practice of judicial review with the ideal of popular sovereignty (i.e. the belief that citizens should be the source of the laws to which they are subject, including the most fundamental law) Sabel shows how citizens are reconciling them. The knowledge of judges does

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not differ in kind from the knowledge of citizens: none of them know the full panoply of actions and arrangements necessary to turn the community they inhabit into the community they want to inhabit. Assertions of expertise, whether administrative, technical or constitutional, curtail democratic decision-making and quell the shared spirit of inquiry that must define any common endeavour among individuals who consider themselves authors rather than characters in someone else’s story.

Of course, the United States of America does not have a monopoly on this spirit. Other scholars have applied Sabel’s arguments to states as different as China and Canada. Nor is it monopolized by states. In fact, Sabel wants to show that democracy is viable beyond national borders, where the familiar relationship between expertise and democracy appears reversed: the former is generally considered the primary basis for international and global political decisions, while the latter is only intermittently and grudgingly accommodated. Democrats cannot assume that their project is viable beyond the state; they must prove that it can thrive in this new terrain. To this end, Sabel describes democratic experiments at the centre of the European Union and the World Trade Organization.

He interprets new EU regulatory practices as expressions of a nascent “architecture” for experimentalist governance that resembles the democratic experimentalism he and Dorf documented in the United States. The latter involved the three pragmatic “institutions” of benchmarking (i.e. distilling a provisional definition of possible regulatory outcomes from a survey of actual regulatory outcomes), simultaneous engineering (i.e. enabling participants to adapt both the new standard and incumbent practices in light of their particular circumstances and similar efforts elsewhere) and error detection (i.e. establishing procedures to monitor, investigate and correct failures to satisfy regularly updated requirements for transparency and substantive performance). In contrast, the former entails four “functions”: first, defining broad goals jointly among European and Member State authorities (e.g. full employment, equal treatment); second, granting the institutions charged with implementing those goals sufficient autonomy to devise their own strategies and even their own objectives; third, rigorously collecting and comparing data across participating institutions; and fourth, periodically revising these goals, standards, procedures and even the universe of participants in such experiments.

Sabel calls this architecture “directly deliberative polyarchy.” He has tracked its evolution across many areas of European public policy, from telecommunications and financial services to

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social inclusion and even fundamental rights, in a series of articles written with Joshua Cohen, Olivier Gerstenberg and Jonathan Zeitlin. The WTO Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade introduce similar innovations across a narrower range of issues but a broader set of states. They entrench in international trade law the experimentalist techniques of transparency (in the form of requirements to notify the WTO of new sanitary and technical regulations) and benchmarking (in the form of a commitment to use scientific evidence both to justify departures from international health and safety standards and to demonstrate equivalence among competing national schemes).

Critics who bemoan democratic deficits in the EU and the WTO would do well to attend to the details of such developments instead of reciting traditional conceptions and expressions of democracy: these arrangements illustrate real efforts to enhance public deliberation, facilitate meaningful participation and improve regulatory outcomes. They promise to reinvigorate national democracies by changing the way domestic governments make rules, and may eventually coalesce into a novel form of democracy beyond the state. Until then, they serve as yet another reminder that states need not be viewed as the exclusive setting for democracy. Before then, we may want a better understanding of their implications for other things we value, such as law.

Sabel rarely writes about law. He does, however, write about things traditionally associated with law, such as rules, rights and principles. More often, he writes about how law is made. This approach confirms his pragmatism, as he is more concerned with understanding how we use law than defining what law is. One instance in which Sabel does directly address law illustrates the basis for this preference. During a short summary of American constitutional history, he acknowledges how the maturation and stagnation of the administrative state secured “the triumph of the realist adage that much of law is politics.” This excerpt raises at least three questions, none of which is answered explicitly in his work. First, does this adage reflect Sabel’s own beliefs about law or just the widespread assumption that the Supreme Court of the United States will not upset the most important aspects of the existing institutional settlement? Second, if much of law is politics, then what is politics? And third, if law is not exhausted by politics, then what completes law? These

235 See e.g. Cohen & Sabel, “Global Democracy?”, supra note 208 at 783.
questions are not intended to identify flaws in his quick history but to demonstrate the limitations of an approach that seeks conclusions in definitions.

Nonetheless, his accounts of the procedures by which we make law reveal important ideas about law itself. When Sabel writes about “law-making,” which he also calls “rule-making,” he describes the production not of doctrine but of frameworks (e.g. standards, procedures, incentives and opportunities) for more law-making. He treats the formal products of such procedures, whether constitutions, statutes or regulations, as provisional guidelines for conduct that do not just invite but require regular elaboration and revision to maintain their connection with conduct that varies across time and place. At one point, he even refers to these flexible frameworks as a “new type of rules.”

These corrigible conventions are born of collaboration and they anticipate more of it: their meaning and effectiveness require the individuals and institutions that use them to reflect upon that use, explain their conduct and the role of such conventions in it, and participate in efforts to improve the entire endeavour. Although such efforts will rely upon and reveal the formal characteristics of law, Sabel’s theoretical account of experimentalist law-making does appear to require a certain degree of publicity and generality, without which such ambitious efforts could not be coordinated. What is unquestionably unconditional, however, is the commitment expressed by the use of law: the commitment to set the terms of political association through public deliberation. Law, understood as the evolving practice of making law, is not an extension of politics but a particular form of politics: democracy.

Sabel reaches a similar conclusion with respect to constitutionalism. This consistency emerges not because he deduces supporting ideas from his preferred conception of democracy, but because he seeks a coherent account of the experimentalist tendencies he perceives in prevailing practices. Like Geertz, he strives to understand “[h]ow, given what we believe, must we act; what, given how we act, must we believe.” In contrast to his circumlocutions about law, Sabel confronts constitutionalism directly. He describes it as “the continuing activity of assessing a polity’s practices

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241 See e.g. Sabel & Simon, “Destabilization Rights”, supra note 202 at 1071-72; Sabel & Simon, “Accountability”, supra note 236 at 409. See also Sabel & Cohen, “Global Democracy?”, supra note 208 at 792, where they urge a departure “from the idea that arguments of political morality sound only in judicial reasoning and that the determinate content of basic rights must have a uniform interpretation across all circumstances.”


243 See e.g. Cohen & Sabel, “Global Democracy?”, supra note 208 at 790 (“the rule-of-law preconditions for democracy”).

244 Geertz, Local Knowledge, supra note 47 at 180.
in the light of its deep commitments, and vice versa,” that “begets not a constitution of enumerated powers and rights, but more activity like itself: constitutionalism.” It thus resembles the activity of making law, which yields not definitive statements of political will but more law-making. Elsewhere, he writes that constitutionalism serves as an “enabling constraint” for “principle-guided ‘deliberative’ problem-solving and democratic participation” and, more simply, “to enable the parties to a conflict to construct the pragmatic settings themselves which are adequate to the resolution of contested policy issues.”

He aims to extract constitutionalism from its two most familiar settings: courts and states. He argues that constitutionalism can no longer be understood as the practice of containing politics with a basic law applied by impartial judges. As a historical matter, judicial decisions have come to be viewed as thoroughly political rather than purely technical. As a conceptual matter, we cannot agree on principles that survive unscathed our efforts to realize them; “issues of constitutional principle cannot be pursued without deciding lots of closely connected questions, not themselves matters of justice, but nevertheless of concern to citizens – matters of strategy, institutional arrangement, local self-understanding,” and courts generally are not equipped to answer such practical questions. Constitutionalism cannot be a matter of establishing and maintaining an ideal institutional settlement, for the appropriate roles and arrangements cannot be known before the problems they must address and the principles they must embody are ascertained. Sabel claims his experimentalist conception of constitutionalism, which entails reciprocal inquiry into a polity’s practices and principles, enables and may even encourage the creation of new institutions capable of adapting as their polity and its circumstances evolve.

He also claims that constitutionalism can no longer be understood as the process by which a national community expresses its values or identity. Just as the court-centric understanding of constitutionalism relies on a vision of law as apolitical and uncontroversial, the state-centric understanding of constitutionalism relies on a vision of the state as harbouring a people who share a pre-political identity. But, under the contemporary conditions Sabel describes, we cannot be certain of what we share. Irrepressible diversity, complexity and uncertainty lead us to doubt, and therefore to determine, the relevance of existing identities as well as the value of prevailing practices. Differences become resources to be deployed in the search for solutions that can be adapted to

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246 Gerstenberg & Sabel, “Directly Deliberative Polyarchy”, supra note 202 at 335 and 341 (emphasis removed).
247 See e.g. ibid at 308 and 335.
249 Ibid at 285; Gerstenberg & Sabel, “Directly Deliberative Polyarchy”, supra note 202 at 337.
251 See e.g. ibid and Gerstenberg & Sabel, “Directly Deliberative Polyarchy”, supra note 202 at 335.
252 Ibid at 301-305.
diverse situations, rather than boundaries to be observed in the pursuit of consensus, however shallow or abstract. In fact, the practice of treating a political community’s conduct as a makeshift expression of its commitments and treating those commitments as a rough guide to future conduct can cultivate solidarity among its diverse members: a solidarity based not on a common identity but rather a common morality.

Such a morality is precisely what the constraint of constitutionalism (a constraint it shares with pragmatism and other anti-rationalist modes of political thought) enables. To conceive political communities in terms of their commitments is to entertain the possibility of the good life. After all, a commitment is not merely a good but a good worth pursuing at the expense of other goods. But since the commitments of the community are those revealed by its conduct, not those that its members (however passionate or enlightened) believe that the community should or does possess, the good life for its members cannot consist in the pursuit or even the enjoyment of any particular set of such goods. The commitments of a political community emerge only from the efforts of its members to discern and demonstrate them; they cannot be stated with sufficient precision to prescribe the requisite efforts, and if they could those efforts would not be refined but redundant.

Rather, the good life consists in the pursuit of the good life: in subscription to the rules, maxims and the other conventions used by the members of a political community to identify those goods that define the proper course of conduct for that community. More pointedly, the good life consists in pursuing the good life well: in subscribing to the standards that define proper conduct for members of that community because they offer such criteria, in submitting to judgment and undertaking to judge others on that basis. The good life consists in seeking to be a good citizen, not adopting the mannerisms of the citizen as means to personal ends, which is in any case a vain pursuit when ends and means converge.

Sabel’s conception of constitutionalism offers an alternative to fatalism once instrumental reason and managerial expertise are dethroned. If each adjustment to practice or principle invites others, the character and design of political associations, whether sub-national, national, multinational or international, are susceptible to endless investigation, deliberation and revision. Although we can never know whether these experiments are complete, this doubt should inspire rather than discourage: if the task of remaking our associations is not a mark of failure but a defining feature of political community, then it is something that has been done before, it is something that is

254 See e.g. ibid; Gerstenberg & Sabel, “Directly Deliberative Polyarchy”, supra note 202 at 337.
255 Macintyre, After Virtue, supra note 213 at 204.
256 Oakeshott, On Human Conduct, supra note 12 at 60-63, 72-75 and 91-92.
being done right now and it is something we can try to do better. Despite his own words, constitutionalism is not simply an activity. It is a project that entails the activity of reciprocal elaboration that Sabel describes: as participants learn to regard one another as engaged in an inquiry that is moral as well as practical, they learn to regard themselves as agents responsible for that inquiry and their contributions to it.

His conception of accountability reinforces the ideal of public inquiry. If constitutionalism consisted of the application of known rules and principles, then actors with constitutional responsibilities could be held accountable by measuring their conduct against those fixed standards and sanctioning impermissible deviations. However, if we learn what rules and principles require only by assessing their use in various circumstances, then such a static form of accountability cannot avail. We cannot specify the relevant standards in sufficient detail without arbitrarily curtailing the inquiry into their contextual requirements. When our objectives are uncertain, we cannot afford to cease experimenting with the means by which we pursue them. Rather, Sabel argues, we require a “dynamic” or “peer review” form of accountability, in which participants must explain their conduct in light of its effects, their circumstances and the choices made by others in similar circumstances. They must make a coherent contribution to this necessarily collaborative inquiry, with the criteria for coherence defined by what their collaborators require to return the favour.

Dynamic accountability does not require a pinnacle authority, such as a legislature or an electorate, to delegate responsibility according to a precise mandate. Instead, it requires a sense of shared fate and institutions capable of harnessing and reinforcing that interdependence by requiring participants to explain their differences in a manner that illuminates a common predicament. Such peer review reveals the debates among experts and exposes their fallibility to those affected by their decisions, thus encouraging a more inclusive practice of justification and suggesting that democrats have less to fear from experts than they might have thought. For Sabel, “[a]ccountability generically understood means presenting the account of one’s choices that is owed to others in comparable situations.” It means acting as though you are engaged in a common endeavour: an endeavour that imposes demands on participants rather than the reverse, and treating others as fellow conscripts by offering them an account of your conduct that aspires to satisfy those demands, with the intention of enriching rather than ending the endeavour.

258 See e.g. ibid at 335.
260 See e.g. ibid at 313.
B. Dyzenhaus

David Dyzenhaus shares this commitment to a culture of justification. In fact, he shares quite a lot with Sabel. For example, his work can be interpreted as an attempt to defend democracy against another serious threat: the state of emergency. To this end, he renovates a familiar suite of ideas: democracy, law, constitutionalism and accountability. Known to some as a champion of common-law constitutionalism, Dyzenhaus is better understood as a pragmatic democrat. He appreciates the common law tradition as a rich and prominent expression of the pragmatist insight that we determine not only our ends and means but also the manner in which they are related: by treating each exercise of legal authority as an expression of legal values, the common law tradition instigates public deliberation about what the rule of law means and how specific acts of law relate to it. He also draws deeply from theorists, such as Hermann Heller and Thomas Hobbes, who were unconcerned with or even hostile to the common law tradition. Finally, he is interested in the roles that institutions other than courts can play in determining the content of law and its values. By treating his contributions to constitutional thought as instances of an ongoing effort to equip democracy against emergency, we can avoid the distortion that results when one element of a whole is considered out of context.

Dyzenhaus believes, as does Sabel, that legal and political theorists have an important yet limited role to play in this contest. Theories of law and politics elaborate political commitments by reflecting on practices that embody those commitments. Theorists who treat conduct as an expression of such commitments adopt an interpretive stance that enables them to refine the valuable tendencies they perceive in practice without viewing their theories as partisan political weapons. Theory can provide a critical resource for evaluating conduct in relation to certain beliefs, but its impact on conduct is always indirect. For theorists committed to democracy, no theory is above actual political debate. Theory does not resolve truths about politics: only politics

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262 See e.g. Thomas Poole, “Constitutional Exceptionalism and the Common Law” (2009) 7 Int’l J Const L 247 [Poole, “Constitutional Exceptionalism”].


266 Dyzenhaus, Legality and Legitimacy, supra note 264 at 5.

267 Ibid at 179.

Nonetheless, theory can be practical while remaining distinct from practice by highlighting the possibilities produced by our actions.

Dyzenhaus is concerned primarily with the possibility of democracy. He describes his understanding of democracy as deliberative: it consists in citizens determining the content of the law that governs their association by exchanging ideas and arguments about what their democratic experiment requires. These deliberations are not limited to election campaigns or parliamentary debates, and while their results are “translated into law” this does not mean that they cease upon the enactment of a statute or any other legal instrument. Indeed, the responsibility for determining the content of law is shared by all constituents of the legal order: all institutions that purport to act in accordance with law, as well as individuals subject to law. Further, the endeavour to rule by law requires knowledge of what law requires from those who use it. For a law is not just the expression of political will; it is the expression of political will in the form of law.

Democratic deliberations seek not only to set the terms of association but also to make sense of the effort to do so through law. They try to understand the requirements of law by treating every legal act as an expression of those requirements and thus a contribution to the rule of law: the practice of defining the fundamental elements of legal order in light of the actions taken to establish them and interpreting those actions in light of the order they illuminate. A legal act obtains its status as law not simply from its form and pedigree, but from the reasons given to justify it during democratic deliberations, which must be legal reasons: reasons that reveal the relationship between the act in question and the effort to secure the rule of law. For Dyzenhaus, democracy is thus intimately connected with the rule of law: democracy aspires to establish the rule of law, but the aspirations of the rule of law are evinced only by democratic deliberations.

He distinguishes liberals from democrats on this basis. The former seek to place their preferred political principles beyond the reach of deliberation or, more precisely, to present such principles as intrinsic to it. Democrats do not deny that there are values and even practices inherent to deliberation. They do, however, insist that such values and practices can only be determined by deliberating: by inquiring into the requirements of inquiry and not by stipulating them

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260 See e.g. Dyzenhaus, *Legality and Legitimacy*, supra note 264 at 254-57.
261 Ibid at 177.
262 See e.g. David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 Queen’s LJ 445 at ¶114 and 120 [Dyzenhaus, “Fundamental Values”].
265 Ibid at 159 and 165.
266 See e.g. Dyzenhaus, *Legality and Legitimacy*, supra note 264 at 16-17, 219-233 and 248.
Following the odd couple of Hobbes and Lon Fuller, Dyzenhaus argues that law is not the command of the sovereign but a conversation between sovereign and subject about the appropriate terms for their relationship. Since democracy is the practice by which citizens determine the content of law, this conversation takes the form of widespread and evolving democratic deliberations.

Some theorists believe this conversation is suspended or even terminated during a state of emergency. These theorists, and those citizens and officials who share this belief, understand a state of emergency as something that, to varying extents, requires suspension of the rule of law. For Carl Schmitt, the democratic conversation about the rule of law never arose because the sovereign exists beyond law and yet is the source of law. In any case, the sovereign always possesses the power to decide unilaterally whether an emergency exists and, if so, how to respond. Schmitt was a partisan. He attacked any attempt to constrain political power with law, whether liberalism, parliamentary democracy or positivism, as paradoxical and hollow. Schmitt also embraced irrationality. He wrote in a deliberately unsystematic fashion and used a patently incongruous argument to deny reasons a role in politics. He claimed that justification could occur only within his ideal of a substantively homogeneous political community, but such a community would find justification both redundant and alien, since it would by definition enjoy complete consensus and transparent communication and its democracy would consist of popular acclaim rather than public deliberation. For these and other reasons, Schmitt is perhaps Dyzenhaus’s nemesis, but Dyzenhaus does not meet his polemics against law, reason and democracy with a screed of his own. Instead, he chooses law (and thus democracy) and seeks to show that we have the conceptual, institutional and moral resources to address emergencies within the law.

He argues that, from the perspective of those committed to the rule of law, there simply is no such thing as political power beyond the reach of law. For such theorists, citizens and officials,

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277 Ibid. at 255; Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 178-80.
278 See, e.g., Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274 at 155; Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 171-74.
280 Dyzenhaus, Time of Emergency, supra note 5 at 39.
281 Ibid at 60.
282 See e.g. Dyzenhaus, Legality and Legitimacy, supra note 264 at 82 (democracy), 97 (liberalism) and 106 (positivism).
283 Ibid at 41.
284 Ibid at 50 and 56. See also Carl Schmitt, The Concept of the Political (Chicago: University of Chicago Press, 2006) at 35, 38 and 47-49.
286 See e.g. Dyzenhaus, “Schmitt v. Dicey”, supra note 268 at 2036.
there are no holes in legal order and there is no such thing as unconstrained discretion.\textsuperscript{287} A state of emergency is a legal response to a political crisis: it is identified, defined and resolved, if at all, within law.\textsuperscript{288} From this perspective, legal positivists such as H.L.A. Hart appear to place a permanent state of emergency around the core of their concept of law.\textsuperscript{289} Those theorists understand law as composed of rules that judges can interpret and apply by reference only to other such rules: law contains no other resources and if a judge were to look beyond law then he would no longer be judging.\textsuperscript{290} However, due to factors such as the inherent ambiguity of language, rules are never entirely determinate. Rather, they are composed of a relatively determinate core surrounded by a less determinate penumbra. Within the central zone of clear meaning, a judge can apply a rule in mechanical fashion. But law falters in the hazy periphery: a judge can employ pragmatic techniques of interpretation to reduce the fog of uncertainty, but faced with irreducible indeterminacy judges must simply decide.

According to legal positivists, such a decision makes law and is thus the exercise of discretion unconstrained by law. Since the boundary between core and penumbra is not itself clear, this perspective risks the gradual erosion of law by political decisions about where law ends.\textsuperscript{291} Dyzenhaus argues that this sort of conceptual legal positivism is increasingly detached from legal practice, since it ignores the widespread use of legal principles and legal reasons by courts and other institutions.\textsuperscript{292} The problem is not so much the idea of indeterminacy as it is the ideal of a determinate rule: one that judges can identify and apply by reference only to other such rules.

This ideal demonstrates a misunderstanding of how we use rules, including rules of law.\textsuperscript{293} Laws do not determine conduct. They provide an opportunity to assess the relationship between action and aspiration, including the aspiration to act in accordance with law, and to adjust each accordingly. They treat subjects as agents capable of performing this assessment and contributing to the conversation about this unfolding relationship. Dyzenhaus joins Fuller and other theorists in attempting to fill the gaps in this positivist understanding of law by investigating the role of law in such deliberations.

In recent years, he has focused on the political challenge presented by the notion of emergency. He has assembled a depressing anthology of historical and contemporary attempts to move beyond the pale of law in response to an emergency. The means range from various schemes

\textsuperscript{287} Dyzenhaus, \textit{Time of Emergency}, supra note 5 at 133 and 206.
\textsuperscript{288} Dyzenhaus, \textit{Legality and Legitimacy}, supra note 264 at 209.
\textsuperscript{289} See e.g. ibid at 15; Dyzenhaus, \textit{Time of Emergency}, supra note 5 at 60.
\textsuperscript{290} For a classic statement, see HLA Hart, \textit{The Concept of Law}, 2\textsuperscript{nd} ed (Oxford: Oxford University Press, 1997). See also Dyzenhaus & Taggart, “Reasoned Decisions”, \textit{supra} note 274 at 163.
\textsuperscript{291} See e.g. Dyzenhaus, \textit{Legality and Legitimacy}, supra note 264 at 15.
\textsuperscript{292} Dyzenhaus, \textit{Time of Emergency}, supra note 5 at 225-27.
\textsuperscript{293} Dyzenhaus & Taggart, “Reasoned Decisions”, \textit{supra} note 274 at 160.
for the detention of apparently sinister individuals to imperial declarations of martial law. Some theorists argue these cases teach us to expect little from judges in times of emergency: due to their traditional place in the separation of powers, they lack the information and other resources necessary to contest the difficult decision made by the executive (and sometimes the legislature) to operate outside of law. In contrast, Dyzenhaus believes that, although we can use law to escape the “legal frame,” judges and all other officials have a responsibility to keep us within it: they should strive to interpret even the most blatant attempts to shed the constraints of law as expressions of the rule of law; they should articulate the legal values and principles on which they rely, in order to maintain these substantive resources; and if, despite such efforts they cannot construe such laws as consistent with the rule of law, they should make clear the implications of that conclusion. Not only should judges resist acknowledging legal black holes, in which law is used to create “a lawless void…in which the state acts unconstrained by law,” they also should avoid creating or even endorsing legal “grey holes,” in which subjects “are given some legal protections but the protections are not sufficient to permit them to contest the basis of the preventive measures taken against them.” The latter are the more insidious threat. They employ a veneer of legality, such as a weak administrative regime approved by a deferential judicial opinion, to create the appearance of compliance with the rule of law while departing from it in substance.

Dyzenhaus demonstrates that judges not only should do such things but also can do them. Judicial failures to uphold the rule of law are distressingly familiar, but they are not fatal to the endeavour and we can learn from them. For example, he studies the dissents from classic cases of judicial deference to executive actions in times of crisis to show that these canonical decisions could have been different because the law has the resources required to deal with emergencies. He also surveys institutional experiments in search of innovative procedures that can address novel threats without abandoning or compromising the commitment to law.

Law and the commitment to it consume a great deal of his attention. His discussions of law and law-related themes are rife with complex, interconnected concepts. To unpack what Dyzenhaus thinks about law, we might start with a rare reference to “law itself”: “[w]e cannot understand law itself unless we see law as a project which aspires to realize the values of the rule of law.”

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295 See e.g. ibid at 2016-21.
296 See e.g. ibid at 2025 and 2036; Dyzenhaus, Time of Emergency, supra note 5 at 15 and 217-18; Dyzenhaus, “Martial Law”, supra note 294 at 30.
298 Ibid at 2018.
299 Dyzenhaus, Time of Emergency, supra note 5 at 63.
300 Ibid at 171-72 and 230. See also, Dyzenhaus, “International Law”, supra note 265 at 140-52.
301 Dyzenhaus, Time of Emergency, supra note 5 at 231.
important to observe that this statement concerns not only the nature of law but also the proper method for understanding it. Dyzenhaus employs a purposive approach to interpretation. He seeks to understand things, including laws, in light of the purposes they serve or the ends to which they aspire, and he encourages those who work with law to do the same. For example, he argues that judges should resist rigid, formal accounts of the separation of powers in favour of an account that emphasizes the end served by constitutional form: the rule of law. However, due to its rigour, his purposive approach shades into a pragmatic one. He acknowledges that each purpose (i.e. the rule of law) has its own purpose (i.e. the dignity of individuals subject to law), which renders provisional the distinction between ends and means, and that our understanding of each purpose evolves as we reflect upon efforts to attain it, which ensures that the inquiry is never complete.

With his method in mind, we can more effectively parse his statements about law. We know that, for Dyzenhaus, law is not a concept but a project that seeks to apprehend and establish the values of the rule of law. This “rule-of-law project,” inherent in law itself, enlists all legal institutions in the effort both to understand and to entrench the rule of law. This effort may even require the adoption of new practices and the creation of new legal institutions, since incumbent arrangements may hinder their purposes in circumstances that differ from those in which they emerged. Individual laws, whether in the form of constitutions, statutes or judgments, are understood to contribute to this project by providing evidence of “the unwritten constitution of legality,” which itself “consists in the values and principles that together make up the idea of the rule of law or legality.” This understanding is something that Hobbes, Heller and Fuller each share with the common law tradition. It also connects, at least conceptually, particular instances of law with the rule of law, which for Dyzenhaus is both essential and somewhat elusive.

He summarizes the rule of law as “the actual requirements of the law, a structure whose components embody the fundamental or constitutional values of legal order.” It is what law must be in order to be law. Elsewhere, he refers to the basic values of legal order as belonging to the rule of law itself, so that the rule of law can be conceived as a composite structure whose parts express its

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302 See e.g. Dyzenhaus, “Hobbes and Legitimacy”, supra note 264 at 493-94; Dyzenhaus, Legality and Legitimacy, supra note 264 at 210.
303 See e.g. Dyzenhaus, “Fundamental Values”, supra note 272 at ¶114; Dyzenhaus, “International Law”, supra note 265 at 151-52.
304 See e.g. Dyzenhaus, “Martial Law”, supra note 294 at 56-57.
305 See e.g. Dyzenhaus, Time of Emergency, supra note 5 at 4 (“Law presupposes the rule of law”) and Dyzenhaus, “Schmitt v. Dicey”, supra note 268 at 2036-38.
306 Dyzenhaus, Time of Emergency, supra note 5 at 11.
307 Dyzenhaus, “International Law”, supra 265 at 139 and 147, n 79.
308 Ibid at 163 (Hobbes); Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274 at 154 (Hobbes and Fuller); Dyzenhaus, Legality and Legitimacy, supra note 264 at 200 (Heller).
309 Dyzenhaus and Taggart, “Reasoned Decisions”, supra note 274 at 156.
fundamental values. This structural conception ensures that the rule of law is not equated with the values it is supposed to serve. He also describes how the rule of law works: it “constrains what we think of as arbitrary power by subjecting individuals to arbitrium, a carefully structured and disciplined process of judgment.” So the structure of the rule of law binds political power with law by imposing a decision-making procedure on the subjects of law, citizens and officials alike. But this is not the whole story, for the rule of law has an alias: legality.

Dyzenhaus employs both terms routinely but rarely admits that they are identical. However, he has written that judges have “a duty to the rule of law or legality, a rule which includes both procedural and substantive values.” In addition, he has described the unwritten constitution as composed of “the values and principles that together make up the idea of the rule of law or legality.” The equation is subtle but certain. In turn, legality appears to have multiple meanings. In a single article, he describes it as “the presuppositions of the idea of legal justice,” “the practice of governing by law” and “a substantive conception of the rule of law.” However, these competing descriptions can be reconciled by a more resonant one.

Dyzenhaus also characterizes legality as “the process whereby decisions with the force of law are produced.” Since it is the decision-making process intrinsic to the rule of law, legality is all of the above: a condition of law itself, for law presupposes the rule of law; the practice of using law to discipline politics; and the process that ensures the rule of law is not purely formal. Since the rule of law is also legality, it is both the structure that requires the process and the process that posits the structure. More concretely, the rule of law is the practice of elaborating the relationship between laws and the fundamental values they express by interpreting each in light of the other.

A purposive digression can further illuminate this practice. Dyzenhaus argues that the point of the rule of law is to impose controls on political power “that ensure it is exercised in the interests of those affected by it.” He also describes that purpose as “the pull of justification,” which is the sense that public power is authoritative “when and only when it justifies its exercise to those whom it affects.” Again, a legal act derives its status as law not from its formal pedigree but from its relationship with the basic values law serves. This relationship is demonstrated by the reasons that can be and are given for the act, which again must be legal reasons: they must draw on resources.

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310 See e.g. Dyzenhaus, “International Law”, supra note 265 at 131.
312 Dyzenhaus, Time of Emergency, supra note 5 at 100.
313 Dyzenhaus, “International Law”, supra note 265 at 147, note 79.
315 Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 130.
316 Dyzenhaus, Time of Emergency, supra note 5 at 4.
318 Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274 at 152 and 166.
provided by law to show that the act is consistent with the fundamental values of law. These resources include the “artificial reason” that laws express and that “draws on a public stock of those moral values that are fundamental to a society and hence considered to be part of its legal constitution.” Artificial reason is the label applied by the common law tradition to the values of the rule of law. Artificial reason is opposed to private reason. It is deliberative rather than pensive, and since it is expressed in positive law it is manufactured by democratic procedures.

Since the purpose of law is to establish the rule of law and the purpose of the rule of law is to inculcate such a “culture of justification,” law can be understood to require that all legal decisions be accompanied by written reasons, unless an exception can be justified on the basis of other legal reasons. Two similarities with Sabel are worth noting here. First, Dyzenhaus understands law as the ongoing practice of making law by making laws: constitutional provisions, legislative enactments, judicial opinions, executive orders and administrative decisions all require justification, which entails elaboration of certain values of the rule of law, which in turn warrant renewed scrutiny and adjustment of particular rules of law and thus perpetuate the commitment to law. Second, his conception of law converges with his conception of democracy: law cannot be a mere instrument of democracy because democracy consists, to a large extent, of deliberations about what law is.

The two theorists also share a relatively direct approach to constitutionalism. Dyzenhaus defines it as “the project of achieving government in accordance with the rule of law.” He argues that this project involves ongoing collaboration among all the institutions of legal order to articulate and re-articulate the principles of the rule of law by justifying their acts in terms of those principles. By now, we can recognize constitutionalism as another vehicle for the aspirations of law itself to realize the rule of law. While common law constitutionalism illustrates this understanding of constitutionalism, other illustrations are conceivable. He is interested in common law constitutionalism because it so clearly embraces the practice of the rule of law, in which rules and the values they serve are elaborated reciprocally through public deliberations. This affinity with the effort to realize the rule of law precludes any notion of constituent power: a power that is simultaneously beyond law and the fount of law. The rule of law entails the belief that the use of law commits those who exercise political power, on pain of public contradiction and perhaps much

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319 Ibid at 152.
320 Ibid at 166; Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 162-64.
323 See e.g. Dyzenhaus, “Fundamental Values”, supra note 272 at ¶110.
324 Dyzenhaus, Time of Emergency, supra note 5 at 17.
worse, to justify their acts in terms of basic legal values.\textsuperscript{325} Further, it means that constitutionalism (like democracy) cannot be understood as the endeavour to entrench particular moral or political principles, because constitutionalism entails a commitment to revise one’s principles in light of the efforts to realize them.\textsuperscript{326} Finally, it means that constitutionalism (again like democracy) cannot be identified with the presence of a particular institutional settlement or the maintenance of a particular separation of powers because the rule of law often requires institutional experiments: the values of the rule of law may form a seamless whole, but our understanding and expression of them is always incomplete and open to improvement.\textsuperscript{327} It seems Sabel would recognize much in this account of constitutionalism, as Dyzenhaus would in his.

They converge yet again on a conception of accountability, although this is not immediately apparent. Sabel offers a model of peer-review accountability to match his understanding of law and democracy, in which parties engaged in a collaborative effort to solve a common problem become accountable by explaining their conduct to each other. This practice requires the parties to reflect on their choices and articulate the reasons for them, which will include the choices made by others facing a similar problem and the ways in which their circumstances and results differ. It is intended to foster and facilitate debate among the parties involved and those affected by their decisions, and thus gradually expand and enrich the practice of justification.\textsuperscript{328} For his part, Dyzenhaus offers what may seem to be two different notions of accountability. First, he argues that the decision to govern through law allows the ruler to be held accountable to the ruled. Positive law provides a visible and contestable standard for official conduct and thus demands justification.\textsuperscript{329} Second, he claims that the decision to govern through law entails accountability “to law, not to any individual or group – to the law that the sovereign makes and to the laws of nature.” Positive law provides not only a standard for official conduct but also an expression of the basic values of law and thus demands justification.\textsuperscript{330} However, on closer look, all three positions are consistent.

Both theorists expect that the reasons used to justify or condemn an act of law will be offered to subjects and officials alike. Where they seem to differ is the direction in which the resulting accountability runs: to one’s peers, to one’s subjects or to law itself. As should be clear by now, law is always the answer. Consider the first version of accountability described by Dyzenhaus, in which the ruler is accountable to the ruled. This relationship arises only because the ruled are ruled \textit{by law}: not directed by the ruler’s unformed will or oppressed by his despotic deeds but

\textsuperscript{325} See e.g. Dyzenhaus, “Constituent Power”, supra note 322 at 144-45.
\textsuperscript{326} Ibid at 140-43.
\textsuperscript{327} See e.g. Dyzenhaus, \textit{Time of Emergency}, supra note 5 at 206 and 230.
\textsuperscript{328} See e.g. text accompanying notes 219-22 and 227-28, supra.
\textsuperscript{329} Dyzenhaus, \textit{Legality and Legitimacy}, supra note 264 at 210 and 250.
governed by acts in the form of law. To maintain that relationship of sovereign to subject, the
former must continue to act in accordance with law, which means his actions must be capable of
being interpreted as contributions to the rule of law, which in turn means that they must be capable
of being scrutinized for consistency with rule-of-law values. For the ruler to be accountable to the
ruled (understood as the subjects of law), the ruler must demonstrate his fidelity to law (understood
as the project of realizing the rule of law) by acting in a fashion that can be explained as part of that
project, which includes fostering an institutional settlement and a civic culture in which such
explanations can be articulated, publicized and debated. A ruler who is accountable to the ruled must
be accountable not directly to their personal interests but to the procedure by which their interests
are formulated and expressed publicly: the procedure of democratic deliberation intrinsic to the
earnest use of law, in which reasons are given to relate legal acts with basic legal values. This is
precisely the sort of accountability Dyzenhaus describes as accountability “to the law that the
sovereign makes and to the laws of nature”: the public practice of giving reasons keeps both in view.

Sabel’s notion of peer-review accountability also can be understood as accountability to law,
once law is understood as the practice of making law. For him, laws are provisional frameworks for
conduct and the revision of conduct in light of new circumstances. Particular enactments or
judgments cannot be separated from attempts to employ and develop them in an unfamiliar or
unexpected context. This development properly takes the form of an explanation that relates the
path chosen to the particular circumstances and to the paths charted by persons or institutions
engaged in similar activities. Such explanations demonstrate fidelity to law by drawing on other
explanations and providing fodder for further efforts to amend and adjust the laws in question.

Since they share this understanding of accountability, it is unsurprising that they also agree
on the corresponding approach to judicial review. Sabel argues that, in a constitution of democratic
experimentalism, courts would review not the substance of the decisions made by dispersed public
problem-solvers but the procedures by which those decisions were made. Courts would look to
whether the actor under review considered the solutions attempted by others facing similar problems
and, if so, how the actor adjusted its practices in light of those possibilities and its own
circumstances. As a practical matter, such review would be possible only if the actors subject to it
provided detailed reasons for their decisions.331 Dyzenhaus argues that, as part of the collaborative
project to establish the rule of law, judges should not assert privileged knowledge of what the rule of
law requires but should defer to the decisions of other institutions where they do a reasonable job of
justifying their interpretation of the law and its values. A legal institution can justify its actions only
by providing reasons that demonstrate how those actions serve the values of the rule of law. Since

331 See e.g. Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 339-40 and 388-89; Sabel & Zeitlin,
our understanding of those values evolves with our attempts to realize them, no single institution can claim a monopoly on them.\textsuperscript{332} For both theorists, judges have a responsibility to perpetuate this public inquiry into the meaning of our basic commitments as our circumstances, our best account of those commitments and our methods of inquiry evolve.

In summary, Sabel and Dyzenhaus agree. They agree on the proper role for theory in the practice of law and politics: modest and interpretive. They agree on the need to defend democracy from some contemporary menace: expertise and emergency, respectively. They agree that democracy is best understood as an inquiry in which citizens learn to define and attain their common goals, and that constitutionalism is best understood as the project of sustaining this inquiry by cultivating citizens who conceive their political community in terms of the commitments evinced by its practices. They agree that accountability consists in offering an account of your conduct that not only enables your peers to scrutinize your performance and contributes to the standards by which they will be judged but also confirms your commitment to a common endeavour (and its intrinsic goods) and expresses your expectation that they share that commitment. And they agree that judges can contribute to accountability in a democracy by insisting that every legal decision be accompanied by reasons that articulate how it bears on the values it is supposed to serve.

C. Pragmatism and the Truth about Truth

They agree on virtually every aspect of this elaborate scheme because they share a more basic idea. This idea, in the words of notorious pragmatist Charles Sanders Peirce, is “the conception of truth as something public.”\textsuperscript{333} Dyzenhaus is candid: he expressly adopts Peirce’s perspective as his own. For the former, truth is “what an unlimited community of inquirers would agree upon, were inquiry to be as diligently pursued as far as it could fruitfully go.”\textsuperscript{334} For comparison, Peirce defines truth as “[t]he opinion which is fated to be ultimately agreed to by all who investigate.”\textsuperscript{335} For both men, truth is an aspiration we can neither abandon (because it is intrinsic to the belief in an intelligible world that our endless schemes evince) nor attain (because our communities are always finite and our inquiries always en route).\textsuperscript{336}

\textsuperscript{332} See e.g. Dyzenhaus, \textit{Time of Emergency}, supra note 5 at 147; Dyzenhaus, “Fundamental Values”, supra note 272 at ¶¶113-121.
\textsuperscript{334} Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 179.
\textsuperscript{335} Charles S Peirce, “How to Make our Ideas Clear” in Louis Menand, ed, \textit{Pragmatism: A Reader} (New York: Vintage Books, 1997) 26 at 45 [Peirce, “Ideas”]. See also Peirce, “Fixation”, supra note 333 at 21, where he insists that the method used to produce true beliefs “must be such that the ultimate conclusion of every man shall be the same.”
\textsuperscript{336} Peirce, “Ideas”, supra note 335 at 33 and 45; Dyzenhaus, “Legality of Legitimacy,” supra note 263 at 179.
For his part, Sabel is somewhat reticent. He does acknowledge that “the pragmatist account of thought and action as problem solving” introduced by Peirce, Dewey, William James and others provides the context for his models of contemporary democracy and constitutionalism.337 As James famously observed, we believe; we cannot help ourselves.338 However, our actions betray our beliefs in two senses: first, they reveal our beliefs by furnishing evidence of their existence and content; second, they test our beliefs by unleashing consequences that can challenge and sometimes upset them. Thus action prompts doubt, which is not a state of enervating skepticism so much as a spur to examine that belief which has failed to guide our conduct to the desired destination.339 Sabel and Dorf describe it as “an urgent suspicion that habitual beliefs are poor guides to current problems.”340 And thus doubt prompts inquiry; and inquiry, like all conduct, conscripts certain beliefs. In the case of inquiry, the key belief is belief in a reality we can know so long as we are properly equipped and sufficiently dedicated.341

This is all quite abstract, but if we apply what Peirce calls the pragmatic method to this idea of a comprehensible reality, if we “trace out in the imagination the conceivable practical consequences, - that is, the consequences for deliberate, self-controlled conduct, - of the affirmation or denial of the concept,” we arrive at the public notion of truth he espouses and Dyzenhaus endorses.342 For what follows from the concept of reality proposed by James and adopted by Sabel is the possibility of truth: the possibility of a belief that provides an infallible guide to conduct and thus offers no opportunity for doubt.

Truth lies in the exhaustion of inquiry; it is what remains when we no longer feel compelled to inquire. Truth is the end, both the target and the terminus, of doubt. Truth is inseparable from the inquiry that yields it.343 Truth is not a property of those beliefs that rational persons would accept if they were to conduct an ideal inquiry. Rather, it is what we will accept once we have asked the last question, run the last test, performed the last experiment: what we will be unable to doubt.

338 William James, “The Will to Believe” in Louis Menand, ed, Pragmatism: A Reader (New York: Vintage Books, 1997) 69 at 75 (“As a matter of fact we find ourselves believing, we hardly know how or why.”) [James, “The Will to Believe”].
339 Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 285. Peirce describes doubt as an “irritation” that is “the motive for thinking” and that is appeased by belief. Peirce, “Ideas”, supra note 335 at 32-33.
341 James, “The Will to Believe” supra note 338 at 75 (“Our belief in truth itself, for instance, that there is a truth, and that our minds and it are made for each other.”) and 81 (“We still pin our faith on its existence and still believe that we gain an ever better position towards it by systematically continuing to roll up experiences and think.”).
Of course, we will not know whether we have reached the end of inquiry until we do in fact reach it and find ourselves unable to go further, at which point everyone who has felt the pangs of doubt will have also felt them fade away.\textsuperscript{344}

So we are left to seek truth in a world beset by uncertainty. Since truth is both what motivates and what survives inquiry, it must be anticipated in order to devise the practices by which it is pursued, but it cannot be invoked to insulate those practices from scrutiny and revision. When Sabel and Dyzenhaus write about law, democracy and constitutionalism, they wrestle with one aspect of this dilemma: how can we practice, let alone master, these disciplines if we cannot confidently state what they demand of us?

The two scholars use the same strategy to answer this challenge: they observe that we do engage in law, democracy and constitutionalism, notwithstanding our imperfect knowledge, and then set out to learn how we do so. Although we are plagued by doubt, we are not paralyzed by it. We often act and talk as though we know the truth about the world we inhabit: we build spacecraft in reliance upon our knowledge of the physical properties of our world; we make claims about the good life in reliance upon our knowledge of its moral characteristics; and we design public institutions in reliance upon our knowledge of the nature and needs of our communities. In other words, we have criteria for deciding when to suspend doubt, halt inquiry (which often takes the form of debate) and act upon what we know to be true at that time.

These criteria are conventional. Even the most intimate knowledge, such as knowledge of my love for another person, is intimate by convention. Although that knowledge is not itself objectively verifiable, the considerations by which I reach it are. A declaration that I love a person I have never met or who has threatened to harm me is cause not for celebration but for concern and perhaps some sort of intervention. Science and politics, to take two other modes of conduct, proffer their own more explicit (and more explicitly public) standards for determining when we have done a good enough job of trying to reach the right answer to stop asking a particular question: for science, formal experiments with replicable results announced in a peer-reviewed publication; and for politics, some combination of democratic elections, transparent rule-making procedures and adjudication in accordance with principles that aim, if not at neutrality, at least at general acceptability.

Although they must be conventional, these criteria need not be arbitrary. For pragmatists like Sabel and Dyzenhaus, they have a purpose: to bring us closer to the truth. They permit us to articulate and test the prevailing consensus. Then we can revisit and revise our beliefs, goals and practices, which include the norms and procedures we use to circumscribe debate, in light of the results. Our conduct commits us to inquiry without end because it puts our ideas in play: it invites

\textsuperscript{344} James, “The Will to Believe,” \textit{infra} note 338 at 77.
outcomes that in turn invite interpretation, explanation and adaptation. It is premised upon the unshakable belief that we can and do know the truth, even if we could always know it a little better. It embodies our irrepressible aspiration to confront, understand and harness reality.

Sabel and Dyzenhaus contend that democrats can, and should, make this aspiration more explicit. For both theorists, democracy requires regular debate about the requirements of democracy. Peer-review accountability, for example, promises to expand and enrich democracy by requiring those who participate in efforts to solve public problems to justify not only their decisions but also the procedures by which they make them. Similarly, the rule-of-law project aims to elaborate and strengthen the rule of law by roping ever more individuals and institutions into investigating its imperatives. Since we cannot predict the results of such inquiries, we cannot abide attempts to dictate them without abandoning the call to inquiry, nor can we abide efforts to restrict our inquiries on terms that are not themselves provisional.

In this spirit, Dyzenhaus identifies the two conditions for a legitimate closure of democratic debate absent consensus: first, the decision to conclude debate must be “based on the best evidence and arguments available”; and second, the closure must be provisional. In other words, it must be “open to revision in the light of future experience.” Clearly, these conditions are not determinate: they anticipate additional institutionalized inquiries that they do not purport to specify. However, that is the point. Concerned immediately with the temporary resolution of democratic debate, they are ultimately intended to sustain such debates and foster the culture of justification in which such debates thrive.

Sabel’s models of democratic experimentalism and directly deliberative polyarchy express the same basic concerns in greater institutional detail. Each scheme involves flexible procedures designed to arm participants with not only the best information available about the problem at hand but also the ability to adapt that information to their circumstances, change how they work in order to improve their results and ultimately enhance both regulatory outcomes and democratic practice. He argues that, as participants learn to coordinate and compare their efforts to solve similar problems in similar situations (which are also slightly different problems in slightly different situations), they will transform their differences from impediments into resources equal to the contemporary demands of democracy and constitutionalism.

Sabel and Dyzenhaus share a commitment to deliberation, experimentation and revision that goes deeper than progressive rhetoric or stylish jargon. It is inseparable from their conception of truth as something public, something that can be approached only by working with others to define

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345 Dyzenhaus, “Legality of Legitimacy”, supra note 263 at 180.
and resolve our doubts. Like Habermas, Waldron, Tully and Bellamy, Sabel and Dyzenhaus also construct their theories of constitutionalism upon a truth about something else: a truth about truth. However, unlike those theorists, they put this meta-truth to modest ends by qualifying their theories as interpretations to be elaborated, hypotheses to be tested, invitations to be answered by academics and citizens alike.

4. Reclaiming Common Ground

In other words, they risk disappointment, as their explorations of institutional marginalia and epochal crises offer no obvious palliative (let alone cure) for the anger, apathy and bewilderment that sap so many constitutional democracies today. Sabel and Dyzenhaus expect a lot from citizens: perhaps more than people in rich, peaceful countries, disheartened by economic malaise, political stagnation and cultural angst, are willing or able to give. Their catalogues of transparent procedures and justification frameworks might seem even less relevant to democrats in South Asia, Africa and the Middle East, where ethnic conflict often presents a genuine existential crisis. But the practical value of their work will be determined in practice. The role of theory is to help us ask questions, not to answer them. Good theory sharpens our sense of intellectual and moral responsibility to make good political decisions. Their project may prove futile if citizens cannot bear that responsibility, but in that case disappointment would be the least of our worries. For concerned theorists, two options remain: expansion and refinement.

Expansion would entail the identification of other theorists whose work reveals additional elements of this pragmatic approach to democracy, constitutionalism and theory. For example, both Sabel and Dyzenhaus respond to the work of influential members of the Legal Process School associated with Harvard Law School in the 1940s and 1950s. Sabel recognizes the contributions made by Henry Hart and Albert Sacks, who literally wrote the book on the subject. However, he also questions two of their fundamental assumptions: that the institutions of the post-war American administrative state exhaust the realm of possibility and that the capacities of those canonical institutions are fixed. He thus challenges basic components of the consensus on institutional competence and design that dominated American legal thought for the last half of the 20th century.

Dyzenhaus adopts a more deferential stance towards Lon Fuller, whose early affiliation with the Legal Process School faded as he set out to explore the formal requirements of law. He accepts that there are forms and limits of adjudication but tries to show that these are not as firm as Fuller

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347 For a dramatic account of Western anomie and decline, see Chris Hedges, The Empire of Illusion: The End of Literacy and the Triumph of Spectacle (Toronto: Vintage Canada, 2009).
appeared to believe. He explains how courts, at least in some Commonwealth countries, have crafted a role in solving polycentric problems in a manner consistent with democracy: they require reasons from administrative bodies, so that technical efforts to solve new problems neither eclipse public participation nor compromise the rule of law. He documents the richness of “official” law, which in practice can involve much more than commands that impose order.

As with the early American pragmatists, a closer look at these members of the Legal Process School might reveal more of the basic concerns that motivate Sabel and Dyzenhaus. Another source of insight might be their respective collaborators, from Joshua Cohen to Michael Taggart. Compared, these scholars might spark unexpected affinities and antagonisms that light up corners of the theoretical terrain our protagonists have yet to explore. However, the risks of expanding the circle of inquiry in this fashion at this time outweigh the potential benefits. More scholars, whether canonical or contemporary, would mean more concepts to corral and more styles to assimilate. It would mean more abstraction and, in all likelihood, more alienation from unsympathetic academics and uninterested citizens.

Expansion would show how similar Sabel and Dyzenhaus are to other scholars. It would be an effective response to the charge that their position is idiosyncratic and marginal. It also would presume exactly what this chapter aims to establish: that Sabel and Dyzenhaus share a theoretical position that is both distinct and viable.

Refinement is the better strategy for this task. Like expansion, it assumes that the two scholars share common ground: for refinement to occur, there must be something to refine. But it makes this assumption in order to permit critique and improvement. Refinement aims to distinguish their position by sharpening its boundaries and clarifying its content. It is not an alternative so much as a precursor to successful expansion.

There are at least three ways to refine the position Sabel and Dyzenhaus occupy: to analyze its internal tensions; to address its critics; and to test its mettle in a case study. The remainder of this chapter pursues the first two in preparation for the third, which consumes the rest of this book.

A. Tensions and Ironies

The purpose of examining those inconsistencies is not to eliminate them. So neat a result would indicate a lack of discernment or rigour. Rather, the purpose is to separate the apparent from the inherent: to identify the ironies that define their position. There are six candidates. The first three are obvious but soluble; the latter three endure.

352 See e.g. Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274. See also Lon L. Fuller, “The Law’s Precarious Hold on Life” (1969) 3 Georgia L. Rev 530.
i. Concrete and Abstract

First, Sabel and Dyzenhaus may seem to juxtapose two registers of analysis: the concrete and the abstract. Procedures for declaring and justifying domestic health regulations augur new hope for global democracy; dissents from appellate decisions concerning the imposition of martial law in 19th-century Jamaica confirm the basic values of the rule of law. Fine conceptual frameworks emerge from the murk of historic events and the churn of contemporary experiments. Every author must choose which details to include and which to omit, but this choice has special significance for Sabel and Dyzenhaus because they aim to educe the relationship between our quotidian practices and our core principles. For them, the challenge is not the stylistic or tactical question of which degree of abstraction best illustrates this relationship, because for them abstraction is not a matter of degree but a matter of course.

As theorists, they do not seek to transcend the concrete facts of our material reality in favour of a higher plane of understanding. They do not aspire to abstraction because they begin with abstractions: a world that makes sense populated by things that make sense precisely because they are not crude facts but articulate ideas. They begin with abstractions because even “experience” and “perceptions” are just notions, not unmediated reality (whatever that might be). For Sabel, Dyzenhaus and other scholars who share this holistic bent, abstractions are not divorced or derived from reality; they are reality because they are all we can know. From this perspective, there can be no dichotomy between reality and our experience or understanding of it, so there can be no tension between the concrete and the abstract. The challenge for Sabel and Dyzenhaus is not to manage this non-existent tension but to develop and encourage the proper response to a world that has no hard factual foundation. Any perceived conflict between the concrete and the abstract is not an inconsistency in their position but a discrepancy between their holistic perspective and one that admits a schism between facts and ideas.

ii. Tradition and Innovation

The second perceived conflict involves tradition and innovation. Given Dyzenhaus’s insistence on preserving the values of the common law and Sabel’s emphasis on experimentation as the cure for sclerotic institutions, it might seem to capture an important rift between them. Nonetheless, this tension can be resolved in much the same fashion as the first: properly understood,

353 See text accompanying notes 208-11 and 266-69, supra.
355 Oakeshott, Experience and its Modes, supra note 148 at 51-54; Kant, Critique of Pure Reason, supra note 148 at 117-20.
tradition is not an impediment but a condition of innovation. However, it can be hard to understand tradition properly.

Just ask Edmund Burke, conservative philosopher *par excellence*. According to him, tradition is not the residue of the actions of our ancestors; it is the result of a peculiar contemporary disposition. Tradition is not a fact that we must accept. It is an abstraction we cultivate by acting as though we have inherited what virtue we possess: “Always acting as if in the presence of canonized forefathers, the spirit of freedom, leading in itself to misrule and excess, is tempered with an awful gravity…By this means our liberty becomes a noble freedom.”

For Burke, tradition is a useful heuristic. It is useful because it orients adherents to the pursuit of the good. But it serves the good only because it follows nature, which he defines as “wisdom without reflection, and above it.” Tradition intimates but cannot reveal nature. By enduring, tradition suggests what is required for the products of human intelligence to endure. It necessarily conforms to the basic moral and physical features of our world. It confirms that we inhabit a world possessed of such truths, even if individuals cannot access them directly or speak them authoritatively.

A tradition is an essential resource for living well. It is not a moribund collection of arcane beliefs and dusty rituals. A tradition imparts roles, from parent and citizen to author and moral agent, and with them expectations. It enables us not only to judge whether these roles are performed well but also to debate the values they embody, the virtues they cultivate and their place in our community. Alasdair Macintyre argues that a tradition that does not invite argument and improvisation in service of its values is not a tradition; it is history because it is dead. At least with respect to politics, Burke concurs: “A state without the means of some change is without the means of its conservation.” As Michael Polanyi has written, “Any tradition fostering the progress of thought must have this intention: to teach its current ideas as stages leading on to unknown truths which, when discovered, might dissent from the very teachings which engendered them.”

Tradition and innovation are not mutually exclusive. Indeed, they are mutually dependent: for a tradition to survive as circumstances evolve, it must encompass innovation; for innovation to succeed in revealing new opportunities for meaningful experience, it must extend the traditions that tend our values.

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357 Ibid at 33.
358 Ibid at 97.
359 Ibid at 40.
362 M Polanyi, *The Tacit Dimension*, supra note 142 at 82.
Regardless, it can be difficult to see tradition as the basis for the experimentalism Sabel recommends to remedy dysfunctional American public institutions. Community policing networks, environmental improvement squads and school reform coalitions resist the division of labour between citizens and officials that defines representative democracy and the division of powers that characterizes its American version. Although their impact will be determined in practice rather than books, they threaten to “undermine” or “transcend” the institutional pillars of contemporary democracy. But Sabel’s call for democratic experimentalism is a call for renewal rather than revolution. He draws upon deep, albeit often neglected, domestic reserves of progressive politics and pragmatic philosophy. Dyzenhaus does much the same when he invokes Hermann Heller or Justice Rand: they are not just examples but predecessors from whom we must learn if we are to redeem the promise of democracy.

Sabel and Dyzenhaus are both proponents of organic rather than radical political reform. Neither counsels innovation for its own sake. Nor could they for, as Hayek argued, we cannot plan for innovation. However, we can provoke it by making our knowledge more explicit, our conduct more complex and our experiments more deliberate. For those who understand truth as something public, there is no tension between tradition and innovation: there is what we know, and there are interpretations of what we know. When doubts arise, we resolve them the only way we can: by drawing upon available resources. If we lack the concepts and sense to perceive a possible solution, we will not even begin to detect a problem.

iii. Deliberation and Action

In a democracy, we expect individuals to follow a simple script when trying to solve public problems: deliberate, act, repeat. We expect them to have reasons for the decisions they make. But at some point, whether on the battlefield, in the prison cell or at the clerk’s counter, the reasons run out. Someone must stop talking (or writing) and do something to someone else. Laws must be debated but they must also be enforced. As Sabel and Dyzenhaus emphasize comparison, elaboration and justification, they might appear to neglect action and thus obscure the coercive aspect of law. They might appear to mischaracterize democracy, which is concerned as much with pruning possibilities as it is with preserving them. They might appear to exacerbate this third tension – the tension between action and deliberation – by trying, and failing, to suppress it.

366 See e.g. Hayek, Studies supra note 188 at 22-25; M Polanyi, Knowing and Being, supra note 191 at 130-31.
They certainly do not dwell on the role of coercion as, for example, Robert Cover did. He argued that courts are jurispathic: they kill laws.367 Courts propound official interpretations of regulations, statutes, common law and constitutions, and they authorize the use of violence to enforce them. They do not create meaning: communities do. Rather, they primarily cull alternative interpretations, competing commitments and genuine communities that defy orthodoxy, such as the Mennonites and the Amish.368 Cover claimed that those who wield law cannot expunge its brutality. Instead, they must acknowledge it, accept their complicity and seek redemption.369 Mercifully, their salvation lies in the law itself. To ensure that the laws they kill do not die in vain, judges must refuse to treat interpretation as a technical exercise and instead regard it as an opportunity to declare the basic commitments of their own community: the commitments that warrant stifling and even eliminating others.370

Cover caught a glimpse of redemption in the act of interpretation, in the act of committing not to certain principles but to the possibility of a principled community. As a result, the dichotomies he developed began to dissolve. The state and its subordinate peoples, coercion and interpretation, violence and meaning; these were in part rhetorical devices used to clarify the constitutive power of law, its power to bind ephemeral actions with enduring values, its power to turn a collection of subjects into a community defined by its commitments. In other words: a community of the sort envisioned by Sabel and Dyzenhaus.

Although species of deliberation feature prominently in their accounts of law, democracy and constitutionalism, Sabel and Dyzenhaus do reserve an integral role for action. As noted, Dyzenhaus explicitly recognizes the need to suspend democratic debate and offers two criteria for legitimate public decisions that produce official action. Sabel expects action to generate the results required to assess the objectives we pursue and to improve the procedures by which we assess and pursue them. For both theorists, deliberation anticipates action and vice versa.

Indeed, their position does not admit a distinction of kind between action and deliberation. Rather, deliberation is just one more form of action. To engage in it, participants must subscribe to its commitments and suspend their doubts about its conditions.371 Deliberation expresses a commitment to public truth, which is a commitment others need not and sometimes do not share. Deliberation presumes that such a truth exists and that we can come to know it better in part

368 Ibid at 26-35.
370 Cover, “Nomos and Narrative”, infra note 367 at 53-60 and 66-68.
371 Taylor, Philosophical Arguments, infra note 48 at 27-33.
through talking about it. If you deny the possibility of truth amenable to common inquiry, then you cannot meaningfully engage in deliberation: it would not be futile; it would be inconceivable. From the interpretive perspective Sabel and Dyzenhaus employ, deliberation is not idle chat punctuated by decisive acts. It is not the preserve of the mythical philosophy seminar: talk without consequence. It is a choice that expresses basic beliefs and precludes other modes of conduct, in part because it demands substantial time, effort and other resources, but also because it requires participants to explain themselves, to listen to others and to fold the results into subsequent rounds. Deliberation harbours ideals, but it is not to be derided as idealistic, for its proper practice entails awareness and acceptance of its costs.

Cover likely would disagree. He recognized the promise of redemption in law but remained sensitive to its temptations: “because law is the attempt to build future worlds, the essential tension in law is between the elaboration of legal meaning and the exercise of or resistance to the violence of social control.” He would probably contend that the costs of deliberation and more generally of law are much higher and more profound than Sabel and Dyzenhaus admit.

In his later writing, Fuller identified a similar tension between two views of the function of law: to achieve social control and to facilitate human interaction. Like Cover, he primarily associated the former with the positive law of the state and the latter with the customary law of traditional communities. Also like Cover, he acknowledged that effective social control depends on “stable interactional expectancies,” or the meaning imparted to common life by custom. Further, Fuller was attuned to his role as theorist. In these articles, he generally wrote about ways of looking at and understanding law, rather than about law itself. In this, he resembled not only Cover but also Sabel and Dyzenhaus. He did not claim that the tension between control and meaning emerges from law but from his attempt to understand law in terms of its function. Although he suggested there were two ways to conceive the function of law, he acknowledged one as fundamental: the explicit commands of positive law rely upon the tacit knowledge embodied in customary law for both sense and success.

Sabel and Dyzenhaus share his respect for the tacit knowledge demonstrated in attempts to live according to law. They do not, however, accept a sharp distinction between the explicit word of

375 Ibid at 2-3, 7; Fuller, “Law as a Means”, supra note 373 at 95;
376 Fuller, “Human Interaction”, supra note 374 at 2; Fuller, “Law as a Means”, supra note 373 at 89 and 92.
377 Cover, “Violence and the Word”, supra note 369 at 210 (distinguishing legal interpretation from literary interpretation, political philosophy and constitutional criticism).
378 See e.g. Fuller, “Human Interaction”, supra note 374 at 5.
the sovereign and the tacit way of its subjects: the former can no more anticipate each act it requires
than the latter can survive in shadows and silence. Sabel and Dyzenhaus do not admit that conduct
can be utterly inarticulate. Assumptions and expectations can always be challenged, elaborated and
improved through experimentation and justification. Under the influence of law, neither violence
nor custom are mute: they can always be made to speak.

Thus, this tension between action and deliberation (or violence and meaning, or meaning
and control) is not so much suppressed as it is excluded by Sabel and Dyzenhaus. Brute force is a
phenomenon unknown to, and indeed incompatible with, their understanding of law. If it occurs at
all, it does so beyond the pale of democratic settlement and offers those within yet another
opportunity to revisit their faith and the reasons for it. It is a limit, perhaps to some an omission, but
certainly not a defining feature of their position. Like the first two, this third mooted conflict does
not capture an essential irony because it does not arise from their perspective properly understood.
At most, each of these tensions presents a practical question of which details to describe, what rate
of change to endorse and when to suspend public debate.

iv. Democracy and Aristocracy

A more serious problem for their position arises from the concessions Sabel and Dyzenhaus
make to aristocracy in the service of democracy. Although adamant democrats, they have an
idiosyncratic understanding of what it takes for individuals to succeed in conducting their common
affairs on the basis of consent rather than coercion. They deny that democracy requires a particular
institutional settlement. More pointedly, both Sabel and Dyzenhaus reject the division of powers
entrenched in most constitutional democracies. Yet they maintain that there is a right way to do
democracy. As the right way cannot inhere in institutions, which we cannot specify in advance, and
cannot consist of practices, which are restatements of institutions, it must lie in our conduct: in
assuming the proper stance towards our institutions and practices.

Sabel and Dyzenhaus champion democracy. But, unimpressed by the orthodox indicia of
democracy, they emphasize civic virtues. In fact, as the concept of legal grey holes suggests, to adopt
the trappings of democracy without the proper democratic spirit might be even more reprehensible
than to repudiate democracy altogether: it could corrode faith in the ability of democracy to deliver
even the minimum protections against arbitrary power.379 Sabel and Dyzenhaus do not just want
democracy. They want democracy done well.

They know there are standards for democracy that cannot be defined democratically and
standards for citizenship that citizens cannot specify. To attain the truth about democracy, we must

pursue that truth properly (and approach that pursuit properly, and so on). There are ways in which we must act and, as importantly, understand our actions if we want to be good citizens and conduct our affairs well. Sabel and Dyzenhaus are not concerned exclusively, or even primarily, with the practical, conceptual and normative limits on democracy that are the traditional preserve of constitutional scholars. They are concerned instead with identifying and implementing the criteria for excellence intrinsic to democracy.

This is why Dyzenhaus celebrates illustrious common law judges, their opinions and, above all, their dissents. Not because he is a jurisprude, obsessed with doctrine and tradition at the expense of politics and practical exigencies, but because these judges embody the virtues of the ideal citizen in a democracy. They justify their decisions, and thus contribute to public reason.\textsuperscript{380} When necessary, they denounce hypocrisy and compromise, and thus reinforce our commitment to the rule of law even in the breach.\textsuperscript{381} Indeed, they serve not only as models but also as means of spurring others to proper democratic conduct. For example, Dyzenhaus argues that deference to the reasoned decisions of administrative officials can revive their dedication to the rule-of-law project and turn their attention from technique to principle.\textsuperscript{382} By developing, enforcing and personifying the demands of democracy, which are not formal but transformative, judges can inculcate an ethos of accountability that no statute or code of ethics could manage. He is not interested in judges per se, but in a form of reasoning and an attitude towards law that some judges prominently and enthusiastically embody.

Although Sabel will never be confused for a jurisprude, he does believe judges have an important and enduring role in democracy and constitutionalism. They are responsible for monitoring the arrangements and maintaining the entitlements that permit the regular comparison, criticism and adjustment successful public endeavours require.\textsuperscript{383} However, for Sabel, judges do not provide the sole, or even the principal, embodiment of civic virtue. In fact, he does not employ one prime illustration of civic virtue. Rather, he plucks examples of good citizenship scattered across cities, states and continents. From backyard environmentalists to school administrators, he esteems individuals alive both to their own fallibility and to the possibilities for collective action that lie between thralldom and anomie. These model citizens demonstrate the ability to improve not only the world they receive but also their ideas about improvement.

\textsuperscript{380} See generally Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274. See also, Dyzenhaus, “Constituent Power”, supra note 322 at 141-43; Dyzenhaus, “Hobbes Challenge”, supra note 311 at 494-46.

\textsuperscript{381} Dyzenhaus, Time of Emergency, supra note 5 at 63 and 67.

\textsuperscript{382} See e.g. Dyzenhaus, “Fundamental Values”, supra note 272 at ¶¶113-23; Dyzenhaus, Time of Emergency, supra note 5 at 147.

Democracy requires citizens to do more than select proxies for that jumble of assumptions, prejudices, desires and opinions that passes for self-interest, although at times even that desultory task seems too much to ask. Citizens must aspire to be more than themselves. To be a citizen is to strive to be a good citizen. They must dedicate themselves to the civic virtues demonstrated by a meritorious few. They must discern those virtues, then understand, incorporate and perpetuate them. Although the ranks of good citizens are not fixed, the criteria for membership are.

For Sabel and Dyzenhaus, democracy is an ambitious enterprise and citizens must rise to the challenge. Institutions incumbent, insurgent or imagined cannot suffice because individuals are always required to operate and adapt them as circumstances evolve. Democracy favours certain habits, aptitudes and temperaments. It demands substantial investments of time, effort and money. These needs are especially stark in a world characterized by extreme inequality, banality, complexity and volatility. In contemporary circumstances, democracy may even begin to resemble a luxury: an acquired, expensive taste to be enjoyed by the cultured and wealthy few.

Thus, the first real irony of their position emerges: to preserve a community of equals, or at least a community that values equality, members must strive to rise above the rest and emulate the best. Alternatively, they can capitulate, choose efficiency and cede control of common concerns to the experts among them. Democracy is but one imperative among many. It is not enough to rededicate ourselves to venerable practices, for if we do not know the ideals those practices serve and cannot learn how to serve them ourselves, what is venerable will soon become vestigial. It is not enough to try to muddle through, for to muddle through real problems requires excellence.

v. Moral and Instrumental

Sabel and Dyzenhaus each harbour a moral conception of law and politics, in which citizens seek to understand and excel in their role because that is what citizens do. However, they are not moral philosophers. They are not content with finding new ways to tell us to do the right thing. They are not idealists, at least not in the lay sense. They study institutions and procedures rather than essences and imperatives. More precisely, they survey, analyze and endorse those institutions and procedures that promote behaviour that resembles moral conduct, for while they appreciate the virtues of a moral mindset they also concede its limitations. If remonstrations were sufficient to ensure proper conduct, constitutional theory would be unnecessary. Indeed, Sabel and Dyzenhaus do not demand individuals pursue intrinsic standards of excellence rather than extrinsic rewards such as efficiency, fairness, wealth or power. Ever pragmatic, the two scholars do not mind whether citizens possess a moral disposition so long as they act as though they do.

To state goals, measure outcomes, compare results and give reasons does not require a moral sensibility nor does it necessarily produce one. The effects of these practices are not wasted or even
diminished if participants seek merely to comply rather than to excel. Indeed, they are prized precisely because they can induce an individual to mimic a moral disposition notwithstanding his stupefying mediocrity or mercenary tendencies. These practices oblige participants to consider the purpose of their conduct and assess their performance by reference to it. They hold individuals accountable not to their own ends but to the demands of the task in which they are engaged.

In sum, Sabel and Dyzenhaus adopt an instrumental approach in service of a moral one. Rather than some grave betrayal, this irony may reflect a sensible concession to an instrumental age in which intrinsic goods are disputed, rejected or forgotten. In any case, this approach is not disingenuous. To cajole citizens to elaborate the relationship between their conduct and their common values is to insist such values can exist and guide our public choices. It is to preserve the possibility of a political morality, one which happens to coincide with the demands of constitutionalism and democracy. It is to preserve the possibility that a culture of justification may emerge from a culture of rationalization. Nonetheless, their strategy does concede that dialogue is inadequate: rewards and sanctions, from enhanced local autonomy to paternalistic standards of judicial review, are necessary to keep our democratic inheritance.

