

A Defence of the Citizens' Constitution Theory: A Response to Ian Brodie and Neil Nevitte

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I thank Ian Brodie and Neil Nevitte for taking my constitutional commentary of the last decade and a half seriously.¹ This exchange of views will remind us that the improvement of our understanding is a collective enterprise sustained by debate and competition between rival schools. Since the adversaries in such debates are often driven by a distorting self-interest, qualitative assessment of the outcome is appropriately left to the academic jury of our peers.

The Citizens' Constitution Theory was developed on the run, as was the linked concept of Charter Canadians. Both, no doubt, are subject to the weaknesses that attend ad hoc efforts to interpret a murky, moving reality. Both are spinoffs from the recognition of the political purposes of the Charter of Rights and Freedoms, which I explored in several articles that anticipated the Charter's arrival, or followed closely on its introduction in 1982.² These early articles, which were not cited by Brodie and Nevitte, explicitly elaborated the thesis that the Charter was an instrument to change our civic self-conceptions,

1 Ian Brodie and Neil Nevitte, "Evaluating the Citizens' Constitution Theory," this JOURNAL 26 (1993), 235-59.

2 "Recent Federalist Constitutional Proposals: A Review Essay," *Canadian Public Policy* 5 (1979), 348-65; "Commentaries: An Overview of the Trudeau Constitutional Proposals," *Alberta Law Review* 19 (1981), 401-07; "The Politics of Constitutional Conservatism," in Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 28-58; "Constitution-Making, Government Self-interest, and the Problem of Legitimacy in Canada," in Allan Kornberg and Harold Clarke, eds., *Political Support in Canada: The Crisis Years* (Durham, N.C.: Duke University Press, 1983), 380-448; "The Politics of Constitutional Renewal in Canada," in Keith Banting and Richard Simeon, eds., *Redesigning the State: The Politics of Constitutional Change in Industrial Nations* (Toronto: University of Toronto Press, 1985), 95-145.

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Canadian Journal of Political Science / Revue canadienne de science politique, XXVI:2 (June/June 1993).
Printed in Canada / Imprimé au Canada

strengthen the pan-Canadian against provincial communities, and manipulate our psyches.

Fundamental to the Brodie/Nevitte analysis is the hypothesis that there are two categories of Canadians, Charter Canadians and non-Charter Canadians, whose attitudes and behaviour can be compared to test the Citizens' Constitution Theory. This assumption is central to their first test, employing bivariate hypotheses that compare the Charter and non-Charter Canadians and postmaterialists and materialists, and to their second test employing a more comprehensive multivariate model—the purpose in each case being to compare the Citizens' Constitution Theory with the rival New Politics Theory. The comparison has no validity. Nowhere do I divide Canadians into these two categories. Nowhere do I identify a category of non-Charter Canadians. Nowhere do I suggest that the Citizens' Constitution applies to some but not all Canadians.

The authors observe in footnote 29 that while I “never [give] a name to those who do not qualify as ‘Charter Canadians’, there must be a complementary category. We lump all those who are not Charter Canadians together, and label them simply ‘non-Charter Canadians’ ” (242). I did not name the second category because it does not exist. A comparison between two categories, one misconceived and the other fictional, to prove or disprove the Citizens' Constitution Theory is without meaning. All Canadians are Charter Canadians and all are included in the citizenry of the Citizens' Constitution. It could only be otherwise by assuming that the Charter applies to some, not all Canadians. Accordingly, the comparisons between Charter and non-Charter Canadians that are central to two of the three tests performed on the Citizens' Constitution Theory are in fact comparisons within the omnibus, encompassing category of Charter Canadians. Every statement that compares Charter and non-Charter Canadians should be rephrased as a comparison between some Charter Canadians and other Charter Canadians. This is *not* a trivial change. For example, Brodie and Nevitte state: “Most damaging to the Citizens' Constitution Theory, perhaps, is the discovery that Charter Canadians were actually stronger supporters of the Meech Lake Accord than non-Charter Canadians” (249). Properly rephrased, this becomes a nonsense statement: “Most damaging to the Citizens' Constitution Theory, perhaps, is the discovery that ‘some’ Charter Canadians were actually stronger supporters of the Meech Lake Accord than ‘other’ Charter Canadians.” Most damaging to the Citizens' Constitution Theory?

