CANADIAN CONSTITUTIONALISM:
1791-1991

Edited by Janet Ajzenstat
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Table of Contents

Acknowledgements .......................................................... vii
Preface: Janet Ajzenstat .................................................... 1
Introduction: Claude Ryan ................................................. 7
PART I—The Crisis Today .................................................. 15
David J. Bercuson and Barry Cooper  
(From Constitutional Monarchy to Quasi Republic:  
The Evolution of Liberal Democracy in Canada) .................. 15
Alan C. Cairns  
(Constitutional Theory in the Post-Meech Era:  
Citizenship as an Emergent Constitutional Category) ............ 27
H.G. Thorburn  
(Ethnic Minorities and the Canadian State) ......................... 37
F.L. Morton and Rainer Knopff  
(The Supreme Court as the Vanguard of the Intelligentsia:  
The Charter Movement as Postmaterialist Politics) ............... 54
Douglas V. Verney  
(From Responsible Government to Responsible Federalism) .... 79
F. Leslie Seidle  
(Senate Reform and the Constitutional Agenda:  
Conundrum or Solution?) .................................................. 90

PART II—Constitutional Roots ........................................... 123
Louis-Georges Harvey  
(The First Distinct Society: French Canada,  
America and the Constitution of 1791) .................... 123
Constance MacRae-Buchanan  
(American Influence on Canadian Constitutionalism) .......... 145
Janet Ajzenstat  
(The Constitutionalism of Etienne Parent and Joseph Howe) ..... 159
Paul Romney  
(Why Lord Watson Was Right) .......................................... 171
R.C.B. Risk  
(Blake and Liberty) ....................................................... 189
Michiel Horn  
(Frank Scott, the League for Social Reconstruction,  
and the Constitution) ...................................................... 206

Contributors ............................................................. 225
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For information on becoming a member of the CSPG, please contact the Secretary, Canadian Study of Parliament Group, P.O. Box 533, Centre Block, Ottawa, Ontario, K1A 0A4.

Gary O’Brien
President
Canadian Study of Parliament Group
The papers in this collection were given at a conference in November 1991, sponsored by the Canadian Study of Parliament Group to mark the bicentennial of the Constitutional Act of 1791. Historians, lawyers, political scientists and parliamentarians contributed to the occasion, and the essays offer perspectives on the constitutional dilemma of the 1990s in the context of a — sometimes ambiguous — celebration of the Canadian constitutional tradition.

Not surprisingly, echoes of Canada’s current political concerns can be found even in the historical papers. In particular the collection illuminates the origins and contours of the quarrel between constitutionalists and communitarians that underlies today’s debate on constitutional reform. At a time when Canadians are in the process of reforming their political institutions on a grand scale, it was perhaps inevitable that debates about the worth of our past constitutional practices would give rise to a discussion about the worth of constitutionalism, and many observers see in the current divisiveness of Canadian politics a confirmation of anti-constitutionalist predictions about the inevitability of fragmentation in the constitutionalist regime.

Can the divisiveness be healed? Constitutionalists place their trust in the power of procedures defined in law and the constitution to bring accord out of the clash of conflicting interests and opinions. Anti-constitutionalists argue that where there is no underlying consensus, procedures may not suffice. They suggest that under the rules of the constitutional regime, debate easily degenerates into a battle of winners and losers, encouraging divisiveness. In the present crisis, they say, Canadians should be looking for reforms that will foster what consensus remains in the country even if they conflict with principles long entrenched in the Canadian constitution.

The procedures of parliamentary constitutionalism are as familiar to Canadians as the air they breathe: within the constraints of the rules governing the electoral process and debate in the legislature, ambitious party leaders conduct a sometimes very noisy battle for the right to wield the power of the state, surrounded by a host of lobbies attempting to secure state benefits for themselves and their clients. The laws and policies that emerge from the process express the will of an ever-changing majority that is likely to comprise a different aggregate of views after every election. Principles of common law, rules of Parliament, and from 1982 the Canadian Charter of Rights and Freedoms, define the limits of state power.

In the Introduction to this volume Claude Ryan remarks on Canadians’ “long tradition of living attachment to their parliamentary institutions.” The grant of elective legislative assemblies to the colonies of Upper and Lower Canada in the Constitutional Act of 1791 marked the “beginning of a long evolution which led in
1848 to the achievement of responsible government and in 1867 to the creation of the federal system." Canadians, he suggests, have every reason to be proud of the Canadian parliamentary system.

We see the revolutionary appeal of constitutionalism and parliamentary institutions for the early inhabitants of British North America in statements from Lower Canada contrasting the autocratic character of the old French regime in the province with the respect for individual rights inherent in the new constitution. Under the French regime, argues a letter writer in *le Canadien*, the Governor was an idol, before whom no one was permitted to raise his head. "A man was nothing or less than nothing... [Now] the people have their rights; the powers of the governor are fixed, and he knows it... "Les grands" are restrained by law."¹ For Pierre Bédard, the foremost constitutional scholar in the colonies and first leader of the *canadien* party in the Legislative Assembly of Lower Canada, the 1791 constitution was welcome above all because it enshrined political freedoms, opening opportunities for citizens to influence the course of government through their elected representatives.

But the parliamentary tradition has never been without critics in Canada. Anti-constitutionalism, like constitutionalism, has its roots in the pre-Confederation period. Deriving originally from Jean-Jacques Rousseau's critique of Locke and the British political tradition, it appears in the arguments of men like Louis-Joseph Papineau and the revolutionaries of the 1830s who wanted a form of government that would express the collective aspirations of a particular people. We find the same tendency of thought in today's anti-constitutionalism. In both the nineteenth century and today the suggestion is that the constitutional regime fails to recognize and provide for the natural and very human desire to participate in a political society that embraces collective goals.

The quarrel between constitutionalists and anti-constitutionalists turns on different notions of political participation and political freedom. For the constitutionalist the fundamental guarantee of political freedom is the requirement that laws be ratified in a representative assembly after running the gauntlet of public debate. What is important is that all political demands and arguments be open to challenge, no matter where they originate, or who puts them forward, so that no individual, political party, or group is able to claim absolute and uncontested authority in politics. Politics is indeed a game of winners and losers, and citizens may often be dissatisfied with the outcome. But in the good constitutional regime they will never be subject to the tyranny of uncontested political leaders.

For the anti-constitutionalist true political freedom, and a truly participatory polity is far more likely where there is a strong sense of community, and substantial agreement about the important political objectives, because citizens can then be sure of seeing their own imperatives reflected in the decision of their leaders. The constitutionalist maintains that where a society embraces collective goals, that is, uncontested ideas of public good, it will soon find itself the prey of unchallenged

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¹ *Le Canadien* 4 November 1809
political parties or leaders. Members of the class, the minority — or as it sometimes happens, the majority — that is most successful in claiming the uncontested right to speak for the collectivity become first class citizens; all others are subordinated. The anti-constitutionalist, in contrast, argues that the political battles encouraged by constitutionalism breed resentments, while the insistence that no political argument is beyond challenge conduces to a disheartening and destructive amoralism.

Two themes recur in the essays in this volume on the current constitutional crisis: the divisiveness of the Canadian political scene, and the lack, or supposed lack, of opportunities for democratic participation. Underneath looms the crucial question in the debate between constitutionalists and anti-constitutionalists: is it possible to strengthen political efficacy and the sense of democratic community in a country like ours without destroying the essential freedoms of constitutionalism?

In “The Evolution of Liberal Democracy in Canada,” David Bercuson and Barry Cooper reject the idea that Canadians today lack opportunities to make their voice heard in politics. The Canada they describe is both a constitutional regime and a participatory democracy: “The Canadian citizen is... an equal partner with all other citizens in the process of government.” The suggestion is that satisfaction with the political opportunities offered by constitutionalism is enough to provide a robust sense of community. The sense of community is not in conflict with constitutional freedoms, according to this argument, because it issues from the exercise of freedoms.

Bercuson and Cooper do not discuss what is for so many observers the obvious and disturbing feature of the Canadian political scene today, its acrimony and divisiveness. The essays by Alan Cairns, Hugh Thorburn, and F.L. Morton and Rainer Knopf, address this aspect of the current crisis.

Cairns finds little that corresponds to the high sense of national identity celebrated by Bercuson and Cooper. He argues that although the Canadian Charter of Rights and Freedoms promised a stronger sense of pan-Canadian citizenship, it resulted in, or called forth, a number of separate political identities: the new and still fragile sense of identity in Canada without Quebec, the nationalism of Quebec’s francophone majority, and the sense of common identity given aboriginals by their new constitutional status. Citizenship has emerged “as a constitutional category,” Cairns maintains; “it takes its place with the other pillars of our constitutional order — federalism, parliamentary government, an independent judiciary, the Charter...” How ironic it is that debate over the terms of citizenship for these constitutional communities has become a force driving them apart.

H.G. Thorburn also finds no pan-Canadian sense of citizenship. Reviewing the history of French and English, native peoples, and ethnic groups, he argues indeed that Canadians never did develop a coherent national identity. Thorburn’s picture of Canada suggests that the political fragmentation predicted by constitutionalism’s critics is very far advanced in this country. He describes the increasing importance of political lobbies and interest groups in politics and constitution-making as a symptom, or perhaps a cause, of the divisiveness. Groups as avenues of political participation undermine the political parties and institutions that in the parliamentary system
traditionally pull together diverse political interests, building legislative proposals out of the mass of apparently irreconcilable claims and demands coming up through the system.

F.L. Morton and Rainer Knopff find a certain cohesiveness in Canadian political life, but cohesiveness of a disturbing kind. They argue that Canadian politics is dominated by an informal alliance of interest group leaders, lawyers, law professors and journalists (the Court Party) devoted to the pursuit of political objectives through the courts, using the Charter of Rights and Freedoms. The political use of the courts is an established feature of politics in the United States. Morton and Knopff show how common the practice has become in Canada since 1982. What is worrisome about recourse to the courts for political ends, they suggest, is first that it enables elites to advance their own narrow interests under the guise of opening avenues for democratic participation.

But more than this the pursuit of political objectives in the judicial arena casts the mantle of disinterested justice over the actions of the Court Party, stifling opposition. It was suggested above that a fundamental principle of constitutionalism, the principle guaranteeing freedom from political oppression, is that it does not tolerate political demands and arguments that claim to have a status or authority beyond challenge in political debate. Another way to put Morton and Knopff’s argument then is to say that the Court Party breaches this fundamental principle, while taking advantage of it. The Court Party’s informal cohesiveness masks a disdain for the forms and formalities of constitutionalism that has become still another force promoting divisiveness in Canadian politics.

Is there a remedy for the dilemmas described in these papers? In the next article, Douglas Verney describes a novel proposal for improving political accountability through reform of the machinery of executive federalism. Leslie Seidle then reviews the recent history of proposals for Senate reform. The argument in both instances is that remedies can be found within the constitutional tradition for at least some of the political ills Canadians complain about.

During the debate on the Meech Lake accord it was commonly said that the First Ministers Conference and the machinery of executive federalism frustrate political participation by promoting the interests of governments rather than citizens. Verney agrees that the attempt to coordinate the affairs of eleven governments through the First Ministers Conference makes it difficult for voters to determine which level of government is responsible for legislation, and that this in turn is probably a factor contributing to the idea that citizens can’t hold governments accountable, and can’t make themselves heard in political circles.

The scheme he has invented, which he calls “responsible federalism,” will charm many readers. Should it be translated into law? Perhaps its real strength lies in the way Verney uses it to analyze the weaknesses of executive federalism, and the opportunities for political participation offered by the constitutional regime that is operating well.

Janet Ajzenstat
Critics of executive federalism suggest that strengthening the Senate as an arena for resolution of at least some federal-provincial issues will reduce dependence on the First Ministers Conference, and that accountability will be heightened if the Senate is elective. Perhaps there is no other proposal for constitutional reform on which the Canadian political imagination has worked more fruitfully. The variations have been many and splendid. Seidle offers a guide for the perplexed.

The historical papers in this collection show us that current debates about community and participation reflect perennial concerns in modern political thought. As they trace the roots of Canadian constitutionalism and anti-constitutionalism in the nineteenth and early twentieth centuries, they enlarge our understanding of the issues — and the possibilities before Canada now.

In "The First Distinct Society," Louis-Georges Harvey maintains that constitutionalism played a relatively minor role in the political development of Quebec and Lower Canada. I have argued in this introductory essay that the Canadian political tradition in those years was chiefly constitutionalist. Harvey disagrees, suggesting that the important influence was an anti-constitutionalist civic republicanism enshrining collective goals and the idea of civic virtue. He draws on the work of U.S. revisionist scholars like J.G.A. Pocock and Bernard Bailyn who find just such a tradition of civic republicanism and virtue in the founding of the United States. Many of the reasons anti-constitutionalists give for rejecting constitutionalism come to light as Harvey develops his case: constitutionalism frustrates community and democracy, and typically embraces commerce and the economic market, promoting a tolerance of luxury that corrupts society and citizens. In Harvey's opinion this last factor weighed heavily with Quebec thinkers in the decades after 1791.

Constance MacRae-Buchanan is another scholar who has been influenced by the U.S. revisionist historians. Like Harvey, she accepts the idea that notions of community and consensus were central in the political culture of the early United States. Her paper treats the ideas of the loyalists who migrated to British North America during and after the American Revolution, and attacks the idea — loving developed by generations of historians — that these important Canadian forebears were state-loving, deferential, Canadian monarchists. In MacRae-Buchanan's argument, the loyalists were populist, rights-rights loving Americans. Their political values, shaped by the experience of American democratic town government and the American notion of popular sovereignty, were virtually identical with those of the American patriots who fought for independence.

Not all American scholars have adopted the revisionist picture of the American founding. The received view argues that the United States rests on a constitutionalist rather than consensual foundation. In "The Constitutionalism of Etienne Parent and Joseph Howe," I give reasons to suggest that Harvey and MacRae-Buchanan have underestimated the strength of the constitutional argument in the United States and British North America. My interpretation of the period, less revisionist than Harvey's and MacRae-Buchanan's, upholds the picture of pre-Confederation Canada as a constitutional regime. The three essays together (Harvey, MacRae-Buchanan, and Ajzenstat) reveal a sharp cleavage in Canadian historiography that very obviously mirrors the present debate between communitarians and constitutionalists.
Paul Romney and R.C.B. Risk focus on the influence of Ontario's liberal reform tradition in the post-Confederation period. Their research challenges the idea that the political culture of this country bears the stamp of the "tory streak", a political conservatism that was brought to Canada originally by the loyalists and reached its ascendancy with Macdonald's tories: an interpretation of Canadian history that has been received wisdom for a generation of students in political science and history.

How much the liberal tradition they describe drew on the doctrine of constitutionalism will be evident from Romney's exposition of Lord Watson's arguments in decisions of the Judicial Committee of the Privy council. Romney attacks a cherished Canadian myth that depicts the Judicial Committee as undermining the intention of the Fathers of Confederation. He does not deny that decisions of the imperial court had the effect of allocating powers to the provinces while shrinking the federal government's effectiveness. His claim is that the Judicial Committee's decision, particularly Watson's in the Prohibition case, drew on the arguments and philosophy of Founders from the Ontario liberals.

A central issue in the debates of the period, as both Romney and Risk show, was exactly the suggestion, so important for Bercuson and Cooper in "The Evolution of Liberal Democracy," that political freedoms and the sense of citizenship ought to go hand in hand, and will flourish in a sovereign polity, and only in a sovereign polity. The struggle for provincial rights, as Risk notes, was seen as part and parcel of the struggle for the political freedoms promised by constitutionalism. As Risk takes us through Edward Blake's thought it becomes evident that Blake regarded a sovereign Parliament as a sufficient protector for both political and individual rights — a notion that Charter supporters will find surprising, and Charter critics will wish to explore.

Michiel Horn's discussion of Frank Scott's political ideas raises the question of constitutionalism's relation to the welfare state. Morton and Knopff are of the opinion that the introduction of welfare legislation in Canada eroded the principles of constitutionalism as mapped by the Fathers of Confederation, because it extended the powers of the state into the realm of private rights. Scott's political thought suggests that they have underestimated the constitutional component of Canadian socialism. The Regina Manifesto did not recommend the abolition or even the wholesale reform of the constitutional regime (of the kind endorsed by the Court Party that Morton and Knopff describe). The expectation was that the form of government that in the 1930s sustained the injustices of the capitalist system would nevertheless allow socialist parties and programs their due in time.

That such confidence in the ultimate fairness of the standards of constitutionalism is fading in Canada is burden of the articles in this volume on the constitutional dilemma today.
I am pleased to participate in this conference organized by the Canadian Study of Parliament Group in order to commemorate the two hundredth anniversary of the Constitutional Act of 1791.

In his *Histoire du Canada français*, Lionel Groulx judged the constitution of 1791 severely. "The system was welcomed with enthusiasm," wrote the historian, "and was said to be a copy of the system of the mother country. In reality, it was an illegitimate and disappointing system; the system of a colony of the Crown maintained behind the parliamentary mask. Parliamentarians had no real influence over the executive; the supreme powers were perpetuated in the hands of autocratic governors without any political responsibilities in the colonies, responsible only to the imperial government."1

The judgment formulated by the historian is severe but just. It must be noted, however, that beyond its obvious shortcomings the constitution of 1791 provided for the creation of parliamentary assemblies for Upper and Lower Canada and thus marked the origin of our parliamentary system. The 1791 constitution required that each of the two provinces have its population elect a parliament. Such assemblies would thus be adapted to the customs and particular nature of each province. It was the beginning of a long evolution which led in 1848 to the achievement of responsible government, and in 1867 to the creation of our federal system. Parliamentary life in Canada thus stemmed from the 1791 constitution. Except for the interruption caused by the uprisings of 1837-1838, the political institutions of this country have functioned with remarkable continuity. Very rare are the modern political societies that have such a long tradition of living attachment to their parliamentary institutions. Beyond all the political differences that may separate us, we have every reason to be proud of the stability of our Canadian parliamentary system.

I will discuss in more detail the difficulties our Canadian system is now facing. Before doing so, I wish however to outline the main features of the constitutional evolution of Canada.

From the beginning, very different objectives distinguished Canada from the United States. In 1776, the establishment of a new society was undertaken in the United States, devoid of all links with the British Crown. In most areas of activity—political institutions, administration of justice, educational system, organization of professions, economic life, and finances—new frontiers were

1 Lionel Groulx *Histoire du Canada Français depuis la découverte III* (Montréal 1952) 12 (author’s translation)
resolutely opened. The results of this daring enterprise are omnipresent today. The United States has become the most powerful country in the world, and the influence of its culture is felt in all continents.

While the United States opted for a new system, Canada chose the path of faithfulness and continuity. The Anglo-Canadians chose to create north of the 49th parallel a society highly inspired by the British model, in particular with regard to its political and social institutions. Francophones who lived in Quebec decided to continue their social evolution within a society inspired by their own cultural and religious values, but they learned rapidly to accommodate themselves to British political institutions. On many occasions during the last two centuries, Canadians, francophones and anglophones, were invited to follow the republican path chosen by the United States. Each time, their answer was negative.

In his famous Report on the Affairs of British North America submitted in 1839 to the Queen of England, Lord Durham dealt mainly with the conflict between francophones and anglophones in Canada. “I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races.” Due to the acuteness of the conflict between anglophones and francophones, Lord Durham recommended the amalgamation of the two Canadas into one province with one parliament without delay. He thought he would thus succeed in reducing the francophones forever to the status of a minority under the control of a majority of British origin. But at the same time Lord Durham was preoccupied with stemming the omnipresent influence exerted by the American society on the British settlers living in Canada. “It can only be done by raising up for the North American colonist some nationality of his own; by elevating these small and unimportant communities into a society having some objects of a national importance; and by thus giving their inhabitants a country which they will be unwilling to see absorbed even into one more powerful.” The dream of Lord Durham was in fact to form a political society which would group within one country all British colonies of North America.

The will to develop a distinct society north of the United States expressed itself in various ways throughout the political and constitutional evolution of Canada. I will discuss certain characteristics of this evolution that seem to me to be linked to the problems of today.

The first characteristic, evident and constant, is the reference as early as 1774 in the Quebec Act, to the distinct nature of the province of Quebec and its population. The evolution of Canada has been marked in this regard with countless vicissitudes. However, the will of Quebec to remain French and to ensure its French identity has been at the heart of all the important phases of the constitutional evolution of Canada. The Durham Report, and the measures that were taken to implement the recommendations it contained, attempted if not to suffocate at least to reduce the

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3 Lord Durham’s Report 162
French population of the country to the status of a minority. As well, during the years following Confederation, the identity and language rights of francophones outside of Quebec were denied by anglophone majorities in most provinces, so that in many regards, the recognition of the French identity was long limited to Quebec alone. However, each time attempts were made to place the francophone community in the position of a powerless minority, it met with unfailing resistance from Quebec. For many historians and analysts, the act of 1791 paved the way for something of utmost importance. By providing Quebec with its own assembly, it contained in embryo the recognition of its distinct nature, and of the right it would later be given to manage its own affairs.

Another characteristic of the Canadian constitutional history concerns religious and language rights. The American republic was created on the basis of the principle of the inalienable right to equality of all persons before the law. In applying these principles, it was decided from the outset that there would be a complete separation between the organized churches and the political institutions, and that consequently no religion would benefit from any particular privileges within the State and political society. It was also decided, although there is no provision to this effect in the constitution, that one language, English, would be universally recognized. In Canada, on the contrary, special rights and privileges were imparted as early as 1774 and 1791 to the Catholic and Protestant churches and to their members. It was also decided in 1867 to enshrine within the constitution the recognition of equal language rights for francophones and anglophones with regard to the deliberations of the federal Parliament and the Legislative Assembly of Quebec, and in judicial proceedings. The day after the accord was reached in 1864 between the concerned provinces, John A. Macdonald wrote: “Delegates from all provinces agreed that the use of the French language is one of the principles on which the Confederation would be based, and that its use as exists today be guaranteed by the imperial act.” The Constitution Act of 1982 added an important chapter with regard to the recognition of language rights of minorities in matters of education.

A third characteristic of our constitutional evolution is the very different manner in which Canada reacted to the internal crises that could have endangered the unity of the country. In the United States, a major crisis occurred under the presidency of Abraham Lincoln involving the emancipation of the black people. When faced with the declaration of secession of the Southern states, Abraham Lincoln proclaimed the indivisible nature of the Union and conducted a war against the Southern states that caused hundreds of thousands of casualties. Violence has often characterized American political life, as shown by political assassinations in recent times. Except for the uprisings of 1837-1838, the Riel case, the political crises surrounding conscription during the two world wars, and the October crisis of 1970, the political and constitutional evolution of Canada has taken place amidst countless debates and conferences, through legislative modifications and various agreements, but generally

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4 Groulx Histoire du Canada Français depuis la découverte IV 83 (author’s translation)
without violence. Each time that individuals or groups have attempted to use violence
to promote their political objectives, they soon faced firm opposition not only from
governments but also from the population.

A fourth characteristic of our constitutional evolution stems from the ambiguity
of the constitution of 1867. For a large majority of francophones, the political system
instituted in 1867 was far more than a simple law of the British Parliament. It was
rather, to quote Lionel Groulx, “the legitimization of a contract or pact concluded
validly between the provinces.”5 In the eyes of a large majority of anglophones, and
especially of civil servants who advised federal politicians, however, the constitution
of 1867 was viewed as a law enacted by the imperial Parliament at the request of
Canadian political leaders, and therefore it can be modified and adapted according to
the dominant will of the central power.

The second interpretation was generally accepted by English Canada, especially
among the technocrats who guided the federal administration. However, the first
interpretation has always prevailed in Quebec. Unfortunately, the text of the
Constitution Act of 1867 does not solve this dilemma. We know, as John A. Macdonald
admitted, that the federal form of the government was accepted because of the
objections of Quebec with regard to a projected legislative union that Macdonald and
most anglophone leaders would have preferred. We also know, through certain
provisions of the Constitution Act of 1867, that the Fathers of Confederation were
conscious of the aspirations of Quebec and made room for these in certain matters.
But the text of 1867 has never lent itself to a decisive interpretation in either way.

The first interpretation opened the door to modifications to the constitution
that could, for example, reinforce the powers of the federal Parliament regardless of
the will of one or more provinces. The second interpretation implied on the contrary a
scrupulous respect of the rights of the provinces, in particular of Quebec. For more
than a century, few major changes were brought to the sharing of powers between the
central government and the provinces unless they had been approved beforehand by
the federal Parliament and all provinces. This practice was so firmly established that in
a study on constitutional amendment published early in the 1960s, the federal
government considered unanimity as a necessary rule for any constitutional
amendment having consequences on the sharing of powers. This rule that had always
prevailed since 1867 was dropped with the adoption of the Constitution Act of 1982.
This law brought important modifications to the Canadian constitutional equilibrium.
It was adopted by the federal government despite the opposition of Quebec.

To complete the picture, it must be stressed that even in the absence of formal
constitutional amendments, the federal government has been repeatedly involved in
areas reserved to provinces by virtue of the 1867 constitution, especially during and
after the Second World War. Made by way of the general powers attributed to the
central parliament by the constitution, these initiatives contributed in many cases to
provide the country with generous policies with regard to health insurance, social
services, higher education, hospital services, vocational training, legal services,

5 Groulx IV 82 (author’s translation)
pension plans, etc. These have also been the source of a number of conflicts between the federal government and the provinces. Finally, they have contributed largely to the increased indebtedness of the federal and provincial governments deriving directly from the troubling deficits accumulated by governments over the last twenty years.

The Constitution Act of 1867 was to provide Canada with a strong economic union that would allow exchanges to take place freely between partners, and whose international influence would be ensured by the privileged links of Canada with Great Britain. The major changes that took place in the world and in Canada have greatly weakened the Canadian economic union. The present level of cohesion of the Canadian economic union has now reached a point that is in many regards inferior to that offered to member countries by the European Community. While the European Community is headed toward an increasing integration of the economic activity of its member countries, the Canadian economy is marked by obstacles, duplication, sluggishness and artificialities which have nothing in common with a genuine economic union.

Canada may take pride in the political stability it has enjoyed for 125 years owing to its 1867 constitution. But this document can no longer respond to new needs generated by the social, economic and political evolution of the country. The present period has seen an increase in Quebec nationalism, in demands from the Western provinces and in demands from aboriginal peoples. In many areas, the sharing of responsibilities established in 1867 no longer answers the requirements of our economic and political reality. It is time to bring important changes to the constitution of our country. These should cover the following areas:

1) The status of Quebec within the Canadian political society

For a quarter century, in the wake of the affirmation the Quiet Revolution gave rise to, Quebec has demanded unceasingly that the Canadian system be adjusted to take into account the new realities. Until now, the answer by the rest of the country and the federal government has been rather evasive. Answers have been generally reserved and of limited impact. On two occasions, Quebec was insulted. It was first insulted in 1982 with the adoption of the Constitution Act in which was enshrined a charter of rights and freedoms despite the opposition expressed by Quebec. The second insult was made when the Meech Lake accord was rejected. The accord failed despite the fact that the leaders of the federal government and all provincial governments had first signed the document. These actions undermined seriously the credibility of Canadian federalism in Quebec.

2) The status of aboriginal peoples

This subject was ignored in the 1867 constitution. It was only briefly mentioned in the 1982 constitution. The new awareness of the aboriginal peoples' concerns forces us today to deal frankly with this question within the framework of exchanges that will take place on the constitutional future of the country.

Claude Ryan
3) **The search for equality of opportunity on the economic and social levels**

Due to ever-increasing financial restrictions that are placed on the governments and citizens, I doubt we will be able to maintain at their present level most social programs instituted in Canada since the end of the Second World War. I believe however that we must remain faithful to the ideal of justice and sharing which inspired these programs. The objective of equal opportunity in economic and social matters must remain foremost among our constitutional objectives. This objective, however, will have to be translated into programs often less ambitious and based on our reality. It will also have to be conceived with greater attention to consultation between the central power and the provinces.

4) **The sharing of influence and power between the regions**

Since 1867, the population of Canada has climbed from 3.5 million to 26 million people. In 1870, over 80 percent of the population was located in Ontario and Quebec. Today, over 40 percent of the population of Canada lives outside these provinces, with more than 25 percent in the Western provinces. In addition, there has been considerable change in the composition of the population of Canada. Canadians whose origin was neither French nor English now represent more than 25 percent of the population. In Ontario and the Western provinces, they refuse to be identified with a rigidly bicultural definition of Canada whilst being gradually assimilated into the anglophone mainstream.

The outlying provinces demand that the benefits of the federation be shared more equitably. They also require that their participation in the decision-making process be ensured. While ensuring that their proposals remain compatible with the spirit underlying our Canadian political system, we have the obligation to search with these provinces for answers to satisfy the questions they raise. The representatives for these provinces will have to understand, however, that the spirit underlying the Canadian system requires from each partner a minimum of respect with regard to the essential elements of the political and constitutional tradition of the country. This point was stressed recently in an article by Johanna den Hartog, of Vancouver, who observed “The impasse is assisted by our overwhelming collective ignorance of our country's history. The understood bargains upon which Canada is based are not of common knowledge, especially outside of Quebec. We are not familiar with the political, legal and economic contracts Canadians have lived under for almost 130 years. This ignorance has fuelled misunderstanding and prevented agreement about the specifics of what is in debate among the public, including many provincial politicians. The vacuum of historical knowledge has been filled with various myths about Canada, about how it works and how we got to where we are today, myths that severely limit the options for accommodation.”

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5) **The reinforcement of the economic union**

At a time when the influence of our American neighbour is felt ever-increasingly in our evolution, and when member countries of the European Community have recognized the necessity of an economic union or a reinforced political union, Canada must examine problems arising from the present Canadian economic union. We have allowed a large number of elements to be introduced into the Canadian economic system. This has led to higher costs and cumbersome operations. In our age of electronics and instantaneous communications, it is necessary that the free circulation of goods, people, services and capital be enhanced.

The distribution of powers will have to be dealt with in future constitutional discussions. Each time, however, that we deal with the sharing of powers in an abstract way and according to ideological rather than functional objectives, discussions end up in a deadlock. Discussions regarding a new sharing of powers will have to be done in the framework of negotiations on the major subjects that seem to be at the heart of the present constitutional uneasiness in Canada.

On the question of language rights, the essentials seem to have been enshrined within the constitution of 1982. If Canada is to continue to be governed by a federal system, it will be necessary to maintain within the constitution guarantees with regard to the equality of both official languages in federal institutions. Also, certain language rights of minorities will have to be protected in vital sectors such as education, the administration of justice, and health and social services. As for the rest, Quebec, in particular, should be able to establish its language policy according to its needs.

With this perspective in mind, the proposals made public in September 1991 by the federal government appear to me as a valuable basis for discussion, despite being incomplete in many respects. There are few proposals which can be accepted in full in their present form. There are equally few proposals which appear worthy of outright rejection in their present form. Among the proposals submitted by the federal government, special attention will be given by Quebec observers to those dealing with Quebec as a distinct society and with the sharing of powers in economic matters. The proposals related to the economic union will have to be examined carefully. As now formulated, they pose serious difficulties.

The reasons that justified the creation of a distinct political society north of the United States seem to me as valid today as they were in the nineteenth century, and even more pressing. The existence of a different political society in the part of the continent occupied by Canada appears to me as highly desirable. Having a strong admiration for American institutions, I do not believe I am adhering to narrow or negative motives in supporting the Canadian constitutional experiment. I desire to maintain a distinct political society in this part of the continent because I believe there is room for a healthy diversity within the North American geographic territory. The presence on this continent of a Canadian political society distinct from the United States can also be beneficial for peace. A strong and united Canada can and will better measure up to its North American neighbour. It will better hold its place in the world.
than a divided Canada. It seems to me that only a federal system of government may answer the needs of a vast and diverse country such as Canada. Any formula that would tend to a stronger cultural and political homogeneity would be unacceptable for Quebec. Any formula that would weaken excessively the central power would be sterile.

The pursuit of this double objective would risk however being gravely compromised if the present impasse were to lead to the separation of Quebec. For Quebec as for the rest of Canada, this separation would have unpleasant consequences. It would risk provoking a marked acceleration of the power of attraction of the United States. Separation might even be followed in the long term by a gradual absorption of the divided parts into the United States.

A greater knowledge of our history; a better understanding of the difficulties which we have overcome in the past; an in-depth understanding of the forces that have built this country; an improved familiarity with our political and constitutional tradition; these are elements that must become present in our debates on the future of this country. Their absence is now being painfully felt, especially among our political representatives. The challenge of the next round of negotiations will consist in freeing this country from certain past ambiguities; building its future on a clear and loyal recognition of the factors that contributed and still contribute to give it its distinct nature; and defining for the future objectives that can create unity among the citizens of each province.

I believe that Canada is capable of facing this challenge. The Prime Minister of Quebec, Mr. Robert Bourassa, has indicated on many occasions that the participation of Quebec in a sincere effort for the renewal of Canadian federalism remains the first option of his government and of the party which is now in power in Quebec. However, there still remains a lot of work to be accomplished in little time and success is far from being assured. In Quebec, the rejection of the Meech Lake accord has caused a deep wound that is still felt with bitterness. Some generous and courageous decisions will be needed in order to prevent this wound from persisting and transforming itself — where it is not yet a fact — into an irrevocable will to leave the house which we have shared together in varying conditions since the Constitutional Act of 1791.
PART I

THE CRISIS TODAY
From Constitutional Monarchy to Quasi Republic: The Evolution of Liberal Democracy in Canada

David J. Bercuson and Barry Cooper

Canada was not a democracy at its birth. It was a British colony with limited self-government. It was in law a constitutional monarchy governed by conventions of parliamentary supremacy. There was no such thing as “Canadian citizenship.” There was no constitutional protection of what we now consider to be traditional freedoms. The franchise was severely restricted and was in no way equally exercised.

Today Canada is a full fledged democracy. Its people are sovereign. It is axiomatic that whatever else liberal democracy may be, it is surely a system of government in which the people are sovereign and in which the people choose elected representatives to legislate on their behalf. We will argue that Canada has become a liberal democracy on the basis of an analysis of the following processes: (1) Canada’s evolution from colony to fully independent nation, which resulted in division of the sovereignty of the Crown among several jurisdictions; legally this entailed the transfer of sovereignty respecting Canada from the Crown in right of Great Britain to the Crown in right of Canada and the provinces; (2) Canada’s evolution from a constitutional monarchy, ordered on the basis of the doctrine of parliamentary supremacy, into a liberal democracy with a defined citizenship, a written charter of rights, and constitutional limits on the power of the Canadian legislatures, which amounts to a transference of the effective exercise of sovereignty from the Crown in right of Canada to the people of Canada; (3) the impact of the Charter of Rights and Freedoms on Canadian political consciousness or sense of citizenship.

The Evolution of Self Government in Canada

The Dominion of Canada came into existence on 1 July, 1867, born of a British statute — the British North America Act. That act united the colonies of Nova Scotia, New Brunswick and the United Province of Canada (consisting of Canada East or Lower Canada and Canada West or Upper Canada), created a new federal government for the dominion, divided Canada into Ontario and Quebec, established provincial governments for the four provinces, divided legislative authority between the provincial and federal governments, established courts, and set a number of other terms and conditions of government in the new dominion. In “internal” matters — tariffs, local improvements, the raising and spending of public revenues, etc. — the new dominion was largely self-governing in that the federal government
was free, by convention, to enact legislation without interference from Great Britain. These conventions had first been established in the late 1840s with the winning of responsible government in the British North American colonies and were confirmed in 1859 when Britain grudgingly acceded to the passage of the Galt Tariff in the legislature of Canada, a measure that discriminated against British manufactures. In “external” matters — the negotiation of treaties, the declaration of war, the daily conduct of relations with other countries — the Dominion of Canada exercised no self-government in 1867.

The British North America Act did many things; one thing it did not do was to give the new Dominion of Canada any more independence than the three colonies had previously enjoyed. As C.P. Stacey observed: “So far as the [British North America] Act went, it had to be assumed that the ‘Dominion of Canada’ stood no higher than the constituent colonies which it brought together or than any of the other British self-governing colonies around the globe.”

Thus Canadians exercising the franchise in the first dominion election in August and September 1867 were voting to choose a House of Commons that was constitutionally restricted in the powers it could exercise. Canadians certainly had a vote, but in exercising that vote they were not the highest authority in the polity — the metropolitan power was. They were not sovereign and their vote was of limited constitutional value in giving guidance to their legislators.

Canada began the long road to fully independent nationhood in 1871 with the negotiating of the Treaty of Washington. In those negotiations Britain invited Canadian Prime Minister John A. Macdonald to sit on the British delegation as one of Britain’s three commissioners. Since the Treaty was wholly concerned with Canada-United States issues, the Canadian Parliament was also given the formal opportunity to approve it although, in reality, it had little choice but to do so.

This step was the first in a long process which culminated in the 1926 Imperial Conference and the Statute of Westminster, passed by the British Parliament in 1931. Along the way Canada gained virtually complete control over its internal affairs as imperial disallowance fell into disuse; Canada also began to exercise a limited authority over its foreign relations. When Britain declared war in August 1914, however, Canada was still constitutionally bound by that declaration and had no right of dissent. This was true for two reasons: first, as a legal colony, Canada exercised no formal legal sovereignty even though it exercised greater political control over its own affairs than it had in 1867. Accordingly, it was bound by the decisions of the Crown in right of Great Britain because the Crown was then considered indivisible. A second reason, linked to the first, was that Canada was still politically subservient in status to Great Britain in matters of foreign policy and was, therefore, practically, as well as formally, bound by British action. Colonial status was not satisfactory to Canada’s wartime government led by Prime Minister Robert Laird Borden. Borden and his cabinet believed that Canada’s four division contingent on the western front, not to mention its contribution to the war effort in manufactures, raw materials and

1 C.P. Stacey Canada and the Age of Conflict 1 (Toronto 1977) 1
2 Ibid. 21ff.
foodstuffs, entitled Canada to equality with Britain within the empire. At the 1917 Imperial War Conference, Borden and the other leaders of the self-governing dominions (along with the British prime minister, David Lloyd George) declared that, after the war, the dominions should enjoy a new constitutional status “based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth.”3 That declaration was initially fulfilled at the Imperial Conference of 1926.

The 1926 Conference was marked by the efforts of two dominions — the Union of South Africa and the Irish Free State — to loosen dramatically the bonds of empire. Canada’s Prime Minister, William Lyon Mackenzie King, did not spearhead these efforts, but he was eager to follow. Thus the assembled prime ministers adopted the Balfour Report, which declared that Britain and the self-governing dominions were “autonomous communities within the British Empire, equal in status, in no way subordinate one to another...and freely associated as members of the British Commonwealth of Nations.”4 If the dominions were free to associate, they were also free to dissociate. They were, in other words, as independent as they chose to be. This declaration, and other changes made in the constitutional structure of the empire, such as the repeal of the Colonial Laws Validity Act in 1929, prepared the ground for the Statute of Westminster.

The Statute of Westminster established full legislative equality between the Parliament at Westminster and the Parliaments of the dominions. It was, effectively, Canada’s declaration of independence. It enabled Canada, if it chose, fully to declare its own independence, to become a republic, to leave the empire. All three moves were subsequently made by the Irish Free State in transforming itself into the Republic of Ireland. Canada chose not to embark on such a course. In fact, it chose neither completely to end appeals to the Judicial Committee of the Privy Council (appeals were ended in criminal, but not civil cases), nor to patriate the British North America Act although legally it could have done both.5 Therefore, the JCPC continued to influence the evolution of Canadian law, making important decisions on radio broadcasting and other matters during the 1930s. The BNA Act, however, could be amended only by the British Parliament.

With each step towards true legal independence, the franchise — the ultimate exercise of sovereign power in a true republic — became more constitutionally significant in Canada. Each time Canada acquired new powers, the exercise of sovereignty by the British Parliament on behalf of Canada was curtailed and the exercise of sovereignty by the Canadian Parliament (and the provincial legislatures) was increased. For the most part this process was completed in 1931. Another way of putting it is to say that the Crown had been divided by political leaders who had been elected by the parliaments of their respective countries in order to legislate on the Crown’s behalf. It was this evolutionary transfer of the exercise of sovereignty to

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3 Robert Craig Brown Robert Laird Borden: A Biography II 1914-1937 (Toronto 1980) 80-81
4 John H. Blair Neatby Mackenzie King II 1923-1932, The Lonely Heights (Toronto 1963) 185
5 John H. Thompson with Allen Seager Canada: 1922-1939, Decades of Discord (Toronto 1985) 304
Canada that gave the Canadian voter greater say in the manner in which that sovereignty was exercised on his or her behalf. Whether or not it gave greater sovereignty to the people of Canada, it certainly gave the legislatures of Canada the right to exercise sovereignty in the name of the Crown.