The practices and procedures Sabel and Dyzenhaus laud do not check or channel political conduct so much as guide it. A critic might contend they yield at best an ersatz morality incapable of sustaining, let alone replacing, the traditional democratic institutions from which they emerge. Moral conduct is deliberate; it cannot be coaxed or commanded because what matters is the spirit in which it is done. Whether we can bootstrap ourselves out of an instrumental funk (i.e. whether we can attain a moral disposition by approximating one more and more precisely) remains uncertain. If not, to pursue political morality via institutional design is folly.

A more hospitable interpretation might characterize these arrangements as training wheels for our faltering sense of civic responsibility in a post-conventional age: deliberate experimentation, critical collaboration and reasoned elaboration keep us upright as we weave and wobble through an unfamiliar environment. However, every metaphor misleads. This one does so by implying we might one day outgrow these props and learn to tend our values without institutional assistance.

Sabel and Dyzenhaus do not go this far. They know their civic ideal is inspiring but not so inspiring as to banish temptation, eradicate idiocy and secure its own success. Perhaps they lack faith in the ideal; perhaps they lack faith in the citizens responsible for realizing it; perhaps both. Regardless, they do not entertain a future in which our democratic infrastructure renders itself redundant by inculcating a perfect and universal political morality. They are resigned to serve indirectly an ideal that can seem quaint, even anachronistic, under current conditions: a strange position for two scholars so concerned with the vanguard of democracy. Thus, the penultimate tension yields the ultimate.
vi. Optimism and Tragedy

Sabel and Dyzenhaus are optimistic. They believe democracy is capable of addressing complex contemporary challenges, such as terrorism and environmental degradation, and that constitutionalism can endure bureaucracy and barbarism. Yet their position is tragic. Democrats and constitutionalists alike are condemned to a Sisyphean struggle against the hostile acts of political opponents, the glazed apathy of disaffected citizens and the unintended effects of their own decisions. Democracy and constitutionalism cannot be secured by design. They cannot be secured at all.

Committed citizens must remain active, observant, creative and realistic in order to foil threats and seize opportunities as they arise. But, as usual, the reward for good work is more work because solutions to one problem often create another. For example, to require reasons for public decisions might engender genuine deliberation but it might also yield counterproductive behaviour: it would likely generate more text to interpret, which in turn might overwhelm both doctrine and justice, encourage appeals, lead parties and officials to anticipate those appeals, emphasize legal expertise, choke public administration, raise the ostensible costs of democracy and spur a popular reaction against government waste. In sum, an attempt to enhance fairness and improve participation, itself enabled by radical advances in information technology that permit the production and dissemination of vast quantities of prose, could undermine access to justice and sour potential allies.

The most important word in the preceding sentence is “could.” The impact of reasoned elaboration cannot be determined by parsing the concepts involved. Its impact can be determined only by allowing it to have an impact: by requiring officials to give reasons for their actions (which will change the way citizens conceive and compose their petitions), observing the results and comparing them to the status quo ante or conditions elsewhere. Our institutions require regular adjustment, as do our ideas about institutions, but revisions require both a vision and circumstances that provoke reflection and warrant change. To improve, we must not only think but also act, face risks and embrace results.

Democracy is a work in progress because we are works in progress. If we were omniscient and unfailingly good, we would not need institutional assistance to remain on the right path. We would always know the right thing to do and we would always do it. However, we are not omniscient, we often disagree about what we know and what it means, and we often do not care whether what we do is right so long as it is advantageous. Imprudence and venality have long served
to justify constitutional constraints on democracy, even as they complicate efforts to explain those constraints as the insights of an exceptional few.\textsuperscript{384}

Sabel and Dyzenhaus accept that our knowledge is incomplete and our moral mettle often unreliable. They argue that we can learn to compensate for these inadequacies: we can develop procedures that expand the bounds of our rationality and adopt practices that lead us to act as though we possess moral dispositions. They do not, however, suggest that we can overcome these defects. They cannot because they write about a world that Friedrich Hayek and Max Weber wrote about first: a world where new knowledge compounds ignorance by inspiring ever more complex and fallible schemes, and where those schemes demand institutions that that prize efficiency and favour an instrumental ethic.\textsuperscript{385}

They resist the caustic implications of these and other influential accounts by identifying counterexamples: institutions that drive citizens to develop, pool and refine their knowledge in order to dissolve calcified problems even as they spawn new ones; practices that serve intrinsic, albeit indeterminate, goals and thus can be characterized as purposive rather than functional. Sabel and Dyzenhaus admit that individuals confront basic limits on their ability to understand, empathize, reason and imagine. But like many theorists from other fields, they insist those limits are not fixed: we cannot be perfected, but we (or at least our practices) can be improved.\textsuperscript{386} Indeed, we must improve as our ambitions mount and our problems metastasize.

Theorists are not spared perpetual, and often obscure, labour. They seek the truth, so they must submit to the disciplines by which it is found. For most so engaged, success in this quest should not be confused with influence or prominence; it is met not with applause but with silence, as the doubt addressed fades from view. There are no easy answers for the questions raised by democracy and constitutionalism. Those projects are intended to provoke doubts about who we are, what we are doing and why we are doing it. Unfortunately, there are no hard answers to these questions, either. Nor are there any grand theories, or at least any grand theories with a prospect of success. There is only work to be done, by theorists and citizens alike.


Once aware that truth is public, Sabel and Dyzenhaus had to accept this fate. They had to accept that their commitment to the truth might yield some unorthodox, even uncomfortable, conclusions. Although they are not intentional iconoclasts, they also had to accept that unexpected results from their inquiries could shake their most basic beliefs. Their common position suffers some tensions. It is not perfectly consistent. However, we should expect complex legal theories to have some knots. Their position on constitutionalism is also totally consistent with their pragmatic approach to theory, which anticipates adjustment and entertains no end. Inconsistencies are not always flaws. They can be opportunities for further inquiry and improvement. However, they can also be game for critics.

B. Critics

There are two types of critics: superficial and serious. All critics seek to advance their own agenda but the former do so at the expense of understanding the arguments they assay. The latter are more respectful and thus more incisive and useful. Sabel and Dyzenhaus (but especially Sabel) have attracted critics from both camps. An exhaustive survey might be valuable but would certainly be impractical. A brief sample will suffice to introduce the debates and prepare for subsequent analyses.

Some critics show how easy it is to misunderstand the claims Sabel and Dyzenhaus make. For example, Thomas Poole includes Dyzenhaus in his catalogue of reactionary, Whiggish and naïve common law constitutionalists. He contrasts their creed with the political constitutionalism and civic republicanism of JAG Griffith and Richard Bellamy, respectively. However, as noted above, Dyzenhaus is not an apostle of common law constitutionalism: judicial pronouncement and elucidation of the principles that define a community. He certainly reserves a major role for courts, but he rejects the Manichean distinction between moral common law and amoral positive law that Poole attributes to this alleged clique. Dyzenhaus expects each element of a legal order to give legal reasons for its conduct. He does not exempt legislatures from this obligation. Further, he describes the judicial role as properly concerned in large part with integrating administrative tribunals into the rule-of-law project: a concession to contemporary parliamentary and regulatory practices that is hard to square with Poole’s image of common law constitutionalists as nostalgists that would be quaint if only they were not so influential.

388 Compare ibid at 450 and 451 n 100 with Dyzenhaus, Time of Emergency, supra note 5 at 143 and 156.
Poole makes perhaps a more fundamental mistake when he chastizes Dyzenhaus for failing to provide judges and other actors with a blueprint of common law constitutionalism. He does not seem to appreciate that Dyzenhaus has an interpretive understanding of theory according to which such a comprehensive plan is inappropriate, even irresponsible: the role of the theorist is to probe not to prescribe. By rebuking Dyzenhaus for failing to do something he believes to be improper without examining or even mentioning that belief, Poole reveals his own failure to understand the position he assails.

Other critics demonstrate how easy it is to mischaracterize the arguments Sabel and Dyzenhaus make. William Scheuerman, for one, bases his polemic against “Sabel and his allies” on a shallow reading of their work that casts them as misguided materialists. He contends that Sabel and his collaborators have made the right diagnosis but recommend the wrong cure. Although they correctly identify the rapid and unpredictable evolution of flexible production techniques as a threat to democracy, they err by encouraging citizens and governments to try to pace these developments and counter their cascading economic, environmental and other effects. Scheuerman prescribes the opposite: rather than accelerate political and regulatory processes to match the blistering rate of private-sector innovation, we should use what remains of the state to moderate that pace by, for example shortening the workweek, and thus nurturing the careful, cautious and, above all, slow deliberations that epitomize liberal democracy and the rule of law.

He questions whether the problems we face are so novel as to warrant departure from familiar forms of liberal democracy. He suggests Sabel and his crew lack evidence that democratic experimentalism is sufficiently nimble and robust to answer the volatility and uncertainty generated by the corporate push for permanent innovation, yet he provides no evidence that his own program is politically, economically or technically feasible. Scheuerman gives no thought to whether the reforms recommended by the democratic experimentalists, some of which would involve citizens and private organizations in elaborating the regulations that affect them, may retard disruptive private innovation. Nor does he consider whether, even if democratic experimentalism entails concessions to manic capitalists, those concessions might be legitimate and worthwhile if they enhance global welfare by trading some traditional indicia of democracy for better products, greater equality and reduced environmental risks.

389 Poole, “Constitutional Exceptionalism”, supra note 262 at 264-65.
391 Ibid at 105 and 127.
392 Ibid at 120-22.
393 Ibid at 118.
Scheuerman distorts democratic experimentalism by clinging to his perspective instead of trying to adopt or even approximate theirs. Like Poole, this lapse crystallizes in his failure to appreciate the nature of Sabel's theoretical enterprise. He makes the provocative claim that Sabel et al are both too Marxist and not Marxist enough. As evidence of the former, he notes that they do not genuinely lament the decline of institutions associated with liberal democracy, such as clear rules and central legislatures: they surrender too easily to the imperatives of contemporary capitalism. Of course, as Scheuerman knows, Sabel and his partners are not especially enamoured with these orthodox arrangements (or with their orthodox academic apologists) because they rarely work as advertised: clear rules too often require clarification and central legislatures too often adopt ambiguous statutes that satisfy the formal requirement of one law for all but oblige diverse private actors, local judges and administrative officials to determine what that law means in their circumstances. These institutions are, to an important extent, responsible for the crisis liberal democracy faces in the wake of the financial crisis: they fostered and facilitated the complex yet inadequate regulatory schemes that ultimately exposed their own weaknesses.

Notwithstanding their obvious appreciation for the reciprocal relationship between regulation and production, Scheuerman accuses the experimentalist cabal of flirting with economic determinism. He argues that Dorf and Sabel improperly suggest an “intimate causal nexus between real-life economic and legal change.” But Scheuerman fails to grasp the implications of the interpretive turn made by his target. Not only does Sabel indicate that any causal link between law and economics runs in both directions, he also characterizes his analyses as interpretations of abstractions. They may be prompted by “real-life” developments but they are not determined by them. Human ingenuity interrupts at every juncture: when drafting regulations, which involves anticipating possible responses; when responding to new rules and their attendant uncertainties; when adjusting those rules in light of their effects; when interpreting that process and articulating a theoretical model of it; when using that model to understand and amend conduct both public and private; and so on. Sabel does not claim to offer definitive accounts of what actually happened in order to divine the proper response. Rather, he offers ways to think about what has happened in order to help citizens perceive, select and pursue the possibilities they most desire. He does not absolve his audience from the responsibility of making choices and facing consequences.

394 Ibid at 118-19.
397 Ibid at 123.
Scheuerman apparently does not appreciate this nuance that distinguishes Sabel and his co-authors from discredited materialists.

As for being insufficiently Marxist, the basis for the charge is their failure to share Scheuerman’s apparent faith in the capacity of governments to tame the excesses of capitalism: a faith that has no basis in recent history. He casts the democratic experimentalists in limbo: too radical for market fundamentalists but not radical enough for true critics of the market. In this, at least, Scheuerman is correct. The democratic experimentalists do eschew polarized positions that for decades have failed to deliver their respective utopias. Instead, they try to offer a realistic method for ambitious democrats to solve unprecedented problems by challenging inherited institutions, connecting complementary perspectives and expanding blinkered imaginations. Pragmatists put great store in results: if the traditional expressions of democracy and the rule of law were not broken, then we would not be able to articulate extensive doubts about them. They seek necessarily new ways to perpetuate the values those incumbent arrangements now struggle to preserve: autonomy and solidarity, diversity and equality, equity and prosperity.

More curious theorists raise more productive questions about the implications of this approach. For example, Neil Walker and Michael Wilkinson ask whether Sabel’s experimentalist model of constitutionalism can guarantee the democratic attitudes and institutions on which it relies. They also ask whether it can ameliorate enduring power asymmetries, historical injustices and socio-economic inequalities. In fairness, Scheuerman asks this question as well. Finally, they ask whether it can determine, in a democratic manner, the boundary that divides those who may participate from those who may not. These are tough questions that take Sabel’s perspective and objectives seriously.

A fair response to the first question is that even incumbent democratic practices do not guarantee their own inception or survival. We can tell a compelling story about how multiparty elections in a parliamentary system policed by principled judges inculcate vibrant and democratic political cultures, but that does not mean the story will be or remain true in any sense that “guarantees” the emergence or continued existence of those institutions or dispositions. No government is a perpetual motion machine.

398 Ibid at 119-21 and 125-27.
401 Scheuerman, “Critical Reflections”, supra note 390 at 118.
An initial response to the second question is that previous attempts to solve such insidious problems have failed and we will not know whether a new approach will work until we try it. In other words, it is not enough to be critical; we must also be constructive.

Finally, a provisional response to the third question is that it is irrelevant. No account of democracy can solve the boundary problem because it is not a real problem: it is a riddle. It does not arise for actual communities, which emerge from history not referendums. The boundaries of South Sudan were a condition, not a result, of its vote for independence. To accept the terms of this question is to concede that democracy, at some point, rests on an arbitrary definition of membership: to subject the boundaries of a political community to democratic scrutiny is to posit boundaries for the group authorized to scrutinize that cannot themselves be scrutinized without assuming another set of boundaries, and so on. There is no escape from this conundrum save some capricious definition of the community in question.

However, this concession does not matter. It would matter only if democracy required democratic origins. But democracy cannot be a condition of its own existence or legitimacy. Otherwise, it could never arise. Further, democracy is not a condition of its own existence or legitimacy. We simply do not regard a democracy as illusory or illegitimate because its initial boundaries were not defined pursuant to a democratic process. However, it is worth noting that democracy may require a democratic means to alter those boundaries via secession. Theorists should not bother with the misleading and illogical ideal of immaculate democratic conception and those eschew it should not be dismissed as nominalists. Instead, they should worry about how to preserve that measure of democracy we do enjoy and how to maximize its legitimacy under prevailing conditions.

Notwithstanding these brief rebuttals, each of which warrants additional attention, Walker and Wilkinson provide a valuable service. They ask what must be true if constitutionalism is an inquiry into the nature of a political community. As a result, they probe the conditions of that inquiry. When Walker and Wilkinson ask whether an experimentalist approach to constitutionalism can remedy deep divisions among constituents, they also probe the nature and extent of solidarity required to generate and sustain such an approach. Such questions reveal an important constraint on this theoretical approach to constitutionalism: although theory can explain what must be the case if constitutionalism is to be and remain a project, theory does not explain how to start that project. Theory offers interpretations, not instruction manuals. Theorists can show that new forms of democracy are possible, but citizens must imagine and pursue them. Only then can theorists reflect

on those efforts and adjust their ideas accordingly. For example, when Sabel writes about “a new logic of collective action” emerging in response to policies that “manifestly fail the public,” he writes about the conditions required for the deep deliberation that characterizes constitutionalism. He does not and cannot determine whether and how those conditions, such as the existence of a public capable of recognizing and responding when policies have manifestly failed it, will be satisfied in any particular case.

Mark Tushnet is another theorist who has offered a genuine and helpful critique of democratic experimentalism from this side of the Atlantic. In particular, he asks two important practical questions: first, whether it can craft a viable political coalition to bridge and then transcend its profoundly local origins; and second, whether it can address the big issues for liberal democrats, such as the protection of free speech and other civil liberties. The two are likely related, as democratic experimentalism is unlikely to sustain a political movement capable of achieving comprehensive constitutional reform until it offers a coherent answer for standard liberal democratic anxieties. Unless, of course, new fears replace those familiar concerns as established bulwarks begin to fail more frequently and unexpectedly.

As should be evident by now, these questions cannot be answered by parsing phrases and paring concepts ever more finely. A case study is required to test the ideas and arguments developed in this chapter: to determine whether they deliver anything beyond rhetoric. More will be necessary to prove Sabel and Dyzenhaus offer a realistic vision for constitutional reform but one will suffice to confirm they provide a valuable theoretical perspective on contemporary developments.

C. A Case Study

A good case study not only changes our understanding of its subject but also challenges the ideas used to reach that new understanding. To fulfill its potential, a subject should be chosen with both ends in mind. For the theory of constitutionalism and democracy developed in this chapter, the ongoing constitutional experiments in British Columbia offer an excellent opportunity.

Since 1990, provincial, federal and indigenous authorities have sought new ways to solve an old problem: unlike the rest of Canada, very few treaties have been signed in British Columbia, so the relationship between indigenous peoples and the Crown remains unsettled. Landmark judicial opinions returned indigenous concerns to the constitutional agenda in the 1970s and early 1980s. The epochal constitutional reforms of 1982 inaugurated another round of negotiation and litigation,

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405 Liebman & Sabel, “School Governance”, supra note 202 at 266-68.
which naturally failed to satisfy everyone involved and had untold unanticipated effects on treaty
talks, consultations and other, less orthodox, means to make this essential bond.

Throughout, the technical aspects of these developments have obscured their moral and
political dimensions. Litigation, negotiation and other methods used to pursue “reconciliation” are
largely the preserve of lawyers and bureaucrats. They have not inspired or sustained an inclusive
popular debate about the colonial history of the province and its contemporary ramifications for
indigenous and non-indigenous peoples alike. Lay attitudes oscillate in a narrow range between
disinterest and distrust. Meanwhile, severe social and economic inequalities fester.

Aside from the juxtaposition of institutional innovations and enduring philosophical
conundrums, other factors make British Columbia a great place to explore the prospects for
constitutionalism and democracy. The situation in the province is discrete but not hermetic. The
government of Canada is a major participant in many of these initiatives, and developments
elsewhere in Canada, especially doctrinal developments, do resonate west of the Rocky Mountains.
These experiments present a wealth of data. The pace of innovation has quickened significantly in
recent years, and the relevant judgments, policies, statutes, declarations and agreements are readily
available. Many of these innovations involve the recognition or establishment of institutions that
depart from the standard menu items: legislature, executive and judiciary. Diversity is rampant in
British Columbia, whether between indigenous peoples and settlers or within them. No single
solution will suffice for the vast range of social, cultural, economic and environmental conditions
found throughout the province.

Further, this chronic constitutional uncertainty has yet to ignite an existential crisis for most
of the province. Fundamental legal questions certainly compound the severe social, economic and
environmental problems residents face. Profound questions about the nature of political community
and the requirements of legal order are addressed obliquely, or perhaps merely obscured, by
cloistered discussions of “ecosystem-based management” and “socio-economic well-being.”
However, most residents of British Columbia, including many indigenous ones, manage to go on
with their lives. Some even get rich from the situation, and the work continues without escalating
into constitutional conferences or descending into communal violence.

Perhaps the single most important reason this burst of constitutional experimentation in
British Columbia makes an interesting case study is that it has yet to succeed. It has not delivered its
own protean objective: reconciliation. And it has not sprung constitutionalism from the elite ghetto
in which it languishes. This case study will test the limits of the model developed in this chapter and
hopefully yield theoretical insights with practical merit as well as practical recommendations with
theoretical impact.
5. Conclusion

Good theory is prophylactic. It protects us from the constraints imposed and follies induced by unduly confident theorists. The basic ideas discussed in this chapter are, or at least should be, simple. Democracy is the effort to determine what we should do and how we should do it. Constitutionalism is the endeavour to divine which values we serve and what they require. More arcane analyses and more elaborate definitions are required only to distinguish and dispel less helpful accounts.

Of course, each of these undertakings has conditions. Most obvious: each presumes a community capable of asking and trying to answer these questions. To demand that theorists of democracy or constitutionalism explain this presumption is to demand the impossible: it is akin to asking for a biological explanation of the physics that make life and the study of life possible. Whether called demoi, little platoons or new publics, such communities simply must exist for these projects to arise. Of course, their boundaries, substance and nature may be the subject of democratic debate and constitutional dispute. But to acknowledge that political communities cannot originate in deliberate, rational acts is not to discover a paradox. It is to appreciate the constraints of democracy and constitutionalism. Ineffable origins are a problem only if effable origins are possible. They are not. Constitutions do not create communities; they abridge them. Individuals and groups must regard one another as compatriots or partners before they can conceive, let alone negotiate and codify, the terms of their union. This does not make origins fascinating; it makes them inaccessible and theoretically irrelevant, even if they remain matters of great historical interest. To theorize about a condition we cannot experience is not edifying. It is a waste of time and words that only prompts more words which consume even more time.

Sabel and Dyzenhaus offer a propitious platform for further research. They are not just two notable theorists whose work proves compatible for certain limited purposes. Their similarities run deep and are evident throughout, despite their distinct reputations and research agendas. They share a pragmatic understanding of truth as something public, and their pragmatism (which is the genuine article, not the bowdlerized version that celebrates compromise as an end in itself) informs their shared commitment to democracy and constitutionalism. The core of their common position is coherent and deceptively simple: to act is to inquire. To engage in constitutionalism and democracy, we must ask what those ventures require, and then we must ask whether our actions satisfy our best account of those imperatives.

We should not fool ourselves. These projects do not serve our interests; rather, we serve them because they allow us to glimpse truths about ourselves and what we are trying to do. Although the position staked by Sabel and Dyzenhaus can be elaborated in great rhetoric and institutional detail, it need not be. However, it must be tested. Their pragmatic method insists we
assess their theoretical position in light of its results. We must determine whether it can contribute to our understanding of our conduct. Bring on the facts!
Chapter 2: Twenty Years of Constitutional Experiments in British Columbia

The Best Place on Earth has a world-class problem.407 The constitutional settlement in British Columbia has come undone. For decades, the provincial government denied the existence of aboriginal rights and title, and for decades the federal government deferred. They chose to impose their preferred terms for Crown rule and wait for marginalization and assimilation to silence indigenous dissent. They chose poorly. Court judgments have confirmed that aboriginal rights and title do exist in this vast province, and that revelation has thrown much of what passed for conventional constitutional wisdom into doubt. The presumption upon which the Crown orchestrated the colonization of British Columbia was wrong: it does not have the authority to dictate the terms on which it governs these lands and their indigenous inhabitants. Unfortunately, this realization does not tell us what is right today, more than 150 years after that venture began.

The Crown and indigenous people in British Columbia have no tradition of cooperation on which to rely, so they have had to improvise. For many years, their relationships were antagonistic. Canadian officials, and before them colonial officials, carved derisory reserves from traditional territories. For most of the 20th century, Canada oscillated between hostility and indifference toward indigenous land claims. Few treaties have been signed in British Columbia since the 1850s because the provincial government saw no reason to bargain with indigenous people who had no rights or title to offer.

Since 1990, almost everything has changed. Epochal court judgments in that year and the next exposed serious problems with the status quo and triggered a scramble for solutions. Those first attempts provoked more litigation, which inspired new experiments, and so on. These experiments are many, sprawling and diverse. They generate at least as much controversy as they do data. This chapter aims to draw order from the chaos by reducing these experiments to four archetypes and tracing their development across four historical periods. Undoubtedly stylized, these abstractions nonetheless prove useful. They clarify a complex and evolving situation. They also confirm the prospects for reconciliation and constitutionalism in British Columbia.

1. Constitutionalism in Context

To define constitutionalism as the project of cultivating a principled political community is to set a high standard. Given the theoretical discussion and the concluding remarks from the

407 In 2005, the government of British Columbia adopted “The Best Place on Earth” as its official slogan. It even applied for the Canadian trademark on the phrase and has not withdrawn that application. Canada, Canadian Intellectual Property Office, Application No. 0917756. In 2011, it quietly retreated from – but did not retract – that brash claim. Its previous website (http://www.bestplaceonearth.ca/) has been dismantled and most evidence has been erased from public sites, but many examples remain.
previous chapter, it should come as no surprise that the outlook for constitutionalism in British Columbia is not good, although opportunities do exist. Many of the innovations discussed in this chapter are ambivalent: in theory, they enable participants to connect their conduct with their commitments, but in practice they do not require such elaboration. While courts demand and provide reasons, their contributions are often compromised by unhelpful rhetoric and unnecessarily deferential decisions.

As those judgments demonstrate, constitutional developments since 1990 have not followed a discernible plan. Under unfavourable conditions of deep mistrust, incomplete information and legal uncertainty, participants have improvised, adapted and sometimes even improved their practices, from drafting pleadings to sharing natural resource revenues. This ambitious conception of constitutionalism requires participants to be understood as agents: their perspectives, as revealed by their statements and actions, are integral to their project. This chapter offers an interpretation of their conduct as a foil for reflection and ideally as inspiration for improvement.

The failure of their experiments to yield constitutionalism might seem to support the sort of centralized, unilateral action that Sabel and Dyzenhaus eschew. It might confirm the criticisms made by Walker and Wilkinson that certain challenges, such as colonialism in Canada, are simply too pervasive and entrenched to be addressed by experimentation. However, it might also indicate that theorists and citizens alike need to take a longer view. The past twenty years have delivered many disappointments but also some positive developments. With the theory of constitutionalism-as-project in the background, this chapter sifts and sorts the details of those experiments to assess their long-term pitfalls and promises.

Nonetheless, one major concern warrants mention at the outset. Most B.C. residents, indigenous or otherwise, do not participate in the constitutional experiments described below. Those innovations take place primarily on the margins of established institutions, in dense thickets of procedure, rather than in the ordinary forums for mainstream politics. They involve technical questions of institutional design and regulatory policy. They are often cloistered and reserved for governments and their advisors. Aside from litigation, individuals have few opportunities to engage directly and formally with each other and the issues and principles at stake. Limited access only reinforces a lack of interest, especially among non-indigenous residents, and maintains a serious barrier to the spread of constitutionalism.

2. Four Procedures

Aboriginal rights and title exist in British Columbia. After decades of protest, delay, confrontation and compromise, we know that much. But this knowledge also exposes the extent of our ignorance. We do not know, for example, who has what rights or where they may exercise them.
In the past 20 years, indigenous leaders, judges and representatives of the Crown have developed four distinct procedures in response to this predicament: litigation, negotiation, consultation and collaboration.

Litigation is the most familiar of the four. It is also the prime catalyst for the others, as opinions from the trial court of inherent jurisdiction (the Supreme Court of British Columbia) to the ultimate appellate court (the Supreme Court of Canada) have had consequences, intended and otherwise, for conduct outside the courtroom. Litigation, especially litigation concerning aboriginal peoples, is by no means uniform. Test cases, in which an indigenous person asserts aboriginal rights as a defence to prosecution for a deliberate regulatory offence, have waned as indigenous groups have more often seized the initiative and launched civil actions. Of course, not all civil actions are equal. Plaintiffs can initiate various proceedings, from petitions for judicial review to class actions, and can seek a range of remedies, from declarations of their aboriginal rights and title to damages for historical wrongs. Aboriginal groups also can seek injunctive relief against parties private or public to preserve the physical subject of their claims pending final judgment.

In this context, litigation is often extremely complex and thus extremely long and expensive. The issues raised often directly affect many parties and indirectly affect many more. Even if they begin as bilateral disputes over territory or regulations, they have a tendency to metastasize. When even injunction applications involving a single logging operation can be read to threaten the entire provincial economy, the drift toward something resembling public law litigation seems inexorable. These cases can involve multiple plaintiffs with different claims to represent different communities, several ministries with overlapping competences, many interveners with diverse interests and agendas, and the federal and provincial attorneys general when constitutional questions are squarely raised. The relevant evidence is often historical and anthropological: dueling experts must prepare reports and submit to cross-examinations; in some cases, elders must attend and try to convey traditional knowledge in a traditional form to a very conventional judge. As a result, after millions of dollars and hundreds of days at trial, judges in the largest cases rarely resolve the dispute so much

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408 Chetlatta Carrier Nation v British Columbia (Project Assessment Director), [1998] 3 CNLR 1 (petition); Kwicksutainenuk/Ab-Kwa-Mish First Nation v British Columbia (Agriculture and Lands), 2010 BCSC 1699 (class action) [Kwicksutainenuk]; Ahousaht Indian Band and Nation v Canada (AG), 2009 BCSC 1494 (declaration) [Ahousaht Indian Band]; Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650 (damages) [Carrier Sekani Tribal Council].

409 Snuneymuxw First Nation v British Columbia, 2004 BCSC 205 [Snuneymuxw].


as write an extensive report on the vexing problems raised and instruct the parties to work it out themselves.\textsuperscript{412}

The limitations of litigation have created demand on all sides for a more comprehensive solution: treaties. In this chapter, negotiation refers to the negotiation of these all-encompassing agreements. Since 1993, these negotiations have taken place primarily under the auspices of the British Columbia Treaty Process. The only exception is the talks that produced the Nisga’a Final Agreement in 1998. Modern treaties are expected to settle all of the parties’ claims by replacing enigmatic aboriginal rights with clearly codified treaty rights, which receive the same formal recognition and protection under s. 35(1) of the Constitution Act, 1982. They are tripartite affairs between an indigenous group, the provincial government and the federal government. They are not \textit{ad hoc} efforts to avoid or settle particular lawsuits. Typically, these agreements establish a new tier of government for the indigenous party, grant fee simple ownership of specified “treaty settlement lands,” provide some measure of financial support for the new government, and set the terms of its relationship with British Columbia and Canada. Treaties are neither cheap nor quick. After 18 years and hundreds of millions of dollars spent in the Treaty Process, only four final agreements had been initialed by the end of 2010, and only two of those have been ratified. They remain extremely controversial, even among indigenous groups, and in some cases have sparked internecine litigation.\textsuperscript{413} Further, their benefits remain unclear, as legislative initiatives and “interim measures” offer some indigenous communities the social and economic boons ordinarily associated with treaties and recent case law limits the certainty they can provide.\textsuperscript{414} Finally, treaties face increasingly stiff competition from consultation and collaboration.

Consultation emerged as a distinct response after the BC Court of Appeal (the highest appellate court in the province subordinate only to the Supreme Court of Canada) began to articulate a duty to consult in 1999 and 2002.\textsuperscript{415} Before those decisions, the Crown sometimes consulted with indigenous people, but only haphazardly.\textsuperscript{416} Afterwards, and especially after the Supreme Court of


\textsuperscript{413}See e.g. \textit{Chief Mtn v Canada}, 2000 BCSC 659; \textit{Tseshaht First Nation v Hun-a-ay-ahht First Nation}, 2007 BCSC 1141 [\textit{Tseshaht First Nation}].

\textsuperscript{414}See e.g. \textit{First Nations Jurisdiction over Education in British Columbia Act}, SC 2006, c 10; \textit{Beckman v Little Salmon/ CARMACKS First Nation}, 2010 SCC 53, [2010] 3 SCR 103 [\textit{Little Salmon}].

\textsuperscript{415}Halfway River First Nation v British Columbia (Minister of Forests) (1999), 64 BCLR (3d) 206 (BC CA) [\textit{Halfway River BCCA}]; Haida Nation v British Columbia (Minister of Forests), 2002 BCCA 147 [\textit{Haida Nation BCCA #1}]; Taku River Tlingit First Nation v Ringstad, 2002 BCCA 59 [\textit{Taku River BCCA}].

Canada upheld one of those decisions on appeal, the Crown began to do so more regularly, albeit reluctantly.417

The duty to consult is a constitutional duty.418 It arises when the Crown contemplates a decision that may affect an aboriginal or treaty right. The right need not be proven; it need only be alleged. The content of the duty ranges from mere notice to deep consultation and even accommodation of the aboriginal interests at stake depending on the strength of the claim and the anticipated severity of the impact.419 In this chapter, consultation refers to both consultation and any attendant accommodation. To uphold the honour of the Crown, consultation must be meaningful and accommodation must be workable.420 Given the low threshold and these ambiguous standards, it should be no surprise that the duty to consult has inspired ample litigation. However, consultation is much more than doctrine.

Consultation includes the actions taken outside the courtroom to satisfy the duty to consult. For example, both Canada and British Columbia have adopted general consultation guidelines as well as policies tailored to specific ministries.421 Some of those ministries also have struck bargains with indigenous groups in which the latter receive some combination of cash and rights to harvest natural resources in their traditional territories. In exchange, they accept that compliance will satisfy the ministry’s obligation to consult for the duration of the agreement. These agreements differ from treaties in almost every respect: they are bilateral rather than trilateral; they are partial rather than comprehensive; they are temporary rather than final; they do not establish new governments; and they generally do not transfer land or codify aboriginal rights.

Consultation is more a competitor than a complement for negotiation. Consultation agreements typically have been limited to one ministry, but broad frameworks are becoming more common. Relatively quick and cheap to agree, they can impose administrative burdens without necessarily ensuring the indigenous party has the capacity to meet them and seize the opportunities

418 R v Kapp, 2008 SCC 41 at ¶6, [2008] 2 SCR 483 [Kapp].
419 Haida Nation SCC, supra note 417 at ¶39.
envisioned. More importantly, consultation does not resolve disputes over rights and title. It redistributes benefits, soothes tensions and postpones adjudication so the parties can seek a final settlement by some other means. Finally, the duty to consult is a creature of the Canadian legal system. Indigenous peoples can and do craft their own consultation procedures, but the primary legal objective of the opinions, policies and agreements in question has been to address the Crown’s obligations under the Canadian Constitution. For an indigenous group to sign an agreement that purports to satisfy this duty is to concede, at a minimum, that it is legitimate for the Crown to regard its own rule over indigenous peoples and their territories as legitimate so long as they have been consulted.

Collaboration does not necessarily concede this much. It is the newest of the four procedures and the least defined: it accommodates a range of positions. Its more radical manifestations posit that indigenous peoples and the Crown inhabit distinct political, legal and constitutional systems. In those scenarios, these systems co-exist, so indigenous political communities are not subsumed within the federal or provincial community. However, less strident examples contemplate a measure of integration between these communities and their respective governments. Some of them even contemplate that the Crown may satisfy its duty to consult by complying with their terms. Like consultation, collaboration generally takes the form of agreements between indigenous authorities and the Crown. However, unlike consultation, the constitutional duties of the Crown are not the primary concern of collaboration agreements.

Instead, they aim to strengthen indigenous governments and manage conflicts with the Crown. They allocate responsibility for decisions about land and resource use between indigenous governments and their provincial or federal counterpart. In many cases, they create new management boards on which the two parties make decisions jointly. They transfer money to indigenous authorities, whether as funds to build administrative capacity or a share of resource revenues. They also acknowledge indigenous claims to sovereignty, title and jurisdiction, often in terms incompatible with similar Crown claims.

Collaboration agreements can often be identified by what they lack. For example, many do not contain a choice-of-law clause that would imply endorsement of the law of the jurisdiction named. A survey of consultation agreements suggests that law would almost certainly be the law of British Columbia, not be the law of the indigenous party. Some collaboration agreements also

eschew any reference to the duty to consult. Less radical examples provide that Crown compliance might satisfy that duty or they allow the indigenous signatory to decide whether each instance of Crown engagement qualifies as consultation.

In some cases, collaboration may resemble consultation but their rationales are different: the former emphasizes solving common problems, not fulfilling the Crown’s constitutional obligations. Under a collaboration agreement, consultation is at best incidental to the primary goal of effective, peaceable and predictable resource management. Provisions that acknowledge parallel claims of authority serve that goal by suggesting the constitutional concerns of the indigenous parties warrant equal attention and respect and thus rousing indigenous enthusiasm. Collaboration expresses a distinctive conception of the constitutional predicament in British Columbia, one in which multiple constitutions compete for influence.

The four responses to the chronic constitutional doubt in British Columbia can be distinguished on various dimensions: litigation and negotiation cost more and take longer than consultation and collaboration; litigation yields agreements indirectly while the other three do so purposely; negotiation is tripartite, consultation and collaboration are almost always bilateral, and litigation can involve any number of parties. However, the most salient ground on which to distinguish them is their relationship to aboriginal rights.

Aboriginal rights are a product of Canadian law. Recent judgments of the Supreme Court of Canada have characterized them as translations of traditional practices into rights that resemble those that exist at common law. Litigation is the only means of performing this translation because it is the only response that can culminate in a declaration of the existence and content of an aboriginal right. Yet litigants and judges alike often skirt such definitive results for strategic reasons; they prefer to seek an interlocutory injunction or impose interim procedural remedies in lieu of a final disposition that may disappoint and that will almost certainly have unexpected consequences. By contrast, negotiation replaces unwritten and thus, for the Canadian Constitution, unpredictable aboriginal rights with explicit treaty rights. Consultation postpones decisions about aboriginal rights. In its extreme forms, collaboration ignores them altogether.

Of course, other academic works have considered these responses. Litigation, unsurprisingly, has received the most attention from legal scholars. They are rightfully concerned with clarifying and critiquing the doctrine, which suffers a surfeit of rhetoric. Popular exercises

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include addressing specific concerns, such as the struggle to protect sacred spaces, or contemplating the legacy of certain influential decisions. However, as so much of the constitutional experimentation in British Columbia takes place outside the courtroom, any comprehensive analysis must put the case law in context.

The BC Treaty Process has proven a divisive part of that context. The two most extensive accounts of modern treaty negotiations in British Columbia, Christopher McKee’s *Treaty Talks in British Columbia* and Andrew Woolford’s *Between Justice and Certainty*, capture this dynamic. Whereas McKee is sanguine about the Treaty Process and its prospects, Woolford is scathing. McKee writes for a general audience. He eschews theory and his style is plain. Woolford writes for his fellow scholars. He invokes Habermas and Jacques Derrida, and his style is more provocative. They share a subject but little else. However, both books do explain the genesis and early development of the Treaty Process.

They also share a basic flaw: each is, in its own way, dogmatic. McKee’s enthusiasm for the Treaty Process blinds him to its very real problems, whereas Woolford’s antipathy blinds him to its possibilities. The former sees no need for meaningful change. The latter perceives such significant obstacles to genuine communication between indigenous and non-indigenous people that he can make no serious recommendations for reform. This deficiency is only compounded by the fact that both books, although published in 2009 and 2006 respectively, do not meaningfully address events that occurred after 2001. As a result, they cannot consider subsequent doctrinal and institutional developments, such as the maturation of consultation, that have created and foreclosed various opportunities.

Woolford’s condition is more serious because it is less easily remedied. McKee might benefit from integrating some theory into the next edition of his work (even if only to dismiss it), but Woolford would need to forget a skein of unhelpful ideas before he could accept more conducive ones. For example, he argues that the Crown must publicly atone for historical and ongoing

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injustices before just negotiations can begin. If true, this argument would render just negotiations either impossible or redundant. If the Crown is not yet ready to apologize, then further talks, which are by his definition unjust and by stipulation serve only to reinforce the Crown's dominant instrumentalist rationality, will not trigger its remorse. And if the Crown were prepared to make such a declaration, negotiations would be reduced, at best, to a technical exercise of allocating rights, resources and responsibilities. They would become uncontroversial calculations.

Similarly, Woolford notes that Habermas's ideal speech situation, in which discourse is stripped of domination and participants strive only to embrace the same ideas for the same reasons, cannot arise in the “intercultural context” between aboriginal and non-aboriginal peoples. Even if this deduction is logically correct because the two groups possess incompatible “worldviews,” and even if we ignore the unfounded implication that the ideal speech situation might prevail within each of those groups, Woolford's application of this argument to the Treaty Process is problematic. He recommends that the Crown and participating aboriginal peoples solve the procedural problems with the Treaty Process, which include the faith in procedure as a salve for enduring grievances and a solution for intractable problems, by revisiting and restating its substantive goals. But it is not clear how they can do so in a just manner (or in a manner that will produce a just outcome), when the purported conditions for genuine dialogue are not merely absent but, again by definition, unavailable to them. Any consensus that results will be tainted by the power of the Crown and its colonial posture. By accepting Habermas’s sharp theoretical distinction between strategic and communicative action and suggesting that only indigenous groups are interested in the latter, Woolford puts justice out of reach. His critique is not constructive. It renders the Treaty Process irredeemable yet identifies no alternatives save an implausible and complete reversal of Crown policy.

In particular, he can see no meaningful role for the agreements and incremental adjustments that surround the main negotiations. However, as successful economic development projects and joint-management initiatives accumulate, the parties may begin to view one another differently, and the sort of watershed declaration Woolford envisions may become more likely. It may even become irrelevant. Yet he insists that explicit Crown contrition must provide the foundation for any new relationship with aboriginal people.

427 Ibid at 136-38.
428 Ibid at 127-28 and 139.
429 Ibid at 21-23 and 174.
430 Ibid at 122.
Nonetheless, relationships are not founded on declarations of any kind. Rather, relationships must precede the documents that are intended to fix them. Such documents, in turn, offer opportunities to revise not the relationships but the documents that serve as imperfect proxies for them. If the Crown does not already perceive aboriginal people as potential partners in a new constitutional venture, it will not be able to make the acknowledgment or apology Woolford claims is necessary to initiate that venture. If public repentance is essential to justice, then we must find a more effective way to induce repentance than demanding non-aboriginal politicians do the right thing.

Some academic accounts suggest consultation could provide that spark. From the outset, the constitutional duty to consult has been influenced by scholarly commentary. Yet its nature, origins and purpose remain inscrutable. For example, in a single sentence, the Supreme Court of Canada recently described the duty as both legal and constitutional without explaining the distinction. The duty purportedly arises from the honour of the Crown, yet it somehow imposes obligations on aboriginal beneficiaries. The courts have stated repeatedly that the duty to consult is intended to preserve aboriginal interests until a treaty is signed. Yet it also can be invoked to challenge and complement treaties after they have been signed. The doctrine needs a lot of work. Perhaps more importantly, so do the policies and agreements by which the duty is implemented. Prominent commentary gives little thought to these lay activities. For example, in his recent primer on the duty to consult, Dwight Newman only briefly considers government policies and corporate efforts to engage in consultation.

Collaboration is the least common of the four procedures and has received much less academic attention, especially in its most radical guise. Collaboration is not indigenous self-determination. It demonstrates concepts and mechanisms short of federalism and secession by

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433 Carrier Sekani Tribal Council, supra note 408 at ¶34.


435 Haida Nation SCC, supra note 417 at ¶¶38 and 45 and Carrier Sekani Tribal Council, supra note 408 at ¶32.

436 See e.g. Little Salmon, supra note 414; Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388 [Mikisew Cree].

437 However, for a popular account of some examples of collaboration, see Ian Gill, All That We Say Is Ours: Guujaaw and the Reawakening of the Haida Nation (Vancouver: Douglas & Macintyre, 2010).

438 Compare e.g. Alfred, Peace, Power, Righteousness, 2d ed, supra note 431.
which the Canadian Constitution can abide fundamental challenges to its legitimacy by a territorially
concentrated group. Hopefully, as it coalesces and diverges from consultation, collaboration will
attract more interest. Indigenous groups in the province are increasingly emboldened by their
successes and motivated by their setbacks. Constitutional unease is unlikely to subside, and
collaboration seems tailored to the needs of ambitious indigenous peoples and a cautious Crown
alike.

This chapter aims to explain two decades of constitutional experimentation in British
Columbia. To do so, it is necessary to leave the judge’s chambers and visit the treaty table, the
minister’s desk and the band office. To make sense of these developments, it is necessary also to
consider the relations among them: a judgment that dilutes the duty to consult encourages
indigenous peoples to pursue collaboration; delays in the Treaty Process increase the appeal of
litigation; and so on. The four procedures cannot be understood in isolation. They have evolved in
concert, and it is to that concert we now turn.

3. Four Periods

British Columbia is an ideal constitutional laboratory. It is huge. The province sweeps from
the Rocky Mountains to the Pacific Ocean and stretches from the boreal forests of Fort Nelson to
the damp suburbs of Victoria: the provincial capital affixed to the southern tip of Vancouver Island.
It is rich with nature, culture and industry. It is prosperous, stable and democratic.

It is also rife with historical grievance, ethnic discord, political controversy, economic
inequality and legal uncertainty. Of its 4.1 million inhabitants, approximately 200,000 (5%) are
indigenous.439 Federal law divides those indigenous persons registered as Indians into 198 bands,
each with its own chief(s) and council.440 Provincial policy informally divides indigenous groups into
those with strong claims to valuable lands and those without. They divide themselves into First
Nations, tribal councils and other bodies on the basis of traditional practices, linguistic affinities and
political objectives. Non-indigenous residents are by no means homogenous: they are urban and
rural, Sikh and atheist, anglophone and sinophone. Although the Canadian Parliament has authority
over “Indians, and lands reserved for the Indians,” the BC legislature has responsibility for many
matters dear to indigenous people, such as health, education and most natural resources. Both
governments are organized (and often reorganized) into ministries that sometimes struggle to
coordinate.441

441 See e.g. *Huu-ay-aht v British Columbia*, supra note 420 at ¶15.
The history of British Columbia is complex and contested. It defies summary yet it must be summarized. The four periods drawn below impart a pattern that favours recent developments. To partition the flow of history risks exaggerating the continuity within each period and the discontinuity between them. However, to eschew order is likely impossible and certainly inimical to clarity. As usual, a compromise is required. The most transparent and productive approach is to hazard a plot, admit the artifice and proceed with the attendant risks in mind.

A. Prelude: Time Immemorial – 1989

Although they tell different origin stories, indigenous people in British Columbia generally claim to have inhabited their traditional territories since a time beyond modern measure.442 The colony of Vancouver Island, by contrast, was founded in 1849. The colony of British Columbia was established on the mainland in 1858. In 1866 the two colonies merged and in 1871 the united colony joined the Confederation of Canada. The government of the new province of British Columbia continued the colonial policy of denying the existence of aboriginal rights and title. The issue was so important to its leaders that they negotiated an article in the Terms of Union that bound the federal government to adopt an Indian policy “as liberal” as had been employed by the Colony.443 As has been noted elsewhere, the negotiators must have been master ironists, for the Indian policy of the Colony was by no means liberal. For example, the only treaties made prior to Confederation were cursory agreements signed by a handful of chiefs on Vancouver Island during a brief window in the 1850s.

The situation did not improve after British Columbia entered Confederation. There were petitions, missions and commissions, but the provincial, federal and imperial governments were unresponsive to indigenous people in the province.444 The federal government signed but one treaty during this period. Treaty 8, to which indigenous groups adhered between 1899 and 1922, was intended to encourage non-indigenous settlement and natural resource extraction in the northeast corner of the province.445 Small reserves were established, and many were later reduced.446 As authority over “Indians, and Lands reserved for the Indians” falls to Parliament under s. 91(24) of the Constitution Act, 1867, the BC government generally tried to ignore indigenous people: once their

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444 See e.g. Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 (Vancouver: UBC Press, 1991) at 63-64 and 88-89 [Tennant, Aboriginal Peoples and Politics]; Delgamuukw BCSC, supra note 411 at ¶¶1106-1132.
445 Mikisew Cree, supra note 436, at ¶24.
reserves had been carved from land held by the province in right of the Crown, they were a problem for someone else to solve.447

Parliament addressed this “problem” primarily through the Indian Act, which James Tully has described as establishing “a vast administrative dictatorship” that has attempted to regulate almost every aspect of their lives, from family relations and property ownership to cultural practices and political organization.448 Under this statute, Parliament even prohibited the solicitation of funds for Indian claims between 1927 and 1951: a policy that further alienated many indigenous people, strengthened their resolve and led indirectly to the litigation that culminated in Calder v Attorney-General of British Columbia.449

In 1973, seven justices of the Supreme Court of Canada heard that case, in which representatives of the Nishga Indian Tribe sought a declaration of aboriginal title in its traditional territory near the north coast of British Columbia.450 Three justices found that “Indian title” arose from the fact that Indians were organized in societies that occupied the land before European settlers arrived but determined that it had been extinguished by colonial actions inconsistent with its continued existence.451 Three others found that aboriginal title derived in part from the Royal Proclamation of 1763 and concluded that it had survived the colonial era.452 The seventh and deciding judge found the entire discussion moot because the plaintiffs had not obtained the fiat required to file a claim against a sovereign that remained immune from suit in British Columbia.453

In light of this ambivalence, the BC government maintained its policy of denying the existence of aboriginal title to land in the province. In contrast, the federal government decided to pursue treaties with indigenous people in British Columbia. Even then, it declined to negotiate more than one claim in any one province at any one time. In British Columbia, the Nisga’a Tribal Council was first in line. Its talks with the federal government began in 1976.454 A queue soon formed and frustration quickly mounted.

By 1989, indigenous people in British Columbia had submitted 22 claims of aboriginal title under the federal government’s Comprehensive Land Claims Policy.455 So long as Canada clung to its single-claim policy, they could not proceed until the Nisga’a had a treaty. However, the Nisga’a talks had stalled because the federal government lacked authority to address matters deemed essential

448 Tully, Strange Multiplicities, supra note 159 at 90.
449 Delgamuukw BCSC, supra note 411 at ¶1133; Tennant, Aboriginal Peoples and Politics, supra note 444 at 122-129.
447 The English orthography of indigenous names is inconsistent. Except where context requires otherwise, the form prevailing today has been used.
450 Calder v Attorney-General of British Columbia, [1973] 1 SCR 313 at 328 and 333 (Judson J) [Calder].
451 Ibid at 395-99 and 412-13 (Hall J).
452 Ibid at 426-27 (Pigeon J).
453 Tennant, Aboriginal Peoples and Politics, supra note 444 at 171-72 and 207.
454 Ibid at 206.
by the Nisga’a, most notably title to Crown lands held by the provincial government. Of course, the provincial government would not participate in negotiations it believed had no legal basis. It refused to admit any uncertainty about its ownership or jurisdiction over the valuable Crown lands often claimed by indigenous people. Its official position remained that, even if aboriginal title had once existed in the province, the colonial legislature had extinguished such title before Confederation.

However, its resolve flagged as indigenous activism surged in the 1980s. Indigenous people were frustrated by decades of delays and denials. They also were encouraged by recent legal advances, such as the repatriation and major reform of the Canadian Constitution. In 1982, after years of strenuous negotiations and one momentous reference to the Court, the Parliament of the United Kingdom enacted the Canada Act 1982, which gave effect to the Constitution Act, 1982 and thereby abolished the requirement for Parliament at Westminster to approve amendments of the Canadian Constitution. The Constitution Act, 1982 provided controversial new amendment procedures that transferred significant powers to the provinces but failed to placate Quebec, which never acceded to this foundational statute. The Constitution Act, 1982 also contained the Charter of Rights and Freedoms, which entrenched a series of supple constitutional rights that are subject not only to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s 1) but also to the whims of provincial legislatures which may preserve for up to five years a law that violates certain key rights (s. 33).

The Act also contains s. 35(1), which is not part of the Charter and therefore not subject to ss. 1 or 33. The section reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Controversial when adopted, it remains controversial today. Those 17 words have had a profound impact on Canadian constitutional practice. They refuted claims that aboriginal rights no longer existed in Canada, but they introduced doubts about which rights were “existing” in 1982 and what it meant to recognize and affirm them. This provision is responsible for the profusion of aboriginal rights litigation in the past 30 years, and thus for most if not all of the developments canvassed in this chapter.

In 1984, the Court decided Guerin v The Queen, which did not implicate s. 35(1) because the case was launched before 1982 but which has nonetheless proven extremely influential. In Guerin, the Court confirmed that aboriginal title arose from prior aboriginal occupation of the land independent of the Royal Proclamation and recognized the fiduciary dimension of the unique relationship between aboriginal peoples and the Crown. Bolstered by sophisticated political networks, indigenous people and their allies assembled blockades to disrupt the resource industries on which the provincial economy relied. They also sought, and in some cases obtained, temporary

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456 [1984] 2 SCR 335 at 349-50 (Wilson J) and 376-79 (Dickson J) [Guerin].
injunctions against logging projects and railway lines that affected their traditional territories.\textsuperscript{457} In other words, they hit the provincial government where it hurt. An accounting firm estimated the annual cost of unresolved land claims at $125 million in lost or delayed investments.\textsuperscript{458} Citizens and businesses alike wanted to know who owned the land and what rules applied. They wanted legal certainty – a clear, comprehensive and final settlement of the rights and responsibilities for land in the province – which meant that the government wanted it too. The “Indian land question” became a salient issue in the provincial elections of 1983 and 1986 and the federal campaigns of 1984 and 1988.\textsuperscript{459}

This sense of urgency was contagious. Section 37(1) of the Constitution Act, 1982 required the Prime Minister, the premiers of each province and representatives of aboriginal peoples to hold a constitutional conference within one year of its effective date to discuss “constitutional matters that directly affect the aboriginal peoples of Canada.”\textsuperscript{460} After the first meeting in 1983, Canada and the provinces actually amended the new constitution to clarify the intent of s. 35(1) and require at least two more such conferences.\textsuperscript{461} In all, they held four constitutional conferences by the end of 1987, but made no material progress.

In 1986, Chief Justice McEachern of the BC Supreme Court demonstrated a similar resolve to tackle these difficult problems when he ordered that three aboriginal rights claims be heard together.\textsuperscript{462} These trials concerned the actions that had begat the most notorious injunctions. He acknowledged the differences between the parties and their claims as well as the difficulty of synchronizing cases at different stages of readiness.\textsuperscript{463} However, he felt that the proper administration of justice required at least partial consolidation: a single hearing with common evidence would be fairer and more efficient, as all the issues could be resolved simultaneously without risk of inconsistency or prejudice.\textsuperscript{464} The Court of Appeal did not share his zeal. It reversed his decision and severed the trials because the obvious risks of consolidating such unfamiliar cases outweighed the tenuous benefits, especially since the issues at stake would likely be decided by the

\textsuperscript{458} JR Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada, 3d ed (Toronto: University of Toronto Press, 2000) at 366 [Miller, Skyscrapers Hide the Heavens].
\textsuperscript{459} Tennant, Aboriginal Peoples and Politics, supra note 444 at 209.
\textsuperscript{462} Uukw v The Queen, [1986] 3 CNLR 146 at 153-55.
\textsuperscript{463} Ibid at 148 and 152.
\textsuperscript{464} Ibid at 152-53.
Supreme Court of Canada. Procedural innovation was present from the start because such novel claims warranted a novel approach.

British Columbia and Canada demonstrated some tolerance for risk when they devolved a broad set of powers to the Sechelt Indian Band in 1986. The band has approximately 1,200 members and its traditional territories are concentrated just north of Vancouver. After intense negotiations, Parliament passed an act that dissolved the Indian Act Sechelt Indian Band and replaced it with a new statutory entity that bears the same name and enjoys the full powers of a legal person. The new entity assumed fee simple title to the former reserve lands as well as authority akin to a municipality over those lands. Sechelt members, who would remain Indians under the Indian Act, approved the resumption of self-government first by referendum on the arrangements and then by referendum on the constitution Parliament required Sechelt to draft and adopt. The procedure occurred entirely within federal and provincial law. It did not rely on Sechelt law or recognize an authority constituted under that law. In that sense, despite Sechelt consent, the devolution was unilateral. This dynamic is confirmed by the 20-year sunset clause contained in the BC statute that granted the new Sechelt council the status of a municipality under provincial law.

By the end of the 1980s, the BC government's stance toward indigenous peoples had softened noticeably. It did not suddenly endorse serious constitutional reform, but it had begun to treat indigenous communities and organizations as “legitimate interest groups within the provincial political process.” But only in 1990 did these developments begin to pay broad dividends.

B. Hopes: 1990-96

In June 1990, the Supreme Court of Canada decided R v Sparrow, in which a member of the Musqueam Indian Band, whose traditional territory is located in and around Vancouver, argued that the net-length restrictions imposed under the federal Fisheries Act violated his aboriginal right to fish. The Crown did not seriously contest the existence of an aboriginal right to fish for food, social and ceremonial (“FSC”) purposes, which allowed the Court to concentrate on other issues. The Court took this opportunity to qualify the protection offered to aboriginal rights by s. 35(1). It articulated three questions to determine whether a government measure infringed an aboriginal right: whether the government measure in question imposes an unreasonable limitation on the aboriginal right; whether the measure inflicts undue hardship on aboriginal people; and whether the measure

467 Tennant, Aboriginal Peoples and Politics, supra note 444 at 234.
468 R v Sparrow (1990), 70 DLR (4th) 385, [1990] 1 SCR 1075 [Sparrow].
denies the aboriginal people its preferred means of exercising the right.\textsuperscript{469} It also explained that the Crown could justify an infringement by identifying a valid legislative objective, such as conservation, and demonstrating that the infringement was consistent with the honour of the Crown.\textsuperscript{470}

The Court had no textual basis for its analysis. Section 35(1) is not part of the \textit{Charter of Rights and Freedoms} and thus is not subject to the reasonable, lawful and demonstrably justifiable limits authorized by section 1 or the more stringent test articulated in \textit{R v Oakes} to ascertain those limits.\textsuperscript{471} Regardless, \textit{Sparrow} has proven durable and extremely influential. In fact, it set much of the political and constitutional agenda in British Columbia for the next twenty years.

For example, the primary means identified by the Court to uphold the honour of the Crown was to give the aboriginal FSC fishery priority over the commercial and sport fisheries.\textsuperscript{472} Under the \textit{Sparrow} priority, the primary concern is conservation. If the amount of fish available exceeds the amount required to satisfy the Crown’s conservation objectives, then the surplus is to be allocated first to satisfy aboriginal FSC requirements. Only if fish remain after FSC needs have been met is the remainder to be allotted to the commercial and sport fisheries, in that order. This waterfall approach has proven more difficult to conceptualize and implement in other contexts, namely where an aboriginal group asserts a right to fish commercially. Unlike FSC rights, an abstract right to fish commercially has no obvious inherent limit, so opponents can claim that to apply the \textit{Sparrow} priority in the commercial context would risk excluding non-aboriginal fishers altogether by allowing aboriginal groups to exhaust the resource first.\textsuperscript{473} As the doctrine and the regulations have evolved, even conservation has become controversial. Aboriginal groups have argued recently that the federal Department of Fisheries and Oceans (“DFO”) has compromised their FSC rights by defining conservation to emphasize sustainability, which favours high “escapement” targets that benefit future non-aboriginal users at the expense of aboriginal groups today.\textsuperscript{474} Thus, the \textit{Sparrow} priority continues to provoke new regulations and fuel new lawsuits.

\textit{Sparrow}’s legacy extends far beyond fisheries. Another potential means of accommodation identified by the Court was consultation. The Court did not articulate an independent duty to consult in this early case. It only suggested that efforts to consult aboriginal people affected by a Crown decision could be relevant to whether an infringement of their rights was justified. Nonetheless, this suggestion created incentives for both the federal and the provincial governments.

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\item \textsuperscript{469} Ibid at 411.
\item \textsuperscript{470} Ibid at 412-13.
\item \textsuperscript{472} \textit{Sparrow}, supra note 468 at 413-414. The Court borrowed this constitutional priority from a dissent by Dickson J in a case decided a decade earlier. \textit{R v Jack}, supra note 446 at ¶¶42-47.
\item \textsuperscript{473} See e.g. \textit{R v Gladstone}, [1996] 2 SCR 723 at ¶57, 137 DLR (4th) 648 (Lamer C) [\textit{Gladstone}].
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to consult aboriginal peoples before taking actions that might breach their constitutionally protected rights. The DFO soon adopted the Aboriginal Fishing Strategy, which sought to involve aboriginal people in implementing the Sparrow waterfall in British Columbia. Of course, this strategy led swiftly to the courthouse, as non-indigenous fishers unsuccessfully cried discrimination. Consultation was not yet a constitutional duty, but it proved attractive at least as a means to manage resource conflicts and to shield government conduct from judicial review.

Sparrow also introduced the rhetoric of reconciliation into the Court’s aboriginal rights jurisprudence. Serious and principled in its original incarnation, reconciliation has since been debased and now serves merely to rationalize Crown conduct. In Sparrow, the Court presented reconciliation as an imperative for the Crown: to answer the juxtaposition of s. 91(24) and s. 35(1), “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.” Reconciliation required the Crown to attend to its constitutional obligations, to favour principle over expedience and, ultimately, to uphold the honour of the Crown, which had been imperiled by the unilateral assertion of sovereignty over aboriginal peoples and their lands.

To assert sovereignty is to do more than exercise power; it is to assert authority. It is to commit to acting like a sovereign: to govern in accordance with the rule of law. The honour of the Crown requires it to implement this commitment. Reconciliation and its vaguely noble sentiment proved popular, although this exacting interpretation did not.

Since its debut, reconciliation has spawned all manner of flourish and confusion. Referenced in countless opinions and consultation agreements, it is now as lax as it is ubiquitous. Its decline is discussed in more detail below, but can be sketched in two strokes. First, although mandated by the honour of the Crown, reconciliation has somehow become a charge of aboriginal peoples as well. Second, it has been diluted, as the relatively concrete elements of federal power and federal duty have been swept away by a conceptual tide: sovereignties, rights, titles and, most recently and prosaically, “interests.” Both trends are encapsulated in this expansive excerpt from a 2005 decision of the Supreme Court of Canada: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.” In another judgment from 2005, a majority of the Court argued that the Sparrow justification analysis “can be seen as a way of reconciling aboriginal

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475 See e.g. Alick, supra note 474 at ¶23; Kapp, supra note 418, at ¶7.
476 Cummins v Canada (Minister of Fisheries and Oceans), [1996] 3 FC 871; Alford v Canada (Attorney General) (1997), 31 BCLR (3d) 228; Cummins v R (1997), 50 BCLR (3d) 262.
477 Sparrow, supra note 468, at 409.
478 Dyzenhaus, “Constituent Power”, supra note 322 at 140-41.
479 Mikisew Cree, supra note 436 at ¶1.
interests with the interests of the broader community.” In turn, this statement can be seen as a way of escaping the original constraints of Sparrow. Although the courts continue to invoke the honour of the Crown, the banal compromise to which they have reduced reconciliation is no longer principled or rigorous. This problem is exacerbated by the fact that reconciliation is rarely given the same meaning twice. At this point, the rhetoric appears to serve primarily to mask undisciplined thought.

In the wake of Sparrow, the provincial government finally acceded to the Nisga’a negotiations in October 1990 and, by December, it had agreed to establish the British Columbia Claims Task Force. Its partners in the latter were the federal government and two indigenous political organizations: the First Nations Council (the “FNC”) and the Union of British Columbia Indian Chiefs (the “UBCIC”), which represented overlapping constellations of indigenous communities in different capacities. The Task Force had seven members: two selected by the Canadian government, two chosen by the BC government, two appointed by the FNC and one nominated by the UBCIC. It was instructed to report on the prospects for resolving land claims in British Columbia via treaty negotiations and to recommend steps to realize those prospects.

Before it could do so, Chief Justice McEachern issued his opinion in Delgamuukw v British Columbia (Attorney-General). The case concerned land near the north coast of the province, close to the territory at issue in the Nisga’a negotiations. Thirty-five Gitxsan and 13 Wet’suwet’en hereditary chiefs brought a civil action in which they sought a declaration of their ownership and jurisdiction over their traditional territories and, in the alternative, certain unspecified aboriginal rights in the same. The trial lasted 374 days and generated numerous interlocutory motions. The judge’s reasons ran to nearly 400 pages. His discomfort with the language of aboriginal rights was palpable but his candour was admirable. He largely ignored the plaintiffs’ traditional oral evidence and then found that all aboriginal rights had been extinguished in British Columbia by a series of colonial enactments. Aboriginal rights had not reached Confederation, let alone 1982. This conclusion was a major, albeit temporary, setback for aboriginal peoples in the province.

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480 Marshall and Bernard, supra note 423 at ¶39.
482 Ibid.
483 Delgamuukw BCSC, supra note 411.
484 Delgamuukw SCC, supra note 412 at ¶5; Delgamuukw (Unkw) v BC, supra note 465; Delgamuukw (Unkw) v BC, supra note 468; Delgamuukw (Unkw) v BC (1987), 16 BCLR (2d) 145. See also, Westar Timber Ltd v Gitksan Wet’suwet’en Tribal Council (1990), 37 BCLR (2d) 352.
485 See e.g. Delgamuukw BCSC, supra note 411 at ¶¶29, 357-360, 404, 418-419, 1503 and 1522-30.
However, the Chief Justice did not force them to bear the entire burden. He also found that, by extinguishing aboriginal rights while promising aboriginal peoples they could use unoccupied Crown land for purposes equivalent to those rights, the Crown had assumed “a legally enforceable fiduciary, or trust-like, duty or obligation upon the Crown to ensure there will be no arbitrary interference with aboriginal sustenance practices in the territory.”\footnote{Ibid at ¶31.} Although he insisted this duty did not impose a burden on Crown title or endow a constitutional right, it did create significant uncertainty for the Crown and those industries that harvest resources from Crown land, which incidentally comprises 94% of the land in British Columbia.\footnote{British Columbia, Integrated Land Management Bureau, “Crown Land – A Definition”, online: Integrated Land Management Bureau <http://archive.ilmb.gov.bc.ca/adventure_tourism/crown_land_definition/crown_land_definition.html>.
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As McEachern CJ must have anticipated, his decision was soon appealed to the BC Court of Appeal, which in 1994 overturned his finding that colonial enactments had extinguished aboriginal rights in British Columbia and which inspired another appeal to the Supreme Court of Canada.\footnote{Delgamuukw v British Columbia (1993), 30 BCAC 1.
} If nothing more, the trial judgment in \textit{Delgamuukw} demonstrated at an opportune time the high costs and serious risks of litigation for indigenous peoples and the Crown.

} It recommended that the process be voluntary for First Nations but mandatory for the governments: each First Nation that chose to participate would define itself and form a separate treaty table with the provincial and federal governments. It recommended that the parties adopt a six-stage process similar to the federal Comprehensive Land Claims Policy pursuant to which the Nisga’a had been negotiating its treaty: (1) submission of statement of intent to negotiate; (2) preparation for negotiations; (3) negotiation of a framework agreement; (4) negotiation of an agreement-in-principle; (5) negotiation of a final treaty; and (6) implementation.\footnote{Ibid at 16-18.
} It recommended that the negotiations remain open to any issue deemed relevant by any party. It recommended that they establish a commission to monitor and facilitate the negotiations. It recommended that the parties employ interim measures to protect indigenous interests while a treaty is pending and to build confidence in the negotiation process. The federal government, the provincial government and the newly formed First Nations Summit (the successor
to the FNC) endorsed each of its recommendations in the *British Columbia Treaty Commission Agreement*, which created the British Columbia Treaty Commission on September 21, 1992.491

That year also brought the defeat of the Charlottetown Accord in two simultaneous referendums (one in Quebec and one in the rest of Canada) and, with it, the demise of what Peter Russell called “mega-constitutional politics.”492 The Accord was a response to the failure of the Meech Lake Accord in 1990, which itself was a response to the failure of the *Constitution Act, 1982* to gain assent from the national assembly of Quebec. The Charlottetown Accord was broader than its predecessor. It was intended to appeal to a wider range of interest groups. Indigenous groups such as the Assembly of First Nations were intimately involved in its negotiation. The Accord would have given indigenous peoples a new role within Canada. For example, it would have recognized the inherent aboriginal right of self-government and acknowledged aboriginal governments as a third order of government in Canada.493 It also would have restructured the Canadian Senate and envisioned subsequent discussions about reserved seats for Aboriginal senators.494 The Accord did not gain popular approval: 54% of Canadians voted against it, including a majority of Quebeckers and a majority of Indians living on reserves.495 Despite its defeat and the disillusionment that followed, it confirmed at least that political elites across the country were willing to entertain radical constitutional changes to address indigenous concerns.

If not imminent, a new relationship finally seemed plausible. Indigenous peoples were enticed by the prospect of tripartite treaty negotiations: absent the federal government, they would have been unable to resolve important formal issues, such as their classification as “Indians” and the resulting application of the *Indian Act*; absent the province, they would have been unable to address vital substantive concerns, from health and education to the ownership of contested Crown lands.

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493 Charlottetown Accord Draft Legal Text, 9 October 1992, ss 2(1)(b) and 35.1, online: Solon Law Archive <http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html>.

494 Ibid at ss 21(1)(a) and (c).

The Claims Task Force had anticipated a maximum of 30 treaty tables. The Commission began operations on December 13, 1993. It received 29 Statements of Intent to Negotiate that day and a total of 41 within six months. The decision to participate in the Treaty Process represented a major departure for each of Canada, British Columbia and the Summit (the “Principals”). The provincial government had acknowledged that the “Indian land question” remained open and that it had a stake in answering that question. The federal government had accepted that multiple tables could move in parallel and that successful talks would require more time and money. Finally, members of the two leading indigenous political associations in the province had set aside disagreements over the proper basis of organization (i.e. self-defined First Nations or Indian Act bands) and the correct balance between collaboration and confrontation to pursue the possible gains from treaty talks, although the UBCIC subsequently turned against the Process and did not sign the Treaty Commission Agreement.