Even if we accept the reasonable thesis that Charter Canadians can be divided into those who choose to relate to the Charter via specific clauses that identify their salient attributes—women, native peoples, official-language minorities, ethnic minorities, and the disabled, for ex-

ample—and those whose Charter identification is more diffuse or generalized, it is odd for Brodie and Nevitte to restrict the first category, their Charter Canadians, for data purposes, to “Non-British, non-French ethnic minorities.” The arbitrariness of this choice is underlined by the recognition that the “naming” clauses of the Charter, sections 15-29, are remarkably comprehensive, including: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (s. 15); official-language minorities (s. 23); aboriginal peoples (s. 25); multicultural Canadians (s. 27); male and female persons (s. 28); and holders of constitutional rights or privileges respecting denominational, separate or dissentient schools (s. 29). All Canadians, as Charter Canadians, will fit into several of these categories, although some categories—as the recent politics of constitutional reform attest—have a greater mobilizing capacity than others. From this comprehensive listing of named Charter Canadians, Brodie and Nevitte inform the reader that women, native peoples, official-language minorities and the disabled have been excluded from “our category of ‘Charter Canadians’”—women because there are too many of them in their sample, and the others because there are too few of them. Others in the comprehensive listing above are simply ignored. Brodie and Nevitte, accordingly, have reduced Charter Canadians to a caricature of reality. To avoid confusion, the reader in most cases should substitute the phrase “non-British, non-French ethnic minorities” when Brodie and Nevitte refer to “Charter Canadians.”

In my understanding, Charter Canadians and the citizenry of the Citizens' Constitution are synonymous. They cover the entire population. It is nevertheless true that women, native peoples, official-language minorities, ethnic minorities and the disabled—groups that mobilized for particularistic Charter interests—were often specifically and correctly identified in my writings as Charter Canadians. Such a listing, however, did not exhaust the overall category. It simply highlighted the most potent illustrations of Charter-induced behaviour in constitutional politics from groups, it should be remembered, that accounted for about three quarters of the population. The remainder, less endowed with organizations pursuing particularistic Charter goals, are, nevertheless, also Charter Canadians.

The Charter Canadians label, therefore, that I logically assumed applied to the entire citizenry, is reduced for data purposes to slightly more than an atypical one fifth of the total population. It is then contrasted with another arbitrary category of Charter Canadians, who are mislabelled non-Charter Canadians and who, by Brodie and Nevitte's logic, are all men. Tables which appear to compare Charter and non-Charter Canadians are in fact comparisons between “non-British, non-French ethnic minorities” and Canadian men outside the ethnic minori-

ties category who are neither aboriginal, disabled, nor members of official-language minorities. I am unable to tell whether women are included in the "ethnic minorities" sample. In either event, the import of a comparison of these two categories of ethnic minorities and residual males to test the Citizens' Constitution Theory eludes me.

Two of the three tests employed to compare the relative strength of the Citizens' Constitution and New Politics theories are invalidated by the authors' construction and use of two idiosyncratically defined categories that cannot be found in my writings. The third test is found in the penultimate section on pre-Charter trends, where Brodie and Nevitte assert that the dynamics predicted by the Citizens' Constitution Theory "could not have been in motion prior to the 1982 event that made Charter Canadians important political actors" (255). They then note that based on the 1981 World Values Survey some elite-challenging participation preceded the Charter and hence cannot be attributed to the Charter. Technically speaking this is true. However, the 1981 survey tapped Canadian attitudes in the midst of the greatest constitutional mobilization and participation in Canadian history prior to the Charlottetown Accord referendum of 1992. The leaked Kirby memorandum in the summer of 1980 identified the Charter as the central component of the federal government's shrewdly labelled People's Package, noted that it was very popular and observed that an adroit public relations rhetoric of rights would put the dissenting provincial governments on the defensive. Subsequently, the Charter was significantly strengthened by the aggressive pressures of Charter advocates before the joint parliamentary committee. As F. L. Morton notes, "[p]erhaps no group received more than Canadian feminists," as they virtually rewrote s. 15 and also achieved their guarantee of sexual equality in what became s. 28.³ The mentally disabled successfully fought to be included in s. 15. S. 27, dealing with the multicultural heritage of Canadians, was only added in response to the demands of ethnocultural Canadians. The toughening of the reasonable limits clause further revealed the impact of Canadians on the Charter's contents, in this case mainly civil liberties groups. Aboriginal involvement in the constitutional process produced major gains with the s. 25 protection from the Charter, and the s. 35 recognition and affirmation of aboriginal and treaty rights. The Metis fought for and achieved the signal triumph of inclusion in the new s. 35 category "aboriginal."