The outbreak of World War II was the occasion for Canada again to demonstrate its status as an independent nation. Britain declared war on Germany on 3 September, 1939; Canada declared war on Germany on 9 September, 1939 with a separate declaration. The divisibility of the Crown and the separate Canadian exercise of sovereignty under the Crown was thereby affirmed. This was proof, if any was needed, that as far as Canada was concerned, sovereignty over virtually all legislative matters now lay within Canadian borders despite the increasingly anachronistic fact that civil appeals to the JCPC were still allowed and that the BNA Act could still be amended only in Britain.

At the end of World War II, and as a result of Canada's pride in its war effort, three steps were taken that moved Canada even further into full national sovereignty. The first was the adoption of the Canadian Citizenship Act in 1946, the second was the ending of all appeals to the JCPC in 1949, and the third was authorization for the Canadian Parliament to amend the BNA Act in areas of federal jurisdiction.

The Canadian Citizenship Act did not confer any additional rights, duties or obligations on those formerly classed as Canadian nationals and it did not remove any rights or status from any person who had formerly been considered a Canadian national. What it did do was to create a category of Canadian citizenship that was separate and distinct. In other words, a Canadian citizen was still to be a British subject, and a British subject still qualified for Canadian citizenship but persons born or naturalized in Canada were subsequently to be considered Canadian citizens above all else. Canada was the first British Commonwealth country to establish its own citizenship.

Citizenship was a further step along the road to full assumption of sovereignty by Canada. As the framer of the legislation told the House of Commons in 1946: "Citizenship means more than the right to vote; more than the right to hold and transfer property; more than the right to move freely under the protection of the state; citizenship is the right to full partnership in the fortunes and in the future of the nation." Put another way, citizenship conferred equal rights, an equal destiny, and equal obligations separate and distinct from the rights, destiny and obligations that were attached to citizenship of some other country. Thirty years later British subjects in Canada were placed on the same legal footing as other foreign nationals and were stripped of special privileges such as the right to vote.

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6 Ibid. 328-9
7 Paul Martin A Very Public Life I Far From Home (Ottawa 1983) 448
The second post-war step to full sovereignty was taken in 1949 when the Supreme Court of Canada was made the court of last resort for Canada in all matters.\(^8\) This did not affect the exercise of sovereignty in Canada because the Court has no legislative function, but it meant that Canadians would subsequently be responsible for interpreting the actions of Canadian legislatures, which did exercise such functions.

The third step was the least significant. Parliament declared that it would henceforth bear sole responsibility for amending the BNA Act in matters solely within federal jurisdiction.\(^9\) Previously even these matters had needed the assent of the Parliament at Westminster. This was certainly a step in the direction of the assumption of full sovereignty, but it was a small one since the truly contentious constitutional amendments were those bearing on federal-provincial jurisdiction and they could still only be made in London.

The final step in Canada's complete severance of all legislative ties, and in the transference of the last vestiges of Britain's exercise of sovereignty on behalf of Canada, was the most significant. This was the adoption of the Constitution Act, 1982, incorporating the patriation of the BNA Act and the adoption of the Charter of Rights and Freedoms, which ended Britain’s last formal role in the governing of Canada — the amendment of the BNA Act respecting provisions dealing with the division of powers. With that step Canada became a fully independent nation in every respect and exercised complete sovereignty in right of the Crown. The Constitution Act also made of Canada a republic in all but name. Section 41 of that act specifies that the constitution may be amended “where authorized by resolutions of the Senate and House of Commons and of the legislative assemblies of each province” with respect to “the office of the Queen.” In other words, it is now possible for the legislatures of Canada acting together to alter not only the powers exercised by the Crown but the very position of the Crown itself as the executive authority. Put simply, section 41 clearly specifies that a resolution to abolish the monarchy and to transform Canada into a republic would be lawful if authorized in the manner so specified. Thus it is that the Crown in Canada now exists by the sufferance of the Canadian legislatures. According to Peter W. Hogg, “Canada could, if it chose, easily become a republic by the simple device of securing an amendment of the Constitution to make the Governor General the formal head of state in his own right.”\(^10\)

The Evolution of Democracy in Canada

Canada was not created as a democracy. In fact, the available evidence shows that the Fathers of Confederation abhorred democracy and created a political and constitutional structure as far removed from democracy as they could. They saw no need for universal suffrage in any form. They were not primarily interested in creating a political or constitutional system that would protect individual rights or guarantee

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\(^8\) Dale C. Thomson *Louis St. Laurent: Canadian* (New York 1968) 277

\(^9\) Ibid.

\(^10\) Hogg *Constitutional Law in Canada* 2nd ed. (Toronto Carswell 1985) 213
individual equality. They were rather more interested in the preservation of group rights because of the widespread acceptance of the reality of the communal nature of Canada in 1867. Thus the legislatures of 1867 Canada were supreme within their areas of jurisdiction and had complete power to act as they pleased within those areas without regard to individual rights. The very notion of individual rights was, so to speak, politically invisible. Although the legislatures of the time did exercise a degree of sovereignty in right of the Crown, it could not be said in any sense that the people of Canada were sovereign.

None of the above is true any longer. As a result of an evolutionary process that paralleled, and was connected to, Canada's march to full independence, Canada became more democratic at the same time as parliamentary supremacy was eroded. That process (like the march to full independence) culminated with the adoption of the Constitution Act, 1982, along with the Charter of Rights and Freedoms in which certain individual rights were placed above the statute law in an entrenched constitution, unlike the largely unwritten constitution of Great Britain.

Does this mean that the people of Canada are now sovereign? There have been few studies of sovereignty in Canada or, in fact, in any other of the constitutional monarchies that once made up the British Commonwealth. One illuminating study, The Spirit of the Laws, by Andrew W. Fraser, devotes a section to the question of what citizenship means in the former dominions and how it relates to sovereignty. Fraser concludes that there is a significant difference in the legal status of citizenship in a republic and citizenship in a "British dominion." In the former, citizenship is "the citizen's right to participate in authority as the sine qua non of civic virtue." In such a system, "the norms of constitutional freedom would aim to secure that power of voice [to decide the direction of government] in every citizen." This, Fraser concludes, would "bind not just the formal institutions of the state, but also ordinary civil institutions in so far as they share in a practise of authority uniting a diversity of individuals in a common or corporate enterprise."11 Put another way, citizenship in a republic is not bestowed by government but precedes government. Republican government is legitimated by citizenship; government does not legitimate citizenship.

This practise cannot apply in a constitutional monarchy such as Britain, Fraser indicates, because sovereignty there still resides formally and legally in the Crown. Citizenship in Britain is a condition of being domiciled in that country and is bestowed by the Crown. Citizenship there does not precede the Crown and does not bestow legitimacy on the Crown; citizenship is received from the Crown and flows from it.

These reflections have a bearing on the status of citizenship in a federal constitutional monarchy such as Canada once was and on the federal, liberal, democratic quasi-republic it has become. In Canada, Fraser asserts, there is a significant difference from the constitutional structure of Britain. From 1867 on Canada had a written, entrenched document that delineated the constitutional relationship of governing bodies to each other. In Canada, therefore, "the

11 Andrew W. Fraser The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity (Toronto 1990) 299
constitutional right of the citizen to participate in authority has its genesis in the experience of covenanting together to constitute a common enterprise. Thus even though the "causes" of citizenship in Canada are different than they are in a true republic, the consequence of the existence of a federalism defined first by the BNA Act and now by the Constitution Act is the same, according to Fraser, since republics are constituted by the acts of their citizens.

Further, in creating the Constitution Act, and especially section 41, no effort was made to elevate the Crown to a special status higher than that of other governmental institutions in Canada. Granted it would take unanimity of the federal parliament and the provincial legislatures to abolish the monarchy, but such unanimity is also required to change the composition of the Supreme Court of Canada and to make other substantive changes to the constitution. In other words, the institution of the Crown in Canada is no safer from abolition than is the Supreme Court of Canada. It thus follows that the Crown in Canada is now defined by, and exists as a result of, the implicit action of the Canadian legislatures. Thus, the Canadian citizens who elected those legislators now control the fate of the Crown in Canada. Put another way, sovereignty now rests solely with the Canadian citizenry. The sovereignty of the Crown in Canada is, to all intents and purposes, a legal fiction.

This was not always so. In his seminal article "Democracy and the Ontario Fathers of Confederation," historian Bruce Hodgins wrote that "all of the Ontario Fathers [of Confederation]... opposed. ... 'democracy' and argued that universal suffrage was one of the two major defects in the American system." Here, for example, is John A. Macdonald speaking on the basic principles of what was to become the British North America Act: "we shall have... a strong and lasting government under which we can work out constitutional liberty as opposed to democracy, and be able to protect the minority by having a powerful central government."

There is ample evidence in the handiwork of the Fathers of Confederation that they were convinced anti-democrats. The BNA Act was proclaimed in order to provide for the "Welfare of the Provinces" and the "interests of the British Empire," not the protection of the individual's pursuit of personal fulfilment. It established an appointed upper house (the Senate) with a large property qualification for Senators with the intent it would be "conservative, calm, considerate and watchful," in the words of Alexander Campbell. "The rights of the minority ought to be protected," proclaimed Macdonald, and "the rich are always fewer in number than the poor." Even George Brown, leader of the reform-minded Clear Grit movement was not enamoured of democracy. He too supported an appointed upper house.13 There is little evidence that the non-Ontario Fathers of Confederation thought any differently.

12 Ibid. 300
13 Bruce W. Hodgins "Democracy and the Ontario Fathers of Confederation" in Bruce Hodgins and Robert Page eds Canadian History Since Confederation: Essays and Interpretations (Georgetown Ontario 1979) 19-28
Not only was the Canada created by Confederation not democratic, it was not liberal either. Here we use "liberal" as describing a polity designed to defend and advance individual liberty. In a now famous interpretation of the basic philosophy of Confederation, the late historian W.L. Morton argued that Canada was founded upon a “conservative” principle which he defined in this way: “[It is] the assertion that the chief political good is stability, the existence of order in the state and society. The order intended, however, is not order imposed by authority from without, but order arising from equilibrium reached among the elements of society by usage, tradition and law. It is what philosophers call an organic order.” Thus Confederation aimed at creating an organically united society.

In his essay, Morton used his concept of the conservative principle to explain why the Fathers of Confederation thought Canada should have a strong central government with weak provinces. He could just as easily have used it to describe why they desired a society where the welfare of the community, or of several communities bound together as one political nation, took precedence over the rights and freedoms of the individual. Certainly there was no attempt in the BNA Act to define individual rights or to mandate individual equality in the Canada of 1867. To do so would have gone against every political instinct of the Fathers of Confederation.

Unlike Britain, Canada was created with a written constitution; in this way the parliamentary supremacy of the British constitutional system was from the outset constrained. But Canada’s constitution was written principally to establish new governments (the federal and provincial governments) and to separate them as to function. In all other matters Canada also had an unwritten constitution and thus it was understandable that Canadian legislatures were believed to be supreme within their spheres of jurisdiction. For example, when the Parliament of Canada desired to constrain individual liberties as part of the War Measures Act, adopted in August 1914, it was thought to have a perfect right to do so. If Fraser is correct, Canada had a quasi-republican status from the very beginning by virtue of its federal nature although neither the legislators nor the people who elected them believed this at the time, and no one acted as if it were so. Canada has always been a quasi-republic in-itself, though not for itself.

The end of Canada’s “colonial mentality” meant a change in the attitude of Canadians with respect to the seat of sovereign power and to the constraints on it. Canada’s evolution from colonial to fully independent status paralleled Canada’s evolution from constitutional monarchy with full parliamentary supremacy to democracy with sovereignty exercised by the people. It took place because of many complex interrelated social, political and economic factors, most of which emerged after World War II, a time of growing diversity of Canada’s population, of the absorption by the Canadian people of American notions of democracy and individual rights, of increased levels of education among the people of Canada and of greater public awareness. Canada has become a more open, more tolerant, and more liberal


David J. Bercuson and Barry Cooper 24
and democratic society than it was prior to the war. Recent polls measuring tolerance towards minority groups in Canada, for example, reveal liberal attitudes quite dramatically different from those demonstrated by polls taken in the mid- to late 1940s.

Several recent milestones along the path to democracy need to be analyzed. The first of these has already been touched upon — The Canadian Citizenship Act of 1946. In establishing a condition of Canadian citizenship, the Parliament of Canada was not only definitively setting Canadian citizens apart from other nationals for the first time, it was also establishing a number of fundamental principles: (1) citizenship was a right of birth; (2) citizenship was beyond the power of parliament to revoke (barring certain extraordinary exceptions); (3) there was, henceforth, to be a “Canadian citizenry” — a class of people with certain constitutional rights and obligations (for example, the right to vote). Beyond that, citizenship, when extended to those from abroad who qualified, signified a “full measure of partnership in the Canadian community,” according to the Act’s framer. The legal and constitutional position of the concept of citizenship in the former British dominions is complex. If Canada were still a constitutional monarchy, how could it confer citizenship, in the accepted republican sense, on those who were born, or become naturalized here? If the Crown is still sovereign (even in right of Canada), could citizenship in Canada mean the same thing as citizenship in an acknowledged republic such as the United States? Again we quote Fraser: “If allegiance could denote both subjection to the self-legitimating authority of the Crown and membership in the political community, the task of defining its constitutional meaning could hardly be distinguished from the classic conundrum: which came first, the chicken or the egg?”

According to Fraser, British courts have traditionally answered this question by continuing to cling to the notion of the Crown as both “the simultaneous precondition of citizenship” and the “consequence of citizenship.” Put another way, “common law judges [in Britain] have been unwilling to acknowledge that the associative forms of modern society might themselves house a federal schema of civic action as the prescriptive foundation of a fundamental law of political obligation.” But Britain is obviously not a federal state and Canada is. That is one major difference. Another is that Canadian courts must now take into consideration the Charter of Rights and Freedoms. To date of writing, the findings of Canadian courts, in the context established by the Charter have been, not surprisingly, different from the findings of British courts on similar questions.

The second milestone along the road to the emergence of popular sovereignty in Canada was the passage of the Canadian Bill of Rights in 1960. The Bill of Rights was a federal statute and not entrenched in the BNA Act. Its chief sponsor, Prime Minister John G. Diefenbaker, was well aware of that, and yet he clearly believed that it ought to have overriding authority in the same way as earlier British statutes bearing on

15 Martin 447
16 Fraser 307
17 Ibid.
liberty had come to have. As he wrote in his memoirs: "There were critics who contended that a statute containing the Bill of Rights could be repealed by any subsequent Parliament. The experience of the Habeas Corpus Act, passed at Westminster in the reign of Charles II, indicated that no Parliament would dare to repeal a freedom statute."18

Too much can be made of the reflections of a political leader on his own work, but it is worth summarizing Diefenbaker's intent in introducing the bill. Although it contained no language that specifically abridged the rights of Parliament, the bill was clearly meant to reaffirm and further entrench two basic principles — the rights of the individual, and the equality of all individuals — both intrinsic to liberal democracy. In so doing it implied that those two principles ought to be beyond the reach of Parliament. In advocating a Bill of Rights in 1948, for example, Diefenbaker had declared: "I stand for freedom that will secure for the individual his inherent constitutional rights."19 In speaking once again on this issue in 1952, he had reiterated much the same point: "[A bill of rights] would give to Canadians the realization that wherever a Canadian may live, whatever his race, his religion or his colour, the Parliament of Canada would be jealous of his rights and would not infringe upon those rights."20 When he introduced the legislation into the House of Commons in 1960, he asserted: "Parliament will have before it at all times the warning which is emphasized in this Bill of Rights, namely that fundamental rights and freedoms within the federal jurisdiction shall not be made light of by this or future Parliaments."21

Despite the limitations of the bill, at least one eminent jurist has concluded the following: "the Bill of Rights was a genuine attempt to advance the liberty of individual Canadians, at least as far as the federal jurisdiction alone could serve that end. If Parliament did not succeed in that intention it is not the fault of the legislators, but rather the fault of the reactionary attitudes of both Bar and bench."22

It is the learned opinion of one constitutional expert that the bill was in the process of achieving the purpose it was intended to serve at the time of the introduction of the Charter. In commenting on the possibility that Drybones might well have set a precedent for later decisions, Peter W. Hogg, observed: "there [were] dicta to the effect that the Bill [would] have been] equally effective over later statutes, and it seems likely that the court would [have] so decide[d]."23

18 John G. Diefenbaker One Canada: Memoirs of the Right Honourable John G. Diefenbaker; The Years of Achievement, 1956 to 1962 (Toronto 1976) 258
19 Ibid. 254
20 Ibid. 32
21 Ibid. 257
22 The Honourable Kenneth H. Fogarty Equality Rights and their Limitations in the Charter (Toronto 1987) 28

David J. Bercuson and Barry Cooper 26
It is not our purpose to try to prove that the Canadian Bill of Rights amounted to a constitutionally entrenched guarantee of liberty and equality for all Canadian citizens. Clearly it did not. Yet it was an attempt to define a set of rights and a condition of equality that accompanied, and was integrally connected to, Canadian citizenship. It did not enshrine that condition above the law but it signalled to Parliament that those rights were, nevertheless, inviolate. The Bill of Rights was, therefore, a further sign of the transferral of sovereignty to the people of Canada or, more accurately, fuller recognition that they already had it.

The Charter Process

The final stage in the evolution of quasi-republican democracy in Canada came with the adoption of the Constitution Act, 1982, with its accompanying Charter. Notwithstanding its other more ambitious political implications, it remains true that by this action, fundamental freedoms and the principle of equality were placed above the law and beyond the reach of ordinary legislation. As Tom Axworthy has pointed out in his analysis of the making of the Charter, political compromise was reflected in many parts of the document, not least in its preamble. The federal government wanted an explicit statement recognizing the sovereignty of the people; several of the provincial governments were opposed to it. Thus although the Constitution Act does not, in its preamble, declare that sovereignty lies solely with the people, that notion is explicit in the document because: (a) it enshrines constitutional liberties, (b) it delineates federal and provincial powers and the powers of the courts, and (c) because section 41 reduces the Crown to an ordinary governmental institution that exists by virtue of the will of the people.

Let us now refocus on the implications of the Citizenship Act of 1946 (and its subsequent revisions) in light of the adoption of the Constitution Act, 1982. We believe that the adoption of the Constitution Act, 1982, with its entrenched Charter of Rights, was the final step that ensured that a Canadian citizen is not a subject in any real, substantive or meaningful sense of the term. The Canadian citizen is that person in whose name the legislators of Canada govern. The Canadian citizen is not a subject of a higher power or authority (the Crown) but an equal partner with all other citizens in the process of government. Allegiance to the Crown in Canada is now a consequence of citizenship, it is no longer a precondition of it (if ever it truly was).

Canada is, de facto, now a republic; the people of Canada are sovereign. Sooner or later, by law or by convention, Canada’s constitution will reflect both those realities de jure. So too will its legislators and courts.
Constitutional Theory in the Post-Meech Era: Citizenship as an Emergent Constitutional Category

Alan C. Cairns

Introduction

My plan for this paper, like the typical plan for constitutional change, was ambitious. My achievement, like the typical outcome of real world efforts to change the constitutional order, has been much more limited. My shortfall reflects the profusion of materials that has already appeared, and the fact that we are now in the middle stages of the post-Meech round of constitutional change. Thus, none of us knows what the outcome will be. Accordingly, it is not easy to find firm ground on which to stand. The pieces have not yet fallen into place and patterns have not yet taken firm shape. So, rather than try and write the equivalent of an analysis of the political thought of the great Depression of the thirties in 1935, or of World War II in 1942, I have retreated to safer ground.

Of the various prominent themes that could be addressed, the emergence of citizenship as a central constitutional category deserves scholarly attention that it has only begun to receive. This article, a tentative, preliminary analysis of citizenship as an emergent constitutional category, singles out several recent developments, unconnected and contradictory as they may be, to direct attention to a major transformation in Canadian constitutional culture. My focus is not legal. I deal not with acts and the law, but with broad socio-intellectual changes that have, I believe, made citizenship a constitutional category that now stands beside parliamentary government, federalism and the Charter as a central component of the working constitution.

Meech Lake and Citizenship

From one perspective, Meech Lake can be analysed as a citizenship controversy. By means of the “distinct society” clause, Meech Lake implied to its critics, and to some of its supporters, that there would be two classes of citizenship in Canada. At a minimum, Meech Lake suggested that Québécois were to have a different relationship to the constitutional order than other Canadians — that the distinctiveness of the Quebec people surpassed federalism's normal range of territorial diversities. Meech Lake officially recognized the hitherto contested norm that Quebec was not a province like the others, and the corollary that its citizenry also was unlike the others.
Meech Lake foundered for many reasons, but the central causes clearly included its conflict with two powerful equality norms given constitutional reinforcement by the 1982 Constitution Act, the equality of provinces stimulated by the amending formula, and the equality of citizen rights expressed in the Charter. The first equality, of provinces, can be rephrased as requiring an equal availability of jurisdictional levers and constitutional recognition for each provincial community of citizens. In other words, provincial citizens should have the same status throughout Canada, both as subjects of provincial authority and as civic actors seeking to influence provincial governments possessed of the same powers from coast to coast. The equality of provinces principle, therefore, is logically about citizen equality as well as equality of the jurisdiction and status of provincial governments.

Meech Lake's "distinct society" was seen as violating the Charter norm of citizen equality in the possession of rights, on the premise that its judicial interpretation would lead to a different and lesser availability of Charter rights in Quebec. To other critics, the "distinct society" clause seemed to violate the equality of provinces norm by the suggestion that the Quebec government might gain an increment of power unavailable to other provincial governments, and hence to their citizenry. From both perspectives, Meech Lake departed from the norm of citizen equality. From the Charter perspective Quebec citizens would experience an attenuation of their rights — and thus would be lesser Canadians — because of the leeway for encroachment on their rights provided to the Quebec government by the "distinct society" clause. From a contrary vantage point, the Quebec government and its community of citizens would enjoy a collective capacity to achieve goals and employ policy instruments denied to other Canadians who were subject to a more severe Charter constraint. So, Meech Lake could be opposed both because it weakened the protection of the rights of Québécois — compared to other Canadians — against their provincial government, while at the same time it gave the Quebec people through their provincial government capacities denied to Canadians elsewhere. Thus citizens outside Quebec could simultaneously envy their Quebec counterparts for having too much citizen power, and pity them because their Charter rights would be reduced. From one view, they were accorded unacceptable privileges; from another, they had to be protected from a reduction of their rights. From either vantage point, the norm of citizen equality appeared to be violated. This somewhat contradictory Rest-of-Canada (ROC) evaluation was held together by the implicit premise that the gainers would be the francophone majority and the losers would be the anglophone and allophone minorities within Quebec.1

The central point of this simplified historical excursion is to point out that the two equalities — of citizen rights and of provinces — induced Canadians outside of Quebec to believe that their own Canadian citizenship status was involved in what happened to their fellow Quebec citizens. Federalism's implied respect for diversity was overpowered by the Charter bias toward citizen uniformity that received additional support from the provincial equality principle. For this reason, Bourassa's

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1 Anglophone Charter feminists also argued that their Quebec sisters, in spite of being a majority, might suffer a reduction of their rights
single, and procedurally proper use of the notwithstanding clause to sustain Bill 178 in 1988 aroused far more concern outside of Quebec than the more blatant and serious rights violations by Duplessis (1936-39 and 1944-59) in pre-Charter days.

The Competition for Expanded Citizen Constitutional Rights

The post-Meech constitutional struggle now unfolding can be seen, in part, as a socio-democratic versus neo-conservative competition between rival versions of citizens rights for admission to the constitution. Thus Shaping Canada’s Future Together, in addition to a single sentence throw-away line recommending the addition of property rights to the Charter, waxed eloquent on how the “rights” of Canadians would be enhanced by an updated mobility clause that would prohibit laws, programs or practices of either level of government “that constitute barriers or restrictions to such mobility.” The supporting document on the Economic Union referred to the capacity of goods, services, people and capital “[to] move without discrimination” as “rights of citizenship.” Their implementation “will require constitutional clarification and changes to expand the rights of Canadians to do business and earn income anywhere in Canada and to provide individuals with the capacity to challenge government action that denies them this right.”

These market rights and freedoms are counterbalanced by the Ontario government proposal for a Social Charter to provide constitutional support for welfare state entitlements, viewed as social rights that are positive attributes of citizenship. Analogously to the way that the 1982 Charter’s floor of citizen rights constrained the diversities of treatment otherwise inherent in federalism, the Social Charter would have a similar function, although not subject to as stringent an enforcement regime.

This debate on the future direction of rights expansion illustrates the imperialistic tendency of the language of citizen rights to increase the amount of constitutional territory subject to its jurisdiction. It also confirms and elaborates what is already known — that our basic constitutional documents now speak directly to the citizenry, and that governments, in pursuing their own interests, routinely resort to the language of citizen rights to legitimate their own means and ends.

Citizens as Constitutional Participants

There has been more concentrated talk of constituent assemblies and referenda in the past year and a half than at any other time in our post-Confederation history. This suggests a profound transformation in our constitutional culture to which we are

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2 Government of Canada Shaping Canada’s Future Together: Proposals (Ottawa 1991) 3, 30
3 Government of Canada Canadian Federalism and Economic Union: Partnership for Prosperity (Ottawa 1991) 17
4 Canada, Federalism and Economic Union 22
gropingly adapting. It is the direct result of a seemingly irresistible democratizing tendency manifest in all the major episodes of attempted constitutional change since 1980.

The Parti québécois held a referendum on its sovereignty-association proposals in 1960. The people spoke; the governing party lost, accepted the results, and conducted itself as a federalist party — not always with passionate conviction — until defeated in 1985.

The 1982 Constitution Act was a compromise between the Gang of Eight’s provincial government agenda and the federal package with the massively supported Charter of Rights. The Charter that emerged from the 1980-81 joint committee hearings was shaped and strengthened by the public input of women, the disabled, ethnic groups and others. It had become their Charter by the end of the public hearings. This build-up of support and expectations precluded federal government acceptance of a stalemate in response to Quebec’s opposition. Such an outcome would have been angrily seen as a “betrayal” by those who had strengthened the Charter and aboriginal constitutional clauses.

The Meech Lake attempt to rectify the major shortcoming of — and the Quebec government’s categorical rejection of the agreement — employed the classic routines of intergovernmental diplomacy and executive federalism. It was apparently believed that a fait accompli could be announced to a surprised electorate who would then deferentially applaud this act of collective executive leadership to make Canada whole again. This colossal misjudgment of the kind of constitutional people Canadians were becoming led to a massive public repudiation of constitutional executive federalism from which Canadians are still reeling. Post-Meech constitutional activity confirms the inescapability of a major public input, although the modalities are imprecise at the time of writing. The basic public relations of the federal package, Shaping Canada’s Future Together, stressed openness, flexibility, tentativeness, listening, etc. Clearly, the Meech Lake lessons have badly jolted our governors.

Accordingly, we now confront the unfinished business of working out a modus vivendi between the inescapable role of governments in constitutional reform and the equally inescapable necessity for serious public involvement if the resulting constitutional product is to be considered legitimate. Citizenship has become a constitutional category with constitutional rights and obligations. It takes its place with the other pillars of our constitutional order — federalism, parliamentary government, an independent judiciary, and the Charter. This is not a small change.

**The Notwithstanding Clause**

Section 33 of the Charter, the compromise between the traditional principles of parliamentary supremacy and the new constitutional doctrine of entrenched rights enforced by the judiciary, is the site for an ongoing constitutional conflict between old and new constitutional doctrines. The notwithstanding clause was not publicly debated in the 1980-81 parliamentary hearings. It emerged at a First Ministers Conference as a compromise to placate the provincial opponents of the Charter. Ten years later, the clause is clearly on the defensive outside of Quebec. According to
Monahan, its use by the Quebec government on the language of signs issue was a crucial turning point in the Meech Lake debate. Indeed, he argues that "notwithstanding" verges on obsolescence outside of Quebec. The federal proposal that the exercise of the override require sixty percent of the members of the enacting legislature rather than a simple majority reflects the ongoing weakening of parliamentary supremacy and the enhanced status of Charter rights. That such a move is highly popular outside of Quebec, and indeed is criticized by some for not going far enough, suggests that the conflict between parliamentary supremacy and the Charter is likely to be resolved, at least outside of Quebec, to the advantage of the latter. In less than a decade, the former defenders of parliamentary supremacy are in retreat. A historic constitutional hallmark of the Canadian identity that distinguished us from our American neighbours, now enjoys greatly diminished status as a constitutional organizing principle.

The Four Canadian Nationalisms

I turn now to a different aspect of citizenship almost certain to become a major constitutional controversy. To what communities of allegiance will tomorrow's Canadian citizens relate? Future historians will view the closing decades of the twentieth century as the era of conflict between four competing nationalisms — that of the aboriginal peoples, the nationalism of Quebec's francophone majority, the residual, relatively inchoate, but emerging nationalism of ROC, and the retreating umbrella of the political pan-Canadian nationalism that the founders sought to implant.

The first three nationalisms have varying capacities for self-expression, for constitutional introspection, and thus for anticipating and shaping constitutional futures sensitive to their particular ambitions.

The Quebec francophone majority is the most fortunately situated with a strong government, and a developed political system and bureaucracy that give it a clarity of purpose and sense of self denied to the aboriginal peoples and to ROC. Québécois have an established state capable of expanding to assume new responsibilities. Their history of nationalist affirmation, born of the conquest and subsequent minority status, will further minimize the discontinuities in the transition to enhanced governing status within or without Canadian federalism.

By contrast, the aboriginal peoples have historically had little capacity for the deliberate pursuit of explicit constitutional objectives applicable either to the overall category of "aboriginal" or to its component parts, defined by section 35 of the Constitution Act to include Indian, Inuit and Métis peoples. The recently coined constitutional category aboriginal is more a container than an identity.

Aboriginal organizations form along the cleavage lines of status Indian, Inuit and Métis. Their political options are very different, ranging from quasi-provincehood for the Inuit in the Northwest Territories, to a range of

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6 Patrick J. Monahan Meech Lake: The Inside Story (Toronto 1991) 159-69
7 Canada Shaping Canada's Future Together 4

Alan C. Cairns
self-governing possibilities for reserve-based status Indians, to the much less easily imagined self-governing options for the landless Métis. As their paths diverge, the various aboriginal peoples will become increasingly dissimilar in the future. Section 35 of the Constitution Act that brought Indian, Inuit and Métis constitutionally together for the first time will probably evolve into a constitutional umbrella harbouring indigenous peoples sharing fewer common experiences.

On the other hand, the constitutional definition of Métis as an aboriginal people gives them a leverage they formerly lacked. They now wield the weapon of comparison with their more favoured status Indian brethren, in the pursuit of further singling themselves out from the general mass of the Canadian citizenry. That leverage, relatively weak though it may be compared to status Indians and Inuit, lies behind the proposal in Shaping Canada's Future Together that the Government of Canada "is committed to addressing the appropriate roles and responsibilities of governments as they relate to the Métis." Both major Métis organizations determinedly seek an interpretation of section 91(24) ("Indians, and Lands reserved for the Indians") that will make Métis a federal government responsibility. The Métis fairness argument is couched in terms of creating a level constitutional playing field for aboriginal peoples.

As recently as 1969 the federal government sought to limit diversities of citizenship between status Indians and other Canadians by eliminating the Indian Act and winding down the Indian Affairs Branch, both viewed as linked instruments of a damaging segregation. The purpose, it might unkindly be said, was to have status Indians take the Métis route and disappear or merge into the general citizenry. A quarter of a century later, the unique relationship of status Indians to the constitutional order is universally recognized, and the Métis have been raised to the status of an aboriginal people. Varying degrees of constitutional specificity among aboriginal peoples, leading to diverse forms of citizenship not like that of other Canadians, appear unavoidable. Indeed, the overwhelming likelihood is that we are only at the beginning stages of the flowering of a constitutionally unique if not uniform status for the aboriginal peoples of Canada. A major royal commission on aboriginal affairs is now getting underway. The federal government has proposed separate

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8 Alberta's eight Métis settlements, with a population of 4,000, and a territory of 2,000 square miles are exceptions to the general absence of a community land base for Métis peoples. See Donald Purich The Métis (Toronto 1988), ch. 6 for a discussion

9 See the presentation by Mr. Jim Durocher on behalf of the Métis National Council in Minutes of Proceedings and Evidence of the Aboriginal Liaison Committee of the Special Joint Committee on a Renewed Canada no 1 (22 January to 30 January 1992) 17-18, and Gary Bohnet for the Native Council of Canada, 222. This concern is a recurrent theme of the presentations by spokespersons of both organizations to this and other constitutional committees

10 See Sally M. Weaver Making Canadian Indian Policy: The Hidden Agenda 1968-1970 (Toronto 1981) for an excellent analysis of the federal proposal and its repudiation by status Indians

11 Royal Commission on Aboriginal Peoples announced by Prime minister Brian Mulroney 27 August 1991

Alan C. Cairns
aboriginal Senate representation. Separate aboriginal representation in the House of Commons is supported in increasingly influential forums. Four separate constitutional conferences were devoted to their affairs in the mid eighties. Leaders of aboriginal organizations now sit at the table with first ministers in the post-Meech round of constitutional bargaining, a recognition accorded to no other non-governmental actors.

The awakening, politicization and positive constitutional recognition of the indigenous peoples of Canada will be viewed by future historians as a belated and modest domestic version of the end of colonialism, whereby the great European empires retreated from their position, in Victor Kiernan's phrase, as the lords of human kind. Whether these events are portrayed as the re-emergence of long-submerged peoples, or as the creation of new peoples, will be secondary to the dramatic reality that the historic hegemony of the European founding peoples over the aboriginal peoples is eroding, to be replaced by what we cannot now predict.

Rest-of-Canada, like the aboriginal peoples, lacks the constitutional apparatus and related historic sense of self that characterizes the majority nationality within Quebec's borders. It is, indeed, a residual category, extricating itself reluctantly from the coast-to-coast pan-Canadianism to which it has been committed and which, to many, remains the preferred future, the recovery of the comfortable past. Officially, ROC does not exist. It lacks constitutional and institutional clothing. No one wielding official authority speaks for it. Its history has not prepared it for the independence that may be thrust upon it, or even for the status of one of two nations in a revised constitutional linkage in which Quebec becomes one of two, thus requiring the second partner also to think of itself as one of two, albeit internally federal.

It is now clearer than ever that the dualist vision of Canada spoke to the French or Quebec side not to the other side, which did not think of itself as a side, or as the other party in a two-person constitutional game. Rather, as the majority, the citizenry of the non-Quebec partner thought of itself as Canadians, in terms of the whole of the Canada that was created. If it now begins to see itself as the other, that reflects growing doubts that the pan-Canadian centre can hold. That the Spicer Commission would detect a ROC, or an anglophone Canada outside of Quebec beginning to acquire a sense of itself was almost inevitable. That at some stage, the retreat, initially involuntary, from Canadianism to a hesitant affirmation of a reduced existence would

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13 Canada's Shaping Canada's Future Together 8-9
15 See Bryan Schwartz, First Principles Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal 1986) for an analysis of the first three conferences
17 Citizens' Forum on Canada's Future: Report to the People and Government of Canada (Ottawa 1991) 3, 53-4, 64
begin to acquire political leaders who addressed its concerns, and academic interpreters and defenders of its will and capacity to survive were also in the nature of things.

The pan-Canadian nationalism that was most aggressively fostered in recent decades by Diefenbaker and Trudeau is not yet vanquished. The inertia of more than a century of living together, the entitlements of the welfare state, and the political and bureaucratic self-interest of the federal government still nourish it. The recent addition of the Charter roots it solidly in much of the population. Yet, it is clearly in retreat. The countervailing forces of aboriginal nationalism, Quebec nationalism, and the residual nationalism of ROC signal a retreat from Diefenbaker's vision of one Canada made up of unhyphenated Canadians and from the Trudeau vision of a Charter-based relatively homogeneous Canadian political identity. The image and reality of our future are not yesterday's tame limited identities, but the much more challenging and vigorous multiple identities of an emerging multinational Canadian state. Those identities will be contained and accommodated, if at all, not by a pan-Canadian juggernaut that seeks their suppression, but by a pattern of coexistence supplemented by a thinner and more diffuse layer of Canadianism than many Canadians formerly hoped was both attainable and desirable.

The Charter, ROC, Quebec, and Aboriginal Peoples

The multinational scenario just described reflects, among other things, the visibly differential allegiance to the Canadian Charter among the three national communities — Quebec, aboriginal, and ROC. The Charter's political purposes have not been fully met. Its less positive reception in Quebec and by aboriginal peoples deserves consideration.

Differential support for the Canadian Charter in Quebec (among francophones, especially the more nationalist elites) and in ROC raises the possibility that the Charter's asymmetrical application to Quebec provincial jurisdiction may be one solvent of Quebec-ROC tensions. This could be achieved either by a recognition that there were Quebec justifications for resort to the notwithstanding clause not available to other governments, or by giving the Quebec Charter the primary role in rights protection in Quebec, as proposed by the Parti québécois in 1985.18 Symbolically, of course, these would be major changes, especially the latter, as from that time onward what had come to be seen as one of the defining characteristics of citizenship in ROC would not have the same pan-Canadian application for matters under Quebec provincial jurisdiction. Quebec and ROC citizens would be subject to distinctive Charter regimes. While this would probably not lead to large differences in the actual rights enjoyed, it would be a profound symbolic indicator of Quebec's distinct identity.

The future application of the Charter to self-governing aboriginal peoples is an open question. Some differential application is implicit in section 25 that protects aboriginal rights and freedoms from abrogation or derogation by the Charter. This is,

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in effect, an automatic notwithstanding clause based on the status of aboriginal peoples as First Peoples with specific rights, who, therefore, are entitled to unique exemptions from the Charter. On the other hand, the federal government constitutional proposals explicitly stated that aboriginal self-government would be “subject to the *Canadian Charter of Rights and Freedoms*.” Since some recent aboriginal constitutional scholarship is profoundly hostile to the Canadian Charter, and since the Assembly of First Nations has raised explicit and specific objections to this proposal, the Charter is clearly not the icon of civic identity for aboriginal peoples that it is for many anglophone Canadians. On the contrary, although there are divisions among the aboriginal peoples over the Charter’s application, the direction of change in recent decades is toward a distinct status for the aboriginal peoples in Canadian society, where they will possess some unique rights sensitive to their aboriginality and, at a minimum, will be subject to a modified Charter regime.

Accordingly, there is a good possibility that in the future the Canadian Charter will have a varying application to and legitimacy among the three main national components of Canada — the hundreds of aboriginal communities scattered across the country, the ROC, and the Quebec polity with its francophone majority.

If this is to be our future, it will constitute a profound shakedown and retreat from the ambitious political purposes vested in the Charter. It will mean, in effect that, symbolically, Canadians will have retreated from a common, universal citizenship, and moved to a fragmented asymmetrical citizenship.

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19 *Canada Shaping Canada’s Future Together*


21 For one example, see the evidence of Professor Leroy Littlebear in *Minutes of Proceedings and Evidence of the Aboriginal Liaison Committee of the Special Joint Committee on a Renewed Canada* 75-6. This volume of the Liaison Committee’s proceedings contains numerous discussions of the desirability of the Charter’s application to self-governing aboriginal peoples
Ethnic Minorities and the Canadian State

H.G. Thorburn

At this moment of crisis in Canadian history, I propose to examine the problems faced by the country by focussing on two axes: first, the values and philosophies that currently guide Canadians, and secondly the realities that they face which constitute the substance of the current crisis. The first fundamental value shared by Canadians of all cultural groups is a commitment to representative democracy. This carries the implication that the people, through their representative institutions, and also by their own contributions of ideas, opinions and argument, have it in their hands to resolve issues confronting them in ways they choose. This commitment to democracy exists within a tradition which is British in origin, and accepts the principles of the British constitution: the supremacy of parliament and the rule of law. To this value must be added the implications of the 1982 Charter of Rights and Freedoms which elevates these rights above the ordinary laws passed by Parliament and the provincial legislatures. These rights are interpreted by the courts and give them the power to override previously existing laws on the ground that they are contrary to the provisions of the Charter. The principle of the supremacy of parliament, therefore, is conditional on the finding of the courts that enacted statutes do not conflict with the Charter. This change has had the effect of making Canadians much more litigious than they were before, and much more conscious of their individual rights, which they are encouraged to be alert to defend.

The Charter has also affected the language of discourse of Canadians. The concepts of rights, civil rights, human rights are constantly articulated, although there is seldom reference to corresponding duties and obligations. This represents a movement towards concern for the individual's rights and away from the community.

The third aspect of Canadian values at present is a commitment to pluralist democracy — a conception of government which has come mainly from the United States and is made generally popular by the media of communication. This pluralism is an open system which perceives the political process as one bargaining between organized groups, with the government participating in the process and giving its authority to the accommodation achieved. Like the automatic economy of the classical economists, it produces an automatic society, through continuous group interaction. The government becomes merely an extension of the political process. Therefore, its legitimacy is undermined, and as a further consequence it fails to pursue rigorous administration. Parliament and cabinet are merely a smallish part of the

Among the realities that the country must face in this time of crisis, I choose to concentrate on the ethno-cultural relations. There are three components here: (1) relations between Quebec and Canada, that is to say relations between French- and English-speaking Canadians; (2) relations between the native peoples and other Canadians through their governments; and (3) relations between the Canadian community expressed through its government and the immigrant groups: the politics of multiculturalism.