Much of the early momentum in the Treaty Process derived from this sharp break with the past. After more than a century of exclusion and repression, the mere establishment of a comprehensive negotiation process was a major achievement. Many of the First Nations that rushed to initiate talks also sped through the first stages of the Process. In 1995, only seven of the 43 participating First Nations (16%) had reached Stage 3 (Negotiation of Framework Agreement) and none had reached Stage 4 (Negotiation of Agreement-in-Principle). Just one year later, 22 of 47 (47%) were in Stage 3 and 11 (23%) were in Stage 4. These numbers bolstered expectations that the Treaty Process would soon deliver a new era of harmony and prosperity in British Columbia.

Such high hopes were bound for disappointment. The early stages of the Treaty Process impose minimal procedural demands. For example, after defining itself and its territory in Stage 1, a First Nation in Stage 2 must prepare for talks: appoint a negotiator, confirm that he or she has a mandate, specify a ratification procedure, and so on. These criteria do not require the parties to hold substantive discussions. As a result, this rapid progress did not indicate any real advance towards a final agreement. Since those informal preparatory stages did not prepare them to compromise or confront real disagreements, the tables that reached Stages 3 and 4 soon began to stall.

497 Ibid at 3.
500 See e.g. Ibid at Executive Summary and 21.
The Commission had to reckon with this superficial success. It had few staff and was overwhelmed by the number of tables in the Process and the pace by which they advanced. It responded by elaborating the formal criteria for entering the Process and moving between stages. It also requested additional money from the provincial and federal governments for First Nations in the later stages, which had proven more demanding and expensive than expected. It may have succeeded in slowing some tables but it did not eliminate the bottleneck in Stage 4.

In these formative years, the parties encountered problems first thought to be transitional but now recognized as perennial. Financing, in particular, remains a concern for all involved. Most First Nations rely on government loans and grants to finance their negotiations. Initially, the governments offered them as a package deal: if a First Nation wanted any financial support, it had to take 80% in the form of a loan and 20% as a grant. The federal government financed all of the loans and 60% of the grants. The province funded the remainder, which means that it provided only $8 of every $100 a First Nation received for negotiations. Loans incurred by a First Nation before it signed an agreement-in-principle (“AIP”) at the end of Stage 4 did not bear interest; those obtained afterwards did. All loans to a First Nation were due on the earliest of three dates: the day its final treaty takes effect, the twelfth anniversary of its first loan or the seventh anniversary of its AIP. First Nations have long criticized both the amount and the terms of government funding. They have claimed that they do not receive enough money to enable them to negotiate as equals. They have also argued that loans unfairly erode the financial component of any final agreement and compound the pressure to conclude a deal. They have had some success on the latter issue. In 2004, the federal and provincial governments decoupled loans and grants in response to pressure from indigenous groups and the Commission. Canada also announced an interest moratorium on Stage 5 loans until 2009. However, these concessions may have come too late to save the Process.

Mandates too posed a challenge from the start. Whereas Crown negotiators generally brought clear yet rigid mandates to the table, indigenous representatives held flexible positions that

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506 See e.g. BC Treaty Commission, Annual Report 1994, supra note 496 at 4 and 23.
could prove ambiguous. As a result, substantive discussions often proved unproductive. Many treaty tables remain hobbled by unconstructive or non-existent mandates.

In addition, the Principals were criticized for dedicating insufficient resources to educating non-indigenous citizens about the Treaty Process, and the federal and provincial governments were chastised for poor consultation practices. Increased awareness, however, is a risky proposition when social divisions compound a steep learning curve: the historical practices and legal decisions that fostered the Process are not widely understood, and many non-indigenous residents already resent what they perceive as generous government treatment of indigenous people.

The interim measures that the Task Force believed crucial to success also proved controversial. The BC government initially refused to entertain such measures until late in Stage 4. This stance was inconsistent with the spirit and the letter of the Task Force Report, which called upon the federal and provincial governments to notify, consult and even accommodate First Nations when proposed developments would affect their traditional territories. Such reluctance suggested the provincial government was more interested in preserving its partnership with resource extraction industries than in developing a new relationship with First Nations. Eventually, the province recanted and affirmed its willingness to negotiate interim measures at any point in negotiations. Looking ahead, the Commission feared not that interim measures would fail but that they would prove too successful. It worried that the attention dedicated to bilateral revenue and development deals would distract the parties from the ultimate goal of comprehensive treaties. Recent trends suggest this was the more prescient concern.

As the parties became acquainted with the Process, they also discovered the limits of their commitment to it. When the provincial government declined to discuss interim measures until a point many tables would never reach without assistance from those very measures, it spurned the Task Force, incensed the Commission and aggravated the Summit. Its apparent desire to conduct business as usual for as long as possible raised doubts about whether the Process could achieve the

cultural adjustments and institutional reforms required to transform politics in British Columbia.\textsuperscript{515} For its part, the federal government was vexed by the prospect of negotiating (and funding negotiations) with First Nations that had sued it. After the Commission intervened, the federal government refined its objections and decided that not all claims warranted disrupting the Treaty Process.\textsuperscript{516} Each party’s commitment to the Process has always been conditional. These conditions are vital to understanding the evolution of the Process as alternatives have emerged.

During the mid-1990s, First Nations continued to submit Statements of Intent to Negotiate, albeit at a slower rate. Tables continued to convene but they no longer moved as swiftly between stages. The Commission continued to issue optimistic annual reports, although obstacles loomed ever larger in its accounts. Despite these difficulties, the parties remained convinced that the Treaty Process was worth the trouble, perhaps because the other options were still immature.

In 1996, the Supreme Court of Canada decided three companion cases: \textit{R v Van der Peet}, \textit{R v Gladstone}, and \textit{R v NTC Smokehouse Ltd}.\textsuperscript{517} Each of them arose from a regulatory prosecution in British Columbia in which an aboriginal right was invoked as a defence. Unlike \textit{Sparrow}, the appellants in these cases (members of the Sto:lo, Heiltsuk and Shesaht and Opetchesaht Nations, respectively) asserted both the right to fish and the right to sell the fish they caught: the Crown was unwilling to concede the latter. Thus, the Court was finally obliged to fashion a test for the aboriginal rights protected by s. 35(1). Chief Justice Lamer wrote the majority opinion in each case. In \textit{Van der Peet}, he revealed the long-awaited formula: to qualify as an aboriginal right, “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”\textsuperscript{518}

With those words, Lamer CJ sent judges across the country on quixotic anthropological expeditions for which few were equipped. The ten “factors” he provided to guide them were more hindrance than help (and arguably, by their number alone, demonstrated the folly of his test). Some seemed simple but proved difficult. He reminded judges to consider the perspective of aboriginal peoples when determining their rights.\textsuperscript{519} Yet the “aboriginal perspective” is an unhelpful abstraction. Consider, as rebuttal, what insights the “non-aboriginal perspective” might possibly provide. Fortunately, Lamer CJ did not expect initiates of the common and civil law to transcend their training: whether as a matter of logic or a matter of aptitude, while judges should entertain the

\textsuperscript{518} \textit{Van der Peet}, supra note 517 at ¶46.
\textsuperscript{519} Ibid at ¶49.
“aboriginal perspective,” they must ultimately deliver something “cognizable to the non-aboriginal legal system.”

Other factors appeared difficult and proved impossible. Lamer CJ recommended judges imagine whether the aboriginal culture in question would have been fundamentally altered without the practice, custom or tradition in question. He also instructed them to ask whether a practice, custom or tradition was “one of the things that truly made the society what it was” and whether that practice, custom or tradition has “continuity” with those that existed prior to contact with Europeans. He assumed not only that aboriginal societies possess discrete essences but also that judges steeped in alien legal systems are capable of discerning those essences and tailoring legal rights to protect them from government ineptitude and discrimination. None of these assumptions were warranted by experience. Nor have they been confirmed by subsequent developments. The complexity of the Van der Peet test ensured that it would prove, if not unworkable, at least unpredictable.

The tests, factors and other heuristics adopted to implement aboriginal rights present another, more insidious risk. These doctrinal trappings give aboriginal peoples and their rights an orthodox appearance. In turn, this creeping resemblance emboldens lawyers and judges. As tropes and formulas accumulate, and cases involving aboriginal rights begin to look and sound more like other cases, they grow more comfortable and confident. Their arguments and decisions grow more ambitious and less sensitive to the dangers of assimilating “sui generis” constructs to ordinary common-law concepts and, worse, aboriginal peoples to “the rest of Canadian society.” Contrast the poise of Lamer CJ in the Van der Peet trilogy with the unease of McEachern CJ in Delgamuukw or the bafflement of Southin JA when she dissented from a 1991 decision of the BC Court of Appeal and wrote about “aboriginal title, whatever that may be.”

Aside from the flaws of the Van der Peet test itself, the decisions in the trilogy confirm other troubling developments. For example, Lamer CJ opined that “the doctrine of aboriginal rights exists...because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.” But this assertion is misleading, because that “one simple fact” is salient only because of another, much more complicated, fact: when Europeans arrived in North America, they asserted ownership of the land and authority over its inhabitants. To acknowledge the former

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520 Ibid at ¶49.
521 Ibid at ¶59.
522 Ibid at ¶¶55 (emphasis in original) and 60-65.
523 Gladstone, supra note 473 at ¶75.
524 British Columbia (AG) v Mt Currie Indian Band, 54 BCLR (2d) 156, [1991] 4 CNLR 3 (BCCA) at ¶91.
525 Van der Peet, supra note 517 at ¶30.
but not the latter obscures important questions about the legitimacy and implications of Crown sovereignty over indigenous peoples in British Columbia who have not formally consented to Crown rule.

Gladstone promised to be the jewel among the three cases because a majority of the Court recognized the Heiltsuk had the right to trade herring spawn on kelp, a traditional food, on a commercial basis. However, the Court quickly tarnished that promise. First, the majority reinforced the distinction between commercial rights and FSC rights. According to Lamer CJ, the former warrant different treatment because they possess no “internal limitation.” To apply the Sparrow priority unmodified to such rights apparently would eviscerate the non-aboriginal commercial fishery. The Court did not consider the negative effect Crown regulations had on the aboriginal commercial coastal fishery. Thus, aboriginal rights acquired another constraint derived from practical concerns and political considerations rather than the terms of a constitutional bargain.

Second, the majority “refined” the Sparrow analysis to make it easier for the Crown to justify infringements of aboriginal rights. In Sparrow, the Court declared that the justification analysis has two components: the Crown must show that the infringing measure not only serves a valid legislative objective but also upholds the honour of the Crown. Lamer CJ casually modified the latter requirement by writing instead that “the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples.”

After Gladstone, justification no longer demands satisfaction of some intrinsic standard for proper Crown conduct. The test no longer obliges the sovereign to act like a sovereign and attend to its constitutional obligations: its “federal duty.” Rather than the ultimate legal authority, it treats the Crown as just another fiduciary, and it treats aboriginal peoples as vulnerable dependents rather than constitutional partners.

The majority in Gladstone also expanded the scope of legislative objectives that provide a valid basis for infringing aboriginal rights. It analyzed them in light of the twin purposes of s. 35(1): to recognize prior aboriginal occupation and to reconcile that occupation with the assertion of Crown sovereignty. It debased reconciliation by conscripting aboriginal peoples and imposing a historical imperative, and this debasement had clear practical consequences. After Gladstone, reconciliation is not an ideal to which the exercise of sovereign authority must aim: an expression of

526 Gladstone, supra note 473 at ¶¶26-30.
527 Ibid at ¶57.
528 Ibid at ¶59.
529 Ahousaht Indian Band, supra note 408 at ¶¶680 and 786-81.
530 Sparrow, supra note 468 at 412-413.
531 Gladstone, supra note 473 at ¶54.
the implicit Crown commitment to fulfill its constitutional responsibilities. Instead, reconciliation demands submission to the reality of Crown sovereignty. Crown rule is a fact that all subjects, including aboriginals, must accept. Redefined, reconciliation could now serve to rationalize the subordination of aboriginal rights and culture to the interests of the “broader social, political and economic community” to which the Court insists aboriginal societies belong. Lamer CJ concluded that, in addition to conservation, valid legislative objectives include “the pursuit of regional and economic fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.” Unlike conservation, these new objectives do not serve or protect aboriginal interests. They reflect the new dynamic of reconciliation, which requires aboriginal groups to accept their role as subjects of the Crown and demands little from the Crown or its law in return.

In sum, the immediate effect of the Van der Peet trilogy was to make aboriginal rights litigation more arcane, more protracted, more expensive and more perilous. It piled words upon words to the benefit of lawyers and expert witnesses. It invited further litigation by providing a deceptively short test for aboriginal rights, which spurred interest in procedural and doctrinal proxies for justice. At the same time, by clarifying the legal questions and raising the financial stakes, it created incentives for all interested parties to find alternative routes to their respective objectives.

Fortuitously, consultation had begun to coalesce. As noted above, the DFO introduced the Aboriginal Fishing Strategy shortly after Sparrow. Some provincial ministries had started to dabble in ad hoc consultation. As part of the Sparrow justification analysis, courts had started to elaborate the content of the obligation to consult. They found the Crown must be proactive: it has a duty to inform itself of the relevant practices of the aboriginal groups affected by proposed conservation measures; it has a duty to inform those groups of the measures and their effects; and it has a duty to consider the informed views of those groups. Unlike the Van der Peet trilogy, the parties in these cases did not contest the rights in question. Instead, they either invoked the blanket fiduciary duty established by McEachern CJ in Delgamuukw or adopted the Sparrow tactic of stipulating the aboriginal right in order to concentrate on infringement and justification. However, the BC Court of Appeal entertained an alternative (and ambiguous) basis for a distinct duty: “the legal obligation

532 Ibid at ¶73.
533 Ibid at ¶¶72-75.
on the Crown with respect to the fiduciary obligation” announced in *Delgamuukw* included “the obligation to consult.”\(^537\)

This first, awkward period of experimentation also provided an early example of collaboration. In January 1993, Canada and the Council of the Haida Nation signed the Gwaii Haanas Agreement.\(^538\) They agreed to establish a joint management board for the ecologically- and culturally-sensitive southern portion of the archipelago known as both Haida Gwaii and the Queen Charlotte Islands.\(^539\) They articulated a common vision for the area that precluded industrial or commercial exploitation, save for certain traditional Haida practices.\(^540\) They adopted a high threshold for joint action and a rare dispute resolution mechanism: any decision that did not garner consensus would be held in abeyance until the parties reached agreement.\(^541\)

As important as the substance and procedure was the form. The agreement possessed all the indicia of strong-form collaboration: Canada and the Council made parallel assertions of ownership, sovereignty and jurisdiction; it made no reference to the nascent practice of consultation; and it employed no choice-of-law clause or other provision conceding the legitimacy of Canadian law or the authority of provincial or federal courts. Although limited in scope, collaboration arrived fully formed.

By 1996, the four procedural responses to British Columbia’s constitutional unease were evident and operational. Litigation offered its usual bazaar of claims, motions and remedies. Negotiation beckoned, flawed yet alluring. Consultation remained vassal to justification but preparations were underway for its emancipation. Collaboration had been attempted but remained isolated. So long frozen by antagonism and fear, the situation had started to thaw.

The release that year of the report of the Royal Commission on Aboriginal Peoples further stoked anticipation. The report was the product of four years of research, consultation and writing by eight illustrious commissioners, their esteemed advisers and extensive support staff. At four thousand pages, it was not fit for public consumption, although shorter extracts and other materials were intended to make it more accessible.\(^542\) The report was comprehensive and ambitious. The commission made detailed recommendations on each of its major subjects, such as health, housing

\(^{537}\) *Ryan v Fort St James Forest District (District Manager)* (1994), 40 BCAC 91 (BCCA) at ¶9.


\(^{539}\) Ibid at s 4.0

\(^{540}\) Ibid at ss 3.0 and 6.0.

\(^{541}\) Ibid at s 5.3.

and education.\textsuperscript{543} It also recommended a new and more respectful federal treaty process and major constitutional amendments.\textsuperscript{544} The commission suggested, among other things, a separate aboriginal house of Parliament and a seat reserved on the bench of the Supreme Court of Canada for an aboriginal judge.\textsuperscript{545} Admirable and sensitive to indigenous concerns, these recommendations were also totally unrealistic. The Charlottetown Accord had contained similarly radical provisions, had failed spectacularly and had exhausted the patience of Canadians for comprehensive constitutional reform. A voluminous official report, no matter how impressive the panel, was always unlikely to reinvigorate the citizenry.

Ultimately, the report fizzled. It had no direct impact on the Canadian Constitution. It had very little political resonance for the settler population and has essentially vanished from public debate. It has had a modest impact on Crown policy, but subsequent doctrinal developments have had much more profound effects. It also has had some influence on the courts and the academy: judges and scholars periodically consider its findings and conclusions.\textsuperscript{546} However, at the time of its release, none of this was apparent. The report again confirmed that members of Canada’s political and intellectual elite supported efforts to correct the injustices done to indigenous people. It resonated with Canada’s new policy, announced in 1995, of recognizing and reinforcing aboriginal self-government, and gave sympathetic minds reason to hope for a more progressive era.

C. Doubts: 1997-2003

In December 1997, the Supreme Court of Canada quickened the pace of innovation when it delivered its opinion in \textit{Delgamuukw}. The majority ordered a new trial for two procedural reasons: at trial, McEachern CJ had failed to give sufficient weight to the oral histories and territorial affidavits introduced by the plaintiffs; and, on appeal, the aboriginal appellants had amalgamated their 51 claims into two communal claims, one for the Gitksan and one for the Wet’suwet’en, but had not amended the pleadings accordingly.\textsuperscript{547} The first error prejudiced the plaintiffs and the second prejudiced the Crown. Given the complexity of the evidence, a new trial conducted with proper pleadings and due attention to the perspectives of the Gitksan and the Wet’suwet’en was necessary.\textsuperscript{548}

However, the Court did much more than reverse the trial judge. It seized this rare opportunity to opine on the nature and implications of aboriginal title. Lamer CJ, writing again for

\textsuperscript{544} Ibid at 125-34 (amendments) and 149-54 (treaties).
\textsuperscript{545} Ibid at 128-9.
\textsuperscript{546} See e.g. \textit{Delgamuukw SCC}, supra note 412 at ¶85 and John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 McGill LJ 615.
\textsuperscript{547} \textit{Delgamuukw SCC}, supra note 412 at ¶76-77 and 107-08.
\textsuperscript{548} Ibid at ¶108.
the majority, explained that aboriginal title lay at the far end of a spectrum with other aboriginal rights that are less connected with the land.\textsuperscript{549} Aboriginal title is a right to the land itself, and it has three “dimensions”: it is inalienable, except to the Crown; it derives from prior aboriginal occupation of the land and the assertion of Crown sovereignty; and it is held communally.\textsuperscript{550} Lamer CJ suggested these characteristics were unified by the “principle” that aboriginal title is \textit{sui generis}, but this label adds only the conceit of Latin.\textsuperscript{551} Ancient languages aside, aboriginal title is unique because it possesses unique attributes, not the reverse.

Two of those attributes are more important than the others. First, the majority confirmed that “aboriginal title is a burden on the Crown’s underlying title.”\textsuperscript{552} In doing so, it upheld the venerable and otherwise discredited precedent of \textit{St. Catherine’s Milling Co. v The Queen}.\textsuperscript{553} In that 1888 case, the Judicial Committee of Privy Council (which at the time was the ultimate appellate body for claims that arose in Canada) also declared that the aboriginal interest in land is not proprietary but “a personal and usufructuary right, dependent upon the good will of the Sovereign.”\textsuperscript{554} The majority in \textit{Delgamuukw} did not endorse this latter anachronism.\textsuperscript{555} Instead, it expounded upon the original point: “[b]ecause it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.”\textsuperscript{556}

In other words, aboriginal title is a common-law concept.\textsuperscript{557} Prior aboriginal occupation is a condition, not a source, of aboriginal title. The “concept of aboriginal title,” as described by Justice Wilson in \textit{Guerin}, is the necessary implication of the unilateral assertion of Crown sovereignty over aboriginal peoples.\textsuperscript{558} Aboriginal title, in turn, is a condition for legitimate Crown rule over peoples who never formally consented to that rule. Without it, the presence of the Crown in British Columbia would rest on raw power alone and the Crown could not claim to be a sovereign, which is not a mere ruler but a lawful one.\textsuperscript{559} Aboriginal title provides the requisite legal foundation for Crown sovereignty. The Court has created a conundrum: while it insists aboriginal title rests upon Crown title, its reasons imply Crown sovereignty (which is the ultimate source of Crown title) rests upon aboriginal title.

\textsuperscript{549} Ibid at ¶138.
\textsuperscript{550} Ibid at ¶112-15.
\textsuperscript{551} Ibid at ¶113.
\textsuperscript{552} Ibid at ¶145.
\textsuperscript{553} (1888), 14 AC 46 (JCPC).
\textsuperscript{554} Ibid at 54.
\textsuperscript{555} Compare \textit{Calder, supra note 451} at 328 (Judson J) with \textit{Guerin, supra note 456} at 349 (Wilson J) and 381-82 (Dickson J).
\textsuperscript{556} \textit{Delgamuukw SCC, supra note 412} at ¶145.
\textsuperscript{557} Ibid at ¶1, 82 (aboriginal rights are a common law doctrine) and 133.
\textsuperscript{558} \textit{Guerin, supra note 456} at 376 (Wilson J).
\textsuperscript{559} Dzynenshaus, “Hobbes Challenge”, \textit{supra note 311} at 493-94.
Second, the majority held that aboriginal title contains an inherent limit. Aboriginal title exists to preserve the relationship between aboriginal peoples and their lands, so it cannot entail the right to use those lands in a manner irreconcilable with that relationship.\textsuperscript{560} Expressed differently, the lands over which an aboriginal people hold aboriginal title have an intrinsic, “non-economic” value, and they cannot put their lands to uses that would destroy that value without also forfeiting their aboriginal title.\textsuperscript{561} This inherent limit also contains a procedural element. Although aboriginal title includes the right to determine how land is used, if an aboriginal group wants to pursue ends incompatible with its relationship to the land, it must first surrender that land to the Crown.\textsuperscript{562}

To fashion the test for aboriginal title, Lamer CJ adapted the \textit{Van der Peet} test to this \textit{sui generis} subject. To prove aboriginal title, a claimant must establish that his or her people enjoyed exclusive occupation, for aboriginal purposes and from an aboriginal perspective, of the territory in question at the first exercise of Crown sovereignty: not at first contact.\textsuperscript{563} The majority acceded to McEachern CJ’s conclusion that the Crown established its sovereignty over British Columbia in 1846.\textsuperscript{564} This test improved upon \textit{Van der Peet} by largely avoiding a clumsy investigation into the essence or defining characteristics of aboriginal societies. However, some awkward moments are inevitable, as courts will need to sift shelves of colonial records and expert reports to determine the boundaries of traditional territories and the manner in which aboriginal peoples occupied them more than 150 years ago.

\textit{Delgamuukw} also confirmed that aboriginal title can be infringed and that such infringements can be justified in much the same manner as violations of other aboriginal rights.\textsuperscript{565} Once again, the majority expanded the catalogue of legislative objectives that can be invoked to absolve the Crown. Those objectives now include: “the development of agriculture, forestry, mining, and hydroelectric power,” “the general economic development of the interior of British Columbia,” and “the building of infrastructure and the settlement of foreign populations to support those aims.”\textsuperscript{566} They no longer require any connection with reconciliation, even the compromised version that prevailed after \textit{Van der Peet}.

Unlike the trial judge, the Court in \textit{Delgamuukw} embraced uncertainty and declined to pronounce upon the existence of aboriginal title in any part of British Columbia. The test for aboriginal title is succinct but unpredictable because its application depends heavily on the facts, and thus the anthropological evidence, in each case. Aboriginal peoples may use present occupation to

\begin{itemize}
  \item \textsuperscript{560} \textit{Delgamuukw} SCC, \textit{supra} note 412 at ¶125.
  \item \textsuperscript{561} Ibid at ¶129-30.
  \item \textsuperscript{562} Ibid at ¶131 and 168.
  \item \textsuperscript{563} Ibid at ¶143.
  \item \textsuperscript{564} Ibid at ¶145.
  \item \textsuperscript{565} Ibid at ¶160-169
  \item \textsuperscript{566} Ibid at ¶165.
\end{itemize}
prove pre-sovereignty occupation, but they must also demonstrate that they have not used the land for any purpose inconsistent with their historical attachment to it. They must prove that their occupation in 1846 was exclusive, but they can use their traditions to establish a distinct conception of exclusivity. British Columbia, on the other hand, can invoke more objectives to justify infringements of aboriginal title. However, it cannot claim to have extinguished aboriginal rights or title. Even before the debut of s. 35(1) in 1982, its laws either lacked the requisite clear intent or possessed it and, for that reason, became laws in respect of “Indians,” breached the division of powers and failed to qualify for referential incorporation under the Indian Act.\footnote{567}{Ibid at ¶181.}

This uncertainty appears to have been calculated to upset expectations and unsettle bargaining positions. The Court did not favour either aboriginal peoples or the Crown. After Delgamuukw, the outcome of any prospective aboriginal title case is just as hazy than it was before, although the parties now have more doctrine to contest. The only certainty is that the case will be complex, expensive and unpredictable. Via Delgamuukw, the Court made litigation less appealing in order to unlock the potential of negotiations.

The majority made its intention clear. In fact, Lamer CJ endorsed both negotiation and consultation. He revealed his support for the former by proclaiming that the Crown has a “moral, if not a legal, duty” to negotiate in good faith with indigenous people that claim aboriginal title.\footnote{568}{Ibid at ¶186.} He also wrote that “[t]here is always a duty of consultation” when justifying infringements of aboriginal title and suggested that this duty could, in some circumstances, extend to an aboriginal veto.\footnote{569}{Ibid at ¶168.}

The Gitxsan and Wet’suwet’en took the hint, as they chose to rejoin the Treaty Process rather than relaunch the litigation that had consumed substantial resources during 13 years of trial and appeals. However, Delgamuukw did not otherwise bolster treaty talks. In abstract, the decision might have been expected to fuel negotiations by making litigation less attractive for all sides. But in British Columbia, a province whose large non-indigenous majority remains unconvinced of the need to accommodate its small indigenous minority, it did little for the Treaty Process. Instead, it marked the onset of hard times.

First Nations who had opposed the Process before Delgamuukw did not flock to it afterward. The Court had clarified the magnitude of what was at stake in treaty talks but did not help the public grasp the mysteries of aboriginal title or the intricacies of the six-stage process. It raised awareness of the existence and potential impact of negotiations without enhancing appreciation for the historical, legal and economic arguments for conducting them. Thus, at least for provincial and federal politicians, Delgamuukw diminished the already questionable benefits of being associated with the
Treaty Process. This effect was evident in the initial reluctance of provincial and federal governments to work with the Summit and other indigenous organizations to implement the judgment.\textsuperscript{570} Talks among the Principals fizzled. Written reports flopped.\textsuperscript{571} As formal progress slowed and operational problems accrued, the disappointment of Delgamuukw confirmed the obvious: the Process had lost its lustre. Its novelty had expired and five years of negotiations had not delivered anything resembling reconciliation.

Yet innovation did not abate. The BC Supreme Court continued to elaborate the duty to consult. In 1997, it drew on both administrative and constitutional law to articulate a freestanding Crown obligation to engage in reasonable and informed consultation with First Nations that may be affected by its decisions.\textsuperscript{572} In 1998, it suggested that s. 35(1) had enshrined “a common law duty to consult where Aboriginal land issues arise.”\textsuperscript{573} And in the same year, it entertained the possibility that the Crown might have a duty to consult aboriginal peoples who have asserted aboriginal rights but have yet to prove them.\textsuperscript{574} The theory was not yet coherent and the practice was not yet consistent, but consultation was developing quickly as ideas proliferated and interest gathered.

The Nisga’a Final Agreement was signed on August 4, 1998. It was the first treaty signed in British Columbia since 1922 and the first ever signed by the provincial government. It enabled the Nisga’a Nation to shed most of the restraints imposed by the Indian Act.\textsuperscript{575} It transferred to the Nisga’a title to nearly 2,000 square kilometers in northwest British Columbia.\textsuperscript{576} This land near the southern tip of the Alaskan Panhandle comprised approximately 8% of traditional Nisga’a territory.\textsuperscript{577} The agreement involved cash, services and property worth hundreds of millions of dollars.\textsuperscript{578} It provided for the creation of the Nisga’a Government and the adoption of a Nisga’a Constitution and it subjected them both to the Canadian Charter of Rights and Freedoms.\textsuperscript{579} It identified

\begin{itemize}
  \item Woolford, Justice and Certainty, supra note 426 at 96.
  \item Halfway River First Nation v British Columbia (Minister of Forests) (1997), 39 BCLR (3d) 227 at ¶72 and 133.
  \item Cheslatta Carrier Nation v British Columbia, supra note 408 at ¶42.
  \item Kelly Lake Cree Nation v British Columbia (Ministry of Energy & Mines), [1998] 3 CNLR 126 at ¶165.
  \item Canada, British Columbia & Nisga’a Nation, Nisga’a Final Agreement, 4 August 1998, s 2(18), online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/nis_1100100031253_eng.pdf> [Nisga’a Final Agreement].
  \item Ibid s 3(2).
  \item See Douglas Sanders, “We Intend to Live Here Forever: A Primer on the Nisga’a Treaty” (1999) 33 UBC L Rev 103 at 109-11 [Sanders, “We Intend to Live Here Forever”].
  \item Nisga’a Final Agreement, supra note 575 at ss 2(9), 11(2) and 11(9). See also Hurley, “The Nisga’a Final Agreement”, supra note 578 at 9.
\end{itemize}
the circumstances in which Nisga’a laws would trump provincial and federal laws and vice versa. It also exhausted the aboriginal rights and title of the Nisga’a Nation.

The Nisga’a Agreement deserved the recognition it received. It was a radical achievement, a testament to the dedication of generations of Nisga’a leaders and evidence that even the most obstinate governments can yield. If Delgamuukw had made compromise prudent, the Nisga’a Agreement proved it was possible. Tripartite negotiations had worked in British Columbia. There was still hope for the Treaty Process. The Commission expected the Agreement to sustain public interest in treaties and accelerate negotiations throughout the province. Instead, it triggered a populist reaction that imperiled the Process and disrupted talks through at least 2002. Since then, the parties have spent an inordinate amount of time and effort trying to rejuvenate what is, by any reasonable measure, a young project.

The Agreement inspired diverse opposition. Some indigenous critics found it inadequate: the Nisga’a did not get enough land, money or power in exchange for their collective inheritance. After decades of preparation, organization and mobilization, they had joined the Canadian constitutional project as a glorified municipality, their rights forever fixed in an arid document that did not even warrant the label “treaty.” Non-indigenous critics often had the opposite problem: the Agreement was too generous and expensive, and the Nisga’a government was insufficiently municipal; it threatened the Canadian constitutional order by disregarding the division of powers and establishing an order of government based on race.

Such arguments were not limited to law reviews, newspaper editorials and talk radio shows. They were made in courtrooms too. Disgruntled members of the Nisga’a Nation complained that their leaders lacked authority to sign the Agreement. They lost. The neighbouring Gitanyow Hereditary Chiefs claimed the Agreement infringed their traditional territory. After they obtained a

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580 See e.g. Nisga’a Final Agreement, supra note 575 at ss 11(36), 11(40), 11(43), 11(45), 11(62), 11(74), 11(83) and 11(111). See also, Hurley, supra note 578 at 11-12.
584 Chief Mtn v HMTQ, supra note 413.
judgment in which the BC Supreme Court held that the Crown has a legal duty to negotiate in good faith once treaty talks begin, the BC and Canadian governments tabled a joint settlement offer. 588 The chiefs did not accept the offer but they did return, if tentatively and provisionally, to the Treaty Process and agreed to hold their challenge to the Nisga’a Agreement in abeyance. 589

In the most momentous suit, Campbell v British Columbia (Attorney General), three prominent members of the BC Liberal Party, then the Official Opposition in the provincial legislature, sought a declaration that portions of the provincial and federal legislation enacted to settle the Final Agreement were unconstitutional. 590 First filed in 1998, the BC Supreme Court initially rejected their claim as premature because the Agreement had yet to be ratified. 591 After the Agreement took effect in May 2000, Justice Williamson quickly heard and dismissed their arguments. He found, among other things, that the division of powers achieved by sections 91 and 92 of the Constitution Act, 1867 could not extinguish an aboriginal right to self-government. Those provisions concerned only the powers possessed by the colonial governments prior to Confederation; they could not allocate or exhaust powers that did not already belong to the Crown, namely those held by indigenous people. 592

Apparently, Parliament and the provincial legislatures are not the only bodies with original legislative authority in the Canadian constitutional system. When Parliament and the BC legislature enacted statutes to settle the Nisga’a Final Agreement and establish the Nisga’a government, they did not abdicate any part of their authority to make laws. Rather, by enacting those laws they had in fact exercised that authority to implement an aboriginal right to self-government: a right that had survived, albeit in diminished form, the assertion of Crown sovereignty and Confederation as an unwritten “underlying value” of Canadian constitutional law. 593 Aside from such doctrinal nuances, Campbell is significant for two practical reasons: first, it dispatched arguments that could have upset every treaty eventually produced by the Treaty Process and thus ruined negotiations across the province; second, the three plaintiffs would later become the Premier, Attorney General and Minister of Aboriginal Relations and Reconciliation for British Columbia.

Whether their opposition to the Nisga’a agreement was canny or genuine, their participation in this lawsuit did not bode well for the Treaty Process. In the May 2001 election, the BC Liberal Party won 77 of 79 seats in the provincial legislature. Its campaign against the incumbent New

590 Campbell v British Columbia (AG), 2000 BCSC 1123 at ¶13.
591 Canada (AG) v Campbell, 1999 CanLII 6139.
592 Campbell v British Columbia (AG), supra note 590 at ¶¶76-78.
593 Ibid at ¶81.
Democratic Party included a promise to conduct a referendum on the province’s participation in treaty negotiations. Upon taking office, the new government promptly removed a number of issues from discussion at treaty tables pending the poll it planned to hold within a year. The Process basically stopped as the parties awaited the results and the government’s reaction.

The referendum proved extremely divisive. A representative of the Hupacasath First Nation sought a declaration that the regulation authorizing the referendum did not comply with applicable legal requirements, but she did not prevail. Other indigenous plaintiffs were denied an injunction that would have stopped the Chief Election Officer of the province from counting the ballots or announcing the results. Critics called the referendum racist and clumsy while the BC Attorney General insisted it would “give the people of British Columbia a direct voice in the principles that should guide the province’s treaty negotiations.”

That populist tone resonated in the ballot, which asked voters to pronounce on eight “principles” to guide provincial negotiators. Aside from the stock argument that a referendum is too blunt an instrument to solve complex problems, the principles were derided as vague, phrased to induce approval from a largely non-indigenous electorate and concerned in part with matters beyond the constitutional competence of the province. Examples include “Private property should not be expropriated for treaty settlements” and “Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.”

The former ignored the actions by which non-indigenous people had purported to transform traditional indigenous territory into private property without compensation or consent. The latter neglected judicial decisions, such as Campbell, that define aboriginal self-government as a constitutional right rather than a privilege granted by higher levels of government. Taken together, the eight principles expressed disdain for indigenous people and disregard for provincial history.

The referendum was conducted by mail in May 2002. It was a tactical success. Only 36% of registered voters returned valid ballots, but the overwhelming majority of those who did vote supported the government’s position. No principle received less than 84% approval. The low response rate suggested that most residents remained uninterested in the Treaty Process. The high approval rate among respondents indicated that those few residents to whom the Process mattered had little desire to understand and treat indigenous people as partners. Further, affirmative results

595 Ke-Kin-I-Uks v British Columbia (AG), 2002 BCSC 802.
596 Bob v R, 2002 BCSC 733.
598 Ibid.
600 Ibid at 6.
aside, the generic language of the principles ensured that, notwithstanding a legal obligation to implement them, they imposed no real constraints on provincial negotiators. Finally, the informal hiatus that most tables suffered during this period prevented the other parties from obtaining concessions that might have jeopardized the new government’s agenda.

The strategic merit of the referendum is less clear. It illuminated a gulf between the provincial government and many indigenous groups. Where the former sees a single community (e.g. “Parks and protected areas should be maintained for the use and benefit of all British Columbians”) governed by a hierarchy of authorities in which aboriginal governments are subordinate to Canada and British Columbia, the latter see an archipelago of diverse peoples and governments in which none is supreme. By crystallizing these divisions, the referendum made comprehensive constitutional settlements impossible in the short term, which means it made tailored and targeted agreements relatively attractive. Nonetheless, those eight principles remain the core mandate for provincial negotiators.

While the Treaty Process stumbled, consultation took a quantum leap. In 1999, the BC Court of Appeal upheld Halfway River: the 1997 BC Supreme Court decision that had recognized an independent Crown duty to consult. The case involved a cutting permit issued by the provincial Ministry of Forests on land in the northeast of the province and subject to Treaty 8. Justice Finch treated consultation as part of the Sparrow justification analysis and found, among other things, that the Crown had not adequately consulted the Halfway River First Nation when it granted the permit. Justice Huddart concurred but suggested that the Crown has both a fiduciary and a constitutional duty to consult aboriginal groups when it contemplates a decision that might affect their treaty rights in order to assess the scope and nature of that right. In turn, that assessment would enable the Crown to accommodate the aboriginal and the non-aboriginal uses of the land or resource in question. According to Justice Huddart, consultation was an essential part of lawful government action, not just a way to justify offensive decisions.

In 2002, the same court issued opinions in two landmark cases: Taku River Tlingit First Nation v Ringstad and Haida Nation v British Columbia (Minister of Forests). The former involved a mining road through land claimed by the Tlingit in the far north of the province; the second involved the replacement of a tree farm licence on Haida Gwaii. In each case, the court drew on precedents such as

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601 Ke-Kin-Is-Uks v British Columbia (AG), supra note 595 at 3-4, citing Referendum Act, RSBC 1996, c 400 at ss 4 and 5.
604 Halfway River BCCA, supra note 415 at ¶¶160 and 167 (Finch JA).
605 Ibid at ¶191 (Huddart JA).
as Delgamuukw and Halfway River to find that the Crown owes a legal duty to consult and accommodate aboriginal people when government actions implicate aboriginal rights they have asserted but not yet proven in court.\textsuperscript{606} Upon a rehearing of Haida Nation, the court extended that duty to third parties that knowingly or negligently received the benefit of the Crown’s failure to engage in adequate consultation.\textsuperscript{607} At this point, the duty to consult remained rooted in the Crown’s fiduciary obligation to aboriginal peoples; third parties implicated in a breach of that obligation became constructive trustees.\textsuperscript{608}

The duty to consult was now an independent obligation of the Crown. In addition, an aboriginal people no longer had to prove a right protected by s. 35(1), demonstrate infringement and then allege inadequate consultation. Instead, the Crown had to consult when it became aware that the aboriginal people in question had a good \textit{prima facie} case to a claim for aboriginal rights or title.\textsuperscript{609} The court explained that the duty to consult served an interim role: it was intended to protect the interests of all parties pending a final determination of that claim, which preferably would take the form of a negotiated settlement.\textsuperscript{610} This provisional status has remained a common refrain, even as the prospect of comprehensive final agreements has faded.

More practically, Taku River and Haida Nation promised to transform aboriginal rights litigation. In consultation cases, courts would no longer need to apply the \textit{Van der Peet} and Delgamuukw tests. Rather, they would ask whether an aboriginal claim appeared valid and whether the Crown’s efforts to consult had been meaningful. The evidentiary emphasis would shift from the distant to the recent (and much more accessible) past. Shortened and simplified, litigation would be more accessible and amenable to strategic use.\textsuperscript{611} Many cases sought to exploit these advantages.\textsuperscript{612}

The BC government wasted little time. In October 2002, it released a revised consultation policy, which established a four-stage process replete with factors and indicators to help each ministry determine how much consultation is enough.\textsuperscript{613} Ironically, the province failed to consult any indigenous people when crafting its policy on consulting indigenous people.\textsuperscript{614} In early 2003, it

\begin{thebibliography}{99}
\bibitem{606} Taku River BCCA, \textit{supra} note 415 at ¶194; Haida Nation BCCA #1, \textit{supra} note 415 at ¶38-40.
\bibitem{607} Ibid at ¶60; Haida Nation \textit{v} BC and Weyerhaeuser, 2002 BCCA 462.
\bibitem{608} Ibid at ¶65.
\bibitem{609} Haida Nation BCCA #1, \textit{supra} note 415 at ¶49-50.
\bibitem{610} Ibid at ¶54 and 57.
\bibitem{611} See e.g. Gitxsan \textit{v} British Columbia (Minister of Forests), 2002 BCSC 1701 [Gitxsan \textit{House}].
\bibitem{612} See e.g. Heiltsuk Tribal Council \textit{v} British Columbia (Minister of Sustainable Resource Management), 2003 BCSC 1422 [Heiltsuk \textit{Tribal Council}]; Lax Kw'alamaas Indian Band \textit{v} British Columbia (Minister of Forests), 2004 BCSC 420; Musqueam Indian Band \textit{v} Canada (Governer in Council), 2004 FC 579; Squamish Nation \textit{v} British Columbia, \textit{supra} note 420.
\bibitem{613} British Columbia, \textit{Provincial Policy for Consultation with First Nations} (October 2002), online: UBC Faculty of Law \textltt{http://faculty.law.ubc.ca/mccue/pdf/2002%20consultation\_policy\_fn.pdf}.
\bibitem{614} Meyers Norris Penny LLP, \textit{Best Practices for Consultation and Accommodation} (September 2009) at 20, online: New Relationship Trust \textltt{http://www.newrelationshiptrust.ca/downloads/consultation-and-acommodation-report.pdf}.
\end{thebibliography}
unveiled measures to share forest revenues and resources with aboriginal peoples.\footnote{Huu-ay-ahl v British Columbia, supra note 420 at ¶84.} It offered standardized Forest and Range Agreements that awarded them timber volumes clawed back from existing licence holders and paid indigenous signatories \$500 per member for each of five years.\footnote{For a comprehensive list of these agreements, see British Columbia, Ministry of Forests, Lands and Natural Resources Operations, “Agreements with First Nations”, online: Ministry of Forests, Lands and Natural Resources Operations <http://www.for.gov.bc.ca/haa/fn_agreements.htm>.} In exchange, they agreed that these concessions satisfied the Crown’s duty to consult with respect to the economic component of their aboriginal interests infringed by activities approved by the Minister of Forests in their traditional territories.\footnote{See e.g. Gitanyow First Nation v British Columbia (Minister of Forests), 2004 BCSC 1734 at ¶14 [Gitanyow First Nation v British Columbia]; Huu-ay-ahl v British Columbia, supra note 420 at ¶125.} These agreements were popular yet contentious. Despite complaints and even successful litigation, British Columbia adhered to a similar formula until 2009.\footnote{Ibid at ¶126.}

culture and capacity of the Katzie First Nation, and so on. It worked with the federal government to implement treaty-related measures, a new class of interim measures the two governments developed after a 1999 review in which they and the Summit identified problems with the Treaty Process. Unlike other interim measures, treaty-related measures are funded jointly by Canada and British Columbia and linked expressly to ongoing negotiations. They emphasize the protection of land and resources pending settlement. The new provincial government also cultivated commercial relationships with First Nations: infrastructure projects and revenue-sharing agreements protocols proliferated.

These developments brought money, knowledge and other practical benefits to many indigenous peoples. They also confirmed the Commission’s early concern about initiatives on the margins of the Treaty Process. The Task Force intended such measures to help the parties circumvent or overcome any material obstacles to a final treaty. In contrast, some of these deals seemed to treat economic development as an end in itself and appeared to sap the parties’ commitment to comprehensive treaties and the tripartite Process designed to produce them.

After the shock of the referendum subsided, progress resumed at some treaty tables but eluded others. Between 1997 and 2003, the total number of First Nations in the Treaty Process increased by just two, from 51 to 53. The roster of participants was more volatile than this figure suggests, as some withdrew, others entered and a few, such as the Nuu-chah-nulth Tribal Council, fractured into distinct groups with separate tables. By the end of 2003, only four First Nations had reached Stage 5: the Sechelt Indian Band did so in 1999 but soon stepped away from the Process; and the Lheidli T’enneh Band, the Maa-nulth First Nations and the Sliammon Indian Band each did so in 2003.

Most, however, remained in Stage 4. In 1997, 36 First Nations (71% of those participating) toiled there. By 2003, that number had risen to 42 (79%). Many tables linger there because they have a lot of work to do. To enter Stage 4, the parties need only draft a framework agreement: a

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626 See e.g. BC Treaty Commission, Annual Report 2001, supra note 620 at 15 (after Canada and British Columbia outlined the land and cash components of a treaty they might be willing to approve, the Ts’kw’aylaxw First Nation chose to withdraw rather than incur more debt); BC Treaty Commission, Annual Report 2003, supra note 620 at 30 (Nuu-chah-nulth).
provisional list of issues, objectives and deadlines. To leave it, they must reach an AIP, which is far more detailed and requires much more compromise and consensus.629

Many First Nations also had financial reasons to stay in Stage 4. Until 2004, First Nations had to pay interest on loans borrowed after they signed an AIP. In addition, all of their outstanding loans originally became due no later than seven years after they signed it.630 These conditions gave them an incentive to minimize the amount of time between the date of their AIPs and the effective dates of their respective treaties. On the latter, their loans will be due but are also likely to be offset by the financial components of the treaty (i.e. compensation or capital transfers).

In Treaty Process terms, First Nations preferred to spend as little time as possible in Stage 5. However, the longer they remained in Stage 4, the lower their chances of ever reaching Stage 5. First Nations that took their time risked being branded difficult or malcontent by the federal and provincial governments. Canada and British Columbia have long cultivated a vanguard by focusing their attention and resources on the most promising few, a practice that continues today even as its rationale remains unclear.631 Whether intended to maximize the return on their investment in the Process, establish favourable precedents in the first wave of treaties or foster competition among First Nations for the fancy of the Crown, this preferential parsimony has inspired regular criticism from the Commission, the Summit and unfavoured First Nations.632

In 2003, the federal government went one step further. It notified 12 First Nations that it would withdraw from their tables absent a renewed declaration of priorities as evidence of their commitment to the Process. The Summit and the Commission erupted over this affront to the Task Force Report, and Canada eventually retracted its misguided ultimatum.633 At the time, eight of the 12 targeted First Nations were in Stage 4 and four were in Stage 3.634 By 2010, just two of the alleged

634 Ibid at 37.
delinquents had moved from Stage 3 to Stage 4. The others remained where they were in 2003.\textsuperscript{635} This crude attempt to prompt quick concessions from wary First Nations failed.

In yet another controversial move, the BC and Canadian governments changed the way they consulted non-indigenous interests in the province. Under the Treaty Commission Agreement, one criterion used by the Commission to determine whether the two governments are prepared to negotiate with a First Nation is whether they have “established mechanisms for consultation with nonaboriginal interests.”\textsuperscript{636} As Principals of the Treaty Process, they are responsible also for building awareness and support for negotiations among all British Columbians.\textsuperscript{637} During the early years of the Process, they nurtured three tiers of consultative bodies: Treaty Advisory Committees (TACs), which represented municipal governments affected by negotiations; Regional Advisory Committees (RACs), which gathered delegates from key social and economic sectors in discrete parts of the province; and the Treaty Negotiations Advisory Committee (the TNAC), a 31-member chamber that assembled interests with provincial scope, such as business, labour and the environment.\textsuperscript{638} These committees collected and distributed information about negotiations to their members. They also communicated their members’ interests to the governments and commented on mandates and draft agreements.

In 2002, as part of a general financial retrenchment, the BC government stopped funding them. The Canadian government soon followed suit. Although the province later reinstated reduced support for a few core TACs, the system was decimated: only a handful of the TACs survived; the TNAC and all of the RACs dissolved.\textsuperscript{639} To satisfy their obligation to consult non-indigenous interests, the two governments turned to a combination of intermittent funding for the remaining TACs and ad hoc “regional visioning” sessions, in which members of the Commission help indigenous and non-indigenous residents develop a common outlook on their part of the province, and direct meetings between government negotiators and community members.\textsuperscript{640}

This more flexible approach to consultation enabled the two governments to conserve cash and consolidate their influence. It eliminated some of the few organizations equipped to scrutinize their mandates. It focused the meager post-referendum public interest in the Treaty Process on limited local matters, like the implementation of particular interim measures. It also reinforced the

\textsuperscript{636} British Columbia Treaty Commission Act, supra note 491 at s 7.1(f)(iii)(B).
\textsuperscript{638} Woolford, Justice and Certainty, supra note 426 at 107-08.
\textsuperscript{640} Ibid at 31.
official claim that, at least for non-indigenous residents, the Process posed no threat to ordinary politics and business since it did not require municipal involvement.

By the end of 2003, the Treaty Process was in disarray. Reckless government attempts to regain momentum had become regular. The advance of interim measures and consultation made comprehensive treaties appear unnecessary. The extra attention received by the few lead tables annoyed the rest, and their slow progress notwithstanding special treatment did not inspire confidence in the talks. Many First Nations prepared for battle: they filed lawsuits to preempt the argument that their aboriginal rights had expired under the provincial *Limitations Act*. For the Treaty Process, the future grew dim.

Collaboration was dormant during this turbulent period, but consultation and litigation continued to shine. Consultation had evolved rapidly, spurred by regular judicial improvisation. The practice of consultation became more elaborate, as aboriginal peoples negotiated departures from the standard Forest and Range Agreements and other arrangements proliferated. The content of the duty to consult became more concrete. In *Halfway River*, Finch JA had offered an exacting standard: the Crown is obligated to provide aboriginal peoples with all information necessary to express their interests and concerns and “to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.” The justices of the BC Supreme Court in turn provided a series of practical notes: “the first step in the consultation process is to discuss the process itself”; the duty to consult is a “constitutional prerequisite” to a ministerial decision, and that duty falls on the Crown itself, so aboriginal peoples cannot obtain a remedy against a particular person or minister. Consultation was quickly developing into a viable alternative to negotiation.

Litigation also engaged negotiation directly, as aboriginal parties used their progress in the Treaty Process to show the strength of their claims and judges contemplated the implications of the troubled talks. Indigenous peoples revealed new priorities and employed new strategies: civil actions supplanted test cases disguised as regulatory prosecutions and petitions for judicial review of Crown consultation practices eclipsed actions seeking declarations of rights or title. Aboriginal peoples won an important tactical battle when the BC Court of Appeal and then the Supreme Court of Canada concluded that, although they did not have a constitutional right to government funding

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642 *Halfway River* BCCA, supra note 415 at ¶160.
643 *Gitxsan Houses*, supra note 611 at ¶113.
644 Ibid at ¶65.
645 *Lax Kw’alaams Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2002 BCSC 1075 at ¶¶34 and 37.
646 See e.g. ibid at ¶36; *Heiltsuk Tribal Council*, supra note 612 at ¶49; *Xeni Gwet’in First Nations v British Columbia*, 2002 BCCA 434 at ¶39.
for aboriginal rights litigation, in exceptional circumstances such claims may possess sufficient public importance to warrant interim costs for impecunious aboriginal parties.647

However, they also lost some important cases. In Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture), which involved culturally modified trees near the coastal town of Prince Rupert, the Court found that aboriginal cultural interests do not lie at the “core of Indianness.” As a result, general provincial laws can affect, and even have a disproportionate impact, on those interests without infringing Parliament’s exclusive jurisdiction over Indians.648 And in Wewaykum Indian Band v Canada, a case that concerned tiny reserves on Vancouver Island yet would resonate widely, the Court held that the Crown’s fiduciary relationship with aboriginal peoples yields a fiduciary duty only “in relationship to specific Indian interests” rather than aboriginal peoples generally.649 Unspecified “interests” took their place alongside rights and title in consultation agreements across the province.650 This insertion was perhaps rhetorical but also defensive, for Wewaykum had troubling conceptual repercussions. In particular, by clarifying and narrowing the Crown’s fiduciary duty, it shook the very foundation of the duty to consult.

D. Promises: 2004-2010

Since 2004, the pace of innovation has quickened, the number of experiments has increased and the links between them have grown denser. The complexity of constitutional developments in the province has mounted rapidly. As a result, this fourth period requires a more rigid chronological approach. Hopefully, what this history loses in spontaneity it gains in clarity.

i. 2004

On March 24, 2004, the Supreme Court of Canada upheld the BC Court of Appeal’s decision in Haida Nation and overturned Taku River. Chief Justice McLachlin wrote for a unanimous Court in both cases. In the former, the Court held that the Crown has a duty to consult and accommodate aboriginal people when it contemplates action that might affect their aboriginal rights, even when they have yet to prove those rights in court or convert them into treaties.651 In the latter, it elaborated this duty by explaining how British Columbia’s environmental assessment process could

647 Ibid; British Columbia (Minister of Forests) v Jules, 2001 BCCA 647; British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71 at ¶36 and 40 [Okanagan Indian Band].
648 2002 SCC 31 at ¶¶67-70 and 78.
649 2002 SCC 79 at ¶81.
651 Haida Nation SCC, supra note 417.
satisfy it under certain circumstances. Together, they ensured that consultation survived \textit{Wewaykum} by casting the Crown as sovereign rather than fiduciary.

In \textit{Haida Nation}, the Court declared that “[t]he government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.”\footnote{653} The immediate goal of the duty to consult is to preserve aboriginal interests pending resolution, negotiated or otherwise, of a claim.\footnote{654} After \textit{Wewaykum}, the fiduciary duty could not generate an obligation that arose before “specific Indian interests” could be identified. The honour of the Crown proved a convenient, if enigmatic, replacement.

From this illustrious lineage, the duty to consult acquired a mysterious air. In both opinions, the Court conspicuously avoided any discussion of the nature of the duty to consult. In \textit{Haida Nation}, McLachlin CJ described it as “legal.”\footnote{655} This generic label should have dispelled any lingering hopes and fears that the duty was merely moral. Unsurprisingly, it also inspired speculation as to whether this “legal” duty arose at common law, enjoyed constitutional status or, was some sort of hybrid.\footnote{656} This conceptual controversy is not an academic diversion. For example, Canada has seized repeatedly on the least common denominator in this formula in an unsuccessful campaign to lessen its burden.\footnote{657} By invoking the honour of the Crown, the Court was able to ensure that third parties do not have a duty to consult aboriginal peoples unless one is imposed by a statute: unlike a fiduciary duty, the Crown cannot delegate its honour.\footnote{658} Nonetheless, aboriginal peoples are somehow obligated to cooperate with government efforts to consult.\footnote{659} Whether ethical, equitable or functional, this the nature of this reciprocal obligation requires further attention.

The Court also compounded the confusion surrounding reconciliation. In \textit{Haida Nation}, McLachlin CJ characterized reconciliation as both a goal and a process.\footnote{660} She proposed various subjects for reconciliation: “state and Aboriginal interests”; “pre-existing Aboriginal sovereignty with assumed Crown sovereignty”; “prior Aboriginal occupation of the land with the reality of Crown sovereignty”; and “the Crown and the Aboriginal peoples with respect to the interests at stake.”\footnote{661}
Indeed, she even suggested that reconciliation served as a second source for the duty to consult, although elsewhere she noted that the imperative of reconciliation itself stems from the honour of the Crown (which is, of course, also the source of the duty to consult). 662 Again, this inquiry is not idle. Judges in subsequent cases, including members of the Court, have not managed to craft a consistent or coherent formula. But if reconciliation is the objective “at the heart of Crown-Aboriginal relations,” then we should know what it means. If we do not, we will be unable to formulate doctrine and design institutions capable of achieving it. Since reconciliation, at least in its everyday sense, cannot be inadvertent, our ignorance will ensure that it remains out of reach.

Ever optimistic, McLachlin CJ suggested that consultation serves negotiation by preserving aboriginal interests “[p]ending settlement.” 663 By protecting the lands in question from unrestrained and uninformed government action, it may encourage aboriginal peoples to commit to comprehensive talks. However, as suggested above, consultation in British Columbia has emerged as a serious rival to the Process. Treaty negotiations and title litigation are epic endeavours: lengthy, expensive journeys that promise great rewards and commensurate risks. Consultation is less adventurous. Each meeting or agreement offers limited results, but consultation is relatively safe, cheap and quick because it does not require codification or adjudication of the asserted aboriginal right. It allows indigenous people to exercise some control over their traditional territory and resources without risking or otherwise compromising their aboriginal rights or title. If a consultation agreement proves unsatisfactory, the parties can simply wait for it to expire or, in some cases, terminate it with proper notice. 664 The same cannot be said for treaties.

Perhaps the Court had it backwards and negotiations actually serve consultation. The promise of a final settlement and the enduring imagery of treaties got the parties talking. The rigid structure and disappointing results of the Treaty Process sent them looking for something else. The appeal of consultation was evident in the immediate wake of Haida Nation and Taku River: within a year, the 53 First Nations enrolled in the Treaty Process filed up to 34 suits to test the merits of the new duty. 665 However, consultation may yet prove a boon for negotiation if its dynamism spurs participants in the Treaty Process to review their commitments, consider reforms and adjust their expectations for comprehensive agreements.

This scenario was bolstered by the way the Court addressed the scope and content of the duty to consult. It reinforced the low threshold set by the BC Court of Appeal: “the duty arises

662 Compare ¶32 and ¶35.
663 See Haida Nation SCC, supra note 417 at ¶45; Taku River SCC, supra note 417 at ¶42.
when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."\textsuperscript{666} The demands of the duty are proportionate to the strength of the claim to an aboriginal right and the seriousness of the likely adverse impact upon it.\textsuperscript{667} As a basic principle, the honour of the Crown requires "meaningful consultation appropriate to the circumstances."\textsuperscript{668} As circumstances vary, so does the duty: where the claim is weak and the likely impact minor, it entails mere disclosure and discussion; where the claim is strong and the likely impact severe, it mandates adjustments to Crown plans that accommodate aboriginal concerns and, in the most extreme cases, obtain aboriginal consent.\textsuperscript{669} The duty to consult includes, where appropriate, a duty to accommodate the aboriginal people in question.

Haida Nation and Taku River abridged the work lower courts had done since Sparrow and more intensely since Delgamuukw. The Court distilled those opinions into general principles of meaningful consultation and proportionality that emphasize process to the detriment of potential substantive obligations on the Crown. Even accommodation remains an inscrutable process of balancing interests. Worse, their facts fail to illuminate the application of these principles: in Haida Nation, the Minister of Forests never tried to consult the Haida on the replacement of tree farm licences notwithstanding their repeated requests; in Taku River, the Crown followed an elaborate statutory scheme to determine how the interests of the Taku River Tlingit would be affected by a winter road through their territory. As most cases could be expected to fall, and have in fact fallen, somewhere between these polar opposites, neither case offers much practical guidance. Intrepid lower courts have since struggled to establish a consistent approach. For example, Tysoe J of the BC Supreme Court found British Columbia's standardized Forest and Range Agreements (i.e. five years of per capita payments for acknowledgment the Crown had fulfilled the economic element of the duty to consult) "understandable" and consistent with the duty to consult.\textsuperscript{670} Less than six months later, Dillon J of the same court found the same uniform scheme unconstitutional because the honour of the Crown requires the duty to consult to begin with an assessment of the particular aboriginal rights in question.\textsuperscript{671} Perhaps these inconsistencies will be resolved as cases accumulate and litigants and judges refine the doctrine, but the current pace promises a long wait, one which is only compounded by absence of a clear objective.

\textsuperscript{666} Haida Nation SCC, supra note 417 at ¶35.
\textsuperscript{667} Ibid at ¶39.
\textsuperscript{668} Ibid at ¶46.
\textsuperscript{669} Ibid at ¶¶43-48.
\textsuperscript{670} Gitanow First Nation v British Columbia, supra note 617 at ¶¶51-52 and 56-57.
\textsuperscript{671} Huu-ay-aht v British Columbia, supra note 420 at ¶126.
Another aspect of the duty that has vexed lower courts since *Haida Nation* is the standard of review applicable to Crown consultation efforts. McLachlin CJ wavered. First, she distinguished between the Crown’s assessment of its duty and the adequacy of its efforts to fulfill that duty.\(^{672}\) She acknowledged that, ordinarily, the existence and extent of a constitutional duty is a legal question that the Crown must answer correctly. However, she then observed that this assessment of the duty to consult “is typically premised on an assessment of facts” and thus entitled to a degree of deference: the answer need only be reasonable.\(^{673}\) Next, she qualified this qualification by suggesting that the standard of review would likely return to correctness if the government mistook the seriousness of the claim or the severity of the impact: in other words, the standard of review for the Crown’s assessment of its duty to consult depends on whether that assessment was correct.\(^{674}\) The standard of review for the adequacy of the process adopted to satisfy a properly assessed duty to consult is much simpler: the process need only be reasonable.\(^{675}\)

By trying to answer some questions about the duty to consult, the Court inevitably created others. The standard of review is of both practical and theoretical concern. It directly determines the threshold plaintiffs and petitioners must meet in order to prevail. The Court’s mangled language has fostered uncertainty that continues to inspire abundant litigation. On a more theoretical note, Dyzenhaus has argued that a lower standard of review for questions of law might be thought to promote the rule of law by involving more institutions in the project of elaborating its requirements.\(^{676}\) However, to relax judicial review of administrative decisions when those decisions involve aboriginal peoples may have less salubrious effects. The bureaucrats in question occupy offices that have long failed to respect aboriginal claims. In abstract, their legal knowledge may warrant deference: they have issued many cutting permits, regulated many fisheries and assessed the environmental impact of many power projects. In practice, such deference may insult aboriginal peoples who have suffered from the exercise of that knowledge. In contemporary British Columbia, a relaxed standard of review for administrative decisions about consultation may actually undermine the rule-of-law project by alienating those people whose participation is essential, if only because they present the most serious challenges to it.\(^{677}\)

Despite these criticisms, *Haida Nation* and *Taku River* did transform constitutional experimentation in British Columbia. Contrary to the Court’s expectations, they undermined

\(^{672}\) *Haida Nation* SCC, *supra* note 417 at ¶61-62.

\(^{673}\) Ibid at ¶61.

\(^{674}\) Ibid at ¶63.

\(^{675}\) Ibid at ¶62.

\(^{676}\) Dyzenhaus, “Fundamental Values”, *supra* note 272 at ¶¶117-21; Dyzenhaus, *Time of Emergency*, *supra* note 5 at 143-47.

\(^{677}\) John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 122 (failure to recognize indigenous law can undermine the legitimacy of and indigenous support for Canadian law).
negotiation. They also incited litigation across the province. Their content was not especially radical, since they primarily synthesized the bold work of lower courts. Of course, the Court’s imprimatur lent the doctrine new lustre. But an opportune procedural innovation gave it momentum.

Approximately eight months earlier, Justice Groberman of the BC Supreme Court issued his opinion in *Snuneymuxw First Nation v HMTQ*.[678] The Snuneymuxw First Nation, whose traditional territory lies at the southern end of Vancouver Island, had applied for an interlocutory injunction to prevent Canada and a corporation owned by Canada from entering into an agreement that would allow the storage of log booms in a bay where the Nation traditionally harvested fish and other resources. Like all parties, aboriginal people had long been able to obtain interlocutory injunctions to stop harmful conduct by private parties until the end of trial.[679] Also like other parties, they could not win injunctions of any sort against the Crown, even in cases involving claims to aboriginal rights and the duty to consult.[680] At common law, the Crown was generally immune from suit and the few limited mechanisms for legal and equitable redress against the sovereign did not include injunctions.[681] Even after the Crown began to renounce its immunity by statute, the relevant enactments did not authorize courts to issue injunctions, only declarations.[682]

Nonetheless, in *Snuneymuxw*, Groberman J broke with precedent and decided that aboriginal parties whose claims raise constitutional issues can obtain interlocutory injunctions against the Crown.[683] The Federal Court soon followed and found it had the statutory jurisdiction necessary to grant interlocutory injunctions against Canada.[684] In a constitutional democracy, the Crown is not immune from the judicial review of actions alleged to exceed its authority and cannot expand its immunity by statute. Interlocutory injunctions quickly became essential tools in aboriginal rights litigation.

These judgments magnified the destabilizing effects of *Haida Nation* and *Taku River* by reinforcing the prospect of fast, affordable and persistent aboriginal interference with government regulation. Although McLachlin CJ had suggested that injunctions were too blunt to promote

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678 *Snuneymuxw*, supra note 409.

679 See e.g. *Pasco v CNR*, supra note 457; *MacMillan Bloedel Ltd v Mullin*, supra note 410; *Hunt v Halcem Log Services Ltd*, supra note 457.


683 *Snuneymuxw*, supra note 409 at ¶¶52–53 and 68–69.

684 *Musqueam Indian Band v Canada (Governor in Council)*, supra note 612 at ¶¶70–74.
reconciliation, they proved just blunt enough for aboriginal groups. The mere possibility of preliminary injunctive relief greatly increased their leverage. It encouraged more strategic litigation designed not to yield declarations of rights or title but to enhance consultation and prompt collaboration. It also confirmed that the courts could provide meaningful assistance to indigenous peoples, who no longer had to wait for a final judgment to gain respite from harmful government conduct.

ii. 2005

These legal developments also inspired more constructive political initiatives. The UBCIC and the Summit set aside their differences after Haida Nation, just as the UBCIC and the FNC had after Sparrow, to ensure that the Crown implemented that decision properly and promptly. Their executives joined with the leaders of the BC chapter of the Association of First Nations, a prominent national aboriginal organization, to form the First Nations Leadership Council (the “FNLC”): a common front for indigenous people in the province to exploit a favorable legal environment and a fluid political situation. They did not want to relive the disappointment of Delgamuukw, which had failed to catalyze meaningful political change.

The provincial government took less than a year to adjust to this new constitutional reality. It is unclear whether the federal government ever has. The latter released interim guidelines for consulting aboriginal peoples only in 2008, albeit after discussions with indigenous groups and other interested parties. It clings to treaty-related measures although British Columbia has abandoned these cumbersome relics for more flexible bilateral arrangements that are not tied to treaties. Fisheries, perhaps the primary source of federal Haida duties in British Columbia, remain a major source of conflict between indigenous peoples and the Crown.


689 See e.g. ibid at 10; BC Treaty Commission, Common Table Report (August 2008) at 3 and 10-12, online: BC Treaty Commission <http://www.bctreaty.net/files/pdf_documents/BCTC-Common-Table-Report_August-2008.pdf> [BC Treaty Commission, Common Table Report]; BC Treaty Commission, Annual Report 2009, supra note 440 at 8 and 11-13. Cases include R v Douglas, supra note 434; Tommy, supra note 474; Aleck, supra note 474; Douglas #1, supra note 474; Douglas #2, supra note 474; Lax Kw’alaams Indian Band v Canada (Attorney General), 2009 BCCA 593; Ahousaht Indian Band, supra note 408.
By contrast, in February 2005, Premier Campbell repudiated the consultation policy his
government had unilaterally adopted in 2002. He committed the province to a more conciliatory
and constructive path. In a speech from the throne, the government ended 134 years of denial by
acknowledging the existence of aboriginal title in British Columbia. Provincial officials worked
with the FNLC to sketch a new relationship between the BC government and indigenous people in
the province. The New Relationship Vision Statement, also released in March 2005, articulates their
respective objectives and establishes six principles, ten strategic steps and one joint management
committee to realize them. It is brief, rhetorical and unenforceable, but it is also hopeful: another
first step in a story full of them. Apparently, just as Calder helped Prime Minister Trudeau
understand aboriginal title and perceive a role for treaties, Haida Nation helped Premier Campbell
understand aboriginal rights and see the need for a new relationship.

The Vision Statement inaugurated a year of political pacts. In May 2005, the Assembly of
First Nations signed a First Nations-Federal Crown Political Accord with the federal government on
behalf of the Queen. Among other things, this accord established a joint committee to explore
ways to implement aboriginal self-government. Its impact has been negligible. Announced in
November 2005, the Kelowna Accord was a much bigger disappointment. This agreement was the
product of 15 months of discussions among Canada, its three northern territories, all ten provinces
and five national aboriginal organizations. It aimed to transform the lives of aboriginal people across
Canada by dedicating unprecedented financial and organizational resources to improve their health,
education, housing and economic opportunities. It also sought to enhance the relationships
between federal, provincial, territorial and indigenous governments throughout the country. The

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690 UBCIC, “Backgrounder – A New Relationship” (16 May 2009), online: Union of BC Indian Chiefs
692 British Columbia and the First Nations Leadership Council, The New Relationship (March 2005), online:
British Columbia – The New Relationship with First Nations and Aboriginal Peoples
FNLC, New Relationship Vision Statement].
693 Tennant, Aboriginal Peoples and Politics, supra note 444 at 171-172.
Accord]. See also the Partnership Accord between the Inuit of Canada and Her Majesty the Queen in Right of
n 21, online: Library of Parliament <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0923-
e.pdf> [Hurley, “Aboriginal Self-Government”].
696 See e.g. Lisa I. Patterson, Library of Parliament, “Aboriginal Roundtable to Kelowna Accord: Aboriginal
Kelowna Accord was unveiled with great fanfare, as befit a commitment to spend approximately $5 billion over 5 years. It was abandoned with much less fanfare by the minority Conservative government that formed after the January 2006 federal election.