In Morton's summary, the "minimalist" Charter initially announced by Prime Minister Trudeau in October 1980 "emerged from the Committee process [as]... a 'maximal' Charter, rewritten from

3 F. L. Morton, *Morgentaler v. Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland and Stewart, 1992), 111.

start to finish according to the requests of the *ad hoc* coalition of civil liberties, feminist, native, and human rights groups."⁴ To speak, therefore, of 1981 as pre-Charter is misleading. The Charter that was anticipated, fought for and strengthened from the autumn of 1980 to the end of 1981 probably had a higher profile than the entrenched Charter at any time since 1982.⁵ If a fair before-and-after test is to be employed to assess the Charter's impact, 1981 is the worst possible year that could be selected.

In any event, I happily concede that positive attitudes to participation preceded the Charter, and that parliamentary supremacy was on the defensive before the Charter arrived. Indeed, one of the recurring themes of my perhaps repetitive essays was precisely that the Charter encountered a people predisposed to accept its constitutional message. Accordingly, I am neither concerned nor surprised that certain civic orientations associated with the Charter have affinities with pre-Charter attitudes. I never believed that the Charter's magic wand awakened overnight a hitherto servile people to participatory maturity.

Thus far I have avoided confronting the larger Brodie/Nevitte enterprise of contrasting the Citizens' Constitution Theory with the New Politics Theory because to do so might appear to give legitimacy to their misinterpretation of the Citizens' Constitution Theory. However, even assuming an accurate understanding of the Citizens' Constitution Theory, I fail to understand how the New Politics Theory could provide a superior explanation of what I was trying to explain, namely, the contribution of the Charter to the thesis that post-1982 we have had a Citizens' Constitution that has stimulated citizen participation in constitutional reform arenas. Every article that is cited by Brodie and Nevitte, and most of my writings since the late 1970s, have focussed on constitutional reform, with an emphasis on process, and thus on the relative roles of governments and citizens. My attention was directed to the changing constitutional culture of Canadians, in a sense to the changed civic identities fostered by the Charter. While on various occasions I implicitly or explicitly indicated my belief that the Charter's contribution to our constitutional culture would spill over into normal, everyday citizen-state politics, that was not my central concern. I was not attempting a comprehensive explanation of patterns of Canadian partici-

4 Ibid., 116.

5 According to Romanow, White and Leeson: "Nothing in the whole episode of constitutional transformation between 1978 and 1982 was as visible as the creation of the Charter of Rights and Freedoms. . . . Of all the justifications for constitutional reform . . . none were [*sic*] as responsive to widely shared anxieties as the proposal to entrench in the Constitution a list of fundamental rights" (Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* [Toronto: Carswell/Methuen, 1984], 216, 218).

pation in all political fora. If it were to turn out that the source of a more participant citizenry outside of constitutional politics could more adequately be explained by the New Politics Theory, I would not retreat from the Citizens' Constitution Theory. Conversely, however, those who attribute a greater explanatory power to the New Politics Theory over the Citizens' Constitution Theory with respect to incentives to participate in constitutional politics—my basic focus—would have to argue that a Charterless constitution would have generated a greater pressure for and evidence of constitutional participation than a constitution with the Charter did. This is implausible.