**Bilingualism and English-French Relations**

Prior to the Second World War, Quebec society was fairly stable. The French-speaking population was led by a small elite of priests, lawyers, doctors and notaries educated in the classical colleges operated by religious orders. The people were either farmers or employed in the factories and shops of the cities. The larger business enterprises were operated by corporations controlled by English-speaking capital (Canadian or America). The ranks of management were largely made up of English-speaking Quebeckers, who supplied the bulk of the managers, engineers, accountants, economists, public relations people, etc. In short, it was a stratified society with the mass of the French-speaking population constituting the working class and farmers, and an English-speaking elite monopolizing the managerial positions in business.

The French-speaking population accepted a dominating role for the Church, with the hierarchy constituting the moral leadership of the community. There were therefore two leadership foci: the hierarchy of the Church and the English-speaking business elite, who worked out between themselves, with the help of the French-speaking professional and political class, the problems of societal direction.

This arrangement fell apart very rapidly after the death of Premier Maurice Duplessis, the autocratic leader who personified the regime of political corruption. There was a wave of resentment among the French-speaking population who realized that they were being excluded from the powerful and well-paid positions in business and government. In the election of 1960, the \textit{duplessiste} Union Nationale party was swept from power and the Liberals under Jean Lesage were elected, introducing the Quiet Revolution — the name given to the regime that promised to make the French-speaking majority \textit{maîtres chez-nous} (masters in our own house). To accomplish this they established a department of education for the first time, thereby replacing the Church at the head of the educational system. Courses of instruction were set up in the French language in engineering, management, science and the secular subjects needed by an economic elite. The civil service was modernized and expanded to accommodate the graduates of the new courses of instruction. They invaded the world of business and confronted the English-speaking professionals already in place. The government supported their penetration by requiring French as
the language of the work place. This was a profound change in the French-speaking society. Attendance at Mass plummetted, as a secularized people grew to resent the Church for keeping them out of positions of secular management by means of a traditional classical educational system that ignored the new scientific and managerial fields. The birth rate tumbled, and women entered the work force in new and elite fields. French-speaking entrepreneurs rode the wave of success to build large new enterprises in engineering, manufacturing, retailing, etc.

This remarkable social transformation had a dramatic effect on political life. French-speaking self-assertion lead to demands for the political independence of Quebec. The Parti québécois was founded to pursue this goal, won control of the provincial government in 1976, and conducted a referendum in 1980 on the question of sovereignty-association — a proposal to combine political independence with economic association with the rest of Canada. This provoked a dramatic mobilization of the two sides, with the opposition to the proposal led by Prime Minister Pierre Trudeau. The outcome was close, with the French-speaking population splitting evenly. The English-speaking people voted massively against sovereignty-association; so the proposal was lost. This defeat defused Québécois indépendantisme for a time, and people turned to economic and personal goals.

Prime Minister Trudeau promised “renewed federalism” if the referendum went against sovereignty-association. He succeeded in getting a major constitutional amendment adopted incorporating a Charter of Rights and Freedoms, and a formula for amending the constitution of Canada so that henceforth it would not have to be amended by the British Parliament. However, to get his proposal accepted he had to make major concessions to special interest groups, notably feminists, multicultural groups (representing recent immigrants), native people, etc. It was a major demonstration of “pluralist democracy,” in which policy is negotiated between government and groups, with the latter holding a veto over policy. The price of success for the government is first to satisfy many of the groups’ demands.

These events were to be a signal that policy-making in Canada is now to be accomplished by bargaining with groups — and no longer only by government in Parliament in the tradition of nineteenth-century Britain. Of course, the shift was not so sudden or so dramatic. Business lobbies had always hovered around major economic decisions. What was new was the addition of the new, vocal, mobilized representatives of single-issue organizations conducting very public campaigns before the media. This process carried the message to Canadians that, even in the most vital of its decisions, i.e. on the constitution itself, government would have to bargain with interest groups.

Prime Minister Trudeau succeeded in imposing his own conception of English-French relations on the country. He wished the country to be bilingual and bicultural in the sense that the government of Canada would be prepared to deal with citizens in either French or English throughout the country. Both languages were given statutory recognition as “official” — and extensive programs to make the public service bilingual were undertaken. This encouraged many English Canadians to learn
French, an act that they came to see as a concession to their French-speaking fellow Canadians. The latter, on the other hand, were often less than pleased to see the precincts of their previously secret language invaded by their rivals.

The program required all products sold at retail to be labelled in both languages; grants were made to the official language minorities (French in the English provinces, and English in Quebec) to preserve their language and culture. The object was to convince both language groups that they are at home in all provinces from coast to coast, even though (in the vast majority) they are themselves unilingual.

In the years following the referendum, this policy had relatively disappointing results. The feeling spread among the less educated elements in English-Canada that “French was being forced down their throats.” They knew that they would not become bilingual and they resented advantages going to others who were. Their discontent focussed on the fact that many jobs were reserved for bilinguals, and were thus denied to them. This in turn sparked some embarrassing demonstrations of anti-French feeling, which were to exacerbate relations between the groups as the media heedlessly played clips of English-speaking bigots trampling the Quebec flag.

On the French side there was a turning inward out of apprehension that the huge North American English-speaking majority would swamp the frail French-speaking community. Laws were enacted to protect and favour French, even to the point of outlawing signs on private businesses if they were not in French only. The provincial government abandoned bilingualism for French only, as far as the constitution would permit, and the English-speaking minority, coming to feel oppressed, began to emigrate to more congenial provinces.

The policies of the Trudeau government came to be considered insufficient to satisfy the promise of renewed federalism. The successor government of Brian Mulroney negotiated an accord in 1987 with the provincial premiers to meet Quebec’s minimum demands. This was to constitute an amendment to the constitution once it had been approved by all ten provincial legislatures within three years. The major provision was the recognition of Quebec as a “distinct society.” There were also provisions for provincial input into the nomination of senators and Supreme Court judges, and for the right of provinces to opt out of federal programs with financial compensation, in cases where they operated in areas of provincial jurisdiction.

The accord unravelled as the three-year deadline approached and two small provinces, with newly-elected governments that had not signed the accord, failed to ratify in time. The major reasons for the failure relate to the pluralist decision-making process which by now was dominant. In Manitoba the sole Indian representative in the legislature refused the unanimous consent required for a motion endorsing debate on the accord. This was justified on the ground that the concerns of the native people had not been adequately addressed. In Newfoundland, the issue was broader, involving the demands of the womens’ lobby, and many other groups that their concerns be addressed and satisfied before Quebec receive its concessions.

In short, the interests were not willing to agree to satisfy Quebec before their own demands were met. The situation moved from one of reasonable requests being settled among the eleven first ministers, i.e. an elitist arrangement among

H.G. Thorburn
governments, to an open and noisy debate involving all who cared to participate, with the major fire power in the hands of the groups with mobilized memberships and shrewd, tough leadership. In the final analysis, it was a kind of holdup: either the groups would get their demands satisfied or the accord would fail.

Of course, the accord did fail in June 1990; and then Quebec reacted with outrage. It saw its modest demands for constitutional reconciliation rejected by the English-speaking provinces. The polls, fed by the argumentation of the critics of the accord, showed opinion in English Canada mobilizing against the accord. Soon an emotional polarization occurred: Quebec renewed its interest in securing sovereignty, and substantial numbers in English Canada (especially in the west) responded: “Let them go.” Thus the accord that was to have reconciled English and French Canada became the provocation for a new and more serious confrontation between Quebec and English Canada. The process appears to mark the end of “executive federalism,” the arrangement by which first ministers and their senior advisors work out solutions to the nation’s problems, largely behind closed doors. The controversy occasioned by the Meech Lake accord produced overwhelming demands for the inclusion of the people (which can only mean interest groups) in the constitutional and governmental process. The gap between English- and French-speaking groups has widened, and with the new pluralist process of policy-making may have become unbridgeable.

Another serious casualty of the estrangement of the two solitudes is the political party system. Since the 1930s Canada has had a party system with two brokerage parties: Liberals and Conservatives vying for the centre and committed to national unity and good relations with business. The third party, the New Democratic Party, was social democratic in orientation and therefore critical of the pro-business orientation of the major parties (who were largely financed by business donations).

The eruptions of independentist nationalism in Quebec and the strong reaction to it, especially in the west, has shattered the party system. Quebec nationalist opinion is drawn to the new Bloc québécois founded by a dissident Conservative ex-minister, Lucien Bouchard. The English-speaking reaction has drawn support to the Reform Party, a right-wing populist party led by the son of the former Social Credit Premier of Alberta. Polls show both of these parties by-passing the old parties in Quebec and western Canada respectively. If present trends hold, the next Parliament will have no majority, and will consist of five parties. Given the single-member, majority-vote electoral system, results could show vast disparities between the proportions of votes cast to seats won — further undermining confidence in the political system, especially if combined with no majority party and no obvious coalition partnerships.

The Native Peoples

Relations between the indigenous population and the settler communities have changed profoundly over time. At first the Europeans were few in number, and were drawn to the new continent for purposes of economic exploitation, and a desire to spread the Christian faith. In the area later to become Canada, the British and the French were rivals from the beginning, and therefore their relations with the natives were determined by their concern for military advantage. This meant that there was

43

H.G. Thorburn
basically a relationship of cooperation between each of these European powers and the natives that they encountered. Each was concerned to recruit allies against its rival and to achieve their cooperation in the exploitation of the resources of the continent. The first concern of the British was the securing of the Grand Banks fishery, and this involved establishing bases on the shores of Newfoundland to dry the fish. The French were concerned to exploit the fur trade; they established long canoe routes into the interior to develop a lucrative trade in beaver pelts. The Indians found it to their advantage to cooperate with the newcomers in order to secure the new products which eased their lives: iron tools and vessels, ornaments, and later firearms and alcohol. This in turn lead them to tolerate the missionary activities of the newcomers which lead to the conversion of substantial numbers. In short, the earlier relationship was one of mutual benefit. There was no threat to the Indians since they were much more numerous and more at home in the North American environment.

However, the European settlements grew in numbers altering the balance between the two societies. The Europeans began to find their commercial exploitation extremely profitable and each power was concerned to oust the other to enjoy this advantage alone. Indian tribes were recruited as allies by each side, and were armed to participate in the eighteenth-century struggle between Britain and France. Generally the Indians sided with the French because they found their form of economic exploitation more congenial. They organized the fur trade in the interior and mixed harmoniously with the natives and provided a mutually satisfactory commercial relationship. The British, on the other hand, were more numerous and favoured an agricultural society. This meant substantial encroachment on Indian land to set up farming communities. However, in the Seven Years War (1756-63), the British won out, mainly because of their control of the high seas, so that it become impossible for the French to reinforce their beleagured garrisons. The British victory was followed by the annexation of New France and the elimination of the French colonial presence on the mainland.

The British issued a royal proclamation in 1763 defining their relationship with the French-speaking population and with the native population. Ever since the words of this proclamation have been used to justify aboriginal title to unceded lands. It recognized rights for the native population, especially over lands that had not been ceded to the Crown. After the American Revolution and the independence of the thirteen colonies, the Indians tended to support the British against the Americans for the same reason that they had previously supported the French against the British: they favoured the power that was less land-hungry and more respectful of their cultures and interests.

In the nineteenth century relations changed as large settler populations were developed in British North America. This meant substantial encroachment by them on the lands previously left to the Indians and in turn led to increasing hostility between the two societies as the Indians came to be seen as obstacles to the settlement project of the white society. Increasing contact spread white men’s diseases among them, and their populations were adversely affected and degraded as their culture was undermined.
Indian lands continued to be encroached upon mainly by purchase after 1815. The Indians ceased to be viewed as valuable allies, and responsibility for them was increasingly shifted to the Crown, treating them as wards. The major policy was one of assimilation of the Indians into the white society. This meant an attempt to convert them culturally; schools were set up and missionary activities extended.

As Canada developed its vast western territories, it extended its policies relating to the native peoples across the continent. Indian lands were purchased for derisory sums, and conflictual relationships developed between the Prairie indians and Métis on the one hand, and the English-speaking settlers on the other. This produced two serious rebellions in 1869 and 1885 which ended in the subjugation of the native people. Generally the land question was settled by treaties with the native peoples that established a relationship promising them assistance in adjusting to the new order. These treaties often lead to serious misunderstandings as the Indians thought they had concluded treaties of friendship and mutual assistance while agreeing to agricultural settlements, whereas the Canadian governments considered the treaties as constituting a surrender by the Indians of whatever claim they had to the vast lands of western Canada.

The Canadian policy has been referred to as one of the Bible and the plow. The Indians were to be Christianized and converted to the life of settlers primarily based on agriculture. This meant doing away with the tribal system, and teaching the Indians the white man's ways. The policy was largely unsuccessful and lead the Indians to begin political organization to resist elimination of their cultures. By the 1930s, the decline in Indian population (mainly from disease) was arrested, and the population climbed back above the 110,000 level.2 Disputes began to arise in various parts of the country over the allocation of reserves, over aboriginal title to land, and over the interpretation of treaties. In British Columbia, Indians had never surrendered their lands to the Crown, and therefore there was a serious lack of definition of Indian rights and title. They considered that they still owned the land.

The Second World War affected the relationship between Indians and the government of Canada. Large numbers volunteered for military service, thereby earning substantial approval. The nature of the war as one against racism and barbarity had its effect in making the Canadian authorities more considerate of the cultures of the native people. This meant that there was a growing consciousness of the need to extend all the rights of Canadian citizenship to Indians, and to take into account their rights as First Nations. They were to be considered "citizens plus."3 The Indian Act which had defined the relationship between Indians and the Canadian government was subject to study and amendment. The Trudeau government stressed individual rights (as it would later do in the Canadian Charter of Rights and Freedoms) but was unsympathetic to group rights. This lead to a tense relationship with the native peoples. In 1969 the government issued its White Paper on Indian

2 J.R. Miller Skyscrapers Hide the Heavens: the History of Indian-White Relations in Canada (Toronto 1989) 213
3 Ibid. 223
Policy, which favoured giving the Indians full rights of citizenship and ending their status as defined in the Indian Act. It also recommended the repeal of the Indian Act in order to make the Indians just another element in a multicultural Canada. The Department of Indian Affairs was to disappear.

The Indians understandably considered this a violation of the treaty obligations to them. This lead to protracted disputes with the Indians forming interest organizations to defend their interests. The government came more and more to consider the Indians, not just Canadians like all the others, but a distinct category of people with special rights. However, the definition of these bogged down in long controversy between the two sides. The Indians were divided in many different bands. Those that were covered by treaties disputed the interpretation of the treaties, and those that were not based their claims on aboriginal rights in a broad sense. The government recognized its obligation to fund Indian organizations to make representations to government and to study the legalities of the situation. However, the progress of the negotiations was frustrating and slow, and gradual embitterment of the Indian organizations occurred during the 1970s. The Indians became increasingly politicized and favoured unified and militant action. The White Paper gave them a common enemy against which to mobilize.

The differences between the two societies remained loosely undefined. Self-government was an aspiration but its meaning differed from one part of the country to another. Provincial governments had been reluctant to settle land claims definitively with the Indians, and the Trudeau government was concerned about making concessions to the Indians which might constitute precedents in recognizing the rights of Québécois to separate status. In the 1970s the primary issue in Canada was Quebec separatism, and the government was determined not to make any concession to one ethnic group that could be used as a precedent for relations with another.

When the government undertook constitutional revision in the early eighties, the Indian organizations seized the opportunity to state their own claims to aboriginal rights, and a favourable interpretation of the treaties with them. While the government did not at first wish to recognize aboriginal rights in the revised constitution, it finally gave way in the winter of 1981-82 and the statement was included that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” “Aboriginal peoples” was defined to include “the Indian, Inuit and Métis peoples of Canada.” These general terms were not defined, and their meaning is still being contested. The Indians claim to be sovereign nations still possessing the power to regulate their own affairs.

In 1985 a split occurred in the ranks of the status Indians of Canada. The Assembly of First Nations was dominated by the bands who had signed treaties with Canadian government. Their claims, therefore, were based upon the interpretation of these treaties. Those who had not signed treaties were forced to base their claims on “aboriginal rights.” These formed their own organization.
Conditions on the Indian reserves remained generally poor (although there were some exceptions in the case of bands with valuable natural resources). These conditions became widely publicized in the media much to the embarrassment of Canadian authorities. While the government continued to fund native organizations, its concern to cut back expenditure meant that these programs too suffered cutbacks after 1985. The government began negotiations with individual bands to reach settlements of land claims. Some of the poorer bands were willing to settle for the equivalent of municipal status in order to secure government support. Others held out for broader interpretations of aboriginal rights, and a generally piecemeal and chaotic relationship developed between the federal government and the Indian bands. Some issues of economic development are now coming into focus as key issues. The development of the Mackenzie Valley in northern Canada provoked a long dispute over the rights of the Dene Nation, and the federal government conducted a long and careful enquiry. Thomas Berger, a judge of the B.C. Supreme Court, as Commissioner listened to the arguments of the Indian peoples about the impact of a proposed pipeline and urged that a settlement be made with the Indians before pipelines were put through.

Similarly in James Bay, the provincial government of Quebec, anxious to develop hydro-electric power in the James Bay area, reached a settlement in 1975 in which the Inuit and Cree surrendered their rights and claims to 400,000 square miles of northern Quebec in return for a commitment from the federal and provincial governments to pay, over a ten-year period, $150 million in grants and royalties from the electricity that was to be generated. This agreement has become an all-important precedent for subsequent relationships with other native groups. The basic question here is the definition of “aboriginal title — the right to lands that an indigenous people has by virtue of its occupation of an area ‘from time immemorial.’” The fact that the Canadian government now recognizes aboriginal title in the 1982 Constitution Act suggests that southerners cannot intrude on native peoples’ territories for economic development without first securing their agreement. Another claim that has followed is the demand for native self-government. This has been particularly difficult to adapt to the reality of political sovereignty in the hands of the government of Canada and the provincial governments.

At the present time the situation is confused. While there is no uniformity because of the different contractual arrangements and the different traditions of the various Indian peoples in their relationship to the provincial and federal authorities, there is nonetheless a changing pattern of relationship. Old insensitive policies of assimilation are now generally rejected, and governments have shown a new willingness to negotiate seriously with the representatives of Indian peoples. These in turn have developed sophisticated interest group organizations with competence and expertise (funded mainly from government coffers).

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4 Ibid. 253
5 Ibid. 257
The adoption of the multiculturalism policy in 1971 has also had its effect on native peoples. Whatever recognition is given to immigrant groups under this policy must of course be extended to the native peoples. In the decade following the White Paper of 1969, the Indians united and made their greatest gains against the policy of assimilation. However, the Indians have been unable to maintain their unity. A split between the Assembly of First Nations and the Prairie Treaty Nations Alliance has weakened their cause as have the further divisions accompanying the splinterings of Métis, non-status Indians and Inuit. The tendency now is for the Canadian political authorities to deal with the Indians as they would deal with any interest group. The Indians are inclined to seek more than this, and wish to go beyond brokerage politics and be treated as the representatives of First Nations. In this they have been largely unsuccessful so far. The frustration and anger of the Indians has produced sever confrontations, one of which in the summer of 1990 ended in a Quebec provincial policeman being killed, and a subsequent skirmish between the Canadian armed forces and the Mohawk nation. In such a confrontation, the Indians are bound to lose. The ritualistic denunciations, rhetorical hyperbole, and made-for-television scenarios serve only to undermine serious negotiations between government and native peoples. It must be admitted that most of the relationships are still civil and mutually respectful. However, the publicity given to the confrontations has added a new tone which suggests urgency, and tends to portray the native peoples as less than reasonable.

While today the native peoples amount to under two percent of the total population of Canada, they pose a serious dilemma to Canadian political authority. Their claims have a moral authority to them which cannot be gainsaid. As the relationship moves into the courts and interest group politics, the likelihood of broad and generous interpretations being placed on native claims increases. The natives now enjoy considerable sympathy among the Canadian population, and governments are therefore less and less inclined to ride over their rights as they did in the past. The new tendency to rely upon the courts, not only to interpret law but to interpret the Charter of Rights and Freedoms opens the possibility of very substantial concessions being made to the native peoples in the future. The politics of interest group pluralism also promises better results for the native peoples. Not only have they sound moral arguments, but they have competent leaders and technical experts to assist them. While as bands they may often be poor, they have recourse to government-funded interest groups that can lobby skillfully and effectively in their interest and bring their cases effectively before the courts. The Meech Lake accord’s failure is in part a result of the failure to secure the support of the native people. As it turned out, they had a veto through their representation in the Manitoba Legislature.

In the spring of 1991 there was a noticeable tendency for the Indians to mobilize in support of the Assembly of First Nations. The elections of the Grand Chief by the chiefs in assembly attracted widespread attention. The selection of Ovid Mercredi revealed an awareness among the native people of the need for a subtle, educated leader who could be relied upon to negotiate competently and shrewdly. Mercredi is a solemn, soft-spoken, but determined young Cree from Manitoba, a lawyer with demonstrated political skills.
Multiculturalism

Canada began to accept substantial numbers of non-English-speaking immigrants during the years of prosperity preceding the First World War. Ukrainians, Poles, Russians, Germans and Scandinavians took up homesteads on the virgin lands of the Western Prairies. Since these settlers were located in remote rural areas, they seldom came into contact with government, which largely ignored them once they were settled. It was assumed that they would become assimilated into the English-speaking population of the Western provinces as their children attended English schools and took up positions in the community. Where there was a policy at all it favoured the assimilation of the immigrants.

In the 1920s, the government was relatively inactive on the question of immigration. The depression of the thirties reduced immigration to a trickle, and the years of the Second World War saw practically no immigrants come to Canada. This changed in the prosperous years after the war. Canada welcomed large numbers of immigrants from continental Europe and, unlike their predecessors, most of them settled in the large urban centres. This naturally led the government to take seriously the matter of settling immigrants. The beginnings of a new policy appeared with the Canadian Citizenship Act in 1947. For the first time Canadian citizenship was a separate category from that of British subject. A new Citizenship Division was created in the Department of Secretary of State, and began to conduct programs in citizenship training. It was here that the first flickerings of concern about the cultural adaptation of immigrants appeared. The government was trying to induce the immigrants to see themselves as Canadians rather than as still belonging to their countries or origin. It became interested in molding the character of the country as early as 1941, and this concern led it to pass on from the earlier assimilationist policies, culminating in the present multiculturalism approach.6

The late sixties and early seventies were years of concern about Canadian unity. Quebec separatism was the main focus, but there was also interest in integrating immigrants into Canadian society. The Department of Citizenship and Immigration was established in 1950 — three years after the Canadian Citizenship Act was passed. From 1953 the government ran programs of grants to assist immigrants, but no core funding of immigrant organizations took place. The main focus was on the eradication of differences between immigrants and the Canadian population, to be achieved through various forms of education. Ethnic group organizations formed and were politicized by the general concern for national unity which was being generated by the Royal Commission on Bilingualism and Biculturalism. In 1971, the government undertook to do for ethnic organizations what was being done for official language minorities (i.e. French-speaking and English-speaking minorities). This stimulated the organization of many groups in order to profit from government grants. These were the heady days of the “just society” — the first term of the Trudeau government, 1968-1972. The enthusiasm and availability of funds declined after the election of


H.G. Thorburn
1972 when the Trudeau government was placed in a minority status. However, grants to multicultural groups continued as a means of cementing support for the government in power among the ethnic groups centred in the Toronto area. The original policy promoting retention of culture — folk culture (especially dancing groups) — and language was downplayed after 1974 in favour of concern with social issues, such as fighting racial discrimination, especially in hiring for employment. The Trudeau policy on multiculturalism amounted to an attempt to shape the political opinions and attitudes of Canadians, and therefore was controversial both within the public service and in the community at large. Opponents of the program found it difficult to attack because civil rights enjoyed a kind of legitimacy which cast a protective blanket over these interventionist policies.

At the centre of this program stood the Canadian Ethnocultural Council — a peak organization representing thirty-eight other ethnic organizations. It was established in 1980 to coordinate their activities and concentrate on policies opposing discrimination and advocating the representation of ethnic groups in various government bodies. About eighty percent of its funds came directly from the federal treasury as grants from the Department of Secretary of State. In 1984 it published Equality Now, in which it made a very strong case for affirmative action to secure jobs and representation for ethnic minorities in public and also private bodies. It also advocated the establishment of a Department of Multiculturalism to act as a defender of the interest of the ethnic minorities.

By the mid-eighties the Department of Secretary of State was funding over 3,500 groups “which shared the government’s view of what Canadian society should be.”7 As the government itself noted, “Support was more likely to be based on the strength of an organization’s lobbying powers than on assessments of need and rational decisions about the best way to achieve social development objectives.”8 The granting pattern tended to be for small core-funding to sustain the group, plus program funding for particular group projects. Preference was for short-term rather than long-term projects. There was also a tendency to support a limited number of umbrella organizations or key national/provincial organizations representing the interests of different ethno-cultural groups. In effect the government’s policy promoting ethnic identity encouraged the fragmentation of Canadian society into ethnic components.

After 1980 the emphasis shifted from language and culture retention to race-related issues. This corresponds to the shift in immigration away from Europe to the Third World, and raises the importance of possible discrimination against “visible minorities.” The aforementioned Canadian Ethnocultural Council plays a key role here. In 1984 this organization strongly endorsed the Charter of Rights and Freedoms, and argued in favour of the strongest entrenchment of rights, demanding explicit constitutional recognition of Canada’s multicultural character. Its recommendations for affirmative action for equity employment programs for visible minorities included

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7 Canada, Secretary of State, Program Evaluation Directorate *A Framework for Cross-sectoral Evaluation of Core Funding in the Secretary of State* (Ottawa March 1986) 8-10
8 Ibid.
the establishment of special training programs. It argued that all federal order-in-council appointments should be made in consultation with the national ethnocultural associations to ensure affirmative action for visible minorities. It made the same suggestion for appointments to the Canadian Senate. Also, it favoured proposals on education to expunge racism in the school curricula and enhance understanding and tolerance. It urged that the government of Canada acknowledge the wrongs committed against Japanese Canadians in World War II, and suggested that similar acknowledgements and regrets be given to Chinese Canadians for the head tax and the Chinese Immigration Act. It also suggested acknowledgement of the mistreatment of Sikh immigrants in 1914.9

The Canadian Ethnocultural Council advocated the passing of the Multiculturalism Act and the establishment of both a distinct Department of Multiculturalism and a House of Commons standing committee on multiculturalism. These have since been acted upon by the federal Parliament.

The Council was not satisfied with the protection of multicultural rights in the Meech Lake accord, and pressed for a revised section that would establish multiculturalism as an equally fundamental national characteristic along with the French and English languages as "fundamental characteristics" of Canada. It urged that multiculturalism be treated as a national characteristic enjoying preservation and promotion by the Parliament of Canada.10

Multiculturalism was presented to Canadians almost without public debate. The Royal Commission on Bilingualism and Biculturalism came out flatly for the two founding peoples conception of Canada. It allowed no place for the cultures of the newly-arriving immigrants, who even then were a significant component of the Canadian population — especially in the major metropolitan areas. The Commission proposed a new vaguely-conceived policy of multiculturalism11 which Prime Minister Trudeau accepted "within a bilingual framework."12 The policy soon took off as politicians representing constituencies with large immigrant populations saw it as a vote-getter, and the Liberal government developed an array of programs. The result has been, perversely, that governments, both Liberal and Conservative, have extended these programs to build up, at public expense, impressive interest groups to maintain pressure on the government for the more recently arrived ethno-cultural groups (notably the "visible minorities"). Thus another pluralist component to the policy-making process has been added, this time at government initiative and expense. The policy has become bi-partisan and the parties are trapped into continuing it lest they gratuitously forfeit the support of the immigrant communities which now have become extremely powerful because of the number of voters concerned. Many

9 Canadian Ethnocultural Council Building the Consensus National Conference Report (June 1984) 35
10 Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional accord Minutes of Proceedings and Evidence 7 (13 August, 1987) 42
11 See R. Bibby Mosaic Madness (Toronto 1990) 47 ff
12 Ibid. 49
constituencies, particularly in the metropolitan areas of Toronto, Vancouver and Montreal, are extremely sensitive to immigration matters, and equality of rights for visible minorities.

The fact that some public opinion polls have indicated little support for these policies among native-born Canadians has not led the government to abandon them. When a given policy is the major issue determining how minorities will vote, governments dare not abandon it, even though that policy may be less than popular with the overall majority of the population, for whom it remains a secondary issue.

The fact that Canada has always been a plural society stemming from its French and English components has prevented it from having a unique culture and identity. When the other ethnic groups came, they tended to attach themselves to one of these two cultures (usually the English) and saw the other as just another ethnic group. For this reason, French Canadians naturally saw the immigrants as posing a threat. On the other hand, the immigrants, faithful to the image of Canada as a "mosaic," were encouraged by the very plurality of the country and government policies to retain their own language and culture. The struggle for political support between the major political parties led them to compete for the support of the immigrants by offering them ever more generous concessions to preserve their culture and protect them from the discrimination that new-comers have inevitably experienced.

As a consequence, Canadian nationalism has a very weak appeal and the country has very mixed loyalties: to region, to province, to ethnic group, etc. Canadian nationalism has appeared with federal government endorsement as a kind of "boosterism." It is in no way comparable in its appeal to Americanism in the United States.

As long as it was a general and non-interventionist policy, multiculturalism received general acceptance among the Canadian-born population. It seemed an innocuous means of pleasing new immigrants. Now that it has become more interventionist, with policies requiring appropriate representation of ethnic minorities in parts of the work force (especially in elite sectors), and with the enforcement of the non-discrimination terms of the Charter, there are signs of declining support for the policy among Canadians. Disapproval tends to focus on support for ethnic pressure groups out of public funds, especially as these groups become active in advocating interventionist policies of immigrant groups.

Analysis

The three inter-ethnic or inter-cultural issues sketched above — English versus French, native peoples versus the Canadian government, federal and provincial, and ethno-cultural groups versus English and French charter groups — serve to illustrate a common fact: the impact of the adoption and imposition of pluralist, interest group policy-making on the older British-style cabinet or parliamentary government. The earlier system was democratic at least from the First World War, but was also elitist, in the sense that once elected the government was assumed to have the authority to make key decisions, including decisions in war and peace, provided the issue was ventilated in Parliament, and after debate, supported by a majority vote of MPs. Issues between
provinces or between them and the federal government were handled by "federal-provincial diplomacy" — i.e. negotiations between governments through their first ministers, analogous to relations between sovereign states.

This system has been transformed, not because of any constitutional or institutional change, but rather as a result of a profound shift in political culture. This must be discussed further. At the end of the Second World War Canada was the senior dominion in the British Commonwealth of Nations. Through its contribution to victory, its economic growth and its weight among the nations of the world it had earned a more independent status. Canada was on its own more than ever before — and it felt self-confident in this condition because of the after-glow of victory and economic growth.

British influence was withdrawn at the same time as American power was at its apogee. Technology served the interests of Americanization. Television expanded into everyone’s living-room, and U.S. culture was pumped into the consciousness of Canadians almost as much as of Americans themselves. Economic integration also proceeded with the takeover of many Canadian businesses and the building of branch plants by American corporations. The result was the emergence of a common North American lifestyle based on a common media coverage, common creature comforts and a common pro-capitalist and anti-communist philosophy.

It is therefore not really surprising that American political culture too would be carried into Canada on the wave of Americanization. This, however, took longer to become manifest. The government “similar in principle to that of the United Kingdom”\(^\text{13}\) was firmly entrenched along with the disciplined party system.

However, change was occurring. Methods of political campaigning soon copied the American, with the widespread use of advertising and public relations experts. The Cold War decreed close military cooperation with the Americans, and this brought more influence. The advent of many U.S. corporations brought their lobbying techniques to Canada — and parties soon found themselves embarked on collaboration with them — especially in areas of concern to business. The American crises around the civil rights movement and the Vietnam War echoed through Canada, imbuing Canadians with the values, concerns and problems of their giant neighbour. Without consciously perceiving the change, Canadians came to see the world more like Americans and less like Britons. Add to this the effect of post-war immigration, coming mostly from countries that were unaware of Canada’s largely British traditions and institutions. The awakening and self-assertiveness of French Canada was another blow against the old ways.

The new post-war Canada was much less structured than before. The old elites were challenged by new. Old money in English Canada quietly made its peace with the representatives of foreign capital, as Canadian banks, insurance companies, retailing empires and utilities found there was money to be made by facilitating the implantation of the new corporate giants. Leadership was quietly shared with them, and they also entered the circle of those who helped finance the old political parties.

\(^\text{13}\) Preamble to British North America Act, 1867
In Quebec the same corporate intrusion occurred, but the old power of the Church collapsed after 1960 — leaving business influence unchallenged as long as it went along with Quebec nationalism. New francophone capital interests entered and joined the older St. James Street interests and the new multinationals.

Along with these changes, especially from the big business lobbies to the gorilla theatre of single interest groups playing to television came pluralist interest group politics. However, Canada is not the United States: there are factors here that make pluralist politics catastrophic. The United States, while forged from immigration from all over Europe, from the importation of black slaves for its southern plantations, and from immigration it is now receiving mainly from East Asia and Latin America, has a well established doctrine of Americanism and a process of absorbing immigrants into the melting pot of English-speaking people who accept the ultra-patriotism that we call Americanism. The pull-haul of interest group politics therefore occurs within the canopy of the ideology of Americanism. The groups pressure the government for advantage, subject to the higher loyalty to the cultural values of Americanism, and always in the English language. The questions of the society's language and culture are therefore settled. What is at issue is: who gets what, when and how?

Now consider Canada. It lacks the unilingual mold; it lacks the ideology of Americanism forged in the American Revolution; it lacks the aggressive feeling of superiority that comes from super-power status and the championship of world capitalism. Canada encounters its immigrants as a country of two languages and cultures. This tells them that there is no norm to which they should conform. Instead there is plurality — a plurality that has been turned into a virtue, as Canadians boast of their toleration of other cultures, which they claim to find so enriching. It is a short step from this pride in toleration to multiculturalism — a unique Canadian phenomenon.

Since Canada lacks the crucible of Americanism and a unilingual English-language policy to contain the eruptions of pluralist/interest group politics within limits that serve the national interest and national cohesiveness, it is exposed to highly disruptive forces when the pluralist policy-making machine is in motion. Since the adoption of the Charter of Rights and Freedoms in 1982, claims are made in terms of rights. And rights cannot be compromised. They are perceived as sacred, fundamental, and no one can speak against them. Enshrined in the Charter, they are ultimately protected by the courts. Their addition to the universe of political discourse has served to make compromise and negotiation much more difficult.

The claims of immigrants, especially of “visible minorities,” are particularly susceptible to articulation in terms of rights, e.g. the right to representation in elite positions (as students at universities, in employment as teachers, judges, politicians, administrators, civil servants, etc.), to equal treatment in the rental of apartments etc., i.e. to freedom from discrimination. Expressed in terms of rights, these claims are not to be challenged; and none of the three established political parties has done so. Now, however, the Reform Party, a new, mainly western, English-speaking party, has expressed criticism of the funding of multicultural programs at public expense — so finally, and somewhat timidly, the issue is being joined. Preston Manning, leader of the Reform Party, is being denounced as racist.
Add to this picture other mobilized groups playing the pluralist game of “give me what I want or I will block the machine” — and you have a formula threatening a fragile national unity. This possibility is not confined to ethnic groups. The pluralist game can be played by business groups, feminist groups, environmental groups, gun lobbies, religious and charitable groups, and any number of others. Its effects are bad enough in the United States.14 In Canada they threaten the viability of the nation itself.

The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics

F.L. Morton and Rainer Knopff

"We have learned that the growth in judicial forms of power has been at the expense of and in direct opposition to other more popular forms of power. Herein lies its expediency. Law has been a way of getting around the people... Law [is] used to achieve an end too difficult to achieve by exclusive reliance on representative institutions or other democratic methods."1

Michael Mandel, 1989

"A comprehensive explanation of judicial decisions must include the actors who employed the courts for their own purposes."2

Alan Cairns, 1971

Two centuries after Canada's first constitution, it is appropriate to reflect on how the most recent addition to our "living constitution," the 1982 Charter of Rights and Freedoms, fits into the pattern of Canadian constitutional evolution. Professor Ajzenstat, in her contribution to this volume, suggests that Canada's constitutional development can be understood as an ongoing struggle between "constitutionalism" and "democracy."3 Her analysis provides a useful prism through which to gauge the Charter: does it represent the triumph of constitutionalism over democracy, or the triumph of democracy over constitutionalism?

Pierre Trudeau, the architect of the Charter, clearly thought the latter when he promoted the Charter as "the people's" constitutional document. The papers by Professor Cairns and Professors Bercuson and Cooper also elaborate the

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1 Michael Mandel The Charter of Rights and the Legalization of Politics in Canada (Toronto 1989) 33

2 Alan C. Cairns "The Judicial Committee and its Critics" Canadian Journal of Political Science 3 (1971) 301

3 Janet Ajzenstat "The Constitutionalism of Etienne Parent and Joseph Howe." See this volume
democratizing influences of the Constitution Act 1982. There is an equally strong case to be trade for the Charter as the triumph of constitutionalism. Constitutionalism opposes the absolutism of the many as well as the absolutism of the few. In modern times, it is inspired by the fear of democratic tyranny and seeks to maintain institutional arrangements that protect individuals' rights to life, liberty and property from unrestrained majoritarianism. In this respect, constitutionalism is more or less synonymous with the classical liberalism of Locke, Montesquieu, and The Federalist. By grafting constitutionally entrenched and judicially enforceable rights onto the tradition of “parliamentary supremacy,” the Charter may appear to represent the triumph of such liberal constitutionalism in Canada.

Appearances notwithstanding, we argue that the Charter — at least as it is understood and promoted by its most dynamic constituency — is neither democratic nor liberal/constitutional. While the Charter clearly contains the language and symbols of liberalism, its most ardent partisans and practitioners are imbued with an “unconstrained” vision of politics that is antithetical to the respect for the private sphere and limited government that informs the tradition of constitutionalism. Nor is the Charter particularly democratic. In practice, it has engendered a new form of legalized politics that intentionally bypasses the traditional democratic processes of collective self-government through popular elections and responsible parliamentary government. The Charter is better understood in the larger context of a coalition of social movements that we call the “Court Party,” which is the Canadian expression of the new politics of postmaterialism found in most Western industrial democracies. Canada’s new Court Party poses a renewed challenge to the constitutionalism established by such nineteenth-century statesmen as Parent and Howe.

Theory Versus Practice

Our traditional understanding of constitutionalism and judicial review is badly out of touch with its actual practice under the 1982 Charter of Rights. According to this traditional understanding, judicial review of constitutionally entrenched rights could be said to have six primary elements. First it was premised on the classical liberal distinction between state (the public) and society and economy (the private), and was strongly portrayed as a defender of the latter against the former. Second, judicial review embodied a distrust of majoritarian democracy; it was understood as a way to

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4 Alan Cairns “Constitutional Theory in the post-Meech Lake Era”; and David J. Bercuson and Barry Cooper “From Constitutional Monarchy to Quasi-Republic: The Evolution of Liberal Democracy in Canada.” See this volume

5 Judicial review is a logical corollary of a written constitution. From its inception in the American constitution of 1787, judicial review has properly been associated with the classical liberal concept of the limited state. Classical liberalism sought to maximize the individual liberty by minimizing the scope of the state. A written constitution may define and empower the different branches of government (separation of powers), different spheres of legislative jurisdiction (federalism), and explicit limitations of the exercise of state authority against individuals or groups (charter/bill of rights). Each of these types of constitutional limitations was initially understood to protect the private sphere — society and economy — the realm of freedom, by restricting the public sphere, the realm of coercion
protect individual rights and liberties, especially private property rights, against demagogues and misguided majority rule.\(^6\)

Third, constitutional rights were understood to be not just “for” but also “by” individuals. Rights claims were raised by individual litigants in the course of settling other legal disputes with the state. Among other things, this meant that the dispute came first, the constitutional issue second.\(^7\) Fourth, judicial review was inherently conservative or traditional, in the sense that it preferred and protected “the ancient truths” against corruption by future majorities. Its purpose was to protect existing rights, not to create new ones.\(^8\) Fifth, judicial review was understood as an exercise of legal judgment not political will. This faith in judges as the paragons of impartial reason (as \textit{lex loquens}), combined with their independence from both the people and the other organs of government, was the primary justification for vesting the power of enforcing constitutional norms in the judiciary. An element of this faith was that judges would never abuse the power of judicial review by injecting their own political preferences into the interpretation of the constitutional text.\(^9\) Finally, there has always been a nation-building or centralizing thrust implicit in judicial review.\(^10\)

Today, all that remains of these original attributes of judicial review are its abiding distrust of democratic politics and its preference for centralized decision-making. The advent of the administrative or “embedded” state — with its blurring of distinctions between public and private, state and society — has shattered

\(^6\) Judicial review has been understood as a way to protect against the chronic problem of democratic regimes — the unjust majority. By constitutionally entrenching individual rights and entrusting their protection to the courts — the branch of government least accountable to public opinion — the dilemma of combining equality and liberty, government based on the consent of the governed and minority rights, was to be solved.