A relatively modest agreement reached alongside Kelowna has proven a more durable and effective tool. On November 25, 2005, Canada, British Columbia and the FNLC signed the Transformative Change Accord (the “TCA”). It addresses the same concerns as the Kelowna Accord but focuses exclusively on British Columbia. It calls for a ten-year plan to close the social and economic gaps between “First Nations and other British Columbians.” It elaborates this objective by committing the parties to take specific actions and identifying possible indicators to measure their achievement. The TCA does not mention the Treaty Process, although it does anticipate “a tripartite negotiation forum to address issues having to do with the reconciliation of Aboriginal rights and title” and suggest that treaties and other agreements could indicate improved inter-governmental relationships.

After signing the TCA in late 2005, the provincial government offered more evidence of its good faith by creating the $100 million New Relationship Trust in March 2006. Administered by the FNLC, the fund is intended to address five priorities for indigenous people in British Columbia: capacity, education, culture and language, youth and elders, and economic development. This was not a trivial investment for the province. In comparison, the provincial Ministry of Aboriginal Relations and Reconciliation estimated its expenditures on treaty negotiations in fiscal year 2006/07.

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698 Ibid. Former Prime Minister Paul Martin introduced a private member’s bill that became the Kelowna Accord Implementation Act when Parliament passed it. This Act obligates the federal government to report annually on its efforts to implement the Kelowna Accord, but it has had little practical effect since a private member’s bill cannot compel expenditures under s 54 Constitution Act, 1867. Kelowna Accord Implementation Act 2008, c. 23.


700 Ibid at 3-5.

701 Ibid at 3.


at approximately $20 million.\textsuperscript{704} The province finally appeared willing to match its rhetoric with revenues.

The Commission has questioned the value and wisdom of the New Relationship Trust. It has cited weak results and noted that the trust had no connection to treaties.\textsuperscript{705} As we have seen with interim measures, the Commission has long criticized developments that shift the parties’ attention from the treaty table to more concrete social, economic and institutional opportunities. The Commission is biased: it was established to facilitate treaty negotiations, so it assesses interim measures and other novelties in relation to that goal. However, the post-\textit{Haida} expansion of programs and policies that emphasize immediate empirical returns does raise legitimate concerns.

All of these plans and accords purport to serve reconciliation. Each aims to do so through some combination of institutional experimentation, data collection, capital infusion and administrative adaptation. Each assumes the path to reconciliation is technical. However, none explains how its practical proposals will deliver this existential result.

The link between policy renovation and reconciliation remains tacit primarily because the parties lack a clear and consistent understanding of the latter. The Transformative Change Accord envisions “reconciling Aboriginal rights and title with those of the Crown.”\textsuperscript{706} The New Relationship Vision Statement imagines “the reconciliation of Aboriginal and Crown titles and jurisdictions.”\textsuperscript{707} The First Nation-Federal Crown Political Accord invokes “the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments.”\textsuperscript{708} Its content, burden and direction remain vague. It clearly has something to do with rights, title and government, but so do litigation, negotiation and consultation.

Reconciliation plays an important rhetorical role in these documents. The concept is expansive, imprecise and inoffensive. It implies consent but does not require consensus. It suggests an enduring relationship that can abide autonomy. It connotes union, transgression and renewal. But to invoke or explain reconciliation is not to accomplish it. To know how to restore a union, you must know the parties to it, the nature of their bond and how and by whom it was sundered. To reconcile, we must understand our common future in terms of our common past: new relationships posit old relationships; transformations can only transform what already exists. Reconciliation does not erase indiscretions or breaches of trust; it reminds us of them. It helps participants remember that their union is deliberate not destined.


\textsuperscript{705} See e.g. BC Treaty Commission, \textit{Annual Report 2007}, \textit{supra} note 702 at 7.

\textsuperscript{706} Transformative Change Accord, \textit{supra} note 699 at 1.


Reconciliation cannot be incidental or accidental. To pursue and perhaps achieve it, indigenous leaders and representatives of the Crown will need to elaborate what it means to them and how it relates to their efforts to ensure that all provincial residents enjoy the same quality of life. Better jobs, health, housing and education are, by definition, desirable goods. However, it is not clear how they encourage or embody reconciliation. Canada, British Columbia and indigenous people cannot expect reconciliation to result automatically from trust funds and shared forest revenues. Nor can they simply label the effects of their experiments “reconciliation.” At minimum, it requires a degree of reflection that precludes such a simplistic (and, for the theoretically inclined, nominalist) approach.

Unfortunately, the parties will not be able to turn to the courts for assistance. The decline from Sparrow to Haida Nation was sharp and clear. The dreamy duo of federal power and federal duty surrendered quickly to “the interests at stake.” Reconciliation had sunk from a fundamental tenet of Crown sovereignty to an instrumental exercise in maximizing utility. The descent continued in 2005. In Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), a case that extended the duty to consult to Treaty 8 and other historic treaties, the Court wrote of reconciling the “respective claims, interests and ambitions” of aboriginal and non-aboriginal peoples. In Marshall and Bernard, McLachlin CJ wrote for a majority of the Court about “reconciling aboriginal interests with the interests of the broader community” and explained that a proper judicial analysis “reconciles the aboriginal and European perspectives.” This dull language obscures the questions of authority, legitimacy and justice that characterize these disputes for all involved. It implies that aboriginal people belong to an inclusive Canadian community and it ignores the unique responsibilities of the Crown that arise from its colonial conduct.

Marshall and Bernard also generated substantive concerns. The case, which was actually two cases consolidated on appeal, concerned logging on Crown lands in New Brunswick and Nova Scotia but resonated in British Columbia. The majority confirmed that aboriginal rights and title are common law concepts rather than elements of aboriginal law. It also glossed the Van der Peet and Delgamuukw tests: those analyses require a court to define the pre-sovereignty practice revealed by the evidence and then “translate” that practice into a modern common-law right. This approach would allow judges to divine the “logical evolution” of the traditional activity into a modern activity

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709 Sparrow, supra note 468 at 409; Haida Nation SCC, supra note 417 at ¶45.
710 Homalco Indian Band v British Columbia (Minister of Agriculture, Food & Fisheries), supra note 434 at ¶20 (balance and compromise inherent). But see, Huu-ay-aht v British Columbia, supra note 420 at ¶94.
711 Mikisew Cree, supra note 436 at ¶1.
712 Marshall and Bernard, supra note 423 at ¶39 and 51.
713 Ibid at ¶¶38, 60 and 81.
714 Ibid at ¶48.
protected by an aboriginal right. However, the Chief Justice later acknowledged that this ersatz translation actually works in reverse: the court must first divine the core concepts of the common law rights in question and seek their equivalent in the relevant aboriginal culture. The concurrence criticized the majority’s method, which adapts aboriginal concepts to common-law concepts and demands nothing of the latter in return. Lebel and Fish JJ also cited John Borrows for yet another attempt to define the enigma: “The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake.” Unfortunately, at this point, even clear and insightful voices struggle to be heard against the din.

iii. 2006

Nonetheless, a clear conception of reconciliation does not appear to be a prerequisite for progress in treaty talks, for three tables reached final agreements in 2006. The Lheidli T’enneh Band initialed its final agreement with Canada and British Columbia on October 29, followed by the Tsawwassen First Nation on December 8 and the Maa-nulth First Nations on December 9. These First Nations are diverse. They are different sizes. The Lheidli T’enneh and Tsawwassen number roughly 300 members each, whereas the Maa-nulth count around 2,000. They have different internal structures. For example, the Maa-nulth First Nations are five members of the Nuu-chah-nulth Tribal Council that sought a common treaty, whereas the Tsawwassen First Nation and the Lheidli T’enneh Band are unitary. They live in different parts of the province. The traditional territory of the Tsawwassen is concentrated to the south of Vancouver in the delta of the Fraser River, while that of the Lheidli T’enneh surrounds Prince George, a city in the center of the province. They have different histories, different cultures and different priorities.

Their agreements reflect this diversity but also share some basic characteristics. Each obligates the First Nation to adopt a constitution that complies with conditions regarding elections and fundamental rights; each provides for a new government to be established and operated in accordance with that constitution; each requires Canada and British Columbia to transfer millions of dollars to the new governments; each turns the First Nations’ aboriginal rights and title into

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[715] Ibid at ¶25. See also R v Sappier; R v Gray, 2006 SCC 54 at ¶48.
[717] Ibid at ¶127-29 (LeBel and Fish JJ).
[718] Ibid at ¶128 (LeBel and Fish JJ).
enumerated treaty rights to harvest certain natural resources and fee simple ownership of specified lands; each purports to limit the Crown’s duty to consult the First Nation to consultation procedures provided by the agreement, similar procedures contained in legislation or steps taken to justify an infringement of the agreement.\textsuperscript{720}

Each final agreement also established the same ratification process. First, a double majority of eligible First Nation members had to endorse it: a majority of those members had to vote and a majority of those who voted had to approve the agreement. Then, the provincial legislature had to enact legislation to adopt it. Finally, the federal parliament had to pass a similar law. Once all three hurdles had been cleared, the agreement would bind each of them.\textsuperscript{721} Although the three tables remained in Stage 5 of the Process pending ratification, their agreements were considered major accomplishments and were expected to encourage others.

What they actually inspired were lawsuits. Before they could be ratified, each agreement was challenged by other First Nations that claimed it would compromise their traditional rights and territories.\textsuperscript{722} Given the patterns of indigenous land use and occupation, overlaps (a.k.a. shared boundaries) are rampant in British Columbia. For example, the claims of 54 indigenous groups overlapped those of the Tsawwassen.\textsuperscript{723} First Nations are responsible for identifying and addressing overlaps during the early stages of the Process, in part out of respect for their existing capacity and relationships and in part because non-indigenous governments lack relevant knowledge and skills. Many First Nations are capable of resolving these disputes amongst themselves, whether by agreeing

\textsuperscript{720} Lheidli T’enneh Band Final Agreement, between British Columbia, Canada and L’heidli Tenneh, 29 October 2006 at ch 2 (General Provisions) ss 37-41 and 48, ch 17 (Governance), ss 2, 7(a), 7(c) and 9, and ch 21 (Capital Transfer and Negotiation Loan Repayment), Schedule A, online: BC Treaty Commission <http://www.bctreaty.net/files_3/pdf_documents/lheidli_final_agreement.pdf> [L’heidli T’enneh Band Final Agreement]; Maa-nulth First Nations Final Agreement, between British Columbia, Canada and the Maa-nulth First Nations, 9 December 2006 at ch 1 (General Provisions) ss 1.11.1-1.11.5 and 1.16.1-1.16.2, ch 13 (Governance) ss 13.1.2, 13.3.1(a) and 13.3.1(f), and ch 16 (Capital Transfer and Negotiation Loan Repayment), Schedule 1, online: BC Treaty Commission <http://www.bctreaty.net/nations/agreements/Maanulth_final_initial_Dec06.pdf> [Maa-nulth First Nations Final Agreement]; Tsawwassen First Nation Final Agreement, between British Columbia, Canada and Tsawwassen First Nation, 8 December 2006 at ch 2 (General Provisions) ss 11-15 and 45, ch 16 (Governance) ss 2, 8(a), 8(c) and 8(i), and ch 18 (Capital Transfer and Negotiation Loan Repayment), Schedule 1, online: BC Treaty Commission <http://www.bctreaty.net/nations/agreements/Tsawwassen_final_initial.pdf> [Tsawwassen Final Agreement].

\textsuperscript{721} Lheidli T’enneh Band Final Agreement, supra note 720 at ch 4; Maa-nulth First Nations Final Agreement, supra note 720 at ch 28; Tsawwassen First Nation Final Agreement, supra note 720 at ch 24.

\textsuperscript{722} See e.g. Chief Alan Apsassin v Attorney General (Canada), 2007 BCSC 492; Tseshaht First Nation, supra note 413; Cook v The Minister of Aboriginal Relations and Reconciliation, 2007 BCSC 1722.

\textsuperscript{723} Ibid at ¶88.
to adjust their claims or devising some means to share the land. Sometimes, however, they are unable to do so.

In each of those three cases, the BC Supreme Court declined to declare the agreement unconstitutional or enjoin its signing or ratification because the treaty would not cause irreparable harm to the plaintiff indigenous group. Unlike dams, roads or pipelines, a treaty is made of words: it can always be interpreted, implemented or even revised to accommodate overlapping rights and title. In the challenges to the Tsawwassen and Maa-nulth agreements, the court emphasized their non-derogation provisions, which prohibit adverse effects on the rights of other indigenous groups and require amendments in the event of irreducible conflicts. However, those provisions protect only rights proven in court or codified in a treaty, not rights that have merely been asserted. In effect, they require concerned indigenous groups to choose between two unpalatable options: litigation or negotiation, both of which are long, expensive and uncertain.

Despite these three agreements, 2006 was a difficult year for the Treaty Process. Most participating First Nations were still stuck in Stage 4. In 2004, the Commission had convinced Canada to relax the terms on the loans it extended to support negotiations. Loans would no longer be coupled to grants, would no longer bear interest when incurred during Stage 5 and would not mature before 2009 absent an effective final agreement. However, these changes had no immediate effect on progress or morale.

In October 2006, 40 First Nations subscribed to a Unity Protocol that expressed their frustration with the status quo and demanded Canada and British Columbia negotiate a new approach to six basic issues blocking deals across the province: certainty; constitutional status of treaty lands; governance; co-management throughout traditional territories; fiscal relations and taxation; and fisheries. They wanted to work within the Process, but felt such efforts were doomed unless the federal and provincial governments adopted new positions on these matters. At the same time, First Nations expanded their pursuit of opportunities outside the Treaty Process. Some shunned

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724 See e.g. BC Treaty Commission, Annual Report 2006, supra note 632 at 36 (Sliammon First Nation reached shared territory agreements with Sechelt, Homalco, Klahoose, K’omoks, We Wai Kai, We Wai Kum and Kwakiah First Nations).
726 BC Treaty Commission, Annual Report 2006, supra note 632 at 4-5 (40 of 57 (70%)).
Treaty negotiations continued to roil First Nations as they sought the proper institutional expression for their identities and ambitions. Some negotiating groups splintered as their constituent communities developed distinct substantive and strategic preferences. The Sto:lo Nation shed eight communities between 2004 and 2006. The Kitkatla Nation and the Allied Tribes of Lax Kw’alaams split from the Tsimshian Tribal Council in spring 2004. The Namgis Nation quit the Winalagalis Treaty Group in spring 2004. The Tlowitsis Nation left the Hamatla Treaty Society in 2005 and K’omoks departed in early 2006. Others experimented with amalgamation: the Hwlitsum First Nation tried to enter the Process by acceding to the Hul’qumi’num Treaty Group, which was already in Stage 4. The Treaty Process has not generated comparable angst among non-indigenous residents of the province, for most of whom it remains abstract and technical and rarely, if ever, assumes political or constitutional dimensions.

However, this does not mean First Nations were the only critics of the Process. Coordinated reports published in November 2006 by the auditors general of Canada and British Columbia identified grave concerns with the pace and outcome of treaty talks. Based on 2005 data, the federal report classified only 18 of 47 tables as “productive.” It labeled 12 “inactive” and the remaining 17 “challenging.” It noted that negotiations had failed to achieve federal objectives. It suggested that the federal government may have impeded progress because its ministries struggled to formulate mandates for its negotiators. It also identified an enduring and worrisome disagreement: whereas courts and indigenous people believe treaty negotiations are premised upon recognition of constitutional rights, Canada believes negotiations are just good policy. The BC report made

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733 Ibid at 32

734 Ibid at 35 (Tlowitsis); BC Treaty Commission, Annual Report 2007, supra note 702 at 29 (K’omoks).


736 But see Corporation of Delta v HMTQ, 2005 BCSC 338.


738 Ibid at 2 and 20-21.
similar observations: the Process has consumed much time and money with few tangible results; woeful provincial administration, including uncoordinated mandates and incomplete reports from the Ministry of Aboriginal Relations and Reconciliation, undermines negotiations; and by doing “business” with First Nations away from the treaty table, the province may hasten the demise of the Process.739

These predictions were not mere speculation. Consultation and litigation had continued to evolve while negotiation staggered.740 In the wake of the TCA, indigenous authorities and the Crown introduced several ambitious province-wide initiatives. In July, Canada and British Columbia signed the Education Jurisdiction Framework Agreement with the First Nations Education Steering Committee: a non-profit society founded in 1992 to support indigenous students.741 This agreement established a process for band councils to assume the power to make laws about education on their reserves by entering into individual agreements with Canada. Under the implementing legislation Parliament passed in December of that year, those agreements devolve power over education to the participating band council and exempt it from the provisions of the Indian Act that concern schools.742 Similarly, in November, the BC government and the FNLC reached the “Transformative Change Accord: First Nations Health Plan,” which identified 29 actions they would take to improve aboriginal health. These included the construction of a health centre in a remote location, guaranteed hearing, dental and vision screening for all aboriginal children and increased training opportunities for aboriginal health professionals.743 This document was accompanied by a broad memorandum of understanding between Canada, British Columbia and the FNLC in which they undertook to improve the quality of health services for indigenous peoples and identified indicators, such as the rates of diabetes, suicide and infant mortality, to help them do so.744

Also in 2006, collaboration rejoined the scene. It had lain dormant since its debut with the Gwaii Haanas Agreement in 1993. Now, six indigenous peoples from the coast, who had participated in the Turning Point Initiative and identified themselves as the Coastal First Nations, executed a Land and Resource Protocol Agreement with the BC government.745 This protocol

740 See e.g. Leighton v Canada (Minister of Transport), 2006 FC 1129.
742 First Nations Jurisdiction over Education in British Columbia Act, supra note 414 at ss 9 and 23.
agreement established a forum, a working group and a technical committee to facilitate joint
management of the lands and resources within the traditional territories of the indigenous signatories.
It committed the parties to implement “ecosystem-based management”: a results-based form of
regulation that allows participants wide discretion to decide how they will meet environmental
targets. The protocol also provided the objectives, indicators and procedures by which they will
monitor their performance.

Each Coastal First Nation supplemented the protocol agreement by signing a bilateral
Strategic Land Use Planning Agreement (a “SLUPA”) with the provincial government. Each SLUPA
set forth a precise map the signatory’s territory alongside hazy undertakings to work towards
developing additional mechanisms to coordinate their respective land-use plans and, more generally,
collaborate on decisions about land and natural resources.746 These agreements envision a dynamic
relationship between equals: a true government-to-government relationship. They are partial and
provisional, as they address only one facet of that relationship and anticipate revisions and additions,
such as separate consultation protocols. Their content is technical and often abstract, but it is also
balanced: neither party was able to dictate the content.

As a result, these agreements also have some, but not all, of the formal indicia of
collaboration. Each SLUPA contains a parallel assertion of sovereignty. For example, the preamble
to the Heiltsuk First Nation – British Columbia SLUPA reads, in relevant part:

“The Heiltsuk Nation asserts that… The lands, waters and resources belong to the Heiltsuk
Nation and are subject to the inherent sovereignty, jurisdiction, and the collective rights of
the Heiltsuk people…

The Province asserts that… The lands, waters and resources included in its Central Coast
and North Coast LRMP areas are Crown lands, waters and resources, and are subject to the
sovereignty of Her Majesty the Queen and the legislative jurisdiction of the Province of
British Columbia…”747

Neither the protocol nor the SLUPAs include a choice-of-law clause. They do refer to the Crown’s
duty to consult, but these references are unusual: the Coastal First Nations may decide whether

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746 See e.g. Wuikinuxv First Nation – British Columbia Strategic Land Use Planning Agreement, between
Wuikinuxv First Nation and British Columbia, 20 March 2006, online: Coastal First Nations
747 Heiltsuk First Nation – British Columbia Strategic Land Use Planning Agreement, between Heiltsuk First
Nation and British Columbia, 20 March 2006, online: Coastal First Nations
Crown communications constitute consultation and they are not required to acknowledge that the provincial government has satisfied its duty. The agreements are not comprehensive. They do not resolve the controversies that surround aboriginal rights and title, and they do not provide British Columbia the degree of comfort it expects from consultation agreements. They provide the minimum required for the parties to work together on land and resource use. In sum, they embody an approach that is at once more modest and more ambitious than its rivals: a complicated and contentious approach seen in many agreements that would follow.

iv. 2007

2007 was another rough year for the Treaty Process. Although the Maa-nulth First Nations and the Tsawwassen First Nation ratified their final agreements, the Lheidli T’enneh Band did not. Its members rejected the agreement by a vote of 123 to 111. Various reasons were given for this disappointment: the document was complicated and poorly explained; the settlement did not meet their unrealistic expectations; they simply were not ready for a treaty. The Crown had compromised in each of these treaties. For example, the BC government abandoned its insistence on a municipal model that would have relegated self-government provisions to side agreements. The deal simply did not satisfy enough members of the Lheidli T’enneh Band.

Behind the frontlines, frustration simmered. One First Nation entered Stage 5 and brought the total there to eight, but support for the Unity Protocol grew. Its signatories called for a common table at which they would discuss their concerns directly with the BC and Canadian governments. After so many idle, unproductive years, they had concluded that more discussions among the Principals would not eliminate the obstacles to progress at their individual tables. The Commission conceded that some First Nations might not obtain treaties or “their idea of ‘true reconciliation.’”

The Hul’qumi’num Treaty Group, which represents more than 6,600 indigenous people whose traditional territory lies along the southeastern coast of Vancouver Island, had an even less optimistic view and a much more radical response. In May 2007, it complained to the Inter-American Commission on Human Rights (IACHR) that the Treaty Process violated the American...

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753 Ibid.
Declaration on Human Rights. It claimed that the Process does not provide an effective mechanism to protect its members’ right to property, in light of the Crown’s refusal to contemplate infringements of private property interests in final treaty settlements. This alleged defect is especially relevant for its member First Nations because most of their territory had been transferred to private parties in the 19th century. In October 2009, the IACHR declared the complaint admissible. It concluded that the Hul’qumi’num were not obligated to exhaust their domestic remedies before petitioning the IACHR, as ordinarily required by international tribunals, because the available domestic procedures, whether litigation or negotiation within the Treaty Process, were inadequate: neither offered any reasonable prospect of success.

As hope withered at the treaty table, it bloomed elsewhere. Indigenous peoples and the Crown continued to build upon the momentum their respective bureaucracies had gathered since they signed the TCA. In June 2007, Canada, British Columbia and the FNLC signed the country’s first Tripartite First Nations Health Plan, which elaborated the plan and memorandum of understanding reached in 2006. The new plan reiterated the parties’ commitment to transfer to indigenous peoples more responsibility for the design and delivery of health services, confirmed the indicators they will monitor and described the governance structure they will use to implement their vision. In November, British Columbia enacted legislation to recognize the authority for on-reserve education that band councils are authorized to assume under the 2006 Education Jurisdiction Framework Agreement and the concomitant federal statute. These developments do not aim simply to increase the quality of services received by indigenous peoples in British Columbia. They aim to do so by integrating their pertinent institutions, such as the province-wide First Nations Health Council and First Nations Educational Steering Committee, into established administrative structures and therefore adapting those structures as required.

In contrast to these incremental adjustments, litigation offered a major shock. After a four-and-a-half year trial, Justice Vickers of the BC Supreme Court expressed his opinion that the Tsilhqot’in people could prove aboriginal title to parts of their traditional territory. The Tsilhqot’in

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758 First Nations Education Act, SBC 2007, c 40.
759 Tripartite First Nations Health Plan, supra note 757 at 4-5; Education Jurisdiction Framework Agreement, supra note 741 at 3.3, 3.4, 3.8 and Schedule A.
thus became the first indigenous people in British Columbia to have a judge recognize any portion of their aboriginal title. Vickers J declined to issue a declaration of aboriginal title because the representative plaintiff’s evidence did not support his pleadings: the chief had sought a declaration on behalf of the Tsilhqot’in for their entire traditional territory, but the evidence established aboriginal title only in certain parts of the area claimed.

Disconnects between pleadings and evidence have proven a perennial problem for indigenous plaintiffs that seek to establish their rights via civil actions. Trials are long and trial preparation is even longer. Evidence is obscure and contested and requires experts to marshal. Litigation is expensive, the stakes are high and the law is constantly evolving. Although the pleadings also evolve, indigenous plaintiffs often rely on expansive and alternative claims so as to ensure their suits do not fail on narrow technical grounds. However, this tactic can backfire if the anthropological and historical evidence, which is commissioned at an early stage and often depends on patchy explorer records limited to unrepresentative times and places, cannot bear such broad and bold claims.

Nonetheless, the judge delivered a symbolic victory for indigenous people in the province and set the stage for more substantial advances in the future. He dismissed the Tsilhqot’in claim without prejudice and with leave to renew their claims over lands for which they can demonstrate aboriginal title. Nonetheless, after halfhearted attempts to negotiate a settlement, Canada and British Columbia obtained leave to proceed with their appeals and the BC Court of Appeal heard their arguments in November 2010.

Vickers J also struck rough justice between indigenous peoples and the Crown by introducing an equal measure of doubt for each. He disturbed the provincial government by confirming that Crown grants of fee simple title cannot extinguish aboriginal title. The BC government has jurisdiction over land in the province and has treated private lands as sacrosanct since deciding to engage indigenous people in the late 1980s. Any suggestion that private interests in land might be at stake in dealings with indigenous people has major political implications in British Columbia. He also spooked the forestry industry by concluding that the BC Forest Act would not apply to lands over which aboriginal title has been established. In turn, he worried indigenous

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760 Tsilhqot’in Nation, supra note 412 at ¶¶958-62.
761 Ibid at ¶¶129 and 957.
762 See e.g. Delgamuukw SCC, supra note 412 at ¶73-77 and Cheslatta Carrier Nation v British Columbia, 2000 BCCA 539 at ¶17.
763 Tsilhqot’in Nation, supra note 412 at ¶1336.
764 William v British Columbia (HMTQ), 2009 BCCA 83.
765 Tsilhqot’in Nation, supra note 412 at Executive Summary and ¶997, citing Delgamuukw SCC, supra note 412 at ¶¶172-176.
766 Musqueam Indian Band v British Columbia, supra note 685 at ¶15 (Southin J).
767 Tsilhqot’in Nation, supra note 412 at ¶1012-13.
people by deciding that the BC Limitations Act applies to aboriginal rights claims via s. 88 of the Indian Act, such that claims for the unjustified infringement of aboriginal title are barred by statute six years after the cause of action is discovered.\footnote{Ibid at ¶1319.} By unsettling expectations on both sides, Vickers J jostled an unproductive equilibrium that had stifled negotiations, just as the Supreme Court of Canada tried to do in Delgamuukw and Haida Nation. If he wanted indigenous people and the Crown to resolve their disputes without resorting to the courts, his decision has had some success in this regard.

Justice Vickers demonstrated an uncommon degree of self-awareness. He recognized that courts are poorly equipped to promote reconciliation and, citing Brian Slattery, acknowledged that judges may inadvertently “diminish the possibility of reconciliation ever occurring.”\footnote{Ibid at ¶1367.} Unfortunately, as if to confirm this observation, he also offered various unsatisfactory ideas about reconciliation. At one point, he cited Sparrow for the proposition that “Government power must be reconciled with government duty.”\footnote{Ibid at ¶1082.} The prospect of a coherent and principled approach to reconciliation arose without warning and receded just as quickly, for he soon reverted to the same trite, post-Van der Peet formulas. He wrote of “the need to reconcile the fact that Aboriginal societies exist within and are part of a broader social, political and economic community.”\footnote{Ibid at ¶1085.} Aside from the controversial assumption that indigenous people belong to a comprehensive Canadian community, this iteration fails to specify what this “fact” must be reconciled with. References to prior aboriginal occupation, Crown sovereignty and “competing interests” offered no new insights.\footnote{Ibid at ¶¶1118 (citing Haida Nation SCC) and 1357 (competing interests).}

Nonetheless, Vickers J did introduce an important rhetorical and conceptual nuance when he asked whether British Columbia’s efforts to engage the Tsilhqot’in amounted to genuine consultation.\footnote{Ibid at ¶1123.} This distinction between the fact of engagement and the legal conclusion of consultation soon became integral to agreements between the provincial Crown and indigenous peoples. In collaboration agreements known colloquially as framework agreements or strategic engagement agreements, indigenous parties with sufficient leverage do not automatically accept that engagement constitutes consultation. Instead, they agree to engagement frameworks and protocols, Crown compliance with which may satisfy the duty to consult.\footnote{Ibid at ¶1118 (citing Haida Nation SCC) and 1357 (competing interests).} These procedures coordinate indigenous and Crown decision-making to improve regulatory outcomes. They do not offer the Crown the certainty it ordinarily seeks from a consultation agreement because its conduct can always be reviewed, even when it adheres to the agreement, for compliance with its constitutional duty. It is

\begin{footnotes}
\item[768] Ibid at ¶1319.
\item[769] Ibid at ¶1367.
\item[770] Ibid at ¶1082.
\item[771] Ibid at ¶1085.
\item[772] Ibid at ¶1118 (citing Haida Nation SCC) and 1357 (competing interests).
\item[773] Ibid at ¶1123.
\item[774] See text accompanying notes 870-76, 880 and 964-65, infra.
\end{footnotes}
this sort of language and this type of agreement that have led the UBCIC to declare the Treaty Process dead and inspired indigenous people to talk of a post-treaty environment.\textsuperscript{775}

Indeed, the provincial government and interested First Nations continued to experiment with bilateral arrangements. In December 2007, the Council of the Haida Nation entered into a Strategic Land Use Agreement with the BC government.\textsuperscript{776} The agreement built upon earlier attempts to establish a “government-to-government” relationship between the parties.\textsuperscript{777} It committed them to work together on a range of plans, policies and procedures to achieve “Ecosystem Based Management Objectives” for the islands known both as the Queen Charlottes and the Haida Gwaii.\textsuperscript{778} These objectives concern the cultural, economic and environmental dimensions of fish and forest resources on the islands.\textsuperscript{779} The parties did not settle on the law of one jurisdiction to govern the agreement: the Haida promised to act in accordance with Haida laws, policies and authorities, and the province promised to act in accordance with provincial laws, policies and authorities.\textsuperscript{780} However, they did insist that the agreement did not affect or prejudice any rights, duties, obligations or authorities not expressly mentioned in the document, such as the Haida Nation’s aboriginal title or the BC government’s duty to consult.\textsuperscript{781} The agreement did not mention reconciliation. However, it could not have hurt that cause by demonstrating British Columbia’s respect for Haida traditions, which include self-government.

In contrast, the Hupacasath First Nation signed an agreement with the provincial government in March 2007 that invoked reconciliation but did little else. The Hupacasath Reconciliation Protocol is a brief document that purports not to create any legal obligations between the parties.\textsuperscript{782} It notes that they “wish to undertake negotiations to develop new approaches and arrangements to establish an on-going effective government-to-government relationship aimed at reconciliation.”\textsuperscript{783} It expresses their desire to reach a final agreement under the Treaty Process and a


\textsuperscript{777} Ibid at s 2.1.

\textsuperscript{778} Ibid at ss 8.3-8.7.

\textsuperscript{779} Ibid at Attachment B.

\textsuperscript{780} Ibid at ss 8.1 and 8.2.

\textsuperscript{781} Ibid at ss 10.1-10.4.

\textsuperscript{782} Hupacasath Reconciliation Protocol, between Hupacasath First Nation and the Province of British Columbia, 31 March 2007 at s 3.

\textsuperscript{783} Ibid at s 1.
separate reconciliation agreement. It identifies existing collaborative programs involving energy, resources and economic development and it suggests other initiatives the parties might consider. But the agreement does not elaborate the relationship that such agreements and initiatives have with reconciliation, which it defines as “an evolving process that leads towards resolution of general and specific issues.” Such vague language does not promote reconciliation. Once again, it mistakes that existential endeavour for a technical challenge. Then it uses abstract jargon to obscure any technical issues that may be relevant. The Hupacasath, whose traditional territory is located on the east coast of Vancouver Island, have since suspended treaty negotiations and returned to the courthouse.

v. 2008

The Treaty Process continued to disappoint in 2008. The Common Table met for 13 days scattered across three months early in the year. The Commission drafted a report on the submissions, discussions and conclusions made during those meetings. The Crown took more than 12 months to issue a response that First Nations found belated and inadequate. Few treaty tables made significant progress. Eight First Nations (13%) occupied Stage 5 while 43 (72%) remained in Stage 4. Each of the three First Nations that entered Stage 4 had recently separated from a similarly advanced table, so no First Nations actually advanced and a significant minority of indigenous people in the province remained outside the Process.

Parliament did enact legislation to settle the Tsawwassen Final Agreement, which became the first final agreement to be ratified by all three parties. However, Canada refused to ratify the Maa-nulth Final Agreement because one of the Maa-nulth Nations was a party in prominent litigation over commercial fishing rights on the west coast of Vancouver Island. Other First Nations rebuffed by the federal government for initiating litigation included the Ditidaht First Nation and the Allied Tribes of Lax Kw’alaams. The former brought another challenge to the Maa-nulth

784 Ibid at ss 3 and 8.
785 Ibid at ss 5 and 6.
786 Ibid at s 4.
789 BC Treaty Commission, Common Table Report, supra note 689.
792 Ibid at 14.
793 Ibid at 16 (Ditidaht) and 30 (Lax Kw’alaams). See also BC Treaty Commission, Annual Report 2006, supra note 632 at 32 (Kaska).
agreement that has been addressed out of court.\textsuperscript{794} The latter sought a declaration of their aboriginal right to harvest and sell on a commercial scale the fish caught in their traditional territories.\textsuperscript{795}

The Commission again lamented the lack of progress “despite considerable investment” in the Process.\textsuperscript{796} It held a conference at which indigenous leaders, government officials and academic experts discussed the difficulties of negotiating treaties and implementing self-government.\textsuperscript{797} Many First Nations were nonplussed: they increasingly preferred to focus on opportunities outside the Process. However, some showed the commitment and initiative necessary to innovate within the confines of the six stages. The Tla-o-qui-aht First Nation withdrew from the Nuu-chah-nulth Tribal Council table in late 2007, filed its own statement of intent to negotiate in July 2008 and reached an incremental treaty agreement with British Columbia in late 2008.\textsuperscript{798} This accord transferred $600,000 and five parcels of Crown land near Tofino, a town on the west coast of Vancouver Island, to the Tla-o-qui-aht and set objectives and benchmarks to help them reach a final treaty.\textsuperscript{799} It was intended, in part, to satisfy the provincial government’s obligation to consult and accommodate the Tla-o-qui-aht with respect to the Maa-nulth Final Agreement.\textsuperscript{800} The Gitanyow First Nation, which earlier had challenged the Nisga’a Final Agreement and rejected a settlement package from the Crown, met with less success. It tabled its own incremental treaty agreement in March 2008, but the BC and Canadian governments were unresponsive.\textsuperscript{801}

Meanwhile, consultation continued to thrive. Canada finally released its interim consultation guidelines, which stubbornly characterized the duty to consult as “legal” rather than constitutional.\textsuperscript{802} The BC government reached a number of agreements with indigenous counterparts, including a Final Agreement with Blueberry River First Nations that capped a suite of sector-specific agreements (e.g.

\textsuperscript{794} BC Treaty Commission, \textit{Annual Report 2009}, supra note 440 at 19.
\textsuperscript{795} Lax Kw’alaams Indian Band \textit{v} Canada (Attorney General), 2008 BCSC 447 at ¶111.
\textsuperscript{796} BC Treaty Commission, \textit{Annual Report 2008}, supra note 505 at 1.
\textsuperscript{800} Ibid at Art 9.1(a).
\textsuperscript{801} BC Treaty Commission, \textit{Annual Report 2009}, supra note 440 at 19.
\textsuperscript{802} Canada, \textit{Interim Consultation Guidelines}, supra note 656 at 5.
oil and gas, mining and minerals, forestry and wildlife) designed to establish a comprehensive government-to-government relationship.\textsuperscript{803}

However, as a series of trial judgments confirmed, consultation can disappoint when litigation fails to provide effective remedies for Crown misconduct. Both the Gitanyow and the Hupacasath Nations had long sought genuine consultation from the Minister of Forests with respect to decisions that authorize logging in their traditional territories. In \textit{Wi'litswx v British Columbia (Minister of Forests)}, Justice Neilson clarified that consultation must be both procedurally and substantively adequate.\textsuperscript{804} In \textit{Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)}, Justice Smith found that the Crown must ensure the consultation process is as transparent as possible.\textsuperscript{805} Despite these useful doctrinal refinements, these cases offered little return on the time, money and other resources invested by the indigenous petitioners.

In \textit{Wi'litswx}, the judge issued only a limited declaration that the Crown had breached its constitutional duty and failed to uphold its honour.\textsuperscript{806} In \textit{Ke-Kin-Is-Uqs}, the judge ordered the parties to try mediation for at least six months and made the Crown bear the costs.\textsuperscript{807} She declined to inconvenience the licensee save for ordering it to notify the parties if it decided to stop complying with the original licence.\textsuperscript{808} Legitimate complaints about the consultation process yielded more process, with the promise of even more process (in the form of a reapplication or a new claim) if the first dose proved ineffective. They offered no meaningful accommodation, such as revocation of the relevant licences, amendments to the applicable decision-making procedures or even monetary compensation.

In contrast, Justice Grauer in \textit{Klahoose First Nation v Sunshine Coast Forest District (District Manager)} did award a remedy with some substantive sting. The petitioner challenged the approval of a Forest Stewardship Plan, which authorized a forestry company to apply for the road and cutting permits required to harvest logs under another licence. The judge found that the BC Ministry of Forests had failed to assess the strength of the Klahoose First Nation’s claims to aboriginal rights and title, let alone the effects of the plan on those claims.\textsuperscript{809} He noted that the duty to consult is reciprocal, but he also suggested that indigenous requests for holistic consultation about operational decisions are not necessarily unreasonable.\textsuperscript{810} More importantly, after he concluded that the Crown

\textsuperscript{803} See e.g. Final Agreement, between Blueberry River First Nations and Her Majesty the Queen in Right of British Columbia, 29 September 2008, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/art/treaty/key/down/Final_Agreement_10272008.pdf>.

\textsuperscript{804} \textit{Wi'litswx #1}, supra note 412 at ¶170 and 178.

\textsuperscript{805} \textit{Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)}, supra note 775 at ¶147.

\textsuperscript{806} \textit{Wi'litswx #2}, supra note 412 at ¶25.

\textsuperscript{807} \textit{Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)}, supra note 775 at ¶255-56.

\textsuperscript{808} Ibid at ¶264-65.

\textsuperscript{809} \textit{Klahoose First Nation v Sunshine Coast Forest District}, supra note 434 at ¶119.

\textsuperscript{810} Ibid at ¶132 and 134.
had breached both its duty to consult and its duty to accommodate, Grauer J stayed all activity under the Plan. He did not quash the initial authorization, but he did instruct the responsible official to engage the Klahoose in deep consultation with respect to the company’s application to expand the scope of the Plan.\textsuperscript{811}

Despite this rare success, consultation has failed to develop a reliable route to substantive remedies. Too often, it shades into attrition as the parties talk about talking (i.e. discussing a consultation protocol), and then talk about talking about talking (i.e. negotiating a consultation record), and so on. Few indigenous communities are equipped for this sort of interminable battle.

For example, the Allied Tribes of Lax Kw’alaams lost their claim for an aboriginal right to fish and sell fish on a commercial basis. That case, which took years to prepare and spent an entire year at trial, became a battle of expert witnesses and Justice Satanove sided with those of Canada and British Columbia. She concluded that the Allied Tribes had not demonstrated their ancestors had traded fish commercially prior to contact with Europeans, so they did not receive the declaration.\textsuperscript{812} She also took issue with what Canada characterized as a belated and prejudicial amendment to their pleadings when they argued that their aboriginal right to fish on a commercial scale included a right to sustain the Lax Kw’alaams community from the fish resources in their territory.\textsuperscript{813} Her decision has since been appealed to the BC Court of Appeal, where it was upheld, and again to the Supreme Court of Canada, which was due to hear arguments in February 2011.

Back in 2008, four appeals from coordinated regulatory convictions marked the return of the test case as a vehicle for aboriginal interests.\textsuperscript{814} They also confirmed the absurdity of trying to manage a natural resource when our demand and ability to harvest far exceed our understanding of the resource and the effects of our industry. Ninety-three First Nations assert rights to harvest salmon from the Fraser River, which flows from the Rocky Mountains to the Pacific Ocean just south of Vancouver and hosts what has traditionally been one of the world’s largest salmon migrations. Non-aboriginal fishermen also claim extensive interests in the salmon fishery. In recent years, the returning population has oscillated so wildly between record highs and record lows that Parliament has appointed a Royal Commission to study the matter.\textsuperscript{815} Indigenous interests in this resource, while similar, are not identical because those on the lower river have a geographical advantage on those further upstream. The task of synthesizing these interests as well as broader

\textsuperscript{811} Ibid at ¶¶138, 150 and 152.

\textsuperscript{812} Ibid at ¶¶487, 496 and 503.

\textsuperscript{813} Ibid at ¶¶101-04.

\textsuperscript{814} Tommy, supra note 474; Aleck, supra note 474; Douglas #1, supra note 474; Douglas #2, supra note 474.

\textsuperscript{815} Order in Council PC 2009-1860.
commercial and environmental concerns is not merely, as the court described it, “complex and dynamic”; it is heroic.\textsuperscript{816}

In each of the four cases, members of the Cheam First Nation on the lower Fraser caught fish from a different salmon run (i.e. species) when prohibited by DFO regulations. They argued that DFO had failed to consult with them before closing the runs: the multilateral stakeholder meetings and “bilateral” aboriginal forums in which DFO representatives met with many First Nations at once could not address the particular rights and interests of their people. Another Justice Smith of the BC Supreme Court disagreed and found that this approach was a compromise necessary to manage such a fickle yet fundamental resource.\textsuperscript{817} Once again, she stated that indigenous people owe a reciprocal duty to participate in good faith in Crown consultation efforts without explaining the source or nature of that duty. She also concluded that the Cheam had breached this reciprocal duty by refusing to take part in the uniform DFO processes.\textsuperscript{818} Unfortunately, Justice Smith did not indicate how her conclusion cohered with the decision in Huu-ay-aht, which requires the Crown to initiate consultation by assessing the particular rights of the indigenous group in question and then to tailor a consultation process to those rights.\textsuperscript{819}

Further, the appellants in these cases argued that DFO had misinterpreted and misapplied the Sparrow priority by unilaterally incorporating the notion of “sustainability” into the premier consideration of conservation and then defining sustainability to mean the preservation of salmon for the future benefit of all user groups.\textsuperscript{820} Again, Smith J disagreed and found that sustainability so understood is a part of conservation.\textsuperscript{821} Thus, the Crown and the courts may put the interests of future non-aboriginal commercial and sport fishermen ahead of the immediate FSC needs of indigenous people. The former now fall within the rubric of conservation, which sits atop the Sparrow waterfall. The latter wait below for any spillover. Whether this doctrinal shuffle will help the Fraser River salmon remains uncertain, given the scientific and political controversy that complicates efforts to manage that beguiling fish.

Far more certain is the role of reconciliation in this troubling development. Consistent with other recent cases, Justice Smith referred to “the government’s obligation to reconcile aboriginal with non-aboriginal interests.”\textsuperscript{822} She characterized the government’s task as allocating the resource between the competing “user groups” and categorized indigenous people as just one such group

\textsuperscript{816} See e.g. Tommy, supra note 474 at \textsection 17; Douglas #1, supra 474 at \textsection 86; Douglas #2, supra note 474 at \textsection 30.
\textsuperscript{817} Aleck, supra note 474 at \textsection 62.
\textsuperscript{818} Ibid at \textsection 70.
\textsuperscript{819} Huu-ay-aht v British Columbia, supra note 420 at \textsection 113-116.
\textsuperscript{820} See e.g. Tommy, supra note 474 at \textsection 51.
\textsuperscript{821} Ibid at \textsection 52 (“Conservation also includes the broader concept of sustainability”) and 57 (“Sustainability requires enhancement of the resource for the future benefit of both aboriginal and non-aboriginal Canadians.”).
\textsuperscript{822} Douglas #1, supra note 474 at \textsection 86.
among many. Thoroughly debased, reconciliation no longer benefits indigenous people. It concerns interests rather than constitutional rights: needs not obligations. It also effaces the distinct position of indigenous peoples in Canadian constitutional law and politics. It exploits the promise of Sparrow to rationalize the erosion of aboriginal rights, which can now be justifiably infringed by reference to the needs of hypothetical non-indigenous businesses. As conceived by the courts, reconciliation no longer yokes federal power to federal duty. Instead, it subordinates duty to power: an instrumental formula that abandons justice for efficiency.

At least one case gave cause for optimism in 2008. The Kaska Dena Council represents some of the Kaska Dena, which asserts a traditional territory in northern British Columbia that covers approximately 5% of the province. It had petitioned for a declaration that disclaimers in a 1997 letter of understanding with the BC government constituted provincial acknowledgment of its rights and title. These disclaimers were classic boilerplate: they blandly confirmed that the letter did not affect any aboriginal rights, title or interests. The council argued that, once acknowledged, Kaska rights and title burdened Crown conduct and title in traditional Kaska territory. In 2007, the BC Supreme Court denied the relief sought. In 2008, the BC Court of Appeal dismissed the council’s appeal. The letter simply could not bear such an expansive interpretation. It was neither a treaty nor an agreement in the nature of a treaty. Further, the case was totally abstract: no factual context was established and no concrete dispute was pleaded.

This loss for the petitioner was a gain for collaboration. The panel in Kaska Dena Council v BC (AG) confirmed that such routine prophylactic provisions do not imply Crown recognition of aboriginal rights and title. Thus, it insulated similar agreements from collateral attack (or, more appropriately, collateral enhancement) and encouraged the parties to continue crafting language and procedures that can accommodate inconsistent positions on basic issues of title, jurisdiction and sovereignty. Collaboration works precisely because it does not force the parties to resolve their deep constitutional disagreements: they can address common concerns without settling or even mentioning their positions on more controversial issues. Indigenous parties pursue collaboration precisely because they need not compromise their legal traditions. Crown representatives hazard it for much the same reason: the agreements are relatively cheap to negotiate and implement; they promote responsible resource management; and their immediate significance is primarily administrative. However, their theoretical impact is perhaps more profound: constitutional

823 Ibid at ¶87.
824 Kaska Dena Council v HMTQ, 2007 BCSC 422 at ¶4.
825 Ibid at ¶47.
826 Kaska Dena Council v BC (AG), 2008 BCCA 455.
827 Kaska Dena Council v HMTQ, supra note 824 at ¶31.
828 Kaska Dena Council v BC (AG), supra note 826 at ¶16.
consensus appears less important than once thought. Rather than a condition, it may be a consequence of relatively mundane economic and political projects.

If each bare reference to indigenous (or Crown) rights had immediate constitutional implications, then collaboration would cease altogether. The stakes would simply be too high. Existing agreements would present huge liabilities for the Crown. New agreements would be unthinkable because prospective parties would be consumed by legal anxieties. Parties would retreat into rigid positions and collaboration would lose its comparative advantage over negotiation and consultation. Innovation would be stifled by the fear of giving too much away. In *Kaska Dena Council*, the BC Court of Appeal showed how courts might instead encourage constitutional innovation: by recognizing the parties’ autonomy and respecting their efforts, however tentative and incomplete, to define their common predicament.

2008 was an especially fruitful year for such experimentation. In May, the Gitxsan Hereditary Chiefs, who had been plaintiffs in *Delgamuukw*, presented an Alternative Governance Model to the BC and Canadian governments. They proposed a departure from the “standard” model for treaties in British Columbia, in which a new indigenous government assumes jurisdiction over “treaty settlement lands” to collect revenue and administer services. They argued such a structure would be unnecessarily expensive and complex. They did not want delegated powers or taxpayer money. The federal and provincial governments could continue to deliver those services they provide to all residents of British Columbia, albeit in a manner that accommodates Gitxsan interests.

The hereditary chiefs wanted to maintain Gitxsan government to manage Gitxsan assets and preserve Gitxsan traditions. For this, they would require release from the *Indian Act*, which would remove the burden of the band structure but also impose ordinary tax obligations. They also would need the BC and Canadian governments to accommodate their inherited economic interest in the entire 33,000 square kilometers of traditional Gitxsan territory through some combination of ownership, investment and revenue sharing. They hoped to build upon existing arrangements that had been developed to accommodate their interests in matters such as forestry and fisheries. But the hereditary chiefs did not dwell on technical issues. They explained the need for a meaningful conversation. They insisted that reconciliation requires attention to “fundamental issues of

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ownership, jurisdiction, and governance.”

Meanwhile, in the southwest corner of the province, the Musqueam Nation had just reached a reconciliation, settlement and benefits agreement with the provincial government. British Columbia agreed to pay the Musqueam Nation more than $20 million, to transfer title to valuable lands near the mouth of the Fraser River, and to assign lease agreements involving a casino and a golf course on some of those lands. In exchange, the Musqueam Nation released its claims against the province regarding those lands but did not otherwise limit or extinguish its aboriginal rights or title.

As usual, this novel arrangement attracted unsuccessful litigation. Also as usual, the agreement contained multiple definitions of reconciliation. The preamble refers to “the reconciliation of the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown,” which resembles a formula from Lamer CJ’s majority opinions in Van der Peet and Delgamuukw. In another provision, the Musqueam Nation acknowledged that the transfer of lands by the province constitutes “a contribution by the Province towards the reconciliation of the Province’s and Musqueam’s interests and the settlement of Musqueam’s aboriginal rights and title claims through treaty or other negotiations.”

Although the parties’ interests may relate to or even derive from their prior presence and assertion of sovereignty, respectively, this relationship remains implicit. The agreement also invoked the “spirit of the New Relationship,” but the New Relationship Vision Statement sought to reconcile Aboriginal and Crown titles and jurisdictions.

Absent a clear conception of reconciliation, this word only indicates that more words are likely to follow. Such reassurances would be unnecessary if the parties were actually reconciling, since further talks and cooperation would follow unprompted from their renewed relationship. Progress requires an objective that can be stated and measured with some precision. At present, reconciliation provides a crude orientation at best. It signals little more than dissatisfaction with prevailing conditions and a desire for fewer disputes. If indigenous and non-indigenous peoples

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830 Gitxsan Treaty Team, Alternative Governance Model, supra note 829 at 9.
831 Reconciliation, Settlement and Benefits Agreement, between Musqueam Indian Band and Her Majesty the Queen in Right of the Province of British Columbia (11 March 2008), online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/art/firstnation/musqueam/down/musqueam_reconciliation_agreement.pdf> [BC–Musqueam Indian Band, Reconciliation, Settlement and Benefits Agreement].
832 Ibid at Articles 1.04, 3.01 and 3.04.
833 Ibid at preamble and Articles 4.01, 4.02 and 4.04.
834 Greater Vancouver Regional District v British Columbia (Attorney General), 2009 BCSC 577.
835 BC–Musqueam Indian Band, Reconciliation, Settlement and Benefits Agreement, supra note 831 at preamble; Van der Peet, supra note 517 at ¶42; Delgamuukw SCC, supra note 412 at ¶81.
836 BC–Musqueam Indian Band, Reconciliation, Settlement and Benefits Agreement, supra note 831 at 6.01.
837 Ibid at preamble; British Columbia & FNLC, New Relationship Vision Statement, supra note 692 at 1.
want to craft a common future in British Columbia, they will need either to stop talking about reconciliation or to become more disciplined.

vi. 2009

The provincial government and the First Nations Leadership Council tried the latter when they unveiled a Discussion Paper on Instructions for Implementing the New Relationship. The paper was the product of talks that had begun the previous year. It envisioned drastic steps to realize the New Relationship they had announced in 2005. It proposed legislation that would recognize the presence of aboriginal rights and title throughout the province, establish another commission that would work with indigenous leaders to reconstitute their many peoples into fewer “Indigenous Nations,” and create statutory mechanisms that would share revenues and decision-making responsibilities with those larger groups. It also anticipated a proclamation that would address the history of British Columbia from pre-contact times through colonization and decolonization in order to educate “the broader population” (read: settlers) and promote reconciliation.

The paper promised changes that suggested a mutual commitment to endure the rigours of reconciliation, which include a genuine effort to determine what reconciliation requires. The province and the FNLC expected the proclamation to provide a detailed and critical account of the relationship between the Crown and indigenous peoples in the province, with reference to particular actions that have generated adversity and animosity between them. By publicly assigning responsibility for past transgressions, it would begin to turn history from a morass into firm ground for a shared future. They intended the legislation to create institutions in which indigenous and non-indigenous peoples would become partners who would govern the province and pursue prosperity together. It was an interesting proposal. Bold and innovative, it might have made a significant contribution to reconciliation. However, it was handicapped by misconception.

The discussion paper noted only that the parties had intended the New Relationship to foster “the reconciliation of Aboriginal and Crown titles and jurisdictions.” Although the parties

840 Ibid.
841 Ibid at 5.
843 Ibid at 1; British Columbia & FNLC, New Relationship Vision Statement, supra note 692 at 1.
did not make the familiar mistake of adopting motley recipes for reconciliation, the formula they chose was flawed. The New Relationship, and by extension the discussion paper, present reconciliation as technical and abstract. They suggest that reconciliation concerns competing titles and jurisdictions, which are concepts unfamiliar to most people. This approach implies that reconciliation is a matter for lawyers, politicians and bureaucrats rather than “ordinary” people. This implication is reinforced by prominent reassurances that reconciliation will not impact private property rights, which remain a key tenet of settler identity and ideas about the proper role of government.\(^{844}\) This emphasis on technical concerns is a symptom of a persistent problem: a failure to appreciate the nature of the challenge posed by reconciliation.

The affronts that must be redressed to achieve reconciliation are not material or institutional. They concern mistaken beliefs about who we are, where we live and what we have done. Reconciliation concerns something visceral: identity. And like all things visceral, identity is slippery and dark. We can have abstract discussions about it, but identity is not abstract. Rather, it is a condition of abstraction: we must always start somewhere, and when we talk about identity we start with the belief that we could have one.\(^{845}\) Nor is identity technical. Institutions and procedures may be said to reflect or express identity, but they cannot exhaust it without eliminating the basis for understanding them as a reflection or expression: a discreet identity that can be discerned only by interpreting the rules, statements and practices that embody it. An interpretive orientation toward institutions and official actions assumes that there is something to be interpreted.

So long as reconciliation involves identity, as it does in British Columbia, it is not a matter for experts alone. No speech, no matter how persuasive the speaker or thorough the appendix, will sustain the necessary popular engagement with the politics and morality of colonization in British Columbia. More drastic and enduring measures are required to stoke doubt about the viability and legitimacy of the constitutional settlement in the province, let alone dominant accounts of BC history and the identities of its inhabitants. More work is necessary to determine whether we have a viable common identity, whether we form a single principled community and, if so, what that means.

But a more productive approach may be to forget about reconciliation. Instead of talking about who we are and what our identities require, we could focus on what we do and what that conduct says about who we might be. We need not deny that we have certain bonds to certain people, but we should not pretend those bonds are so transparent and abiding as to dictate our political arrangements in perpetuity. If we could start from a position of doubt rather than certainty, we might be surprised by the constitutional possibilities we discover.

\(^{844}\) British Columbia & FNLC, Implementing the New Relationship, supra note 838 at 2. For referendum, see text accompanying notes 597-603, supra.

\(^{845}\) See, on the conditions of theorizing, Oakeshott, On Human Conduct, supra note 12 at 28; and Taylor, Philosophical Arguments, supra note 48 at 28.
Of course, philosophical problems do not defeat political proposals: political problems do. The latter consumed the Recognition and Reconciliation Act (“RARA”) shortly after it was announced from the throne of the BC legislature in March 2009.846 Intended to promote certainty, the proposed Act would have abolished it.847 The discussion paper promised significant changes: 30 Indigenous Nations would replace roughly 200 First Nations; a single statutory scheme would divide revenues and decision-making responsibilities across all areas of provincial competence; a specialized tribunal may resolve disputes over the new arrangements.848 It also promised that nothing significant would change: the Act would not affect private property rights such as fee simple title conferred by the provincial Crown; it would not affect any aboriginal rights, aboriginal title or treaty rights; it would not preclude litigation or negotiations; it would not change the division of powers between the federal and provincial governments.849 British Columbia and the FNLC wanted to address, or at least appear to address, fundamental problems without addressing anything fundamental. They wanted to isolate economic and administrative issues, on which they enjoyed some consensus, from contested conceptual and constitutional matters, but they could not.

The mooted Act quickly became moot. Its ambiguous legal implications obscured its potential economic effects and tarnished its political merits. In response to concern from industry and aboriginal groups alike, the BC government and the FNLC agreed to postpone its formal introduction to the legislature until after the May 2009 provincial elections.850 During the campaign, awareness and opposition grew among both camps.851 In August, an assembly of chiefs rejected the Act and members of the FNLC withdrew their support.852 Returned to power with a diminished majority, the BC Liberal Party abandoned the RARA in favour of more modest projects.

The RARA had been expected to complement the Treaty Process but more likely would have broken it.853 By 2009, the Process had grown frail. Although it enjoyed two prominent successes, most of the work had been done years before. In April, the Tsawwassen Final Agreement took effect: the first final treaty produced by the Process.854 The Tsawwassen Nation entered the

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847 British Columbia & FNLC, Implementing the New Relationship, supra note 838 at 1 and 2.
848 Ibid at 3-4 and 6.
849 Ibid at 2.
uncharted waters of Stage 6 and began the ten-year process of implementing its treaty by enacting laws and assuming control of its lands. In June, Canada finally ratified the Maa-Nulth Final Agreement after the Huu-ay-aht Nation decided to withdraw from the Nuu-chah-nulth fisheries litigation once arguments concluded in March. In addition, the Klahoose First Nation signed an incremental treaty agreement in which the province paid it $2.1 million to assist in the purchase of a forestry licence, Klahoose acknowledged that the payment contributed “toward the reconciliation of Klahoose First Nation interests, aboriginal rights and title” and both parties agreed to ask Canada to return to the treaty table.

Progress was otherwise scarce and prospects continued to decline. The Common Table initiative had founder. Of the 60 First Nations that remained in the Process, one (Tsawwassen) had entered Stage 6 and seven occupied stage 5 (12%). Forty-three sat in Stage 4 (72%). Save for the implementation of the Tsawwassen treaty, nothing had changed since 2008: the political demands and financial burdens of Stage 4 continued to present an insurmountable obstacle for most participating nations. The provincial government and many First Nations seemed more interested in consultation and commercial projects than in comprehensive treaties. Introduced in 1999 to bolster negotiations, treaty-related measures had failed to flourish. A federal report explained why: they were overshadowed by opportunities outside the Process; they were restricted largely to advanced tables; they were designed without sufficient input from participating First Nations; and they were poorly funded because, although the federal government agreed to match the funding provided by the provincial government, British Columbia chose to focus on bilateral deals and gradually cut its funding for treaty-related measures to zero.

The Chief Commissioner of the Treaty Commission warned that, absent immediate and extensive intervention, the Process could dissolve far short of its goals. The First Nations Summit declared the Process “on Life Support.”

The R-ARA promised radical changes that likely would have killed it. The Act would have created another procedure to compete directly with negotiation. It would have established a second commission and another layer of government. It would have diverted financial and political resources.


856 Klahoose First Nation Incremental Treaty Agreement, between Her Majesty the Queen in right of the Province of British Columbia and Klahoose First Nation, 5 March 2009, at 5.1, 6.1 and 7.1, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/art/treaty/down/klahoose_ita_final.pdf>.


resources, unsettled expectations once again and sent an unmistakable signal that the Process had failed to fulfill its promise.

In comparison, 2009 was a good year for consultation. It enjoyed steady progress: no landmark achievements and no serious reversals. New agreements refined two trends that had begun to emerge in previous years. First, consultation agreements had begun to cover a wider range of natural resource industries: from fishing and forestry to mining and petroleum. Second, consultation procedures had become far more complex. For example, British Columbia entered into a bundle of agreements with three Treaty 8 nations: the Doig River, Prophet River and West Moberly First Nations from the northeast corner of the province. Like the Blueberry River package finalized in 2008, these agreements include a wildlife management agreement, a strategic land use planning agreement and an economic benefits agreement that ties the Crown’s payments to the number of ratified agreements. They were soon joined by agreements on oil, gas and forestry, as well as an umbrella agreement that confirmed a modular approach by affirming the new relationship between the parties while anticipating more sector-specific agreements. Indeed, the entire program anticipates the accession of other Treaty 8 nations. Most of the agreements contain their own


863 Long Term Oil and Gas Agreement, between Her Majesty the Queen in right of the Province of British Columbia and Doig River First Nation, Prophet River First Nation and West Moberly First Nation, 20 May 2010, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/arr/treaty/key/down/treaty_8_long_term_oil_gas_agreement.pdf>; Forests and Range Resource Management Agreement, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/arr/treaty/key/down/treaty_8_forest_agreement.pdf>; Final Agreement, between Her Majesty the Queen in right of the Province of British Columbia and Doig River First Nation, Prophet River First Nation and West Moberly First Nation, 20 May 2010 at Art 2 and 3, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/arr/treaty/key/down/2010-05-20_final_agreement_signed.pdf>.

consultation procedures and many establish specialized bodies to implement those procedures. Of course, they also contain a menagerie of ideas about reconciliation.

This model might not work for many indigenous peoples, especially those who lack the natural and financial resources of some of the Treaty 8 nations. Nonetheless, it indicates that consultation has matured. No major breakthroughs are required to complete consultation. It has become a meaningful alternative to treaties as its basic features have become familiar and parties have grown comfortable tinkering and adapting them to new contexts.

These agreements with the Treaty 8 nations were part of a raft of deals announced in December 2009. Of that lot, the Treaty 8 agreements most clearly embody consultation. They bear no indicia of collaboration and were designed expressly to satisfy the BC government’s duty to consult. In contrast, the other agreements demonstrate the range of collaboration.

The Nänwákolas/British Columbia Framework Agreement expanded a pilot clearinghouse to streamline consultations on natural resource projects within the traditional territories of the six Nänwákolas First Nations, which straddle the east coast of Vancouver Island and the adjacent mainland. The parties agreed to establish a Strategic Forum with three tiers of escalating seniority

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865 See Government to Government Protocol Agreement, between Her Majesty the Queen in right of the Province of British Columbia and Doig River First Nation, Prophet River First Nation and West Moberly First Nation, 17 December 2009 at Art 3 and 6, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/art/treaty/key/down/govt_to_govt_protocol_agreement.pdf> [BC-Treaty 8 Nations, Government to Government Protocol Agreement]; BC-Treaty 8 Nations, Strategic Land and Resource Planning Agreement, supra note 862 at ss 5-7; Collaborative Management Agreement for Provincial Parks, between Her Majesty the Queen in right of the Province of British Columbia and Doig River First Nation, Prophet River First Nation and West Moberly First Nation, 8 December 2009 at ss 6 and Appendices B, C and D, online: Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/art/treaty/key/down/parks_collaborative_management_agreement.pdf>; and BC-Treaty 8 Nations, Wildlife Collaborative Management Agreement, supra note 862 at ss 3 and 4.

866 See e.g. BC-Treaty 8 Nations, Government to Government Protocol Agreement, supra note 865 at s 3.1(b) (“furthering the reconciliation of the rights of Treaty 8 FN’s recognized and affirmed under Section 35(1) of the Constitution Act, 1982 with the responsibility of British Columbia for resource management”); BC-Treaty 8 Nations, Strategic Land and Resource Planning Agreement, supra note 862 at preamble (“The Parties are seeking mutually acceptable reconciliation with respect to Treaty 8 First Nations’ rights recognized and affirmed by section 35(1) of the Constitution Act, 1982, which may be adversely affected by the strategic planning decisions respecting land use and natural resource use that are made by British Columbia”); BC-Treaty 8 Nations, Wildlife Collaborative Management Agreement, supra note 862 at preamble (“the objective of reconciliation between British Columbia and Treaty 8 First Nations in the spirit of Shared Decision Making with respect to wildlife management in the Agreement Area”).

867 Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1998] FCJ No 1952 (QL) at 8.

868 See e.g. BC-Treaty 8 Nations, Collaborative Management Agreement for Provincial Parks, supra note 865 at s 5.1(a); BC-Treaty 8 Nations, Wildlife Collaborative Management Agreement, supra note 862 at s 3.1(a).

to share information, make policy recommendations and explore additional opportunities for cooperation. They also agreed to employ a complex Engagement Framework to guide and enhance consultation practices. They did not define reconciliation but vowed to pursue it by sharing revenues and responsibilities.

This framework agreement contains some elements of consultation, some aspects of collaboration and some ambivalent features. Indicia of consultation include references to the Transformative Change Accord and the absence of parallel assertions of title, sovereignty and jurisdiction, which would reveal a more fundamental disagreement about the nature of political community in the province. Collaboration is represented by a dispute resolution clause that does not actually resolve disputes. In the event of disagreement, either party may refer the dispute to mediation or non-binding arbitration. The default rule is that no decision will occur: the province does not retain ultimate authority to make contested decisions. The agreement also lacks a choice-of-law clause, which would have affirmed the legitimacy of the jurisdiction selected, which almost certainly would have been British Columbia rather than Nanwakolas law.

The ambivalent provisions are more difficult to summarize. For example, the agreement invokes “the goal of closing the social and economic gap between the Nanwakolas First Nations and other British Columbians.” This phrase suggests that the Nanwakolas First Nations belong to a comprehensive, uniform and province-wide political community. However, the agreement elsewhere targets the socio-economic gaps “between the members of Nanwakolas First Nations and non-Aboriginal peoples.” This phrase, by contrast, posits a distinction between aboriginal and non-aboriginal peoples and does not imply they comprise a single community. Similarly, the agreement uses the terms “engagement” and “consultation” somewhat indiscriminately.

This distinction is familiar from the judgment of Vickers J in Tsilhqot’in Nation. The agreement acknowledges that the duty to consult exists and that the Engagement Framework provides the processes by which the provincial government intends to satisfy it, but the agreement does not confirm that compliance with those processes will actually discharge that duty. Although the agreement does not repudiate this doctrine of Canadian constitutional law, it does preserve ample uncertainty by denying a safe harbour to Crown officials anxious to acquit their basic obligations.


870 Nanwakolas/British Columbia Framework Agreement, supra note 869 at s 5 and Appendix B.
871 Ibid at Preamble.
872 Ibid at TCA.
873 Ibid at s 16.
874 Ibid at s 6.1.
875 Ibid at Preamble ¶E.
876 See e.g. ibid at ss 4.3.5 and 5.3.
The agreement also preserves a measure of formal inequality between the parties. It contains a clause that allows British Columbia to terminate the agreement if one or more of the signatory First Nations sues it for anything other than failure to comply or otherwise adequately consult them. The separate clause seems intended solely to warn the indigenous parties: the provincial government will not tolerate attempts to assert aboriginal rights that are recognized and affirmed by the Canadian constitution. It also means that the decision of one First Nation to resort to litigation could jeopardize the agreement for the other five: it increases the costs, financial and otherwise, of choosing to enforce their rights in court. How such a clause could be thought to promote reconciliation is unclear, especially since the First Nations do not enjoy a similarly redundant clause that empowers them to terminate in the event the province dares to enforce its own constitutional rights.

The Reconciliation Protocol between British Columbia and the six Coastal First Nations represented yet another step away from consultation toward collaboration. The protocol extends an incremental approach, as it expressly builds upon the SLUPAs signed in 2006, which in turn built upon the parties’ 2001 General Protocol Agreement on Land Use Planning. Like the N̓n̓w̓ak̓əłəs Agreement, it adopts a three-tier joint governance forum and an extensive Engagement Framework intended to help the Crown satisfy the duty to consult and accommodate on decisions involving land and resources in their traditional territories. Also like that agreement, it withholds any assurance that compliance with that framework will suffice to satisfy that duty. However, the protocol does not contain any crude attempts to dissuade the Coastal First Nations from litigation. Instead, the province expressly acknowledges their aboriginal rights, title and interests in their traditional territories. The protocol also recognizes the laws and “legal institutions” of the Coastal First Nations without limiting these institutions to Indian Act bands, which suggests British Columbia may recognize their indigenous governments as legal entities, not just cultural remnants.

The protocol also demonstrates other characteristics of collaboration. It has no choice-of-law clause. The dispute resolution procedures do not authorize the provincial government to make decisions when its indigenous partners dissent. Nor do they commit the parties to any final procedure or mechanism to break a deadlock. Instead, in the event of an impasse, they authorize

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877 Ibid at s 14.5.
878 Ibid at s 14.3.
879 Amended Reconciliation Protocol, between the Coastal First Nations and Her Majesty the Queen in right of the Province of British Columbia, 7 December 2010 (original agreement 10 December 2009), Preamble, online: British Columbia – The New Relationship <http://www.newrelationship.gov.bc.ca/shared/downloads/coastal_first_nations_amended_agreement_dec_10_2010.pdf> [BC-Coastal First Nations, Reconciliation Protocol].
880 Ibid at ss 1 (“Engagement”), 5 and 6 and Schedule B.
881 See e.g. ibid at s 3.1(d) and Schedule B s 5.2(a).
each party to make a decision in accordance with its own laws, regulations, policies, customs and traditions. They favour the parties’ autonomy, which offers one sort of certainty, over the more familiar Crown goal of procedural certainty.

The protocol is presented as “a bridging step to a future reconciliation of those aboriginal title, rights, and interests with provincial title, rights, and interests.” By recognizing their rights and laws and treating the Coastal First Nations as partners in forestry, tourism, carbon offsets and alternative energy, this protocol showed how this humble aspiration might be realized in 2009.