The Citizens' Constitution Theory is superior to the New Politics Theory in its capacity to explain the transformed citizen role in constitutional politics because it identifies both particular and diffuse citizen constitutional interests that are directly linked to, indeed are dependent on the Charter. By contrast, the New Politics—absent a Charter—has a much more limited capacity to mobilize the citizenry into participation in constitutional politics. Simply stated, my position is that citizens are more likely to rush to the defence of constitutional interests they have, than of interests they do not have. The Citizens' Constitution, with its Charter, gives the citizenry constitutional interests of a highly visible nature. They are given constitutional connections, constitutional niches, constitutional identities, constitutional clauses they can identify with, and the powerful language of rights to remind them that Trudeau's purpose was to vest sovereignty with the people. Would the New Politics Theory in a Charterless Canada, whose constitutional pillars were still parliamentary government and federalism, predict an equal degree of constitutional involvement? Would Inglehart's postmaterialists in a Charterless Canada have had equally powerful incentives to view the constitution as theirs, and the same apprehension that their constitutional interests would be similarly damaged if they were excluded from constitutional reform processes? Without the Charter there would be no Citizens' Constitution. Without the Charter, the New Politics of the postmaterialists would have limited incentives to focus its participatory drives on the constitution, compared to the incentives the Citizens' Constitution offers to Charter Canadians. Whilst a postmaterialist ethic doubtless contributed to the positive reception of the Charter, it was the emergence of the Charter issue and the Charter's subsequent entrenchment that catalyzed so many Canadians into constitutional politics.⁶

6 As Lynn MacDonald, 1981 president of the National Action Committee on the Status of Women, stated: "Having equality rights in the Charter was never an issue [for women's groups]. It *became* an issue because the government announced there was going to be a Charter." Doris Anderson, then president of the Canadian Advisory Council on the Status of Women, agreed, stating: "women were quite disinter-

The running commentary on constitutional affairs that has posed as scholarship in the last hectic decade and a half has had many shortcomings—partisanship (I plead mildly guilty), short-sighted and hasty interpretations (guilty), and patterns of thought that evolved, wavered and changed direction (guilty). These shortcomings were inherent in the enterprise. We were all seeking patterns, coining labels and juggling the tensions between citizenship and scholarship as we tried to find a stable vantage point in a contingent constitutional world.

If I had written less and thought more (good advice), I might have attained greater clarity with respect to a number of issues. First, I had difficulty working out the relationship between the comprehensive Charter Canadians category and the more specific, focussed sub-category who had Charter clauses they felt were theirs, that they had won and that they sought to strengthen or at least defend. The constitutional politics of group activism in various Meech Lake fora inevitably gave a profile to the latter that the former more diffuse category of Charter Canadians did not receive until the October 1992 referendum. This indeterminacy probably explains why Brodie and Nevitte discerned two categories in my thoughts, but not why they defined one of these categories as non-Charter Canadians. Their invention of the latter category is especially odd given the fact that their initial description of the Citizens' Constitution Theory makes numerous references to at least four different articles or chapters where I refer to the general impact of the Charter on the constitutional culture of Canada, sometimes restricted to English Canada. No explanation is offered as to why these statements were set aside. Second, I initially and inappropriately included aboriginal peoples in the category of Charter Canadian activists. This was wrong-headed, and I now know better.⁷ Third, I paid insufficient attention to the literature on postmaterialism. Related, a critic might argue, although I would disagree, I should have been more emphatic that my prime focus was on constitutional participation, not the more generic political participation addressed by Brodie and Nevitte. These particular shortcomings were avoidable. Barring retreat to a slower-paced scholarship, however, they would have been replaced by other imperfections.

ested [*sic*] in the whole idea of the constitution." Cited in Sandra Burt, "What's Fair? Changing Feminist Perceptions of Justice in English Canada," mimeograph, originally presented as the 1991 *Access to Justice Lecture* at the Faculty of Law, University of Windsor, November 1991, 13; emphasis in original.

- 7 See Alan Cairns, "Reflections on the Political Purposes of the Charter: The First Decade," in Gérald-A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville, Quebec: Les Éditions Yvon Blais, 1992), esp. 175-91.