\(^7\) The corollary to this was that many important constitutional questions might never be addressed by the courts. See Rainer Knopff and F.L. Morton \textit{Charte Politics} (Toronto 1992) ch 7 “The Oracular Courtroom”

\(^8\) This is implicit in the very nature of a “written” as opposed to an “unwritten” or informal constitution. The practice of a written constitution and judicial review implies a skepticism about future generations. Explicitly in the case of the American Constitution, and implicitly in most other instances, there is a sense that we, the present generation, know and respect what is just and right, but that future generations are less likely to be so virtuous. The solution is to constitutionally entrench the standards of justice, making them difficult for future majorities to either alter (through formal amendment) or ignore (by disobeying court decisions). Thus built into the traditional understanding of judicial review is an inherent conservatism, a preference for the “old ways” and a distrust of the new.

\(^9\) These are the elements of the first and most famous defense of judicial review — Alexander Hamilton in \textit{Federalist No. 78} — and continue to appear in all subsequent accounts. Cf. Chief Justice Dickson’s opening comments in his judgement in the \textit{Morgentaler case}, quoting Justice McIntyre: “... the task of the Court in this case is not to solve what might be called the abortion issue, but simply to measure the content of s.251 [of the Criminal Code] against the Charter”

\(^10\) In the United States, Alexander Hamilton proposed a national judiciary as the only alternative to armed force as a means of forcing the member states to fulfil their obligations toward the Union and one another. See \textit{Federalist No. 15}. In Canada, many of the proponents and opponents of the first Supreme Court Act saw judicial review as a form of “disallowance in disguise.” See Jennifer Smith “The Origins of Judicial Review in Canada” \textit{Canadian Journal of Political Science} 16 (1983) 115. The critique of the Court as a covert agency of centralization is still very much alive. See Andre Bzdera “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review.” Forthcoming in the \textit{Canadian Journal of Political Science}
the traditional foundation of judicial review: the ideal of limited government. The advent of the modern welfare state appeared to spell the end for any significant exercise of judicial review in both the United States and Canada. The "government generation" sought to enhance personal liberty through the state not from the state. This "state worship," as Smiley dubbed it, in conjunction with the tradition of parliamentary supremacy, swamped Diefenbaker's 1960 Bill of Rights and rendered it without effect.

While the Charter seems to suggest a resurgence of the idea of "limited government" through constitutional rights, practice does not support theory. Former Supreme Court Justice Bertha Wilson explicitly rejected what she described as the "doctrine of..." constitutionalism"... according to [which] states are a necessary evil." According to Wilson, the equation of "constitutionalism" with "limited government" is an American idiosyncrasy that "is no longer valid in Canada, if indeed it ever was." The Canadian experience, Wilson declared, "shows... that freedom has often required the intervention and protection of government against private action."

Most interest groups active in Charter politics are concerned not with restricting government policy and intervention but with expanding it. Section 23 litigation is usually aimed at obtaining more minority language education facilities or services from provincial governments. The expansion of government benefits or intervention is often the object of section 15 litigation by feminists and other "equality seeking groups." Judicial attempts to restrict the scope of the Charter — and thus the ambit of


12 In the U.S., this destruction was dramatized in the conflict between the Supreme Court and Franklin Roosevelt's "New Deal," which culminated in the capitulation of the Court in 1937. Corwin described this as nothing less than a "constitutional revolution," because it marked the end in practice (if not in popular myth) of the American Founders' ideal of guaranteeing "limited government" through a written constitution. To the architects of the new American welfare state, the constitution and the courts were perceived as obstacles if not enemies. Once Roosevelt had succeeded in packing the Court with New Dealers, the American Court publicly abdicated its traditional constitutional responsibilities (federalism, economic liberty, and property rights), and virtually disappeared from American politics for almost two decades — until its School Desegregation Decision in 1954

13 In Canada an analogous if less dramatic conflict between the Courts and the new interventionism of the federal government appeared to spell the end for a significant political role for the courts in the new welfare state. Political negotiation replaced judicial review as the preferred means of managing federal-provincial jurisdictional disputes. See Paul Weiler In the Last Resort: A Critical Study of the Supreme Court of Canada (Toronto 1974). Also J.A. Corry Law and Policy (Toronto 1962) 62

14 Doug Owram The Government Generation: Canadian Intellectuals and the State 1900-1945 (Toronto 1986)


16 Ibid. While Wilson wrote in dissent, her expansive view of government action — and thus the scope of judicial review — has won overwhelming support amongst Charter scholars, some of whom deny that there is any meaningful distinction between "public" and "private"
judicial coercion — to "state action" strictly defined have been widely criticized. 
Further contradicting the old state-society dichotomy is the fact that most of these Charter groups are funded by the state.

Judicial review has also lost its traditional character as a conservative check on democratic change. It is no longer portrayed as a way of defending traditional rights, but as an instrument for social and political reform. In a complete reversal of its approach to the 1960 Bill of Rights, the Supreme Court, following the near unanimous exhortations from the law journals to adopt a "large and liberal" approach to interpreting Charter rights, quickly liberated itself from the interpretive confines of "fidelity to the framers' intent," and shed its inhibitions about striking down parliamentary and provincial statutes. For example, the Supreme Court has struck down Canada's abortion law, the Lord's Day Act, the language-of-education provisions of Quebec's Bill 101, and the (mis)treatment of applicants for refugee status in Canada. It has also begun a thorough revamping of the criminal justice process that much more strongly favours the interests of the accused. Other courts of appeal have added their voices to this chorus of social reform by striking restrictions on pornography, voluntary school prayer, boys-only hockey leagues, discrimination against single-mothers and illegitimate children, homosexuals, and

17 After the adoption of the Canadian Bill of Rights in 1960, Canadian civil libertarians and social reformers hoped to duplicate many of the social reforms achieved through the leadership of the Warren Court in the United States. When the Canadian Supreme Court balked at adopting the role of reformer, it was roundly criticized in the law journals. See Walter Tarnopolsky "The Supreme Court and the Canadian Bill of Rights" Canadian Bar Review 53 (1975) 649
18 For a critical review of the legal academy's endorsement of an activist Charter jurisprudence, see F.L. Morton and Rainer Knopff "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" Supreme Court Law Review Second Series 1 (1990) 533-546
19 The key decision on this point was Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486
21 Morgentaler v. The Queen, [1989] 1 S.C.R. 30
22 Big M Drug Mart v. The Queen, [1985] 1 S.C.R. 295
24 Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177
25 See Knopff and Morton Charter Politics ch 2
26 Luscher v. Deputy Minister, Revenue Canada, (1985), 45 C.R. (3d) 81 (Fed.C/A)
29 Williams v. Haugen, unreported (Saskatchewan Court of Appeal, 13 Dec. 1988); leave to appeal denied, (1990) 76 S.R. 57
30 Knodel v. B.C. Medical Services Commission (1991), 58 B.C.L.R. (2d) 356
"the poor." This legacy of Charter-inspired reform hardly supports the traditional view of judicial review as a conservative check on the tides of social change.

The record of the Court's new role as policy reformer reflects subtle but important changes in its own procedures, rules, and self-understandings. The Supreme Court has consciously transformed itself from a traditional, British-style adjudicatory court to a court designed to solve social problems by issuing broad declarations of constitutional policy. It sees itself as the authoritative oracle of the constitution, empowered to develop its standards for society as a whole, rather than just for the litigants before it. The establishment of constitutional policy now comes first, the concrete dispute second. Indeed, the particular dispute before the Court is merely the occasion — a sufficient but no longer a necessary condition — for the exercise of this oracular function.

The Court's oracularism is particularly evident in its embrace of the "noninterpretivist" approach to constitutional interpretation. Noninterpretivism emphasizes the need for constitutional flexibility and thus "judicial updating" of constitutional principles to accommodate changing socio-economic conditions. Seeing the constitution as a "living tree," whose contours must be shaped by judicial gardeners, noninterpretivism minimizes the importance of judicial fidelity to the constitutional text, its "original understanding," or the "framers' intent." The Court's adoption of the "living tree" approach significantly enhances the ability of judges to act as agents of policy reform by giving them a free hand to "discover" new meaning in broadly worded constitutional principles. In addition, the Court's new willingness to use what is known as "extrinsic evidence" or "social facts" — information relating to the broader policy issues implicated in the case — has further enhanced its policy-making role. Indeed, its most celebrated decision, Morgentaler, could not have been made without such extrinsic evidence.

33 The Court declared in its 1985 decision in Reference re B.C. Motor Vehicle Act that it would not be bound by "the intent of the framers" 34 Justice Wilson's "discovery" of a "right to abortion" in section 7 of the Charter is the most wonderful example of this, since the framers of the Charter explicitly rejected requests to include such a right. See F.L. Morton, Morgentaler v. Borowski: Abortion, the Charter and the Courts (Toronto forthcoming)
35 In the past, the Supreme Court restricted the relevant evidence to those facts pertaining to the immediate dispute before them: who did what to whom, when, and how. These are termed "historical facts"
36 The three majority opinions relied extensively on the data on access to abortion services reported in the Badgley and Powell Reports — both done for legislative committees considering law reform in the abortion area. This use of "social facts" was absolutely necessary for the Court's ruling that the 1969 federal abortion law violated women's section 7 right to "security of the person," since, as the dissenters sarcastically noted, there were no women plaintiffs before the Court; only three doctors who freely admitted that had intentionally violated the law. The "historical facts" could hardly have supported an acquittal
With the important exception of criminal cases involving legal rights, the individual litigant is vanishing in Charter litigation. Interest groups are increasingly the principal carrier of Charter litigation, if not as the litigant, then as the financial backer or intervener. The decline of the individual reflects the conscious decision of an increasing number of interest groups to use Charter litigation to challenge government policy. Drawing on American experience of systematic litigation strategies, a new breed of Canadian interest groups has become adept at packaging their causes as cases and taking them to court.

The Supreme Court has facilitated interest group litigation by relaxing the rules of standing and by adopting a new, open-door policy for non-government interveners. A rarity in the decade preceding the Charter, interest-group litigation has mushroomed since. More than one hundred interest-group interveners have participated in over half of all the Supreme Court's Charter cases. The Court has also dramatically relaxed the doctrines of standing and mootness, both of which have made it easier for interest groups to bring their causes before the courts. Interest groups that intervene on behalf of policy concerns that may be quite different from the concerns of the immediate parties have also benefited from the Court's willingness to

37 Interest groups who have directly litigated Charter claims before the Supreme Court of Canada include: the Quebec Association of Protestant Schools; Operation Dismantle; Société des Acadiens, Public Service Alliance of Canada, the Toronto Public School Board, B.C. Government Employees Union, Committee for the Commonwealth of Canada. There are of course many more whose cases did not reach the Supreme Court.

38 For example, the Canadian Abortion Rights Action League (CARAL) covered most of the legal expenses incurred by Henry Morgentaler in his successful challenge to the abortion law. Campaign Life financially backed Joe Borowski's pro-life Charter case. The National Citizens' Coalition (NCC) financially backed the successful Charter challenge to restrictions on third-party election expenditures and also Merv Lavigne's unsuccessful challenge to labour union expenditures for political causes. The Canadian Council of Churches has sustained an ongoing litigation campaign against the government's refugee determination policies.

39 In politically charged cases involving abortion (Daigle v. Tremblay (1989)) and language rights (Mahé v. Alberta (1990)), the number of interest group interveners has reached as high as nine. This data comes from a draft of Ian Brodie "Interveners in Charter of Rights Litigation" M.A. thesis, University of Calgary 1992. This development parallels American experience, where interest group intervention in constitutional cases has become the norm not the exception.

40 The doctrine of standing prevented individuals who objected to a law but were not directly affected by it, from challenging it before the courts. This restriction on access partially protected the courts from constantly being forced into confrontations with Parliament by disgruntled losers in the political arena. The Supreme Court lost this protection in 1981, when it granted Joe Borowski standing to challenge Canada's abortion law despite the fact that he was not directly affected by it. Minister of Justice v. Borowski, [1981] 2 S.C.R. 575.

address issues not actually raised by the factual situations of the parties. The latter procedural changes are an index of the Court's willingness to issue broad declarations of constitutional policy even when there is no bona fide legal dispute before it that clearly implicates the policy questions it wishes to address. This is why disputes, the traditional stock in trade of courts, are now merely a sufficient and no longer a necessary condition for judicial intervention in public policy.

The effect of the Court's relaxing of the rules of evidence, relevance, standing, mootness and intervener status, combined with the new sophistication of Canadian interest groups in using constitutional litigation as a political tactic, means that there are few major government policy initiatives that are likely to escape a Charter challenge. Judicial intervention in the policy-making process is no longer ad hoc and sporadic, dependent upon the fortuitous collision of individual interests and government policy; it has become more systematic and continuous.

**Postmaterialism and the Court Party**

The collapse of the state-society distinction; the redefinition of rights as entitlements to government goods and services; the triumph of the oracular court over the adjudicatory court; the fact that the primary users of (non-criminal) Charter litigation are groups promoting their interests not individuals protecting their rights; and the emergence of the courts as instruments of social reform — these are all symptoms of a revolution in the institution of judicial review. Even taken together, however, they fail to explain the essence of Charter politics. The ascendancy of the courts and their primary supporters and beneficiaries is a political phenomenon and deserves a political explanation. The rise and fall of political institutions does not occur in a vacuum. Political power gravitates into the hands of those “most representative of dynamic new social forces.” In a system of government where representative functions are divided among different political institutions, “power has tended to shift from one body to another according to each body's success or failure in responding to powerful demands” from dominant or ascendent elites. The triumph of Parliament over the monarchy in the seventeenth century and the eclipse of the House of Lords by the House of Commons in the nineteenth century, signalled the rising influence of first the landed aristocracy and subsequently the urban bourgeoisie.

42 In *Andrews* the Court responded more to issues raised by LEAF and other interveners — issues that did not address the immediate issue before the Court. In *R v. Edward Dewey Smith*, [1987] 1 S.C.R. 1045, the Court overturned a mandatory seven-year minimum sentence for importing illegal drugs even though everyone agreed that Smith, the litigant, deserved at least seven years. For further discussion see Knopff and Morton *Charter Politics* ch 7.

43 The fear voiced by Chief Justice Laskin in his dissent in the first Borowski case — that “if standing is accorded to the appellant, other persons with an opposite point of view might seek to intervene and would be allowed to do so, the result would be to set up a battle between parties who do not have a direct interest [and] to wage it in a judicial arena” — has become the new reality.


45 Ibid.
The same political dynamic influences the development of a nation's constitutional law. As Edward Corwin, the celebrated American constitutional scholar, once observed, "Constitutional law always has a central interest to guard."\(^46\)

What are the social groups and interests that account for the emergence of the Charter and the politics of rights in Canada? What is the "central interest" that drives the Court's new activism and shapes its Charter jurisprudence? What Alan Cairns said about the influence of the JCPC on Canadian federalism prior to 1949 is equally true of the Supreme Court and the Charter today: "A comprehensive explanation of judicial decisions . . . must include the actors who employed the courts for their own purposes."\(^47\)

Whatever its negative effects on the Canadian body politic, the struggle over the 1987 Meech Lake accord revealed quite clearly the identity of the partisans of the Charter and the courts. The leaders of the then ill-defined and novel coalition that came together to defeat the accord were not reticent about who they were and their commitment to the Charter. Deborah Coyne, chairperson of the Canadian Coalition on the Constitution has provided as good a description as any of what we prefer to call the new "Court Party" in Canadian politics.\(^48\) "The Charter's appeal to our non-territorial identities — shared characteristics such as gender, ethnicity and disability — is finding concrete expression in an emerging new power structure in society. . . . This power structure involves new networks and coalitions among women, the disabled, aboriginal groups, social reform activists, church groups, environmentalists, ethnocultural organizations, just to name a few. All these new groups have mobilized a broad range of interests that draw their inspiration from the Charter and the Constitution." The power of this coalition cannot be doubted given the outcome of Meech Lake. Together with some improbable allies, the Court Party achieved what was unimaginable only a decade earlier: the defeat of a constitutional amendment that enjoyed the support of all eleven first ministers and of the leaders of both opposition parties. While this coalition may initially have been ad hoc, it is now as entrenched in Canada's ("small c") constitution as the Charter is in the ("large C") Constitution.

The Court Party is not a party like the Liberals or the NDP. Its leadership looks more like a "party" in the eighteenth century meaning of that term — i.e., a faction. Its base consists of the various "social movements" that it purports to represent. Alan Cairns has coined the term "Charter Canadians" to describe this coalition. Cairns' term is accurate as far as it goes, but it misses the institutional and the social nexus that nurtures the coalition. Socio-economically, members of the Court Party are drawn almost exclusively from the service sector of the economy, and enjoy high levels of education, affluence, and mobility. As in most Western developed democracies, this

\(^46\) Edward S. Corwin *The Constitution and What It Means Today* (Princeton 1946) viii

\(^47\) Alan C. Cairns "The Judicial Committee and its Critics" 301

\(^48\) Deborah Coyne "How to Escape the Meech Lake Morass and Other Misadventures." Notes for remarks to the annual meeting of the Council of Canadians (Ottawa: 14 October 1989) 3
social class has spearheaded a new kind of politics, known as the politics of postmaterialism. This class and its politics constitute the foundation of Canada’s Court Party.

Seymour Martin Lipset has observed that in post-war western democracies the most dynamic agent of social change has not been Marx’s industrial proletariat but a new “oppositionist intelligentsia,” drawn from and supported by the well-educated, more affluent strata of society.49 Inglehart and others explain this change as a consequence of new and growing concerns with noneconomic and social issues — “a clean environment, a better culture, equal status for women and minorities, the quality of education, international relations, greater democratization, and a more permissive morality, particularly as affecting familial and sexual issues.”50 These new concerns are most prevalent outside the working classes. “The reform elements concerned with postmaterialist or social issues largely derive their strength not from the workers and the less privileged, the social base of the Left in industrial society, but from segments of the well educated and affluent, students, academics, journalists, professionals and civil servants.”51 In their own way, these groups are participants in the “knowledge industry” that is a new locus of power in postindustrial democracies. “Just as property was the foundation of elite power in industrial society, so knowledge (thus, a high level of education) is the vehicle of power in post-industrial politics of the administrative state.”52

Recent research has found firm evidence of the new politics of postmaterialism in Canada.53 Spearheading the Court Party’s involvement in Charter politics is a collection of new citizens’ interest groups, which find an effective supporting cast in the main institutional strongholds of the postmaterialist “chattering classes:” state bureaucracies, the universities (especially the law schools), and the media.

49 Seymour Martin Lipset “The Industrial Proletariat and the Intelligentsia in a Comparative Perspective” ch 5 in Consensus and Conflict (New Brunswick 1985) 187
50 Ibid. 196. Lipset and others attribute this political realignment to deeper structural changes with the political-economy of most Western industrial democracies: historically unprecedented levels of material affluence, education, communication, mobility, and the displacement of the manufacturing and agricultural sectors of the economy by the new service sector. Structural change produces value change. Economic growth, public order, national security and traditional morality decline in importance. They are replaced by concerns for individual freedom, social equality, and quality of life issues — “peace,” environmentalism, and so forth. Structural change also results in new sources of wealth and power
51 Ibid. 196
52 Ibid. 194
53 See Neil Nevitte “New Politics, the Charter and Political Participation” in Herman Bakvis ed Representation, Integration and Political Parties in Canada (Toronto 1992). While Nevitte finds strong evidence of postmaterialism in Canada, he does not find that it correlates strongly with support for the Charter. We believe that this could be explained by the difference between mass and elite attitudes, but it is a question that clearly requires further research.

F.L. Morton & Rainer Knopff
Citizen Interest Groups

The most obvious manifestation of a new Court Party in Canadian politics are the groups that have sprung up around the Charter. Some were formed during the period of Charter-making that culminated in 1982. They were active in shaping the Charter’s content and then contributing the support necessary for its adoption. Since 1982, these groups have actively used the Charter to lobby and litigate their respective policy agendas. The Supreme Court has encouraged their use of the courts through its “open door” policy for litigants and interveners.

While Canadian interest groups occasionally used the courts prior to 1982, the Charter has contributed to a significant increase and legitimation of political litigation. The change is qualitative as well as quantitative. For one thing, all of the principal Charter groups fit the postmaterialist mode in “promoting an idea or cause,” thus standing “in contrast to [groups] with an occupational prerequisite.” Traditionally, most interest groups have been occupationally based and motivated by the explicit self-interest of their membership. The development of postmaterialist citizens’ interest groups predates the Charter, and has strong parallels in American politics. Since the 1960s, however, citizens’ groups have been the fastest growing kind of interest group in both Canada and the U.S.

Many of these groups have acquired wholly new organizational expressions designed mainly to exploit the new political opportunities afforded by the Charter. The Women’s Legal, Education and Action Fund (LEAF) is the archetypical example. After having heavily influenced the wording of the equality rights sections (15 and 28) of the Charter, feminist groups then sought ways to take advantage of the broad wording. In 1984 the Canadian Advisory Council on the Status of Women published a study calling for the creation of a single, nationwide “legal action fund” to coordinate and pay for a policy of “systematic litigation” of strategic “test cases.” The study reported that with the adoption of the Charter, “we find ourselves at the opportune moment to stress litigation as a vehicle for social change.” A year later LEAF was launched, and it has gone on to become the most frequent non-government intervener in Charter cases before the Supreme Court.


54 Knopff and Morton “Nation Building and the Canadian Charter of Rights and Freedoms”


57 M. Elizabeth Atcheson, Mary Eberts, and Beth Symes Women and Legal Action: Precedents, Resources and Strategies for the Future (Ottawa: Canadian Advisory Council on the Status of Women 1984) 163

58 Ibid.

59 Brodie “Interveners in Charter of Rights Litigation”
the Equality Rights Committee of the Canadian Ethnocultural Council, and Equality for Gays and Lesbians Everywhere (EGALE), to name just a few. This trend parallels the American experience where many of the citizens’ interest groups “sprang up after the passage of dramatic new legislation that established the major outlines of public policy in their areas.” As with the Charter groups, the political strength of certain postmaterialist organizations, and even the formation of entirely new ones, was more the consequence of new legislation than its cause.

The new Charter organizations differ from traditional interest groups also in being more significantly funded by the state than by their members or the groups they represent. Feminist groups received $13 million through the Women’s Program administered by the Secretary of State in 1988. Official Language Community Grants, also administered by the Secretary of State, totalled $28 million in 1988-89. Both LEAF and minority language groups, such as Alliance Québec and “Francophones hors Québec,” have also been the primary beneficiaries of the Court Challenges Program, a federal program that distributes grants to support language rights and equality litigation by would-be Charter claimants. Grants have run as high as $105,000, $35,000 for each level of court. Other section 15 “equality seekers” typically receive all or most of their budgets from governments or private foundations. Again, this reliance on external rather than membership funding is characteristic of almost all citizens’ interest groups in both Canada and the United States.

Finally, in the pre-Charter era, interest-group use of constitutional litigation usually represented the efforts of members of society (individuals or corporations) to restrain state action. By contrast, many Charter groups litigate to try to force the expansion of state services, benefits, or regulation. This is clearly the case in the numerous state-funded section 23 “minority language education rights” cases such as the Mahé case from Alberta. It is also often the object of feminists and other “equality seekers,” whose policy agendas reject formal “equality of opportunity” in the name of “equality of results.” This has led feminist legal scholars to reject a constitutional policy of “non-discrimination” as inadequate. Instead they have proposed sophisticated jurisprudential theories of “disparate impact” and “systemic

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60 These are some of the groups that have received funding from the Court Challenges Program
61 Walker “Origins of Interest Groups” 43
62 The Canadian Civil Liberties Association is an important exception. It refuses to accept any government money
63 The National Action Committee (NAC) alone received a $500,000 grant. The Canadian Research Institute for the Advancement of Women (CRIAW) received $361,200. In 1987-88, LEAF received $269,770 from the Women’s Program
64 For Canada see Paltiel “The Changing Role and Environment of Special Interest Groups.” For the U.S., see Walker “The Origins of Interest Groups”
65 This is one of the principal themes advanced by J.R. Mallory Credit and the Federal Power in Canada (Toronto 1954) 30-32
66 See generally, Anne F. Bayefsky and Mary Eberts eds. Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto 1985)
discrimination" that invite judicial revision of legislative decision-making. This theory of systemic discrimination has been endorsed by other members of the section 15 club, and the Supreme Court appeared to accept it in Andrews, its landmark section 15 ruling. At a minimum this interpretation of section 15 challenges otherwise neutral government policies that disproportionately burden women and other "disadvantaged" minorities. At a maximum it sanctions judicially-ordered positive remedies to achieve equal results. In the latter instance, Charter experts advocate the use of structural injunctions, a legal instrument pioneered by American activists whereby the courts "manage the reconstruction of a social institution" such as schools or prisons until they comply with constitutional standards. Failure to use such aggressive, state-extending remedies, says Helena Orton, litigation director for LEAF, will render "the guarantee of equality . . . deceitful and meaningless." Indeed, the very concept of the state-society dichotomy is not accurate for many Charter-based interest groups, since they themselves depend to such an extent on public funding, and are thus creations of the state. American scholarship shows that groups dependant on government financing overwhelmingly support increased government intervention in the economy and society, and there is impressionistic evidence that the same is true in Canada. A corollary finding is that "government agencies are unlikely to sponsor groups that do not share their fundamental political sympathies." This has been confirmed in Canada by the experience of "REAL Women," an anti-feminist women's group. REAL Women's requests for funding have been rejected by both the Women's Program (Secretary of State) and the Court Challenges Program.

REAL Women is one of several conservative groups that have been active in Charter litigation. Others include the National Citizens' Coalition (NCC), Joe Borowski's Alliance against Abortion, Men and Women for a Fair Market Wage, and Kids First. The NCC successfully challenged restrictions on independent third-party

69 Support for structural injunctions has not been limited to spokesmen for minority groups who hope to directly benefit from them. They have also been endorsed by Professor Dale Gibson, one of Canada's leading constitutional scholars and by Robert Sharpe, formerly the Executive Assistant to Chief Justice Dickson and now Dean of the University of Toronto Faculty of Law
70 See "Aggressive challenges to discrimination urged" The National (Canadian Bar Association) (February 1989) 7
71 Paltiel "Special Interest Groups"133; Walker, "Origins of Interest Groups" 402
72 Walker "Origins of Interest Groups" 402
73 In 1989 REAL Women finally received a $21,000 grant from the Women's Program to hold a conference. See Danielle Crittenden "REAL Women don't Eat Crow" Saturday Night May 1988
expenditures in the Canada Elections Act and sponsored Merve Lavigne’s initially successful challenge to the union practice of using mandatory membership dues to support various political causes totally unrelated to collective bargaining. Kids First is challenging the provisions of the Income Tax Act that deny deductions for childcare to “stay at home” parents. They claim this policy unfairly discriminates against couples who decide to raise young children themselves rather than use daycare. The active presence of these conservative groups in the arena of Charter politics seems to challenge the thesis that the Court Party is ideologically homogeneous.

Upon closer examination, however, the conservatives’ rather dismal record of failure actually confirms the post-materialist bias of Charter politics. On appeal, the NCC’s trial victory in the Lavigne case was summarily rejected by both the Ontario Court of Appeal and the Supreme Court of Canada. A similar fate met REAL Women’s attempt to support the Quebec Court of Appeal’s decision upholding the right to life of the unborn child in the Chantal Daigle case. Borowski’s Charter-based “right to life” argument was rejected by both lower courts. The Supreme Court then pulled the plug on his last appeal by rendering the case moot by striking down the abortion law in their Morgentaler decision several months prior to the Borowski hearing. In sum, these conservative groups may be Court Party “wannabes” but their dismal bottom line shows that they are decidedly swimming against the ideological tide.

State Bureaucracies

The administrative state has become an active participant in the Charter movement. It is involved through public funding of interest groups; through provision of the institutional playing field and personnel in the form of courts and human rights commissions; and through the quasi-public sector of post-secondary education, which provides the constitutional experts and policy intellectuals who play such an important role in the Court Party.

The public funding connection is the most direct and tangible evidence of the state bureaucracy’s participation in the Court Party. It is consistent with Walker’s conclusion that in the United States the surge in citizens’ interest groups is less a response to public opinion in society at large than the result of “top down

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74 National Citizens’ Coalition Inc. v. Canada (A.-G.) (1984), 5 W.R.R. 436. This decision was handed down on the eve of the 1984 federal elections and, because of time constraints, was never appealed by the federal government.


mobilization” from government agencies and private foundations. It also suggests that the Court Party fits comfortably into the new “state autonomy” model of the policy process, whereby the impetus for policy change comes from networks of policy entrepreneurs who span the old government-interest group model; and who, in the absence of electoral support for their agendas, are just as happy to pursue their policy objectives through the administrative and judicial rule-making process.

The Secretary of State and the Court Challenges Program have been the two most direct funding mechanisms for groups with official Charter “status.” The Court Challenges Program was launched in 1985 with a $5 million budget for five years and renewed in 1990 with a $13 million grant. Its mandate was to fund litigation arising under the equality rights and language rights provisions of the Charter. To qualify for funding, a case had to be deemed to have “substantial importance . . . legal merit [and] consequences for a number of people.” The program was cancelled in 1992, but Justice Minister Kim Campbell announced at the time that the government might continue to pay for Charter challenges by other means.

Less direct but still significant funding is channelled through education and research programs administered by the Social Sciences and Humanities Research Council and the “Human Rights Fund” in the Justice Department. The SSHRC has recently launched a new “strategic grants” program in “law and society” research. Much of this research funding goes to “Charter experts” in the universities. Since most Charter experts are also Charter-philes, to support their research is usually to support the new genre of advocacy scholarship intended to advance the policy agenda of the various Charter groups.

Certain sectors of the state bureaucracy participate directly in the politics of rights as adjudicators of disputes about rights. This is most obviously true of judges at all levels of the judiciary. Judicial independence notwithstanding, the judiciary is an integral part of the administrative arm of the state. While its independence makes it less amenable to the partisan interests of the government of the day, the perception of such independence confers almost unquestioned authority on the judiciary. This authority makes the final judgment of a court one of the most conclusive acts of the modern administrative state.

The Charter explicitly confers the power of judicial review on all of the 1800 judges in Canada. Recently the Supreme Court ruled that certain kinds of administrative tribunals also have jurisdiction to apply the Charter and to refuse to

80 Walker “Origins of Interest Groups” 403
81 Ibid.
83 See Alan Cairns “Ritual, Taboo, and Bias in Constitutional Controversies, or Constitutional Talk Canadian Style” in Alan Cairns, Disruptions: Constitutional Struggles from the Charter to Meech Lake Edited by Douglas E. Williams (Toronto 1991) 199-222

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enforce offending statutes. This precedent extends the power of judicial review to additional thousands of adjudicators. Generally supported by Charter scholars, this development multiplies the points at which interest groups with effective policy networks within the administrative branch can attempt to obstruct or change government policy.

Finally, there is the entirely different but related sphere of federal and provincial human rights acts and their superintending commissions and boards of inquiry. The explicit target of these policies is "private discrimination," and they thus represent a direct and intentional extension of the state into society in the name of protecting rights. The commissions are staffed preponderantly by human rights enthusiasts, drawn from the same groups as the major section 15 "equality seekers." As a representative of the Ontario Human Rights Commission recently observed, "Thus we [the Commission] are part of an extended family of equity forums that engage us with the Charter at a fundamental level." The explicit purpose of the human rights commission is not to "protect society" from the state but to reform society through the state. They are thus state-builders not state-limiters.

Universities

The universities, especially the law schools, are perhaps the most important constituency of the Court Party. They recruit, form and pay the salaries of the engaged academics whose ideas drive the Charter movement. Law schools now produce a steady stream of "rights experts" to staff the interest groups, bureaucracies, and courts that pursue the politics of rights. Of special significance are the scores of committed law professors who serve on the boards and litigation committees of Charter-oriented interest groups. The research interests and legal expertise of these professors usually dovetail with the cases they volunteer to work on. Their research thus supports their politics, and their politics in turn feeds their research. The distinction between education and political action is dissolved completely by the mounting of Charter

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84 Cuddy Chicks Ltd. v. Ontario Labour Relations Board, (1991), 81 D.L.R. (4th) 121

85 A recent example of this was the decision of an administrative adjudicator in the Immigration department. She ruled that the delays in the refugee determination process were so long as to violate the claimant's Charter right to be heard within a reasonable time. Lawyers for church and immigration groups had been urging such a ruling since a similar ruling was handed down in the criminal law field. Ironically, the principal cause of the delays was yet another Charter decision that all refugee claimants are entitled to a full, oral hearing before the decision-making board. This new process takes longer and has resulted in backlogs. "Refugee delays ruled unlawful; Immigration adjudicator's decision may affect huge backlog" The Globe and Mail 10 October 1991

86 See Rainer Knopff (with Thomas Flanagan) Human Rights and Social Technology: The New War on Discrimination (Ottawa 1989)

litigation projects in some law schools. This mutual penetration of politics, education and government is also reflected in the typical career paths of Court Party activists, which would include multiple (and often simultaneous) migrations between universities, administrative positions within the rights bureaucracy, and executive positions within Charter-based groups.

Charter scholarship is the other great asset that the universities provide the Court Party. While legal commentary has always been an important influence on the development of jurisprudence, it has taken on added significance in the case of the Charter. The Charter was successfully portrayed as a break with past Canadian jurisprudence — a sort of legal tabula rasa. On this understanding there were few past precedents that were unambiguously applicable to Charter interpretation. This left a convenient legal vacuum that was quickly filled by an avalanche of new, reformist Charter scholarship. The Supreme Court has liberally availed itself of this new literature, explicitly citing it in support of its own Charter decisions.

The link to the Court Party is that there is a hardly a Charter expert who is not also a Charter-phile. In the new constitutional politics of gender, race, ethnicity and language, each of the “official” constitutional groups draws extensively on academic sympathizers for legal and political advice. The “extensive intermingling of the academic and political spheres,” Cairns has observed, has produced a Charter scholarship that is increasingly “purpose driven and laced with advocacy.” Cairns noted a parallel trend of “insiderism” — the belief that only a member of an ethnic, linguistic or gender group can speak with any authority about its constitutional interests.

In this environment, treatment of Charter issues tends to be one-sided. Counter-arguments and contrary precedents are portrayed negatively or ignored altogether. It is all but impossible to find a law review article that argues for judicial self-restraint or narrow interpretation of Charter provisions. Articles on the scope of the Charter’s application overwhelmingly support the kind of broad definition of government action embraced by Justice Wilson in the Mandatory Retirement

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88 The law school at Queens University runs a “prisoners rights” project. Toronto has a similar project. The Human Rights Research and Education Centre at the University of Ottawa serves as a central clearing house for Charter and human rights researchers and groups. It circulates newsletters, organized bibliographical service in the country. More recently, it became the host institution of the Court Challenges Program. The Director of the Centre, Professor Bill Black, is the former director of the CCP

89 Cairns “Ritual, Taboo, and Bias in Constitutional Controversies” 281. As if to prove Cairns’ point, a conference was held at the law school at the University of Edmonton in October, 1991 entitled “Conversations Among Friends: Women and Constitutional Reform,” that listed nineteen panellists — all women (half of them lawyers)

90 The major exceptions to this are feminists who write in support of censorship of obscenity and Quebec nationalists who support narrow interpretations of the language rights of the Anglophone minority
Articles on the issue of intervener participation in hearings before the Supreme Court unanimously endorsed the “open door” policy that the Court ultimately adopted. The most influential book-length commentary on section 15 does not contain a single piece challenging or opposing the concepts of systemic discrimination or disparate impact. A reviewer concluded that the collection of essays gave the strong impression of “legal scholarship in the service of a social movement.”

The advocacy, reformist character of Charter scholarship is neither surprising nor accidental. The same phenomenon has been at work in the United States for over thirty years. Peltason noted that “since 1937, changes in public policy first have been mentioned in the nation’s law reviews.” ‘Flooding the law reviews’ with favorable articles has been an established tactic of movement interest groups since it was first used by the NAACP in the 1950s. The simultaneous appearance of numerous articles all supporting the same position puts judges and legal scholars on notice that there is support for the position advanced.

Finally, the university law schools provide “Charter experts” to the media to explain to the public what it is the Supreme Court really decided. Even when the media want to communicate the substance of Charter decisions, they tend to suffer the same disabilities as ordinary citizens: length of judgments, lack of time, and highly technical language. Typically the media try to short-cut these difficulties through interviews with experts who are expected to cut through the legalese and give the public a plain-language version of the decision. To the extent that these experts are themselves


94 Karen O’Connor Women’s Organizations’ Use of the Courts (Toronto 1980) 26
partisans on the issue at stake, there is a tendency to provide interpretive “spin” that favours their political views. The media’s uncritical use of such Charter experts makes them accomplices, unwitting or other wise.

The Media

The media component of the Court Party is less tangible but equally important. Unlike the bureaucracies and the universities, the media have no direct link with Charter groups. Yet without sympathetic media coverage, the Court Party could not prosper. Today television provides the playing field for all politics, including Charter politics. Most important for the Court Party, it provides a way to bypass governments and political parties and to go directly to the people — or more accurately, to public opinion. Winning Charter cases and persuading the courts to strike down a statute is not an end in itself. The real objective is insuring that the invalidated law/policy is not reenacted. This requires marshalling public opinion for or against the law/policy in question. The judicial decision becomes a means to this more important end. Charter victories become political resources to shape public opinion, but to succeed they need a public forum. The media provides this forum.

At a technical level, the media love affair with the Charter is a consequence of the form and format of television news. Most Charter cases have the ingredients of good entertainment that prime-time producers are looking for: “drama . . . winners and losers, and an emotional element . . . but most of all . . . conflict.” To take the Morgentaler case as an example, the evening news on 28 January, 1988, the day the decision was released, was on the same level as locker-room interviews with the winning and losing teams after the Stanley Cup final. No substance, no information, just conflict — the thrill of victory, the agony of defeat. Some cases, such as Chantal Daigle’s, have the additional characteristic of “personality.” Personalities can enhance the dramatic impact of a story because they symbolize and thus simplify the

95 There was some evidence of this in the days following the Morgentaler case. The media relied heavily on interviews with women lawyers and law professors, almost all of whom are also feminists. Consciously or not, there was a decided tendency to overstate the scope of the Court’s decision; e.g. quoting Madame Justice Wilson at length; minimizing the narrow, procedural basis of the other four majority judges; and ignoring the two dissenting judges altogether. There were also instances of extending the meaning of Morgentaler to include public funding of abortions, an issue that clearly was not addressed or answered by the Supreme Court’s decision.

96 The best example of this was the defeat of the government’s attempt to re-enact a revised abortion law. The legal basis for the 1988 Morgentaler decision was narrow and procedural — the lack of access and delays caused by the required approval of a therapeutic abortion committee (TAC). The revised abortion bill abolished the TAC requirement, thereby complying with the majority’s reasoning. These subtleties were lost, however, in the public relations battle that ensued. The Court had declared that the abortion law violated the Charter, declared pro-choice advocates, and now the government was trying to re-enact an abortion law. The intended implication that the government was ignoring the Charter proved to be a powerful rhetorical card.

otherwise complex issues. If the news story can be reduced to personalities, it can more easily be dramatized by television journalists: “who is to blame, who has won or lost, who is doing what to whom.”

Another characteristic of the television news structure that results in high exposure for Charter litigants is the “point-counterpoint format.” Taras reports that in television news “the pro-con model is so rigidly adhered to . . . that items are routinely dropped if spokespersons for opposing positions cannot be found.” The adversarial character of Charter litigation assures that this is never a problem. More importantly, the simplistic, pro-con format can legitimate or at least publicize odd or extreme positions. Television viewers are presented with assertion and counter-assertion, usually with little contextual help to determine the truthfulness of either.

The media’s exercise of its power is more significant because of its natural political affinity with Court Party activists and their causes. Sympathetic media coverage of feminism, bilingualism, multiculturalism and “equality seeking” generally is an undeniable (if intangible) fact of contemporary Canadian politics. It is also predictable. Individual reporters and producers come from or are socialized into the same socio-economic milieu as the Court Party activists they cover, and they do not check their politics at the door when they come to work. Studies of the American media and public interest foundations found that members of both are well to the left of mainstream public opinion on such issues as religion, abortion, homosexuality, the environment, nuclear disarmament and detente. The “Fifth Estate” is located at the very centre of the new politics of postmaterialism.