The Kunst’aa guu – Kunst’aayah Reconciliation Protocol, signed by the Haida Nation and British Columbia in December 2009, is perhaps the most extreme example of collaboration to date. The parties committed to establishing a relatively simple framework for making joint decisions about land and resources in Haida Gwaii. However, the protocol does not mention the Crown’s duty to consult, even to hint that it may not be discharged. Nor does it invoke the New Relationship or the TCA, as the other 2009 agreements do. The protocol does not contain a choice-of-law clause and its dispute resolution provision is cursory: it permits the parties to use those mechanisms to which they agree. On its face, the protocol is not an attempt to satisfy the provincial government’s obligations under Canadian law. Instead, it is a limited, provisional agreement to share responsibility for certain practical matters to the parties’ mutual advantage.

It does have concrete components. The province promised to transfer $10 million to the Haida Nation so that it can acquire forest tenures on the islands. The money may help the Haida preserve culturally important forests by purchasing licences to log them from non-indigenous logging concerns. As in the Coastal First Nations Reconciliation Protocol, the parties agreed to develop a method to quantify carbon reductions from changes to forest practices, a process to validate those reductions and an agreement to share the resulting carbon offsets. If successful, these protocols, like other arrangements that support ecosystem based management, will marry traditional knowledge with contemporary science to yield economic, environmental and political benefits.

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882 Ibid at Schedule B s 6.6.
883 Ibid at Preamble ¶3.
884 Ibid at ss 7-9 and Schedules C-E.
885 Kunst’aa guu – Kunst’aayah Reconciliation Protocol, between the Haida Nation and Her Majesty the Queen in Right of the Province of British Columbia, 11 December 2009, online: Council of the Haida Nation  [Kunst’aa guu – Kunst’aayah Reconciliation Protocol].
886 Ibid at s 6.2 and Schedule B.
887 See e.g. Na’awakolas/British Columbia Framework Agreement, supra note 869 at Preamble C; BC-Coastal First Nations, Reconciliation Protocol, supra note 877 at Preamble ¶5.
888 Kunst’aa guu – Kunst’aayah Reconciliation Protocol, supra note 885 at s 11.1.
889 Ibid at Schedule D.
890 Ibid at Schedule C.
Despite these tangible commitments, the symbolic elements of the Kunst’aa guu-Kunst’aayah Reconciliation Protocol provide its true substance. Like the Gwaii Haanas Agreement of 1993, the protocol begins with an acknowledgment that the parties have different perspectives on Haida Gwaii, which is followed by parallel assertions of rights, sovereignty and jurisdiction over the islands. The Haida Nation is as adamant and consistent on these points as the Crown. The parties describe the document as part of “a process of reconciliation of Haida and Crown titles.” At first glance banal, the formula is inspired. It refers to Haida title rather than aboriginal title. The latter is a concept and doctrine of Canadian law; the former is not. The practical ramifications of this distinction are not yet clear but it brilliantly conveys the Haida position that Haida laws and institutions stand alongside Canadian laws and institutions, not within or beneath them.

Consistent with this stance, the parties pledge to “operate under their respective authorities and jurisdictions.” They make parallel commitments to recommend their respective legislative bodies enact the laws necessary to implement the protocol. They present the protocol as a precursor to a comprehensive Reconciliation Agreement, which they will reach in accordance with a Framework Agreement. They do not seek a treaty and they do not commit to use the Treaty Process, where the Haida Nation languishes in Stage 3. Their relationship does not require an explicit foundation because it is implicit in who they are. An agreement that codifies their rights under s. 35(1) of the Canadian Constitution appears to be of little interest to the Haida.

In a more sensational move, the BC government relinquished the colonial name of the Queen Charlotte Islands in favour of Haida Gwaii. The gesture showed respect for the Haida Nation and its home. Especially after it was made official in June 2010, it alerted non-indigenous people who might otherwise have ignored administrative adjustments at the edge of the province. Unlike speeches, which fade and can be dismissed as grandstanding, such obvious and enduring concessions may provoke wider awareness of these cryptic experiments. Some degree of popular

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891 Ibid at Preamble A.
892 Ibid at Preamble B.
893 Ibid at Preamble E s 6.3.
894 Ibid at ss 6.4-6.5.
895 Ibid at s 3
897 Compare Kunst’aa guu – Kunst’aayah Reconciliation Protocol, supra note 885 at Preamble with BC-Haida, Strategic Land Use Agreement, supra note 776 at Preamble (a).
engagement will prove necessary to ensure technical solutions do not turn incremental progress into a superficial production.

Of course, 2009 was not all handshakes and hugs. There were lawsuits, too. The BC Court of Appeal upheld the trial judgment in *Lax Kw’alaams Indian Band v Canada* and made similar criticisms of the plaintiffs’ broad pleadings.\(^{899}\) On the other side of the ledger, the five remaining Nuu-chah-nulth plaintiffs in *Abousaht v Canada* obtained a declaration from the BC Supreme Court of their aboriginal rights to fish and to sell their catch.\(^{900}\) *Abousaht* was the case from which the Maanulth Nation withdrew in order to conclude its treaty in the summer of 2009.

The judgment was both radical and conservative. It was the first judgment in Canada to recognize a First Nation’s aboriginal right to harvest and sell on the commercial market all species of fish caught in its traditional territory.\(^{901}\) Although broad, this right is subject to some limits. For example, the plaintiffs had sought rights over 100 miles of foreshore, which would have enabled them to catch species that frequent deep waters, but Justice Garson found their traditional territory extends only nine miles off the coast.\(^{902}\) Nonetheless, the decision represents a significant departure from precedents that strongly favoured either subsistence and ceremony or traffic in a single species.

For all its novelty, *Abousaht* was familiar in one important respect. Yet again, the judge found a technical reason to deny the plaintiffs immediate relief. Garson J declined to decide whether the applicable federal fisheries regime infringed the aboriginal rights she had recognized and, if so, whether such an infringement was justified.\(^{903}\) She based this decision not to decide on a fine distinction between a right to fish commercially and a right to sell fish in the commercial marketplace.\(^{904}\) Since Canada’s evidence on justification concerned the former but the plaintiffs proved the latter, Canada received a two-year reprieve despite the fact that the plaintiffs had pleaded the right they proved.\(^{905}\) The relationship between this result and reconciliation remains mysterious.

As popular with trial courts as it is with the Supreme Court of Canada, this practice risks becoming a tradition. Various rationales could be offered: a political economist might argue that judges want to shield themselves and their institution against assertions of activism when deciding such inflammatory cases; a cynic might claim that Canadian judges want to deny indigenous people the full fruits of their inheritance; a traditionalist might assert the importance of democracy and the division of powers; and a functionalist might invoke relative institutional competence. Some judges

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\(^{899}\) *Lax Kw’alaams Indian Band v Canada*, supra note 689 at ¶¶61-62.

\(^{900}\) *Abousaht Indian Band*, supra note 408 at ¶¶896 and 909.

\(^{901}\) Ibid at ¶¶486-87.

\(^{902}\) Ibid at ¶¶486-89.

\(^{903}\) Ibid at ¶¶901 and 903.

\(^{904}\) Ibid at ¶¶486-489.

\(^{905}\) Ibid at ¶¶870-71 and 901-06.
themselves seem to think that this approach promotes reconciliation by encouraging and even requiring the parties to work together.906

However, it could have the opposite effect. In certain circumstances, a measure of uncertainty may spur parties to seek new solutions, revisit entrenched beliefs and unleash a virtuous circle of innovation: over time, sufficiently positive results may render ideological, cultural and other differences irrelevant. But where parties are divided by decades of discrimination and dispossession, such a rosy outcome is unlikely to be achieved surreptitiously. Where the relationship remains unequal, the prospects are worse. In these circumstances, it can be difficult, perhaps impossible, to liberate the future from the past. Technical questions of objectives, indicators and procedures cannot be distinguished from questions of justice.

In British Columbia, while officials learn to work together, indigenous and non-indigenous peoples must learn to live together: they must overcome common prejudice, manifest disadvantage and, in many cases, de facto segregation. Here, substance can be symbolic. Judgments that match rhetoric with remedy may prompt more privileged and conscientious citizens to scrutinize, or at least contemplate, the conduct of their representatives and the nature of their constitution. The risk of backlash is real, but so is the risk that professional paternalism will further alienate indigenous people from the Canadian legal system by denying the relief they seek on formal grounds and then claiming to have acted in their best interests.

2009 was a year of consolidation. The trends that had become apparent in each of the four procedures during recent years became more pronounced and entrenched. Litigation continued to surprise and provoke: more often than not, it challenged rather than comforted the parties. Negotiation continued to stumble as poor results and an inability to correct its problems led participants to embrace alternative measures. Consultation and collaboration continued their steady expansion and evolution as they proved capable of responding to the demands imposed by new developments.

vii. 2010

From the outset, 2010 juxtaposed spectacle and substance. Vancouver and Whistler hosted the Olympic Whistler Games in February. The festivities took place in the traditional territories of four aboriginal peoples: the Lil'wat First Nation, the Musqueam Nation, the Squamish Nation and the Tsleil-Waututh First Nation. They participated in prominent events, such as the opening ceremonies, but also in less glamorous initiatives to build their organizational capacity, encourage

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906 Ibid at ¶¶877-88. See also Calder, supra note 451; Van der Peet, supra note 517; Delgamunukw SCC, supra note 412; Tsilhqot'i Nation, supra note 412.
economic development and educate visitors and residents alike.\textsuperscript{907} The Games showed that indigenous people and the Crown could work together, at least for an extremely limited period of time spent under intense international scrutiny.

Elsewhere in the province, however, disputes festered and relations soured. A few hundred kilometers northeast of Vancouver, the Okanagan Indian Band blockaded a logging road through its reserve. The road is the sole means of access to an area in which the band asserts an aboriginal right to harvest wood. Although the BC government has recognized that right, at least for subsistence purposes, it also authorized a logging company to cut trees in the same area.\textsuperscript{908} In January and February, the company obtained a series of orders to end the blockade, one of which included an undertaking to abide by an archaeological plan intended to reduce the impact of the harvest on Okanagan cultural and historical interests.\textsuperscript{909} In March, the Halalt First Nation blockaded a road near the town of Nanaimo on the south end of Vancouver Island to protest the drilling of wells into an important aquifer. It lifted the blockade two weeks later, once the BC government and the relevant municipal government agreed to negotiate a comprehensive watershed management plan.\textsuperscript{910}

Twenty years after \textit{Sparrow}, little had changed for many desperate indigenous peoples across the province who still had to resort to roadblocks and injunctions. Much work remains to be done, but that admission should not eclipse the progress that has been made. Indeed, 2010 was a good year for each of the four responses to constitutional turmoil.

Litigation showed real promise. In \textit{West Moberly First Nations v British Columbia (Chief Inspector of Mines)}, Justice Williamson of the BC Supreme Court found that the duty to consult constrains not only the Crown’s treatment of indigenous peoples but also its internal organization. The Crown can tarnish its honour and breach the duty to consult by granting officials the power to make decisions that threaten aboriginal rights without the authority to consult and accommodate affected aboriginal peoples.\textsuperscript{911} Williamson J confirmed that aboriginal peoples can challenge and courts can review the institutional arrangements the provincial and federal governments adopt to exercise their powers and acquit their obligations. He also confirmed that courts can award substantive relief for a breach of the duty to consult by staying the effect of the provincial mining and logging authorizations that


\textsuperscript{908} British Columbia (Minister of Forests) v Okanagan Indian Band, 2008 BCCA 107 at ¶¶16A and 20-23; Tolko Industries Ltd. v Okanagan Indian Band, 2010 BCSC 24 at ¶¶6 and 8.

\textsuperscript{909} Tolko Industries Ltd v Okanagan Indian Band, Vancouver Registry No. S097906, Order made by Madam Justice Brown, 1 Feb. 2010 (entered 4 Feb. 2010).


\textsuperscript{911} 2010 BCSC 359 at ¶¶54-55.
offended West Moberly’s right to hunt under Treaty 8 and by instructing the Crown to develop an adequate plan to protect the caribou herd at the centre of the dispute.\textsuperscript{912}

Later that year, Justice Slade of the same court took an important procedural step by certifying a class action for the breach of aboriginal fishing rights caused by the provincial authorization of marine fish farms on the east coast of Vancouver Island.\textsuperscript{913} Rather than individuals, the class was composed of aboriginal “collectives” that possess or assert an aboriginal right in those waters.\textsuperscript{914} A representative action by a properly authorized person on behalf of an individual band or aboriginal people is the ordinary, but not the exclusive, procedure to establish aboriginal rights and title.\textsuperscript{915} However, the collective approach has some obvious advantages. First, costs are not available in class actions in British Columbia, so parties can better predict and control the financial burdens of such litigation.\textsuperscript{916} Second, as the number of plaintiffs increases so does the aggregate amount of potential damages and, in turn, the total leverage of the aboriginal claimants. Litigation can influence negotiation, but in a circular fashion awareness of that relationship can influence the outcome of cases as judges attempt to anticipate and manage the effects of their decisions.\textsuperscript{917}

The Supreme Court of Canada also delivered two important judgments near the end of the year. In \textit{Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council}, a unanimous Court reversed the BC Court of Appeal and held that the duty to consult can be triggered only by a new physical impact on land or resources or a strategic decision that could lead to such an impact: an underlying or past infringement of aboriginal rights is not sufficient.\textsuperscript{918} In \textit{Beckman v Little Salmon/Carmacks First Nation}, a majority of the Court held that the duty to consult buttresses modern as well as historic treaties.\textsuperscript{919} The first case concerned the decision of a provincial utility to sell surplus electricity generated by a dam built in the traditional territory of the respondent First Nations during the 1960s. The second concerned the decision of a Yukon official to exercise the Crown’s right to take for development purposes land subject to rights under a treaty ratified in 1997.

In each case, the indigenous respondents lost. Also in each case, the Court wasted an opportunity to rehabilitate reconciliation. In \textit{Rio Tinto}, McLachlin CJ repeatedly and exclusively referred to reconciliation as a matter of balancing aboriginal and non-aboriginal interests.\textsuperscript{920} More

\textsuperscript{912} Ibid at ¶¶79-83.
\textsuperscript{913} \textit{Kwicksutaineuk}, supra note 408 at ¶3.
\textsuperscript{914} Ibid at ¶125.
\textsuperscript{915} Ibid at ¶236. See also, \textit{Pasco v Canadian National Railway Company}, (1989), 34 BCLR (2d) 344 (CA) at ¶¶25-26 and 29-30; and \textit{Gitseaca Nationa Council v Gitseaca Treaty Society}, 2007 BCSC 1845 at ¶27 [\textit{Gitseaca National Council}].
\textsuperscript{916} \textit{Kwicksutaineuk}, supra note 408 at ¶178 and 242.
\textsuperscript{917} Ibid at ¶¶204 and 219.
\textsuperscript{918} \textit{Carrier Sekani Tribal Council}, supra note 408 at ¶¶47-50.
\textsuperscript{919} \textit{Little Salmon}, supra note 414 at ¶¶61-66 and 68.
\textsuperscript{920} See e.g. \textit{Carrier Sekani Tribal Council}, supra note 408 at ¶¶50 and 74.
concise and consistent than the muddle she made in *Haida Nation*, this account of reconciliation is a serious departure from Dickson and Laskin JJ’s original principled position in *Sparrow*. It treats indigenous and non-indigenous peoples as formal equals but ignores the historical, moral and legal controversies that define their relationships. Whether they are merely competing interest groups within a single political community composed of such groups is not settled: it is a very controversial assumption. Other scenarios are possible. For example, they can be understood also as reluctant partners in a constitutional project that is about more than dividing the spoils of bountiful land and transparent government.

In *Little Salmon*, Binnie J wrote for the majority and adopted two formulas for reconciliation. He summoned the historical effort to reconcile indigenous people to the assertion of European sovereignty over their territories. But he later wrote: “The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35.” The first suggests reconciliation is unilateral. It does not entertain the possibility that non-indigenous settlers and their successors might have to reconcile themselves to the sovereignty, jurisdiction, ownership or title of indigenous peoples. The second is so generous as to offer no guidance.

Of course the parties to the constitutional predicament in British Columbia seek an enduring and courteous relationship. It is difficult to imagine a reasonable person who does not share that sentiment. However, aboriginal leaders, the Crown and the courts do not agree on the basis or the incidents of mutual respect. Nor do they agree on how to achieve or maintain it. They seem to lack clear ideas about the whole affair. In other words, they do not know how to reconcile. They barely know how to talk about it. If reconciliation is both a journey and the destination, then it is time the parties admitted they are lost.

Perhaps because the Court lacks a coherent conception of reconciliation, it could not articulate a consistent account of the duty to consult. At some points in *Rio Tinto*, McLachlin CJ characterized it as a “corollary of the Crown’s obligation to achieve the just settlement of Aboriginal claims through the treaty process” and implied it becomes redundant once indigenous claims are resolved in a final agreement. This description is consistent with the purposive approach she employed in *Haida Nation*: the duty is intended to preserve aboriginal claims until they can be resolved via negotiation. Absent such interim protection, she argued, negotiations would be futile. However, elsewhere in *Rio Tinto*, she implied the duty to consult might arise whenever contemplated

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921 *Little Salmon*, supra note 414 at ¶8.
922 Ibid at ¶10.
923 See e.g. ibid at ¶12.
924 *Carrier Sekani Tribal Council*, supra note 408 at ¶¶32 and 48.
925 *Haida Nation SCC*, supra note 417 at ¶¶38 and 77.
Crown conduct may impinge on an aboriginal right, regardless of the status of treaty talks.\textsuperscript{926} Further, the majority in \textit{Little Salmon} confirmed that the duty to consult is a constitutional limit on all Crown conduct and thus fills gaps even in comprehensive modern treaties negotiated by sophisticated parties.\textsuperscript{927} This result contrasts with McLachlin CJ’s suggestion that the duty to consult exists only “[w]hile the treaty claims process is ongoing.”\textsuperscript{928} Once again, if we do not know what we are trying to do we cannot know what we need to do. To pursue and achieve reconciliation, we need a more thorough, exacting and sustained debate about what it is and what it requires. The courts have not yet delivered that debate.

Despite these flaws, the Court made valuable contributions in each case. Earlier trial judgments had described consultation as a “constitutional prerequisite” to valid government conduct.\textsuperscript{929} The BC Court of Appeal had dismissed this threshold approach but preserved the notion that the duty to consult is “upstream” of both statutes and regulations: even if an enactment appears to authorize it, the Crown simply cannot act contrary to the Constitution.\textsuperscript{930} The majority in \textit{Little Salmon} appeared to revive and reinforce the former, stricter approach by bifurcating the standard of review applicable to Crown consultation efforts.

The Crown’s assessment of its duty to consult must be correct, as must the consultation itself: “A decision maker who proceeds on the basis of inadequate consultation errs in law.”\textsuperscript{931} In contrast, a decision made following adequate consultation need only be reasonable.\textsuperscript{932} Although the standard of review is a matter of administrative law, it is the constitutional nature of the duty to consult that garners the heightened standard of review for consultation. Whether on administrative or constitutional grounds, a decision made on the basis of inadequate consultation is defective and must be remedied.

This two-step approach represents a sensible end to the perennial contest over the standard of review applicable to consultation. Strict scrutiny of consultation promotes indigenous participation in making regulatory decisions and, more generally, elaborating the duty to consult by developing consultation practices. It signals the importance of dealing properly with aboriginal peoples and also happens to promote informed decisions by encouraging indigenous peoples to share their knowledge. In turn, deference to decisions made after adequate consultation

\textsuperscript{926} \textit{Carrier Sekani Tribal Council}, supra note 408 at ¶33.
\textsuperscript{927} \textit{Little Salmon}, supra note 414 at ¶38 and 45.
\textsuperscript{928} \textit{Carrier Sekani Tribal Council}, supra note 408 at ¶32.
\textsuperscript{929} \textit{Gitksan Houses}, supra note 611 at ¶65.
\textsuperscript{930} \textit{Musqueam Indian Band v British Columbia}, supra note 685 at ¶19 (Southin J); \textit{T’zeachten First Nation v Canada (AG)}, supra note 657 at ¶¶44-45.
\textsuperscript{931} \textit{Little Salmon}, supra note 414 at ¶48.
\textsuperscript{932} Ibid.
demonstrates respect for the competence and fairness of administrators. It may deter frivolous litigation that could undermine new relationships between indigenous peoples and Crown officials.

This rigorous standard of review may even reinforce consultation as an alternative to litigation. The Crown will have greater incentives to take its constitutional duty seriously, so the quality of consultation should improve. In turn, indigenous peoples will have less reason to shun the Crown’s efforts if it is more likely to be held to account.

The Court’s judgment in *Rio Tinto* also seems likely to bolster consultation. As noted, it did conclude that the duty to consult is prospective only: historic infringements of aboriginal rights and past failures to consult do not require consultation today. However, it also confirmed the potential that doctrine has to transform the way the province is governed. For example, as suggested by the BC Supreme Court in *Huu-ay-aht* and *West Moberly*, the duty to consult is not limited to operational and administrative decisions: strategic plans and organizational adjustments that have no immediate impact on land and resources may trigger it so long as they have the potential to cause such an impact. Courts can review the structures and procedures adopted by governments for compliance with the rigours of meaningful consultation. In addition, the Court reiterated that damages are available to remedy breaches of that duty and noted they may be especially appropriate for historical failures to consult. By combining a broad reach with real remedies, *Rio Tinto* frames the duty to consult as correlative to a potential destabilization right, as described by Sabel and Simon: a legal entitlement to disrupt dysfunctional institutions by compelling interested parties to rehabilitate them.

The likely impact of these decisions on treaty negotiations is less clear. *Little Salmon* suggested that courts should defer to the bargain struck by the parties to a comprehensive modern treaty: the political leverage, legal sophistication and economic resources of aboriginal peoples and the Crown are far more comparable today than they were in the late 19th and early 20th centuries. However, Binnie J also found that the honour of the Crown and thus the duty to consult are basic constitutional limits on Crown conduct and thus apply even to treaties that contain consultation provisions. As a result, the Crown may be unable to obtain the legal and operational certainty it expects from treaties. Given the time, money and effort negotiations require, it may choose to shift even more resources to treaty substitutes: agreements that accomplish less but also present fewer risks, namely consultation and collaboration.

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933 *Carrier Sekani Tribal Council, supra* note 408 at ¶¶48-49 and 54.
934 Ibid at ¶¶43-44 and 47.
935 Ibid at ¶49.
936 *Little Salmon, supra* note 414 at ¶¶53-54.
937 Ibid at ¶¶45 and 69.
In 2010, however, the Treaty Process did score some success. The Maa-nulth First Nations continued to prepare their laws and people for the effective date of their treaty: April 1, 2011. More importantly, Canada, British Columbia and the Yale First Nation initialed the fourth Final Agreement produced by the Treaty Process. This agreement, while tailored to the needs and interests of the Yale First Nation, shares many features with those negotiated by the Tsawwassen, the Maa-nulth and the Lheidli T’enneh: it purports to exhaust both the Yale’s aboriginal rights and title and the Crown’s duty to consult; it provides for a democratic constitution and a government that will comply with the Canadian Constitution, including the Charter of Rights and Freedoms; it transfers more than $10 million and nearly 2,000 hectares of Crown land along the southern reach of the Fraser River in fee simple to the 150-member First Nation; it recognizes limited rights to harvest natural resources in traditional Yale territory. The agreement remains to be ratified by each of the parties, but its mere existence suggests that the Treaty Process might still deliver for some First Nations.

Nonetheless, the Treaty Process continued to breed discontent. For example, the Sliammon First Nation concluded negotiations on a final agreement in June only to have the federal government decline to initial the document. The Lheidli T’enneh First Nation voted narrowly (92-89) to hold a second ratification vote on the final agreement defeated in 2006, but only under Canada’s threat to withdrawal from the talks.

Many First Nations are stuck in stages 2, 3 and 4. Nearly one-third of registered First Nations are no longer actively negotiating. But a few others, whether due to sunk costs or genuine enthusiasm, remain wedded to the Process. These First Nations are overwhelmingly rural, as provincial policy has essentially alienated those whose traditional territories now encompass cities and large towns: little or no urban land is available for treaty settlement purposes and proper cash

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939 Yale First Nation Final Agreement, between Yale First Nation, Her Majesty the Queen in right of Canada and Her Majesty the Queen in Right of British Columbia, 5 February 2010 at ch 2, ss 2.4.1-2.4.5 and 2.13.1 (exhausts rights and duties), ch 3, ss 3.1-3.4 (constitution, legislature and government) and 2.3 (compliance with Canadian constitution), ch 19, ss 19.1 and Schedule 19-A (capital transfer), ch 12, s 12.1 (land transfer), ch 8 (fish) and ch 11 (migratory birds), online: BC Treaty Commission <http://btreaty.net/nations/agreements/Yale-Final-Agreement_Feb10.pdf>. For a summary of the agreement, see Ministry of Aboriginal Relations and Reconciliation, Yale First Nation & Indian and Northern Affairs Canada, News Release, 2010ARR0002-000132, “Final Agreement Initialled by Yale First Nation, BC, Canada” (5 February 2010), online: <http://www2.news.gov.bc.ca/news_releases_2009-2013/2010ARR0002-000132.htm>.
943 Ibid (19 of 60).
compensation is not forthcoming. Nonetheless, tripartite talks persist in a handful of locations scattered from the east coast of Vancouver Island (K’omoks First Nation) to the upper Fraser Valley (In-SHUCK-ch Nation) and Stuart Lake in the centre of the province (Yekooche First Nation).944

Consultation, by contrast, continued its relentless rise. First supplement then rival, by 2010 it had become the successor to negotiation. Far more nimble and dynamic, consultation consolidated its position as the first choice for constitutional adjustment in 2010. West Moberly, Rio Tinto and Little Salmon ensured that it will play a vital role in the evolution of regulation and, more generally, government in the province.

Outside the courthouse, consultation made more measured progress. For example, the provincial Ministry of Aboriginal Relations and Reconciliation introduced a new template for consultation and accommodation on forestry decisions. Forest and Range Consultation and Revenue Sharing Agreements finally abandoned the per capita formula for revenue sharing rejected five years prior in Huu-ay-aht. In its place, the agreement employed a fairly complicated calculation based on the revenues collected by the Crown from forestry activities in the traditional territory of the indigenous party.945 Five indigenous peoples had signed new agreements by the end of 2010, but the merits of this new method remain to be seen, as it will be phased in over three years.

The agreement also establishes a consultation framework for administrative and operational decisions that the parties agree will, if followed, satisfy British Columbia’s duty to consult.946 It is framed as a precursor to more comprehensive agreements short of a treaty. It expressly anticipates both a strategic engagement agreement, which would establish a comprehensive consultation process with one or more provincial natural resource ministries, and a reconciliation agreement, which would create “a foundation for the reconciliation of aboriginal rights and/or aboriginal title with Crown sovereignty.”947 These definitions do not evince the character and content of the most avant garde agreements that have been reached but they do reveal a promising incremental approach that would give the parties time to study, critique and adapt both their practices and their expectations.

The province also adopted a new approach to consultation and accommodation on mining projects. On successive days in August, the BC government unveiled agreements related to mines in the traditional territories of two indigenous groups: the Stk’emlupsemc of the Secwepeme Nation,

944 Ibid at 22-23.
946 Ibid at s 5.3 and Appendix B.
947 Ibid at ss 1.14 and 1.16.
which is an alliance of two bands, and the McLeod Lake Indian Band. Relative to logging and fishing operations, these projects are large, long and expensive. They require a huge investment and have a huge impact on the land. The stakes are large for all involved, including the proponent. These agreements, which are similar in most respects, respond to these distinct characteristics.

Each concerns only the mine in question and contains a complete release of the indigenous party’s past, present and future claims against the BC government with respect to the mine in its territory. Each provides a transparent and straightforward formula for revenue sharing: British Columbia will pay the Stk’emlupsemc and McLeod Lake a fixed proportion of the tax it collects from the proponents in relation to the mines. Each establishes a Consultation and Accommodation Process that, if followed, will fulfill the provincial Crown’s duty to consult with respect to the project.

Each also flirts with paternalism. Both the Stk’emlupsemc and McLeod Lake are obligated to identify their priorities, goals and outcomes and report annually to British Columbia on how the funds transferred under these agreements have contributed to their progress. The Stk’emlupsemc agreement authorizes the provincial government to require an audit of each such expenditure. The payments to McLeod Lake will be made not to the band itself but to a trust created to help the band achieve its objectives (and, by implication, to prevent misuse or abuse by band council). Upon request, the province is entitled to receive copies of the annual audit statements for the trust, as well as a written summary of its activities. Whether colonial affronts to indigenous dignity or pragmatic attempts to bolster band administrative capacity, these provisions are a stark reminder that the parties to these agreements are not equals.

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949 Stk’emlupsemc ECDA, supra note 948 at ss 6.2(a), 6.2(b), 6.2(c) and 6.4; McLeod Lake ECDA, supra note 948 at ss 5.2(a), 5.2(b), 5.2(c) and 5.5.

950 Stk’emlupsemc ECDA, supra note 948 at s 3.1; McLeod Lake ECDA, supra note 948 at s 3.1.

951 Stk’emlupsemc ECDA, supra note 948 at ss 1, 2.1(a) and 6.1(b); McLeod Lake ECDA, supra note 948 at ss 1, 2.1(d) and 5.1(b).

952 Stk’emlupsemc ECDA, supra note 948 at ss 6.2 and 6.3; McLeod Lake ECDA, supra note 948 at ss 5.3 and 5.4.

953 Stk’emlupsemc ECDA, supra note 948 at s 6.3(d).

954 McLeod Lake ECDA, supra note 948 at s 3.2

955 Ibid at s 5.4(c).
In this respect, they could not differ more from the Gwaii Haanas Marine Agreement signed by Canada and the Haida Council in January 2010.\(^{956}\) This accord built upon the original collaboration agreement: the Gwaii Haanas Agreement the same parties had reached in 1993.\(^{957}\) Generally, it sought to integrate the parties’ environmental, educational, economic and cultural objectives. To that end, the new agreement increased the size, expanded the responsibilities and elaborated the procedures of the joint Archipelago Management Board established by its predecessor.\(^{958}\) It preserved other important elements of the initial agreement: the board strives to make decisions by consensus; its decisions constitute recommendations to the Council of the Haida Nation and the Government of Canada; and where it cannot reach consensus, the Parties may agree to hold the relevant matter in abeyance until they decide how to proceed.\(^{959}\)

Indeed, the Gwaii Haanas Marine Agreement resembled most other pacts between the Haida Nation and the Crown, which means that it is defined more by what it omits than by what it contains. It did not mention consultation. Nor did it contain a choice of law clause or make any reference to aboriginal rights, save for noting that it has no impact on them. It did not include the now-familiar parallel assertions of sovereignty, jurisdiction and title but it did not need them: they were made first in the original agreement. Although the parties did affirm their commitment to explore opportunities for reconciliation, they did not attempt to unpack that loaded term.\(^{960}\) In sum, the agreement offered another prime example of orthodox collaboration. It made no concessions to the Canadian Constitution and the parties appeared as partners rather than sovereign and subject.

The Tsilhqot’in Framework Agreement and the Ktunaxa Strategic Engagement Agreement demonstrate a less strident form of collaboration. The former was finalized in June 2010 and it shares more with consultation than the latter, signed in October. As described above, the Tsilhqot’in Nation won judicial acknowledgement, but not true recognition, of its aboriginal title in 2007.\(^{961}\) The Tsilhqot’in Framework Agreement does not apply to the territory on which the judge opined favourably in that case.\(^ {962}\) The parties anticipated a “Phase 2” agreement that would encompass that area, but those negotiations broke down and led to the revival of the appeal heard in November of

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\(^{956}\) Gwaii Haanas Marine Agreement, between Her Majesty the Queen in Right of Canada and The Haida Nation, 16 January 2010, online: Council of the Haida Nation <http://www.haidanation.ca/Pages/Splash/Documents/GHMarineAgreement.pdf> [Gwaii Haanas Marine Agreement].

\(^{957}\) See text accompanying notes 538-41, supra.

\(^{958}\) See e.g. Gwaii Haanas Marine Agreement, supra note 956 at ss 4.1(a) and 4.1(b).

\(^{959}\) Ibid at ss 5.1 and 6.4.

\(^{960}\) Ibid at Preamble.

\(^{961}\) See text accompanying notes 760-61, supra.

that year.\textsuperscript{963} The traditional territory of the Ktunaxa nation lies in the southeast corner of the province, where Alberta, British Columbia, Idaho and Montana converge on the Rocky Mountains. Like the Nanwakolas/British Columbia Framework Agreement and the Coastal First Nations Reconciliation Protocol, these two agreements establish complex engagement processes to ensure Tsilhqot’in and Ktunaxa input on land and resource decisions that might affect their respective territories.\textsuperscript{964} The intensity of the engagement required increases with the likely impact of the proposed activity, which itself is a product of factors such as the scope and nature of the activity and the geographic and cultural character of the lands in question. Each process involves a matrix that converts these factors into a regimen of applications, comments, impact assessments, meetings and recommendations. Each agreement also creates a two-tier “government-to-government” forum to oversee implementation and to explore new opportunities for sharing responsibilities and revenues.\textsuperscript{965}

The Tsilhqot’in agreement bears fewer marks characteristic of collaboration. It does not contain parallel assertions of sovereignty and jurisdiction, although the parties do express a desire to resolve the uncertainty surrounding their relationships and respective rights, titles and authorities.\textsuperscript{966} Rather than a traditional choice of law clause, the agreement provides that it will be interpreted “in a manner consistent with provincial, federal and constitutional law”: a list that does not include Tsilhqot’in law.\textsuperscript{967} It concedes that the engagement process constitutes the means by which the BC government “will fulfill legal consultation obligations.”\textsuperscript{968} On the other hand, the dispute resolution provision neither requires resolution nor defaults to provincial practice.\textsuperscript{969} Further, the agreement approximates the Haida agreements when it refers briefly to “Tsilhqot’in rights” alongside aboriginal rights.\textsuperscript{970} Yet the agreement is clearly designed to operate within rather than alongside the Canadian Constitution. It does not necessarily indicate Tsilhqot’in submission to Canadian authority, but it does not assert inherent Tsilhqot’in authority as forcefully as other agreements.

The Ktunaxa agreement makes a slightly more forceful case. The parties acknowledge their incompatible views on sovereignty, jurisdiction and title, albeit without elaborating them.\textsuperscript{971} They list

\begin{itemize}
  \item \textsuperscript{963} \textit{William v British Columbia (HMTQ), supra} note 764 at ¶ 2-5.
  \item \textsuperscript{964} Tsilhqot’in Framework Agreement, \textit{supra} note 962 at Appendix A; Ktunaxa SEA, \textit{supra} note 664 at Appendix B.
  \item \textsuperscript{965} Tsilhqot’in Framework Agreement, \textit{supra} note 962 at ss 2.7-2.15; Ktunaxa SEA, \textit{supra} note 664 at s 5(l) and Appendix C.
  \item \textsuperscript{966} Tsilhqot’in Framework Agreement, \textit{supra} note 962 at Preamble.
  \item \textsuperscript{967} \textit{Ibid} at s 10.1.
  \item \textsuperscript{968} \textit{Ibid} at s 3.3.
  \item \textsuperscript{969} \textit{Ibid} at s 8.
  \item \textsuperscript{970} \textit{Ibid} at “Shared Vision”.
  \item \textsuperscript{971} Ktunaxa SEA, \textit{supra} note 664 at Preamble.
\end{itemize}
their respective interests without suggesting how to balance or integrate them. The agreement makes no reference to reconciliation and its dispute resolution mechanism also allows disputes to remain unresolved. It acknowledges the duty to consult, but it mitigates this concession by characterizing engagement as the means by which the provincial government “will seek to fulfill” its consultation obligations. In contrast to the Tsilhqot’in agreement, as well as the agreements struck earlier that year with the Sts’ailes, the Stk’emulgum and the McLeod Lake Indian Band, the Ktunaxa agreement denies the Crown the certainty that compliance with the specified process will satisfy the duty to consult. However, like the Tsilhqot’in agreement, it does not represent a break with the Canadian Constitution. The Ktunaxa agreement refers throughout to aboriginal rights and title protected by s. 35(1) without invoking Ktunaxa rights. It also asks to be interpreted consistently with provincial law, federal law and the Canadian Constitution.

Read together, these two agreements confirm four recent trends. First, collaboration agreements are increasingly common. While relatively pure instances of consultation and collaboration do occur, enterprising indigenous leaders, Crown officials and lawyers are beginning to develop weaker forms of collaboration. They demonstrate the diversity and flexibility of the features of collaboration. Some of these features may overlap with those used in consultation agreements, but it remains clear in collaboration agreements that their primary purpose is to strengthen the signatory indigenous institution rather than help the Crown fulfill its consultation obligations. Second, these agreements favour a holistic approach. They provide one unavoidably complicated framework for a range of activities, industries and ministries. Third, they are customizable: neither uniform nor bespoke. Each iteration draws on its predecessors and reveals new options that lower the costs of further adaptation and experimentation. Fourth, the indigenous signatories are not individual bands or nations but clusters of affiliated indigenous communities. The Nanwakolas First Nations and the Coastal First Nations are collectives of First Nations that share environmental concerns, economic interests and cultural connections. The Ktunaxa Nation and the Tsilhqot’in Nation are single peoples divided among seven and five constituent communities, respectively. Whether authentic, revisionist or calculated, these allegiances increase indigenous leverage by pooling their members’ rights and title claims. Amalgamation not only expands the scope of the aggregate territory claimed but also enhances the quality of those claims by eliminating overlaps among them, which prevents the Crown from pitting the claims of one member nation against another to dilute

972 Ibid at ss 3(1) and 3(2).
973 Ibid at ss 15(1)-15(6).
974 Ibid at s 6(2).
975 Ibid at s 17(1).
976 Nanwakolas/British Columbia Framework Agreement, supra note 869 at Preamble.
977 Tsilhqot’in Framework Agreement, supra note 962 at s 1 (“Tsilhqot’in Nation”); Ktunaxa SEA, supra note 664 at s 1 (“Ktunaxa Communities” and “Ktunaxa Nation”).
the control and divide the revenue they receive under any such agreement. In the long run, the origins of these affiliations may prove irrelevant, as each agreement creates procedures and institutions around which new and renewed indigenous identities may coalesce. Those identities and the practices in which they are forged and tested may in turn create opportunities to revisit familiar beliefs.

E. The End of an Era?

As 2010 rolled into 2011, the constitutional experiments in British Columbia rolled with it. The constitutional crisis that seemed imminent in the 1980s had not materialized. The four responses have succeeded in managing tensions but do not provide a permanent, comprehensive solution. They continue to evolve in response to pressures created by external events, such as the budget constraints imposed by the ongoing financial crisis, as well as their own unpredictable effects. Save for the Treaty Process, each response has momentum. If nothing else, the status quo is not safe.

What progress has been made remains crimped by the lack of popular engagement. In the short term, settler disinterest is helpful: given widespread historical ignorance about indigenous peoples and hostility to any policy that resembles “special treatment” for an ethnic minority, there is little to be gained from their participation in procedures that exist to give indigenous peoples a stake in British Columbia’s constitutional settlement. However, in the long run, settler indifference presents a huge risk. Their failure to appreciate the character and magnitude of some of these developments raises the possibility of backlash and intense political pressure on the federal and provincial governments to retreat from deals struck with indigenous peoples.

It will be expensive to resolve the constitutional doubts that vex the province. Until the Crown makes this truth clear and settlers accept it, British Columbia will remain in constitutional limbo. Frugality spurs these experiments: if money was no object, then the parties would feel much less pressure to test different ways of accommodating indigenous dissent, channeling resistance and generating wealth to share. However, economic constraints are in part a product of political constraints, which are themselves shaped by conceptual and institutional constraints. The problems British Columbia faces are complex, perhaps too complex to be resolved consensually. Nonetheless, the parties have no choice but to try.

At the end of 2010, the Court of Appeal held two major judgments under reserve: Ahousaht and Tsilhqot’in. Each case concerns a potentially incendiary subject: commercial fishing rights and aboriginal title, respectively. Although all four procedures retain the capacity to surprise, litigation has a high yield of unexpected and disruptive outcomes. It involves adjudication rather than compromise. The parties can contribute to the judicial process but they cannot control its outcome, which in turn cannot be amended, only appealed. In addition, the effects of a judgment are not
limited to the case in which it is pronounced. The conventions of precedent and hierarchy can amplify a judge's reasons. Judgments influence and in some instances bind courts in later cases. They also inform and otherwise affect the conduct of parties engaged in the other three procedures, which consist of actions taken to assert lawful authorities, acquit legal obligations and enforce legal rights. As the law changes so do these considerations.

Indigenous peoples, the Crown and their respective counsel have begun to learn how to moderate the pace and alter the trajectory of constitutional change. They have also begun to learn the limits of that control. The institutional ecosystem that has evolved in British Columbia since 1990 remains vulnerable to endogenous and exogenous shocks. The appeals in *Ahousaht* and *Tsilhqot'in* will test the sustainability of that ecosystem: its capacity to absorb the shocks that it generates.

4. Reconciliation and Constitutionalism

So much has changed in the past two decades that it can be easier to consider what has stayed the same. For example, reconciliation remains out of reach. This is in part because judges, advocates and politicians have failed to adopt a single, coherent definition. But it is also because many of their definitions share one fatal defect: they mischaracterize reconciliation as primarily a technical challenge when it is actually a moral imperative. Reconciliation requires the Crown to determine what it must do, not how it can achieve its objectives more efficiently, more effectively or even more fairly. Because they fail to understand that it entails a moral orientation and is therefore incompatible with an instrumental attitude, they find and will continue to find that reconciliation retreats as they approach with talk of balancing interests and accepting the reality of Crown sovereignty.

In contrast, constitutionalism has become a plausible, albeit troubled, project in British Columbia. The campaign to induce more principled political conduct via institutional reform faces significant challenges. It is still an elite concern and it is also somewhat unpredictable. Laypersons remain ignorant of the details that would permit widespread reasoned discussion of the relative merits of litigation, negotiation, consultation and collaboration. The four responses create opportunities for lawyers, bureaucrats and others to measure their conduct against their commitments, but they do not require such opportunities be seized.

For the prospects of constitutionalism to improve, two things must happen. First, we must abandon the rhetoric of reconciliation. Second, we must identify the primary constraints on constitutionalism and promote conditions, institutional and otherwise, that seem likely to loosen them. Constitutionalism is an instrumental endeavour, albeit of strange sort. If successful, it will
yield something indistinguishable from “genuine” moral conduct and thus achieve indirectly what those who pursue reconciliation cannot accomplish directly.

Dickson and La Forest JJ were right when they wrote in Sparrow that s. 35(1) requires the reconciliation of federal power and federal duty.978 For that text to fulfill its promise of a just relationship between indigenous peoples and the Crown, Canada must reckon with its decision to rule them and their lands. Canada’s power is not the mythic raw power of the unbound despot. It is the power of a sovereign, and a sovereign must act in accordance with law.

For its rule to be legitimate, the Crown must fulfill its legal duties to its indigenous subjects. A condition of this condition is that the Crown must try to discern those duties: the Crown must attend to what its role requires. It cannot rely on the positive laws of Canada, for that would presume the legitimacy of the Canadian constitutional order in which those laws enjoy legitimacy. Rather, the Crown must consider the foundation of its constitutional order.

In British Columbia, where so few treaties have been signed, aboriginal title provides that foundation. The Court has declared that aboriginal title is “based on occupancy at the time of sovereignty.”979 However, prior aboriginal occupancy is relevant only because of the subsequent exercise of Crown sovereignty and the imposition of the common law. Indeed, it is the assertion of Crown sovereignty that gave rise to aboriginal title, which is a doctrine of the common law.980 The latter would be unnecessary, indeed inconceivable, without the former. Instead, there would be keyoh in Carrier Sekani territory, lax yipbl wilp in Gitxsan territory, ang'oskw in Nisga’a territory and so on.981

Justice Dickson noted in Guerin that “The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title.”982 In Sparrow, he and La Forest J elevated this notion to the “general guiding principle” that the Crown “has a responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”983 In Van der Peet, Lamer CJ warned that this fiduciary relationship put the honour of the Crown at stake.984 In Mitchell v M.N.R., McLachlin CJ removed some links from the chain and found simply that the assertion of Crown sovereignty in Canada generated “an obligation to treat aboriginal peoples fairly and honourably, and

978 Sparrow, supra note 468 at 409.
979 Marshall and Bernard, supra note 423 at ¶32. See also, Delgamunkw SCC, supra note 412 at ¶114.
980 Ibid at ¶82; Marshall and Bernard, supra note 423 at ¶38.
982 Guerin, supra note 456 at 376.
983 Sparrow, supra note 468 at 408.
984 Van der Peet, supra note 517 at ¶24.
to protect them from exploitation, a duty characterized as ‘fiduciary’ in *Guerin*. 985 By asserting sovereignty without conquest or consent, the Crown not only created the concept of aboriginal title but also conjured a fiduciary duty and jeopardized its very honour.

Indeed, in *Haida Nation*, McLachlin CJ wrote “The honour of the Crown is always at stake in its dealings with aboriginal peoples.” 986 It is at stake because the assertion of sovereignty carries the inherent promise to act lawfully and the honour of the Crown is a fancy way to say that the Crown keeps its promises. Although it has special significance for explicit promises like grants 987 and treaties 988, it colours all Crown conduct.

Aboriginal title provides the doctrinal foundation for Crown rule over aboriginal peoples in Canada because Crown rule has a foundation in law. However, the true basis of Crown rule is the lawful nature of Crown rule: the insistence that it requires a foundation in law. In this sense, Crown sovereignty provides its own foundation by claiming to be lawful and thus affirming the preeminence of law. Aboriginal title and its incidents, such as the fiduciary relationship and the duty to uphold the honour of the Crown, express that foundation in legal doctrine. They embody the Crown’s innate commitment to find out what the law requires of it.

For this reason, the much-maligned majority decision in *Marshall and Bernard* may just be misunderstood. 989 It departed from precedent by acknowledging that aboriginal title derives from the exercise of Crown sovereignty, not from the collision of common and aboriginal law. 990 Contrary to *Delgamuukw*, aboriginal law did not help to conceive that doctrine: it is relevant only as a fact for courts to consider when they determine whether the common law test has been satisfied. McLachlin CJ’s opinion in *Marshall and Bernard* also revealed the proper way to think about aboriginal rights. The common law provides the templates judges use to turn indigenous practices into common-law aboriginal rights: judges engage in translation, not dialogue. The majority seemed to accept, even embrace, the colonial character of the Canadian Constitution. Crown sovereignty is a doctrine of the common law that necessarily seeks justification within the common law. Whether or not the Canadian Constitution could or should incorporate indigenous law, at this time it does not. 991 However, the Court has yet to reveal the extent of its candour, in part because it has heard so few aboriginal cases since then.

986 *Haida Nation SCC*, supra note 417 at ¶16.
989 For a critique of the case, see Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?”, supra note 424.
990 Ibid at 305; *Marshall and Bernard*, supra note 423 at ¶38.
991 For a more magnanimous account, see Borrows, *Canada’s Indigenous Constitution*, supra note 677 at 15.
This sort of inquiry into the nature of Crown rule is technically difficult. It also risks unsettling basic beliefs held by indigenous and non-indigenous peoples alike, such as the consensual nature of government authority in Canada and the extent to which democracy and education can rehabilitate a colonial constitution. But reconciliation requires this sort of rigour and risk. It requires a moral orientation: the pursuit of an ideal inherent to the role in question. In the case of a sovereign, that ideal is legitimacy.

Absent brazen nominalism, reconciliation requires that a union be restored. The parties to that union must return to their roles. In the context of a marriage, reconciliation requires estranged spouses resile to their vows. In the narrow confines of the Constitution Acts, it requires government power be brought again to law’s bit. In each case, reconciliation requires the wrongful party to resume its role within the union, which includes the obligation to make amends appropriate to that role. The repentant party must ask not what it must do to reconcile but what it must do because it has wronged its partner by breaching their union. It must act without regard to result: whether its effort delivers reconciliation is irrelevant.

Duties cannot be satisfied inadvertently. Moral conduct entails intent. For a wrongful party to do right, it must try to understand the nature of both the union transgressed and the transgression. The Crown cannot begin to satisfy its duty to indigenous peoples unless it also begins to assess in earnest the basis of its claim to rule them. Only once the Crown grasps its roots in the rule of law can it start to comprehend the nature of its breach and appreciate not only the magnitude but also the character of its effects. The same is true for many settlers. Current conceptions of and approaches to reconciliation are too lenient. They do not require any inquiry beyond the calculations that characterize everyday interest-group politics.

As noted above and elsewhere, reconciliation has been misused and diminished since Sparrow. Originally, it entailed honest introspection and the discipline to implement the lessons learned from reflections on the nature of Crown rule. Then, it required efforts to help aboriginal peoples accept as fact their place in the Canadian political community. 992 Now, it consists primarily in generic formulas that define banal compromises that, in turn, offer no meaningful guidance and make almost no demands on settlers. To reduce reconciliation to balancing interests and accommodating perspectives is not only disappointing; it is wrong. Reconciliation is not a bargain or a truce. The official rhetoric of reconciliation attempts to normalize indigenous peoples. It aims to make them more like other minority groups in Canada (except the Quebecois) that pursue their claims through ordinary political channels and bring suits that reinforce, rather than question, the legitimacy of the Canadian Constitution. The courts and the Crown do not understand

992 Gladstone, supra note 473 at ¶73.
reconciliation. Until they come to appreciate its moral dimension, they chance association with assimilation.

In contrast, constitutionalism is not a moral endeavour but an unusual instrumental one whose aim is to induce political conduct that approximates moral conduct. It approaches existential questions through incremental reforms on the conviction that such questions generally are not answered but dispelled by developments that render them irrelevant. Constitutionalism is a pragmatic discipline; at this point, reconciliation is neither.

Reconciliation is not a condition of constitutionalism. Indigenous peoples and settlers need not heal their rifts and embrace a common identity before they set their respective principles against real problems. Rather, all of the talk about reconciliation can distract from the task of constitutionalism. True reconciliation emphasizes deep differences and related grievances between settlers and indigenous peoples: vital concerns that may endanger efforts to work together before those concerns are addressed. The adulterated version of reconciliation mischaracterizes the nature and understates the magnitude of the challenges facing British Columbia. Constitutionalism aims to avoid this dilemma: done well, it reveals how familiar practices implicate basic values and also how those values influence conduct. It insists on experiments to determine the content and resilience of beliefs. For example, to determine whether settlers and indigenous people inhabit the same political community, the curious party should act as though they do and then talk about the results, not the reverse. Identity is neither the beginning nor the end of the inquiry. It is an assumption: a condition liable to be tested, and thus confirmed or disproved, by one or more of the four procedures.

Litigation provides the most formal and reliable forum for constitutionalism. Lawsuits that involve aboriginal rights or the duty to consult require attention to laws both positive and natural. Judges must give reasons for their decisions and they require reasons from the parties to the disputes they resolve. When they elaborate the Crown’s constitutional obligations toward indigenous peoples, they attempt to discern what must be true for Crown rule to be legitimate. Although dominated by judges and lawyers, litigation allows laypersons to participate more than any other response. Among other things, they hire counsel, swear affidavits and testify at trial. However, expense and uncertainty bar many aboriginal rights claims. The advance costs awards sanctioned by the Supreme Court of Canada in 2003 remain elusive. To lose a claim of aboriginal rights or title is to lose a singular and extremely valuable asset: real doubts about the scope of government authority are difficult to revive once dispelled. Claims that involve the duty to consult are more affordable and they do not directly endanger aboriginal rights or title. But of course they offer results proportionate to those reduced

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993 See e.g. British Columbia (Minister of Forests) v Okanagan Indian Band, 2007 BCSC 1014; British Columbia (Minister of Forests) v Okanagan Indian Band, 2007 BCCA 440; British Columbia (Forests and Range) v Okanagan Indian Band, 2010 BCSC 1088; British Columbia (Forests and Range) v Okanagan Indian Band, 2010 BCSC 1634.
risks: typically, an order to keep talking about the impugned licence or regulation rather than a declaration of aboriginal right or title. In most cases, rhetoric and deference to political circumstance leave the hardest decisions to future citizens, lawyers and politicians.

Negotiation also allows the Crown and indigenous participants to elaborate their commitments. Treaties engage each of the four fundamental constitutional principles identified by the Supreme Court of Canada in the *Quebec Secession Reference*—federalism, democracy, constitutionalism and the rule of law, and respect for minorities.\(^{994}\) They also implicate the unwritten “value” of indigenous self-government mooted by Williamson J in *Campbell*.\(^{995}\) Canada, British Columbia and their negotiators could try to make the relationship between their bargaining positions and these principles more explicit.

They also could try to clarify the principles that define their conduct. British Columbia remains wedded to the eight “principles” endorsed in the 2002 referendum. But “Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians” and “The existing tax exemptions for Aboriginal people should be phased out” are not principles.\(^{996}\) They are slogans or bargaining positions at best. To bolster constitutionalism, the provincial government could publicly scrutinize these eight objectives to divine the principles that unite them, confirm whether they cohere with prevailing provincial values and adjust provincial policy as necessary. This effort likely would yield inarticulate ideals of equality and autonomy: formal commitments that rely upon even more tacit beliefs about political community and human nature. As shown in the next chapter, such an examination may uncover inconvenient truths about the incompatibility of certain Crown and indigenous perspectives and thus basic constraints on a common constitutional project.

Despite the risks, Canada would benefit from a similar exercise. In 2010, it announced a “new approach” to the Treaty Process that appears designed to address some of the grievances raised by the Unity Protocol and at the Common Table. It is strategic in the sense that it does not articulate the values Canada serves in the Treaty Process. Instead, it evokes the technocratic jargon of ecosystem-based management. It reiterates familiar Crown objectives (i.e. legal certainty), identifies ambiguous indicators of progress (i.e. mutual respect) and specifies the procedures by which Canada intends to achieve that progress (i.e. various “tools,” such as renovated treaty-related measures and “more respectful language related to recognition of Aboriginal rights as well as language that

\(^{994}\) *Reference re Secession of Quebec*, supra note 403 at ¶32.

\(^{995}\) *Campbell v British Columbia (AG)*, supra note 590 at ¶81

acknowledges the realities of the past, or reconciliation language”). However, the concepts are too vague and the attempt probably comes too late to gain traction from this superficially pragmatic scheme. Again, to catalyze constitutionalism, Canada must delve more deeply and use the commitments it finds to revise or reframe its negotiation policy, including the mandates for its representatives.

Some indigenous treaty groups do consider expressly which practices and institutions their values and aspirations require in an uncertain world. The few indigenous parties that have ratified a treaty have acquired a new framework to express and refine their values in positive law: constitution, statutes and regulations. Nonetheless, the treaties themselves eschew references to basic principles. The promise of the Treaty Process is betrayed by absent mandates, rigid positions, a dysfunctional negotiation process and templates that may reduce the marginal cost of subsequent treaties but also stifle genuine reflection and impede agreements that express the parties’ basic commitments.

Consultation is now perhaps the preeminent response to the constitutional problems in British Columbia, but it has an ambivalent relationship with constitutionalism. More so than negotiation, it is an instrumental exercise. Both the Crown and the indigenous party seek the best deal at the lowest (financial, political and administrative) cost, which generally means they try to avoid the difficult questions constitutionalism entails. Also unlike negotiation, consultation is not concerned (even in theory) with entrenching fundamental political principles. Consultation agreements are targeted and temporary. They serve important ends, from economic development and political inclusion to environmental protection and cultural vitality, but they are provisional: they are not intended to be permanent, comprehensive or definitive. For example, unlike treaties, they do not require the signatory indigenous people to ratify them by majority vote or otherwise. Further, and in this sense like treaties, consultation agreements are susceptible to standardization, which again facilitate negotiations but also weaken the link between their terms and the parties’ basic values. To strike the best deal is important, but good results are not synonymous with constitutionalism.

Nonetheless, consultation does involve indigenous peoples as partners within the Canadian constitutional order. Their participation is required to determine how the Crown can satisfy its constitutional duties to indigenous peoples without abandoning its secondary objectives. Consultation agreements are often similar but need not be identical; they can be customized in some respects to address idiosyncratic indigenous concerns. In addition, the stock phrases employed in template agreements (e.g. “The Generic First Nation has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy”) can be interpreted

not as dull boilerplate but as compromises that accommodate a range of indigenous positions.\textsuperscript{998} Finally, the short terms of these agreements suggest the parties anticipate future negotiations, which may demand more commitments and compromises, which may yield new and more refined agreements, which could ultimately facilitate if not demonstrate constitutionalism.

Collaboration is the rarest of the four responses. It presents the most opportunities for constitutionalism because it posits at least two political communities capable of articulating and implementing their respective commitments: the participating indigenous people and the community represented by the provincial or federal government, as appropriate. But collaboration does not require the parties to engage in constitutionalism: it only preserves the autonomy each community needs to define and pursue its own path. The parties may not capitalize on this opportunity. Further, collaboration is available only to those few indigenous peoples with the political and economic influence to extract the most significant symbolic and substantive concessions from the Crown. Some contiguous indigenous peoples have won collaboration agreements by uniting to increase their bargaining power. To the extent these deals succumb to standardization, they may not reflect rigorous consideration of what the parties’ principles require. In any case, collaboration agreements at least express the indigenous party’s belief that it forms a distinct political entity capable of serving distinct political principles.

Despite these shortfalls, constitutionalism remains a useful foil: it provides an exacting yet feasible standard with which to assess the evolving institutional experiments in British Columbia. It is certainly more helpful than reconciliation, which after two decades remains enigmatic and unreliable. The four responses have yet to establish a new constitutional settlement. The ideal of constitutionalism can illuminate how and why they have so far failed. It can elicit knowledge required to improve those practices, confirm whether familiar objectives remain realistic and worthwhile, and even redefine successful constitutional reform. Perhaps the four responses have not fallen short; perhaps an improvised band of institutions, rules, principles and agreements is not a necessary evil but a good result given the inequities and uncertainties that warp the grain of British Columbia.

Constitutional experiments will persist in the province because no alternative to relentless institutional innovation exists. The four responses and four eras set forth in this chapter were

\textsuperscript{998} See e.g. Sumas First Nation Interim Agreement on Forest & Range Opportunities, between the Sumas First Nation and Her Majesty the Queen in Right of the Province of British Columbia, May 1, 2007, online: Ministry of Forests <http://www.for.gov.bc.ca/haa/Docs/Sumas%20FRO.pdf>; Neskolinth Indian Band Nation Interim Agreement on Forest & Range Opportunities, between Neskolinth Indian Band and Her Majesty the Queen in Right of the Province of British Columbia, October 25, 2007, online: BC Ministry of Forests <http://www.for.gov.bc.ca/haa/Docs/Neskonlith%20FRO.pdf>; Canoe Creek Indian Band Interim Agreement on Forest & Range Opportunities, between the Canoe Creek Indian Band and Her Majesty the Queen in Right of the Province of British Columbia, June 9, 2006, online: BC Ministry of Forests <http://www.for.gov.bc.ca/haa/Docs/Canoe_Creek_FRO.pdf>.
intended to explain how British Columbia came to occupy this demanding yet somehow liberating state. The following chapters examine the prime constraints on constitutionalism, which could yet provide a method to cope with the mounting complexity. They are intended to identify the ideas and institutional adjustments that could turn this constitutional predicament into a crucial opportunity.
Chapter 3: Land and History: Conceptual Constraints on Constitutionalism in British Columbia

Aboriginal people were here first. In British Columbia, Crown officials, indigenous leaders and their respective counsel are trying to turn this tautology into a constitutional settlement. Progress is slow and fitful because the work is hard. Knowledge and consensus are limited: new discoveries and agreements reveal new frontiers of ignorance and discord. Problems and institutions are interdependent: each solution requires another adjustment. Actions have unintended effects.

Ambiguity compounds the challenge. Citizens, politicians and lawyers seek to change the relationships between indigenous and non-indigenous people in the province. They struggle to determine who has what rights to which lands. They labour to define effective remedies for historical injustices and to design contemporary forms for traditional practices. Their efforts employ ideas about land and history. These ideas are clear enough to support conflicting positions on rights, title and treaties. They are also sufficiently obscure to allow a bland vernacular of “traditional territories” and “new relationships” to disguise profound differences.

These differences inhibit constitutionalism in British Columbia. Constitutionalism is the endeavour to ensure that the conduct of a political community expresses its basic commitments. Due to their adverse ideas about land and history, the federal, provincial and indigenous authorities in British Columbia often frustrate the conditions for this project. Some indigenous leaders suggest that indigenous and non-indigenous people in the province occupy distinct political communities with distinct political commitments. Others acknowledge, along with the provincial and federal governments, that indigenous and non-indigenous people in British Columbia share a political community but they do not necessarily agree on the nature and purpose of that community.

These differences run deep. They permeate our vocabulary. They define our past and disturb our present. This chapter begins by demonstrating that disagreements over land and history confirm an enduring division between indigenous and non-indigenous people in British Columbia. It then uses these competing conceptions to distinguish Crown and indigenous perspectives on political community. It aims to refine expectations about the results of constitutional experimentation in the province: at this time, constitutionalism is not sustainable beyond a few elite enclaves. This chapter also aims to show that the diverse parties litigating, negotiating, consulting and collaborating in British Columbia are doing more than allocating institutional and natural resources: they are trying to determine who we are and what sort of world we inhabit.
1. Enduring Ironies of Constitutionalism

This chapter involves each of the three ironies that define the effort to understand constitutionalism as the project of cultivating a principled political community. First, it focuses on the ideas expressed by political elites rather than laypersons, and thus engages the relationship between democracy and aristocracy. In fact, this engagement is twofold. It not only highlights the dearth of opportunities for citizens to participate in these constitutional experiments and the reliance of laypersons on their representatives to articulate basic political commitments. It also demonstrates how those representatives can fall short of the active-yet-introspective ideal set forth by Sabel and Dyzenhaus. To understand constitutionalism as a project, it is important to treat participants in constitutional experiments as agents and to seek to understand their positions by taking them at their words. In the case of British Columbia, this can be difficult because the statements of indigenous, provincial and federal officials often suggest their beliefs about all matters, from the practical to the profound, are both strong and starkly different. Further, they rarely seize chances to explain how their beliefs inform their conduct and vice versa. It remains possible that their ideas are not as firm or clear as they appear, and that their constituents either do not heed the rhetoric or have different and more compatible interpretations of their predicament. This chapter is, in part, an attempt to elaborate the implications of these official positions. It is intended to provide participants and observers alike an opportunity to reflect on the language being used in British Columbia today: an opportunity to improve and perhaps even justify their choice of words.

In this sense, it is an intervention, and therefore it represents an instrumental approach to constitutionalism rather than an appeal to political morality. It is borne of a strategic decision to try to spark discussions about important but potentially inflammatory matters: participants are more likely to respond to a provocative account of their positions than yet another reminder to respect and accommodate their differences. This decision certainly bears risk: although candour may ultimately help to resolve some uncertainties and misunderstandings, it may also reinforce other rifts by clarifying and confirming disagreements. No approach is neutral. Perhaps most importantly, this chapter demonstrates that not all the possibilities revealed by theory are constructive: an interpretation need not be uplifting to inspire a response.

As a result, this chapter demonstrates both optimistic and tragic tendencies. Due to the often severe conceptual differences between the Crown and indigenous peoples, constitutionalism seems unlikely to thrive in British Columbia. However, the effort to diagnose these conceptual constraints is premised on the belief that they might be mutable and that, with sufficient time and effort, constitutionalism could take wider root in the province. But that is just a possibility; it relies on the responses of many others and cannot be secured by argument alone, no matter how incisive. This chapter offers only a snapshot. At the moment, the prospects for constitutionalism in British
Columbia look bleak, but the role of the theorist is to test perceived limits and seek opportunities to stretch them.

This chapter does, however, explore an intrinsic limit to constitutionalism. That limit can be clarified by distinguishing between decentralization and pluralism. Understood as a project, constitutionalism involves a substantial degree of the former: ideally, citizens and officials should work together to determine what the constitution requires in the diverse, volatile and uncertain conditions they face. It is a dispersed undertaking in which participants can learn from one another and adapt to that new knowledge: the principles they serve emerge gradually from their various efforts. However, constitutionalism is also a coordinated endeavour: it presumes a common, albeit vague, commitment. Participants are believed to be involved in the same project, even if they do not agree on its exact definition. By contrast, pluralism is a condition in which many such engagements, associations, or orders coexist but do not necessarily resolve into a coherent whole. Pluralism does not require the “enabling constraint” of constitutionalism: the presumption that the parties all serve the same principles. The positions taken by federal, provincial and indigenous officials suggest that, whereas constitutionalism has struggled in British Columbia, constitutional pluralism thrives.

2. Different Terms, Different Times, Same Old Problems

Indian. Aboriginal. Indigenous. First Nation. There are many English words for the peoples whom Europeans encountered in the place now called British Columbia. They are not the traditional words these peoples have for themselves and each other. They exist for different reasons and they have different meanings, yet each involves some relationship with land and history.

“Indian” is a colonial remnant with contemporary resonance. Perceived by many as derogatory, the term retains legal and political significance because it marks a class of persons to whom a distinct regime applies under the Canadian Constitution and the federal Indian Act. Since 1876, this colonial regime has attempted to regulate almost every aspect of their lives, from marriage and childrearing to cultural practices and political organization. The Act repudiates their land and history: it substitutes rudimentary reserves for traditional territories and imposes a default foreign system of government (i.e. the Indian Act band led by an elected chief and council). The word “Indian” does the same. Often thought to refer to the subcontinent, it is more likely an English rendition of a Spanish reference to an imported deity: Columbus described the people he met in what

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1000 See e.g. Lee Maracle, Jeannette C. Armstrong, Delphine Derickson & Greg Young-Ing, eds, We Get Our Living Like Milk from the Land (Penticton: Theytus Books, 1993) at 33 [Maracle et al, We Get Our Living].
is now the Dominican Republic as “una gente en Dios,” or “a people in/of God.”

In either case, the term exudes colonial hubris: it purports to identify people without reference to their own ideas about themselves. Such insensitivity and oppression may generate a sense of solidarity among some of its subjects, but for others the idea of the “Indian” threatens a bleak future – either assimilation or irrelevance – in part because it has no regard for their past.

“Aboriginal,” by contrast, affirms a historical connection with land. Aboriginal people were here first. That is what “aboriginal” means. That prior presence is the conceptual basis for aboriginal rights and title, which are common-law translations of their traditions that are recognized and affirmed by section 35(1) of the Constitution Act, 1982.

“Indigenous” entails a more intimate relationship with land. Indigenous people are not just the people who occupied a certain area before others arrived. They are part of a particular place and it is part of them; their relationship with that land makes them who they are. That relationship is of a different quality – not just a different vintage – from those who came later. I use “indigenous,” except when referring to a particular group or invoking a legal term, because it best conveys the perspectives they espouse.

“First Nation” is a more ambiguous and pragmatic term. To some, it is useful; to others, it is irksome. It suggests that the people to whom it applies are both like and unlike other people: they are a “Nation” equal to other nations and thus entitled to their own political narrative and territory, but they are also distinct because they are “First.” The term does not illuminate the bases on which these people qualify for nationhood. Nor does it indicate the sense in which they are first: morally, temporally or perhaps both. “First Nation” defers debates about land, history and other important matters: it leaves the similarities and differences between First Nations and other nations in Canada unresolved.

It may have political value as a means of avoiding controversy, but it has no independent content. The agreement that established the Treaty Commission defines a First Nation as “an aboriginal governing body, however organized and established by aboriginal people within their


1002 See e.g. Marshall and Bernard, supra note 423 at ¶48.

1003 See e.g. P Dawn Mills, For Future Generations: Reconciling Gitxsan and Canadian Law (Saskatoon: Purich, 2008) at 137 (“They are who they are because of their relationship with the land.”) [Mills, For Future Generations]; Taku River Tlingit First Nation Constitution Act, 1993 at ss 2.4 (“As Tlingit, we accept that we are a part of and responsible to our land”) and 2.5 (“We know that we come from this land and we are rooted in this place, online: BC Assembly of First Nations, <http://www.bcafn.ca/files/documents/Presentation_Taku_River_Tlingit_FN_Constitution.pdf>); Maracle et al, We Get Our Living, supra note 1000 at 1-3.

traditional territory” and in possession of a mandate to negotiate. The federal legislation that enables participating First Nations to enact laws respecting the management of their reserve lands equates them with Indian Act bands. The 2005 provincial statute that established the $100 million trust fund to build their organizational capacity defines “first nation” simply as “a first nation in British Columbia”: a large circle perhaps, but circular nonetheless.

By placing concrete ends before conceptual questions, parties to otherwise intractable disputes may be able to achieve unexpected results and dislodge anachronistic beliefs. But by choosing to postpone the articulation and examination of their assumptions, they also risk mistaking superficial change for incremental progress. Given the Crown tradition of dismissing indigenous people and their beliefs, it is unsurprising that so many are willing to adopt a term that seems designed to efface their distinct perspectives as the symbolic price of doing business with the federal and provincial governments. Only with time will we know if the benefits of these practical engagements outweigh the costs of setting aside difficult questions about land, history and even more abstract matters, such as identity.