**Conclusion: Embattled Constitutionalism**

The postmaterialist thesis suggests that the social movements comprising the Court Party would be present in Canada even without the Charter. They would not have gone so far so fast, however. The Charter conferred the status needed to participate in the arena of constitutional politics. The result has been enhanced legitimacy (and generous state funding) for Court Party efforts in the legal arena. The opposite, however, is not true. Without a Court Party, the Charter and the Supreme Court would not have attained their current prominence. Postmaterialism has provided the political buoyancy that breathed life and energy into the Charter, lifting it out of the statute books and making it a force in the mainstream political process.

The postmaterialist analysis also explains one of the most distinctive characteristics of Charter politics: the division of the Canadian left. The progressive camp has been sharply divided on the merits of the Charter. Feminists, civil

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98 Ibid.
99 Ibid.
libertarians, and other minority rights activists have generally embraced the Charter as an overwhelming (if not unqualified\textsuperscript{102}) good. The traditional or socialist left, however, has been equally uniform in its criticism. Mandel,\textsuperscript{103} Petter,\textsuperscript{104} Glasbeek,\textsuperscript{105} Fudge,\textsuperscript{106} Hutchison\textsuperscript{107} and others have mounted a sophisticated and sustained critique of the Charter as essentially a variant of liberal politics that will not achieve any real redistribution of wealth or power. According to this analysis, Charter politics primarily benefits lawyers and judges, groups who already have power and are too much a part of the capitalist establishment to challenge its fundamental institutions. The legalized politics encouraged by the Charter is condemned as inherently conservative because it diverts reformers' attention and energy away from challenging the structural inequalities of Canadian society.\textsuperscript{108} This division of the intellectual left was foreshadowed by the conflicting responses within the New Democratic Party to Trudeau's Charter proposals prior to 1982. The provincial NDP government of Premier Blakeney of Saskatchewan staunchly opposed the Charter as hostile to labour and the interventionist government required by the welfare state. The federal NDP strongly supported the Charter as a way to promote human rights and national unity.\textsuperscript{109}

As Lipset says, "There are now two Lefts, the materialist and the postmaterialist, which are rooted in two different classes" and which have two very different sets of concerns.\textsuperscript{110} The "life-style issues" that preoccupy the new, postmaterialist left are quite different from the issue of economic redistribution,

\textsuperscript{102} There is a new stream of Charter criticism from Court Party principals but it is directed against the judges' "misinterpretation" of the Charter and not against the Charter itself. See Gwen Brodsky and Shelagn Day \textit{Canadian Charter Equality Rights for Women: One Step Forward or Two-Steps Back} (Ottawa: Canadian Advisory Council on the Status of Women 1989); also David Beatty "A Conservative's Court: The Politicization of Law" \textit{University of Toronto Law Journal} 41 (1991) 147-167

\textsuperscript{103} Michael Mandel \textit{The Charter of Rights and the Legalization of Politics in Canada} (Toronto 1989)

\textsuperscript{104} Andrew Petter "Immaculate Deception: The Charter's Hidden Agenda" \textit{The Advocate} 45 (1986) 857


\textsuperscript{106} Judy Fudge "What Do We Mean by Law and Social Transformation?" \textit{Canadian Journal of Law and Society} 5 (1990) 47-69

\textsuperscript{107} A. Hutchinson and Andrew Petter "Private Rights/Public Wrongs: The Liberal Lie of the Charter" \textit{University of Toronto Law Journal} 38 (1986)

\textsuperscript{108} For a fuller discussion of the leftist critique of the Charter, see Knopff and Morton \textit{Charter Politics} ch 9


\textsuperscript{110} Lipset "The Industrial Proletariat and the Intelligentsia" 196
which lies at the core of the old, working-class left. From this vantage point, it is hardly surprising that the Charter has divided the Canadian left.\footnote{This schism also confirms one of the enduring differences between Canadian and American politics — the existence of a significant labour-based socialist movement in Canada. During the heyday of the Warren Court, it was all but impossible to find leftwing or "progressive" criticism of litigation as a strategy for political reform. An analogue to the Mandel-Petter-Hutchison, et al opus cannot be found in the United States because there is no similar political tradition to support it}

The postmaterialist analysis also helps to explain the anti-majoritarian bias of the Court Party, precisely the feature that makes it appropriate to speak of it as the Court Party. Unlike the progressive reformers of past generations who sought to transfer power from the "few rich" to the "many poor," the postmaterialist left finds that it must wrest power from the "unenlightened" majority, at least temporarily. As John Kenneth Galbraith has observed, "something new in the history of democratic government" is occurring "with the emergence of a comfortable middle-class in a solid voting majority . . . . who aren't as interested in social reform as they are opposed to paying taxes to finance it."\footnote{As quoted by Mike Bygrave "Mind Your Language" Guardian Weekly 26 May 1991} According to one commentator, "the result is a seemingly insuperable problem for the left."\footnote{Ibid.} He was not quite correct. This is a problem only to the extent that the postmaterialist left must compete in the majoritarian politics of elections and parliaments. To the extent that it can move its policy agenda into the courts and the administrative bureaucracy and pursue it through the rulings of sympathetic judges and administrators, the problem is minimized.

Although it is ironic, the modern left's tendency to favour undemocratic institutions is, on reflection, not surprising.\footnote{For an expanded version of the following analysis see Knopff and Morton Charter Politics ch 9} As the nineteenth century constitutionalists analyzed by Ajzenstat understood, radical democrats, though always speaking in the name of "the people," will in fact be tempted to betray them. In the name of democracy, they will subvert it. The modern left fits this mold. It is nothing if not radically democratic in its rhetoric; yet it is powerfully attracted to the courts, the most undemocratic branch of government, as a favoured vehicle for achieving its policy ends.

Ajzenstat's fuller analysis of the ideological clash between constitutionalists and radical democrats in her book on Lord Durham helps us to unlock this apparent paradox. The radical democrats, she argues, held a Rousseauian vision of human nature (and hence of "the people") as fundamentally good. According to this view, the social evils of this world, stemming from selfish competitiveness, are caused not by human nature but rather by defective social institutions and systems. Cure the institutional ills and natural human goodness will prevail. This vision, of course, is not limited to the past; it continues to attract a powerful constituency in our own time,
especially among the postmaterialist left. In his analysis of the wellsprings of modern ideological conflicts Thomas Sowell has aptly called it the “unconstrained” vision of human nature and society.

For the unconstrained vision, human beings are good by nature but corruptible by society. If the corruption has affected only a nefarious elite, the obvious answer is to promote increased democracy. The rule of the “whole uncorrupted portion of the people” can then be seen as an unmitigated good, bringing social and political life to a state of perfection. This seemed to be the view of the nineteenth century radical democrats. But, of course, the theory does not in principle exclude the systemic corruption of the people as a whole. They too can be deformed by the social system. When this happens, democracy may still be the ultimate end, after the people have been returned to their natural purity, but it cannot be the immediate means. The achievement of true democracy will first require a period of purification through social reconstruction by a vanguard of purifiers. This is the position proponents of the unconstrained vision tend to find themselves in today. Wishing to transform the formative “system,” they cannot entrust power to the people who have been formed by that system, and who are likely simply to reproduce it. Thus the vanguard elite must temporarily exercise transformatory power, which it can do only through institutions relatively unresponsive to the will of the corrupted many. The most readily available institution of this kind is the appointed judiciary.

Modern constitutionalists reject this transformatory project for reasons related to those that led their nineteenth century forbears to reject the radical democracy then being proposed. Willing to abandon democracy now in the name of more perfect democracy in the future, the modern transformatory project can succeed only by setting aside the constitutionalist ideal of limited government. In its own self-understanding, of course, this departure from limited government is merely a temporary expedient, entailing no outright rejection of the principle; indeed, in the more radical versions of unconstrained theory, the success of the transformatory project will be indicated by the “withering away of the state,” surely the ultimate in limited government. Liberal constitutionalists, by contrast, insist that the ideal future envisioned by the radicals is impossible, and that the unlimited, and undemocratic state required to pursue it will thus be permanent, not temporary. In Sowell’s terms, liberal constitutionalists accept a “constrained vision” of human affairs, which insists that such traits as selfishness and competitive ambition are not the changeable imprints of social systems, but permanent features of human nature that will outlast any misguided attempt to eradicate them. For constitutionalists, the point is thus not to transform human nature, but to construct a system of checks and balances that will moderate the difficulties inherent in human competitiveness, turning it into productive channels. Such checks and balances are desirable precisely to maintain limited government in the context of ineradicable human imperfection. Indeed, in the

116 Janet Ajzenstat The Political Thought of Lord Durham (Kingston 1988) 69
constrained vision, it is precisely human imperfection that justifies limited government. Limited government is emphatically not something that only a perfected humanity deserves.

It is of course possible for judicial review of constitutionally entrenched rights to form part of a constitutionalist system of checks and balances, but that is not what the Court Party, with its unconstrained vision of human affairs, has in mind. As the vehicle for the Court Party, the Charter is the enemy of liberal constitutionalism, not its friend. This is not novel. The radically democratic forces vanquished by Parent and Howe have reformed and regrouped in our own time. The battle is joined once more!

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117 See Knopff and Morton Charter Politics ch 8
From Responsible Government to Responsible Federalism

Douglas V. Verney

Canadians have traditionally assumed that they enjoy a "parliamentary federalism" which is based on two principles. The first is responsible parliamentary government (introduced by convention in 1848) and the second, federalism (legally established by the British North America Act of 1867).\(^1\)

We now know that it is misleading to call the system "parliamentary" because the executive branch of government plays such a dominant role. But by and large, despite party discipline, cabinets do remain responsible to the MPs for their actions: government measures must win the assent of a majority of members; hence the assumption that the first principle remains "responsible government" even if it is not "responsible parliamentary government" in the mid-nineteenth century sense of governments being frequently toppled by the legislature.\(^2\) Fundamentally, responsible government has not presented serious problems. Indeed, the principle introduced in 1848 is still applicable today in Ottawa and in all the provincial capitals, including Quebec City.

The same cannot be said of the other principle: federalism. Its evolution has been more problematic. Established by law in the British North America Act of 1867, the federal distribution of powers was maintained by the imperial authorities in London. There were a number of imperial umpires of the fledgling Confederation, among them the Parliament of the United Kingdom, the Colonial Secretary, Governor General, and the Judicial Committee of the Privy Council. These represented in principle the three branches of government, the legislative, executive and judicial.

Today these institutions no longer act as federal umpires. What may be called "imperial federalism" has gone, being replaced in recent years by the "executive

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* This paper brings together a number of arguments sketched in previous papers. The critique of executive federalism was made in "From Executive to Legislative Federalism? The transformation of the political system in Canada and India" in The Review of Politics (April 1989) 241-263. Various types of executive federalism were explored in "Incorporating Canada's Other Political Tradition" David P Shugarman and Reg Whitaker eds Federalism and Political Community: Essays in Honour of Donald Smiley (Peterborough On 1989) 187-202


2 "Legislative power was at its height in the United States in 1787 and in Canada in 1867. In the twentieth century, executive power has prevailed." Report of the Special Joint Committee of the Senate and the House of Commons The Process for Amending the Constitution of Canada (Ottawa 1991) 7
federalism" of First Ministers Conferences. Interestingly enough, the shift from imperial to executive federalism was achieved not by changes in the law but by convention. The imperial institutions remained in the constitution: First Ministers Conferences, like cabinet government, had no constitutional basis.

The significance of the Constitution Act of 1982 was that in establishing an amendment procedure and recognizing the importance of First Ministers Conferences, the act replaced convention (in fact a much disputed convention) by constitutional law. However, the other institutions necessary for an indigenous Canadian form of federalism have yet to be created.

It is therefore necessary to take a fresh look at federalism, the second principle of the Canadian constitution. We need to ask whether it is possible to develop a political system that combines responsible government with a form of federalism that is an improvement on both imperial federalism and executive federalism. Such a system should if possible add to responsible government what we may call "responsible federalism."

A New Chain of Responsibility?

Responsible government, it will be recalled, replaced the separation of the executive power of the Crown from the legislature's powers by a chain of responsibility linking the cabinet through the legislature to the people. While formally the members of the cabinet remained "ministers of the Crown," the cabinet was henceforth in practice responsible not to the Head of State but to the legislature, with the legislature being responsible to the electorate. Consideration needs to be given to replacing "executive federalism" with a novel, indigenous Canadian form of federalism with its own chain of responsibility. Already executive federalism has shown some movement in the direction of a more responsible federalism. Since the Constitution Act of 1982 the first ministers are no longer able to reach firm agreements alone: now they must secure their acceptance by Parliament and the provincial legislative assemblies. But provincial premiers are elected to office for reasons other than constitutional reform, and they find themselves asking their provincial legislature to accept decisions reached in secret after long discussion. MLAs have been able to veto decisions that have been reached only after considerable debate among the first ministers. It is an anomaly of the Canadian constitution that it is those institutions of government which operate according to British-style conventions, and are not recognized in the BNA act, notably the Prime Minister and the cabinet, that continue to flourish.

The second principle, an American-inspired federalism expressed in such sections of the constitution as 91 and 92, is not supported by comparable institutions. A number of institutions mentioned in the act were able in their day not only to support the imperial authorities but to sustain Canada's federal system. But when these institutions lost their imperial role their federal function withered too. Among the institutions that now have more form than substance are the Governor General, the Privy Council, and the Lieutenant Governors. These institutions are of minor significance because they have no federal function to perform, though it is arguable that they do play at least a marginal role in the day-to-day functioning of responsible government.

Douglas V. Verney

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Until such time as English-speaking Canadians are prepared to replace the Constitution Act of 1867, it might make sense to see if they can be revived, democratized, and given a new federal role. There could then be a federal chain of responsibility to match the chain of responsible government.

It is not always realized just how much concentration of executive power there has been since the days of imperial federalism with its assorted umpires. Today there is excessive reliance on the first of Canada's principles, responsible government. It is the Prime Minister who nominates not only the senior civil servants and heads of federal agencies, but also the Governor General, members of the Privy Council, the Lieutenant Governors and members of the Senate. For a supposedly federal system, this is a remarkable situation.3

Opponents of change are nearly always able to secure the rejection of novel proposals by arguing that they run counter to the principle of responsible government, whereby the government is responsible to the House of Commons alone.4 Even proponents of change have been constrained by this principle. In the Constitutional Amendment Bill of 1978, Pierre Trudeau accepted the argument that reform of the Senate (presumably to make it a more useful federal institution) should not compromise the principle whereby the cabinet was responsible only to the House of Commons.5 In 1991, Brian Mulroney also proposed a reformed Senate, but again without tampering with the principle of government being responsible only to the House of Commons.6

It is the argument of this paper that the Canadian political system must rest on both principles not one, and if this means modifying responsible government, with its representation based on population, then so be it. After all, the 1867 compact was not supposed to signify the victory of “rep. by pop.”

The demise of imperial federalism, as we have indicated, left a vacuum that was in due course filled by what has been called executive federalism. But the old federalism had also involved the British Parliament and the Judicial Committee as well as the colonial executive. The new executive federalism was hardly a replacement of imperial federalism since federalism involves legislatures even more than executives. Executive federalism simply expanded the role of governments. To have the first ministers meet together and produce a new constitution was a travesty of

3 “...the British experience is a graphic illustration that a parliamentary system has an inherent propensity towards the concentration of power in the hands of the executive branch.” Campbell Sharman “Parliamentary Federation and Limited Government: Constitutional design and redesign in Australia and Canada” Journal of Theoretical Politics 2:2 (1990) 209

4 “But my concern remains. It is that we not allow the exercise through which we have gone to be used to legitimate notions of governance so at variance with the principles of British parliamentary democracy.” Citizens' Forum on Canada's Future (Ottawa 1991) Commissioner Richard Cashin's comments 142

5 Section 53(1) of Mr. Trudeau's Constitutional Amendment Bill 1978 stated: “The Cabinet has the management and direction of the government of Canada and is responsible to the House of Commons for its management and direction thereof”

6 “Only the House of Commons will be a confidence chamber under these proposals.” Shaping Canada's Future Together (Ottawa 1991) 20
federalism, and of constitutional government. Where else had the framing of a new constitution been the responsibility of the executive branch of government? From a federal perspective, therefore, First Ministers Conferences left much to be desired.

The provincial premiers were selected by their provincial parties for provincial reasons. From the 1960s onwards they had to shoulder great responsibility not only for the affairs of their own provinces but for changes to the constitution of Canada. Yet to whom were they responsible? Their model would seem to have been that of responsible government, not federalism. The First Ministers Conferences met as a quasi-cabinet under the chairmanship of the Prime Minister, but unlike the federal cabinet, the first ministers were not collectively responsible to a national, let alone a truly federal, legislature. Instead, each first minister was responsible to his or her own legislature.

Under the old pre-1982 executive federalism, in constitutional matters there wasn't even this degree of responsible government. First ministers were often able to dominate their legislatures on constitutional issues, and to assume (except in Quebec) that what had been agreed at a conference was generally acceptable to the legislative assembly. But since the Constitution Act of 1982 the various provincial legislatures individually have become as involved as Parliament in the amendment process. Canada appears to have moved from one straitjacket to another — from the unanimity of the first ministers to the unanimity of all the provincial legislatures.

At first glance it might seem that in involving the provincial legislatures in constitutional reform, Canada is following the American example. But in the United States the state legislatures do not have to reach unanimity. Moreover, neither the President nor the Governors are involved in the process. Constitutional amendments are the responsibility of the legislatures alone. And, one should add, the Americans are not having to face the fundamental questions that are being debated in Canada.

The present system in Canada has made it easy for opponents of change to block reform of the institutions most in need of it: The Senate and the offices of Governor General and Lieutenant Governor. Changes to these offices require unanimity. Since there is usually an election pending in one or more provinces, it is tempting for an opposition party in such a situation to seize on a constitutional agreement agreed to by the provincial premier and to make it an election issue. Since such an agreement may have been reached only after much delicate and secret negotiation among the first ministers, the government in power is vulnerable to any criticism. Yet the very negotiations under attack may have resolved issues that have long been contentious. Responsible federalism could help to overcome the difficulty of securing ratification by making the whole process public.

Another means of securing a more orderly ratification process would be the holding of regular and simultaneous federal and provincial elections. It has been a peculiarity of the Westminster form of parliamentary government (devised of course for the unitary British system), that elections may be held at any time, should the government be defeated or wish to appeal to the electorate. As a result, in Canada too it has been customary for elections to be held at irregular intervals and at different times by the eleven governments. Now that the provincial legislatures are required to
confirm an agreement reached by first ministers, it would seem sensible to seek ratification before the elections. Regular elections would help to remove some of the uncertainty regarding important changes to the constitution, even if these means abandoning certain features of the Westminster tradition.

Above all, if the structure of government known as “parliamentary federalism” is to mean anything, it should mean a coherent relationship between the two principles on which it is supposed to be based: responsible government and federalism. There have to be federal institutions comparable to those which make responsible government possible. Moreover, the federal process has to be separated from that of responsible government. It too has to be responsible. To obtain constitutional amendments through a process euphemistically called executive federalism, with secret deals among first ministers, is incompatible with responsible federalism: there has to be a better way.

Towards Responsible Federalism: A Federal-Provincial Council?

The immediate problem facing those introducing “responsible federalism” is that Canada’s first principle, responsible government, has traditionally been interpreted to mean that the government is responsible to the House of Commons alone. This as we have seen, is the very negation of the principle of federalism. To give the provinces a more equal say in the national legislature, and to make it a federal body, in recent years proponents of federalism have argued in favour of a reformed Senate.

Another, and I would argue better, suggestion is to accept a transitional stage in which the main complaints about the present executive federalism are addressed. There are a number of objections to First Ministers Conferences: 1. They concentrate power not only in the executive branch of government but in the first ministers themselves. 2. The meetings are necessarily occasional, ad hoc and brief. 3. All sessions are chaired by the prime minister, who is responsible for the agenda. The assembled first ministers are treated as a sort of cabinet, searching for consensus. 4. There is always the possibility that at least one provincial legislature will reject important agreements that require unanimity.

One way of meeting each of these objections might be initially to try a half-way house, tackling them as follows:

1. Reduce the concentration of power in the hands of the first ministers. Without abolishing the institution known as the First Ministers Conference, there could be added to it a larger body or council comprising all those presently involved in

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7 "However, it has not proven to be an effective mechanism of collaboration — there are no decision-making rules and there is no formal process of consultation." Shaping Canada’s Future Together 41
constitutional issues, particularly ministers dealing with intergovernmental affairs. Unlike the reformed Senate, this Council would comprise representatives of both the federal and provincial governments.  

This Federal-Provincial Council (FPC) would include the first ministers ex-officio, though the delegations from each of the governments would in practice be headed by a Minister for Intergovernmental Affairs. The delegation would include the constitutional advisers to each government and be supplemented by knowledgeable MPs or MLAs drawn from all parties in the legislature. Each delegation would still have only one vote on critical issues.

Because initially the Federal-Provincial Council would be the creature of the First Ministers Conference there would be no conflict of interest with either the House of Commons or the First Ministers Conference, as there would be with a reformed Senate. As in First Ministers Conferences, federal and provincial interests could be expected to take precedence over party loyalty. The novel aspect of the FPC would be that unlike a parliamentary body like the Senate, it would represent not only the provinces but the federal government. This would make Canada as innovative in the move towards the creation of responsible federalism as it was in 1848 with responsible government.

Moreover, it would not be a break with Canada's tradition of executive federalism through First Ministers Conferences. These could continue. Yet the creation of a broadly-based Federal-Provincial Council would be a step away from the present form of executive federalism towards one that would be more responsible.

2. Replace ad hoc and brief meetings by ongoing debate. The Federal-Provincial Council would be a permanent body, like a legislature. There would be regular meetings, with ample time for delegates to get to know one another and to deliberate the constitutional matters brought to their attention. In the past, when the first ministers have concluded their brief discussions, there have had to be further conferences, usually of other ministers and their advisers, to put agreements into appropriate legal language. The proposed Council would transform these conferences into regular meetings, operating under agreed rules of legislative debate.

3. Select a new chair. It would seem improper for the Prime Minister to chair the meetings of the new Council. The person or persons selected to chair its sessions should reflect its federal composition. The ex-officio president of the Council should be the Governor General, who represents all Canadians. The Governor General would symbolize the federal character of the deliberations, and would relieve the Prime Minister of a difficult task. The Governor General would not be expected to chair the day-to-day proceedings of the Federal-Provincial Council. Deputy-presidents would serve as chairs. They could be selected in rotation from the

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8 The proposals for constitutional reform put forward by the Government of Canada in Shaping Canada's Future Together included "the establishment of a Council of the Federation composed of federal, provincial and territorial governments that would meet to decide on issues of intergovernmental coordination and collaboration"
Lieutenant Governors, thus giving them too a federal role. The Council, through its committees, would determine its own agenda in the same way as other legislative bodies. Proceedings, for the most part, would be public.

4. *The provincial veto curbed.* The Council would not be able to overcome objections by a provincial legislature or by Parliament to any constitutional amendment it proposed. However, because in its deliberations there would be representatives of all the parties involved, with meetings in public, and without the pressure on those attending FMCs to reach a quick agreement, the results of the Council's deliberations should be more acceptable to Parliament, the provinces and the general public throughout the country.

One issue that the new Federal-Provincial Council could tackle would be the unanimity rule for special amendments to the constitution, a rule that could prevent necessary change in the roles of the Governor General and Lieutenant Governors. Were the Council to assure the provinces that their grievances were now given adequate expression in a permanent body, the need for unanimity might seem less desirable.

The proposed Federal-Provincial council has a number of advantages over proposals for a Triple-E Senate. First, it would not challenge either the first ministers or the House of Commons. The new body would not raise an issue of principle, since it would be merely an extension of the present back-up arrangements of the FMC. Consequently, the first ministers would have no need to feel jealous, and the House of Commons would be able to treat the Council much as it has learnt to treat the FMC. Once the country had become used to the new arrangement, there would be no need for First Ministers Conferences on the constitution. Secondly, the new FPC would achieve some of the goals of the proponents of a reformed senate. The first ministers are all equal: so would be the various delegations in the Federal-Provincial Council (the FPC). The first ministers are effective: so would be the FPC.

One weakness of the FPC is that it would not be a body directly elected by the Canadian people. However, the ministers of intergovernmental affairs, who would be head of delegations, and the MPs and MLAs accompanying them, would all be persons elected to office. In any case, as we have suggested, this indirectly elected Council would be a half-way house, overcoming the main objectives to the First Ministers Conferences. Direct elections could come later, possibly for all members of the FPC. Elections might even extend to the Governor General and Lieutenant Governors.

**A New Constitution for a New Society?**

Fundamental changes, such as the replacement of the BNA Act with a genuine constitution that incorporates responsible government and responsible federalism, as well as the Charter of Rights and the amendment procedures, might ultimately require some sort of constituent assembly or convention. But in all countries, such conventions are called only as a last resort, for example, if Canada were to be in the same turmoil as France in 1958 when General De Gaulle came into power, or the USSR in 1991. A constituent convention, by definition, would have to examine all aspects of the Canadian political system and be prepared if necessary to propose to the people a wholly new constitution.
We have noted that one compelling reason for reassessing the present constitution is that Canada does not have a “parliamentary federalism” based on responsible federalism as well as responsible government. There is another argument for a wholly new constitution, just as compelling, namely, that Canada in the 1990s has changed out of all recognition since the British North America Act, designed for a colony, was framed in 1867. And it has changed a great deal since the fearful outrage caused to many English-speaking Canadians by President De Gaulle’s cry for a “Québec libre” in 1967. The proposals in *Shaping Canada’s Future Together* recognized these changes, but did not draw the conclusion that a wholly new constitution is needed. Canada’s main constitutional document would remain the British North America Act — a colonial constitutional statute that is hardly an instrument to help create a new Canadian identity.

a) 1867. We need to remind ourselves of the very different context in which the British North America Act was framed. Canada was then dominated by its English-speaking inhabitants, settlers who until the first world war preferred to call themselves British. The French were a conquered minority: there was no French version of the British North America Act, even though only thirty years had elapsed since the French had outnumbered the British in the old province of Canada. Even in the new province of Quebec, where the francophones were given political autonomy, the economy was largely in the hands of “les anglais.”

At that time, Canadians of both “races” (as they were called) were proud to be part of the greatest of empires, and one which had inspired much of the world with its parliamentary system. It was therefore natural for Canadians to call themselves British, to retain the Westminster Parliament’s tradition of responsible government, and to have the imperial authorities in London act as “federal” umpires of the distribution of powers between the dominion Parliament and the provincial legislatures.

b) 1967. By 1967 Canada, but not the constitution, had changed. Francophone Canadians were no longer willing to be treated as second-class citizens: Daniel Johnson, now the premier of Quebec, demanded “égalité ou indépendance.” Like the Catholic minority in Northern Ireland, the Algerians in France’s North African Department, and the blacks in the United States, the Québécois too wanted to be free and equal, and not to be “nègres blancs.” De Gaulle struck nerves and in all parts of Canada when he exclaimed “Vive le Québec libre.”

The “British” by contrast were now English-speaking Canadians who believed that the British North America Act had served Canada well. Certainly they had no intention of starting afresh. Proud of Canada’s achievements, its independent status and its role as senior member of the Commonwealth, they felt no urge to cut off their remaining links with the United Kingdom, particularly after the divisive debate over the new maple-leaf flag in 1964. The Queen was now “Queen of Canada.” The monarchy, and the Westminster form of government, helped to distinguish Canada from the United States. So did the red double-decker buses at Niagara Falls, the Canadian Guards in their bearskins, the bagpipers of the 48th Highlanders, the Shakespeare Festival at Stratford and the Shaw Festival at Niagara-on-the-Lake.
De Gaulle's outburst came as a dreadful shock. Yet in that time of prosperity and complacency there was little awareness of the need for English-speaking Canadians to counter De Gaulle by creating a new political identity which encompassed English, French, native and new Canadians, an identity that was distinctively Canadian, not an imitation of Westminster.

It was to be another fifteen years before any change was made to the constitution, and even then the British North America Act remained largely intact.

c) 1991. Canada has changed considerably since 1967 when there still appeared to be "two founding races." Those of British descent are becoming a minority. Those of French descent in Quebec are increasingly prepared to go it alone if their "distinctive society" is not recognized. No one quite knows what to expect of the newest Canadians, people who increasingly are coming from non-Western cultures. So far their role has been a subordinate one.9

It is quite possible that "English Canada" resents Quebec's claim to be distinctive because the traditionally distinctive British character of its own society is fast disappearing under the impact not only of immigration but of American — and even global — civilization. English-speaking Canadians have seen people of British origin being absorbed in South Africa, Zimbabwe and elsewhere. They have been incensed that in Canada of all places the English language, the language of the country's majority, should be under attack in Quebec. They also wonder how Canada, especially English Canada, will survive the impact of free trade with the United States and a world economy dominated by Japan, Europe and the United States.

For a long time, English Canadians saw their identity in the British connection and the presence of Quebec. This made Canada different from the United States. If the British connection has withered, and Quebec wants to be recognized as a distinct society, where does this leave English Canadians? As a result of multiculturalism and bilingualism have they perhaps become an indistinct society?

This is surely the wrong question to worry about. A more practical question needs to be asked: how can a new Canada be created, independent of both the United Kingdom and the United States, proud of its distinctive character and appealing to all Canadians, including the Québécois?

Conclusion

It has been the argument of this paper that the term "parliamentary federalism" is a misnomer. Canada's responsible government is not parliamentary, as envisaged in 1848, and the "federal" institutions upholding the distribution of powers in the BNA Act have been shown to have been primarily imperial. The end of empire meant the end of the imperial umpires.

9 "Can Canada survive when a significant part of the population is wilfully excluded from full participation in what one historian has called 'so great a heritage as ours'?" Sheldon Taylor "On the Sidelines in the Constitutional debate" Globe and Mail 23 September 1991
To fill the vacuum, executive federalism in the form of First Ministers Conferences emerged. These conferences became the primary vehicle for constitutional change. The result has been a series of very slow, piecemeal amendments that have not tackled the main issue, the replacement of the obsolete Constitution Act of 1867, an act designed when Canada was a colony, by a new constitution which recognizes the principles of both responsible government and responsible federalism.

At the present time, many Canadians are not prepared for either a constituent convention or a new constitution which replaces the BNA Act. As a transitional measure, therefore, we have proposed the introduction of a more responsible federal system based on a Federal—Provincial Council which initially would be an extension of the First Ministers Conference.

Such a body would soon have a lot of work on its hands, beginning with the future relationship of Quebec and the rest of Canada. But it would also have to consider economic issues, notably Canada's long-term relationship with the United States. Canada is dealing with a world in which the United Kingdom, like France before it, has withdrawn to Europe. Unlike Canada's two previous civilizations, the United States is likely to dominate the North American economy permanently. Canada's identity was not an issue in 1867 when the British Empire was at its height and Canada was still a colony, about to become the first dominion. Now it is the most serious problem facing English-speaking Canadians and it cannot be resolved by clinging to the monarchy and an archaic colonial statute as the main constitutional document.

The year 1791 saw the beginning of constitutional government in Canada with the establishment of what the French call a new regime. During imperial rule Canada progressed from the representative government of 1791 for two separate provinces of Canada to the dualism following the Act of Union in 1840. This was followed by the introduction of responsible government (granted to all the British North American provinces) in 1848, and the imperial federalism of 1867.

Since then Canada has continued to change, with new regimes in 1931 and 1982. It would be appropriate if, starting in 1992–93 the imperial federalism of 1867 could be finally and formally replaced by a new Canadian constitution. This constitution should be anchored in the country's rich constitutional tradition and novel enough to combine a new responsible federalism with a new form of responsible government.

Two questions will need to be addressed if Canada is to be firmly based on these two principles. 1. Is there a federal alternative to the monarchical system of Queen, Governor General and Lieutenant Governors that in 1867 helped to maintain the distribution of powers? 2. How is responsible federalism to be integrated with responsible government in view of the fact that in the past government has been responsible to the House of Commons alone?
Senate Reform and the Constitutional Agenda: Conundrum or Solution?

F. Leslie Seidle

The publication of the Government of Canada’s proposals, *Shaping Canada’s Future Together*, in September 1991 confirmed that Senate reform had become a major item on the constitutional agenda. At the centre of the discussion of “Responsive Institutions for a Modern Canada,” one of the three parts of the proposals, was the outline of an elected Senate. It was thus expected that Senate reform would figure prominently in the report of the Special Joint Committee on a Renewed Canada expected early in 1992 and in the ensuing discussions.

The significance of this development can only be understood by looking well beyond recent events. While the Senate has long been the subject of criticism and reform proposals have accumulated on library shelves, in the past the issue was only intermittently on the formal constitutional agenda. The main purpose of this paper is to trace the path that led to the rise of Senate reform as a key constitutional issue. Major reform proposals are reviewed, particularly as to the method of selection advocated and the representational role expected of the reformed Senate.

The paper begins with a discussion of the Senate’s position as part of the Confederation settlement, including the representational role the Fathers of Confederation sought to assign the Senate as a second chamber in a federal parliamentary system; early reform suggestions are reviewed. The second section discusses how the issue acquired salience in the 1970s and early 1980s, and how the Triple-E Senate concept took hold. After the Meech Lake accord was signed, pressure for action on Senate reform increased. This is analyzed in the third section, along with the factors that led to the agreement on an elected Senate which first ministers reached in June 1990. The concluding section reviews the federal government’s 1991 Senate reform proposal and ensuing debate.

The Senate and the Confederation Settlement

While the origins of the Canadian Senate can be traced to the Legislative Councils established in Upper and Lower Canada by the Constitutional Act of 1791 — R.A. MacKay referred to the councils as “the first real upper house[s] in British colonial history”¹ — the more relevant reference point is the Legislative Council of the United Canadas.

¹ R.A. MacKay *The Unreformed Senate of Canada* rev. ed. (Toronto 1963) 18
The Council, as established in 1840 by the Act of Union, was appointed by the Crown. Members retained their seats for life, and there was no upper limit on the number of members (although there could be no fewer than twenty).

Responsible government having being achieved, the Legislative Council had considerably less power than its predecessors in Upper and Lower Canada. In 1849, however, when it seemed certain the Council would defeat the Rebellion Losses Bill, Lord Elgin, the Governor, accepted the Government's request to appoint twelve additional members. The measure passed but contributed to a further decline in the Council's stature. In addition, "attendance fell to such a disgracefully low figure it was difficult to carry on business."2 As a result: "The system of appointment, which twenty years earlier had been regarded as vital to the maintenance of the British connection, having failed to create a useful upper chamber, the people and their leaders now turned to the American method of election."3

In 1856, a bill was passed providing for a council of forty-eight members, twenty-four from each province, with each member to be elected for an eight-year term and one-fourth to retire every two years. Existing members were replaced by elected members only as seats fell vacant. A stiff property qualification of two thousand pounds applied. The Council's power was revived by this measure, but not for long. In 1859 and 1860, disputes arose over supply. At the same time, the Council acquired ambitious members who sought to make an active political career and became in effect "a second edition of the assembly."4

When the discussions that led to Confederation began, there was little support for an elected second chamber. Indeed, at the Charlottetown Conference of 1864, "with hardly an exception the elective principle as applied to the Legislative Council was decidedly condemned."5 The next month at Quebec, John A. Macdonald sponsored a motion that the future Members of the Legislative Council (the term "Senate" was not used until 18676) be appointed by the "General Government" for life. His view was as follows: "While I do not admit that the elective principle has been a failure in Canada, I think we had better return to the original principle and in the words of Governor Simcoe endeavour to make ours 'an image and transcript of the British Constitution.' "7

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2 MacKay The Unreformed Senate 28-9
3 MacKay The Unreformed Senate 29
4 MacKay The Unreformed Senate 31
5 G.P. Browne Documents on the Confederation of British North America (Toronto 1969) 45. In 1862, the Legislative Council of Prince Edward Island became an elected chamber and remained so (a restricted property franchise applied) until 1892, when it was abolished
6 Joseph Pope Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (Toronto 1895) 160
7 Pope Confederation 58
While this arrangement had its critics, it was adopted at Quebec without much debate. More time was spent on the question of how the first members of what came to be the Senate would be chosen. It was eventually agreed they should be selected from among the members of the existing Legislative Councils, upon nomination of the respective governments. The resolution adopted at Quebec also stipulated that “due regard shall be had to the claims of the members of the Legislative Council of the Opposition in each Province, so that all political parties may as nearly as possible be fairly represented.” Apart from this interim measure, there is no record of any support for Senate appointments being made upon the recommendation of provincial governments or for Senators to be chosen by the provincial legislatures — a method that would have paralleled the procedure then in place in the United States, where direct election of Senators was not adopted until 1913.

The distribution of Senate seats was a far thornier issue. From the outset, the principle of equal representation of three “divisions” was fundamental. At Charlottetown, it was agreed that Upper Canada, Lower Canada and the Maritime provinces would each have twenty seats. By the conclusion of the Quebec Conference, it had been decided to raise the number to twenty-four. George Brown underlined the importance of this agreement: “Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. On no other condition could we have advanced a step.”

To the degree, therefore, that the Senate was to have a role in protecting the interests of the constituent units of the federation — what has come to be referred to as “regional representation” — this reflected in large part the decision to assign an equal number of seats to Ontario and Quebec. But Macdonald’s expression “sectional interests” did not have as strong a geographic connotation as the expression “regional representation” later came to acquire. The “sectional interests” that concerned him most were those of the distinct linguistic (and religious) community in Lower Canada: Quebec’s share of Senate seats was to provide protection against decisions taken by the House of Commons on the basis of the majority principle. At the same time, the position of the English-speaking minority within Quebec was acknowledged. Only in Quebec would a Senator have to be appointed from an “electoral division;” because of the way francophones and anglophones were distributed within the province, the

8 Jennifer Smith “Canadian Confederation and the Influence of American Federalism” Canadian Journal of Political Science 21:3 (Sept 1988) 457-8, 462; Browne Documents 68
9 Browne Documents 155. This agreement was reflected in section 25 of the British North America Act, 1867 (repealed in 1893)
10 P.B. Waite The Life and Times of Confederation 1864-1867 (Toronto 1962) 90-5
11 Browne Documents 45. A.A. Macdonald from Prince Edward Island, referring to representation in the United States Senate, considered each province should have equal representation (Browne Documents 138)
12 Parliamentary Debates on the Subject of the Confederation of the British North American Provinces (Quebec 1865) 88
provision would ensure that a certain proportion of Quebec Senators were English-speaking.

The Senate was also to have a role in representing the propertied classes. John A. Macdonald was explicit on this point: "A large qualification should be necessary for membership of the Upper House. The rights of the minority must be protected, and the rich are always fewer in number than the poor." Accordingly, appointees had to possess $4,000 worth of real property above any debts or liabilities.

Finally, in carrying out its legislative duties the Senate was to play a role analogous to that of the British House of Lords at the time. Writing in the year of Confederation, Walter Bagehot remarked that during the period following adoption of the 1832 Reform Act, the House of Lords had been altered from "if not a directing Chamber, at least a Chamber of Directors" to a body of "temporary rejectors and palpable alterers." For John A. Macdonald, the Senate was not to be "a mere chamber for registering the decrees of the Lower House . . . [but] a regulating body, calmly considering the legislation initiated by the popular branch." The goal, then, "was to construct a second chamber which should not be strong enough to control the Ministry, but which should be sufficiently powerful and sufficiently conscientious and independent to perform those indefinite functions which people dimly felt were required of a second chamber by the British system of government, and no more."

However, when the Senate's powers were defined, no express limitations were set, with one exception: bills appropriating public revenue or imposing taxation had to originate in the House of Commons, which meant the Senate could not revise upwards such money bills (although, in law, it could reject them). While this reflected the constitutional convention in Great Britain at the time, it left the Senate with legislative powers virtually equal to those of the House of Commons. There was no question, however, that the Government would be responsible only to the House of Commons; the Senate was to be the secondary chamber of Parliament.

Although some aspects of the Senate, such as the method of selection, were resolved without lengthy debate, their broad acceptance was not assured. Indeed, as early as 1874, David Mills (subsequently Minister of Justice) moved in the House of Commons: "That the present mode of constituting the Senate is inconsistent with the Federal principle in our system of government, makes the Senate alike independent of the people, and of the Crown . . . and our Constitution ought to be so amended as to

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13 Pope Confederation 58
14 Walter Bagehot The English Constitution (Glasgow 1963) 128
15 Parliamentary Debates on the Subject of Confederation 36
16 MacKay The Unreformed Senate 32
17 During debate in the Legislative Council (Canada) in February 1865, Sir Narcisse Belleau stated that "the House of Commons is the body that will make and unmake ministers" (Parliamentary Debates on the Subject of Confederation 185)
confer upon each Province the power of selecting its own Senators, and to defining the mode of their election."\textsuperscript{18}

During the period 1906-11, various other reform proposals were debated in the House of Commons, including abolishing Senators' life tenure by obliging retirement at a fixed age (eventually achieved in a 1965 amendment), instituting fixed terms (tenure equal to the life of three Parliaments was suggested in a 1906 motion), electing a proportion of the Senate (in a 1909 motion Sir Richard Scott suggested approximately two-thirds, for seven-year terms) and abolition\textsuperscript{19} (the position adopted by the Progressives in the 1920s, the Co-operative Commonwealth Federation in the 1930s and its successor the New Democratic Party). At the first Interprovincial Conference in 1887, the premiers passed a resolution to the effect that half the Senators from each province should be appointed by the provincial government and half by the federal government, in each case for a limited term. Various reform proposals were discussed at the 1927 Dominion-Provincial Conference. Otherwise, provincial governments expressed little interest in Senate reform until the late 1970s.

Even so, critics of the Senate could be found in various quarters. Their remedies differed, but often enough they agreed on the ill: the Senate, with its members appointed solely by the federal government, lacked authority to carry out the representational role it was intended to play. Writing in the mid-1960s, Kunz reviewed what he considered the Senate's useful role as "a second-line defence within the framework of the political system," but admitted that "the Senate has been an auxiliary, rather than a primary, check upon the executive — one of the many control devices provided by the political and social forces of a federal state."\textsuperscript{20} As a parliamentary second chamber, the Senate appeared less and less effective. It represented the people of the constituent units only in a symbolic sense, lacking the authority to act for their interests.\textsuperscript{20} While some believed distinct improvements could

\textsuperscript{18} George Ross \textit{The Senate of Canada} (Toronto 1914) 91
\textsuperscript{19} Ross \textit{The Senate of Canada} 92-5
\textsuperscript{20} F.A. Kunz \textit{The Modern Senate of Canada} (Toronto 1965) 316. Since 1984, the Senate has been much more than an "auxiliary" check upon the executive: in early 1985, the Liberal majority in the Senate delayed adoption of a borrowing authority bill; in 1988, it obstructed passage of the Canada-United States Free Trade Agreement until an election resolved the issue; and its opposition to the Goods and Services Tax led the Prime Minister to appoint (on 27 September 1990) eight additional Senators under section 26 of the Constitution Act, 1867 (the first time that section was used). On the Senate's powers and its relations with the House of Commons see: Andrew Heard \textit{Canadian Constitutional Conventions} (Toronto 1991) 87-99; there is a useful table at p. 90. For statistics on the Senate's treatment of legislation before the period covered by Heard's table see Kunz, Appendix III
\textsuperscript{21} Hanna F. Pitkin \textit{The Concept of Representation} (Berkely 1972). For Pitkin, political representation includes the concept of "acting for" (61): "the representative system must look after the public interest and be responsive to public opinion" (224). She contrasts this with descriptive or symbolic representation: "standing for" by resemblance (87). Even on the basis of the latter concept, the Senate's representativeness can be questioned; see Colin Campbell \textit{The Canadian Senate: A Lobby from Within} (Toronto 1978) ch 2
be made without fundamental reform, when the issue was joined at the level of governments, it became clear that an effective second chamber would only be achieved through restructuring the Senate.

Senate Reform and the Constitutional Agenda, 1968-1985

While constitutional issues had been discussed on occasion at federal-provincial meetings, the “summitry” that became the characteristic method of seeking agreement on constitutional change dates from the 1960s. The Quiet Revolution in Quebec and, in particular, the election of a Union Nationale government in 1966 placed that province’s demands for increased powers at the centre of the national agenda. Prime Minister Pearson, prompted at least in part by the interprovincial Confederation of Tomorrow Conference of November 1967, convened a First Ministers Conference on the Constitution in February 1968. On that occasion, the federal government proposed that constitutional review proceed in three stages. The first priority was to guarantee the rights of Canadians, including linguistic rights; the second was reform of “central institutions;” the third was review of the distribution of legislative powers between the federal and provincial governments.

Senate reform thus was not a major issue during the series of federal-provincial meetings that led to the Victoria Charter of 1971. Even so, at the First Ministers Conference held in February 1969, the federal government, now led by Pierre Trudeau, briefly addressed the issue: “The Senate should be reorganized to provide for the expression in it, in a more direct and formal manner than at present, of the interests of the provinces. At the same time, the interests of the country as a whole should continue to find expression in the Senate to maintain there an influence for the unity of Canada.”

Accordingly, the proposal suggested that the Senate “could be partly selected by the federal government and partly selected by provincial governments. Senators selected by the provinces could be nominated by the provincial governments, acting with or without the approval of their legislatures.” There was no suggestion that the House of Commons have a role in the selection of the federally-appointed Senators.

No provincial government made a formal proposal on Senate reform during this period. However, in 1972, the Special Joint Committee on the Constitution, appointed in 1970, recommended a selection method in the spirit of the 1969 federal proposal: while the federal government would continue to appoint all Senators, as vacancies occurred one-half of the Senators from each province and territory would be appointed from a panel of nominees submitted by the provincial or territorial government; the other half would be appointed by the federal government acting

22 Kunz The Modern Senate of Canada 374-5
23 Government of Canada Federalism for the Future (Ottawa 1968) 24-36
25 “The Constitution and the People of Canada” 30
alone. The Committee also recommended increasing from six to twelve the Senate representation from each of the Western provinces and that the Senate's legislative power be reduced to a suspensive veto of six months.\textsuperscript{26}

Constitutional reform lay dormant until the election of the Parti québécois in 1976. That event, paired with the demands of the Western provinces (particularly Alberta and British Columbia) for greater influence, led governments to consider fundamental changes. The Senate was no exception, and during the four-year period leading to the September 1980 First Ministers Conference a number of major reform proposals came forward. The modesty of the earlier proposals disappeared as restructuring the Senate became one of the remedies for the crisis which most agreed was threatening Canada. This reflected an interest — particularly on the part of the federal government — in “intrastate federalism,” a perspective which, according to Alan Cairns, provides an outlet for “territorial particularisms . . . not only by the control of a government at the state or provincial level, but also in the key policy-making institutions of the central government.”\textsuperscript{27}

Professor Cairns has suggested that the Trudeau government’s program, “A Time for Action,”\textsuperscript{28} which excluded the division of powers, “was an attempt to modify the relation between the governments and peoples of Canada in such a way as to enhance federal legitimacy, strengthen the national community, and increase Ottawa’s sensitivity by a very selective regional input into federal institutions.”\textsuperscript{29} The program was centred on Bill C-60, which, among other things, sought to establish a “House of the Federation.”

The members of the House of the Federation were to be selected through indirect election by provincial legislative assemblies and the House of Commons, and on the basis of a form of proportional representation: following a general election, the respective legislative assembly or the House of Commons would choose persons from a nomination list so that the final choice “fairly reflects” the “political preferences” of the electors.\textsuperscript{30} As for the intended representational role of the House of the Federation, the position paper stated: “[F]ederal and provincial legislators both represent regional interests, although from different perspectives. It follows that the federal and provincial legislatures and political parties should all play a role in the selection of members of the second chamber. With more parties represented in the

\textsuperscript{26} Final Report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Ottawa 1972) 33

\textsuperscript{27} Alan C. Cairns From Interstate to Intrastate Federalism in Canada (Kingston 1979) 4. In contrast, the “interstate” perspective concentrates on “altering the distribution of powers, and the system tends to be assessed in terms of the degree of centralization or decentralization” (4). See also: Donald V. Smiley and Ronald L. Watts Intrastate Federalism in Canada XXXIX Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1985)

\textsuperscript{28} P.E. Trudeau “A Time for Action: Toward Renewal of the Canadian Federation” (Ottawa 1978)

\textsuperscript{29} Alan C. Cairns “Recent Federalist Constitutional Proposals: A Review Essay” Canadian Public Policy 5:3 (Summer 1979) 354

\textsuperscript{30} Government of Canada “The Constitutional Amendment Bill” (June 1978) section 64(2)
second chamber ... the debates would probably be more vigorous, and the confrontation of differing views and their reconciliation would probably be a more open process."31

The position paper suggested the constitution could explicitly state that the government was “not formally obliged to command the second chamber’s confidence,”32 and Bill C-60 provided for a suspensive veto of no longer than 120 days over ordinary legislation. The proposed method of selection was linked to a concern about “a situation in which a second chamber could repeatedly frustrate the government’s attempts to legislate. The best way to ensure against this would be to so arrange matters that no single federal political party can at any one time expect to have a majority of members, or to control a permanent majority in concert with other parties.”33

This innovative approach to reforming the Senate prompted considerable criticism, including from the premiers (who rejected the proposal at their 1978 annual conference) and Senators. Although a Special Joint Committee had been struck to study Bill C-60, the Senate established a separate committee. The latter, in its report (while not proposing an alternative) said it “detect[ed] an underlying confusion in the mind of the proponents of Bill C-60 between a federal-provincial enclave and a parliamentary second chamber.”34 It concluded that the limited tenure of the members of such a House, its highly partisan structure (emphasized by the introduction of a limited system of proportional representation) and the subservient role imposed on it, would render it ineffective. . .”35

The Senate reform proposals in Bill C-60 did not fare much better before the Special Joint Committee, which adopted a resolution suggesting the government submit a reference to the Supreme Court of Canada as to whether such reform could be implemented by Parliament alone (as Bill C-60 proposed to do).36 In December 1979 the Court ruled that it could not (seven provincial governments intervened to oppose the position of the federal government).37

The same year as the House of the Federation proposal, an alternative — and for a time, influential — approach to Senate reform was launched. This model, which will be referred to here as the “house of the provinces,” was based on the West German second chamber, the Bundesrat, which is composed of delegations of Ministers or their designates (often officials) from the state (Länder) governments. In September 1978,

31 Marc Lalonde “Constitutional Reform: House of the Federation” (Ottawa 1978) 11
32 “House of the Federation” 13
33 “House of the Federation” 13
34 Special Committee of the Senate on the Constitution First Report (18 October 1978) 1:17
35 Senate Special Committee Report 1:17. The selection method in Bill C-60 was recommended by the Ontario Select Committee on Constitutional Reform in its Report of 21 October 1980 (15).
36 Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada Report (10 October 1978) 20:7
37 Re: Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R.
the government of British Columbia endorsed this approach and proposed that the members of a reformed Senate of about sixty members, with equal representation for five regions, be exclusively appointed by provincial governments. The "leading Senator" from each province would be a provincial Cabinet minister, and the others would be appointed "from among the residents of the province at large;" Senators' term would correspond to the tenure of the provincial government. The reformed Senate would have a suspensive veto over matters within federal jurisdiction but an absolute veto over the use of federal powers that affect the provinces (such as the spending and declaratory powers) and over appointments to the Supreme Court of Canada and major federal agencies and commissions. The stated merits of such reform were: "The legitimacy of the Senate as an instrument to reflect the views of provincial governments will be assured by the fact that the leading Senator from each province will be a provincial Cabinet Minister who is clearly authorized to speak on his governments behalf. In addition, the fact that all Senate appointees [sic] are made by provincial government's will encourage Senators to reflect accurately the interests of the province which they represent." 38

The house of the provinces model was also endorsed by the Pepin-Robarts Task Force on Canadian Unity in its 1979 report. It recommended the Senate be replaced by a "Council of the Federation" composed of delegations to whom provincial governments could issue instructions, each headed by a minister or the Premier. The Council was to have no more than sixty voting members (representation was to be weighted towards the smaller provinces, with Ontario and Quebec assigned a minimum of one-fifth of the seats). It would have a suspensive veto over most matters, although of longer duration in areas of concurrent jurisdiction. In summing up its proposal, the Task Force stated: "All this would be a radical departure... Unlike the existing Senate, the Council of the Federation... would be an institution which could play a major part in ensuring that the views of provincial governments are taken into account before any central action which might have an impact upon areas of legitimate provincial concern occurs." 39

Reform along those lines was also recommended by the Ontario Advisory Committee on Confederation and the Committee on the Constitution of the Canadian Bar Association, both in 1978, and in 1982 by the government of Alberta. 40 Indeed, until proposals for a directly elected Senate emerged in the early 1980s, the "house of the provinces" was hardly challenged as a model for restructuring the existing Senate. There were detractors, however. Some commented that the West German federal system — and the place of the Bundesrat within it — was being misinterpreted, leading to wrong conclusions about the suitability of a

38 British Columbia "Reform of the Senate" Paper No. 3 (September 1978) 23
39 Task Force on Canadian Unity A Future Together (Ottawa 1979) 99
provincially-appointed second chamber to Canada. The November 1980 report of the Senate Committee on Legal and Constitutional Affairs (known as the Goldenberg-Lamontagne report) provided a blunt assessment of what it referred to as the Council of the Federation model:

"[O]ne may wonder how the Canadian body politic could accept the institutional transplant that a Council of the Federation would involve... [T]hat institution would be clearly incompatible with a true, genuine federation. It would give the executive branch of the provincial order of government suspensive and absolute veto powers over the legislative branch of the federal order of government."  

The Goldenberg-Lamontagne Committee did, however, see the need for institutional arrangements "at the level of intergovernmental relations... [to] guarantee the sovereignty of the provinces;" accordingly, it proposed to establish First Ministers Conferences "in the Constitution," under the name of the "Federal-Provincial Council," with constitutional, overseeing and coordinating roles but with its decisions subject to ratification by Parliament and the provincial legislatures. At the same time, the Committee proposed a modest reform of the selection method for Senators: the federal government would continue to make all appointments but with every second one from a list submitted by the government of the province or territory concerned. The Committee thus separated reforms intended to address concerns about federal-provincial coordination and possible encroachments on provincial jurisdiction from changes to the second chamber of Parliament. Earlier that year, the Constitutional Committee of the Quebec Liberal Party, addressing concerns about "federal-provincial interaction," took a different course: it recommended the Senate be abolished and that a separate institution, the "Federal Council" be established outside Parliament.

While Senate reform proposals became relatively numerous during the late 1970s and early 1980s, the issue gained only a degree of prominence on the constitutional agenda. After the setback with Bill C-60, the Trudeau government did not press the issue, and it was not on the agenda of the First Ministers Conferences held in 1978 and 1979. The Pepin-Robarts report arrived not long before the 1979 election; in any case, the decentralizing thrust of many of its recommendations did not find favour with Mr. Trudeau. At the same time, provincial governments, apart from British Columbia, did not attach a high priority to the issue. Alberta, later the chief provincial proponent of Senate reform, was more interested in gaining greater jurisdiction over natural resources (eventually achieved in section 92A of the

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41 See Smiley and Watts Infrastate Federalism in Canada 123. On federalism in West Germany, see: Nevil Johnson "Federalism and Decentralization in West Germany" Research Paper no. 1 Commission on the Constitution (London 1973)  
42 Standing Senate Committee on Legal and Constitutional Affairs Report on Certain Aspects of the Canadian Constitution (November 1980) 13 (emphasis in original)  
43 Report on Certain Aspects of the Canadian Constitution 20-1  
44 Constitutional Committee of the Quebec Liberal Party A New Canadian Federation (1980) 52  
45 Robert Sheppard and Michael Valpy The National Deal (Scarborough 1982) 35
Constitution Act, 1982); it is unclear how strongly it felt about reform even in 1982 when it released a proposal for a provincially-appointed Senate on the eve of a provincial election. Senate reform was discussed by the Continuing Committee of Ministers on the Constitution during the round of meetings in summer 1980 following the Quebec referendum, but there was only a cursory discussion at the First Ministers Conference that September.46

The house of the provinces approach attracted considerable interest during the period preceding patriation. There was no consensus, however, on the intended representational role of such an institution—in particular that the active involvement within Parliament of provincial appointees or members of provincial governments was the best way to ensure an effective federal second chamber.

The interest in "intrastate" institutional reforms took a different turn in the early 1980s as the possibility of an elected Senate began to be seriously debated. The winds of change blew from the West, notably Alberta, where the Canada West Foundation drew attention to the option of direct election by the 1981 publication Regional Representation, the report of a task force comprised of Peter McCormick, Ernest Manning and Gordon Gibson.47 While accepting the need for formal mechanisms for intergovernmental coordination, the authors wrote that Senate reform "provides the most direct way for the effective articulation of regional concerns within the national government... [Elected Senators] would possess a clear mandate for speaking out on behalf of [their] region, and a leverage for achieving concessions that would not rest merely on personality, fortuitous circumstances, or political convenience."48

The report charted new ground by recommending an equal number of Senators (from six to ten) for each province.49 It could also be said that Regional Representation introduced to public debate the idea that the Canadian Senate be elected by a form of proportional representation. Referring to Australian Senate elections, the report recommended adoption of the "transferable vote" to allow voters to "fine-tune" their "electoral choice" (the authors were critical of the influence of party organizations under list systems). As for the Senate's powers, the report proposed that Senate rejection of ordinary legislation be overridden by "an unusual majority" of the House.

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46 The Continuing Committee of Ministers, which met throughout the summer, reported that "Ministers identified two sets of functions in second chamber reform: 1. The ratifying of federal action on a limited list of specified matters of joint federal-provincial concern; and 2. A general parliamentary review function involving a suspensive veto." The report included "an interim institutional framework for dealing with the first of these functions." ("Report of the Continuing Committee of Ministers on the Constitution to First Ministers: New Upper House, Involving the Provinces" in Anne F Bayefsky Canada's Constitution Act 1982 & Amendments: A Documentary History II (Toronto 1989) 716-18)


48 Regional Representation 108-9

49 Regional Representation 111, 116-17, 120, 124
of Commons; the Senate would have an absolute veto over the federal government's "extraordinary powers" and over nominations to "designated national boards, agencies and tribunals."

Although formal constitutional discussions (except on aboriginal matters) were not revived during the last years of Prime Minister Trudeau's mandate (Quebec did not recognize the 1982 Constitution Act), the federal government sought to strengthen national institutions and compensate for its limited elected representation from the Western provinces. A Special Joint Committee on Senate Reform reported in January 1984. It recommended an elected Senate, which in its view "is the only kind of Senate that can adequately fill what we think should be its principal role — the role of regional representation." The Committee added that such reform would "strengthen Parliament and make a significant contribution to easing some of the tensions that have troubled our country in the last decade."50

The Special Joint Committee considered the possibility of Senators being elected by a form of proportional representation. The discussion paper which the Minister of Justice, Mark MacGuigan, submitted to the Committee, examined this in some detail and concluded: "An elected Senate could . . . help to compensate for the underrepresentation of national political parties in some regions of the country. It could only do this, however, if it were based on an electoral system other than the first-past-the-post method now used for the House of Commons."51

The Committee was not convinced, however. It endorsed the single-member plurality system, which it found "simple and satisfactory," and observed: "[I]f parties are incapable of electing members in a particular province, they should pull themselves together and change their attitudes. The electoral system should not be altered merely to compensate for the weaknesses and strategic errors of political parties."52 Senators would be elected from constituencies within provinces for nine-year non-renewable terms. The Committee recommended that Ontario and Quebec each retain their twenty-four Senate seats and that all other provinces have twelve seats, except for Prince Edward Island, which would have six. The Senate would have a suspensive veto of a maximum of 120 days over all legislation except appropriation bills, which "would not be subject to any delay."53

In the government's response, Prime Minister Trudeau did not take a position on the Committee's central recommendation of a directly-elected Senate but suggested that the Committee's "rejection of proportional representation . . . might well compound the very problem of regional polarization that your report argues

50 Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform (January 1984) 4
51 Mark MacGuigan "Reform of the Senate: A Discussion Paper" (Ottawa 1983) 19 (emphasis in original)
52 Special Joint Committee Report (1984) 24-5
53 Special Joint Committee Report (1984) 30-1

F. Leslie Seidle 102
Senate reform should help to resolve.\textsuperscript{54}

In the meantime, the Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) studied the issue. Some of its 1985 recommendations were similar to those of the Special Joint Committee: it proposed the same provincial distribution of Senate seats and a suspensive veto of six months for all ordinary legislation. On the method of election, however, the Commission took another tack. It recommended Senators be elected by proportional representation (no further details were provided), noting that this would likely allow the governing party to have elected representatives (Members of Parliament or Senators), including Cabinet Ministers, from all regions.\textsuperscript{55} In his research study for the Commission, Peter Aucoin suggested that under proportional representation Senators from all regions could play an important role within party caucuses and “check those elected on the basis of representation by population.”\textsuperscript{56}

The March 1985 report of the Alberta Select Special Committee on Upper House Reform also endorsed an elected Senate, suggesting that the Senate’s primary purpose was “represent[ing] the regions in the federal decision-making process.”\textsuperscript{57} It did not, however, advocate that the Senate become a forum for intergovernmental negotiations because this would “complicate and blur the Canadian governmental process;” instead it proposed that annual First Ministers Conferences be entrenched in the constitution.\textsuperscript{58}

The Committee’s report gave currency to the concept of a Triple-E Senate. Election would be on the basis of the first-past-the-post system in province-wide constituencies at the same time as provincial elections. Each province would have six Senators and each territory two. As for the third “E” — effective — further contrasts with the federal proposals emerged. The Alberta Committee “strongly recommend[ed] that a reformed Senate . . . be provided with ‘power’ in order to live up to its purposes;” it thus proposed the Senate have “the power to veto any bill except a supply bill.” However, this power was restricted in a number of ways: the Senate would have to vote on a money or taxation bill within ninety days after adoption by the House of Commons and other bills within 180 days; the House of Commons could override a Senate “veto” on money or taxation bills by a simple majority and override

\textsuperscript{54} Letter from Prime Minister Trudeau to Senator Gildas Molgat and Paul Cosgrove, MP (10 April 1984) 3

\textsuperscript{55} Royal Commission on the Economic Union and Development Prospects for Canada Report III (Ottawa 1985) 89-91

\textsuperscript{56} Peter Aucoin “Regionalism, Party and National Government” in Peter Aucoin ed Party Government and Regional Representation in Canada XXXVI Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1985) 152

\textsuperscript{57} Alberta Legislative Assembly Select Special Committee on Upper House Reform Strengthening Canada — Reform of Canada’s Senate 14-15

\textsuperscript{58} Strengthening Canada 15, 40. On 15 February 1985, at the conclusion of their Conference on the Economy in Regina, first ministers signed a Memorandum of Agreement providing for a First Ministers Conference to be held at least once a year. The Memorandum of Agreement was to be in effect for five years
any Senate "amendment (veto) . . . by a vote that is greater in percentage terms than the Senate's vote to amend." On 27 May 1985, the Alberta legislative assembly unanimously adopted a motion to approve in principle the Committee's report.

While Triple-E Senate reform did not yet have the resonance it later acquired, by 1985 it had become clear that a directly elected Senate was the most credible option for strengthening the Senate's representational role. While the advocates of a "house of the provinces" proposed powers to allow it to be effective, it would have acted for the interests of the people of the provinces in an indirect manner — through the actions of provincial representatives within the national Parliament. In contrast, voters would grant the members of an elected Senate a direct mandate. The nature of that mandate, in effect the representational role expected of elected Senators, was only beginning to emerge. It would later become a major point of debate.

Senate Reform and the Meech Lake Accord

The election of a Progressive Conservative federal government in 1984 and the re-election of Robert Bourassa's Liberals in Quebec in 1985 provided the opening for discussions aimed at securing Quebec's agreement to the Constitution Act, 1982. Prior to the 1985 election, the Quebec Liberal Party outlined the "main conditions" that might allow this to be achieved. In a speech at Mont-Gabriel, Quebec on 9 May 1986, Intergovernmental Affairs Minister Gil Rémillard narrowed to five the immediate conditions for Quebec's endorsement of the 1982 Act. The joint declaration issued on 12 August 1986 at the conclusion of that year's Premiers Conference indicated provincial acceptance of these conditions as the basis for discussions on "the top constitutional priority . . . [of bringing about] Quebec's full and active participation in the Canadian federation." At the same time, the Edmonton Declaration sketched the beginnings of a future agenda on "amongst other items, Senate reform, fisheries, property rights, etc."

This inclusion of a reference to Senate reform — which Premier Don Getty pressed for — had little impact on the ensuing cross-country tours and other discussions carried out by Quebec and federal representatives. Governments did not question the agreement to concentrate on Quebec's five "conditions." Even so, the Alberta government took a number of steps to indicate its support for Senate reform. On 10 March 1987, the Alberta legislative assembly unanimously endorsed a Triple-E Senate and the recommendations of the 1985 Committee report. In his 5 April 1987 speech to the Alberta Progressive Conservative Party convention, Premier Getty


59 Strengthening Canada 31–2. For a commentary on the Alberta Committee report see Randall White Voice of Region (Toronto 1990) 222-40
60 Parti libéral du Québec "Maîtriser l'avenir" February 1985
61 Patrick J. Monahan Meech Lake: The Inside Story (Toronto 1991) 61

F. Leslie Seidle 104
pledged to "keep on fighting for a Triple E Senate," and later that month, as he left for a meeting of First Ministers, he said he would raise the issue of Senate reform "at every opportunity."62

When the first ministers met at Meech Lake on 30 April 1987 Senate reform entered the negotiations which led to the agreement-in-principle released late that evening. Patrick Monahan, then senior policy adviser to Ontario Attorney General Ian Scott, has provided the following account.63 In response to Quebec's request for a veto over changes to the Senate and other national institutions64 under section 42 of the Constitution Act, 1982, the federal government proposed that the level of consent be raised from seven provinces representing at least fifty percent of the population of the provinces to the same number of provinces representing at least eighty percent of the population; this would have given each of Quebec and Ontario a veto. When it became evident this would not be acceptable to all premiers, Prime Minister Mulroney offered to raise the requirement to unanimity, thus giving each province a veto. Premier Getty was concerned that, if unanimity applied, there should be guarantees Senate reform would actually take place and proposed that provincial governments be allowed to appoint Senators to fill half of all future vacancies. A compromise was eventually reached: as with future Supreme Court appointments, the federal government would fill all future Senate vacancies from lists provided by provincial governments.

First ministers then turned to the question of future constitutional discussions. The federal government had proposed that a First Ministers Conference on the Constitution be required in each of the ensuing five years, with Senate reform as the lead item on the agenda. Premier Vander Zalm was apparently concerned that agreement on Senate reform might not be achieved within that period. Premiers eventually agreed to a counter-proposal, that Senate reform be on the agenda of annual constitutional conferences until it was achieved, although Premier Peckford insisted on including another item, "fisheries roles and responsibilities." Monahan describes the result of this part of the day's negotiations as follows: "Everyone seemed willing to live with this set of compromises on the amending formula. Quebec would get a veto over changes to national institutions, but so would all the other provinces . . . Getty and Vander Zalm had to agree to subject Senate reform to unanimity, but they had won an immediate role for their provinces in Senate appointments as well as the guarantee of annual constitutional conferences until comprehensive reform was achieved."65

62 The Globe and Mail 6 April 1987; Toronto Star 30 April 1987
63 Monahan Meech Lake 94-6
64 In addition to Senate reform, section 42 applies to "the principle of the proportionate representation of the provinces" the Supreme Court of Canada (except for its composition, which is covered by the unanimity rule in section 41), the establishment of new provinces and "the extension of existing provinces into territories."
65 Monahan Meech Lake 96
First ministers met at the Langevin Block in Ottawa on 2-3 June and approved the text of constitutional amendments to give effect to the Meech Lake accord. No substantive changes to the earlier agreement as it related to Senate reform were made, although the accompanying “political accord” made it clear that the procedure for making future Senate appointments from provincial lists would apply immediately and not await ratification of the constitutional amendments.66

First ministers agreed informally that there would be public hearings on the Meech Lake accord at the national level. Accordingly, a Special Joint Committee of the Senate and House of Commons was established. During its hearings in August and early September 1987, Senate reform was not a leading concern, although there was considerable discussion about the extension of the unanimity rule. Even so, some witnesses paid considerable attention to Senate reform itself, and their testimony anticipated subsequent debate.

David Elton, president of the Canada West Foundation, expressed the view that the Meech Lake accord did not “adequately address the long-term concerns and aspirations of western Canadians.” He considered the interim Senate appointment procedure made “a mockery out of the commitment to Senate reform” and proposed that instead Senate appointments be suspended “until meaningful Senate reform takes place.”67 Bert Brown, national chairman of the Canadian Committee for a Triple-E Senate, said ratification of the accord as it stood would make the road to Senate reform “narrow, arduous and very long,” and suggested the Committee “develop . . . an amendment which would give Canada an elected, equal and effective Senate.” If that could not be achieved, he, too, supported suspending future Senate appointments until reform was achieved.68 Peter Meekison, long a constitutional adviser to the Alberta government, disagreed: “I think it is very difficult for a province to cast a veto . . . Obviously it is there to be used, but the natural tendency in those

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66 Constitution Amendment, 1987 clauses 2, 9 and 13; 1987 Constitutional Accord section 4
67 Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord 4:21-3. For further comment on the provincial “patronage” role, see: Peter McCormick “Senate Reform: Forward Step or Dead End?” in Roger Gibbins ed Meech Lake and Canada: Perspectives from the West (Edmonton 1988) 33-6. The proposal to suspend Senate appointments is discussed further in: David Elton “The Enigma of Meech Lake for Senate Reform” in Gibbins Meech Lake and Canada 23-31; according to Elton (30), this would represent a “legal timebomb” because “the decreasing numbers in the Senate would increase the relative powers of the remaining Senators to the point where First Ministers would be obliged to act.” The idea was first floated in an article by McCormick and Elton the Canada West Foundation published not long before the Meech Lake First Ministers meeting: “The Western Economy and Canadian Unity” (Calgary 1987) 19
68 Proceedings of the Special Joint Committee on the 1987 Constitutional Accord 15:45-6
circumstances is to try to find a compromise. So I feel that what Alberta has gained under this accord is a guarantee that constitutional discussions will take place on Senate reform.  

In its report, the Joint Committee concluded that “meaningful Senate reform must be pursued by First Ministers on a priority basis in order to justify the claim that the temporary appointment procedure . . . will indeed be temporary;” and that “the veto powers now available to all provinces will assure provinces such as Alberta . . . that they cannot be forced to accept a Senate reform package that does not live up to their expectations.”

Speaking during debate in the Alberta legislative assembly in December 1987, Premier Getty noted that the change to the amending formula, “a veto for Alberta and all provinces,” reflected the equality of the provinces. On Senate reform, he referred to the priority to be given the issue in the “second round:” “[For 100 years people have been talking about Senate reform in Canada, but until this government went through this process, there was never a provision that there would be Senate reform . . . In the coming years we will have Senate reform as the number one item . . .”

As 1987 drew to a close, there was no doubt that Senate reform had acquired a more important place than ever before on the constitutional agenda. At the same time, the issue was acquiring greater resonance among Canadians. In the Gallup poll conducted in September forty-six percent of respondents favoured an elected Senate, an increase of five points since 1985; a Goldfarb poll conducted 20-25 May found eighty-three percent support for an elected Senate (unlike Gallup, the poll did not present alternatives).

While the profile of Senate reform had been raised, it is also fair to say that 1987 marked a hardening of some of the discourse on the issue — particularly as to the representational role of a reformed Senate. An example is found in a paper the Canada West Foundation published only weeks before first ministers met at Meech Lake. The authors, Peter McCormick and David Elton, argued that “parliamentary government as we know it means that whenever the interests of Central Canada clash with the interests of any other part of Canada, the result is a foregone conclusion.” The Canada West Foundation paper called for stronger powers than the 1985 Committee had recommended: “[A]n elected Senate must retain effective power; at the very least it must retain the legislative power of the existing Senate, and possibly it requires additional powers over the ratification of some appointments as well. It is not an acceptable trade off that an elected and equal Senate be reduced to powers so nominal as a suspensive veto, leaving it unable to defeat or to force amendments to objectionable legislation but only to delay implementation for a matter of weeks or

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69 Proceedings of the Special Joint Committee on the 1987 Constitutional Accord 10:50
70 Report of the Special Joint Committee on the 1987 Constitutional Accord 95
71 Alberta Hansard 23 November 1987 2002
72 The Gallup Report (10 April 1989); Toronto Star 22 January 1990; Toronto Star 1 June 1987
73 McCormick and Elton “The Western Economy and Canadian Unity” 17
months... Western Canadians are not looking for a paper tiger to protect them from hypothetical dangers, but a real tiger to protect them from an unacceptable ongoing process."

Behind the image of "a real tiger," lies a conception of the role of the reformed Senate as not only an advocate but also a defender of the interests of people in the less populated provinces; to carry out that role, effective powers were needed to be certain Senators could act for those interests. Even among advocates of Triple-E reform, the definition of what constituted effective powers was shifting.

During 1988, the attention to Senate reform rose further. Among the factors that accounted for this was the growing popularity of the Reform Party (founded the previous year), a vocal advocate of fundamental changes to a number of federal policies and the structure of federal institutions. Senate reform was prominent in the party's platform, and in May 1988 it released a draft constitutional amendment, which provided for election of ten Senators from each province by the single transferable vote on fixed dates for six-year terms. On powers, Mr Manning stated in an open letter to the four Western premiers that the reformed Senate should have powers and procedures to make it effective in "safeguarding and enhancing regional and provincial interests." Under the draft amendment, Senate approval of a bill "to appropriate money solely for the ordinary annual essential services of the government" would not be required. However, the Senate would have to agree to all other legislation and would ratify the appointment of the justices of the Supreme Court of Canada, as well as the officers, directors or members of Crown corporations, boards, agencies and tribunals with "regional impact."

Also in May 1988, the federal government began a series of steps to indicate its interest in Senate reform and help prepare for the first of the annual constitutional conferences mandated by the Meech Lake amendments. Lowell Murray, Minister of State for Federal-Provincial Relations, met his Alberta counterpart, James Horsman, on 5 May 1988. In his address that evening to a National Conference on Senate Reform, Senator Murray stated that "the Government of Canada is convinced that the health and effectiveness of our national institutions, acting on behalf of all Canadians, require that the Senate become elected." In addition, Senator Murray indicated he and Mr Horsman had agreed that Alberta would play a leading role,

74 McCormick and Elton "The Western Economy and Canadian Unity" 15. During the late 1980s, Alberta government representatives mentioned more frequently the potential of a Triple-E Senate to protect regional interests. In an address to the National Conference on Electoral Reform on 6 May 1988, Alberta Intergovernmental Affairs Minister James Horsman said: "[W]ould an elected, equal, effective Senate, representing the interests of the provinces, have ever agreed to the devastation wrought by the national energy program?" The Canadian Senate: What is to be Done? (Edmonton 1988) 57

75 Memorandum from Preston Manning to Premiers Vander Zalm, Getty, Devine and Filmon 18 May 1988; the attached "Draft Constitutional Amendment to Reform the Senate of Canada" was dated 17 May 1988

76 Murray The Canadian Senate: What is to be Done? 6. Senator Murray's statement was the Mulroney government's first formal position on the substance of Senate reform, although in December 1987 Prime Minister Mulroney had indicated that the federal proposal for the first of the annual constitutional conferences would include a provision for an elected Senate (transcript of CBC interview with Peter Mansbridge broadcast 21 December 1987)
similar to the one Quebec had played in 1986 at the start of the pre-Meech Lake discussions, in carrying out soundings with provincial governments to encourage "the development of consensus" on Senate reform and "prepare the ground for success in the second round."77

Premier Getty and Mr Horsman pursued the issue with the other governments during the ensuing months, as the chances dimmed that ratification of the Meech Lake accord would be completed in time to convene a First Ministers Conference on the constitution in 1988. On 20 May, in response to Premier Getty's initiative, the four Western Premiers at a conference in Parksville, British Columbia, endorsed "the principles embodied in the Triple E concept [as] the basis for a more representative national Parliament."78 At the Annual Premiers Conference in Saskatoon in August, Alberta's plan to carry out a round of bilateral discussions on Senate reform was approved. Mr Horsman toured the country in the autumn. In January and February, Senator Murray held a series of bilateral meetings with premiers and provincial ministers, at which Senate reform and the Meech Lake ratification process were discussed. Senator Murray's tour concluded on 14 February in Edmonton when he met Premier Getty and James Horsman.

The apparently cordial relations reflected in the coordinated series of bilateral consultations were soon strained, however. In early February, there were reports that the Alberta government would introduce legislation to choose a nominee for the province's Senate vacancy through a province-wide election.79 Questioned about this in a scrum following his 14 February meetings, Senator Murray told reporters that the Meech Lake accord provided for a province to submit "names, plural" and added that Senate reform "cannot be done piecemeal through the back door."80 The Senatorial Selection Act was introduced on 17 February but was not passed prior to the 20 March Alberta provincial election. On 26 June, the bill was re-introduced. During debate, Mr. Horsman referred to Alberta's initiative as a "bold step" that would "forever change the face of the Canadian Senate;" he admitted, however, that "if all the provinces began to follow Alberta's lead, there is the risk that the current inequalities and the current powers could be forever entrenched in this newly elected body" and added that "we are prepared to take this risk as a government."81

Following adoption of the legislation, Albertans voted on Senate nominees on 16 October 1989 at the same time as the municipal elections. Stan Waters, the Reform Party candidate, came first, defeating the Progressive Conservative candidate Bert

77 Murray The Canadian Senate: What is to be Done? 9
78 Western Premiers Conference (18-21 May 1988) Communiqué no. 12 "The Parksville Accord"
79 The possibility of electing Senate nominees to fill vacancies under the Meech Lake Accord appointments provision was raised in the Alberta Legislative Assembly on 7 May 1987 by Liberal leader Nick Taylor (Alberta Hansard 1069) and in the Report of the Special Joint Committee on the 1987 Constitutional Accord (p. 95). See also: David Elton and Peter McCormick "Democracy on the Instalment Plan: Electing Senate Nominees" Canada West Foundation (Calgary 1989)
80 The Edmonton Journal 15 February 1989. Five Senators were appointed on the basis of lists premiers submitted: one from Newfoundland (30 December 1987) and four from Quebec (26 September 1988)
81 Alberta Hansard 17 July 1989 788-9
Brown. Premier Getty recommended to Prime Minister Mulroney that Mr Waters be appointed to the Senate. For several months, he resisted, but on 11 June 1990, following the week-long First Ministers Conference Mr Waters assumed a seat in the Red Chamber.82

As the developments sketched above helped focus attention on Senate reform, public support for an elected Senate continued to rise: according to the Gallup poll released in April 1989, for the first time since 1945 (when Gallup began asking questions about Senate reform options) a majority of respondents favoured an elected Senate. An Environics poll conducted in March 1989 indicated seventy-four percent support for an elected (as opposed to an appointed) Senate, with the highest support (eighty-five percent) in Alberta and the lowest in Quebec and Ontario (sixty-nine and seventy percent respectively).

During this period, the Meech Lake ratification process ran into major difficulty as a result of changes of government in New Brunswick, Manitoba and Newfoundland. In September 1988 a Select Committee of the New Brunswick Legislative Assembly began hearings. Its report, issued on 24 October 1989, noted that Senate reform had not received a great deal of attention, but made one recommendation related to the issue: to delete from the accord all references to annual First Ministers Conference agenda items.83

The previous day, the all-party Manitoba Task Force released its unanimous report, which called for several changes to the accord before ratification, including on the amending formula: "Repeatedly the Task Force heard presenters state that expansion of the unanimity requirement for constitutional amendment was wrong. Unanimity would freeze and stultify what was supposed to be a living, evolving document. Specifically, presenters impressed upon the Task Force that the requirement of unanimity for amendments to the Senate would prevent Senate reform. The majority of the presenters viewed this clause as a betrayal of western interests."84

The Task Force also noted that "Manitobans place great hope in the prospects of Senate reform . . . [as] a prerequisite for making the smaller provinces more effective and more equal partners in Confederation."85 Accordingly, it recommended deletion of the unanimity requirement for Senate reform (and the other matters covered by

82 In an interview with CFAC in Calgary on 5 April 1990, Prime Minister Mulroney, questioned about the Alberta Senate "election", said: "I want change that will benefit Alberta in a real way, not in a peripheral way . . . And it can't just be something to catch an eye." (transcript) The background to Alberta's initiative and the campaign are reviewed in: Patrick Malcolmson "Reflections on Canada's First Senate 'Election'" Canadian Parliamentary Review 14:3 (Autumn 1991) 15-17. Senator Waters died on 25 September 1991

83 Legislative Assembly of New Brunswick Select Committee on the 1987 Constitutional Accord Final Report (October 1989) 66. The report stated: "The Committee endorses the general desires expressed in many of the briefs to get on with Senate reform. It feels this can be accomplished without entrenching the agenda in the constitution." (66)


85 Manitoba Task Force Report (1989) 34, 36
section 42). On the specifics of Senate reform, the Task Force did not take a position, claiming this would be "premature," but recommended Manitoba establish a committee "forthwith... to investigate the possible types of Senate reform." 86

No committee on the Meech Lake accord was established in Newfoundland. Instead, Premier Clyde Wells enunciated the provincial government's position that the accord should not be ratified without major amendments in a series of written statements, including letters to Prime Minister Mulroney. On Senate reform, Premier Wells took firm positions on both the substance and the amending formula. He advocated a Triple-E Senate, the rationale for which had first been articulated in the Newfoundland Speech from the Throne in May 1989: "If the true federal principle is to be embodied in the Canadian Constitution... there must be a chamber of the federal legislature in which each province has an equal say in the exercise of federal legislative power in Canada... That is the only means by which provinces with smaller populations, such as ours, can protect their interests in relation to the two provinces with larger populations, and thereby attain their rightful and proper position as full participating provinces of this nation." 87

On 6 November, two days before the opening of a First Ministers Conference on the Economy in Ottawa, Premier Wells sent the Prime Minister a constitutional proposal subtitled "An Alternative to the Meech Lake Accord." Three of his proposed amendments to the accord related to the Senate:

a) Retain the general amending formula for Senate reform (and the other section 42 matters) but add a new procedure: constitutional amendments "affecting linguistic or cultural rights or the civil law system including the proportion of civil law judges on the Supreme Court of Canada" would require the approval of a majority of each of the following: the Senate as a whole, Quebec Senators and Senators from the other provinces;
b) Replace the procedure for provincial nomination of Supreme Court justices with a requirement that appointments of justices from common law provinces be approved by a majority of Senators from those provinces and those from Quebec by a majority of Senators from that province;
c) Delete the interim Senate appointment procedure and the requirement to hold annual First Ministers Conferences. 88

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86 Manitoba Task Force Report (1989) 35-6. There probably would not have been all-party agreement on the details of Senate reform: Premier Filmon and Liberal leader Sharon Carstairs strongly advocated Triple-E reform but Gary Doer, the NDP leader, was opposed to what he referred to as "the Americanization of the Senate through the Triple-E proposal." (Winnipeg Sun 27 March 1990)

87 Newfoundland Speech from the Throne (25 May 1989) 13-14

88 Government of Newfoundland and Labrador "Constitutional Proposal: 'An Alternative to the Meech Lake Accord'" (attachment to letter from Premier Wells to Prime Minister Mulroney, 6 November 1989)
Premier Wells also proposed to “integrate consideration of Senate reform in this round of constitutional negotiations,” and appended to his proposal was a draft constitutional amendment to establish a Triple-E Senate with six seats for each province and a veto over all legislation except bills “to appropriate money solely for the ordinary annual essential services of the government.”