Indigenous people are well equipped to make this decision, as they have extensive experience with the arrivistes and their institutions. The battles for land and history began once settlers arrived on Vancouver Island and the mainland, before British Columbia became a province (1871) or even a colony (1858). Unlike the fur traders and gold panners that preceded them, settlers coveted the lands on which indigenous people lived. The former wanted to farm where the latter hunted, trapped, fished, cultivated crops and harvested other resources. Although the territory that would become British Columbia was vast, only a small portion of it was suitable for farming so the competition was intense. As elsewhere in North America, the settlers and their governments invoked European theorists like John Locke and Emmerich de Vattel to justify their disregard and displacement of indigenous peoples who generally worked the land without spoiling it. Their rationalization was simple: to own land was to use it and, since what indigenous people did with land rarely satisfied the settlers’ agrarian notions of use, they did not own the land their ancestors had inhabited for

1005 BC Treaty Commission Agreement, supra note 491 at s 1.1. See also Cheslatta Carrier Nation v British Columbia, supra note 408 at ¶¶30-34 (Williams CJSC wrestling with a similar definition of “first nation” in the BC Environmental Assessment Act).
1006 First Nations Land Management Act, SC 1999, c 24, s 2(1).
1007 New Relationship Trust Act, supra note 702 at s 1.
1009 Ibid at 105.
millennia. Unsurprisingly, the coal miners, loggers and industrialists that followed them were even less inclined to acknowledge indigenous land use and ownership. The newcomers described indigenous people as savages: below the threshold of civilization and beyond the arc of progress. For the settlers and their churchmen, the indigenous people in British Columbia might have had a past, but to have a future they would have to stop being Indians and start to assimilate.

To condense a long sequence of events, the colonial, provincial and federal governments facilitated non-indigenous settlement, speculation and resource extraction by ignoring the traditional territories of indigenous people and assigning them inadequate reserves defined with little regard for their needs or arguments. The BC government, both before and after Confederation, saw no need to negotiate treaties with landless people. The Canadian government largely deferred to the province because, under the Terms of Union pursuant to which the colony of British Columbia joined Canada, it agreed to follow “a policy as liberal” as that of the colonial government when dealing with Indians and the lands reserved for them.

Indigenous responses to these affronts varied. Many individuals turned the attendant economic opportunities to their material and social advantage. They found work in canneries, coalmines, logging camps, railroad crews and sawmills, but they often also took part in traditional harvests and used the wealth they accumulated to acquire prestige in traditional ceremonies. Their leaders generally opposed these encroachments, which presented serious and direct challenges to their authority. Independently and in concert, chiefs across the province made repeated, formal and ultimately futile appeals to the provincial, federal and even Imperial governments for recognition of their laws and titles. From the Haida and Gitxsan on the north-central coast to the Okanagan in

1011 Fisher, Contact and Conflict, supra note 1008 at 104-105; Cole Harris, Making Native Space (Vancouver: UBC Press, 2002) at xvi-xxii.
1012 Fisher, Contact and Conflict, supra note 1008 at ch 6, especially 132-133 and 142-145. For a contemporary version of this argument, see Flanagan, Second Thoughts, supra note 1004.
1013 The 14 treaties signed prior to Confederation were negotiated by James Douglas in his capacity as Governor of the colony of Vancouver Island. They were made between 1850 and 1854, and they concern just 358 square miles of territory on the southern portion of the island. The colony of British Columbia was not founded until 1858, well after the policy of negotiated purchase had lapsed for lack of financial support from London. British Columbia was not a party to Treaty 8, which was signed in 1899 and concerned the northeast corner of the province.
1014 British Columbia Terms of Union, supra note 441 at Art 13; Fisher, Contact and Conflict, supra note 1008 at 176-77; Tennant, Aboriginal Peoples and Politics, supra note 444 at 43.
the southern interior, they obstructed government efforts to redraw the reserves once it became clear that the officials involved were not competent to consider indigenous conceptions of land and ownership.\textsuperscript{1017} Organized violence did occur, as when members of the Tsilhqot’in people attacked a road crew, a pack train and a settler who had ventured into their remote territory, but it was surprisingly rare given the magnitude of disruption and disrespect.\textsuperscript{1018} Many indigenous people simply continued to live according to their laws as best they could, whether among, alongside or apart from the newcomers. However, once the latter secured demographic, financial and political dominance in the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries, they adopted discriminatory laws and policies that stifled indigenous entrepreneurs, suppressed the traditional subsistence economy and squeezed indigenous labourers out of the wage economy. In sum, they pushed indigenous people to the margins of the new, non-indigenous industry and society.\textsuperscript{1019}

In recent decades, laws, technologies and economies have evolved, and the prosperity of many non-indigenous BC residents has come to depend once again on indigenous people. The early fur traders relied on indigenous knowledge and initiative to trap, transport and prepare the otter, beaver and other pelts coveted abroad. Their low numbers and relative ignorance of the local environment meant settler industries needed indigenous skills and labour to extract valuable natural resources.\textsuperscript{1020} The environmental ignorance displayed by contemporary forestry, fishing and mining concerns is of a different sort, as is their dependence on indigenous people. They have the technical capacity and specialized workforce required to locate and harvest the logs, fish and minerals they prize. Nonetheless, their sophisticated modern methods remain vulnerable to blockades, injunctions and the quagmire of consultations with the indigenous people who assert ownership, and in some cases stewardship, of those resources and the lands affected. These enterprises do not need indigenous assistance to make extraction feasible, although they may ultimately need indigenous knowledge to sustain their businesses. At the moment, however, they need only indigenous acquiescence to make extraction faster, cheaper and easier.

Given the importance of these industries to the provincial economy, the BC government faced strong incentives to develop a new strategy to deal with indigenous people after the legal tide began to turn in the 1980s. The Treaty Process aims to convert, modify or translate aboriginal rights that protect indigenous traditions regarding land and government into a bundle of rights and

\begin{itemize}
\item \textsuperscript{1017} Gill, \textit{All that We Say is Ours}, supra note 437 at 33-35; Mills, \textit{For Future Generations}, supra note 1003 at 46;
\item \textsuperscript{1018} Fisher, \textit{Contact and Conflict}, supra note 1008 at 107-09.
\item \textsuperscript{1019} Lutz, \textit{Makûk}, supra note 1015 at 236-255.
\item \textsuperscript{1020} Ibid at 75-76 and 167-193; Fisher, \textit{Contact and Conflict}, supra note 1008 at 34 and 36.
\end{itemize}
responsibilities codified under Canadian law. The two treaties it has produced purport to exhaust the
tribal rights of the signatory First Nations. At the treaty table, indigenous traditions function
as bargaining positions rather than viable outcomes: negotiators need not know what they are only
what they are worth. Other initiatives have addressed the interests that indigenous and non-
indigenous people share, like good health, quality education and sustainable economic development,
while avoiding issues that divide them, such as identity and justice. Whether pragmatic, cynical or
materialist, this approach implies that we can attend to practical problems without answering abstract
questions. But sometimes the latter must at least be acknowledged, if only because the two realms
are not separate. For example, beliefs about the nature of land and our relationship with it influence
the objectives and expectations of the parties who seek to determine not only how certain lands
should be used but also how such determinations should be made.

Beliefs about land and history, like beliefs about most things, are fluid and murky. The
provincial government denied the existence of the “Indian Land Question” for more than a century
before committing to the Treaty Process. Now, it celebrates the “special relationship” that First
Nations have “with this land and all who live upon it” and expresses support for “the recognition of
Aboriginal rights, title, and self-determination within the Canadian Constitution.” However, the
meaning of such statements is obscured by vague language and legal jargon: they neither explain the
sense in which that relationship is “special” nor establish what the provincial government believes
the Constitution requires.

Further, official rhetoric need bear no relation with official behaviour. For example, in 1999
the Gitanyow First Nation sought a judicial declaration that, once treaty talks begin, the federal and
provincial governments have a legal duty to negotiate in good faith. The BC government argued,
unsuccessfully, that the negotiations should not be subject to judicial review. It also claimed,
implausibly, that the Treaty Process is not about land. Notwithstanding its nominal support for
aboriginal rights and title in abstract, the provincial government continues to challenge actual claims,
often at great financial and political cost. It is very difficult to determine what provincial

\[1021\] Tsawwassen Final Agreement, supra note 720, ch 2 (General Provisions), ss 11-15 and 45; Maa-nulth First
Nations Final Agreement, supra note 720, ch 1 (General Provisions), ss 1.11.1-1.11.5 and 1.16.1-1.16.2.
\[1022\] See e.g. British Columbia & FNLC, New Relationship Vision Statement, supra note 692; Tripartite First
Nations Health Plan, supra note 757; First Nations Education Act, supra note 758.
\[1023\] British Columbia, Speech from the Throne, 38th Parliament, 2nd Session (14 February 2006) at 29, online:
Legislative Assembly of British Columbia <http://www.leg.bc.ca/38th2nd/Throne_Speech_2006.pdf>.
British Columbia, Speech from the Throne, 38th Parliament, 3rd Session (13 February 2007) at 10, online:
\[1024\] Gitanyow First Nation v Canada, supra note 491 at ¶52.
\[1025\] See e.g. Delgamunkw SCC, supra note 412; Tsilhqot’in Nation, supra note 412; Statement of Claim filed by
Council of the Haida Nation, Action No. L020662 online: Council of the Haida Nation
<http://www.haidanation.ca/Pages/Splash/PDF/Statement%20of%20Claim.pdf> [Haida Statement of
politicians and officials actually believe about land and how those beliefs relate to their actions. Similar uncertainties sometimes efface the beliefs of those who represent indigenous people and the federal government: their statements change with time and context, and their actions obscure nearly as much as they illuminate.

Opaque and lacking an obvious connection with conduct, beliefs about land and history may seem trivial. After all, many indigenous persons negotiate, consult and collaborate non-indigenous persons in the federal and provincial governments. Perhaps such beliefs are mere cultural differences of the sort we encounter, embrace, criticize and dismiss every day in a diverse society: distractions, alternately irritating and endearing, from our shared interests in a sound economy and responsible government. If so, then perhaps a cultural response is sufficient. For example, we can acknowledge that we have different names for the same things: what a government minister calls “Vancouver” in a speech to members of the forestry industry becomes “traditional Coast Salish territory” when he addresses a conference of First Nation representatives.1026

However, this notion of names as labels is neither culturally neutral nor exclusively cultural. For some indigenous peoples in British Columbia, important places are not simply named after historical figures, as Vancouver and the Fraser River are named for colonial explorers: George Vancouver and Simon Fraser, respectively. For example, members of the Tsilhqot’in and Nlha7kápmx peoples believe that certain important places are their ancestors or predecessors, transformed into features of the physical landscape that orient their economic, political and spiritual lives.1027 To respect such places for what they are, we must begin by using their proper names; it is not for contemporary inhabitants, indigenous or otherwise, to decide what they are called.1028 It is not enough to treat our respective names as equally valid and thus interchangeable. That approach would assume precisely what remains in question: that we are actually talking about the same things.

In many cases, we have not yet earned the right to make this assumption. For indigenous peoples in the province, land can be a source of obligations and constraints that are neither voluntary

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1028 See e.g. Kwakiutl Indian Band, “Our Land: Traditional Territory,” online: Kwakiutl Indian Band <http://www.kwakiutl.bc.ca/land/territory.htm> (“We have always had and will always have the original place names of our Territories and it is important that those names be identified and we once again call them by their Kwakwaka’wakw names.”); and Jo-Anne Fiske, Cis Didoen Kat (When Plumes Rise): The Way of the Lake Babine Nation (Vancouver: UBC Press, 2000) at 31.
nor instrumental. As a result, it can also be a source of political legitimacy for indigenous governments. In contrast, for the governments of Canada and British Columbia, land is the subject of responsibilities they adopt and impose: any such limitations are the result, not the basis, of their authority.

Consider the Gitxsan, a community of approximately 5,500 who live near the southern tip of the Alaskan Panhandle. The land on which they live is more than the material foundation of their culture. It is the source and subject of their primary public responsibilities; it is the basis for the legitimacy of their hereditary chiefs and the continued existence of their community. Their adawaaks (histories) illustrate their ayooks (laws), which contain the conditions upon which they were permitted to return to their traditional territories after being expelled for failing to respect the animals with which they shared those lands. If their chiefs do not respect their lands and each other in the manner prescribed then their lands will no longer sustain them, and if their lands fail to sustain them then the authority of their chiefs and the existence of the community itself will be imperiled. The ways we talk about land reveal at least some of our beliefs about the limits and purposes of government. To neglect these beliefs is not to remain neutral.

Disagreements about land and history drive constitutional experimentation in British Columbia. They are unavoidable. They are part of the language we use to discuss the people whose ancestors were already here when the rest of us began to arrive. They cannot be answered by philosophical investigation, but perhaps they can be clarified. The remainder of this chapter is an attempt to do just that by demonstrating how different ideas about land and history infiltrate our constitutional practices and define our constitutional possibilities.

3. Constitutionalism and Community

Constitutionalism requires, at the very least, a political community. It is premised upon the existence of a community that can be understood in terms of the values evinced by its political conduct. For a theorist, such communities can be difficult to identify, let alone define, but indigenous leaders in British Columbia have no such trouble. They know who they are and for whom they speak, as do members of the BC and Canadian governments. From the West Moberly Indian Band and the Katzie First Nation to “all British Columbians,” inhabitants of the province do not lack for political communities. However, this abundance of affinities raises issues that affect the viability of constitutionalism in the province: first, whether these communities maintain separate existences or coalesce into a single community; second, if they do form a single community, whether

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1030 Mills, For Future Generations, supra note 1003 at 66, 115 and 139-140.
that community is simple (i.e. composed of undifferentiated individuals) or compound (i.e. composed of distinct communities which have their own members, individual or otherwise); third, whether the members of that inclusive community, simple or compound, share political commitments.

There is no consensus on these issues, either among indigenous leaders or between them and Crown officials. Constitutionalism does not require consensus on matters of principle, but it does require the possibility of consensus: it cannot emerge among parties who deny the existence of a common political community or who champion incommensurable conceptions of a common constitutional project. Beliefs about the number, nature and purpose of political communities in British Columbia are not merely diverse: they are, in some cases, incompatible. Beliefs can change and practices can evolve, but some of these differences are so vast as to swallow any reasonable hope for consensus, at least in the short-term.

A. Coordinate Communities

In 1976, the Musqueam people declared their right to govern themselves and their lands according to their laws and denied they had compromised that right in favour of “any foreign government or power,” including Canada and British Columbia. In 1986, the Okanagan Nation and the Shuswap Nation declared their sovereignty: bestowed by the Creator, rooted in their lands and inalienable, whether to the Crown or any other authority. In 1984 and again in 1998, the Tsilhqot’in (Chilcotin) National Government declared its own sovereignty, its willingness to negotiate Terms of Union with Canada and the ineffectiveness of federal and provincial laws in its traditional territory: the Tsilhqot’in Nen. These declarations assert the autonomy of these indigenous people. They not only confirm the existence of distinct political communities but also repudiate membership in the broader British Columbian and Canadian communities. Even if the indigenous peoples in question no longer possess such provocative views or express their views so provocatively, these declarations still illustrate this ideal.

Such declarations are clearly at odds with the prerogatives of the federal and provincial governments, which continue to apply their laws to these peoples and their traditional territories.

1032 Shuswap Nations Declaration, 8 December 1986; Okanagan Nation Alliance, Okanagan Nation Declaration, August 1987, online: Okanagan Nation Alliance <http://www.syilx.org/governance-okanagannationDeclaration.php>.
1034 As recently as 2000, the Musqueam Indian Band invoked the Musqueam Declaration in Federal Court. Mathias v Canada, 2000 CanLII 16282 at ¶153.
The Council for the Haida Nation may appear to have adopted a more conciliatory approach, but on closer review it is simply more subtle. The Council was formed in 1974 to represent all Haida people in their dealings with governments, corporations and other organizations. Its primary mission was to protect their aboriginal rights and title. It has since evolved into “a National government enacting legislation and policy affecting many aspects of life on Haida Gwaii.” It is governed by a Constitution that was introduced in 1977, formally adopted in 2003 and subsequently amended in 2010. Its authority flows from the historic relationship between the Haida Nation and Haida Gwaii: the Council is not registered, defined or otherwise dependent on the laws of Canada or any other authority. Since 1993, it has signed a series of bilateral collaboration agreements with the federal and provincial governments that articulate the Council’s vision of Haida territory, identity, sovereignty and jurisdiction alongside the competing views of the Crown. The signatories neither endorse nor reject the opposing account of this land, these people and their governments.

This approach indicates a measure of mutual respect. It also suggests a confident Council, which apparently sees no need to disclaim the Canadian constitutional order, perhaps because it believes the Haida case for sovereignty and a truly separate existence is so strong. Other indigenous peoples in the province have pursued a similar path with less publicity. The Taku River Tlingit First Nation (TRTFN), a community of roughly 400 whose traditional territories encompass parts of Alaska, Yukon and northern British Columbia, is relatively reserved. It adopted its own constitution in 1993 because “it was necessary to move from the foreign Chief & Council system of government.” It claims to be a self-governing people and does not recognize the borders drawn by other governments, namely Canada and British Columbia. However, it does not expressly spurn them for independence. Although its official statements do mention sovereignty, they emphasize stewardship. Unlike the Haida Council, the TRTFN does acknowledge that the provincial and federal governments have “responsibilities and jurisdictions that overlap with those of

\[\text{1035} \text{ See Council of the Haida Nation, Executive Meeting, Resolutions Committee (December 7, 1974), online: Council of the Haida Nation } \text{<http://www.haidanation.ca/Pages/CHN/History.html>}.\]

\[\text{1036} \text{ Ibid.}\]

\[\text{1037} \text{ Ibid; Council of the Haida Nation, Constitution of the Haida Nation, online: Council of the Haida Nation } \text{<http://www.haidanation.ca/Pages/CHN/PDF/HNConstitutionRevisedOct2010_officialunsignedcopy.pdf>}.\]

\[\text{1038} \text{ Gill, } \text{All That We Say is Ours}, \text{ supra note 437 at 100.}\]

\[\text{1039} \text{ Gwaii Haanas Agreement, } \text{supra note 538; Kunst’aa guu – Kunst’aayah Reconciliation Protocol, } \text{supra note 883; Gwaii Haanas Marine Agreement, } \text{supra note 956.}\]


\[\text{1041} \text{ Taku River Tlingit First Nation Constitution Act, 1993, supra note 1003 at Forward.}\]

\[\text{1042} \text{ Ibid at s 2.5.}\]

\[\text{1043} \text{ See e.g. ibid at ss 2.3-2.4; Taku River Tlingit First Nation, } \text{Our Land is Our Future, } \text{supra note 1040 at 13 and 15.}\]
the TRTFN.” Nonetheless, it does not seem to believe those responsibilities and jurisdictions compromise its sovereign authority. In each case, the core claims are the same: these nations and their governments are not part of Canada; whether and on what terms they may ultimately join Confederation remains uncertain.

Their aloofness should not surprise. For centuries before the settlers arrived, these communities cultivated their own identities and institutions. For decades afterward, the governments of British Columbia and Canada refused to treat them as members of the same political community, let alone partners in a common constitutional project. They encroached upon indigenous territories, proscribed indigenous economies and stigmatized indigenous cultures. They disqualified indigenous people from voting in federal (1885-1960), provincial (1875-1949) and even municipal (1896-1948) elections and prohibited them from organizing or raising money for land claims (1927-1958). For much of the 20th century, indigenous people were excluded from official political activity in British Columbia, save for elections to Indian Act band councils on their reserves. Section 35(1) of the Constitution Act, 1982 and its extensive judicial embroidery have not rectified this paternalism: many indigenous people continue to assert their sovereignty long after it came into effect.

These communities seek autonomy, not necessarily independence or autarky. They work with other governments, including other indigenous governments, when it suits them. They use services delivered or funded by the BC and Canadian governments, such as public education and healthcare. They languish in the early stages of the Treaty Process. They elect Indian Act chiefs and councilors to serve alongside their traditional leaders. Those leaders strike deals with federal and provincial officials.

Of the four procedures discussed in the last chapter, collaboration is the most compatible with this position. For example, in 2008, the TRTFN signed a Framework Agreement with British Columbia that established a Joint Land Forum to prepare plans and recommendations to their respective authorities for the management of lands and wildlife in traditional Taku territory.

1046 See e.g. General Protocol Agreement on Land Use Planning and Interim Measures, supra note 623.
1049 Framework Agreement between the Taku River Tlingit First Nation and the Province of British Columbia, dated March 26, 2008, online: Integrated Bureau of Land Management
Forum consists of three TRTFN and three provincial representatives. The TRTFN received equal treatment throughout the Agreement: TRTFN principles and plans for land use were invoked alongside provincial plans; the TRTFN Constitution was regarded as a basic constraint on TRTFN officials just as provincial laws constrain provincial officials; and the dispute resolution provisions allow each party to proceed as it sees fit. Consistent with TRTFN priorities, the parties made parallel assertions of rights, title and responsibilities rather than sovereignty. Perhaps the most revealing aspect of the Agreement lay in one of the objectives identified: to diversify sustainable economic activity in the affected area in order to provide “improved employment opportunities and economic benefits for the Tlingit, Atlin residents, other communities and for citizens of British Columbia.” This provision suggests that the Tlingit and the citizens of British Columbia are separate groups; more concretely, it implies that the Tlingit may not be citizens of British Columbia. At the same time, it commits the provincial government to work with the TRTFN on common environmental concerns and even to negotiate economic opportunities and revenue-sharing agreements.

Other deals can also suffice. In 2000, the Westbank First Nation, a constituent of the Okanagan Nation, signed a self-government agreement with Canada under which the Westbank Indian Band was dissolved and replaced by another entity with the same name. Whether that entity was established and empowered by federal statute or created by Okanagan law and merely recognized by the agreement was unclear. When the agreement took effect in 2005, that Westbank Indian Band then assumed responsibility for many matters regulated by the Indian Act and obtained powers akin to those of a municipality over its reserves, but expressly did not compromise its rights or title. Like the 2008 Musqueam Reconciliation, Settlement and Benefits Agreement or the 2009 Kunst’aa Guu-Kunst’aayah Reconciliation Protocol, these agreements deliver concrete benefits to these distinct communities, whether or not they qualify as collaboration. In turn, these benefits bolster their distinct identities, governments and ambitions.

These groups also litigate strategically within the Canadian legal system, often to great effect. Their members have been parties to some of the most influential cases involving aboriginal rights.


1050 Ibid at s 3.1.c.
1051 Ibid at Preamble and s 2.5.
1052 Ibid at ss 1(f) and 11.11.
1053 Ibid at s 10.
1054 Ibid at Preamble C and G.
1055 Ibid at s 2.3.f (emphasis added).
and title since 1982, such as Guerin v The Queen (Musqueam), R v Sparrow (Musqueam), Haida Nation v British Columbia (Minister of Forests), Taku River Tlingit First Nation v British Columbia (Project Assessment Director) and Tsilhqot’in v British Columbia. Their willingness to protect their rights under Canadian law does not necessarily indicate acceptance of Canadian jurisdiction over them or their lands: the Council of the Haida Nation, for example, denies Crown jurisdiction over Haida Gwaii but has filed a claim for aboriginal title with the British Columbia Supreme Court. Recourse to Canadian courts may instead demonstrate their pragmatism: they seek the protection of federal and provincial laws not because those laws are legitimate but because they are effective. Under this interpretation, they are simply using available means to preserve their lands and traditions until they can stop talking about sovereignty and start exercising it without fear of retribution.

When indigenous people deny the Crown’s authority to govern them and decline membership in the broader Canadian and British Columbian communities, at least on the terms offered, they adopt a strategic relationship with the Crown and its subjects. They define their own objectives and values. Non-indigenous people and authorities are relevant only to the extent that they impede or advance those ends and ideals. Such an instrumental relationship is anathema to constitutionalism. Although it does not require participants to share specific political commitments, constitutionalism does ask them to entertain the possibility that they could espouse common values. If members of one community do not regard members of another as potential compatriots, then they cannot begin to discuss common aspirations and arrangements: that divide must be spanned before they can engage in constitutionalism.

The laws that inhibited indigenous political activity during the 20th century had the opposite effect. They reinforced, in stark legal prose, the rifts between indigenous and non-indigenous people in British Columbia. For nations like the Haida and the Tsilhqot’in, these rifts have not been and perhaps cannot be healed: they resist inclusion in the Canadian political community defined by the Crown. Other indigenous communities know that they have a place within Canada. However, this knowledge brings little comfort because it raises yet another series of questions, namely what that place is and what it means for the rest of Canada.

B. One Community, Many Perspectives

In 1977, the Gitksan-Carrier Tribal Council issued its own declaration. It invoked the sovereignty of its constituent peoples and the sanctity of their lands. It noted the injustices caused by public and private development schemes. It appeared to follow a familiar script, but then came the

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1057 Guerin, supra note 456; Sparrow, supra note 468; Haida Nation SCC, supra note 417; Taku River SCC, supra note 417; Tsilhqot’in Nation, supra note 412.

1058 Gill, All That We Say is Ours, supra note 437 at 17; Haida Statement of Claim, supra note 1025.
council’s demand: “The way of life of our people must be recognized, protected and fostered by the Government of Canada and the Laws of Canada.” Its reason was equally conciliatory: “Only then will we be able to participate fully in Canadian society.” The declaration was an invitation, not a proclamation. It declared their intention to negotiate a “meaningful and dignified” relationship with the provincial and federal governments.\footnote{The Gitksan-Carrier Tribal Council, “Our Declaration” (7 November 1977), online: Storytellers’ Foundation <http://www.upperskeena.ca/vmc/multimedia/sec1/2%20Canada%20declares%20ready/mm/2%20declaration.pdf>.
} In contrast to the declarations discussed in the previous section, this document demonstrated a desire to clarify and improve the lot of the Gitksan (Gitxsan) and Carrier people within Canada: it presumed that they are already part of that larger association while expressing deep discontent with the status quo. Before the Gitksan and Carrier people could commit completely to the Canadian political community, the BC and Canadian governments had to recognize them as who they are, which would have entailed recognizing their special relationship with their lands in something more substantial than a press release. If the Crown could not understand and accommodate this relationship, then it would not “recognize” them at all. It would see only a reflection of itself and its subjects: not a promising foundation for respectful dialogue.

Other indigenous groups share this critical yet constructive stance, although few display it so clearly or concisely. The Tsimshian First Nations Treaty Society represents five First Nations with traditional territories on or near the north coast.\footnote{Tsimshian First Nations Treaty Society, “Home,” online: Tsimshian First Nations Treaty Society <http://www.tfntreaty.ca/>.} Its Chief Negotiator has written that, although its members may want to recover the full measure of self-government they once enjoyed, they must remember: “Today we are a part of a much larger nation state – called Canada.”\footnote{Tsimshian First Nations Treaty Society, “Discussions with Tsimshian First Nations Chief Treaty Negotiator Gerald D. Wesley,” online: Tsimshian First Nations Treaty Society <http://www.tfntreaty.ca/discussions.html#self>.} They must tailor their goals and activities to accommodate those of their partners in this larger and more diverse community. The Nuu-chah-nulth Tribal Council, which encompasses 14 First Nations with a total membership of approximately 8,000, provides another example. The council seeks self-government, self-sufficiency and even self-determination for its members.\footnote{Nuu-chah-nulth Tribal Council, “Welcome,” online: Nuu-chah-nulth Tribal Council <http://www.nuuchahnulth.org/tribal-council/welcome.html>.} However, it does so without denouncing the legitimacy of Canadian institutions or rejecting membership in provincial and federal political communities. It does not appear to assert sovereignty. It does not chafe at the use of English names to denote its traditional territory, which the council itself describes as “the lands and
waters on the West Coast of Vancouver Island.” It does not shy from proposing solutions that benefit “all Canadians,” a term it uses to include the Nuu-chah-nulth people.

Comfortable with the idea of being Canadian, these indigenous groups are also comfortable using the Canadian legal system to pursue their vision of that community. The Gitksan chiefs were plaintiffs in Delgamuukw. The five Maa-nulth Nations have accomplished the rare feat of ratifying a final agreement under the Treaty Process. Like the Nisga’a and the Tsawwassen Nations, they have defined their place in the Canadian Constitution by securing a measure of autonomy within the Canadian federal structure. These treaties confirm that Canada incorporates many constituent groups but also that those groups share commitments to democracy and basic constitutional rights.

In Ahousaht, five other Nuu-chah-nulth nations won a momentous victory when the BC Supreme Court recognized their aboriginal right to fish and to sell their catch. Further, and unlike the Council of the Haida Nation, the Nuu-chah-nulth Tribal Council and the Tsimshian First Nations Treaty Society (and their respective predecessors) are registered under the BC Society Act. While it is possible that their members chose to register with the province for purely practical reasons, it is certain that they did not refrain from registering for reasons of principle.

These groups identify with Canada, although they have their own conceptions of Canadian identity. They work with Canadian institutions, including the government of British Columbia, although they have their own ideas about those institutions and how they should operate. Some of them have forged a new partnership with the Crown; others seem poised to do the same. However, big differences persist, betrayed by two very small words.

In March 2005, the leaders of three major aboriginal organizations in British Columbia agreed to establish the FNLC as a forum and process for political cooperation. In the founding accord, they promised to promote the interests of “First Nations in British Columbia.” In contrast, when the BC premier discussed the “New Relationship” his government conceived with representatives of the FNLC, he referred to “the First Nations of British Columbia.”

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1063 Ibid. See also, Umeek/E Richard Atleo, Tsawalk: A Nuu-chah-nulth Worldview (Vancouver: UBC Press, 2005) at 1 (“On the west side of Vancouver Island in British Columbia, Canada, are those who now call themselves Nuu-chah-nulth (people who dwell along the mountains)” [Umeek, Tsawalk].


1065 Delgamuukw SCC, supra note 412.

1066 Maa-Nulth First Nations Final Agreement, supra note 720.

1067 Ahousaht Indian Band, supra note 408.


1069 First Nations Leadership Accord, supra note 686 (emphasis added)

1070 British Columbia, Office of the Premier, News Release, 2006OTP0086-000551, “Premier’s Statement on the New Relationship” (4 May 2006) at 1, online: British Columbia
matter: the former phrase depicts the province as a place in which some First Nations simply happen to reside; the latter suggests that they somehow belong to it. For the provincial government, “British Columbia” is not just the territory defined by boundaries enshrined in Canadian law; it also is home to a single political community that includes First Nations. Consistent with this vision of the province and its inhabitants, the BC government regularly confirms its commitment to close “the socio-economic gap that separates Aboriginal people from other British Columbians.” Members of that latter category are equal and identical in their membership, so they warrant equal and identical treatment from the government whose territorial reach defines them.

Canada might appear to side with the FNLC and other indigenous people when it uses the phrase “First Nations in British Columbia.” However, it also refers to the “Aboriginal people of Canada,” which appears in s. 35(1) of the Canadian Constitution. Canada denies British Columbia’s claims to its “First Nations” but only to bolster its own claims to “Aboriginal people.” This rhetoric suggests, unsurprisingly, that the federal government believes the confederation is the primary basis for political community in Canada and that subordinate jurisdictions, whether provincial or indigenous, are home to subordinate identities.

The courts swing between the provincial and federal perspectives as cases require. Judges should be more familiar with indigenous views because they must confront more frequently and directly the conflicts between settler and indigenous claims, but they are constrained by their role within the Canadian constitutional system. To acknowledge indigenous political communities incommensurable with provincial and federal communities would raise fundamental questions about the extent and legitimacy of Canadian sovereignty because those separate communities may require separate political institutions with a proportionate measure of autonomy. To introduce this possibility could be seen as irresponsible or even incompatible with their responsibility to uphold the [emphasis added]


1074 Compare Kitkattla Band v British Columbia (Minister of Forests), supra note 648 at ¶69 and Carrier Sekani Tribal Council, supra note 408 at ¶10.
laws of Canada. Instead, judges generally (and likely instinctively) associate indigenous people with all “other” Canadians and British Columbians.1075

Of course, many indigenous people challenge these accounts of their place in Canada, which seem to provide no place at all for them as indigenous peoples. Again, consider the Gitxsan and the 2008 Alternative Governance Model proposed by their hereditary chiefs. They wrote about “Gitxsan territory” as the inheritance of the “Gitxsan people” and the basis for the traditional “Gitxsan governance system.”1076 Yet they also claimed the same entitlement to responsive governments and efficient public services as “all other British Columbians” and expressed the desire “to participate fully in Canadian society.”1077 Although they acknowledged their status as Canadians and British Columbians, the chiefs did not present those affiliations as prior or superior to their Gitxsan identity. Instead, they asserted the existence of a distinct political community with a discrete territory defined by Gitxsan rather than Canadian traditions.

The Canadian, BC and Gitxsan governments agree that individuals can belong to more than one political community. They also agree that a hierarchy exists among those communities: one affiliation provides the foundation for the rest. They disagree, however, on which community performs that function in British Columbia. The federal government champions the national community that corresponds with international borders and in which provincial and indigenous communities nestle. The provincial government emphasizes provincial boundaries and the political community that coincides with them: British Columbia incorporates the places within it, and British Columbians are the people who inhabit it. Secwepemc, Nuxalk and other indigenous people also live there, but they are just special types of British Columbian (or Canadian, as appropriate). The Gitxsan chiefs, like many other indigenous leaders, favour their traditional territories and membership in the political communities that have inherited those lands: British Columbia abuts or perhaps overlaps their territories, and membership in the provincial (or, for that matter, the federal) political community complements but does not precede Gitxsan membership. For the Crown, its indigenous subjects are Canadians (or British Columbians) first and Tahltan or Musqueam second. For many of its indigenous subjects, the reverse is true: they are Nuu-chah-nulth or Tsimshian (or Ahousaht or Metlakatla), and their identity as Canadians or British Columbians complements that basic truth.

These conceptual differences have practical implications, the most immediate of which concern the proper model for indigenous self-government. For the BC government, that model appears to be the municipality: the recipient of resources and responsibilities delegated by the provincial and federal governments. For example, in the controversial 2002 referendum 87% of

1075 See also, Heiltsuk Tribal Council, supra note 612 at ¶114; Tommy, supra note 474 at ¶57; Lax Kw’alaams Indian Band, supra note 689 at ¶¶61 and 77.
1076 Gitxsan Treaty Team, Alternative Governance Model, supra note 829 at 5 and 9.
1077 Ibid at 6 and 9.
respondents agreed that “Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.” The Treaty Process has yet to recover from many of the missteps made during that confrontational period: this principle remains a key part of the provincial mandate for its negotiators.

The Canadian government appears to have a similar view of indigenous political community and a similar model for indigenous self-government. Since 1995, it has claimed to recognize an inherent aboriginal right to self-government. However, the various attempts it has made to implement this right suggest there is nothing “inherent” about it: aside from unproductive treaty talks, they consist largely of federal laws that transfer responsibilities to local authorities (i.e. band councils) established by another federal statute (i.e. the Indian Act). Recent efforts to give indigenous people greater control over the education of their children provide a concrete example. For example, under federal legislation, First Nations may assume responsibility for educating students on “First Nation land” to the same standard those students would receive in the BC school system. Although it may deliver promising results, the scheme is premised on federal jurisdiction over “Indians, and lands reserved for Indians” under s. 91(24) of the Constitution Act, 1867: “First Nation” and “First Nation land” are defined by reference to the terms “band” and “reserve,” respectively, in the Indian Act. When the BC government, in separate legislation, “recognizes” the “jurisdiction” that the 14 participating First Nations exercise over education on their lands, it recognizes only the limited authority delegated to those bands by the Canadian government: it does not promise to respect anything inherent to indigenous political communities.

Whether any of those 14 First Nations actually accept that delegated conception of indigenous self-government or simply assign greater importance to educating their own people is unclear. Groups that, like the Gitxsan Hereditary Chiefs, claim a traditional territory and political community coordinate with those of the provincial and federal governments assert a different model of self-government: one in which, like federalism, each constituent unit retains some measure of inalienable autonomy.

1080 See e.g. First Nations Land Management Act, supra note 1006.
1081 First Nations Jurisdiction over Education in British Columbia Act, supra note 414 at ss 9(1) and 9(2).
1082 Ibid at s 2(1).
1083 Education Jurisdiction Framework Agreement, supra note 741 at s 2.1(a); First Nations Education Act, supra note 758 at s 2.
In *Campbell v British Columbia (Attorney General)*, Williamson J entertained the possibility that indigenous governments retained a measure of inherent authority and occupied a distinct position in the Canadian constitutional order alongside the provincial and federal governments. However, that decision has not been embraced in subsequent cases. In *R v Pamajewon*, the Supreme Court of Canada had already indicated that no general aboriginal right to self-government exists under Canadian law. Rather, indigenous groups may possess particular rights to regulate specific practices, such as gaming or hunting, but always within the limits established by the Canadian Constitution. For the courts, then, the nature of indigenous government is determined case-by-case.

The proper model for indigenous government remains contested. As they consult and collaborate outside the Treaty Process, the BC and Canadian governments implicitly endorse robust forms of self-rule. As they file claims against the Crown and petitions for judicial review, indigenous peoples test and expand the limits of those forms. The nature of political community in British Columbia remains unresolved. Canada, British Columbia and indigenous authorities espouse and act upon various ideas, but those ideas are too often obscure and unrefined. One or many, simple or compound: the residents of British Columbia have yet to decide who they are.

### C. A Principled Community

Their differences, which are often buried beneath enigmatic political compromises and anodyne press conferences, present serious obstacles to constitutionalism in British Columbia. Constitutionalism assumes that the terms of political association can be made more explicit and that the existence of a political association can be made more deliberate. For the parties to a political association to check their constitutional arrangements against their basic commitments, they must articulate those commitments with sufficient precision to permit comparison. If it turns out that indigenous leaders and Crown officials possess contrary ideas not only about land and community but also political identity and even human nature, their ability to initiate and sustain a common constitutional project is doubtful.

When the BC government aims to ensure similar socio-economic outcomes for “all British Columbians,” it reveals what Lamer CJ called a “liberal enlightenment view” according to which each individual in society possesses equal “inherent dignity” that governments should respect. The Canadian government expresses a similar view, albeit one tempered by awareness of practical challenges, when it proposes to deliver aboriginal people “a quality of life comparable to that of other

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1085 *Campbell v British Columbia (AG)*, supra note 590.
1086 [1996] 2 SCR 821 at ¶27.
1087 *Van der Poet*, supra note 517 at ¶¶18-19.
Both governments aspire to treat their subjects equally because they are equal: each subject is an individual identical in his or her subjection to government authority. This commitment to equality arises from an understanding of human nature, not from a campaign promise, a constitutional provision or a historic treaty.

Enlightenments are ambitious undertakings, and an enlightenment view encompasses more than just governments and subjects. An enlightenment view is a view of the world, of everything that can be viewed, of view itself. The two variants of European enlightenment, Anglo-Scotts empiricism and Franco-Prussian idealism, sought to illuminate the mysteries of human experience. Their champions wanted to know what we know and how we know it. They tried to understand understanding: to determine what must be true about us and the world we comprehend, given the unshakable fact of comprehension. They have had profound political influence. They have, for example, shaped the Canadian Constitution from the Constitutional Act of 1791 through the Constitution Act, 1982. We can, however, begin to appreciate their many contributions by focusing on a matter dear to the present investigation: land.

i. Land

Ideas about land resonate broadly and deeply. They not only inform various practical measures but also implicate beliefs about political identity, human nature and the role of government. Many indigenous people, including the Gitxsan, the Wet’suwet’en, the Sto:lo and the Salish, assert a constitutive relationship with land: the place in which they live makes them who they are. The Haida and the Taku River Tlingit share this orientation. According to the traditions of the Nuu-chah-nulth, the beings responsible for their existence have taken form as landmarks that require respect and preservation. To harvest the resources in their traditional territory not only generates wealth and reminds them of their ancestors, it also renews their connection with the spiritual realm that orders and animates the physical world.

1088 See e.g. INAC, “BC Strategic Plan 2007-2010”, supra note 1072 at 4 and 14.
1091 See e.g. Gill, All That We Say is Ours, supra note 437 at 15; Taku River Tlingit First Nation Constitution Act, 1993, supra note 1003 at ss 2.3-2.10.
From the “liberal enlightenment” perspective entrenched in the Canadian Constitution, individuals lack such an intimate bond with the places they live. They have a contingent relationship with land. A place can contribute to their political identity, not because of something inherent in the land, but because of something other persons have done there, such as building a church, fighting a war or drawing a border. Since at least Aristotle, the intellectual forebears of the European enlightenments have understood political communities as human associations formed for human purposes that are, of course, informed by human nature: they require some territory, but their geographic boundaries can be adjusted without affecting the identity of the association or its members.1093 From the liberal enlightenment view, land assumes constitutional relevance because of human conduct. For many indigenous peoples, the reverse is true: human conduct derives constitutional meaning from land. Adherents to the former orient themselves in the world not by reference to spiritual truths accessed by performing traditional practices in sacred places but by reflecting on their experience and discerning, to whatever extent possible, what must be true.1094

For Gitxsan and Nuu-chah-nulth leaders, the connection between land and identity is obvious. For those who inherit the enlightenment view, it is absent. This dichotomy is as clear as it is clichéd. Indigenous accounts of identity capture the human ability to live within the physical world; the enlightenment view affirms our ability to withdraw from it. In tired metaphysical terms, the former requires us to grasp and appreciate the particular while the latter demands that we intuit and elaborate the universal.1095

This is identity disintegrated, not explained. Neither abridgment offers a complete account: indigenous peoples certainly distill abstract principles from their predicaments, just as non-indigenous peoples seek specific contexts to test their generic beliefs.1096 These observations may be commonplace, but this chapter does not aim to develop a theory of identity. In any event, identity is too complicated and obscure to be reduced to a single factor such as land. It is also too important to escape further scrutiny.

In particular, it raises questions about human nature: questions about what we are rather than who we are. According to the enlightenment perspective, individuals have a contingent relationship with land. Their identity derives from those with whom and the ends to which they associate, not from where they do so. However, this contingency is itself constitutive. Individuals must be capable

1093 Aristotle, supra note 384 at 175-76.
1094 Compare e.g. Alfred, Peace, Power, Righteousness, 2d ed, supra note 431 at 84 with Hume, Human Understanding, supra note 187 at 15-18.
1095 See e.g. GWF Hegel, Outlines of the Philosophy of Right (Oxford: Oxford University Press, 2008) at 180-186; Oakeshott, On Human Conduct, supra note 12 at ch 1 (On the Theoretical Understanding of Human Conduct).
1096 See e.g. Umeek, Tsawalk, supra note 1063 at ch 5; Alfred, Peace, Power, Righteousness, 2d ed, supra note 431 at 10, 14, 28 and 50; Harold Johnson, Two Families: Treaties and Government (Saskatoon: Purich, 2007) at 27-29 and 45-47 [Johnson, Two Families]; M Polanyi, The Tacit Dimension, supra note 142 at 21 and 76-77; Dorf & Sabel, “Democratic Experimentalism”, supra note 202 at 284-286.
of bearing an identity dissociated from land; this identity must be compatible with their nature. The
same general point is true for Gitxsan, Nuu-chah-nulth and other indigenous perspectives: if people
have a constitutive relationship with land, they must possess certain basic features to make that
relationship possible.

Human nature here refers to the characteristics and capacities that make us human, not the
tendency to employ those endowments in a certain way. Machiavelli, for instance, famously asserted
that human nature is wicked. But this assertion relies on a deeper conception of human nature:
the ability to determine what is right and to act otherwise (i.e. the capacity for moral conduct). This
approach will not reveal every facet of human nature, but it will help to illustrate the different ways
we can relate to land and thus the different meanings land can bear.

Again, the ancestors of the European enlightenments understood human nature apart from
the physical world. Aristotle argued our virtue is inherent and includes the ability to discern and
develop that virtue. He claimed human beings share in reason: the power to deliberate and indicate
just and unjust. Other influential European theorists have made similar claims, with slightly different
roles for reason. Marsilius of Padua was an Aristotelian and an untimely democrat. He thought
humans naturally possess the genius to establish the civil associations necessary to foster the
conversations, knowledge and laws required to check their ignorance and passion. Thomas
Hobbes believed that reason is one of “the faculties of human nature,” that it has a divine source and
that it enables us to identify evident truths, deduce from them the proper ends and means and thus
pursue the good life in the shadow of the sovereign.

David Hume, perhaps the epitome of the Scottish enlightenment, began his treatise on
human nature with an inquiry into human understanding. He argued that our ability to understand
the world we inhabit is not based on anything in that world but on something in us: our irrepressible
belief that we can understand it. Reason relies on this belief but cannot confirm it. Only experience
can, but our ideas of experience are products of our reason and thus we cannot render this belief
explicit: each attempt to do so implicates the very belief it tries to articulate. Since human nature
entails faith it also requires doubt; since it involves understanding it also entails ignorance. According
to Hume, we must assume our relationship with “external existence”: we cannot say with
certainty that the world exists apart from our impressions of it, but we cannot avoid acting as though

1098 Marsilius of Padua, *Defender of the Peace*, ed and translated by Annabel Brett (Cambridge: Cambridge
University Press, 2005) at 51-60, 75, 90 and 124.
1099 Thomas Hobbes, *De Cive* (Kessinger Publishing: 2004) at 13 (reason as a faculty of human nature), 35
(reason commands ends and means), 41 (reason given by God) and 106-07 (to live delightfully).
it does.\textsuperscript{1101} Of course, Hume begat Kant, for whom human reason provides the conditions of experience: it is essential to both doubt and belief and thus subject to neither.\textsuperscript{1102} In turn, Kant begat Hegel, who begat Herder, and so on: their descendants tend the flame to this day.\textsuperscript{1103}

For adherents to the enlightenment view, human nature is the ability to understand human experience, which includes the experience of human nature. But experience itself is an abstraction: a product of human reason. The very facility that makes us what we are is premised on our alienation from an ineffable external world. Reactions to that premise range from skepticism to certainty, but at least one thing is certain: it precludes the belief that human nature consists in what unites us with the world beyond our experience. It is important to note that the enlightenment view of human nature is tragic rather than heroic: it admits fundamental limits on human nature and human knowledge. If humans lack a constitutive relationship with land, they cannot will one into existence. They cannot re-enchant the world because it is made in their image and that image is bleak.

Indigenous peoples have their own ideas about human nature. Since they know that their lands make them who they are, they also know that it must be in their nature to accommodate that relationship. Umeek is a Nuu-chah-nulth hereditary chief. He explains that, from “a Nuu-chah-nulth perspective,” “reality is perceived as a unity: hesbook-ihb tsawalk.”\textsuperscript{1104} This basic tenet of traditional Nuu-chah-nulth beliefs translates succinctly as “everything is one.”\textsuperscript{1105} From this perspective, “The physical dimension is like a mirror or shadow of the spiritual realm...Spiritual things do not derive from physical things, but physical things derive from the spiritual.”\textsuperscript{1106} What humans know of themselves and the physical world they inhabit derives from what they share with that world: a common origin in the spiritual domain.\textsuperscript{1107} The Nuu-chah-nulth perspective thus contradicts the enlightenment view that reason entails estrangement from any reality beyond human experience. As physical beings, they are also unavoidably spiritual beings. They share their nature with the land and its other inhabitants. They can obtain truths about themselves and their world only by embracing that unity and the uncertainty it brings, not retreating from them.\textsuperscript{1108} They can cultivate ties with the spiritual world by showing respect for all aspects of the physical world, which involves performing practices learned from other members of the Nuu-chah-nulth communities. They can obtain new knowledge but not by ruminating privately upon our experiences; they access it by demonstrating publicly their faith in the spiritual world.

\textsuperscript{1101} Hume, \textit{A Treatise of Human Nature}, supra note 354 at 48-49.
\textsuperscript{1102} Immanuel Kant, \textit{Critique of Pure Reason}, supra note 148 at 59-61.
\textsuperscript{1103} E.g. Habermas, \textit{The Divided West}, supra note 19; Charles Taylor, \textit{A Secular Age} (Cambridge: Belknap Press, 2007).
\textsuperscript{1104} Umeek, \textit{Tsawalk}, supra note 1063 at xi and 17.
\textsuperscript{1105} See e.g. ibid at xi and 10.
\textsuperscript{1106} Ibid at 18.
\textsuperscript{1107} Ibid at 88 and 91.
\textsuperscript{1108} Ibid at 61-62.
Gidsay Wa and Delgam Uukw, the lead plaintiffs in *Delgamuukw* and hereditary chiefs of the Gitksan and Wet’suwet’en people respectively, describe a similar view when they write: “To the Gitksan and Wet’suwet’en, human beings are part of an interacting continuum which includes animals and spirits.”

They are one part of a unified world. Their nature lies in their connection with other beings on that continuum, not in their alienation from them. They must guide their people to acknowledge, respect and maintain that connection in order to assure their prosperity, preserve their authority and perpetuate their communities.

For these and other indigenous people in British Columbia, land is not a bundle of resources to be managed. It is their link to the spiritual truths that explain their existence and legitimate their governments. For the BC and Canadian governments, the truth that they must uphold to remain legitimate lies within their subjects, who are identical in their capacity to reason and thus warrant equal treatment from public authorities. The land and its bounty are means by which to provide that treatment.

Even those indigenous groups that embrace Canada and seek to define their place in it face serious obstacles to working with the federal and provincial governments in a manner consistent with their traditional beliefs. They often disagree on the crux of political community: whether it is the indigenous group, the province or the federation. They disagree on the relationship between land, identity and government. They disagree even on the proper account of human nature and human knowledge. They may claim to inhabit the same political community, but they have very different conceptions of that community. They appear to be capable of crafting a community of interest, in which members regard one another as agents that pursue their own ends in accordance with common rules. But they are struggling to forge a community of principle, in which the members regard one another as partners in the pursuit of common values.

Recent experience validates this concern. The four procedural responses to the constitutional confusion in British Columbia have yet to inspire serious public inquiry let alone consensus. Despite obvious institutional advantages and strenuous efforts, courts often struggle to accommodate indigenous beliefs. For example, in 2005, the Hupacasath First Nation (a member of the Nuu-chah-nulth Tribal Council) sought judicial review of provincial decisions that would have transferred parts of its traditional territory from one provincial regulatory scheme to another, less stringent one. It claimed that logging pursuant to that parallel regime would irrevocably damage certain sacred places. However, Hupacasath law prohibited its members from disclosing the specific locations of those sacred sites and thus impeded efforts to tailor this industrial activity to their

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1110 See e.g. ibid at 31 and Mills, *For Future Generations*, supra note 1003 at 115.
1111 See e.g. NSTC, 2009 NSfQ Consultation Guidelines, *supra* note 422 at 5.
1112 See e.g. Ross, *First Nations Sacred Sites in Canada’s Courts*, supra note 425.
traditional needs. The court ultimately found that the Crown had breached its constitutional duty to consult the Hupacasath, placed conditions on the use of the land in question and ordered the parties to engage in meaningful consultation. In 2008, after three unproductive years, the Hupacasath returned to court and obtained an order that required the Crown to pay for a mediator who would help the parties explore possible measures of accommodation. When traditional beliefs require insularity and secrecy, the standard remedies of dialogue and transparency do not avail. Such beliefs also suggest that efforts to harmonize indigenous, provincial and federal laws may face real limits. Those limits have been reinforced in recent years by jurisprudence that casts the relationship between indigenous peoples and settlers in terms of their respective interests and that assigns judges the role of mediating between them.

Treaty negotiations offer little reason for optimism: seventeen years of active tables and only two treaties (three if the Nisga’a Final Agreement is included). Most tables are stalled and have been for some time. This poor progress is due in part to design flaws in the Treaty Process and the rise of consultation as an alternative to a comprehensive settlement. However, it is due also to the parties’ disparate ambitions and expectations. Some indigenous people want a treaty because they want to formalize their relationship with the Crown and truly begin to build a common community. The Treaty Process cannot deliver the substance they seek because the deals available from the Crown shock their ideas about themselves and their role in Confederation. A few First Nations have been able to cobble a compromise with the BC and Canadian governments that falls somewhere between a municipality and a province: a government that has more powers and responsibilities than a city and that enjoys constitutional protection against unilateral amendment or annulment; but also one that is subordinate in many matters to provincial law, grafted onto inherited forms of government and entrusted with a collection of Treaty Settlement Lands much smaller than its people’s traditional territories. Many First Nations are unwilling to incur the cultural, financial and spiritual costs of negotiating accords that permanently displace their conceptions of government.

Despite its curb appeal, consultation on government decisions that threaten aboriginal rights presents a distinct set of problems. It is a favorite topic for litigation, as governments only grudgingly alter their permitting, licensing and authorizing procedures to involve indigenous people. Further, the resulting engagement is often desultory. The 2008 interim federal guidelines, for example, suggest that consultation requires the Crown to reconcile “Aboriginal and non-Aboriginal rights and interests.” Such formulations offer no real guidance on the necessary substance of a

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1113 Hupacasath First Nation v British Columbia, supra note 656.
1114 Ke-Kin-Is-Uqs v British Columbia (Minister of Forests), supra note 775.
1115 See e.g. Haida Nation SCC, supra note 417 at ¶14 and 45; Marshall and Bernard, supra note 423 at ¶39; Tsilhqot’In Nation, supra note 412 at ¶1357.
1116 Canada, Interim Consultation Guidelines, supra note 656 at 9.
legitimate compromise. Further, they reduce indigenous traditions to “rights and interests” apparently commensurable with those of industry, consumers and other interest groups. The government of Canada took nearly four years to prepare those guidelines, which conspicuously avoid acknowledging the constitutional dimension of the Crown’s duty to consult. They evince neither respect nor collegiality, perhaps because the federal government does not regard indigenous people as partners in Confederation but as subjects that possess some unusual and inconvenient entitlements.

Given the chronic fixation on identity, constitutionalism is unlikely to prosper in British Columbia absent a more rigorous airing of beliefs and values in which indigenous leaders and Crown officials explicitly relate their assumptions to their actions. However, due to the grave differences that persist, greater candor may not suffice to spark a common constitutional project. Even the more provocative and increasingly frequent examples of collaboration do not mandate or necessarily induce this cycle of reflection, criticism and adjustment. The practical advances in service delivery and inter-governmental cooperation in recent decades should be neither dismissed nor glorified. They are primarily technical successes, not political transformations or constitutional awakenings. The persistence of these differences despite decades of hard work and reams of optimistic rhetoric suggests there may not be a common community in British Columbia. Perhaps efforts to engineer solidarity face insuperable constraints. Perhaps the Crown squandered its slim chance for success, given the disparities between traditional indigenous and traditional non-indigenous beliefs, and must now reconcile itself to the impossibility of reconciliation.

ii. History

Indigenous peoples and settlers are generally thought to have different historical perspectives. However, indigenous leaders and Crown representatives clearly share a preoccupation with time. They fret about the pace of treaty negotiations. They lament the length of trials and appeals involving aboriginal rights and title. They decry the duration of constitutionally mandated consultations, which are either interminable or perfunctory depending on one’s perspective. Many of their concerns are driven not by time itself but by its costs, in terms of money spent and missed opportunities.

However, both sides raise more interesting issues when they criticize perceived anachronisms. By designating what is and is not contemporary, they reveal beliefs about our history and our future; they offer different accounts of our paths. The federal government, for example,

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remains critical of traditional indigenous governments organized on the basis of heredity rather than democracy. It often treats them as relics unsuited for current conditions. As a default rule, it uses the Indian Act to impose elections for chief and council. In the Treaty Process, it aligns with the provincial government to insist that final agreements ensure democratic accountability and receive majority assent.

In a document describing its approach to the inherent aboriginal right of self-government, Canada argues that “Aboriginal governments and institutions should be fully accountable to their members or clients” and states that “Mechanisms to ensure political and financial accountability should be comparable to those in place for other governments and institutions of similar size, although they need not be identical in all respects.” It suggests that the “specific accountability measures required” will depend in each case on the “particular functions” performed by the relevant aboriginal government. Since the federal government’s model for indigenous self-government has long been the municipality, with an elected council and chief executive, it did not need to mention democratic elections to make its preference clear. Further, it did not identify aboriginal political traditions as a relevant consideration because traditions simply have no place in a functional approach to government.

For their part, some indigenous peoples in British Columbia consider treaties anachronistic remnants of colonialism. They believe that, while comprehensive written settlements may have served the needs of settlers and the peoples they encountered in New France and British North America during the 18th, 19th and even early 20th centuries, they do not belong in the current political, economic and constitutional environment. As widespread (if largely unenthusiastic) participation in the Treaty Process attests, not all indigenous people concur. However, those who do dismiss treaties see no reason for indigenous people to fix their inherited rights and practices forever in exchange for small cash settlements and a shallow form of self-government. Instead, they champion flexible concepts and arrangements like federalism and self-determination. More concretely, in the wake of Haida Nation, Taku River and Tsilhqot’in Nation, some indigenous peoples in British

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1118 Canada, “Canada’s Approach to Implementation of the Inherent Right”, supra note 1073.
1119 Ibid.
1120 McKee, Treaty Talks, supra note 426 at 52-53.
1121 See e.g. Jennifer Kramer, Switchbacks: Art, Ownership, and Nuxalk National Identity (Vancouver: UBC Press, 2006) at 32-33; Gill, All That We Say is Ours, supra note 437 at 24.
1122 See also Johnson, Two Families, supra note 1096.
Columbia have begun to invoke and cultivate a “post-treaty environment.” They employ an eclectic and evolving mix of strategies to pursue their interests and shape their relationships with the Crown.

The BC government also responded to Haida Nation and Taku River by adopting a different approach to indigenous people in the province. In 2005, it abandoned an unsatisfactory consultation policy and worked with the FNLC on the New Relationship Vision Statement: a list of their respective goals and a bundle of principles and plans to guide “a new government-to-government relationship” and overcome “the present socio-economic disparity between First Nations and other British Columbians.” The document looked to a common future but made only the barest glance at the history that made such grand statements both obligatory and unconvincing. It evoked the initial promise of the BC Claims Task Force, the first recommendation of which called upon First Nations, Canada and British Columbia to “establish a new relationship based on mutual trust, respect, and understanding – through political negotiations.” It reiterated comments made by the prior provincial government. It also echoed the optimistic campaign slogan of the reigning BC Liberal Party, which dominated the provincial elections in 2001 with a pledge to deliver a “new era of hope and prosperity.”

The New Relationship implies an old relationship between aboriginal people and the Crown in British Columbia. It implies that the old relationship was flawed. A flaw in the old relationship implies the belief in a proper relationship: the relationship that truly reflects who and what the parties are. The New Relationship is preferable because it more closely approximates this true relationship between aboriginal people and the Crown. Unfortunately, as indigenous people and Crown representatives possess very different ideas about who and what they are, this reasoning does not bode well for the New Relationship.

For the provincial government, the New Relationship entails a clean break from the past. In fact, the BC government seems to deny history any purchase on its “strategic vision” for the province: it does not deny the occurrence of particular events but rather the relevance of the past for the bright future awaiting all British Columbians. It enthusiastically reports the “innovative tools” and “new processes” used to improve their circumstances. It repeatedly describes the New

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1124 See e.g. Ke-Kin-Is-Uqt v British Columbia (Minister of Forests), supra note 775 at ¶132.
1127 See e.g. Gitanyow First Nation, supra note 491 at ¶52.
Relationship as “forward-looking.” It offers a rousing account of that vista: British Columbia will lead the country, the continent and in one case the world in various accomplishments, from education and employment to environmental management.

However, despite all the rhetoric about looking ahead and abroad, the New Relationship is primarily about looking within. For the provincial government, it is about British Columbians not only realizing their promise but also embracing their identity as a single, superlative political community. The past is not part of its understanding of the province as a single political community composed of equal individuals. The historical relationships between aboriginal peoples and the Crown in British Columbia are relevant only to the extent that they have given rise to “disparities in health, education, housing and economic opportunity” or, in other words, caused the circumstances of indigenous British Columbians to diverge from those of non-indigenous British Columbians.

History matters only because it makes the official vision of the future more difficult to achieve.

The proposed Recognition and Reconciliation Act might have introduced a different stance. It was expected to include a proclamation that recounted the long history of colonialism in the province, identified the harms caused to indigenous people and explained the often adversarial relationship between them and the Crown. It was also expected to amend the BC Constitution Act to allow for the establishment of a Council of Indigenous Nations that would represent indigenous peoples in the province. However, the BC government abandoned the proposal in response to a combination of indigenous and industry opposition. Its failure confirms that, for the provincial government, indigenous people remain just another segment of the BC community, just another interest group in the contentious milieu of BC politics. They are an “economic partner” but not a constitutional one.

Indigenous groups, including those organizations that helped to write the Vision Statement, also want a new relationship that approximates their true relationship with the Crown. Unlike the provincial government, however, they generally do not conceive that relationship as culminating in a single provincial political community. They want to address decades of colonialism and enable


1132 British Columbia, “Premier’s Statement on the New Relationship”, supra note 1070 at 3.

1133 British Columbia & FNLC, Implementing the New Relationship, supra note 838 at 5.

1134 Ibid at 4.

indigenous individuals to face the Crown as members of their traditional communities. Whether they do so as subjects as well is a separate and secondary question.

They envision a new relationship between their communities and the Crown that resembles the original relationship that prevailed before the latter asserted sovereignty over the lands that would become the province. Unvarnished by contemporary rhetoric of “respect” and “recognition,” this relationship was characterized by conflict, cooperation, strategy and opportunism. They have different ideas about the institutional form such a relationship might take today, from delegated self-government to treaty and even “sovereignty association.” They embrace innovations like consultation procedures and joint decision-making frameworks to uphold the enduring truth of their existence as distinct communities with constitutive links to their lands. They accept the provincial government’s emphasis on common standards of living but insist that those standards can be achieved only by revitalizing indigenous communities and economies. For indigenous peoples, the past is not an impediment but a bridge to the future.

Indigenous leaders and Crown representatives have different ideas about their respective political communities and the individuals who comprise them. At one level, these ideas entail different conceptions of the purpose of political community: some indigenous leaders emphasize stewardship over public lands and natural resources; provincial and federal politicians switch between expressions of equal treatment. However, at a more abstract level, they share the belief that the purpose of a political community is to perpetuate itself. Thus, they may disagree on the proper political role for history, but they agree that it exists to serve the future (i.e. it must be understood in terms of the future, which is itself understood in terms of the nature of the political community). Finally, they express different fundamental political commitments: indigenous leaders emphasize self-determination while Crown officials emphasize equality. Yet again, at a very abstract level, self-determination can be understood as a claim for each political community to be treated equally, just as equality among individuals can be understood as a claim for each individual to enjoy self-determination. The positions appear symmetrical. Their disagreements seem to result from basic beliefs about human nature and reality. So long as they remain certain, such intimate elements of our experience are impervious to persuasion and compromise.

4. Conclusion

In British Columbia, disagreements about land and history inspire protests, roadblocks and unpredictable political responses. They fuel litigation, which regularly generates precedents that resonate throughout Canada. They anchor the British Columbia Treaty Process, in which 60 self-
designated First Nations pursue comprehensive settlements with the provincial and federal governments: settlements that concern the ownership, use and control of their traditional territories. They yield overlapping consultation procedures that, for an optimist, preserve indigenous interests pending a negotiated solution and, for a cynic, provide coercive industrial development with a bureaucratic sheen of legitimacy. They lead indigenous governments and the Crown to devise complicated, *ad hoc* arrangements that minimize disruption after an otherwise intractable conflict emerges. These disagreements and the activities they inspire reveal profound divisions. Indigenous and non-indigenous leaders often demonstrate very different ideas about the places they live and the people they govern.

According to Liebman and Sabel, the “new collective action” that characterizes constitutionalism emerges when “policies manifestly fail the public.”

However, since there is not one but many “publics” in British Columbia, there is nothing manifest about the failure of any policy. For example, the *Indian Act* has affected indigenous and non-indigenous people in different ways. It has failed most indigenous people by attacking their cultures, undermining their political traditions and sapping their social, spiritual and economic resources. By contrast, many non-indigenous people are completely unaware of the statute. Some who know of its existence may approve of it, while others may have no opinion at all. Finally, those mindful settlers who feel the *Indian Act* has failed may have various reasons: it has wasted public resources on poor social, economic and democratic returns; it has compromised Canada’s commitment to formal equality; it has oppressed indigenous peoples; or perhaps some combination of the foregoing. These perceptions of failure depend on one’s perception of self and community. They also prompt competing assumptions about the proper solution to this failure, since a policy does not simply fail: it fails in particular ways for particular reasons.

Constitutionalism may fail in British Columbia because the differences among its residents are grave. Their basic political commitments are informed by beliefs about human nature and knowledge that so far appear impervious to gradual and deliberate adjustment. Persistent and explicit disagreements about the existence and nature of a common community belie a “public” capable of finding and forging shared values. Indigenous peoples and settlers may be able to reach fruitful compromises but a shared constitutional project may require more sacrifice than they are able willing to make. In particular, they appear unwilling to put their identities at risk. As demonstrated by the failure to define and achieve reconciliation, most indigenous peoples and settlers expect any ultimate settlement to accommodate rather than efface their respective identities. Identity is just a hypothesis, as are particular identities. If we posit a relationship between them and our constitutional

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arrangements, then we must be willing to test it. Indigenous peoples and settlers must be willing to entertain a different understanding of a constitution: one that has less to do with who they are and more to do with what they do and why they do it.
Chapter 4: Institutional Constraints on Constitutionalism in British Columbia

Institutions matter. While ideas indicate possibilities, institutions enable us to pursue them, gauge their merit and produce better ones. But institutions also help us to quash ideas, circumscribe debate and foreclose alternative paths. Whether this relationship is productive, oppressive or merely inert depends on the ideas and institutions in question.

In British Columbia, the institutional constraints on constitutionalism are as significant as the conceptual impediments. Indigenous and non-indigenous peoples often disagree about whether they form a single political community, whether that community is one of principle or convenience and, if the former, which principles are at stake. When the very existence and nature of a political community are contested, its purported members cannot attend to the relationship between its commitments and its conduct as constitutionalism requires. These conceptual barriers are reinforced by institutions that blunt the impact of transformative developments, convert existential quandaries into technical problems and cater only to the most privileged communities.

This chapter examines the institutions, old and new, that inhibit constitutionalism in British Columbia. It also identifies innovations that may unsettle those institutions while eroding the associated imaginative barriers. Finally, it considers how courts can contribute to constitutionalism in the province.

1. Experiments and Constitutional Theory

The theory of constitutionalism advanced in this dissertation emphasizes experimentation. The recent constitutional experiments in British Columbia have been resigned to the political margins. They raise important questions about the conceptual and moral foundations of Canadian sovereignty in the province, but they have resulted in relatively small institutional adjustments. The resilience of the primary institutions of the Canadian Constitution may suggest that, at least in this context, such tinkering may not yield a new constitutional dynamic. More pointedly, as Walker and Wilkinson argued when reviewing Sabel’s work, these experiments may be too strange and subtle to upend entrenched power asymmetries and correct historical injustices. However, it is too soon to draw such a harsh conclusion, especially when no serious opportunities for more radical change exist.

The constitutional innovations in British Columbia have, for the most part, been small. Yet they have come quickly and continue to pile up. Each must be understood in light of the others. Their cumulative effects are vital but not immediately apparent. Even now, despite their formal intransigence, the conduct of the core constitutional institutions is changing, albeit slowly and irregularly: ministries are adopting consultation protocols, the legislatures have enacted laws to implement treaties, and judges try to make sense of reconciliation. Inequalities and inequities persist,
but theorists must remain attentive to the details of these developments and the possibilities they present.

Theorists must be pragmatic. They must accept fallibility, surprise and revision. They must accept that the answers to the difficult questions raised regarding the constitutional settlement in British Columbia are unlikely to be elegant and borne of scholarly reflection. Rather, those answers will be the arrangements that work for the persons and communities vexed by those questions: work in the sense that they make the discomfort and doubt less acute and allow the parties to continue to seek even better answers. At first, those arrangements may not even resemble a solution, since to succeed they should not replicate the conditions that generated the problem in question. Indeed, they are likely to seem incomplete, even incoherent, as they emerge.

This theme of constitutional improvisation is developed in more detail below, but a few elements are worth noting at the outset. First, new arrangements make possible new affinities, which then make possible new compromises, conflicts and another round of institutional adjustments. When participants work together on a challenge that engages their interests as well as their political commitments, such as a shared land-use plan, they may find their beliefs are not as clear and their differences are not as stark as once thought. In theory, such common ground could emerge between indigenous and non-indigenous parties to a working group established by a collaboration agreement or between members of different indigenous groups that form a common political organization. However, it is important to observe that many such opportunities are ignored or even eliminated, such as when the provincial and federal governments slashed the funding available for advisory committees in the Treaty Process and thus shut rare venues for non-indigenous participation. Failure to imagine, identify and exploit such opportunities can insulate dubious assumptions about our selves and our community that in turn unnecessarily limit constitutional possibilities.

Second, courts can challenge those limits; they can serve as catalysts for constitutional change. The courts in British Columbia have the doctrine required to do so. They can invoke unwritten principles of constitutional law and related obligations to review not only the Crown’s administrative decisions but also its decision-making process and regulatory structure, award damages to an aggrieved indigenous group and pronounce relief both declaratory and injunctive to remedy any remaining defects. However, judges rarely exercise the full extent of their powers. They prefer to defer to the executive, which has recourse to options that range from technical (e.g. treaty negotiations) to extremely technical (e.g. consultations). Yet, due in part to decisions made about how to design the Treaty Process and conduct consultations, few non-indigenous persons are seriously engaged with the constitutional experiments in British Columbia. Although a backlash to an especially assertive judgment is conceivable, especially if it concerned a popular issue such as commercial fisheries or urban property rights, it is not certain. Nor would a backlash necessarily
herald disaster: as constitutionalism concerns the principles we serve rather than the principles some of us wish we served, officials and theorists should welcome broader constitutional debate. Nonetheless, as judges rely heavily on procedural remedies that minimize the political implications of the issues at stake, the catalyzing effects of their judgments are primarily incidental and unintentional.