In addition to proposing the series of amendments to the accord, Premier Wells announced that, if his concerns were not addressed, he would move to rescind his province’s endorsement of the accord (it had been approved on 7 July 1988). This became a main point in first ministers’ private discussions during their conference in Ottawa, and at his closing press conference Prime Minister Mulroney indicated that, for the time being, Newfoundland would not rescind its approval. The Prime Minister also indicated Senator Murray would meet provincial representatives “to explore the possibility of movement on the Meech Lake Accord” and to “intensify and seek to accelerate the process of meaningful Senate reform.” In addition, the Prime Minister announced that if the Meech Lake round came to “a successful conclusion” he would convene a First Ministers Conference on Senate reform in Western Canada on 1 November 1990.

During the ensuing months, efforts were intensified to find common ground despite growing division (Newfoundland rescinded its adoption of the accord on 6 April). The approach that emerged was to seek agreement on a “companion resolution” on items that would be added to the accord but take effect only after it had been proclaimed. On 21 March 1990, Premier McKenna introduced in the New Brunswick legislative assembly both the Meech Lake resolution and a companion resolution (intended at least partly to address concerns of official language minorities, the territories and aboriginal groups). The resolution was referred to a special committee of the House of Commons chaired by Jean Charest. In its 17 May report the committee recommended additions to Premier McKenna’s companion resolution, including on the amending formula: “[T]o avoid constitutional impasse the unanimous consent rule for Senate reform should be moderated after a limited period, say three years, if it has not produced success. We should then adopt a less restrictive amending formula with some form of regional approval.”

89 For further details see Table 2. On 22 March 1990, Premier Wells released the text of a proposed constitutional resolution (attachment to letter to Prime Minister Mulroney of the same date). The resolution did not include the Triple-E amendments he released the previous November. The additional responsibilities for the Senate proposed in November 1990 were retained, presumably to allow these to be exercised by the Senate prior to reform.

90 Transcription of press conference. In April 1991 in Calgary, the Prime Minister said the federal government had developed a discussion paper on Senate reform, which was to be referred to a special House of Commons committee that would hold hearings in the summer (Notes for an Address by the Prime Minister 5 April 1991 3).

91 House of Commons Report of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord 11.
Despite Premier Bourassa's immediate rejection of the Charest report, the possibility of a "sunset" provision for the amending formula was explored in the ensuing discussions between federal and provincial representatives, which included a series of meetings the Prime Minister held with each premier to assess whether to convene first ministers for a last attempt to resolve the impasse. It is clear that the Meech Lake amending formula and the substance of Senate reform had become closely linked. Premiers Wells and Filmon wanted the unanimity rule removed and the latter sought simultaneous progress on reform itself; Premier Vander Zalm proposed immediate proclamation of the Meech Lake provisions except those that required unanimity and the implementation of "fundamental and comprehensive Senate reform" by 23 June 1992, after which the remaining provinces would adopt the Meech Lake unanimity items (including the change to the amending formula); and Premier Getty wanted any companion resolution to reflect progress on Senate reform. Public opinion seemed to confirm this linkage: a Toronto Star-CTV news poll conducted by the Environics group in early May indicated support for the Meech Lake accord would increase to forty-eight percent from thirty-five percent if Senate reform were included as part of the constitutional agreement.

In the end, the fundamental issue of the amending formula proved intractable during the first ministers meeting that lasted from 3 to 9 June. No alternative was proposed in the final communiqué. On the substance of Senate reform, however, First Ministers reached an agreement-in-principle. They would seek adoption, by 1 July 1995, of an amendment on comprehensive Senate reform consistent with the following objectives:

a) The Senate should be elected; b) The Senate should provide for more equitable representation of the less populous provinces and territories; c) The Senate should have effective powers to ensure the interests of residents of the less populous provinces and territories figure more prominently in national decision-making, reflect Canadian duality and

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92 One proposal was that, if unanimous agreement on Senate reform had not been achieved within three years, a new amending formula based on "regional vetoes" would take effect (see Monahan Meech Lake 202-3).

93 On 31 May on "Canada AM," Premier Wells said: "I've never asked that Senate reform be considered or discussed at this stage." On 26 May Premier Filmon said an equal and elected Senate should be adopted "now" and agreement on the Senate's powers sought over a "certain period of time," failing which the Senate's current powers would obtain (CBC NewsWorld, transcript). Premier Vander Zalm's proposal was released on 23 January 1990 (Office of the Premier, press release). Reacting to the Charest committee report, Premier Getty said: "If there are going to be changes to Meech Lake, rather than others getting what they want in the way of changes, we say additional strength for Senate reform is important." (Ottawa Sun, 18 May 1990)

94 Toronto Star 14 May 1990 A15

95 According to Monahan (Meech Lake 249), unanimity "represented the only possible way of squaring the circle between the demands of Quebec and of the other provinces... In the end, even [Premiers Wells and Filmon] were forced into the position of recognizing that a concession on this issue was necessary if there was to be any kind of negotiated agreement involving all the provinces"
strengthen the Government of Canada's capacity to govern on behalf of all Canadians, while preserving the principle of the responsibility of the Government to the House of Commons.\textsuperscript{96}

The communiqué stated that a commission with federal and provincial representation would hold hearings and report on "specific proposals" to give effect to the above objectives prior to a First Ministers Conference on Senate reform to be held in British Columbia by the end of 1990. Finally, on a point some consider central to the outcome of that meeting,\textsuperscript{97} first ministers agreed to a redistribution of Senate seats if Senate reform were not achieved by 1 July 1995: Ontario's Senate representation would drop by six (to eighteen) and that of Nova Scotia and New Brunswick by two each (to eight), and the number of seats for each of the four Western provinces and Newfoundland would increase from six to eight.

When Manitoba and Newfoundland failed to ratify the Meech Lake accord by the 23 June deadline, the agreements reflected in the 9 June communiqué died with it. It would be wrong, however, to confine the agreement on Senate reform to an historical footnote. The compromise reflected in the communiqué left no doubt that Senate reform had become a key item on the constitutional agenda. While many factors explain this development, there is no doubt that the Meech Lake round gave impetus to the call for an elected Senate with significant powers, particularly in Western Canada, where advocates wanted "some equal attention to their own dissatisfaction."\textsuperscript{98}

For advocates of an "equal" Senate, the Meech Lake accord presented a dilemma: while the accord presumed the equality of the provinces (as Premier Getty and others often noted), some were convinced the unanimity requirement would block Senate reform. In addition, those who had expected there would soon be constitutional talks on the Senate grew impatient. It was not surprising, therefore, that when the barrier around the "Quebec round" agenda items was shifted in 1990, Senate reform had to be part of an eventual agreement.

\textbf{Canada at the Crossroads: The Potential of Senate Reform}

The outline of a reformed Senate presented in the federal government's proposals, \textit{Shaping Canada's Future Together}, reflects the first ministers' agreement of 9 June 1990, although it provides additional details and addresses aspects of reform not covered by the objectives outlined in the communiqué. In a number of cases, alternatives were presented for the Special Joint Committee's consideration.

On the method of selection, the proposals confirmed a development traced in this paper: that only an elected Senate is acceptable to Canadians. The overall purpose of an elected Senate was stated as follows: "to improve regional representation and to

\textsuperscript{96} First Ministers Meeting on the Constitution \textit{Final Communiqué} (Ottawa 9 June 1990) 1
\textsuperscript{97} For example, see Monahan \textit{Meech Lake} 224-6
\textsuperscript{98} Gordon Robertson \textit{A House Divided: Meech Lake, Senate Reform and the Canadian Union} (Halifax 1989) 27
increase responsiveness to individuals by strengthening the power of the Canadian electorate."\(^9\) On this point, the proposal would likely meet little opposition.\(^{10}\) On the question of which electoral system should be used, the proposals noted that other federal second chambers are chosen by "a wide variety of means," ranging from first-past-the-post to "more complex systems of proportional representation." The proposals then stated: "The method of election should give expression to the social diversity of the Canadian population, keeping in mind the history of the inadequate representation of women, aboriginal peoples and ethnic groups."\(^{101}\)

Recent proposals have divided on the question of what electoral system should be used for Senate elections (see Table 1). The 1984 Special Joint Committee and the 1985 Alberta Committee recommended first-past-the-post; the Macdonald Commission and the Reform Party preferred proportional representation. A full discussion of the two broad alternatives is warranted, including the dynamics and possible impact of different forms of proportional representation.\(^{102}\) As for the timing of elections, the proposals suggested Senate elections coincide with House of Commons elections, which "would emphasize the federal character of the Senate, and would also recognize the fact that the House of Commons and the Senate share a common legislative agenda."\(^{103}\) Some have suggested this would lead to federal parties being the main contenders in Senate elections. In his commentary on the proposals, Premier Wells proposed (as in his 1989 draft amendment) that Senate elections be held on fixed dates in order to diminish party influence and make the Senate more independent of the governing party in the House of Commons.\(^{104}\)

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9 Shaping Canada's Future Together: Proposals (Ottawa 1991) 17

10 Although the "Group of 22" may have intended to revive the "house of the provinces" approach in its report (Montreal 11 June 1991) when it recommended (25) that the reformed Senate, to be called the "House of the Federation," "be elected and/or appointed from the provinces." See also: Peyton Lyon "For a Useful Senate" Ottawa Citizen 7 July 1991

101 Shaping Canada's Future Together 17-18


103 Shaping Canada's Future Together 17

Table 1
Proposals for an Elected Senate: Electoral System, Timing of Elections and Term

<table>
<thead>
<tr>
<th></th>
<th>Electoral System</th>
<th>Constituencies</th>
<th>Timing of Elections</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special Joint</td>
<td>First-past-the-post</td>
<td>Within province</td>
<td>Fixed dates every three years</td>
<td>Nine years (non-renewable); one-third elected every three years</td>
</tr>
<tr>
<td>Committee (1984)</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Macdonald Royal</td>
<td>Proportional representation (no details)</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Commission (1985)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta Special</td>
<td>First-past—the-post</td>
<td>Province-wide</td>
<td>Coincide with provincial elections</td>
<td>Equal to the life of two legislatures; half renewed at each provincial election</td>
</tr>
<tr>
<td>Committee (1985)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reform Party of</td>
<td>Single transferable vote</td>
<td>Within province</td>
<td>Last Monday of October</td>
<td>Six years; half elected every three years</td>
</tr>
<tr>
<td>Canada (1988)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Government of</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Last Monday of October</td>
<td>Six years; half elected every three years</td>
</tr>
<tr>
<td>Newfoundland</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1989)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Government of</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Coincide with House of Commons elections</td>
<td>Not specified</td>
</tr>
<tr>
<td>Canada Proposals</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1991)</td>
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</table>

The federal proposals stated that an elected Senate “must have real powers to be effective and provide the necessary regional balance to Canada’s Parliamentary institutions.” In particular:

[The Government of Canada believes that, as a general rule, in order for measures to become law, approval of both the Senate and the House of Commons should be required as at present.

Since the Senate would not be a confidence chamber, the Government proposes that the Senate have no legislative role in relation to appropriation bills and measures to raise funds including borrowing authorities.

The Senate should . . . not be able to override the House of Commons in relation to matters of particular national importance, such as national defence and international issues. In these cases, the Government of Canada proposes that the Senate have a six-month **suspensive veto**, following the expiry of which the House of Commons would be required to repass the legislation for it to become law.
For matters of language and culture, the Government of Canada proposes that the Senate also have a double majority special voting rule.\(^{105}\)

Comparing the above to the proposals summarized in Table 2, it could be said that the federal proposal reflected the shift in recent years — particularly during the Meech Lake period — from support for a Senate with a suspensive veto over virtually all matters to one that would have virtually the same legislative powers as the present Senate. In this case, there would be three exceptions. The first, affecting certain money bills, is similar to the recommendation of the 1984 Special Joint Committee. However, the range of money bills in relation to which the Senate would have “no legislative role” appears narrower than the definition in the proposed constitutional resolution introduced in 1985 after the Senate delayed borrowing authority legislation (although that resolution provided for a thirty-day suspensive veto in relation to money bills).\(^{106}\) The Minister for Constitutional Affairs, Joe Clark, claimed the proposed powers would have allowed the Senate to block the non-revenue aspects of the National Energy Program and the Goods and Services Tax — the latter on the basis that it “was a matter of tax policy . . . not a measure designed to raise revenue.”\(^{107}\)

Neither the exception for “matters of particular national importance” nor the double majority special voting rule has received much comment. The first does not appear to have a precedent (although Bill C-60 (section 68) included a procedure for rapid adoption of “urgent” legislation). The double majority rule for linguistic and cultural matters was part of Bill C-60 in 1978, and has been figured in a number of reports and studies since then (see Table 2).\(^{108}\)

In general terms, the federal proposal aimed to ensure the responsibility of the government to the House of Commons. Reviewing the proposals in the House of Commons, Prime Minister Mulroney said that “good government demands that only the House of Commons be a confidence chamber, in order to prevent the kind of constitutional instability that parliamentary federal systems have known at other times and in other jurisdictions.”\(^{109}\) The Prime Minister was no doubt alluding to the 1975 constitutional crisis in Australia — an event that is bound to surface as debate.

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105 Shaping Canada's Future Together 20 (emphasis in original; the order of the paragraphs quoted here has been changed).

106 For the text of the resolution and the speech by the Minister of Justice, John Crosbie, see House of Commons Debates 7 June 1985 5531-40. Eight premiers (all but Pawley and Lévesque) indicated in letters to Prime Minister Mulroney (which Mr Crosbie tabled) that they were prepared to seek adoption of the resolution. However, when the Ontario Progressive Conservative government, led by Frank Miller, was defeated in the election of 2 May 1985, it became evident that the population requirement under the general amending formula would not be met; no further action was taken.


108 As Réjean Pelletier has pointed out, the effect on Quebec of such a provision would be different depending on whether the “double majority” is defined as anglophone and francophone Senators or as Senators from Quebec and Senators from the other provinces (“Apporter des précisions aux réformes proposées” Le Soleil 16 October 1991). For a discussion of the double majority rule as recommended by the Special Joint Committee in 1984, see Smiley and Watts Intrastate Federalism in Canada 128-9.

continues, along with the claim that an elected Senate would represent a further “Americanization” of Canada’s political institutions. The issues involved are fundamental, not least because the Senate’s powers will in large measure determine how effectively it will carry out its representational role. The debate about them would benefit from sound analysis of the role and powers of other federal second chambers.110

Reconciling the wide range of positions on the Senate’s powers will present a considerable challenge. For some, like Premier Wells, the House of Commons and the Senate “should remain coordinate legislative bodies as they now are”111 if the latter is to act effectively for Canadians, particularly those in the less populous regions. For others, lesser powers for the Senate are preferable; the Manitoba Task Force, for example, recommended the Senate have the power to delay legislation “but only for a limited period of time.”112

The federal proposal also outlined an additional responsibility for the Senate: ratification of appointments. The following positions would be subject to Senate ratification: the Governor of the Bank of Canada, and the heads of national cultural institutions and of regulatory boards and agencies. Again, there are a number of precedents (see Table 2), although the stated intent was to ensure not only that regional interests are reflected in appointments but also “to ensure the appropriate representation of women, visible minorities, language groups, aboriginal peoples, and the disabled.”113

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110 On the relevance of the Australian Senate to Canada see: Donald Smiley “An Elected Senate for Canada? Clues from the Australian Experience” (Kingston 1985); Campbell Sharman “The Australian Triple-E Senate: Lessons for Canadian Senate Reform” (Calgary (Canada West Foundation) 1989); and Campbell Sharman “Second Chambers” in Herman Bakvis and William Chandler eds Federalism and the Role of the State (Toronto 1987) 82-100


112 Report of the Manitoba Constitutional Task Force (28 October 1991) 66

113 Shaping Canada's Future Together 21
Table 2
Proposals for an Elected Senate: Powers

<table>
<thead>
<tr>
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<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Money bills</strong></td>
<td>Supply bills subject to no delay</td>
<td>Not specified</td>
<td>House of Commons override Senate on money or taxation bills by simple majority</td>
<td>Senate need not pass bill &quot;to appropriate money solely for the ordinary annual essential services of the government“</td>
<td>After 45 days Senate need not pass bill &quot;to appropriate money solely for the ordinary annual essential services of the government“</td>
<td>No role in relation to appropriation bills and measures to raise funds including borrowing authorities</td>
</tr>
<tr>
<td><strong>Ordinary legislation</strong></td>
<td>Suspensive veto of 120 sitting days</td>
<td>Six-month suspensive veto</td>
<td>House of Commons override Senate by &quot;vote greater in percentage terms“</td>
<td>Senate approval required</td>
<td>Senate approval required</td>
<td>Senate approval required (but see other)</td>
</tr>
<tr>
<td><strong>Linguistic/ cultural matters</strong></td>
<td>Double majority for &quot;legislation of linguistic significance“</td>
<td>Double majority for &quot;matters of special linguistic significance“</td>
<td>Double majority for &quot;all changes affecting the French and English languages“</td>
<td>No</td>
<td>(see other)</td>
<td>&quot;Double majority special voting rule“ for &quot;matters of language and culture“</td>
</tr>
<tr>
<td><strong>Ratification of appointments</strong></td>
<td>Appointments to federal agencies with important regional implications</td>
<td>None specified</td>
<td>None specified</td>
<td>Supreme Court justices; officer, director or member of Crown corporations, boards, agencies and tribunals with &quot;regional impact“</td>
<td>Supreme Court justices (60 days to act); heads and directors of Crown corporations, boards or commissions subject to Financial Administration Act</td>
<td>Governor of Bank of Canada; heads of national cultural institutions, regulatory boards and agencies</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>None specified</td>
<td>None specified</td>
<td>Ratify non-military treaties</td>
<td>None specified</td>
<td>Constitutional amendments on linguistic or cultural rights or civil law Supreme Court justices to be approved by majority of full Senate, Quebec Senators and Senators from other provinces</td>
<td>Six-month suspensive veto over &quot;matters of national importance such as national defence and international issues“</td>
</tr>
</tbody>
</table>

* Justices from common law provinces to be approved by majority of Senators from those provinces; judges from "civil law provinces“ [Quebec] to be approved by majority of Senators from "civil law provinces“ [Quebec]

On the distribution of Senate seats, *Shaping Canada’s Future Together* again recalled the 9 June 1990 communiqué: "[T]he Government of Canada proposes that the composition of the Senate provide for much more equitable provincial and
territorial representation than at present."\textsuperscript{114} The Special Joint Committee was asked to take into account several factors, including the "nearly 80-fold difference in provincial populations," Canada's linguistic duality and the need for aboriginal representation; and refers to the Canada West Foundation proposal for equal representation and the Macdonald Commission's recommendation for an "equitable Senate."

While the word "equitable" appeared a number of times in the discussion of the distribution of Senate seats, it seemed possible the federal government had not ruled out equal provincial representation. Prime Minister Mulroney said that "equity includes a range of possibilities, from weighted representation of member states, such as in Germany, to equal representation of provinces."\textsuperscript{115} Premier Getty was reported as saying that the Prime Minister told him the "federal government has not sided with anybody against equality" and that if Canadians . . . say [in the hearings] that it should be an equal Senate, it will be."\textsuperscript{116} While the Manitoba Task Force suggested seats "should be distributed equally or equitably,"\textsuperscript{117} Premiers Wells and Getty remained staunch advocates of equal provincial representation.

The federal proposal highlighted a number of facets of the representational role of an elected Senate. On the one hand, the representation of the interests of the constituent units was important: "[The] reality of contemporary Canadian politics is that provinces and territories, and not regions, are basic to our sense of community and identity. Provinces should therefore replace regions as the basic units for Senate representation." At the same time, the federal government proposed that aboriginal representation be guaranteed in a reformed Senate.\textsuperscript{118} This suggestion is not new; it emerged, for example, during the hearings of the Special Joint Committee on Senate Reform in 1983.\textsuperscript{119} In turn, other groups may seek enhanced or even guaranteed representation in the Senate. Indeed, the National Action Committee on the Status of Women suggested fifty percent of seats be reserved for women by having two seats rather than one for whatever electoral districts are created.\textsuperscript{120} In a similar vein, Robert Keaton, president of Alliance Quebec, said an elected Senate may not

\textsuperscript{114} Shaping Canada's Future Together 19
\textsuperscript{115} House of Commons Debates 24 September 1991 2588
\textsuperscript{116} The Globe and Mail 26 September 1991
\textsuperscript{117} Manitoba Task Force Report (1991) 66
\textsuperscript{118} Shaping Canada's Future Together 18, 9 (emphasis in original)
\textsuperscript{119} The Native Council of Canada and the Métis National Council both endorsed specific Senate representation for aboriginal people (Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform 20:53, 22:5)
\textsuperscript{120} Judy Rebick, Barbara Cameron and Sandra Delaronde "Why we want half the Senate seats" The Globe and Mail 28 October 1991. For a dissenting view see: Jeffrey Simpson "Playing the politics of exclusion is a dangerous game" The Globe and Mail 9 October 1991
represent anglophone Quebecers unless there are specific guarantees.  

As debate ensues, there will be tension between what Professor Cairns has called the “territorial pluralism of federalism” and the “multiple particularistic identities of a modern people.” The latter — bolstered by the recognitions in the Canadian Charter of Rights and Freedoms — could lead to conflicting definitions of the representational role of the reformed Senate. This will be particularly so in relation to Quebec. If the Senate is to represent and protect not only the interests of the residents of the constituent units of the federation, but also those of minorities — as was the case at Confederation — the call for equal provincial representation presents a conundrum. Will it be possible to obtain agreement on what one academic commentator has labelled a “2½ E Senate” or will certain provinces refuse to accept anything less than an “equal” Senate? The answer is not obvious. What is clear is that Quebec, which has traditionally paid little attention to Senate reform, will be obliged to confront the implications of the various options — both on their own and in the context of a possible agreement on the range of issues covered by the federal proposals and the report of the Special Joint Committee.

As Canada faces a constitutional crossroads, Senate reform has the potential of being an important part of the solution. By giving the provinces outside Central Canada a greater say in national-decision making, Senate reform could help secure an eventual agreement that would also acknowledge Quebec’s distinct position within Canada. At the same time, enhancing the legitimacy of a discredited federal institution should increase the likelihood that difficult national decisions will find broad acceptance and possibly heighten Canadians’ allegiance to the federal government. The search for such an agreement will bring to the fore a range of views about how Canadians wish to be governed and the role they expect their

121 The Gazette 5 October 1991

122 Alan C. Cairns “Constitutional Change and the Three Equalities” in Ronald L. Watts and Douglas M. Brown eds Options for a New Canada (Toronto 1991) 84

123 Roger Gibbins “2½ E’s may not be enough” The Globe and Mail 27 September 1991. Premier Wells calls for a “true Triple-E Senate” and has stated: “We believe that anything less is a denial of the fundamental principles of federalism and there can be no justification for such denial.” (“Commentary on the Federal Government’s Proposals” (1991) 11). At the time of the June 1990 meeting, all but three premiers (Bourassa, Peterson and Ghiz) were on record as supporting Triple-E reform. The election of three New Democratic Party (NDP) governments since then changed the configuration of Premiers’ positions. On 8 June 1991 at the NDP’s federal convention the following resolution was adopted: “The New Democratic Party reaffirms its longstanding commitment to abolish immediately the unelected, unrepresentative Senate. At the same time, we recognize the need for new federal institutions which will give provinces, territories and regions a democratic voice”

124 Lise Bissonnette has suggested that unlike the proposed distinct society clause, which she believes may not often be invoked, restructuring the Senate will affect the “equilibrium of forces” within Canada (“Le clair objet du désir” Le Devoir 28 October 1991). See also José Woehrling Le ‘triple E’ n’est pas la solution” Le Devoir 23 November 1991. In a highly decentralized federation or a system of sovereignty-association, the Senate would probably have limited relevance to Quebec; this may help explain the Allaire report’s endorsement of abolition (Parti libéral du Québec “Un Québec libre de ses choix” (28 January 1991) 47-8)
representatives to play. In response, those engaged in that search will be called on to show ingenuity, resolve and generosity — as did the Fathers of Confederation when they struggled some 125 years ago to shape a second chamber for the Canadian federation.
PART II

CONSTITUTIONAL ROOTS
It is singularly appropriate that we examine the early definitions of collective identity in French Canada at a time when we are celebrating the bicentennial of constitutionalism. For since its inception, Canadian constitutionalism has struggled with the definitions of collective identity which came into conflict with its individualistic and libertarian foundations. In the case of the Constitutional Act it was the constitution's inability to accommodate the aspirations of French Canadian politicians which led to its ignominious and violent demise in Lower Canada. Still, the inherent limitations of a colonial constitution never intended to confer local autonomy do not solely explain its rejection in Lower Canada. For even had the constitution been amended by the mystical formula of responsible government, the Patriotes would have rejected it. As Papineau pointed out in 1836 an executive council could never be responsible because ministers would inevitably be “bribed or tampered with . . .”\(^1\) Simply put, by the 1830s French Canadian political discourse was dominated by idioms which ran contrary to the evolution of British parliamentary democracy. Indeed, the dominant view in French Canada at the time of the Rebellions was that constitutionalism had been utterly corrupted in Britain, a society itself in marked decline.

To understand the political language of the past we have to understand its structures. One of the key assumptions of a contextualist approach to the evolution of political discourse is that it assumes that historical actors knew precisely of what they spoke, that they and their audiences shared an understanding of the meaning of key words and concepts and that, surprisingly, they need not have read in the future to give their discourse significance. Avoiding anachronism means that we must suspend the tendency to assume that political texts are transparent; that is, we must begin from the assumption that the meaning of political terms is not constant over time.\(^2\)

Putting political discourse in its proper context, creating a true history of meaning in the political sense, has not been a dominant theme in Canadian historiography. The historiography dealing with Lower Canada reveals on the contrary a long tradition of present-minded debate on the relationship between “liberalism” (usually undefined) and “nationalism” (usually over emphasized). The

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\(^1\) NA Fonds Famille Papineau 2162-2165 Louis-Joseph Papineau to Marshall Spring Bidwell 16 April 1836

\(^2\) For a classic theoretical statement of this view see Quentin Skinner “Meaning and Understanding in the History of Ideas” *History and Theory* 8 (1969) : 3-53
obvious contemporary references in the work of these historians has led one recent commentator to refer to one school's interpretation as "cité libriste." The anachronistic nature of this debate can be demonstrated in the tendency of historians to chastise the Patriotes for not having been mid-nineteenth century English liberals, which of course they could not have been, and its counterpart of making them perhaps the most advanced political and economic thinkers on the planet at the time, espousing an "entrepreneurial spirit" to quote one commentary from the entrepreneurial eighties.

Like so much in Canadian history, the origins of this debate might be traced back to our dear Lord Durham, who as Ajzenstat has so rightly argued, deserves a central place in our historical consciousness. Durham's critique of French Canada was based on the fact that it did not correspond to his vision of a dynamic and progressive society. Moreover, Durham enshrined the notion of the superficiality of French Canadian liberalism, writing that the Patriotes "used their democratic arms for conservative purposes, rather than those of a liberal and enlightened movement." While Durham's assimilation prescription has been reviled by generations of historians, this aspect of his interpretation of French Canadian political discourse and behaviour has been taken up, and admittedly simplified, in the work of historians down to the present day. As brilliantly perceptive as Durham was, it is good to remember that he too was a product of his time and his culture; and at the risk of sounding heretical, we might also speculate that he too might have missed the essential meaning of French Canadian political discourse because it was so radically different from his own.

I am maintaining that the liberal-conservative, traditional-modern, and feudal-capitalist dichotomy posited in much of the historiography as the central element of conflict within the period is at best a dangerous oversimplification, at worse largely irrelevant. A few suggestive recent studies support such a contention. Consider, for example, the simple question of the definition of liberalism in French Canadian political discourse. Few historians have been explicit about what they meant by the term. André Vachet, however, has forcefully challenged the notion of a coherent French Canadian liberalism for the whole of the nineteenth century precisely by attempting a more accurate definition. While we might disagree with his analysis of the 1850s, surely Vachet's argument that French Canadian discourse before 1837 was not liberal because it rejected the notion of possessive individualism is supported implicitly by most of the historiography. More recently, a highly suggestive

3 Yvan Lamonde "L'histoire culturelle et intellectuelle du Québec : tendances et aspects méthodologiques" in his Territoires de la culture québécoise (Québec 1991) 12
4 On the historiography dealing with French Canadian political discourse before 1837 see Louis-Georges Harvey "Importing the Revolution : The Image of America in French Canadian Political Discourse, 1805-1837" (Ph.D. Dissertation (History) University of Ottawa 1990) Introduction and chapter 1. See also Harvey and M. V. Olsen "French Revolutionary Forms in French Canadian Political Discourse 1805-1835" Canadian Historical Review LXVII 3 (Sept 1987) 374-392
5 Cited by Janet Ajzenstat The Political Thought of Lord Durham (Kingston 1988) 80
6 André Vachet "Idéologie libérale et la pensée sociale au Québec" in C. Panaccio and P. A. Quintin eds Philosophie au Québec (Montréal 1976) 113-126

Louis-Georges Harvey
article by Peter Smith argues that pre-Confederation political discourse might be more appropriately analyzed in the light of studies on civic humanism in Anglo-American discourse. Smith maintains that the dialectic of wealth and virtue was the central component of that discourse and bemoans the fact that this potentially rewarding avenue of research has not been explored by Canadian intellectual historians.7 Here, I find myself in complete agreement with Smith, at least where French Canadian political discourse before 1837 is concerned, having arrived separately at the same conclusion.

The argument here then is that the first distinct society, that defined by the Patriotes, was constructed in the language of civic humanism. Additionally, I contend that this language was given meaning by an extremely powerful and positive image of the United States which emerged in French Canada between 1815 and 1837. Following the Anglo-American lead, the Patriotes sought to preserve an agricultural society which they saw as the basis of the population's political virtue from corruption by an alliance of commerce and political power. In this they represented one strand of a civic humanist or classical republican tradition which found fertile ground and took firm root in the New World.

In The Machiavellian Moment, Pocock traced the development and redeployment in a number of different historical contexts of a pattern of political discourse associated with classical theories of power and corruption. Pocock argues that a particular view of the basis of political power and the cyclical nature of historical development in political entities, which he identifies as civic humanism, was first developed in Florentine Italy, revived and used in political analysis in seventeenth century England, re-emerged in the opposition literature of mid-eighteenth century England and finally was transferred to America where it helped shape the political discourse of American revolutionaries.8

The "Machiavellian Moment" was, then, first the point where Florentine writers attempted to come to terms with the historical development of their republic. These writers were themselves influenced by certain patterns "in the temporal consciousness of medieval and early modern Europeans [which] led to the presentation of the republic and the citizen's participation in it, as constituting a problem in historical self-understanding . . ."9 Pocock presents their dilemma as one which constituted a "historically real" problem, one which brought forth an explicit definition of the difficulties which republics faced in attempting "to remain morally and politically stable in a stream of irrational events conceived as essentially destructive of all systems of secular stability."10 In defining this problem Machiavelli and his contemporaries developed a particular language, or idiom, within which

9 Ibid. vii
10 Ibid.
certain terms acquired a great deal of importance. At the root of this pattern of discourse was the assumption that the instability of republics grew out of a confrontation between the “virtue” of their citizenry, the essential requirement for political stability, and the threat to that virtue posed by “fortune” and the inevitable “corruption” it brought with it.

The “Machiavellian moment,” writes Pocock, also “had a continuing history, in the sense that secular political self-consciousness continued to pose problems in historical self-awareness, which form part of the journey of Western thought from the medieval Christian to the modern historical mode.” Here he is arguing that the language of Florentine thinkers, the idioms and modes of argument they used, “left an important paradigmatic legacy . . .” Pocock finds the language of Florentine Italy restated in the Anglo-American thought of the seventeenth and eighteenth centuries, with the same emphasis on “virtue” and “corruption.”

To be sure, he readily admits that this language underwent a transformation in its adaption to each new circumstance, and that in Anglo-American discourse it existed alongside a “constitutionalist” mode of political discourse; but the language of civic humanism proved well suited to dealing with the political contexts of these differing periods and was adapted by new historical actors to fit the contexts of their political situations. Thus, in seventeenth-century England writers such as James Harrington meshed the language of civic humanism with the English “common law understanding of the importance of freehold property,” and thus made property “the basis of political personality.” In the same way, Harrington moved away from a purely moral definition of corruption to one which stressed the disjuncture between the distribution of property and the distribution of power within the state.

Once integrated into English political culture, civic humanism became a form of discourse available for use in later situations. In the eighteenth century opposition politicians came to see corruption in the concentration of power in the hands of a few ministers. What is more, they argued that land ownership accounted for the political virtue of the English citizenry. Thus, the discourse of English opposition groups came to be dominated by references to the corruption of the “court party” and by dire warnings of the threat posed to liberty by the machinations of moneyed interests connected with the King’s ministers. This form of discourse, argues Pocock, was transferred in the second half of the century to the American colonies. Amidst the background of the deepening imperial crisis, colonists came to see the threat to their liberty as growing out of the same corruption of moneyed interests. Because the colonial economy was primarily agricultural, and because colonial society was in large part made up of landholders, the pattern of discourse which was derived from civic humanism allowed colonial leaders to define their society as politically virtuous and contrast it to the increasingly corrupt political system of the mother country.

11 Ibid.
12 Ibid. 384 386
13 Ibid. chapters XIV, XV

Louis-Georges Harvey 128
In establishing the presence of civic humanism in Anglo-American political discourse, Pocock challenged historical interpretation which stressed the rise of liberalism as the principal component of that discourse from Locke forward. Rather he argues that a liberal or modern political theory of property was in conflict with a more ancient understanding of the role of property in "determining the relations of personality to government." The persistence of this "agrarian ideal" also shifted the focus of Anglo-American political theory toward a consideration of the struggle between "virtue and corruption" within society itself. "From 1688 to 1776 (and after)," writes Pocock, "the central question in Anglophone political theory was not whether a ruler might be resisted for misconduct, but whether a regime founded on patronage, public debt, and professionalization of the armed forces did not corrupt both governors and governed; and corruption was a problem in virtue, not in right, which could never be solved by asserting the right of resistance. Political thought therefore moves decisively, though never irrevocably, out of the law centred paradigm and into the paradigm of virtue and corruption."

Although their studies were not predicated on an explicitly contextualist theory, Bernard Bailyn and Gordon Wood made much the same point in their examinations of early American thought. Analyzing the political discourse of their periods, they found that the civic humanist paradigm was not only operative, but dominant in the discourse of the revolutionary generation. Indeed, American intellectual historians have traced the continuing history of civic humanist and classical forms through the political debates of between Republicans and Federalists down to those which opposed Jacksonian Democrats and their whig critics in the 1830s and 1840s. Lance Banning, for instance, found that the ideology of Jeffersonian Republicans was laden with the language of eighteenth century English opposition groups and that this language formed the core of the debates over Hamilton's economic program, the American debate over the French Revolution and the Republican reaction to the Alien and Sedition Acts. Robert Remini and Daniel Walker Howe found the same idioms present in the discourse of the Jacksonian period, shaping the political culture of both the Democrats and whigs. It is useful to note that the Jeffersonians and the

14 Pocock "The mobility of property and the rise of eighteenth-century sociology" in his Virtue, Commerce, and History (Cambridge 1985) 108
15 Pocock "Authority and Property: The Question of Liberal Origins" in his Virtue, Commerce and History 48
16 Bernard Bailyn The Ideological origins of the American Revolution (Cambridge MA 1969); Gordon Wood The Creation of the American Republic (New York 1972). Wood, however, argues that the adoption of the Federal Constitution marked the "end of classical politics" and the beginning of a more indigenous and modern conception of politics based on the balance of interests within the state as embodied in the constitution itself. This is a view which Pocock challenged in his Machiavellian Moment, and which has come under fire in more recent studies. See Wood Creation of the American Republic, chapter XV; Pocock Machiavellian Moment 513-552. On Jeffersonian thought see Lance Banning The Jeffersonian Persuasion (Ithaca 1978), chapters 5 to 9. On the whigs and Democrats see Howe The Political Culture of the American Whigs (Chicago 1979) and Remini Andrew Jackson and the Course of American Freedom (New York 1981). The historiography of "Republican Revisionism" and the liberal critique of that view has recently been summarized by Banning "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic" William and Mary Quarterly (1988) 3-19
Jacksonians were both contemporaries and neighbours of the Parti canadien and the Parti patriote and that American politics were widely reported in Lower Canada.17

By the late eighteenth and early nineteenth centuries Anglo-American civic humanism, particularly its American variant, had become obsessed with the corruptive potential of an alliance of commerce and power. The relevance of this pattern of discourse to Lower Canada should be apparent. Here the socio-political context created the classic civic humanist confrontation. On one side stood the elected representatives of a largely rural population, on the other the appointed representatives of the urban merchant class allied, most frequently, to the governor. Surely any country politician drawn from eighteenth century Britain or Jeffersonian America would have recognized the potential for corruption and degeneration inherent in such a situation.

That Lower Canadian politicians came to recognize the same potential is hardly surprising. Not only did they have access to the works of authors from the mainstream of the civic humanist tradition, but they shared in common with most educated westerners of their time a grounding in classical thought and history which in itself provided a basis for the civic humanist view of history. As one might expect, classical allusions occurred frequently in discussions of current political problems, particularly when the texts in question were highly theoretical. From D. B. Viger's Considérations, published in 1809, which cited the fall of Rome as an example of corruption and degeneration, to articles in la Minerve of the 1830s which restated the argument, the classical view of history and its relevance in interpreting social and political change appears almost as an article of faith.18 The cycle of corruption and degeneration was also emphasized through references to more recent history. The Italian city states of the renaissance and eighteenth-century Britain were used in the very first issue of le Canadien as examples of societies which had been or were in danger of being corrupted.19 Indeed by the 1830s Europe as a whole was being portrayed as being well along the downward slope of historical decline, with its societies marked by the twin characteristics of political corruption and social degeneration.

Canadien politicians, of course, defined their own people as virtuous. In the period before 1815 this was often done to contrast the habitants qualities with the defects of American migrants moving into the Townships. The latter, in the pages of le Canadien appeared as a morally inferior and politically corrupt people. As to the source of the Americans' corruption, the paper's political writers were quite explicit:

17 On the diffusion of American news in the colony see Harvey “Importing the Revolution...” ch 2
18 Denis-Benjamin Viger Considérations sur les effets qu'ont produit en Canada... (Montreal 1809) reprinted in Viger Oeuvres Politiques (Montreal 1970). On the history of Rome, Viger writes: "Ce qu'il y a de plus surprenant dans le tableau de leur histoire; c'est que le temps de la dépravation fut celui des plus affreuses révolutions... Gangrénée intérieurement, elle [Rome] tomba pour ainsi dire d'elle même, affaissée par son propre poids... L'épicurisme moderne a produit les mêmes effets chez les nations qui ont eu le malheur de se laisser entrainer par leur exemple"
19 Le Canadien 22 November 1806
the American had fallen through the influence of commerce.²⁰ By the mid 1820s French Canadian political discourse had turned that argument on its head while remaining in the civic humanist paradigm. To put it simply, virtue became North American in the decade following the end of the War of 1812. Now the social basis of French Canadian political virtue acquired a historical and geographic explanation, and one which helped reverse the position of external political models to the benefit of America and the prejudice of Great Britain.