However, unexpected effects should not be dismissed as unimportant. The final point to remember while reading this chapter is that the institutions and procedures discussed below do not exhaust the realm of possibility. Novel practices may emerge from established settings, whether from the courts or from collaboration agreements. Or an unexpected event, such as a global economic boom or bust, may disrupt this relatively stable environment. There is no grand plan, and there is likely no ultimate solution to the constitutional questions in British Columbia. Instead, participants in these ongoing experiments will need to keep adjusting their conduct and adapting their expectations, just as theorists will need to revisit their ideas about constitutional settlements.

2. Design, Reform, Renovation, Redecoration

Constitutional design has attracted intense academic interest in recent years. It has enticed political and legal theorists alike. They have no shortage of inspiration: the collapse of the Soviet Union and the uneven transitions to liberal democracy in Eastern and Central Europe; the prevalence of ethnic conflict in many parts of the world; the devastating wars in Afghanistan and Iraq; the perennial constitutional debates in Europe; and, most recently, political upheavals in the Middle East.

Constitutional design is by no means a new idea. It has been a constant theme of modern Western political theory at least since Machiavelli. It enjoys an illustrious American tradition centred on federalism and judicial review. It has achieved international prominence with an

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1141 Machiavelli, The Discourses, supra note 1097.
emphasis on democracy and human rights. It also has influenced how we think about managing ethnic tensions and preventing civil conflict.

The term implies an act of creation rather than preservation or adaptation. Scholarly contributions generally concern ideal arrangements unburdened by the need to accommodate traditional institutions. In many cases, this approach is warranted by civil war, revolution or secession: the political community in question is prepared and perhaps forced to revisit the basic terms of its existence; the prior regime may have been razed. Constitutional design is a rationalist exercise that requires practitioners, primarily professors of law and politics, to apply their expertise to communities that differ along certain standard dimensions: religion, language, race, wealth, inequality, territorial concentration of minorities and so on. It can be a valuable exercise, but it has limited relevance for a community that does not face an existential crisis or an institutional vacuum.

In its traditional form, it has little relevance for British Columbia. Indigenous activism and landmark judgments have thrown into doubt the legitimacy of the constitutional settlement in that province. However, this doubt is not widespread: it is limited to a handful of judges, lawyers and politicians. It concerns the legitimacy of the application of the entire Canadian Constitution to indigenous peoples and their territories in British Columbia, not the merit of particular aspects of that basic law. In general, indigenous peoples criticize the manner in which the Canadian Constitution has been implemented: they demand the Crown satisfy its existing constitutional obligations before it makes any new promises.

There are no real prospects for constitutional design in British Columbia. The Canadian Constitution is firmly entrenched. It will not be repealed or replaced in the foreseeable future. Any conceivable reforms would have to modify or complement it. However, there are no real prospects for constitutional reform, either. Formal amendments that address indigenous grievances and aspirations face political and procedural hurdles that, for now, appear insurmountable. Since 1982, Canada has endured two rounds of constitutional negotiations. Both ended in failure and

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Indeed, constitutional amendment is not the subject of any serious proposals, perhaps because s. 35 of the Constitution Act, 1982 has had such ambivalent and unpredictable effect.

The few First Nations actively negotiating and implementing treaties with the provincial and federal governments might be seen as engaged in constitutional design. They are trying to redefine their relationship with the Crown by adopting written constitutions that accommodate their indigenous political traditions and by assuming responsibility for regulating certain activities on fractions of their traditional territories. However, these treaties and constitutions are subordinate to the Canadian Constitution. They are implemented by ordinary legislation rather than constitutional amendment and they can be infringed by unilateral government action, so long as that action can be justified. They apply to relatively small parcels of relatively remote land, and they require no major constitutional compromise from the Crown. Further, the BC Treaty Process has lost most of its early momentum. It is unlikely to yield treaties for more than a handful of the 60 participating First Nations, and the few treaties it does produce are even less likely to galvanize a viable movement for systemic constitutional change.

From a political economy perspective, the indigenous population is too small, too dispersed and too divided to achieve such a radical result. Despite raising a fundamental question about the legitimacy of Crown rule, indigenous peoples have not triggered a constitutional crisis and have not risked ethnic conflict to do so. Even if they view politics through an ethnic lens, non-indigenous residents generally do not. At best, the latter perceive the gulf between them as an unfortunate legacy of their colonial past, not a defining feature of their political community.

Indigenous peoples lack the political, legal, cultural and economic clout to set the terms of political debate in British Columbia. Although capable of disrupting some natural resource extraction, they do not pose a serious threat to the survival of the provincial or federal governments, so no grand bargain is forthcoming.

Of course, these conditions can change. Indeed, they may change in response to some of the institutional innovations described in this chapter. Until then, the Canadian Constitution remains intact in British Columbia. Its legitimacy is in question but its structure, which includes the terms of the Constitution Acts 1867 and 1982 as well as the unwritten principles that bind them, is not. Indigenous institutions may proliferate, evolve and even thrive, but the familiar elements of the

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1148 See e.g. Tsawwassen First Nation Final Agreement Act, SBC 2007, c 39; Tsawwassen First Nation Final Agreement Act, SC 2008, c 32; R v Badger, [1996] 1 SCR 771 at ¶¶96-98; and R v Marshall, [1999] 3 SCR 533 at ¶24. Note the provincial power to infringe non-commercial treaty rights is limited by the division of powers and s 91(24) specifically. Simon v The Queen, [1985] 2 SCR 387 at ¶54; R v Morris, 2006 SCC 59 at ¶¶50-55.

1149 British Columbia, “Premier’s Statement on the New Relationship”, supra note 1070 at 3.
Canadian Constitution will persist: the *Charter of Rights and Freedoms*, the division of powers and the separation of powers are not in jeopardy.

Yet something is happening to the Canadian Constitution in British Columbia. Judges, indigenous peoples and representatives of the Crown are trying to dispel the doubts that have mounted since at least 1973, when three justices of the Supreme Court of Canada found that aboriginal title still exists in the province. They have employed all sorts of strategies, but their efforts can be reduced to the four ideal types introduced in Chapter Two: litigation, negotiation, consultation and collaboration. Too modest to qualify as design or reform, these efforts at best amount to constitutional renovation or, less hospitably, constitutional redecoration. The former connotes meaningful change that endures without altering the underlying structure; the latter suggests superficial rearrangement with no lasting impact.

Such metaphors are perhaps more entertaining than insightful. Their relative appeal depends on disposition rather than evidence. In either case, constitutional change will be irregular and will frustrate any detailed plan. The relevant experiments are not and cannot be orchestrated, as each involves different constellations of autonomous actors and generates a complex chain of unintended effects. Whether renovating or redecorating, scholars and participants must acknowledge their limitations, temper their expectations and act responsibly.

Although most constitutional design literature has little bearing on British Columbia, scholars who focus on post-conflict constitutions may prove relevant. Post-conflict constitutions are constitutions intended to resolve or at least contain conflicts among ideological factions or ethnic groups: they aim to keep such conflicts in the past. They may, but need not, follow acts of political violence.

The immediate objective of a post-conflict constitution is to maintain peace and stability. This objective generally requires the transformation of pathological institutions, irreconcilable cultures and anachronistic ideas about constitutions. Vivien Hart described the making of post-conflict constitutions as a conversation. She characterized it as a dynamic process rather than a discrete moment. She claimed it has two main functions: to establish a serviceable government and to express the identities of constituent groups. Vicki Jackson believes post-conflict

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1150 *Calder*, supra note 451 at 412-13 (Hall J).
1153 Ibid at 157-58.
1154 Ibid at 159-160.
constitutions may serve more varied ends but otherwise concurs with Hart. Both scholars acknowledge that post-conflict constitutions often take unorthodox forms: rather than a single authoritative text, they consist of frameworks, accords and principles. Hart and Jackson also recognize that such constitutions emerge from novel procedures, such as public consultations and interim declarations subject to judicial review.

More generally, they agree that the adoption of a constitution is often just one step in the effort to establish constitutionalism in post-conflict societies: it is neither the beginning nor the end of that project. They agree also that consensus among citizens or constituent groups is neither a condition for constitutional success nor a necessary result of an effective post-conflict constitution. Finally, they admit that post-conflict constitutions do not represent an ideal but an imperfect compromise that adapts old ideas to new and difficult circumstances.

British Columbia does not resemble Iraq, Northern Ireland or even Quebec. The divisions between indigenous peoples and settlers do not threaten violence or otherwise disturb daily politics. Indeed, the developments in British Columbia may more accurately be described as transitional because they seek primarily to purge the Canadian Constitution of its colonial spirit and introduce a more respectful age.

In her discussion of post-conflict constitutionalism, Jackson distinguishes two types of transitional constitution: incremental and interim. The former is haphazard: it stumbles along with no clear plan or destination. The latter is deliberate and ordered: it explicitly anticipates a more formal process and a more permanent constitution. Post-communist countries such as Hungary and Poland have used constitutional courts to craft incremental constitutions capable of constraining government conduct and rehabilitating damaged societies and dysfunctional economies. South

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1156 Ibid at 1294 and 1298-1304; Hart, “Transformation of Conflict”, supra note 1152 at 158.
1162 Jackson, “What’s in a Name?”, supra note 1155 at 1260.
Africa, by contrast, employed an interim constitution as part of its transparent, multi-stage constitutional process to dismantle apartheid.1163

British Columbia does not fall clearly within either category. Nonetheless, the pacific Canadian province could learn from constitutional experiences in more tumultuous divided societies. For example, material results may matter as much as moral principles. Improved social, economic and political outcomes for marginalized groups may broaden support for an emerging constitutional settlement and encourage more citizens to consider its basic principles, whether during ordinary election campaigns or in popular constitutional forums.1164 Further, novel institutions may challenge familiar political identities by offering new venues for diverse participants to pursue common interests and values.1165 Finally, procedures may trump rights as a source of allegiance to a transitional constitution and the process by which it is made. Reserved seats in the legislature, executive or judiciary can give minorities direct influence on public policy and government conduct. Federal and consociational structures can cast linguistic, religious or other ethnic groups as the basic units of a composite political community and thus provide the recognition those groups so often seek. Such measures also can encourage reliance on a relatively conciliatory political process rather than a relatively confrontational legal process to resolve disputes. Rather than insulate and isolate disadvantaged minorities from government decisions, smart procedures can integrate them and create opportunities to improve regulatory outcomes while cultivating more complementary identities, which would have the effect of reducing the constitutional relevance of identity.

3. Constitutionalism: When Democracy is Not Enough

To understand how political and legal institutions constrain constitutionalism in British Columbia, it is necessary to understand constitutionalism. When domestic democratic institutions struggle to remain relevant and effective, constitutionalism cannot fruitfully be understood to require some variation on the tired triumvirate of legislature, executive and judiciary.1166 That vintage design has proven unfit for, and in fact has contributed to, many contemporary challenges. Nor can constitutionalism be understood as the direct exercise of individual and collective freedom in a constant struggle against all institutional settlements.1167 Such accounts offer no meaningful guidance to persons dedicated to solving public problems of the scale and complexity we face today. From

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1166 See e.g. Waldron, Law and Disagreement, supra note 55 and Bellamy, Political Constitutionalism, supra note 87.
1167 See e.g. Tully, Public Philosophy: Vol I, supra note 143 and Tully, Public Philosophy: Vol II, supra note 144.
environmental degradation to economic instability and cultural malaise, we confront challenges that demand coordinated responses yet overwhelm the traditional trappings of democracy.

Under these conditions, constitutionalism is better understood as a project. More specifically, it is the project of cultivating a principled political community. This project consists of establishing the community’s commitments through its conduct and assessing its conduct in light of those commitments.\(^{1168}\) It requires the perpetual adjustment of both elements and reinforces their reciprocal relationship. The enterprise is defined by belief in a political community that bares its principles in its practices.

The institutional incidents of this “enabling constraint” cannot be specified in abstraction from the community in question or in isolation from the challenges that inspire questions about its practices or principles. This limit should not be interpreted as an admission that constitutionalism is a frivolous academic diversion. It is a reminder that improvement implies both a starting point and a goal, however hazy. The steps necessary to move from one to the other simply cannot be identified by theory alone.

Constitutionalism is not a thought experiment but a real option that presents real risks and benefits. It does not dictate a standard institutional outcome or even a uniform procedure to reach correct decisions. Rather, it offers an orientation: a way of thinking about our selves and our problems that promotes right results. In other words, it promotes outcomes that address the practical concerns of participants in a manner consistent with their values. This account of constitutionalism avoids exaggerating the utility of theory; participants will determine the outcome, but their institutional inheritance and intellectual disposition will determine how well they fare.

Constitutionalism is a demanding endeavour. It is more demanding than democracy because it concerns commitments rather than interests. Democracy can be simple and crude: it can be understood to involve the mere summation of preferences by majority vote, whether in service of equality, good public policy or both. Constitutionalism is more elaborate. Done well, it should appear rigorous; done poorly, it will seem ornate and indulgent. Instead of intermittent aggregation, constitutionalism requires perpetual justification: citizens and officials alike are expected to explain how their actions cohere with their common values and to demand similar explanations from one another. It aims for gradual improvement, which may prove contentious and uneven. Such discipline is not a condition of democratic success. Indeed, where democratic institutions are expected primarily to keep the peace, such rigorous inquiries may hasten failure by accentuating rifts and grievances between factions.

Constitutionalism requires a measure of public anxiety about the character of the political union in question. If it cannot perpetuate unease sufficient to provoke serious inquiries into that character, then it will subside into complacency. If it provokes too much angst, then it will collapse into conflict. The balance may not be delicate but it can be difficult to strike.

Constitutionalism also requires a political community that can be understood in terms of its principles. This condition need not be affirmed. It can even be doubted, so long as it is not denied. It is still an open question whether British Columbia consists of a single political community and, if so, whether that community is a principled one. Established institutions have failed to spark the sustained reflection on common values that would confirm and ideally propagate belief in such a community. Recent attempts to overcome their limitations have yet to prevail. Constitutionalism remains exceptional.

4. Something Old, Something New

The institutional constraints on constitutionalism in British Columbia are manifest. The basic constitutional structure is rigid and paternalistic. It marks indigenous people apart from the general population but only to subordinate them. It denies them a meaningful political role. The four procedures that have developed in response to these defects have not set the virtuous circle of constitutionalism in motion. However, they have spawned a gang of new institutions that may yet set it in motion.

A. Incumbent Institutions

The constitutional structure in British Columbia has two dimensions: vertical and horizontal. The former consists of the division of powers between different levels of government; the latter refers to the separation of powers among different branches of each level. Both dimensions present problems for indigenous peoples and hurdles for constitutionalism.

i. The Division of Powers

The Constitution Act, 1867 divides legislative authority in Canada between Parliament and the ten provincial legislatures. Section 91 gives Parliament authority over matters thought to be of national significance in the mid-19th century, from marine fisheries to “Indians and lands reserved for Indians.”1169 Section 92 empowers the provincial legislatures to regulate concerns considered local, such as property rights and the administration of justice.1170 Section 109 grants the provincial governments ownership of the Crown lands within their respective boundaries and not subject to

1169 Constitution Act, 1867, supra note 447 at ss 91(12) and 91(24).
1170 Ibid ss 92(13) and 92 (14).
other interests. Section 96 preserves provincial superior courts with plenary original jurisdiction capable of enforcing the division of powers. These provisions establish the basic structure of the Canadian confederation. However, they do not necessarily exhaust it.

As Justice Williamson found in *Campbell*, when the Imperial Parliament enacted the *British North America Act, 1867* (later renamed the *Constitution Act, 1867*) it could not give what it did not have. Specifically, it could not allocate to the federal Parliament and the provincial legislatures the authority exercised by indigenous governments at that time. According to Williamson J, the federal structure of the Canadian Constitution properly understood has three levels: federal, provincial and indigenous. The survival of these indigenous authorities is one of the unwritten constitutional principles that haunt the text of the Canadian Constitution and influence its interpretation. However, that constitution does not recognize a general aboriginal right to self-government. The indigenous authority acknowledged by Williamson J is not uniform across the country, or even the province. Instead, the authority of each indigenous government consists of those aboriginal rights it has proven in court and those powers it has settled in treaties with the Crown.

Indigenous governments are not analogous to municipal governments. The authority of the former does not flow from any legislative enactment or Crown undertaking. In this respect, they are also distinct from the band council structure established under the *Indian Act* to help federal officials regulate Indian affairs. Some customary governments do serve as band councils, in which case their statutory powers are spliced on to their inherent authority.

However, indigenous governments are not equal to provincial and federal governments. They govern much smaller populations and territories and they generally do not exercise authority over non-indigenous persons. Their powers are fewer and less certain. British Columbia and Canada can infringe the aboriginal rights that compose the powers of indigenous governments, and their infringements subject to an increasingly lax justification requirement. Section 91(24) of the *Constitution Act, 1867* empowers Parliament to legislate for Indians and the lands reserved for them. Parliament has used that power to enact s. 88 of the *Indian Act*, which extends this privilege to the

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1171 Ibid s 109.
1173 *Campbell v British Columbia (AG)*, supra note 590 at ¶¶76-78.
1174 Ibid at ¶81. See also *Reference re Secession of Quebec*, supra note 403; *Reference re Independence and Impartiality of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 [Judicial Independence Reference].
1175 Pamajewon, supra note 1086.
1177 Sparrow, supra note 468; *Van der Peet*, supra note 517; *Delgamuukw SCC*, supra note 412.
provincial legislatures and effectively augments their constitutional authority by incorporating as federal laws some provincial statutes that could not otherwise apply to Indians. 1178

In sum, notwithstanding Williamson J’s opinion, indigenous governments in British Columbia are subordinate to the provincial and federal governments. The federal structure does not accommodate the conflicts between settlers and indigenous peoples the same way that it does those between anglophones and francophones. The vast majority of French-speaking Canadians live in Quebec. Like indigenous peoples, they have played a central role in the constitutional melodrama that has propelled Canadian history since before Confederation. Quebec was the only province that refused to accede to the terms on which the Canadian Constitution was repatriated in 1982. Its place in Confederation remains contested.

Many features of Canadian federalism reflect and reinforce this dynamic. Indeed, the very existence of federalism in Canada is due to an attempt to accommodate the linguistic divide between the former provinces of Upper and Lower Canada, now known as Ontario and Quebec. In the words of the Supreme Court of Canada, it was “an act of nation-building.” 1179 The colonial experiment with a unified province of Canada between 1840 and 1867 was abandoned in light of francophone resentment and agitation. 1180 Today, French is one of Canada’s two official languages. 1181 Quebec enjoys the full array of provincial legislative powers. Due to its size, it has a vital role in constitutional amendments, most of which require the approval of provinces that house at least 50% of the Canadian population. 1182 Due to its status, Quebec also has a veto over amendments that affect its vital interests in the French language, the composition of the Supreme Court and the amendment procedure itself. 1183

In contrast, the constitutional provisions that establish the federal structure of Canada do not recognize indigenous governments. Nor do the formulas for amending that structure. The prospects for structural reforms that address indigenous concerns are dim. Indigenous authorities often appear to be residual, perhaps even vestigial, features of the official Canadian constitutional settlement.

Indigenous governments are at best junior partners in the constitutional project outlined in the Constitution Acts of 1867 and 1982. The historical role of indigenous peoples, captured in quasi-constitutional texts such as the Royal Proclamation of 1763, has largely been eclipsed by subsequent

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1179 Reference re Secession of Quebec, supra note 403 at ¶43.
1181 Constitution Act, 1982, supra note 471, s 16(1).
1182 Ibid s 38(1).
1183 Ibid ss 41(c), (d) and (3).
enactments and events. The formal division of powers does not sustain public debates about the proper place of indigenous peoples in Canada because, according to the legal instruments in question, that is not a live issue: they are subject to the authority of Parliament under s. 91(24). Despite ubiquitous rhetoric about “First Nations,” the federal structure established by the two preeminent foundational texts does not treat indigenous peoples as constituent nations of Canada, alongside anglophones and francophones. Nor does it treat indigenous governments as constituent units of Canada equal to those established by the Imperial Parliament upon the request of the Fathers of Confederation. Treaty rights, which are rare in British Columbia and only somewhat protected by s. 35(1), cannot compensate for these basic features.

But the division of powers cannot be fully assessed in isolation from other elements of the Canadian federal system. For example, whether federalism delivers the benefits intended also depends on the design of the subunits, in this case the provinces. Their number, size and shape influence the nature, extent and allocation of those benefits.

Federalism has long been thought to enhance democracy. The causal mechanism is unclear but the hypothesis is rarely challenged. Federalism brings government closer to the governed. It multiplies the number of political offices to fill, and thus the number of opportunities for political participation. These claims may seem obvious but they do not tell the whole story. They assume the existence of political communities coextensive with provincial boundaries, which would indeed enjoy greater control over their political affairs. However, as William Riker observed, this perspective favours those ostensible provincial communities at the expense of the national community. Federalism is not neutral: to assign certain matters to provincial governments may empower provincial majorities but also impairs the national majority that would otherwise make those decisions. This critique is less worrisome in Canada than in other federal systems, as Parliament retains general jurisdiction over matters of national concern.

In Canada, a parallel critique is more salient: the assignment of certain powers to the provincial governments thwarts minorities within each province. As indigenous people constitute a minority in each province, this argument is especially relevant for them. In British Columbia, the division of powers combines with the boundaries of the province to deprive indigenous communities of authority over matters traditionally within their jurisdiction, such as land use and education.

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British Columbia is a large province. When established in 1871, the majority of its subjects were indigenous. However, they were prohibited from voting in provincial elections until 1949. In the meantime, indigenous communities have shrunk or at best grown much more slowly than the settler population. Now, indigenous peoples constitute roughly 5% of the provincial population. They are unable to guide, let alone dictate, provincial policy through ordinary democratic politics. If the boundaries of the province had been drawn differently, and in particular to establish separate indigenous jurisdictions, indigenous people would enjoy far more influence.

For minorities within provinces, federalism may not pay the democratic dividend for which it is often valued. For example, federalism is thought capable of promoting the development and diffusion of optimal policies via experimentation, comparison and competition for tax and other revenues. Again, the merits of this belief depend on the details. Clearly, it requires substantial regulatory capacity and a high degree of corporate and individual mobility. In addition, it may be undermined by the shape of the subunits. As many scholars have noted, the impacts of environmental policies rarely coincide perfectly with the territorial jurisdiction of the governments responsible for those policies: polluted rivers can flow to other provinces; air pollution has little regard for borders on the ground. To the extent that provincial boundaries do not capture all negative and positive externalities of provincial policy, federalism may in practice yield suboptimal results.

At best, the evidence of a regulatory race to the top is mixed. For indigenous governments in British Columbia, such evidence simply does not exist. They have weak governments, minimal taxation powers and authority over few matters relevant to fickle individuals and organizations. Their members simply are not mobile in the manner required by this hypothesis. They can and do leave their traditional territories to pursue various opportunities, but they cannot simply take up residence within the territory of another indigenous community and expect to receive all the incidents of membership: one thing Indian Act bands do control is the right to occupy their reserves. At the same time, the uniform nature of provincial authority within its expansive boundaries encourages the BC government to develop policies that ignore the needs of its indigenous minorities: by design, it acts for the province as a whole.

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1188 Lutz, Makúk, supra note 1015 at 165 and 236.
1193 Indian Act, supra note 440, s 28; Joe v Findlay (1981), 122 DLR (3d) 377.
Further, some scholars believe federalism offers opportunities for individuals to sort themselves into like-minded communities and thus maximize aggregate satisfaction. Rather than optimal policies on specific issues, this voluntary segregation is supposed to yield policy bundles tailored to groups of individuals with similar preferences: to take crude examples, low taxes or high taxes, strong environmental protection or weak. Charles Tiebout introduced this influential argument in an article about municipalities.¹¹⁹⁴ It has since been adapted to federal systems despite the higher barriers to mobility between provinces than between towns.

Tiebout-sorting involves a number of problematic assumptions. It assumes individuals know their preferences with sufficient clarity to identify the policies that best promote them and with sufficient certainty to incur the cost of relocation. As that assumption rarely holds, this model has little practical utility. More concretely, Tiebout-sorting assumes informed, unmoored individuals who are able to move between jurisdictions with little harm to their economic prospects and, more importantly, to their sense of self. For Tiebout, relocation is an instrumental decision, not an existential one. However, many indigenous persons have constitutive connections with their communities and with their lands. The barriers to their mobility are not simply higher than those that confront the ersatz individuals that populate economic models: they are of a different nature altogether.

Finally, Tiebout-sorting assumes individuals initially live alongside others who do not share their priorities. Otherwise, federalism would not be necessary. But in this respect many indigenous persons are already sorted. Indigenous communities certainly endure their fair measure of conflict and dissent.¹¹⁹⁵ Yet members of those communities often share many basic commitments, which may include resolving disputes about the character and requirements of those commitments in a manner consistent with their common culture.¹¹⁹⁶ Many indigenous peoples simply do not need federalism, not even federalism tailored to the scope and scale of their communities, to form groups that have similar interests, commitments and identities. Their challenge is different: rather than form communities around governments, they must fashion governments that can serve by modern means the modern needs of their communities.

The federal structure of Canada does not deliver to indigenous peoples the benefits classically associated with federalism. It allocates all meaningful powers to the federal and provincial governments. It creates strong political incentives for them to ignore the distinct priorities of the diverse indigenous communities within their respective jurisdictions. It increases the cost and difficulty of developing a comprehensive approach to indigenous concerns by dividing authority over

¹¹⁹⁵ See e.g. Joe v Findlay, supra note 1193; Leonard v Gottfriedson (1980), 21 BCLR 326; Tsimshian Tribal Council v British Columbia Treaty Commission, supra note 1068; Gitxaala National Council, supra note 915.
¹¹⁹⁶ Grimer v Squamish First Nation, 2006 FC 1088 at ¶¶61-62, 68, 74 and 77-78.
Indians and their lands from authority over the subjects that pique indigenous peoples, such as education, health and most natural resources. In retrospect, s. 91(24) may have insulated them from venal provincial governments that sought to extinguish their rights in the early years of Confederation. However, this protection came at a steep cost: the ruinous paternalism of the Indian Act and the Department of Indian Affairs.

Most problematic for constitutionalism, the Canadian federal structure is fixed. Its basic texts establish two tiers of government and purport to divide all of the powers of government between them. The courts may adjust the margins of those powers but may not make any fundamental changes. Justice Williamson’s decision in Campbell gained no traction: it has not been followed by other courts and has had no lasting impact on the operation of Canadian federalism. The federal structure is too rigid to fulfill the ideal expressed by Binnie and Lebel JJ for a majority of the Supreme Court of Canada in Canadian Western Bank v Alberta: “the very functioning of Canada’s federal system must continually be reassessed in light of the fundamental values it was designed to serve.”

Federalism is one of the “fundamental and organizing principles” of the Canadian constitution. The objectives of Canadian federalism are clear: to reconcile unity with diversity, to promote democratic participation and to encourage cooperation among governments and legislatures. The values it serves must be inferred from those objectives, but they appear to include other basic constitutional principles, such as order, efficiency, democracy and respect for minorities.

Regardless, the federal structure of Canada is not open to reassessment or revision in light of the principles of mutual respect and reconciliation that purportedly define the relationship between indigenous peoples and the Crown. The Court has not confirmed whether these principles have entered the pantheon of fundamental constitutional principles. However, such veneration would not change the fact that the division of powers and the design of the provinces combine to limit the role of indigenous peoples in constitutional politics.

Despite these flaws, one significant advantage of federalism is the practice of judicial review. While it may not be a logical necessity for federal success, judicial review did emerge in federal states and is recognized as an element of good practice because it can provide a neutral and authoritative

1197 2007 SCC 22 at ¶23 [Canada Western Bank].
1198 Reference re Secession of Quebec, supra note 403 at ¶32.
1199 Canada Western Bank, supra note 1197 at ¶22.
arbiter of jurisdictional disputes. It also can bolster fundamental rights if courts are equipped with appropriate remedial powers. Canadian courts, with recourse to s. 91(24) and s. 35(1), have in recent years demonstrated greater capacity to regulate government conduct that harms indigenous peoples. They have shown an aptitude far greater than the other branches of government to disrupt harmful policies and encourage more productive approaches. The following section explores the role of the judiciary in the detail it deserves.

ii. The Separation of Powers

Canada does not have a clear separation of powers between the three stock branches of government: the legislature, the executive and the judiciary. Instead, it enjoys what is known as a Westminster system of government or responsible government. Canadians do not elect an executive separate from their representatives in Parliament and their respective provincial legislatures. Instead, the executive of each government, provincial or federal, is selected by the leader of the party (or coalition of parties) that enjoys the confidence of the legislature: the Premier and the Prime Minister, respectively. The executive is not independent from the legislature, as a government can fall upon the vote of a majority of legislators. The judiciary is relatively separate from the other branches of government. Judges are appointed by the federal government of the day but insulated from political influence by various measures. Indeed, the Court has recognized an unwritten constitutional principle of judicial independence that requires, among other things, independent compensation tribunals.

The presidential system employed in the United States of America entrenches an institutional bias in favour of limited government. The President, who must approve each act of Congress before it becomes law, answers to a national electorate rather than local constituencies. Unless both branches concur, no law can be passed. By contrast, in a system of responsible government, the checks on the executive are primarily political. However, these considerations do converge in minority governments, when the party that forms the government must earn the support of enough unaffiliated legislators to maintain a majority.

Despite these qualifications, the conceptual framework of legislative, executive and judiciary does illuminate the operation of government in Canada and British Columbia. It is familiar and it

1203 Peter Hogg, Canadian Constitutional Law, 5th ed (Scarborough, Ont: Carswell, 2010) (Looseleaf) at ss 9-1 and 9.5(e).
1204 Judicial Independence Reference, supra note 1174 at ¶¶83 and 147.
1205 Unger, Politics: Vol I, supra note 142 at xli.
facilitates comparison with arrangements in other states. Also, despite the absence of formal partitions, it largely corresponds with provincial and federal practice.

a. Legislature

In a system of responsible government, the legislature is perhaps first among equals. In the United Kingdom, this relationship is encapsulated by the formula of “Parliamentary sovereignty”: Parliament makes the law, so no other institution can bind it. This trope is perhaps less true now that the United Kingdom has joined the European Union and incorporated the European Convention of Human Rights into domestic law. The European Courts of Justice and Human Rights may qualify Parliamentary sovereignty, but the practical and theoretical ramifications of these commitments remain contested.\footnote{1206} In Canada, the situation is far more settled: the federal Parliament and the provincial legislatures are subject to judicial review. They must adhere to the division of powers, uphold the fundamental rights contained in the \textit{Charter of Rights and Freedoms} and sustain the principles that define the Canadian constitutional order. To the extent they falter, their enactments will be struck down, read down or otherwise denied effect by the courts. In Canada, as in the United Kingdom, the law is sovereign. However, in Canada, courts have the ultimate authority to say what the law is.

The Canadian Parliament is bicameral: both the elected House of Commons and the unelected Senate must pass a statute for it to become law. The BC legislature is unicameral, but they are otherwise identical in all material respects. For example, each enacts laws by majority vote. More importantly, Members of Parliament and members of the provincial legislative assembly represent discrete territorial ridings. They are chosen in accordance with the British, and now Canadian, tradition of “first-past-the-post” elections: voters cast a single ballot for a single candidate, and the candidate who receives the most votes wins even if she does not garner a majority of votes cast.

There are 79 seats in the BC legislature, 308 seats in the House of Commons and 108 in the Senate. None of them are reserved for representatives elected by indigenous people. However, to reserve seats is a common technique to promote indigenous political participation and to recognize the distinct status of indigenous peoples in modern democracies. For example, New Zealand reserves seven of the 122 seats in its Parliament for representatives of the Maori.\footnote{1207} India also


reserves seats in its lower chamber, the House of the People, both for the disadvantaged castes and for the indigenous groups listed in the schedule to its Constitution.\(^{1208}\)

These structural biases are compounded by the facts in British Columbia. Indigenous peoples compose a very small part of the provincial population. Two hundred and three First Nations and dozens of tribal councils are scattered around the province and, while many share cultural characteristics and practical concerns, they are by no means homogeneous. Given their differences, it is uncertain whether indigenous peoples would vote as a bloc if given the opportunity. However, territorial ridings and first-past-the-post votes ensure that opportunity will not arise. Indigenous persons are elected to Parliament and the BC legislature, but they are few and they campaign on a mainstream, not an indigenous, ticket.

The design of Parliament does not recognize indigenous peoples as a constituent element of the Canadian political community. Contrast Quebec. It is one of the four divisions of the Senate and, in recent years, its population has been slightly over-represented in the House of Commons.\(^{1209}\) Basic institutional structures that favour francophones depict Canada as a state shared by two nations defined by language. Indigenous peoples have no place in this picture, just as they have no permanent place in either house of Parliament.

The unicameral BC legislature reflects an even simpler vision of a province inhabited by a single, uniform political community. Its residents may differ in many respects, from race to religion, but those differences are irrelevant for constitutional purposes.

The status quo inhibits and perhaps even prevents sustained public debate about indigenous peoples and their place in Canada and British Columbia. Both legislatures fail to provide indigenous peoples a distinct voice in the most prominent political institutions. These arrangements do not acknowledge the sense, shared by many indigenous peoples, that they form distinct political communities within or entirely separate from the national or provincial community. They do not guarantee any measure of indigenous representation and thus do not ensure indigenous peoples any role in making most of the laws that affect their lives. Rather, indigenous political participation depends in large part on the whims of overwhelmingly non-indigenous politicians and the decisions of primarily non-indigenous Canadian judges. Exclusion and vulnerability do not favour constitutionalism.


In contrast, reserved seats for indigenous peoples would acknowledge that Canada is not defined exclusively by the anglophone-francophone divide. They would recognize the rift between indigenous peoples and settlers as a basic feature of Canadian society and politics: another axis of discord. They would express a commitment, not to healing that rift, but to dealing with it openly and honestly.

Although some features of the Canadian Constitution do recognize the unique status of indigenous people, that status is second-class. Section 91(24) is a colonial relic. It subjects Indians and their reserves to federal authority, which is checked only by the Crown’s flexible fiduciary relationship with indigenous peoples and the loose reins of s. 35(1) of the Constitution Act, 1982. Until these design defects are corrected, the legislatures in Ottawa and Victoria are unlikely to stoke constitutionalism throughout British Columbia. Aside from reserved seats, options for improvement include specialized committees that review each draft statute for compliance with the Crown’s obligations to indigenous people and that report their conclusions publicly. The requirement could be constitutional, statutory or simply a matter of legislative procedure. For example, the UK Parliament has created a committee to promote compliance with the Human Rights Act. Among other things, the Joint Committee on Human Rights reviews and reports on the human-rights implications of specific bills and government policies. Both the BC legislature and the federal Parliament have committees dedicated to aboriginal issues: the Select Standing Committee on Aboriginal Affairs and the Standing Committee on Aboriginal Affairs and Northern Development, respectively. However, these committees have a much lower profile than their UK counterpart. The BC committee has not published a report since 2001, notwithstanding the many provincial laws and policies that affect indigenous interests. The federal committee is more active, but most of its published reports concern technical questions of statutory language and do not attempt to illuminate the Crown’s constitutional duties. Neither makes meaningful contributions to public debate.

1210 Wewaykum, supra note 649 at ¶81.
1213 See e.g. Legislative Assembly of British Columbia, Committee Reports, online: Legislative Assembly of British Columbia <http://www.leg.bc.ca/cmt/5-8.htm>.
1214 See e.g. House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, 40th Parliament, 3rd Session, “Report 1 - Bill C-3, An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in Melior v. Canada [Registrar of Indian and Northern Affairs]”, online:
The reforms need not be radical. Indeed, given the blend of apathy and antipathy that characterizes mainstream Canadian opinion towards indigenous peoples, drastic change is as improbable as it is risky: backlash is a possibility, albeit one that should not be exaggerated. In such unfavourable circumstances, Hart and Jackson remain good guides. The most effective reforms are likely to be incremental and unconventional. Constitutional amendments may be the traditional ideal but, in contemporary British Columbia, statutes, regulations and even guidelines will have to suffice.

b. Executive

The provincial and federal executives share many defects with their respective legislatures. This should come as no surprise, as responsible governments are drawn primarily from those representative bodies and face few constitutional constraints on their structures and membership.

As a matter of law, the executive power in Canada remains vested in the Queen. In theory, that power is exercised in respect of Canada by the Governor General and in respect of British Columbia by the Lieutenant Governor. Those representatives of the Crown act in conjunction with or on the recommendation of the Executive Councils (i.e. the cabinets) of Canada and British Columbia, respectively. In practice, the Prime Minister wields the executive power of Canada and the Premier commands the executive power of British Columbia. He or she may organize the government into ministries as they see fit; no legislative authorization is required. They may also select the members of their cabinets at will. Their discretion is constrained only by politics and prudence. Prime Ministers generally strive for a competent cabinet characterized by regional and linguistic balance.

Neither the Canadian Constitution nor any provincial or federal statute mandates indigenous representation in government. Neither level of government has developed a habit or custom of appointing indigenous ministers. No Canadian or BC minister responsible for aboriginal matters has been indigenous.

Once again, the absence of any formal requirement or informal practice of indigenous representation in the executive indicates a failure to conceive of indigenous peoples as partners to Confederation. As cabinet organization and composition are driven by political strategy, that
absence also confirms the minimal political clout of indigenous peoples. That weakness, in turn, derives in part from the deficiencies of the legislatures described above. Unlike francophones in Quebec and even inhabitants of identifiable regions such as the Maritimes and the West, indigenous peoples lack the concentrated numbers to elect enough representatives to force governments to address their concerns.

Weak political influence also explains why solutions adopted in other divided societies, known generically as power-sharing agreements, are unlikely to be adopted to satisfy indigenous peoples in British Columbia or Canada. The literature on power-sharing agreements is extensive and contentious, but it need not be reviewed in detail for the current purpose.\textsuperscript{1218}

Power-sharing agreements are employed to defuse political tensions that threaten to ruin ordinary politics. In the most extreme circumstances, they are used to avoid civil conflict between ethnic groups trapped in a single state. These agreements can take many forms, from the classic consociationalism of Belgium\textsuperscript{1219}, to the complicated mathematical nominating formula employed in Northern Ireland\textsuperscript{1220} and the collegial approach adopted in Switzerland that aspires to ensure that the country’s regions and linguistic groups are “appropriately represented” in the Federal Council.\textsuperscript{1221} Such arrangements are increasingly common in countries outside Europe that struggle to recover from civil war.\textsuperscript{1222}

In each case, the competing constituent groups are guaranteed, among other things, some measure of participation in government. Power-sharing agreements not only recognize those groups as fundamental elements of the political community in question but also provide some formal opportunity for their concerns to be heard and perhaps even addressed. Unfortunately, such arrangements are neither cheap nor easy. In most cases, they are not entertained until a real threat of civil war or perennial political crisis emerges. Indigenous peoples in Canada generally do not exert such pressure, and the executives in British Columbia and Canada remain inert and unresponsive:

\textsuperscript{1218} See e.g. the materials cited at supra note 128.
they hinder constitutionalism by excluding individuals that could challenge prevailing assumptions about these institutions, their conduct and the composition of the communities they represent.

c. Judiciary

The judiciary is the final branch of government in the traditional separation of powers. In the late 18th century, Alexander Hamilton labeled it the least dangerous branch because courts depend on the legislature and the executive to implement and enforce their judgments: the judiciary has “neither FORCE nor WILL but merely judgment.” He sought to allay nascent American anxieties about judges who substitute their own preferences for the will of the people. He argued that, when judges declare a law void as contrary to the constitution, they do not subvert the will of the people but rather uphold a more fundamental expression of that will.

Nearly 200 years later, another eminent Alexander confronted the same concern couched in more modern language: how to reconcile the “deviant institution” of judicial review with democracy. In his influential academic response to the ambitious Warren Court, Alexander Bickel echoed Hamilton by arguing that courts do not override elected representatives so much as uphold lasting values. He invoked relative institutional competence: each branch of government should do what it does best, and the judiciary excels at identifying and sustaining those principles that define a community.

The perennial, and perennially exaggerated, American fear of judicial review is premised on the belief that the will of the American people is the source of political legitimacy and the further belief that the Constitution and the laws adopted pursuant to it are the best expression of that will. Both Bickel and Hamilton accepted that premise, and both responded by assigning judges a passive constitutional role. Bickel celebrated the virtues of restraint: judges best serve the Constitution and its democracy by avoiding constitutional issues when possible. However, he also counseled judges to take bold action when confronted with matters clearly within their grasp: “principle, called constitutional law, is in the Court’s charge, and the other institutions are expected to defer to the Court with respect to it.” For his part, Hamilton reassured his readers that judges simply pronounce the meaning of laws “and can take no active resolution whatever.”

1223 The Federalist Papers, supra note 1142 at 78 at 437.
1224 Ibid at 438-39.
1225 Bickel, The Least Dangerous Branch, supra note 228 at 18.
1226 Ibid at 58.
1227 Ibid at 27 and 95.
1229 Bickel, The Least Dangerous Branch, supra note 228 at 261.
1230 The Federalist Papers, supra note 1142 at 438.
This belief in popular sovereignty and the attendant conservative judicial role are based upon yet another belief: that the “American people” exists and is capable of possessing and expressing a will. Hamilton and his fellow Federalists wrote in the wake of the Revolutionary War and with the intent to influence the New York State ratification convention. During that shining constitutional moment, he could refer unabashedly to “the people,” their power and their intention.1231 Bickel wrote after the Civil War, the Lochner Era, the New Deal and in the midst of the civil rights movement, yet he still claimed that the “moral unity” of the American Republic “makes possible a society that accepts its principles from on high.”1232 Of course, he was referring to the pinnacle of the secular bench, not the mythic pantheon or the hallowed mount.

These beliefs, contentions and conclusions are not uniquely American but they are exceptional. In many states, from India to Spain, ethnic conflict presents a serious test for national unity. In others, such as Bosnia-Herzegovina and Somalia, ethnic conflict is so ingrained that calls for national unity are rarely heard above the din. Courts play a different role in states troubled by ethnic strife, whether they are described as divided, multinational or plurinational.1233 In such states, the constitution is not a neutral framework for resolving political contests but a deeply contested political arrangement amenable to review, revision and even rejection. It may involve principles, but those principles are not delivered from above. They must be tested and accepted, if only provisionally, by the constituent groups and their institutions.

The outcome of democratic elections and the laws enacted by elected governments are not necessarily considered legitimate by all components of a divided society. Aggrieved groups may reject not one election, one law or one constitutional provision but the entire constitutional settlement and all of its incidents. This complaint may not stop them from working together when it is in their interest, but cooperation without more should not be interpreted as submission or acceptance.

In such conditions, courts cannot sensibly be described as upholding the national will as expressed in authoritative legal texts. No such will can be said to exist because the very existence of the nation is contested. In addition to applying relatively uncontroversial elements of the law, courts in divided societies are charged with mediating disputes between the dueling nations trapped in the same state. This task may include creating the legal conditions for them to resolve existential questions somewhere between the courtroom and the battlefield. It may involve avoiding, obscuring and deferring such questions until they fade away: in other words, until they are answered by

1231 Ibid at 438-39.
1232 Bickel, The Least Dangerous Branch, supra note 228 at 30.
someone else. Courts in divided societies need to be strategic. They must be capable of activism as well as restraint, and they must know when each stance is appropriate.

The Canadian legal system reflects these imperatives because it was designed in part to manage the tensions between English- and French-speaking colonists. For example, the Constitution Act, 1867 neither establishes nor requires the establishment of a court supreme over all others and lord over all laws in Canada. Instead, it authorizes Parliament to provide for “a General Court of Appeal for Canada.”1234 Parliament first exercised this authority in 1875, when it created the Supreme Court of Canada.1235 Initially a statutory court subordinate to the Judicial Committee of the Privy Council, it has effectively been entrenched in the Canadian Constitution by ss. 41(d) and 42(1)(d) of the Constitution Act, 1982, which specify the procedures for constitutional amendments that affect the Court.

Although it had no original institutional bias in favour of uniformity, the Canadian judiciary is now unitary: the Supreme Court of Canada has jurisdiction to review all provincial and federal courts and to interpret definitively all laws of Canada.1236 By contrast, the Supreme Court of the United States, which was established by Article III of the American Constitution, can scrutinize state laws for compliance with the federal constitution but cannot review interpretations of those laws by state courts except in very limited circumstances (e.g. where the application of federal law depends on those interpretations).1237 Even in such rare conditions, the Supreme Court of the United States often defers and the highest court in each state remains the ultimate authority on its otherwise valid laws.1238

Perhaps not as federalist as it could be, the Canadian judicial system nonetheless respects provincial autonomy. In particular, it favours the special status of Quebec within Canada. First, as a colony acquired by conquest in 1763, British policy allowed Quebec to retain the distinct legal system it received from its French founders.1239 To this day, the civil law applies in Quebec while the common law reigns in the rest of Canada. The Crown extended no such privilege to indigenous people in British Columbia, who were never conquered and most of whom have yet to treat with the Crown. Canadian courts do sometimes find indigenous laws as facts with the help of elders and anthropologists, just as they find foreign laws with the assistance of expert witnesses.1240 However,

1234 Constitution Act, 1867, supra note 447, s 101.
1235 Hogg, Canadian Constitutional Law, supra note 1203 at s 8.1; Supreme and Exchequer Courts Act, 1875, SC 1875, c 11.
1237 Erie R Co v Tompkins, 304 US 64 (1938).
1240 See e.g. Casimel v Insurance Corp. of British Columbia (1994), 106 DLR (4th) 720; [1994] 2 CNLR 22 at ¶¶13, 42 and 52.
notwithstanding reminders from dedicated scholars, advocates and judges that indigenous law is actually law and not just evidence, it remains marginalized even in constitutional disputes. Judges generally do not treat indigenous law as equivalent to the civil law or the common law: a third Canadian legal tradition on which judges can draw and to which they might even contribute.\footnote{1241}{See e.g. John Borrows, \textit{Canada's Indigenous Constitution}, supra note 677; Marshall and Bernard, supra note 423 at ¶130 (LeBel J).}

Second, as a province, Quebec is responsible for the administration of justice within its boundaries.\footnote{1242}{\textit{Constitution Act, 1867}, supra note 447, s 92(14).} It has established a hierarchy of courts to apply the civil law. No province was designed to accommodate indigenous people as Quebec was created for francophones. Given the cultural diversity and geographic distribution of indigenous people, it is unlikely any such province could have been designed. British Columbia, with its colonial origins and dominant settler population, certainly does not qualify.

Third, the \textit{Supreme Court Act} reserves three of nine seats on the Supreme Court of Canada for jurists from Quebec.\footnote{1243}{\textit{Supreme Court Act}, RSC 1985, c S-26, s 6.} As a matter of convention, the federal government also appoints three judges from Ontario, two from “the West” and one from Atlantic Canada.\footnote{1244}{The Supreme Court Act, RSC 1985, c S-26, s 6.} Not one seat is reserved, by statute or custom, for a lawyer trained in indigenous laws.\footnote{1245}{Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty Year Commitment, supra note 543 at 129.} A seat on the bench of any court is not just a matter of influence: it is a matter of recognition and respect. Like the other two branches of government, Canada’s judicial system reinforces the popular conception of Canada as a state divided between two linguistic groups. It also relegates the rift between indigenous peoples and settlers to law schools and libraries.

Nonetheless, the judiciary remains the branch of government most responsive to indigenous concerns. The legislatures and executives may act on particular complaints, but typically only after the courts have ordered them to do so. In the courtroom, the demographic disadvantage indigenous people suffer is less relevant. The formal equality provided by legal procedure mitigates the substantive inequality that otherwise defines their relationship with the Crown. This gap is narrowed further by the availability of legal costs and the emergence of a sophisticated aboriginal bar. The practical effects of court victories often disappoint, but indigenous peoples can employ the leverage of the law to advance their interests indirectly: by changing the terms of constitutional debates from political compromise to principled undertaking.

Courts are insulated, albeit imperfectly, from political pressures. They are often criticized for this isolation, but what may be perceived as a democratic vice can be a constitutional virtue.\footnote{1246}{See e.g. Bellamy, \textit{Political Constitutionalism}, supra note 87 at 38, 47, 166, 243 and 260.}
American realists long ago (and von Jhering even longer ago) saw that judges are people too. They saw that judges are people too. However, we cannot forget that they are people who judge and they must judge in accordance with the law. The method matters. Absent a democratic pedigree, judges must act like judges to retain their legitimacy. They must give legal reasons, not personal or political rationalizations, for their decisions. They are charged with connecting practice with principle and with doing so in a manner subject to public scrutiny and open to political response. In divided societies, their task is even more complicated: judges must use legal principles to weld controversial compromises into a coherent constitutional project that earns the support of skeptical, even hostile, groups.

Judges give reasons. In contrast, voters express preferences when they cast ballots, just as consumers do when they purchase services. Preferences are personal. Absent reflection, they affirm the will of the persons who express them. Upon reflection, they also affirm the value of individual autonomy, but upon reflection we are no longer dealing with preferences. By contrast, reasons assume some measure of consensus about what is important. They also assume consensus is important: otherwise, they would be superfluous. That consensus need not be perfect, so long as the persons who exchange reasons can continue to exchange reasons. Reasons permit us to ask and answer “why?” They allow us to justify our actions.

When judges give legal reasons, they draw upon a common reserve of legal principles. They also replenish that reserve, in part by demonstrating the importance of invoking such principles and in part by expounding particular principles in new contexts. Judges do not have a monopoly on legal principles. Other individuals and institutions, such as administrative tribunals, can consider and invoke them, albeit with different degrees of authority and influence.

The structure of the Canadian judicial system maintains the status quo, and most notoriously the myth of a Canada split between anglophones and francophones. However, the conduct of judges and persons who expect to deal with judges confirms that deliberate and principled institutional change is possible.

B. The Four Procedures

The division of powers, the separation of powers and their respective defects are firmly entrenched in the Canadian Constitution. The parties to the constitutional quandary in British

1248 Bickel, The Least Dangerous Branch, supra note 228 at 58 and 95.
1249 Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 274.
Columbia have not addressed this predicament by surveying a new province or proposing another package of unrealistic constitutional amendments. Instead, as noted above, they have developed four distinct procedural responses short of an ill-fated constitutional conference: litigation, negotiation, consultation and collaboration. These procedures and their respective merits were discussed in Chapter Two. This section emphasizes their flaws because their flaws are the problem for constitutionalism.

i. Litigation

When indigenous people and the Crown litigate, they seek a legal solution to a legal dispute. Their search takes place in court and requires a judge to make a legal decision: one buttressed by legal reasons, which apply laws that embody basic legal principles. The parties may use litigation tactically to extract concessions at the bargaining table. But when they abandon an instrumental approach and actually litigate, they undertake the principled endeavour described above: to extend the principles of law by arguing about what those principles are and what they require of their adherents in a particular dispute.

The structure of litigation holds promise for constitutionalism. It offers formal equality to the parties, which not only extends a measure of respect to indigenous peoples and their claims but also offers a practical advantage for groups that lack the numbers and resources to obtain political favour. Litigation is flexible. It comes in many forms and presents various opportunities to participate, from opting into a class action suit to intervening in a case before the Supreme Court of Canada. Litigants can choose among procedural, substantive and remedial options that present different risks and rewards. Nonetheless, each procedure, from an injunction application to a full civil trial, provides a chance to contest what the law requires.

Litigation is also transparent. Hearings are generally public, judgments are reported and most orders can be appealed. Arguments and reasons contribute to the rule of law by allowing those who subscribe to the law to be held accountable to it.

Finally, litigation is dynamic. It mutates when judgments permit innovations in the practice of law that change the types of claims brought to court, as in 2004 when the BC Supreme Court bucked decades of precedent and found that courts can enjoin the Crown from breaching the Constitution and the aboriginal rights it protects.1250 It changes when judges award unprecedented remedies or write ambitious obiter that inspire novel claims and applications.1251 It also influences conduct outside the courtroom, as judgments that may change the law disrupt expectations and push interested parties to innovate and adapt. Reasons, especially ambiguous reasons, cast unpredictable

1250 Supra note 409.
1251 See e.g. Delgamuukw SCC, supra note 412.
ripples: it took the Nisga’a Nation 27 years to get from the Court’s split decision in *Calder* to the Nisga’a Treaty. In the meantime, litigation inspired by *Calder* prompted the development of the Treaty Process, and when the promise of negotiation soured the parties turned swiftly and decisively to consultation. In turn, each of these adaptations has led participants back to the courtroom, where another cycle begins.\(^{1252}\)

Of course, irony lurks as this dynamism depends on a stable body of principles. These principles are maintained by legal reasons that link one case with another by abstracting from each the relevant features. This abstraction is made possible by the very principles it sustains because lawyers and judges use those principles to identify and define the disputes that culminate in fecund legal reasons.\(^ {1253}\) This practice does not refine the law; it renews the law.

Unfortunately, disturbing trends in practice have frustrated the promise of litigation. First, litigants and judges have in recent years shifted their focus from substantive rights to procedural rights.\(^ {1254}\) For litigants, disputes about procedure are quicker, cheaper and less risky: a petition for judicial review of a ministry’s decision-making process is much simpler than a civil claim seeking a declaration of aboriginal title. The former requires less historical research, preparation and time in court. It also yields a more limited remedy, but many indigenous people are willing to accept that trade, since a loss would not shred their identities and sink their aspirations.

For judges, procedural rights are generally less controversial than substantive rights, especially when those substantive rights are aboriginal rights unfamiliar and unavailable to the rest of the population. If judges can exercise their “passive virtues” and decide a case on procedural grounds, they can avoid sensitive matters and perhaps reduce the risk of backlash from settlers who resent what they view as preferential treatment. In the era of consultation, the reluctance to decide such issues is palpable. Even when judges find the Crown has breached its duty to consult when deciding whether to issue a permit or licence, they frequently decline to quash the tainted authorization. Rather, in the name of reconciliation, they allow the decision to stand and order more consultation. An optimist might argue this approach strengthens the constitutional project by encouraging indigenous peoples and the Crown to determine what constitutional principles require in

\(^{1252}\) For challenges to the Nisga’a Treaty, see e.g. *Chief Mtn v HMTQ*, supra note 413; *Sga’nisim Sim’augit v Canada (Attorney General)*, 2005 BCSC 1928; *House of Sga’nisim v Canada (Attorney General)*, 2006 BCCA 155; *House of Sga’nisim v Canada (Attorney General)*, 2007 BCCA 483. For challenges to the Treaty Process and the agreements it has produced, see e.g. *Campbell v British Columbia (AG)*, supra note 590; *Ke-Kin-Is-Uks v British Columbia (AG)*, supra note 595; *Bob v R*, supra note 596; *Chief Allan Apassin v Attorney General (Canada)*, supra note 722; *Tseshaht First Nation*, supra note 413; *Cook v The Minister of Aboriginal Relations and Reconciliation*, supra note 722; *Tsimsian Tribal Council v British Columbia Treaty Commission*, supra note 1068; *Gitxaala National Council*, supra note 915.

\(^{1253}\) Geertz, *Local Knowledge*, supra note 47 at 173-175 and 230.

their specific circumstances. However, the consultations that follow such orders often disappoint and result in more litigation rather than a principled bargain.1255

In British Columbia, when courts decline to make bold decisions and award substantive remedies, they squander an opportunity to upset stale expectations and jostle unproductive negotiations, to stall. They also compound the symbolic value of litigation. Prim reasons that interest only high priests of the law replace ringing declarations of principle accessible to all. Such declarations would not only destabilize archaic institutions, they would also provide meaningful guidance to the parties who must fashion a new arrangement.1256 However, courts too often simply intone “reconciliation”: a most modern and inscrutable mantra.

Indeed, this tendency exemplifies the second problem with the practice of litigation today: the benefits of the common law method have been obscured by rhetoric. To connect one case with the next, judges abstract from each to factors made relevant by rules that express basic legal principles. They posit, implicitly or explicitly, a community that embodies those principles and they maintain that community by explaining what those principles require.1257 However, the concept judges invoke most often in constitutional disputes involving indigenous peoples is reconciliation. As previously noted, the Court has not decided whether reconciliation is a process or an outcome, let alone what it entails or how to recognize it. Similarly, judges regularly summon “the honour of the Crown” but struggle to illuminate its origins or its implications. If the honour of the Crown simply requires the Crown to fulfill its legal obligations, then it is unclear what the concept contributes.

When our basic commitments are ambiguous, we cannot know how to uphold them. We cannot be certain they are truly commitments, since we cannot be certain what, if anything, they require of us. Instead, we are consigned to muddled rhetoric, crude balancing tests and unhelpful exhortations to do the right thing. Such decisions are arbitrary and unproductive: they inhibit efforts to elaborate those commitments, whether in subsequent cases or deals struck outside the courtroom.

Despite these flaws, litigation remains the primary catalyst for constitutional innovation in British Columbia. Alone among the four responses, litigation culminates in a judgment rather than an agreement. Right prevails, not consensus. Prevailing assumptions and established practices must yield to principle. Judgments can shock litigants and spectators alike and provoke them to explore

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1255 See e.g. the two series of cases that were considered in Chapter Two, at text accompanying notes 804-08, supra. First, Hupacasath First Nation v British Columbia, supra note 656 and Ke-Kin-Is-Ups v British Columbia (Minister of Forests), supra note 775. Second, Gitxsan Houses, supra note 611; Gitanyow First Nation v British Columbia, supra note 617; Willitswax #1, supra note 412; Willitswax #2, supra note 412.


new possibilities. In contrast, negotiated agreements are intended to comfort the parties. To exploit this comparative advantage, courts must embrace it. They should act strategically. They should anticipate resistance to ambitious decisions but they should not always accommodate it by diluting their reasons and moderating their remedies. They should become more comfortable making grand statements and supporting those statements with equally grand remedies. They should improve their sense of when to be active and when to exercise restraint. They should expect rebuke, but they should no longer defer to the other branches of government on aboriginal matters because the Crown has failed to appreciate the nature and extent of the constitutional challenges in British Columbia.

Alexander Hamilton underestimated judgment. In communities acculturated to judicial review and wedded to the rule of law, legal reasons play a central role in constitutional debates because citizens and officials understand their association in terms of the law and the values it expresses.1258 Politics, especially constitutional politics, are not merely about power and will.

ii. Negotiation

One way in which the Crown has responded to the constitutional malady in British Columbia is by subscribing to the BC Treaty Process. However, that process has proven deeply flawed and its Principals have proven unable to fix it.

When indigenous peoples and the Crown negotiate treaties, they seek comprehensive and permanent settlements that address grievances, reduce inequalities and establish viable indigenous governments. Treaties transfer former Crown lands and allocate specific powers to new indigenous governments. Those governments are established by new constitutions ratified by the members of the indigenous community. They are built to last.

Treaties do not render lawsuits obsolete. Rather, they shift the focus of legal disputes from unwritten aboriginal rights to the written treaty provisions that replace those rights.1259 A treaty is a political compromise expressed in a legal document subject to dispute, vulnerable to justified infringement by the Crown and amenable to judicial interpretation in accordance with legal principles.

Treaties could have a profound impact on British Columbia. In Campbell, Williamson J suggested they could enshrine a third tier of government in the province, which would transform Canadian federalism. They could transfer more resources and powers to indigenous peoples than at

1258 Habermas, The Postnational Constellation, supra note 17; Michelman, Brennan and Democracy, supra note 39.
any time since Confederation. They could finally herald a new relationship between indigenous peoples and settlers.

However, two structural flaws have corrupted this promise. First, the BC Treaty Process is sclerotic. Adapted in the early 1990s from the prevailing federal framework by a non-partisan task force, it has proven unfit for the number and complexity of the claims filed in British Columbia. Indeed, it has been overwhelmed from the outset. The Treaty Commission has appealed for more money and political support ever since.

The talks are tripartite, long and difficult. In 2010, 60 First Nations sat at 48 treaty tables scattered throughout British Columbia. Each treaty table must pass through all six stages. In just a few years, the parties must do what has taken the commonwealth countries centuries: design a government that fits the existing scheme of authority, sustains the culture of the people governed, solves real problems and proves both stable and legitimate.

The Process suffers a severe bottleneck at Stage Four: the point where substance overtakes procedure. Whereas Stage Three requires but a brief framework agreement that simply lists the matters the parties hope to resolve, Stage Four demands a detailed agreement-in-principle that actually does address each of those matters. Most First Nations that enter Stage Four encounter significant delays and incur substantial expenses without making meaningful progress. Neither they nor the Crown possess the resources to craft solutions and build consensus quickly. For years, roughly 70% of the First Nations enrolled in the Process have stewed in Stage Four. Recently, British Columbia and Canada have tried and failed to break this impasse by candidly cultivating a vanguard among the stalled tables.

The Treaty Process has produced only two treaties in 18 years, and none since the Crown adopted this misguided tactic. The premise behind the Crown’s aggressive approach is wrong: the bottleneck is due to the faulty structure of the Treaty Process, not the weak political will of participating First Nations. The Crown cannot fix a broken structure by applying more pressure to the First Nations trapped within it. More pressure will only harm the process further, as many indigenous alliances have crumbled under the stress of negotiations: the Sto:lo Nation, the Tsimshian Tribal Council, the Winalagalis Treaty Group, the Hamatla Treaty Society and others have each lost member nations to attrition or disillusion.

The second structural flaw of the Treaty Process is that the politics of treaty negotiations are asymmetrical. British Columbia and Canada have strong incentives to favour standardized treaties; First Nations do not. The former must negotiate a separate treaty at every table; each First Nation negotiates just one of those deals. For reasons of both strategy and efficiency, the provincial and federal governments would prefer that each table accept similar terms or at least start from the same template: the fear of setting an unfavourable precedent can harden their bargaining positions.
 Whereas the members of each participating First Nation care deeply about the terms of their treaty, non-indigenous BC residents generally do not. For them, the question is not whether a particular treaty provision is acceptable but whether any treaties are acceptable and, if so, on what terms they should be negotiated: whether the treaty process itself is legitimate.

When the process was launched in the early 1990s, these questions appeared to have been answered. After a tumultuous decade of blockades and injunctions, popular support for a political resolution to “the Indian question” was strong. In 1998, the Nisga’a Agreement was signed and in 2000 it took effect. By 2002, popular misconceptions about that agreement and the Treaty Process had eclipsed memories of the turbulent 1980s, and treaties were controversial once again. That year, in the infamous referendum, a small but resolute group of voters approved the eight questionable principles to guide negotiations. Armed with a clear, if constitutionally suspect, mandate, provincial negotiators returned to the tables and the treaty process receded from public view. For non-indigenous voters, the political questions had been answered. Negotiation became the technical exercise of implementing that mandate: an exercise that requires minimal public monitoring and indirect ratification of the results via provincial elections.

Crown policies have reinforced both structural flaws. For example, it long squeezed the bottleneck at Stage Four by creating financial incentives for First Nations to fear Stage Five. First Nations depend on government loans and grants to finance their negotiations. Canada sets the terms of those loans and, until relatively recently, only those loans incurred in Stage Five bore interest. As a result, to enter that penultimate stage would have increased not only the cost of treaty talks for First Nations but also the bargaining power of the Crown, which serve simultaneously as their counterpart and their creditor.

Similarly, the Crown has reinforced the technical character of negotiations by eliminating financial support for the committees that allowed municipalities and important social and economic sectors to monitor and contribute to the talks. Although they are expected to consult “nonaboriginal interests,” they have yet to introduce adequate replacements. The demise of the original committees in the early 2000s further divorced treaty talks from ordinary politics and left them to Crown officials and their lawyers.

Finally, the arrangement between British Columbia and Canada to apportion the costs of each treaty has frustrated bargains and blunted the political impact of negotiations by insulating most residents from treaty talks. The provincial government holds title to nearly the entire province, and all things equal would prefer to make its contributions to treaty settlements in the form of land rather

1261 BC Treaty Commission Agreement, supra note 491 at s 7.1(f)(iii)(B).
than cash. Under the Cost-Sharing Memorandum, the more land it transfers in aggregate to all settlements (and the more valuable that land is), the less cash it must pay, down to a floor of 10%. By design, Canada has the opposite incentives. The tension is most acute in urban areas, where Crown lands are scarce and expensive. Due in part to this conflict, treaties with First Nations that claim urban lands are not forthcoming. Cities are also where the vast majority of settlers lives, so most non-indigenous persons in British Columbia are not directly affected by the few tables that may succeed. Since they have so little at stake, they have little reason to remain engaged.

The appeal of treaties has been undone by the treaty process. It defers too much until the late stages. It puts too little pressure on the Crown. It will produce too few treaties, and those treaties will be concentrated in rural areas. Without significant adjustments, it will not induce constitutionalism because it does not trouble settlers’ interests and assumptions: it does not challenge them to view themselves as settlers and accept or reject responsibility for their conduct.

iii. Consultation

Consultation addresses some of these flaws but not others. It is faster and more flexible than negotiation, but it is also very technical and remote from most daily life. When indigenous peoples and the Crown consult, they seek to discharge their respective legal obligations to preserve indigenous interests pending a final settlement between them. The Crown has a constitutional duty to consult when it contemplates conduct that might infringe an asserted or established aboriginal right. Under Canadian law, indigenous peoples have a curious corresponding duty to abet Crown efforts. They also have an understandable desire to influence the use of their traditional lands.

Consultation can proceed under Crown policy. The federal Department of Fisheries and Oceans, for example, often prefers to hold large stakeholder meetings to hear from all indigenous peoples in an area at once. More commonly, consultation takes place under an agreement between an indigenous people and one or more provincial ministries: forests, energy, wildlife and so on. Although these agreements must be tailored to the needs of each indigenous signatory, the parties often work from a template.

In practice, many consultation agreements are very similar. They address two primary concerns: control and revenue. Indigenous peoples want to protect their territories from unnecessary harm. To that end, consultation agreements often establish notification procedures and communication protocols that allow the indigenous parties to convey their concerns about pending applications, decisions and regulations to the relevant officials. They do not, however, impose

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1262 British Columbia and Canada, Memorandum of Understanding on Sharing Treaty Costs, supra note 505, Annex A.
1263 Ahousaht v Minister of Fisheries and Oceans, 2007 FC 567 at ¶¶52, 59 and 66; Tommy, supra note 474 at ¶34.
indigenous control of government conduct: even in the most egregious circumstances, the Crown’s
duty to consult does not entail an indigenous veto.\textsuperscript{1264}

Indigenous peoples also want to benefit from any industrial development and resource
extraction that does occur on their lands. To this end, some consultation agreements allocate
indigenous parties a small share of government revenues from those activities. Early agreements
calculated that share by reference not to government revenues but to the population of the relevant
indigenous community. The courts criticized this approach for subverting the purpose of
consultation: it bears no relation to the impact of the impugned government conduct.\textsuperscript{1265} More
recent agreements use more complex formulas based on the amounts actually collected by the
province.\textsuperscript{1266}

Consultation agreements are typically bilateral accords between an indigenous authority and
the Crown represented by one or more ministers. However, some indigenous groups have chosen to
form alliances with their neighbours.\textsuperscript{1267} A consultation agreement with the Crown offers an
opportunity to reinvigorate traditional relationships and perhaps form new ones. It also happens to
concentrate the bargaining power of groups like the Stk’emlupsemc of the Secwepemc Nation in the
southern interior and the Treaty 8 First Nations in the northeast.

Treaty negotiations have split similar alliances. However, consultation costs less, involves
fewer risks and offers more immediate benefits. Unlike treaties, consultation agreements are
temporary: most have a term of around five years. As befits a short-term solution, they do not
replace or otherwise affect aboriginal rights. Good results, even incremental improvements in
communication and revenues, may reinforce the relationships asserted in such consultation
agreements. They may enable the parties to explore new constellations of interests and identities,
whether among indigenous peoples or with the Crown. Of course, poor results may have a similar
effect for the opposite reason: disappointment may drive the parties to abandon established ties and
seek affiliations with more immediate returns.

According to the courts, the purpose of consultation is to promote reconciliation by
preserving aboriginal rights and interests pending a final settlement with the Crown.\textsuperscript{1268} In practice,
consultation is about sharing information and resources. It is not a prelude or complement to
negotiations: it is a substitute. It allows participants to cobble a piecemeal alternative to

\textsuperscript{1264} Haida Nation SCC, supra note 417 at ¶48.
\textsuperscript{1265} Compare e.g. Huna-ay-atv British Columbia, supra note 420 at ¶126 and Gitanyow First Nation v British Columbia, 
supra note 617 at ¶57.
\textsuperscript{1266} Chehalis (St’s’ailes) Indian Band Forest and Range Consultation and Revenue Sharing Agreement, supra note 945 at Appendix C.
\textsuperscript{1267} See e.g. BC-Treaty 8 Nations, Amended Economic Benefits Agreement, supra note 862, and Stk’emlupsemc EHDA, supra note 948.
\textsuperscript{1268} Haida Nation SCC, supra note 417 at ¶38; Carrier Sekani Tribal Council, supra note 408 at ¶¶32 and 48.
comprehensive treaties. Like litigation, consultation is flexible and dynamic. The province learns
from past experience and revises its policies; indigenous groups learn from one another and adapt
their strategies; both sides learn from the courts, as the duty to consult has proven quite
controversial. Also like litigation, consultation is transparent. The province posts many of its
agreements online and they are drafted (and challenged in court) by a relatively small network of
lawyers and other professionals.

However, like the other responses, consultation suffers some flaws. Each consultation
agreement is limited by geography and subject matter: for example, the McLeod Lake Indian Band
Economic and Community Development Agreement concerns only a single mine in the center of the
province. Consultation is necessarily targeted because it is intended to address the impact of
particular government conduct on specific indigenous peoples: each agreement affects only a
relatively small population in a small, often remote, territory. Further, consultation is an extremely
technical undertaking. It deals almost exclusively with resource extraction activities. Participants
must master the details of harvesting fish, logs, oil and other materials as well as the intricacies of
regulating those industries. At the same time, each agreement must accommodate an indigenous
perspective on land, rights and government. When the interested ministries often struggle to make
sense of their obligations; lay citizens have little hope.

Consultation seems unlikely to galvanize a popular debate about the demands of
constitutional principle. However, it is much more dynamic than treaty negotiations so it cannot be
dismissed entirely. Both the practice and the doctrine of consultation evolve regularly and rapidly.
In late 2010, the Court indicated the duty to consult could require the Crown not only to revisit
impugned regulatory decisions but also to restructure the departments that made them. The
Court also reminded litigants that some breaches of the duty to consult could result in an award of
damages. The spectre of more rigorous judicial review and especially the risk of financial
consequences may attract more scrutiny and engagement from settlers. Whether that engagement
proves hostile or constructive will depend on how well public officials and the press explain the
doctrine.

In abstract, consultation still promises to transform aboriginal rights from regulatory
entitlements into the basis for a new and more conciliatory political process within the Canadian
Constitution. It exemplifies post-conflict constitutionalism, in which participants cannot and do not
insist on the classical constitutional form. Instead, they accept assorted policies, frameworks and

1260 McLeod Lake ECDA, supra note 948.
1270 Carrier Sekani Tribal Council, supra note 408 at ¶43-44 and 47.
1271 Ibid at ¶49.
agreements because a single authoritative document is beyond reach. Consultation forms one part of that constitutional mosaic in British Columbia.

iv. Collaboration

The implications of collaboration remain uncertain. It entails a measure of indigenous autonomy unparalleled in British Columbia. It may provide an essential element of a new constitutional settlement, or it may pose a serious threat to the entire project. When indigenous peoples and the Crown collaborate, they seek an agreement that accommodates their divergent interests as well as their incompatible ideas about identity, sovereignty and the Canadian Constitution. To the Crown, Canada encompasses its aboriginal peoples and British Columbia includes its First Nations. But indigenous peoples committed to collaboration insist they stand alongside the Crown as partners in a new constitutional order.

Like consultation agreements, collaboration agreements allocate government revenues from natural resources taken from the traditional territories of indigenous peoples. Unlike consultation agreements, they also give indigenous parties an active management role in their territories. They are agreements to work together on matters of common concern. They do not prioritize the duty to consult: a doctrine introduced to justify under Canadian law the imposition of Crown sovereignty without indigenous consent. In some cases, they do not mention it at all, while in others they acknowledge it almost casually. Instead, collaboration agreements emphasize the containment and management of disputes between indigenous peoples and the Crown. Only rarely do they contain a choice of law clause which could confirm whether the indigenous parties submit to Canadian authority. Indeed, collaboration agreements strongly suggest the opposite because their preambles often include parallel assertions of title, jurisdiction and sovereignty by the Crown and the indigenous signatories.

Collaboration agreements are becoming more common but remain less familiar than consultation agreements. They are bilateral: British Columbia has signed nearly all of them on behalf of the Crown; Canada very few. Not many indigenous groups have the inclination or the influence to extract an agreement from British Columbia that questions the legitimacy of Crown rule. The Haida Nation, whose claim to its famous island homeland of Haida Gwaii is free from the competing claims of other indigenous groups, is the primary example and proponent of collaboration. Other prominent groups, including the Coastal First Nations, have incorporated elements of collaboration into their land-use agreements and reconciliation protocols with the provincial government.1273

1272 Text accompanying notes 1071-73, supra.
1273 See e.g. BC-Coastal First Nations, Reconciliation Protocol, supra note 879.
Indeed, many of the collaboration agreements struck since 2009 show some elements of consultation.\footnote{1274}{Ktunaxa SEA, supra note 664; Tsilhqot’in Framework Agreement, supra note 962; Nānwaqolas/British Columbia Framework Agreement, supra note 869.}

However, the ideal collaboration agreement would differ sharply from both “traditional” consultation agreements and these “hybrid” arrangements. It would be sparser because the parties would agree on less. The indigenous signatory would resist the assertion and the appearance that the Canadian Constitution governs its relationship with the Crown. Unlike both the treaties negotiated in the Treaty Process and international treaties between sovereign states, the agreement would remain agnostic on the question of sovereignty. Whether the Crown satisfies its domestic duty to consult is a matter for Canadian law and is irrelevant to the business between the parties to a collaboration agreement. As a result, the ideal collaboration agreement would not contain an intricate consultation procedure or “engagement framework” to raise doubts about whether Crown compliance will satisfy its duty to consult.

For example, the Kunst’aa Guu-Kunst’aayah Reconciliation Protocol between the Haida Nation and British Columbia establishes a two-tier joint framework for decisions about land and natural resource management on Haida Gwaii. Among other things, the five-person Haida Gwaii Management Council sets policies for the identification of heritage sites and makes plans for environmentally protected areas.\footnote{1275}{Kunst’aa Guu – Kunst’aayah Reconciliation Protocol, supra note 885 at Appendix B, 2.2.4 and 2.2.5.} It consists of two members chosen by the Haida, two chosen by the province and a chair appointed jointly by both parties. The Solutions Table answers the technical and operational matters raised by those policies and plans.\footnote{1276}{Ibid at Appendix B, 3.3.} The parties drafted this protocol as one step in the process of reconciliation. It anticipates a more comprehensive Reconciliation Agreement, but does not provide procedures, deadlines or criteria for that agreement. Notwithstanding this omission, the protocol resembles the interim type of transitional constitution identified by Vicki Jackson. Careful and considered, it aims for a new constitutional equilibrium: one that involves multiple constitutions, none of which is supreme. This agreement contrasts with most consultation agreements, which embody the other type of transitional constitution: incremental, unfocused, even inadvertent.

The most dramatic difference between collaboration and consultation is that the former implies the existence of at least two distinct constitutional projects instead of one. It allows British Columbia and the Haida Nation, the Ktunaxa Nation and other indigenous groups to reconsider their respective priorities and their most basic beliefs about identity, politics and authority. It may maximize aggregate constitutionalism within the boundaries of the province, but it would do so by carving indigenous communities out of the provincial community so they can pursue their own
constitutional projects. In each case, collaboration acknowledges that the two groups have, or at least may have, distinct commitments and may choose to conduct themselves differently. Of the four responses, it involves the most autonomy for indigenous peoples.

The parties may not seize the opportunity, but collaboration has the potential to inspire indigenous communities and to provoke settlers to reconsider their basic values. At its most stark, it is analogous to secession because it queries the legitimacy of Canadian authority over indigenous peoples and their lands. It also updates the classic Canadian debate: whether Canada is composed of one, two or more constituent nations that warrant representation in its basic institutions.

But collaboration agreements do not answer these questions. Rather, they are the means by which the parties manage to work together despite their doubts about such basic issues. Indeed, these doubts are conditions of collaboration. Without them, collaboration would be unnecessary. If the parties were certain that indigenous peoples are Crown subjects, they would employ other means to govern their relationship: regulations, statutes, consultation agreements or even treaty negotiations. If instead they were certain that indigenous peoples are independent nations, then they would rely on international law, negotiate agreements as formal equals and otherwise leave each other be. But they disagree. They cannot be certain about these matters and so they must employ other means to address their common concerns despite these doubts.

Collaboration changes the Canadian Constitution not by amending its provisions but by challenging its nature and status. No amendment could address the key indigenous complaint registered by collaboration: that the Canadian Constitution, no matter its content, does not apply to them. Collaboration agreements and agreements that employ elements of collaboration, such as the parallel preamble, entertain the possibility that more than one constitution exists in the territory known to Canadian law as British Columbia. The Canadian Constitution may be complete: its written provisions and unwritten principles may form a coherent and resilient framework for resolving political disputes which include disputes about the framework itself. However, it may not be exhaustive. It may not be the only such framework in the province.

Collaboration is either a theoretical goldmine or a conceptual quagmire. What is the relationship between the Canadian Constitution and, for example, the Haida or Taku River Tlingit Constitution? If they are both frameworks for resolving political disputes within their respective communities, then what framework resolves disputes between them? What is the Canadian Constitution? What is a constitution? Once again, collaboration agreements do not avail. They cannot resolve debates about whether, and if so how, one or more constitutions might overlap. They
have little, if anything, to contribute to theoretical debates about constitutional pluralism, multi-level governance and so on.\textsuperscript{1277}

Collaboration aims to end, or at least suspend, these inquiries not by answering them but by making them irrelevant. If successful, collaboration agreements allow the parties to achieve some of their common goals such as economic development and environmental conservation without compromising their irreconcilable beliefs about title, jurisdiction and sovereignty. They suggest these matters are less fundamental than most constitutional theorists assume. More generally, they suggest participants do not share the preoccupations of theorists. More importantly, they suggest theorists should stop asking what a constitution is and start asking why that question remains so compelling.

Agreements like the Kunst’aa Guu-Kunst’aayah Reconciliation Protocol give the parties an opportunity to ask themselves serious questions. They allow the Crown time to decide whether it should govern communities that have not formally consented to its rule and, if so, why its rule is nonetheless legitimate and how its reasons (e.g. promoting democracy, quality of life or human rights) affect its other policies and commitments. Similarly, they offer the indigenous party time and some money to explore why it opposes Crown rule, to explain how its conduct would differ from that of the Crown and to examine how that conduct may affect its values and identity.

However, these agreements also give the parties latitude to ignore these questions in favour of the practical issues of land use and resource extraction that occupy most of the text and most of their time. Like consultation agreements, collaboration agreements are complicated and technical. They establish procedures to make regulatory decisions about industries, from fishing to carbon-offset trading, that few laypersons understand. They are also obscure, and what success they enjoy may depend on that obscurity. Collaboration elicits questions of sovereignty and identity that remain controversial. If more members of the settler population knew the provincial government was dabbling in something that even marginally resembles secession, it might face political pressure to retreat from these experiments.

Two decades of institutional experiments have not entrenched constitutionalism in British Columbia. The four procedures have solved some discrete problems but have not galvanized a wider lay audience. Timidity and verbosity undermine litigation. A faulty process sabotages negotiation. Consultation presents a compelling incremental approach but remains a procedural shroud. Finally, collaboration provides the autonomy constitutionalism requires but not necessarily the discipline. However, the four procedures have established and strengthened a host of institutions that warrant separate analysis because those institutions may succeed where the procedures themselves have so far failed.

C. Innovative Institutions

Two ideal types define those institutions: technical and representative. The first is characterized by neutrality and expertise. Technical institutions seek to unravel historical and theoretical disputes indirectly by solving knotty practical problems that have long sustained the underlying grievances. Representative institutions express identities old and new. Their success can enable indigenous peoples to explore alliances and affiliations, assert themselves in political discussions and obtain greater recognition in public forums. As always, these ideal types do not hold together off the page. Real institutions combine elements of these models in response to various concerns.

The innovations described below are not entrenched in the Canadian Constitution. Nonetheless, they do influence how constitutional rights and obligations are implemented in British Columbia. They form an increasingly important part of the constitutional settlement in the province and offer some reason to hope that constitutionalism may one day thrive in the province.

i. Technical Institutions

Technical institutions are designed to be neutral. They are tasked with solving problems, not promoting agendas. To take an early example, the British Columbia Claims Task Force was struck in late 1990 to assess whether, and if so how, treaty negotiations might answer the “Indian land question.” It had seven members: two chosen by the provincial government, two chosen by the federal government and three chosen by the new First Nations Summit. Its report contained 19 recommendations on the scope and structure for a treaty process. The Principals adopted each of these recommendations, including the disappointing six stages discussed above, when they executed the agreement that initiated the Treaty Process.

The report also contained a history of the colonial relationship between the Crown and indigenous peoples in British Columbia. It denounced Crown conduct generally: “Individual aboriginal people were denied recognition, respect, dignity, and even the minimal opportunity that was implicit in the policy of assimilation.” More importantly, it noted specific grievances: the catastrophic outbreaks of imported diseases, the insult and oppression of the Indian Act, the residential schools that wrenched children from their families, lands and languages; and the special 1927 joint Parliamentary committee that rejected formal requests for treaties and recognition of title. It also identified examples of resistance, both violent and peaceful: the 1864 Tsilhqot’in “war” against

interlopers and examples of post-Confederation regional and province-wide indigenous political alliances.1279

The Task Force acknowledged that this divisive history required “a much wider political and legal reconciliation between aboriginal and non-aboriginal societies.”1280 It concluded that reconciliation required a new constitutional bargain: treaties that would embody a new relationship inspired by the Crown’s fiduciary duty to indigenous peoples and supported by an informed public. The Task Force could afford to wax both critical and creative because it was neutral. Its esteemed members were appointed by representative bodies on both sides of the indigenous-settler divide. It had no authority to impose a settlement, so it could acknowledge the legacy of past atrocities without dictating a response. It could present treaties as a moral necessity and economic boon rather than a political compromise or, worse, a concession. As a result, its recommendations could appear apolitical notwithstanding their serious political ramifications.

The BC Treaty Commission has played a similar role within the Treaty Process. Its five members are appointed as follows: two by the First Nations Summit, one by each of Canada and British Columbia and a chief commissioner selected by all three principals.1281 It is responsible for monitoring, facilitating and publicizing treaty negotiations in the province.1282 It is dedicated to the Process and is apolitical in the sense that it does not mind the terms of a treaty so long as the parties agree to something.1283 Of course, the decision to pursue treaties is a political decision, but it is not one for the Commission to make. As a result, the Commission can censure the Principals for failing to support negotiations and even criticize specific negotiation strategies, such as threatening to withdraw from a table absent sufficient evidence of a First Nation’s commitment, without compromising its neutrality.1284 It remains a legitimate pundit despite increasingly bleak assessments that appear to assign Canada much of the responsibility for faltering talks.1285 The Commission has managed to maintain negotiations for nearly 20 years in part by embodying a commitment to equality between indigenous participants and the Crown: so long as it remains viable, so does that shared commitment.

The working groups and other bodies created by collaboration agreements have a far more modest mandate. Some of them make decisions about land and resource management in the territories covered by their respective agreements. Others make only recommendations. They often

1279 Ibid at 4-7.
1280 Ibid at 4.
1281 BC Treaty Commission Agreement, supra note 491 at 4.0.
1282 Ibid at 3.0 and 7.0.
1283 See e.g. BC Treaty Commission, Annual Report 2009, supra note 440 at 4.
1285 See e.g. BC Treaty Commission, Annual Report 2009, supra note 440 at 2.
have two tiers, in which case a subsidiary committee is tasked with implementing conclusions drawn by the primary body. They generally consist of an equal number of representatives chosen by each signatory. In the spirit of collaboration, these bodies allow the parties to address their environmental and economic concerns while holding controversial issues of ownership and jurisdiction in abeyance. Their procedures are not designed to resolve such basic disagreements. However, by offering indigenous peoples and the Crown a way to work together despite their differences, these working groups may have a similar effect: those “fundamental” differences may no longer seem fundamental.

These institutions also challenge orthodoxy in more commonplace ways. For example, they possess less precise legal forms than might be expected for institutions designed to discern and implement constitutional obligations. The Task Force was established by agreement among the parties, two of which were governments with a measure of sovereignty and two of which were organizations incorporated under provincial law. Rare is the political accord that treats formally subordinate bodies as equal to manifestations of the Crown. Yet the Treaty Commission was established by three separate enactments, one from each of its principals: a statute passed by the BC legislature, another passed by Parliament and a resolution passed by the Summit.

The working groups are even more ambiguous. They are enshrined in agreements between indigenous peoples and either British Columbia or Canada. The indigenous parties may assert their inherent authority when they sign rather than rely on authority bestowed by the Crown. The parties may decline to choose the law that applies to their agreement. The nature of the agreements themselves remains unclear: they are neither treaties nor contracts. The popular “government-to-government” label does not assist because it does not specify the status or character of the governments in question. Despite their sophisticated appearance, these are mongrel institutions. Their pedigree may be dubious but their claim to impartiality is solid.

Technical institutions are neutral in both form and substance. Their authority is premised upon expertise. But they are not sterile. If successful at solving the difficult problems they face, these institutions may provide a platform for a new civic identity that can bridge estranged settler and indigenous communities. The equal representation offered by each of the institutions described above is both symbolic and instrumental. It eliminates an obvious source of bias, confirms the equal status of the parties and thus encourages them to support the institution even when the results injure their immediate interests. By softening instinctual resistance, it creates the conditions in which success can build upon success. That momentum can make consensus into something more profound. If they endure, innovations like the Treaty Commission may blur the line between

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1286 See e.g. Tsilhqot’in Framework Agreement, supra note 962; Ktunaxa SEA, supra note 664.
technical and representative institutions by enabling the parties to promote their interests, build relationships and even cultivate common (albeit thin) identities that cut against their inherited differences.

ii. Representative Institutions

Representative institutions display a different dynamic. They are incurably partisan. Each exists to serve the interests of a group. However, by rendering more explicit the terms of that group’s identity, they expose those terms to question, challenge and revision. In turn, an evolving identity can raise doubts about the institutional arrangements used to express it, which can lead to conflict, amendment and even collapse.

More concretely, representative institutions allow indigenous peoples to explore possible local, regional and provincial affiliations. When they enter the courtroom united or sit together at the treaty table, they can test different relationships to determine which best promote their preferred outcomes and promise to endure under contemporary conditions. Representative institutions are not limited to indigenous people on principle, but as a matter of practice settlers in British Columbia are content to rely on their incumbent institutions: they rarely, if ever, experiment with new political identities. Provincial elections may be fiercely contested, but the coalitions that sustain the dominant parties remain stable and the components of those coalitions even more so.

Although exceptions exist, the size of a representative institution determines many of its characteristics. To begin, large institutions have more diverse constituents than small institutions. For obvious historical and environmental reasons, indigenous peoples generally have more in common with their closest neighbours than with nations more removed. As the scale of an institution increases, it encompasses and therefore must accommodate more distinct communities: the roughly 360 members of the Tsawwassen First Nation are much more homogenous than the 203 First Nations represented by the BC Assembly of First Nations.\(^{1287}\)

As these examples suggest, the size of an institution also determines the type of its constituents. Small representative institutions, such as bands or the customary governments of single peoples, represent simple communities: individuals bound as a political unit by history, language and other features.\(^{1288}\) Larger institutions, such as regional tribal councils and provincial political organizations, represent compound communities composed of simple communities that associate for

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\(^{1288}\) Some bands that represented distinct peoples have split, such as the Beaver Band of Fort St. John (Blueberry River First Nation and Doig River First Nation) and the Fort Nelson Slave Band. *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at ¶29; *Canada v Wolf*, 2002 FCA 117 at ¶¶7-13.
various reasons. Compound communities are the product of political accords among their members, whereas simple communities are a condition of political conduct for their members.

The origins of larger institutions are often mundane and are always deliberate. In the wake of the turbulent 1980s, the First Nations Summit was established to represent common indigenous interests at the heart of the Treaty Process. On a smaller scale, the Nanwakolas Council Society was incorporated in 2007 to help the eight Kwakwaka’wakw First Nations, who share their language and culture, implement a land-use planning agreement with the provincial government.

In contrast, smaller institutions represent communities whose bonds are inherited: they are not made but accepted. Many indigenous peoples can recount their history from time immemorial, the beginning of time or, more concretely, the “time of the Transformers.” Of course, some peoples do not reach so far back. And, in all of these cases, their identities are not fixed: like all communities, they acknowledge the impact of human conduct on their development and interpret that action in light of the traditions received from earlier times. For example, the Squamish Nation is composed of 16 Salish tribes that amalgamated in 1923 to protect their lands, secure good government by replacing the four bands into which they had been separated and bolster their nation against further interference by settlers and settler governments. Put differently, the larger the representative institution, the more instrumental (and the less existential) are the ties between its constituents.

In practice, mid-sized (i.e. regional) representative institutions are more volatile than large (i.e. provincial) or small (i.e. local) institutions. They are established more frequently than the former, and they break down more often than the latter. They are volatile because they have the most difficult work to do. Regional representative institutions are voluntary associations, but their constituents choose to work together because their physical proximity fosters similar cultural attributes, imposes similar environmental pressures and inspires similar economic concerns, which perpetuate physical proximity, and so on. They are small enough to express common identities that resonate with the traditions of their members, but they are too large to avoid serious differences and

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1289 McKee, Treaty Talks, supra note 426 at 32; Woolford, Justice and Certainty, supra note 426 at 113-14.
1290 Nanwakolas/British Columbia Framework Agreement, supra note 869 at Preamble.
1292 Antonia Mills, Eagle Down is Our Law: Witsuwit’en Law, Feasts, and Land Claims (Vancouver: UBC Press, 1994) at 76 (Tahltan) [Mills, Eagle Down is Our Law]; Mills, For Future Generations, supra note 1003 at 146 (Gitxsan); Dinwoodie, Reserve Memories, supra note 1027 at 205 (Tsimshian).
1293 See e.g. Borrows, Canada’s Indigenous Constitution, supra note 677 and Alfred, Peace, Power, Righteousness, 2d ed, supra note 431.
1294 See e.g. Squamish Nation, “Squamish Nation Amalgamation, July 23rd, 1923” online: Squamish Nation <http://www.squamish.net/files/PDF/Amalgamation_Celebration_Handout.pdf>. See also Grismer v Squamish Indian Band, supra note 1196 at 5.
dissent. Similarly, they are large enough to pursue ambitious visions but can be too small to realize them. As a result, they are the both the most dynamic and the most precarious class of representative institutions.

Their practical challenges beget existential challenges and *vice versa*. Mid-sized institutions must accommodate the distinct identities of their constituent communities, which may be two or twenty. They must enable those communities to articulate their common values and interests with enough precision to allow pursuit. They must identify and implement strategies to achieve their objectives. They must generate enough leverage, whether by building larger alliances or by strengthening their members’ rights and title claims, to extract meaningful concessions from the Crown. These concessions must include financial support because many of these mid-sized institutions also provide social, educational and other services to their members. Regional representative institutions must also maintain solidarity and reinforce the identity, however thin, shared by their members. Such bonds are essential to sustain political support for the institution when their expectations are inevitably dashed.

The Nisga’a Tribal Council is perhaps the most prominent and successful regional representative institution. It was formed in 1955 as the successor to the pioneering Nisga’a Land Committee, which began to push for Crown recognition of Nisga’a land rights in the late 19th century. It represented the four Nisga’a tribes that had been classified as *Indian Act* bands in the lawsuit that culminated in *Calder*. In 1973, it inaugurated modern treaty talks in British Columbia. And in 1998, it executed the Nisga’a Final Agreement with the BC and Canadian governments. When the Agreement took effect in 2000, the Council was dissolved. The Nisga’a Nation, which is the “collectivity” of persons who share Nisga’a language, culture and laws, assumed all of its rights and obligations. The Council’s accomplishments strengthened ties among the four tribes by establishing a government designed to express their Nisga’a identity and securing Crown recognition of that identity within Canada.

The Nuu-chah-nulth Tribal Council is another successful regional representative institution. It is a kaleidoscopic association of 14 indigenous peoples strung along the west coast of Vancouver Island that organize and reorganize in different patterns for different purposes. For example, 12 of its member nations initially tried to negotiate a common treaty with Canada and British Columbia,

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1296 *Calder, supra* note 451 at 317.
1297 Nisga’a Final Agreement, *supra* note 575, Preamble and Chapter 13, s 13.
but only five of them signed the Maa-nulth Final Agreement. Five other Nuu-chah-nulth nations won judicial recognition of their right to fish and sell fish in Ahousaht; four other nations dropped out of the litigation to appease the federal government. Each member nation also pursues its own agenda and interests via litigation and consultation.\footnote{See e.g. Tseshaht First Nation, \textit{supra} note 413; Mowachaht/Muchalaht First Nations, Interim Agreement on Forest Opportunities, between the Mowachat/Muchalaht First Nations and Her Majesty the Queen in Right of the Province of British Columbia, 20 November 2008, online: Ministry of Forests <http://www.for.gov.bc.ca/haa/Docs/Mowachaht%20Munical%20FRO20NOV08.pdf>.
} Despite these uneven developments, the Tribal Council endures. Its members share a common culture founded upon the knowledge that \textit{besooy\-ish tsawalk:} everything is one.\footnote{See e.g. Umeek, \textit{Tsawalk}, \textit{supra} note 1063. See also, Uu-a-thluk (Taking Care Of), “About Us (“Hishukish Ts\’awalk’”)” online: <http://uuathluk.ca/wordpress/?page_id=2>.} This conviction guides the efforts of the Tribal Council to provide important services to its members, from health plans to fisheries regulation.\footnote{See e.g. ibid and Nuu-chah-nulth Tribal Council, “Health Promotion & Social Development” online: Nuu-chah-nulth <http://www.nuuchahnulth.org/tribal-council/HealthSocial.html>.
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The Stó:lō Nation Society offers a more cautionary case. It currently represents 11 First Nations that rely on the bounty of the lower Fraser River. It pursues their common interests and embodies their common identity. For example, each of its employees must undertake to serve its organizational values, which include responsibility (“Stó:lō Nation accepts the responsibility given by the Creator”), spirituality (“Stó:lō Nation needs to maintain its spirituality, as this can sustain the active presence of the Creator in the life of its people”) and sharing (“Stó:lō Nation must further develop and share a common vision of the future”).\footnote{Stó:lō Nation, “Organization Value” online: Stó:lō Nation <http://www.stolonation.bc.ca/about-us/meet-our-council/organization-values.htm>.
} The dispute between the Stó:lō Nation Society and the Stó:lō Tribal Council was driven in part by disagreement about the proper structure for an institution that represents the Stó:lō Nation and thus the structure of the nation itself. The former is led by the chiefs and council of its member bands.\footnote{Stó:lō Nation, “Our History”, \textit{supra} note 1302.} It resembles a confederation because the shared government is populated by delegates from its constituent governments. The latter is composed of individuals elected directly by members
of the participating groups.\textsuperscript{1306} It resembles a federation because the shared government is chosen by its subjects rather than its sub-units. It also gives more credence to the notion that the Stó:lō Nation forms a single overarching (or perhaps underlying) political community.

As noted above, other regional representative institutions have cracked under the strain of treaty negotiations.\textsuperscript{1307} At the outset, the parties to a regional institution must hope the pull of their shared beliefs, priorities and aspirations can overcome the resistance of distinct dialects, practices and laws. The effort to articulate and achieve their ends is potentially rewarding but also quite risky. If it fails, it may shatter the tentative, tacit identity that brought them together. If the effort succeeds, the results may strengthen a new regional identity that could eclipse old local affiliations. The decision to work together on such a project is radical. There is no going back. Even if the union ultimately disintegrates, the relationships among the former partners will have been altered by the attempt to formalize and build upon them.

The legal forms adopted to launch such ambitious yet intimate ventures make these transformations possible. Once again, these forms are associated with relative size. Small communities are more likely to invoke their inherent authority and use indigenous legal forms for their representative institutions. Coalitions of those communities, whether mid-sized or large, rely on provincial or federal law. The difference is important, but what they share is more significant: they are converging on a common method to make the basis of their association more explicit, deliberate and corrigible.

Indigenous communities in British Columbia possess their own rules and practices to determine the powers, responsibilities and legitimacy of their governments.\textsuperscript{1308} However, the \textit{Indian Act} constrains and in many cases preempts the exercise of this inherent authority. In practice, each band in British Columbia may seek ministerial consent to implement its customary government within the limits of the statute and the rest of Canadian law. But those that do not obtain that consent must accept the default structure of an elected chief and council.\textsuperscript{1309}

That structure cannot bear constitutionalism. Although the statute is odious and the parliamentary procedures to amend it are clear, the band council system remains difficult to change, let alone escape. Some indigenous people have more immediate concerns. Many lack the requisite political influence. Others may have grown accustomed to the Act, in part because they have suffered it for so long, and in some cases may even view it as a shield (albeit a feeble one) from

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\textsuperscript{1307} See text accompanying notes 731-34, supra.
\textsuperscript{1308} See e.g. Mills, \textit{For Future Generations}, supra note 1003; Mills, \textit{Eagle Down is Our Law}, supra note 1292.
\textsuperscript{1309} Shin Imai, \textit{The 2010 Annotated Indian Act and Aboriginal Constitutional Provisions} (Toronto: Carswell, 2010) at ss 74-86.
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assimilation. These peoples make do with incremental improvements, such as delegated responsibility for land management or restored control over membership. Incremental improvement is still improvement, but band councils remain too rigid and dependent upon the Crown to embark upon a project so demanding as constitutionalism.

However, some indigenous peoples have done just that: slipped the shackles of the Act, exercised their inherent authority and started to do something that looks very much like constitutionalism. Some have done so on their own accord, while others have been prompted by treaty talks.

Indeed, the indigenous parties to each of the three modern treaties in British Columbia are not bands but nations with governments that possess inherent authority to make binding agreements with other governments. Each treaty employed a different model for execution. The Nisga’a Final Agreement was executed by the executive of the Nisga’a Tribal Council, which was incorporated under provincial law, on behalf of the Nisga’a Nation, which existed separately under Nisga’a law. The agreement codified the rights of the latter and, when it became effective, the council ceased to exist and its rights, titles, interests and other incidents vested in the Nation. The Tsawwassen Final Agreement is ambiguous. It was executed by the Tsawwassen First Nation, which may have been the Indian Act band of that name, the indigenous nation of the same, or both. The Maa-nulth Final Agreement was executed by the five Maa-nulth nations rather than their respective bands. In any event, the indigenous parties to those agreements today are nations with intrinsic authority. The treaties define that authority; they do not create it or the entities that possess it.

Other indigenous governments in British Columbia have exercised their intrinsic authority in dealings with the Crown outside the Treaty Process. The Haida Nation enacted its own constitution and has signed multiple association agreements. The Taku River Tlingit First Nation has adopted its own constitution to repudiate the foreign chief and council structure. The Westbank First Nation signed a self-government agreement that designated the Indian Act band with that name non-existent and listed the powers the “self-governing” Westbank could exercise alongside the Crown.

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1310 First Nations Land Management Act, supra note 1006; Indian Act, supra note 440, s 10.
1311 Nisga’a Final Agreement, supra note 575, ch 1 (Definitions) at “Nisga’a Nation” (“the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga’a Indians of the Nass Area, and their descendants”).
1312 Ibid at ch 13 (Indian Act Transition), s 13.
1313 Tsawwassen Final Agreement, supra note 720, ch 1 (Definitions) at “Tsawwassen First Nation” (“the collectivity that comprises all Tsawwassen Individuals”) and “Tsawwassen Individual” (an individual eligible to be enrolled under this agreement), ch 3 (Transition), s 9 and ch 21 (Eligibility and Enrolment), s 2. See also BC Treaty Commission, “Statement of Intent, Tsawwassen” online: BC Treaty Commission <http://www.bctreaty.net/soi/soitsawwassen.php> (“How is the First Nation established? Other. Please describe: A) Traditional Law – Cultural History. B) Legislation – Indian Act”).
1314 Maa-nulth First Nations Final Agreement, supra note 720, s 15.3.1 and ch 29 (Definitions).
Treaty or not, the method by which these peoples elaborate the terms of their association is the same. They adopt a written constitution by a democratic process. The constitution states certain principles, some more specific than others, to guide the community’s conduct. For example, the Nisga’a Constitution invokes “the principle of the common bowl,” while the Tsawwassen Constitution commits its people to “the principle of honouring and respecting the traditions of our ancestors and our oral history.” The constitution then establishes the rules that enable and discipline that conduct. Later, decisions made within that framework have effects that raise questions about certain aspects of it, and some of those questions escalate into controversies that result in amendments made in accordance with the constitution: each of the Tsawwassen First Nation, the Taku River Tlingit First Nation and the Haida Nation have amended their constitution since 1990. This method allows participants to revisit their original principles, entrench their best understanding of the political practices those principles demand (or prohibit) and even consider whether the principles themselves require amendment.

Larger representative institutions offer a more crude approximation of this model of constitutionalism. Generally, their modus operandi is to incorporate as a non-profit society under the BC Society Act. The Summit is not a society but it has established a separate society to help conduct its affairs. The UBCIC and the BC chapter of the Assembly of First Nations are both societies. Almost every regional representative institution is a provincial society: the Nanwakolas Council Society, the Nuu-chah-nulth Tribal Council, the Stó:lō Tribal Council, the Tsimshian First Nations Treaty Society, the Shuswap Nation Tribal Council, the Kaska Dena

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1315 The Constitution of the Nisga’a Nation, supra note 1291, at ch 1, s 2(d); Tsawwassen First Nation, 2009 Constitution Act, Schedule A at s 1.3., online: Tsawwassen First Nation <http://www.tsawwassenfirstnation.com/tfnlaws/laws/CONSTITUTION%20ACT.pdf>.
1317 See e.g. ibid; Taku River Tlingit First Nation Constitution Act, 1993, supra note 1003; and Tsawwassen First Nation, 2009 Constitution Act, supra note 1315 at Preamble.
1318 RSBC 1996, c 433.
1319 See e.g. New Relationship Trust Act, supra note 702 at s 1.
Council\textsuperscript{1326}, the Te’Mewx Treaty Association\textsuperscript{1327} and so on. There are, of course, some exceptions. For example, the Tsilhqot’in National Government is incorporated under federal law.\textsuperscript{1328}

In either case, the decision to incorporate appears driven primarily by practical concerns. Incorporation offers these organizations legal status independent of their members and all legal powers enjoyed by a natural person under Canadian law, including the ability to own property and incur legal obligations. These powers are important because of the services many regional representative institutions deliver to their members.\textsuperscript{1329} Many of the tribal councils were established in the 1950s, 1960s and 1970s as regional rivals to pan-provincial organizations like the UBCIC. They harnessed cultural and linguistic similarities to galvanize their communities and marshal resources for communal land claims.\textsuperscript{1330} Today, 21 tribal councils are registered to receive federal funds.\textsuperscript{1331} Few of them remain active in the Treaty Process.

Societies that accept federal funds are not beholden to the Crown. For example, the Carrier Sekani Tribal Council (CSTC) was incorporated under the Society Act in 1979.\textsuperscript{1332} In 1982, it filed a claim under the federal Comprehensive Claims Process on behalf of its member nations, whose traditional territory occupies a large swath of the centre of the province.\textsuperscript{1333} It now represents its member nations in the Treaty Process as well as consultations with the Crown and private enterprise.\textsuperscript{1334} Most recently, it brought (and lost) the appeal in Rio Tinto: the momentous case in which the Supreme Court of Canada held the Crown does not owe a duty to consult indigenous peoples with respect to decisions that impose no additional physical impact on the land.\textsuperscript{1335} Similarly, members of the Okanagan Nation Alliance ardently press the ir rights in the courts and on the


\textsuperscript{1327} Tsilhqot’in Nation, supra note 412 at ¶36.

\textsuperscript{1328} Tennant, Aboriginal Peoples and Politics, supra note 444 at 181-184 and 198.


\textsuperscript{1330} Carriere Sekani Tribal Council, “CSTC Mandate”, online: Carrier Sekani Tribal Council <http://www.cstc.bc.ca/cstc/15/cstc+mandate>.

\textsuperscript{1331} Carriere Sekani Tribal Council, “Declaration of Alliance”, online: Carrier Sekani Tribal Council <http://www.cstc.bc.ca/cstc/16/declaration+of+alliance>; Carrier Sekani Tribal Council, “Declaration and Claim”, online: <http://www.cstc.bc.ca/cstc/50/declaration+and+claim>.


\textsuperscript{1333} Carriere Sekani Tribal Council, supra note 408.
The Okanagan Indian Band won the case in which the Court found that the Crown can, in some circumstances, have a duty to provide aboriginal peoples advance funds for rights and title litigation. It continues to litigate over the scope of that duty and the implications of that decision. Even the Council of the Haida Nation, which practices the most radical form of collaboration and is not incorporated under provincial or federal law, established the Secretariat of the Haida Nation as a BC society to receive and administer funds on its behalf. As these examples suggest, the decision to incorporate and even to accept money from Canada does not indicate submission. Rather, it can be a savvy decision that enhances the resources available to a community and expands the range of tactical options at hand.

Incorporation is not easy: it does impose some procedural burdens. For example, each society must adopt a constitution and bylaws, hold annual meetings and file annual reports. These requirements ensure a modicum of transparency and provide at least some formal trappings of accountability. Absent a vigilant subject population, these trappings may not translate into a responsive and responsible government. However, those groups that embrace the opportunities offered by incorporation can design institutions that accommodate and respond to their members’ values and concerns. For example, the CSTC undertook to amend its basic documents in 2006. It struck a committee composed of one representative from each of its eight member nations, instructed them to propose new rules that garnered consensus from their communities and identified four principles to govern the exercise: transparency, accountability, inclusiveness and respect and open mindedness. The new rules took effect in 2008. Incorporation is not a mere formality. It is an institutional expression of a collective identity and thus invites reflection and attracts criticism.

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1336 See e.g. text accompanying notes 908-09.
1337 Okanagan Indian Band, supra note 647.
1338 See e.g. British Columbia (Minister of Forests) v Okanagan Indian Band, supra note 908; British Columbia (Minister of Forests) v Okanagan Indian Band, supra note 993.
1341 Society Act, RSBC 1996, c 433, ss 3(1)(a), 56 and 68.
from within and without. It makes more explicit ideas, practices and allegiances that may have been tacit and that may not survive the attendant scrutiny.

The Hul’qumi’num Treaty Group illustrates one end of the range of possibilities available to indigenous peoples willing to experiment with their affiliations. It suggests that the line between artificial and organic identities is itself artifice. The Treaty Group consists of six members with a total population of 6,200 whose core traditional territories encompass the southern end of Vancouver Island. They are members of the larger Coast Salish nation and they share not only Salish culture but also a distinct dialect. They formed the Treaty Group in 1993 to negotiate a common, comprehensive agreement within the Treaty Process. It is incorporated as a BC society, and it uses various internal working groups and targeted community meetings to elaborate its positions, develop its strategies and build consensus for its work. It does not draw funds from Canada outside of the Treaty Process.

Like so many others, the Hul’qumi’num Treaty Group has reached Stage Four of the Process. But as Canadian constitutional law and practice have developed, it has acquired new responsibilities and, with them, new operations. In 2006, after the Supreme Court of Canada had confirmed the duty to consult in Haida Nation, the Treaty Group released its own consultation policy to help the Crown comply with that new constitutional obligation. This policy responded to Canadian constitutional imperatives but it also connected basic principles of Hul’qumi’num law, such as ts’ets’uw-wutul su ’ny shaqwalawun (helping each other with good manners, thoughts, or behaviour) and mukw ihwet ’uw ts’ qwul (everybody has a voice), to the procedures it prescribed. In this regard, it is one small example of constitutionalism in British Columbia.

In 2007, the Treaty Group took a more confrontational step by filing a petition with the Inter-American Commission of Human Rights to protest Canada’s transfer of Hul’qumi’num traditional territory to private parties without any form of restitution, such as return, replacement or

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1347 Hul’qumi’num Member First Nations and Hul’qumi’num Treaty Group, Consultation Policy, supra note 422.
1348 Ibid at 16 and 17.
compensation. It took this step in part because it had been unable to advance the issue in the Treaty Process in light of British Columbia’s refusal to contemplate any infringement of private property rights, whether in the form of reallocation or co-management. Canada opposed the petition, but the Commission found the complaint admissible and noted the Treaty Process is “not an effective mechanism” to protect the rights asserted by the Hul’qumi’num.

As its brief expands and its successes accumulate, the Treaty Group has established a scaffold for a new Hul’qumi’num identity that is distinct from its members’ local ties as well as their broader Coast Salish bonds. It gives them more leverage against the Crown but remains responsive to their distinct concerns. In doing so, it renders questions of authenticity less relevant. The Treaty Group is premised upon the existence of a common identity among its members. That identity is confirmed and expressed by the structure and the actions of the Treaty Group, which uses Hul’qumi’num values to explain and justify its conduct. The Treaty Group has bootstrapped the hint of a possible identity into a robust institution that promises a bright common future.

If the Hul’qumi’num Treaty Group embodies the promise of experimentation, the Ktunaxa Nation Council confirms the risks. It represents the Ktunaxa Nation, whose members are spread across seven bands, five of which are located in southeastern British Columbia. The other two are located in the United States. Its members share a traditional territory that includes parts of two provinces and three states. They also share a culture rooted in that land and a language that most, but not all, of its members speak: Ktunaxa. Unlike the Hul’qumi’num and other indigenous communities discussed above, the Ktunaxa Nation contains a linguistic minority and has adapted its institutions to recognize and accommodate its Secwepemc-speaking members. The Shuswap Indian Band, to which the Secwepemc-speaking members of the Ktunaxa Nation belong, is not part of the Ktunaxa Nation Council. Rather, it is part of the Shuswap Nation Tribal Council. In other words, the Ktunaxa Nation may represent some Shuswap members but it does not represent the Shuswap band.

In recent years, those arrangements have stalled. Adopted in 1991, the name of the Ktunaxa/Kinbasket Tribal Council reflected the bilingual character of the Ktunaxa political community. Kinbasket refers to the descendants of the first Secwepemc speakers to settle in Ktunaxa territory. However, the tribal council was renamed the Ktunaxa Nation Council in

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The same pattern unfolded for the Ktunaxa Kinbasket Treaty Council, which was established in 1993 to pursue a treaty for the entire bilingual Ktunaxa Nation. The Shuswap Indian Band was a founding member, but in 2009 it withdrew from both the Treaty Council and the Treaty Process. In 2010, the Ktunaxa Nation Council signed a Strategic Engagement Agreement with eight provincial ministries to establish a protocol for government-to-government engagement. The agreement makes no reference to the Shuswap band. It defines the “Ktunaxa Nation” as “the collectivity of the Ktunaxa People,” which includes the “Ktunaxa Communities and their members.” The definition is circular because the agreement also stipulates that “Ktunaxa People” are those persons who are entitled to exercise the aboriginal rights of the Ktunaxa Nation. But more importantly, the agreement does not list the Shuswap Indian Band among the “Ktunaxa Communities.”

The Ktunaxa Nation has an identity based on language and land that has evolved for 10,000 years. In the mid-19th century, it was capable of accommodating Secwepemc settlers as a distinct element of the community, but the institutions designed to perpetuate that experiment in the early 21st century failed. They could not manage this linguistic divide and it ultimately pulled the Ktunaxa Nation apart: both its Ktunaxa-speaking units and the Secwepemc-speaking Shuswap have since reverted to mutually exclusive unilingual identities.

Representative institutions put their members’ identities to work. They use them to define their boundaries, to explain their decisions and to justify their existence. They also put those identities at risk. Success in political and practical endeavours may strengthen support and permit more ambitious ventures, but failure risks disillusion and dismemberment. The forms adopted by these institutions, whether indigenous or Canadian, offer regular opportunities for members to check their aspirations and expectations against those results. They also provide the procedures necessary to respond to internal criticism and external developments. Thus, representative institutions, and especially the mid-sized variety, can display the dynamism and fortitude that constitutionalism requires. However, whether their performance can be replicated on a larger scale or across wider social divides remains unclear. Both the Summit and the FNLC have demonstrated a measure of mission creep in recent years, but they have yet to inspire their members to make comparable commitments or take comparable chances.

1352 Ibid.
1354 Ktunaxa SEA, supra note 664 at s 1 (“Ktunaxa Nation”, “Ktunaxa People” and “Ktunaxa Communities”).
iii. Courts

Notwithstanding these novel developments, old-fashioned courts may prove to be the ultimate engine of constitutional innovation. They can disrupt dysfunctional institutions and subvert the anachronistic identities coupled with them. They also can offer an alternative basis for solidarity and suggest different responses to familiar problems. In the absence of a stable constitutional settlement, courts must improvise. They do not and cannot simply interpret an authoritative text: first, because there is no comprehensive constitutional bargain to scour; and second, because there is nothing simple about constitutional interpretation in even the most bucolic community. Courts in a volatile environment must help to construct the constitutional settlement and, in doing so, define their role in that settlement. That role cannot be fixed in advance because the structure, whether political or institutional, necessary to define any lasting function remains uncertain. Their immediate responsibility is to prompt and sustain inquiry into the requirements of the efforts to reach a satisfactory bargain, which is a bargain that allays demands for another bargain.

Courts fit both categories of innovative institutions. They are extremely technical. Their procedures are daunting. Their denizens are members of a guild that cultivates an elite representation, in part by erecting barriers to entry premised upon exclusive education. But these practices do serve a purpose beyond increasing lawyers’ hourly rates. Courts are neutral. They are designed and expected to remain impartial in the disputes they adjudicate. The adversarial process is thought to enhance the quality of decisions by enhancing the quality of the submissions that inform them. In turn, that conflict is tempered by professional obligations that prohibit sharp dealing and procedures, such as document discovery, that are intended to minimize asymmetries among the parties.

Lower courts answer to higher courts in a review process that refines doctrine and promotes regularity, but all Canadian courts answer to the law. They are bent to the rule of law, which can require judges in difficult cases to look beyond written rules. It obliges them to inquire, when prompted, into the nature of Canadian law: to ask what is Canadian law and what Canadian law is. Their commitment to Canadian law may be seen as a source of bias, but Canadian law is not exhausted by the enactments of Parliament and provincial legislatures. It incorporates international law. It includes unwritten constitutional principles. It is often illuminated by reference to foreign laws. It could even accommodate a much more substantial role for indigenous law.

Courts are also repositories of legal expertise. The bench, and especially the appellate bench, is stocked with and attended by eminent lawyers. It is true that judges are no longer, if they ever were, the sole fount of legal truth. They sometimes defer to administrative tribunals, and legislatures in Canada have the power to override judicial interpretations of certain constitutional

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1355 See e.g. Cooper v Canada (Human Rights Commission), [1996] 3 SCR 854 at ¶10.
rights. However, judges do remain disproportionately influential. Their authority relies on their reasons, which they give to connect their conclusions with our commitments. Those reasons must be legal reasons, which are reasons that invoke and amplify legal principles. Their fealty to law grounds both their expertise and their neutrality.

Perhaps for these reasons, indigenous peoples turn again and again to the Canadian courts. They do so despite their history of losses and hollow victories, in which judges have found in their favour but awarded ineffective remedies. Courts may simply be the least worst option, given legislative indifference and executive intransigence, but a more hospitable interpretation is possible.

Even those indigenous peoples who question Canadian sovereignty invoke the jurisdiction of Canadian courts to protect their rights recognized by Canadian law. As the First Nations Summit has noted, aside from such tactical maneuvers, indigenous peoples often look to the courts for practical guidance when they must deal with the Crown.¹³５⁶ They do so because the Crown heeds the courts. And it does so because, like the courts, the Crown is also bowed to the law. This fidelity to the law, often observed in the breach and corrected by judges, still buoys hope the Crown may not only concede fault in certain cases but also commit to a more rigorously experimental outlook.

Yet courts are not perfect. They can fail to meet the high standards set forth in their own judgments. For example, despite significant improvements, some judges still struggle to appreciate and accommodate indigenous legal traditions. They also make errors of fact and law and write confounding judgments. Nonetheless, the steps to the courthouse are shorter than those to Parliament, and the judicial process is much more disciplined and transparent than the political process.

Courts also qualify as representative institutions. This dimension may not be as obvious. Canadian judges are not elected and, save for francophone justices on the Supreme Court of Canada, they are not formally appointed to accommodate and integrate specific ethnic groups. Rather, they represent a civic identity that rebuffs ethnic affiliations. Judges act for Canadians, and Canadians are the people subject to the Canadian Constitution. Of course, this community is an abstraction defined by reference to the values latent in the Constitution and to the methods by which those values can be defined: legislation, interpretation and constitutional reform, whether botched or not, and so on. These values are not immediately accessible. They are expressed, if they are expressed at all, in the form of law: administrative decisions, statutes, constitutional provisions and, most elaborately, judicial opinions.

A constitution is not just a dispute resolution mechanism. It can serve that function in certain circumstances, but it is never entirely functional. The constitution always conveys a vision of

¹³⁵⁶ Nunavik Inuit v Canada (Minister of Canadian Heritage), [1998] 4 CNLR 68 (FCTD) at ¶49.
the community it constitutes. In particular, the incidents of a federal constitution capture the communal divisions thought salient when it was made. Groups with sufficient influence at that time may demand and receive some measure of legal and political autonomy, as well as dedicated seats in the central legislature, representatives in the cabinet, judges on the highest court and perhaps even vetoes or weighted votes in amendment procedures. Less concretely, constitutional principles convey essential information about the character of a community. In India and Ireland, some of these principles are listed in the written constitution. In Israel, they are acknowledged but not elaborated in the Basic Law: Human Dignity and Liberty, which begins “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” In Canada, they toil in the shade of the written constitution, awaiting judicial illumination.

These principles reveal the ideals of the peoples who possess them. More realistically, they reveal the ideals certain elites believe their compatriots should serve. But most importantly, they reveal a more basic belief about these communities: that they are founded on principles and, more specifically, legal principles that can be expounded and enforced via legal procedures. Those procedures offer legitimacy through justification, but they also bind the parties to the underlying assumptions: participants must accept the premise that they and their community are committed to the elucidation of their basic values in this manner.

A civic identity may be too cerebral to withstand the earthy appeal of ethnic allegiances. Neither sort of identity is natural; they do not arise spontaneously from the blood, heart or spirit. Ethnic identities need rules and institutions, just as civic identities need money and coercion. The former are generally more widespread, familiar and robust. However, they appear ill suited to the sort of economic, environmental and existential problems that characterize the 21st century. Indeed, they are responsible for some of the world’s most intractable conflicts: Congo, Kashmir, Afghanistan, Nepal. In many cases, but certainly not all, ethnic identities are insular and reactionary. A civic identity forged in the rigorous inquiry required by law is an elite identity. It is aspirational, which means it is exclusive yet open to those who accept its discipline. It may prove untenable in a world increasingly beset by populism: a demand for simple solutions to stupefyingly complex challenges. In any case, rumination will not decide this contest. Whether they begin with a boot strap or a kick start, experiments will be necessary.

Courts have the power to break pernicious routines and suggest new paths. In British Columbia, some decisions have had radical impacts on Crown conduct. In the 1970s, Calder bolstered

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1358 Basic Law: Human Dignity and Liberty, s 1.
indigenous opposition to a mooted federal policy of assimilation and brought Prime Minister
Trudeau and the federal government back to the treaty table. It led directly to the Nisga’a Treaty,
indirectly to the Treaty Process and eventually to consultation. In the mid-2000s, the combination of
_Snuneymuxw_ and _Haida Nation_ convinced Premier Campbell and his cabinet to embrace consultation,
albeit awkwardly, and seek a new approach to land and resource regulation. Courts also have had
more subtle effects. Lawsuits concerning the abuses perpetrated on indigenous children at residential
schools during the 20th century have increased awareness and sympathy among settlers of the
challenges indigenous peoples face. Less sensational examples include the many cases since _Sparrow_
that have helped to define Canada’s policy on aboriginal fisheries in the province and others that
have influenced major infrastructure developments. Thanks to the courts, more and more
government decisions are preceded by an attempt to answer the question of what, given the nature of
the Crown and its commitments, must be done.

5. Conclusion

Law has the power to redeem itself and its adherents. However, law also has the potential to
oppress its subjects and corrupt its promise. Criticism of law and constitutionalism is essential but it
must not be allowed to ferment into cynicism. In British Columbia, the incumbent institutions have
created problems they cannot solve. They are not unique in this regard; they are typical human
constructions. Our knowledge is incomplete, not merely because our spirit is weak and our methods
are flawed, but also because it consists of hypotheses: abridged guides to action, which then
mercilessly tests their veracity. Some of our knowledge is explicit but much of it is embodied in our
conduct, which includes our institutions. They are not the product of isolated genius, or even
proximate genius, but rather interminable experiments by men and women of earthly talents. Over
time, those experiments have produced the ideas, customs and beliefs that allow (and perhaps compel)
us to pursue ever more complex challenges.

Constitutionalism is one such challenge. It remains uncommon in British Columbia: it is
both rare and reserved for elite practitioners of law and politics. It is limited by defects in the three
familiar branches of government: the legislature, the executive and the judiciary. These defects, which
marginalize indigenous peoples and their concerns, are deeply engrained in the structure of these
institutions and unlikely to be cured. Serious legislative reform is only unpopular. Constitutional
amendments are unthinkable.

Nonetheless, its adherents have found ways to work around their constraints. Rather than
impose a substantive remedy for a breach of the duty to consult, trial judges often order the parties
to resume consultation and decline to monitor their efforts unless they reapply to the court. In one recent case, the judge ordered the parties to attempt mediation in their dispute over accommodation, at the Crown’s expense. Appellate judges can compose innovative doctrine, sometimes in awkward prose. Their decisions raise questions about the constitutionality of familiar government practices, many of which involve lucrative natural resources, but they provide few answers. They put the onus on interested parties to determine what the Constitution requires of them in each case.

This calculated uncertainty has inspired restraint, but that restraint has inspired a vigorous response. Parliament and the BC legislature have not tried to legislate away the challenges posed by indigenous peoples, their rights and the Crown’s misconduct. They have neither the authority nor the capacity to do so. Similarly, the provincial and federal executives have had to settle for small, incremental agreements with assertive indigenous authorities rather than grand bargains. They have all come to rely on smaller, more specialized institutions that are not enshrined in the Constitution. But they have also nurtured those institutions by establishing hospitable legal, political and financial conditions.

As these innovative institutions have emerged, the prospect of a comprehensive constitutional settlement in British Columbia has faded. Instead, as theories of post-conflict constitutionalism predict, the province has acquired a constitutional pastiche: a relatively stable collection of textual provisions, unwritten principles, landmark judgments, key statutes, influential policies, major agreements and tacit understandings. Settlers, indigenous peoples and their authorities will not get the type or degree of certainty they desire, but they will have opportunities to check their conduct against their commitments, and therefore opportunities to elaborate those commitments. In theory, those opportunities could also ignite popular interest in constitutionalism, but in practice this still seems unlikely.

The collapse of the Treaty Process or a controversial appellate decision could disrupt this emergent equilibrium. However, given the lamentable state of settler interest in indigenous matters, the risk of a serious and sustained backlash is small. This observation is not an endorsement of radical changes in policy or rhetoric, because radical change is rarely responsible change; it is hubris and it is unwise. Sometimes we must act quickly, but never so quickly that we cannot learn from our actions. Judges must embrace this tactical, contextual aspect of their role, as must theorists. Law can be used to control the pace: to make political change more deliberate and effective. Other stories

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1359 See e.g. Gitskan Houses, supra note 611 at ¶115; Wiillitux #2, supra note 412 at ¶¶28-30.
1360 Ke-Kin-I-Uqi v British Columbia (Minister of Forests), supra note 775 at ¶¶254-257.
1361 K Polanyi, The Great Transformation, supra note 124.
can be told about law: like other human inventions, it is fallible. But this story has the virtue of being both optimistic and useful.

Nonetheless, the outlook for constitutionalism in British Columbia is poor. Indigenous and non-indigenous peoples may have to settle for an inert collection of compromises that, as Jackson and Hart suggest, allow them to live together and nothing more. They may be able to reduce some inequalities, limit outright oppression and contain most conflicts: laudable outcomes, but not the virtuous, progressive circle theorized in Chapter One. The constitutional practices that have emerged from these experiments are better than those they replace. However, they are not as good as they should be.
Conclusion: The Possibilities of Constitutionalism

“The primary question, for any cultural institution anywhere, now that nobody is leaving anybody else alone and isn’t ever again going to, is not whether everything is going to come seamlessly together or whether, contrariwise, we are all going to persist sequestered in our separate prejudices. It is whether human beings are going to continue to be able, in Java or Connecticut, through law, anthropology, or anything else, to imagine principled lives they can practicably lead.” Clifford Geertz, Local Knowledge: Fact and Law in Comparative Perspective

Clifford Geertz asked this question nearly 30 years ago and it remains the primary question for our institutions today. They are inescapably cultural because our conduct is an expression of our commitments. Those commitments are tested regularly as cultures collide, combine, erode and evolve. The question is unavoidable. I had intended this project to correct undue enthusiasm and dispel unwarranted confidence among constitutional theorists, first by demonstrating how little we know about constitutionalism and second by showing how hard it can be to learn more. I hope it has succeeded in this respect. However, I now realize it was also an attempt to answer Geertz’s question, at least for one class of institutions in one provincial setting. Unfortunately, the answer with respect to the constitutional sediment in British Columbia is “maybe not.”

The problems created by the failure to agree on the basic legal and moral terms of settlement are manifest and manifold. They inundate inherited ideas and deplete customary practices; they leave many individuals disoriented. They do not respect disciplinary boundaries: permissive laws permit environmental mischief, which may have immediate economic benefit but may also compromise what remains of traditional ways, which can compound social disorder and prompt corrective legal intervention that disrupts more than it corrects. Thus we continue our irregular orbit. Political, economic and legal elites have improvised precarious responses, but few laypersons are aware of them, let alone appreciate their implications. We are largely overwhelmed.

This predicament requires intellectual modesty, dutiful experimentation and therefore ideological promiscuity. Indigenous grievances are real, inequalities are severe, misunderstandings are rampant and disagreements are often profound. Settlers and their governments are met by bands, tribes, peoples, nations and all manner of alliances among them. It is not a matter of applying familiar solutions more vigorously. In many cases, we do not know what to do, and we may not even know how to find out. But, as Lamer CJ noted in Van der Peet, “we are all here to stay.” Therefore, we must keep trying.

The constraints we face are both conceptual and institutional. Settlers and indigenous peoples generally do not agree on the scope and nature of the political communities they inhabit. The former primarily adopt provincial and federal communities, and the institutions that represent

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1362 Supra note 517 at ¶186.
those communities often struggle to articulate the principles that inform their engagements with indigenous peoples. Equality appears to govern, but it is a formal and impatient variant of equality. In turn, many indigenous peoples identify their indigenous communities as their primary political affiliation. They disagree with a significant proportion of settlers in British Columbia, who deny constitutional relevance to what they perceive as ethnic or racial bonds.

Solidarity within a political community is not guaranteed. For some, Canada and British Columbia are mainly instrumental associations. Solidarity among political communities is even less likely. Consider the various examples of federal disintegration, from the Soviet Union to Malaysia and Singapore. However, the arrangements that nurture solidarity are not limited to familiar institutions. Consider the gradual expansion and maturation of China, the United States and, perhaps less successfully, the European Union. Other paths are possible, but they are also contentious, protracted and expensive.

For both Geertz’s fluent inquiry and the relatively stilted demands of constitutionalism, whether settlers and indigenous peoples in British Columbia form one, two or many communities is an important question. It is not important in itself but because it affects their ability to uphold principle in their politics. Their institutional innovations are critical for the same reason.

After so many pages, this prognosis may disappoint. It is both hesitant and pessimistic. However, given the challenges, we must be realistic and the situation does not warrant confidence. We go to the courtroom and the boardroom with the countrymen we have, not with the countrymen we might want or wish we had. Some scholars favour optimism at the expense of political and institutional detail. For example, Alan Cairns has championed a model known as “Citizens Plus,” in which indigenous peoples would possess certain exclusive rights in addition to those all Canadians enjoy. He believes in a Canadian identity strong and supple enough to accommodate such constitutive diversity. However, he mistakes two vital points. First, contrary to his assertion that indigenous peoples identify (or at least want to identify) with Canada, some reject that affiliation and others oscillate between ambivalence and indifference. Second, and especially in British Columbia, there is a real likelihood of settler antagonism to “special treatment” that offends their commitment to formal equality among individuals. His book is ten years old. It relies on proposals from the late 1960s. Nonetheless, these obstacles were apparent in British Columbia at the millennium.

To determine whether our assumptions still hold, we must compare them regularly with our practices. John Borrows scrutinizes legal and political developments for evidence that Canada is able

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1364 Ibid at 107-10.
1365 Ibid at 68 and 90.
to accommodate indigenous peoples and their laws, traditions, ambitions and visions for the country. His work is constructive and reasonably optimistic. However, he also understates the hostility many settlers feel toward measures that assign resources to and recognize the autonomy of indigenous peoples. This understatement may be strategic, but scholars, politicians and judges must mind the risk that short-term constitutional gains may in the long run be undone by political discontent.

The theory of constitutionalism that Sabel and Dyzenhaus share and that I have elaborated in this dissertation can help to identify these risks. It can explain the constitutional experiments that have rocked British Columbia since 1990. It can demonstrate how the Crown and indigenous peoples have wasted the early promise of s. 35(1), Sparrow and the BC Claims Task Force. As a result, it can also identify realistic improvements and promising developments that may help them reorient and recover some momentum. More abstractly, this theory can diagnose anachronistic ideas and dysfunctional institutions that are beaten by the complex problems they have helped to create, from severe social inequality to profound economic uncertainty. Constitutionalism offers a practical way to think about this predicament as well as a riposte to the creeping meanness that characterizes contemporary politics in so many countries.

As this exercise has demonstrated, this theory has its limits. Constitutionalism cannot arise where its basic premise is denied: where individuals inhabit separate political communities or conceive their association as primarily instrumental. But a limit is not necessarily a flaw: every theory has conditions. However, to understand constitutionalism as the project of maximizing principled political conduct does have disturbing implications. The pragmatic method is merciless: no belief or practice is sacred. It may reveal supposedly fundamental commitments to democracy, at least in its familiar forms, as superficial, outdated or even hazardous. It may require major revisions to basic ideas about equality and the steps taken to realize them. Altogether, this theory of constitutionalism is viable, useful and, most importantly, controversial.

But constitutionalism is more than a theory. According to the Supreme Court of Canada, constitutionalism is one half of one of the fundamental unwritten principles of the Canadian Constitution. It lies with the rule of law “at the root of our system of government.” As the Court wrote in the Quebec Secession Reference, “Simply put, the constitutionalism principle requires that all government action comply with the Constitution.” However, as the members of the Court surely know, there is nothing simple about it.

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1366 See e.g. John Borrows, Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002).
1367 Reference re Secession of Quebec, supra note 403 at ¶49.
1368 Ibid at ¶70.
1369 Ibid at ¶72.
The “constitutionalism principle” proposed by the Court might be easy to realize if the Constitution consisted exclusively of unambiguous textual provisions that could be applied routinely. But the Canadian Constitution does not match that ideal. No constitution does. The imperative of constitutionalism is itself unwritten, as are other basic principles such as federalism, order and fairness. They organize and animate the textual elements of the Constitution, just as those provisions embody and express them. However, since these principles are unwritten, a definitive list is impossible. In short, they complicate matters.

Principles cannot be implemented because they are not plans or instructions. The difference is not merely one of detail and diligence. Principles (e.g. democracy) are propositions about what should be done. They are premised upon values (e.g. equality) that in turn rely upon even more basic beliefs about individuals, their communities and their world (e.g. how we are equal, how we assess our equality and how we should respond to it). They are a resource to be considered when making and justifying decisions. Their content is important but their logical structure even more so. Principles imply the discretion to choose whether and how to use them; they imply the possibility of principled conduct, which is conduct directed to doing what should be done.

The challenge of constitutionalism is compounded by the existence of unwritten constitutional principles and, more generally, the indeterminacy of law. Judges, officials and ministers are often unsure what the Constitution requires until they begin to apply it. In the *Manitoba Language Rights Reference*, the Court wrote, “The 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.” These principles are implicit in constitutional text and the practices that follow it: “they are the vital unstated assumptions upon which the text is based.”

To uncover them is an interpretive, not a mechanical, procedure.

Similarly, to apply any part of this constitutive “statement,” whether tacit or explicit, requires interpretation. Principles such as efficiency, not to mention provisions such as “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed,” are not clear in the sense that their application to particular disputes is automatic, obvious and uncontroversial. These words and the ideas and values they express must always be extended and elaborated to assimilate new situations. These efforts arise from and engender disputes, which is why, as Lamer CJ noted in *Cooper v Canada (Human Rights Commission)*, “the existence of courts is definitional to the Canadian understanding of constitutionalism.”

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1370 Ibid at ¶49; *Hunt v T&N plc*, *supra* note 1200; *Unifund*, *supra* note 1200.  
1372 Reference re Secession of Quebec, *supra* note 403 at ¶49.  
Since so much of the Canadian Constitution is indeterminate, the “constitutionalism principle” is aspirational. It seeks a worthwhile end that can neither be fully achieved nor entirely abandoned. More specifically, it seeks a government that is always faithful to the constitution. That ideal is inherent in the existence of a constitution, but it is also impossible when we cannot be certain what the constitution demands, due to some combination of internal ambiguity and external volatility. The best we can do is try to comply with it, which requires first that we try to determine what compliance involves. Therefore, constitutionalism entails practices, such as the provision of legal reasons by judges and administrative tribunals, that tether government conduct to the best possible account of the constitution. They conscript litigants and applicants by obliging them to prepare materials and make arguments that approximate what the arbiter must do.

Not-so-simply put, constitutionalism requires a perpetual inquiry into the relationship between basic principles, the written provisions of the Constitution that express those principles and the conduct of those institutions subject to the Constitution. That inquiry, which often takes the form of judicial review, presents the possibility of regular constitutional adjustment, whether by interpretation or amendment. That possibility raises questions about the legitimacy and effectiveness of the basic law. As Lamer CJ wrote in Reference re Remuneration of PEI Judges, “Given these concerns which go to the heart of the project of constitutionalism it is of the utmost importance to articulate what the source of those unwritten norms is.” \(^{1374}\) And that analysis is itself part of that project: the endeavour to determine what must be the case for politics to heed principle. The “constitutionalism principle” posits that this project is an essential part of the great Canadian experiment.

Yet its prospects are unclear in British Columbia. The four procedures developed since 1990 to manage constitutional disputes between indigenous peoples and settlers are neither well known nor well understood. While some progress has been made on the most acute material inequalities and regulatory flaws, the conditions for constitutionalism remain uneven. The incidents that most affect indigenous peoples occur in rural areas, but settlers live primarily in cities and fail to appreciate the nature and extent of those impacts. For many settlers and indigenous persons alike, constitutional change is not regular but imperceptible until punctuated by a series of rapid and unexpected developments. Also, as noted repeatedly above, significant gaps remain between elites and laypersons as well as between official rhetoric and action. The recent innovations in British Columbia are interesting, or at least I hope they are, but that is not enough to sustain constitutionalism.

Of course, this project is by no means exclusive to British Columbia or Canada. Nor, as this dissertation and other contributions have shown, is it limited to courts. It is a protean effort that

\(^{1374}\) [1997] 3 SCR 3 at ¶93.
favours innovation but only because new challenges put old commitments at risk. In fact, constitutionalism is hostile to the entrenched interests and routines that characterize most institutions because it entails the relentless revision of assumptions and activities alike. Sabel and Dyzenhaus do not offer a plan to rescue political morality from cynicism and bewilderment. Instead, they offer a method that can take many forms: compare ends (i.e. principles) with means (i.e. practices) and vice versa; then adjust each accordingly in light of results. This pragmatic method succeeds by pushing the circle of inquiry ever wider, testing interim results against ever more diverse experiences and generating ever more reliable outcomes.

Therefore, the next step for this project will be to expand the circle of inquiry even further. It must encompass more countries and more institutions. They are linked because institutions other than the conventional triumvirate loom larger in countries beyond the prosperous, and largely anglophone, democracies that still receive the most attention from anglophone scholars. To avoid the temptation to merely browse and collect constitutional curios, it will be necessary to adopt an agenda. To learn the most about constitutionalism, we should examine its gravest threats: those intricate, apparently intractable, problems that afflict many communities and that may undermine principled government. Leading candidates include coups, corruption and central banks. When the military seizes (or threatens to seize) power or venal officials subvert due process, principle seems likely to suffer, but the effect depends on the context and the alternatives: Turkey is not Niger, and China is not Afghanistan. Although central banks are ordinarily uncontroversial bastions of technocracy, in recent years their actions have acquired an overtly political character. While the U.S. Federal Reserve and the European Central Bank have fought the global credit crisis, the Banco Central de la República Argentina has fought for independence from the state and the Banque Centrale des Etats de l'Afrique de l'Ouest has fought to oust the former President of Coté d'Ivoire. Equipped with novel policies and implored to act by humbled states, central banks now openly wield great influence on our ability to discern and defend our commitments and, by precommitting resources and distorting priorities, may in the long run alter those commitments.

If successful, these studies will have results similar to this dissertation: they will elaborate constitutionalism and illuminate their complex subjects. Ideally, they will provide a way to understand these problems that suggests how the protagonists can be folded into the same constitutional project: for example, how to adjust established constitutional principles to accommodate an assertive military while also reforming it and other public institutions to cohere with those principles. As that example suggests, these studies may also uncover some further limits to constitutionalism. Notwithstanding the risk, we have no choice but to proceed. Theories are only hypotheses, and hypotheses are made to be tested.
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