Implicit in that view was a redefinition of Lower Canadian society as distinctly North American. The argument that the colony was different in its social organization from European models was made first in light of the Union Crisis, when it seemed that Great Britain was interfering in the colony's internal affairs without its consent. In time, however, the same pattern of discourse would serve as a rationale for demanding change in the very constitution the Canadiens had sought to protect in 1823. Lower Canadian political institutions, it was argued, had to conform to North American society, where disparities in wealth were less pronounced because of widespread land ownership and where aristocracies had failed to take root. In short, North American political institutions had to reflect the democratic ethos of the New World.

This pattern in French Canadian political discourse will certainly be familiar to students of the early national period in American history. Indeed, since the early moments of the Revolution, Americans had believed in their particular destiny as a North American nation to preserve liberty from the corrupt governments of the old world. It was in this vein that Thomas Paine, for example, had proclaimed America the final asylum of liberty and that Jefferson had dreamed of an empire for liberty stretching across the continent.²¹ This element in American discourse, argues Pocock, accounted for the continued relevance of civic humanist forms in the new Republic. The dream of North American liberty was tied up with the concept of land ownership as a basis for political virtue and the vision of a vast agricultural republic.²² The democratic and republican destiny of the United States and of the continent as a whole was rarely more evident in American discourse than in the years following the end of the War of 1812. Most historians consider the “Era of Good Feelings,” as one marked by the rise of American nationalism and as one where dreams of Manifest Destiny took root.²³ Indeed, defending the particular character of North American politics even became official policy with the proclamation of the Monroe Doctrine in December of 1823. For Monroe’s message was more than a warning that new European military incursions would not be tolerated in the western hemisphere; it also proclaimed that European political systems were no longer suitable to the New World.

²⁰ See, for example, the articles on American migrants to the Townships published in le Canadien 8 November 1807, 28 November 1807, and 26 December, 1807
²¹ Banning Jeffersonian Persuasion 82-83
²² Pocock Machiavellian Moment, chapter XV
Significantly, French Canadian discourse began to emphasize the distinctively North American nature of Lower Canadian society at about the same time that Monroe was reading his message to the American Congress. Indeed, a pronounced shift occurred in 1823-1824, as more and more French Canadian political texts made the link between North American society and democratic institutions. Still, intercultural transfers are rarely so mechanistic as the timing here might suggest, and while Monroe's speech was fully reprinted in the colony, many French Canadian allusions to the same theme predated it.

The contrast between Europe and America was vividly drawn in *le Canadien* in the early months of the struggle against the Union: "En Europe il y a une dépendance continue depuis le plus grand jusqu'au plus petit. En Amérique il y a des forêts immenses qui attendent un maitre ou des bras pour les cultiver; il n'y a ni lord, ni seigneur; le mérite individuel est ce qui forme la règle de conduite pour la masse du peuple. La force n'y fait rien, parce que tout homme qui travaille est toujours à même de s'y soustraire. Ainsi donc, tout système de gouvernement qui n'a pas pour but le bien être général, ne peut durer longtemps." By 1823 an article in the same paper stated that the *Canadiens* were "descendants de Français, mais ils sont natifs et habitants de l'Amérique; ils ne veulent plus être entraînés dans les guerres de l'Europe contre l'Amérique." Later the same year the paper commented that "il y a encore dans le vieux continent des millions d'hommes sans existence politique; selon moi ce ne sont que des troupeaux de bétails, destinés à porter le joug."

It was also in 1823 that Papineau, writing from Europe, commented on the social inequality and degeneration which marked life in Britain and France. The implication of his analysis was that North American society was free of those abuses. For although Papineau found that England had maintained a free government despite these social ills, he noted that "le peuple n'est ni aussi heureux ni aussi content comme il l'est en Amérique." Pierre de Sales Laterrière, living in Great Britain at the time, expressed the contrast in terms of the cycle of corruption and degeneration so common in the civic humanist view of history: "On voit [...] l'Amérique régénérer et en imposer par la liberté qui existe dans toutes ses institutions, à toutes ces vieilles machines européennes..." he wrote in August of 1823. Inevitably, such a view led commentators to predict that the United States would rise to become a great nation. Papineau expressed that view in one of his letters from London: "A quel degré de

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25 *Le Canadien* 1 January 1823

26 *Le Canadien* 12 November 1823; cited by Reid 193

27 *RAPQ* (1953-1955) 205-210, Papineau to Julie Papineau 27 June 1823

28 NA Fonds Les Eboulements MG8 F131 1313-1317 Pierre de Sales Laterrière to Paschal de Sales Laterrière 25 August 1825
prospérité ne sont donc pas appelés les Etats-Unis qui avec le même caractère
d'industrie et d'activité de ce pays sont affranchis de presque tous les abus qui règnent ici." 29

Despite these private predictions that the American form of government would
combine with the natural state of North American society to surpass the political
achievements of Europe, America did not immediately become a positive political
model in French Canadian discourse. The notion of democratic or representative
government as the form most appropriate to North America, however, made
significant inroads into that discourse before 1830. Increasingly, as reform of the
legislative council became an important topic of discussion, canadien political writers
rejected the upper chamber's aristocratic underpinnings. An early and radical
statement of that view came in a pamphlet attacking the council from the pen of
François Blanchet. Blanchet's argument rested squarely on the notion that North
American society differed essentially from that of Europe and that, as North
Americans, the Canadiens could never accept a landed aristocracy. The pamphlet
even provided a historical backdrop for the argument, maintaining that the Canadiens
had acquired a different character from the French long before the Conquest. In New
France the habitants had been able to get the tithe reduced, the censitaire had become
as prosperous as the seigneur, and the church had been democratized through the role
of elected syndics. As a North American people the Canadiens had evolved to a point
where European institutions were no longer acceptable:

Le continent d'Europe diffère essentiellement de l'Ancien Continent sous
presque tous les rapports. Le climat, la nature du sol, les productions
naturelles, les végétaux, les animaux, tout y difère. Les hommes y sont
aussi différemment modifiés, et vouloir leur faire trouver bon en
Amérique, ce qu'ils trouvent bon en Europe, est une absurdité
complète... Croit-on que lorsque l'opinion publique dans tout le vaste
continent de l'Amérique est en faveur des gouvernements représentatifs, il
soit bien facile d'établir et de maintenir en Canada une noblesse
dégénérée. L'idée est vraiment des plus ridicules. Telle est la tournure de
l'esprit humain qu'il semble qu'il faille tout le contraire dans le nouveau
monde. En Amérique il suffit de travailler pour être heureux.30

The rejection of degenerate European aristocracies in Blanchet's argument did not
mean that the emerging patriote party's philosophy was wholly dedicated to
democratic institutions in the modern sense. Indeed, Papineau still argued in 1826 for
an appointed council, modified by the admission of rich, independent and thus,
Suggestions for reform of the council were made within the framework of a social analysis which stressed the egalitarian nature of North American society.

Jacques Labrie’s constitutional discussion of 1827, for example, argued for change in the council along these same lines. Labrie made the point that English politicians debating the Lower Canadian constitution’s merits in 1790 had seen the need for institutions more in keeping with conditions in the New World. According to Labrie, Fox and other opposition critics, “...suggérèrent que l’on pourrait confier à un peuple de pères de familles, tous propriétaires, et qui en conséquence auraient des habitudes morales et paisibles, et souvent étrangères à des prolétaires, une action plus directe dans sa législation, que ne s’était réservé même le peuple le plus libre des nations européennes; ils souhaitèrent que le Conseil Légitatif, qui en Canada devait tenir lieu de la Chambre des Lords, fut électif à vie.”

The distinction made here between “prolétaires” and “propriétaires” is significant. The discourse of canadien political writers assumed that land ownership conferred qualities consistent with the virtuous practice of politics, and North America was a society of landholders. Papineau in an address to his electors made the point in more lyrical, and distinctively Jeffersonian, language: “Nous avons tous une mise à peu près égale dans le fonds social, nous ne devons pas souffrir que des sociétaires privilégiés emportent tous les profits à discrétion et sans être tenus de nous rendre compte de leur administration. La nature, ou plutôt le Dieu de la nature, en donnant aux hommes à une époque où ils sont aussi éclairés qu’en la présente, les terres fertiles et d’une étendue illimitée de l’Amérique, les appelle à la liberté, à l’égalité des droits aux yeux de la loi, sur toute l’étendue de plus vaste des continents, depuis les rives de la Baie d’Hudson, jusqu’à la terre de feu.”

Such an emphasis on the political destiny of the North American continent inevitably implied a re-evaluation of the image of the United States. Indeed, by 1827, Papineau’s admiration for the American republic, expressed in the same document, was clear: “Il n’y a pas sur la surface du globe une société plus belle, mieux réglée, plus prospère où les peuples soient aussi contents, aussi universellement admirateurs de leurs institutions politiques, comme ils le sont dans toute l’étendue de cette puissante confédération. Elle fait en Europe l’admiration des plus grands hommes d’état. [ . . . ] Elle est appelée, même avant cette génération passe, à devenir le plus utile des alliés ou la plus formidable des rivales de l’Angleterre.”

Such comments marked an important transition in Papineau’s thought. For although the Speaker’s public utterances still occasionally praised the British constitution, the political crises of the 1820s were pushing him closer to openly advocating republican government. Before 1830, however, the patriote movement had

31 NA Fonds Famille Papineau MG24 B2 vol 1 669-674, Papineau to Sir Francis Burton, November 1826; see also vol 1 640-659, Papineau to Sir James Mackintosh 25 April 1826
32 Jacques Labrie Les premiers rudiments de la Constitution britannique . . . (Montréal 1827) 39
33 Louis-Joseph Papineau Adresse à tous les électeurs du Bas Canada (Montréal 1827) 3-4
34 Ibid. 18-19

Louis-Georges Harvey
not progressed to that point and consequently the image of the United States had not yet become a central part of its discourse. Still, the changes in that discourse, particularly the distinction between North America and Europe, were accompanied by the elaboration of a far more favourable image of the United States than that which had existed before 1815.

In the years leading up to the Rebellions, the image of the American remained firmly rooted in the civic humanist archetype of the ideal citizen. As the battle between the assembly and imperial authorities intensified, discussion of the United States and of the American character became a central component of political discourse within the colony. Much of that discourse continued to point out the differences between North America and Europe. Papineau, for example, speaking in favour of the Ninety-Two Resolutions in the assembly, could not resist making the comparison between the state of public opinion and enlightenment in the American republic and in European monarchies:

Dans un temps où des gouverneurs militaires couvrent l'Europe de sang, les États-Unis, sans alarme, sans trouble, ouvrent leurs ports comme l'asile du malheur, où viennent se froisser et se briser toutes les opinions contre des opinions bien meilleures et bien plus profondément gravés dans les coeurs. C'est pourquoi ils ne craignent pas les sentiments des généraux de Bonaparte, qui s'y sont réfugiés. Toutes les opinions, tous les préjugés de la vieille Europe viennent tomber auprès du républicanisme de l'Union. On n'y a pas besoin d'armée, ni de censeur de la Presse. Chacun peut tout dire, tout écrire, et l'intérêt de tous assure qu'il n'y a pas de danger que les erreurs y prennent racine, et s'étendent au point de devenir contagieuses . . .

The basis of this ability to shape the new immigrants into virtuous North Americans came from the particular democratic ethos of the American people which, in turn, was derived from the particular social conditions of the New World. This was again highlighted in 1835 when a correspondent for l'Écho du pays published his impressions of Vermont society. Writing from the tiny community of Montpelier Vermont, he argued that "l'égal répartition de la propriété en Amérique est une forte et puissante barrière opposée à l'oppression que facilitent tant dans la vieille Europe les fortunes colossales de l'Aristocratie." The author went on to draw the obvious conclusion for Lower Canada, declaring that "l'état de société y étant le même, il doit également jouir des avantages d'un gouvernement représentatif, responsable et soumis à l'opinion publique. Ce gouvernement, je le répète, est le seul possible en Amérique." Americans and French Canadians shared the common distinction of being North Americans, and as such were inherently more virtuous than the impoverished European masses.

35 Papineau, speech in the Assembly 18 February 1834 reprinted in Etat de la province (Québec 1834) non paginated [8]
36 “Situation de Montpelier—Etat de société en Amérique et aristocratie en Europe” in l'Écho du pays 3 September 1835
Still, despite the assumption inherent in the logic of North American specificity, there remained room for commentary on the character of the American people in the political discourse of the 1830s. In some cases that discussion was prompted by the criticism of newspapers opposed to the patriote cause who now saw the necessity of discrediting both the Americans as a people and their form of government. Having adopted the Americans as a model, the Patriotes were now forced to defend their choice.

On one level, the patriote press in the 1830s continued the tendency of the earlier decade which emphasized the virtue of the American farmer. In fact, la Minerve even reprinted texts that had been published in the 1820s which underlined the good manners and virtue of the American farmer. One such text appeared in June of 1836, based ostensibly on the unpublished account of a canadien traveller. Here, as it had in the 1820s, the French Canadian press heralded American farmers (in this case New England farmers) as "des hommes éclairés et vertueux, remplis de force et d'énergie, pénétrés d'amour pour leur pays, capables par cette raison de tous les sacrifices nécessaires pour en cimenter l'indépendance . . ."37

The American people did not, however, always live up to the image that was being drawn of them in the patriote press. The 1830s were years where the political effervescence that characterized Jacksonian democracy was often expressed in mob action. Riots broke out in New York City in opposition to the growing abolitionist movement, while in Baltimore the people took to the streets in protest of the activities of the Bank of the United States. The Gazette de Québec, which had followed John Neilson in his opposition to the patriote movement, saw the activities of the mob as evidence of the instability of American political institutions. The patriote press, on the other hand, tried to explain the rioting in American cities as either the healthy expression of democratic life, the result of foreign intrigues, or a temporary aberration in the otherwise orderly progress of republican institutions.

The idea that political unrest in the United States was the result of European influence gained wide currency in the French Canadian press of the 1830s. Riots in Baltimore directed at the Bank of the United States prompted the editor of le Canadien to write of the foreign contamination of American politics through European immigration: "L'Amérique étant devenue l'égout du rebut des peuples de l'Europe elle doit s'attendre au renouvellement fréquent de pareilles scènes; et elle doit prendre ou prendra promptement, nous n'en doutons pas, des mesures énergiques pour réprimer les violences populaires dont elle est devenu le théâtre au grand scandale du monde entier, et au détriment des institutions libérales qui y règnent . . ."38 Significantly, these comments came at a time when the Patriotes themselves were highly critical of foreign immigration. In addition they again underlined the European origin of political trouble in North America and that such subversion could even operate in the American republic. Reporting the same riots, l'Echo du pays saw the activities of the mob in Baltimore as evidence that the

37 "Extrait inédit d'un voyage aux Etats-Unis" la Minerve 1 June 1836  
38 Le Canadien 21 August 1835
American people were ever vigilant in guarding against the activities of institutions which might infringe on their liberties. Not unlike Lower Canadians, the good people of Baltimore had risen up against a local oligarchy: "Si l'on en cherche la source on trouvera qu'ils remontent à l'époque où l'opinion publique se déclara contre la banque des Etats, établissement qui eût fini par faire perdre à nos voisins leur liberté et à les mettre entre les mains d'une oligarchie puissante . . . ils [le peuple] prirent en horreur plus qu' jamais la tyrannie et les hommes qui voulaient la favoriser. Tout ce qui avait quelque rapport avec la banque excitait leur indignation, et le peuple une fois excité a peut-être été trop loin en quelques circonstances. On voit du moins que la faute n'est pas dans les institutions américaines bien dans l'aristocratie ministérielle des Etats-Unis." In the same article the journalist left no question of the support for this "aristocratie ministérielle:" "il est même à notre connaissance que l'Autriche soudoie des hommes qui se vendent à tout prix pour exciter des troubles chez nos voisins . . ."39 Thus, the source of political troubles in the United States could again be traced back to European interests and their subversive activities in North America.

If the political difficulties of the United States gave the Patriotes cause for concern, there was by the 1830s very little dissent from the view that American government embodied the form of political organization which was thought to be best suited to a North American society. Further, the Patriotes viewed the United States very much as a loosely knit federation of independent republics. In this they were consistent with the classical theme that republics could not be too large, because the common good would become unidentifiable in a large heterogenous country. The American experience seemed then, to be the fulfillment of Enlightenment ideal of the republic, an ideal made reality by the peculiar social conditions of the New World. Of course, this interpretation of American government was not unique to the Patriotes. One finds it in the writings of the French americophiles, and, indeed, in the political discourse of the Americans themselves.40

The theme of North American specificity and the emphasis on the United States as a political model merged in the patriote discourse of the early 1830s. Papineau openly avowed his republican beliefs in 1831 in speeches before the assembly which stressed the importance of making the elective principle the basis of Lower Canadian government. The Speaker made the explicit link between the social state of the colony and the need for political reform, and, increasingly, cited the United States as a model for political change in the colony. Thus, in speaking on reform of the legislative council in March of that year, he referred to the American government as " . . . le gouvernement où le système représentatif produit de si heureux effets, qui est le thème constant des hommes éclairés en Europe, et dont l'organisation sociale si sagement composée est vantée même par des ministres anglais . . ."41 Speaking of

39 L'Echo du pays 27 August 1835
40 For a discussion of European sources of the same view and of their availability in the colony see Harvey, "Importing the Revolution . . ." 2
41 Papineau, speech to the Assembly la Minerve 17 March 1831
American political institutions a few days later, Papineau declared that "... à peu d'exceptions elles sont parfaites, et les habitans des États-Unis sont sans comparaison les mieux gouvernés qu'il y ait sur la surface du globe."\(^{42}\)

By late 1832 and early 1833, reform of the constitution in order to create an elected legislative council became part of the patriote programme, and was enshrined as such in resolutions passed by the assembly.\(^{43}\) At this point patriote papers openly began to refer to the United States as the only acceptable political model for the colony. Here again the emphasis on the American political system was justified by the argument that it was in harmony with the special nature of North American societies. In the summer of 1833 \textit{la Minerve} argued that only the American form of limited government could apply in a situation where "un peuple est composé d'existences homogènes, c'est à dire, qu'il n'y a pas une énorme disparité de droits, de devoirs, de fortune, d'intelligence, de connaissances, d'occupations, et de respectabilité morale entre ceux qui le composent ..."\(^{44}\) \textit{Le Canadien} made the same point in an editorial published a few weeks later. Citing the egalitarian state of Lower Canadian society as incompatible with aristocratic institutions, the editor declared: "Le seul modèle que nous avons à suivre, ce sont les États-Unis où la société ressemble à la nôtre."\(^{45}\) Yet another editorial in \textit{la Minerve} dealt with the differences between European and North American political institutions in an article titled "Deux systèmes opposés." Arguing that the despotism which characterized European government fed on ignorance, inequality and fanaticism, the author noted that, with the exception of the British North American colonies, such forms of government had almost disappeared in the New World: "partout ailleurs les privilèges aristocratiques et les monopoles d'argent et de pouvoir, décrédités, honnis, ont disparu avec l'expulsion de ceux qui les exploitaient."\(^{46}\) The reference, of course, was to the United States which, according to \textit{le Canadien}, "possède la civilisation la plus avancée; j'entends par civilisation, les meilleures lois, le gouvernement le plus libre et le mieux organisé; la population la plus heureuse et la plus généralement éclairée ..."\(^{47}\)

The assembly's resolutions calling for constitutional change and the emphasis on the United States as a model for those changes were but a prelude for the more complete statement of the patriote position which came, in February of 1834, in the form of the Ninety-Two Resolutions. Indeed, the Resolutions themselves, albeit in rather veiled language, rejected the British political model in favour of the American. Thus, the 41st resolution reminded the British government of the Colonial Secretary's admission that the colony's inhabitants should have nothing to envy in the political

\(^{42}\) Papineau \textit{la Minerve} 28 March 1831

\(^{43}\) The Assembly voted a resolution asking that a convention be called to amend the constitution in order to make the Legislative Council more compatible with the state of Lower Canadian society on January 15 1833

\(^{44}\) "Société politique" \textit{la Minerve} 25 July 1833

\(^{45}\) Parent in \textit{le Canadien} 12 August 1833

\(^{46}\) "Deux systèmes opposés" in \textit{la Minerve} 26 August 1833

\(^{47}\) Parent in \textit{le Canadien} 20 September 1833
arrangements of their neighbours, adding that there remained a great deal worthy of envy in the American form of government: "... les États voisins ont une forme de gouvernement très propre à empêcher les abus de pouvoir et très efficace à les réprimer; que l'inverse de cet ordre de choses a toujours prévalu pour le Canada, sous la forme actuelle de gouvernement; qu'il y a dans les pays voisins un attachement plus universel et plus fort pour les institutions que nulle part ailleurs, et qu'il y existe une garantie de perfectionnement progressif des institutions politiques..." The 43rd resolution rejected the British political tradition as the sole source for constitutional reform in the colony. Rather, it suggested that consideration be given to the more liberal regimes which had been granted the American colonies, as well as to "... des modifications que des hommes vertueux et éclairés ont fait subir à ces institutions coloniales, quand ils ont pu le faire avec l'assentiment des parties intéressées." The 44th resolution cited the "consentement unanime avec lequel tous les peuples de l'Amérique ont adopté et étendu le Système électif..." as proof that "... il est conforme aux voeux, aux moeurs et à l'état social de ses habitants..."48 If the resolutions themselves left any doubts on the matter, Papineau dispelled them in his energetic defense of the Patriotes' political manifesto. The speaker predicted that before long "toute l'Amérique doit être républicaine..." and praised the government of the United States as far more liberal than the military despotisms of Europe.49

The Ninety-Two Resolutions firmly established the idea that the United States was the only appropriate model for reform of the Lower Canadian constitution. This view was echoed by La Minerve which, in its New Year's Day edition for 1835, again contrasted the sorry political state of Europe with the prosperity and stability of the American republic.50 Later the same year the paper explained that representative government had evolved naturally out of the peculiar social conditions of the New World, and that North Americans had begun to teach the lessons of liberty to old Europe. Only the continued existence of European institutions in the colony had prevented it from reaching the same degree of prosperity as its southern neighbour.51 For its part, l'Echo du Pays made no bones about where Lower Canadians should look for examples of improved political institutions: "... L'exemple du gouvernement modèle, les États-Unis, les a convaincu qu'il est celui qui offre le plus de garanties au sujet. Ce qu'ils voient faire le bonheur d'un peuple et lui procurer un état de prospérité inconnue encore chez aucune autre nation, ils le regardent avec raison comme ce qui approche le plus de la perfection."52

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48 The text of the "Quatre-quatres-vingt-douze résolutions" (1834) appears in T. P. Bédard Histoire de cinquante ans (1791-1841) (Québec 1869) 334-346. The resolutions cited appear on 345-346
49 See Papineau's speech in the Assembly 14 February 1834 reprinted in Etat de la province (1834) non paginated [7]
50 La Minerve 1 January 1835
51 La Minerve 23 November 1835
52 l'Echo du pays 31 December 1835
By 1835, the same sentiments were being expressed in public meetings across the province. Thus, a reform dinner held in Stanstead toasted the United States, and proclaimed, to the air of “Hail Columbia,” that the Canadiens should have nothing to envy their neighbours. At the St. Jean-Baptiste celebrations held in St. Denis the same year, two toasts were drunk to the United States, the first celebrating the liberty and prosperity of the American republic, the second calling for reforms in the colony which would leave Lower Canadians with nothing to envy their neighbours. Much the same sentiment was expressed the following year at celebrations held at St. Jean and St. Charles. When news of the Russell Resolutions reached the colony, the emphasis on the United States as a political model intensified. Papineau, speaking before a patriotic assembly held at St. Laurent in May of 1837, was unreserved in his praise of the American form of government, calling it “... la structure de gouvernement la plus parfaite que le génie et la vertu aient encore élevée pour le bonheur de l'homme en société.” Similarly, toasts made at public assemblies on the eve of the Rebellions praised the American Constitution as “un modèle de sagesse que nous envions.”

The Patriotes' admiration for American government then, grew out of the fact that its democratic institutions were more in keeping with the particular nature of North American society. It would be a grave error to believe, however, that French Canadians viewed the United States as a unitary government, or that when they referred to American constitutions they had only in mind the federal constitution. In fact, one of the most attractive elements of American political institutions for the Patriotes was the autonomy of state governments which they saw very much as independent republics within the federation. The genesis of the state governments lent credence to this view. New states, after all, adopted their own constitutions in democratically elected conventions before joining the Union. When Papineau, in 1837, praised the American form of government as the most perfect known to man, the process for the admission of new states was one aspect listed in support of his argument. Papineau used this example less than a year after the admission of the new state of Michigan. Nor had the process of constitution-making in the Michigan territory gone unnoticed in the patriote press. Le Canadien, for one, produced a

53 This was the 8th toast of the reform dinner held at Stanstead in January of 1835, reported in l’Echo du pays, 29 January 1835

54 Reported in le Canadien 6 July 1835

55 Reported in la Minerve 27 June 1836

56 Comité central de Montréal Procédés de l'assemblée des électeurs du comté de Montréal : tenue à St. Laurent le 15 mai 1837 (Montréal 1837) 10

57 See reports of the proceedings of the “fête champêtre” held at l'Acadie and at Lavaltrie in la Minevre 5 October 1837

58 The American Constitution, Papineau explained, “pourvoit d'avance à ce qu'un territoire dès qu'il y a 60,000 habitants puisse se constituer en état libre et indépendant. Il devient le maître et l'arbitre absolu de son sort.” See his speech in Procédés de l'assemblée ... 10
detailed report on the constitutional convention's activities. Moreover, the sight of a free people adopting their own form of government moved the paper's editor to reiterate the theme of North America as the cradle of political liberty.59

Of course, by the time these comments were made, the idea of revising the Lower Canadian constitution through a popularly elected convention had been around for some time. The assembly had even formally called for a convention as early as 1833. While this call might not have been inspired by an American constitutional convention, there was one compelling example of the American people acting in convention at the state level early in the period. In 1832, after years of political struggle over the issue of federal tariffs, the state of South Carolina took the drastic step of calling a convention to deal with the issue. This provoked the so called "Nullification Crisis," a test of strength between the federal government and a renegade state, which ended with President Jackson declaring South Carolina to be in a state of rebellion and dispatching federal troops to enforce the tariff. Although the Nullification Convention failed in achieving its goals, it was a stunning and well publicized example of direct participation in American politics. As such it was not lost on the Patriotes. The incident was widely reported in the press, with Lower Canadian papers reproducing the Nullification Ordinance and Jackson's Nullification Proclamation.60 A month after the first reports of the South Carolina convention voting the nullification ordinance appeared in the colony, the assembly passed resolutions calling on Great Britain to give an elected convention the power to amend the Lower Canadian constitution.61 The debates over the issue leave no doubt of the American inspiration of the measure.62

While the debates in the Lower Canadian assembly took place before the denouement of the nullification crisis, the Patriotes had to admit that the actions of this particular convention had put the Union in peril.63 When the issue was resolved, the patriote press rejoiced, arguing that such a crisis, defused through compromise in the United States, would surely have provoked a war in Europe.64 Further, the nullification debate did little to cool patriote enthusiasm for the notion of a

59 Le Canadien 13 July 1835
60 The Nullification Ordinance was published in full in la Minerve 13 December 1832 and in Le Canadien 14 December 1832. Jackson's proclamation appeared in Le Canadien 21 and 24 December 1832 and in the Gazette de Québec 22 December 1832
61 JHALC 42 (1832-33) 307-308
62 See the text of Papineau's speech of 10 January, 1833, reproduced in la Minerve 17 and 24 January 1833; cited by Ouellet Bas-Canada 353. Joseph Gugy, an opponent of the measure invoked the nullification convention as an example of political discord in the United States; see the report of his speech in the Gazette de Québec 22 January 1833
63 Patriote papers recognized this when they first reported the actions of South Carolina's convention. Parent, in Le Canadien, wrote of "... la position menaçante dans laquelle ces deux pièces [South Carolina's Nullification Ordinance and Jackson's Nullification Proclamation] mettent le gouvernement général des Etats-Unis vis-à-vis d'un des états de cette vaste et florissante république..." see the paper's 14 December 1832 issue
64 See l'Echodupays 28 March 1833; also Le Canadien 30 April 1834 where Parent argues that "La question des états du sud, qui a été réglée à l'amiable, aurait certainement causé des bouleversements en Europe"
constitutional convention. Indeed, the example of South Carolina pointed out that the people of a state could meet in convention to alter existing political arrangements. Papineau made this point in 1834, when he argued that political institutions could be perfected and revised in the republican system “au moyen de conventions du peuple, pour répondre sans secousses, ni violences aux besoins de toutes les époques.”

Jackson’s actions in the midst of the nullification crisis and in other instances led some to question the extent of executive power in the United States. When the American whigs raised the spectre of executive abuse and insisted on the role of the legislature in preserving the people’s liberties, their message was received wholeheartedly by the Lower Canadian Patriotes. For the French Canadian political movement, the struggle was similar and the stakes just as high. In advocating an elected legislative council, the Patriotes were seeking to wrest control of the colonial government from the hands of the Governor and, what they considered to be his corrupt entourage of appointed officials. In this sense the American model was a compelling one, for, at both the state and federal level, popularly elected bicameral legislatures watched vigilantly over the actions of the executive. The essential quality of American government in the Patriotes’ eyes then, was popular participation at all levels of the legislative process. Thus, Denis-Benjamin Viger, speaking as a member of the legislative council he sought to abolish, pointed out that nowhere in the United States could there be found a legislative body immune from the influence of the people. Consequently no legislative body would, as was the case in the colony, stifle the will of the people’s elected representatives.

When French Canadian papers favourable to reform discussed changing the legislative council, the American model was invariably invoked. Even before the passage of the Ninety-Two Resolutions, an article in le Canadien argued that the reformed upper house should be patterned after the American Senate, with councillors serving six-year terms, and with a third of the house elected every two years. The author also suggested that election to the council be reserved for those owning land in the colony. Linking the council to land ensured that it would be composed of virtuous and independent members. Indeed, this was the only way to ensure the independence of councillors in a society where “... les fortunes sont mobiles, où l’homme qui était indépendant hier peut devenir dépendant demain ...” Thus, the new council had to be clearly linked to property, “...comme on l’a fait dans presque tous les Etats-Unis ...”

65 Speech reported in la Minerve 24 March 1834; cited by Ouellet Bas-Canada 353. Papineau was citing the 41st of the Ninety-Two Resolutions. Privately, Papineau predicted that the American federation might one day break into several smaller federations, but believed that this would be affected through conventions of the various states involved rather than through war. Papineau made the comment in a letter to Arthur Roebuck. See NA Roebuck Papers MG 24 A19 file 5 47-48, Papineau to Roebuck 13 March 1836
66 Viger Observations ... (1835) 31
67 Le Canadien 12 August 1833
68 Le Canadien 10 May 1833

Louis-Georges Harvey

142
The *Patriotes* also envisaged an upper house which would act as a balance against the will of the people expressed in the assembly. Indeed, the very call for a reformed council rather than for abolition of the upper house indicates the importance still attributed to the idea of balance in political institutions. Yet, having pronounced North America as antithetical to aristocracy, the question became what order in society would be represented in the council. To this the *Patriotes* replied that the council would be made up of the “aristocracie des talents et vertus,” or the “aristocratie naturelle” within Lower Canadian society. In describing the political balance established by the American constitution, *patriote* papers noted that while the Americans had rejected the idea of a hereditary aristocracy, they had created “une aristocratie elective.” Indeed, this was one of the primary advantages of the American system: it allowed men of virtue, independence and talent—the “natural” aristocracy—to take their rightful place in the political order. The example of virtuous and moderate upper houses in the United States, both at the state and federal level, seemed to indicate that such a body might restore the balance which had been so long absent from the Lower Canadian legislative process.

The *Patriotes’* very open advocacy of an American form of government did not go unchallenged. Indeed, their political opponents reacted, particularly after 1834, with a scathing critique of the United States and its constitution. *Le Canadien*, while it opposed the *patriote* leadership after 1836, rarely attacked the American form of government per se, preferring to harp on the dangers presented by the prospect of annexation to the republic. The *Gazette de Québec*, however, felt the need to rebut the *patriote* position more directly. To this end it highlighted disorder and conflict in the United States and proclaimed that the republic was but an experiment in government which was inevitably doomed to failure. Thus, on the occasion of squabbles between two states in 1835, the *Gazette* predicted that the union “n’existera certainement pas cinquante années de plus.” When some slave owners in Louisiana put a price on the head of a leading New York abolitionist, the paper mocked the vaunted perfection of American institutions: “Vraiment, la république parfaite commence à offrir des traits qui répugneraient aux noirs de l’Afrique, dont ils [sic] tiennent un si grand nombre en esclavage.” When feeling against the Bank of the United States excited American mobs to riot, the *Gazette* termed American government “… une expérience en

69 The term appears in “Réflexions sur l’administration générale des colonies” in *la Minerve* 4 July 1831

70 See for example Papineau’s description of American government in his speech at St. Laurent in May of 1837: “...Toutes les charges y étant électives, elles y sont exercés par l’aristocratie naturelle...”; see the report of his speech in *Procédés de l’assemblée...*. 12

71 Etienne Parent continued to believe this even after he had broken with the *patriotes*. Applauding the creation of an upper house in Vermont, the editor remarked “Une seconde chambre avec certaines conditions d’âge ou d’expérience et de propriété, nous parait un modérateur nécessaire dans un gouvernement représentatif...” See *le Canadien* 26 October 1836. There were those, however, who argued for the abolition of the upper house, and predicted the disappearance of the House of Lords in England, as well as the American Senate. This view, a rather isolated one, appears in an article published in *l’Echo du pays* 16 October 1834

72 *Gazette de Québec* 14 May 1835

73 *Gazette de Québec* 3 September 1835
embrion...” predicting “ces étoiles et ce drapeau rayé ne flotteront pas pendant cinquante ans sur ce continent, sans qu’il se passe des scènes de carnage qui feront la honte de la liberté et de la raison...”74 When the American economy was plunged into disorder in 1837, the Quebec paper believed the crisis to be imminent: “...Le peuple souverain demande à hauts cris une réforme radicale du gouvernement modèle; on parle d’assembler une convention nationale, et de lever à New York une armée de 10,000 hommes pour aller assiéger le Président à Washington.”75 In short the Gazette argued that the Patriotes were blind to the republic’s faults and that in choosing it as their political model they had demonstrated their own political ineptitude.

The attacks of the anti-patriote press are a powerful testimony to the central place of the American model in French Canadian political discourse of the 1830s. By then, in order to discredit the Patriotes one had to attack the society they sought to emulate, to discredit the Americans and their institutions. Although the Patriotes fought back energetically and their tone was generally optimistic when they discussed the American republic, their discourse also manifested a certain sense of urgency. To be sure it was difficult to counter the patriote insistence on the excellence of American institutions and the material as well as political achievements of republican government; indeed, this positive view of the United States was supported by the work of European commentators. Still, the political events of the 1830s in the United States seriously challenged the vision of a stable and virtuous agricultural republic populated by independent landholders. For the Patriotes’ political enemies, the Bank War, anti-abolitionist riots and particularly American manifestations of anti-Catholicism were powerful arguments against the republic. While all these events could be explained away as examples of European influence in the New World, the increased frequency of political upheaval in America was an ominous sign that the “Machiavellian Moment,” as Pocock called it, was at hand. The New World stood at a crossroads, with one path leading in the direction of degeneration and corruption, the other to the maintenance of virtue and liberty.

It is from this civic humanist perspective of the evolution of society and politics that the Patriotes viewed the historical and geo-political significance of their own movement. For, as they made clear time and time again, corrupt European institutions had but one significant foothold in the New World: British North America. In a historical and geographically determined view which made the American Revolution the most important event in North American history, the destruction of European influence on the continent became as necessary to the preservation of liberty as had been the stand of American patriots sixty years earlier. In preserving the liberty of their distinctly American society, the Patriotes would help guarantee its future in the hemisphere. To a certain extent this argument rested on an analysis of imperial policy which emphasized its tyrannical and aristocratic objectives, one which British

74 La Gazette de Québec 20 February and 30 April 1836
75 Gazette de Québec 27 May 1837
attempts at compromise in the early 1830s seemed to belie. When news of the Russell Resolutions reached the colony in early 1837, however, there could be little doubt concerning the intention of European legislators.

In the context of 1837, the American image acquired its full significance. The Revolution, whose meaning had been highly ambiguous even in the early 1830s, now began to be cited as an example of armed colonial resistance. In the tense summer leading up to the Rebellion the Revolution was invoked time and time again. In his first speech after news of the Russell Resolution reached the colony Papineau recalled the example of the First Continental Congress’ economic boycott and the memory of the patriots of 1774. Yet, this oft-cited example of the early phase of American resistance was followed in his speech by references to the sword of Washington and to the defeat of British regulars by virtuous North American farmers. Over the summer, short articles on Washington now appeared beside the more traditional profiles of Franklin in the patriote press. In Montreal young Patriotes organized themselves under the name Fils de la liberté and their manifesto began with a literal translation of the Declaration of Independence. Across the province patriotic assemblies expressed solidarity with the Americans, their government and their revolution. In the countryside committees of safety and vigilance organized in conscious imitation of those founded in Massachusetts on the eve of the Revolution. By the time more moderate leaders such as Papineau tried to regain control over the meaning of the American Revolution and use it to support economic strategies of resistance, radicals had used it to push the movement to the brink of rebellion.76

When the Patriotes met at St. Charles in the last days before armed conflict broke out, they spelled out the logic which led them to rebellion in clear terms. In the “Adresse de la confédération des six comtés” we find again a literal translation of Jefferson’s Declaration. Like the Declaration, the “Adresse” enumerated British abuses and spoke of the government’s will to impose tyranny on the people by force. In addition, however, there is an expression of solidarity with the peoples of the Americas, and particularly with the citizens of the United States. The Americans, stated the “Adresse” would recognize the similarity of the Lower Canadian situation to that which had brought on their own revolution and would understand that the establishment of a tyrannical government on their northern border would serve as the instrument “de l’introduction du même gouvernement arbitraire dans d’autres parties du continent américain ...”77 European corruption could no longer be tolerated in the New World; what had begun at Lexington and Concord would be completed on the banks of the St Lawrence.

As we know, the Rebellions failed, the French Canadian republic was never created, and the forces of corruption triumphed. For their part, the Americans proved indifferent to the cause and their good republican first magistrate moved quickly to declare his country’s neutrality in the conflict. In the patriote refugee community of

76 These developments are described in detail by Harvey “Importing the Revolution . . .” ch 6
77 “Adresse de la confédération des six comtés au peuple du Canada” published in la Minerve 2 November 1837
northern Vermont and New York, America's positive image gave way to disillusionment and eventually resentment, but this is another story. For twenty years America's image as a sister North American society and eventually a political model had been carefully cultivated. The significance of that image, however, can only be understood in reference to definitions of French Canadian collective identity which emerged in the same period. This first definition of the distinct society was marked by an emphasis on its North American nature and was constructed in the language of civic humanism. North Americans, quite simply, lived in a social context which favoured the preservation of virtue and offered the possibility of checking the growth of commerce and its attendant threat of political corruption.

This is not to say that language, institutions and religion, the traditional triumvirate of early French Canadian nationalism as described by historians, were not part of the first distinct society. Their inclusion in a civic humanist distinct society, however, is far less contradictory than their presence in a liberal one. In this civic humanist perspective on early French Canadian political discourse the divided souls of traditional historiography appear far less tormented. Moreover, such an explanation in no way divorces the social motivations of political actors from their political discourse. Further, it clearly situates French Canadian political discourse in a North American context, rejecting an interpretation which relies on notions of French Canadian particularism in favour of one which highlights similarities with the American discursive context. Finally, getting back to the Constitutional Act whose bicentennial this volume celebrates, the classical form of French Canadian political discourse enhances our understanding of its final and unequivocal rejection by the Patriotes, who could no more compromise with constitutionalism than they could with the devil.

Louis-Georges Harvey
American Influence on Canadian Constitutionalism

Constance MacRae-Buchanan

Introduction

It is well known that the constitution given to Canada by Great Britain in 1791 was a direct result of the American Revolution. As a consequence of this act, the old province of Quebec was divided into the two new provinces of Upper and Lower Canada. Both received what Nova Scotia, Prince Edward Island, New Brunswick, and the thirteen American colonies had enjoyed previously: namely, popular representation in the form of elected assemblies. It was the 50,000 American loyalists — those Americans who chose to flee the American Revolution from New York, New Jersey, Pennsylvania, Connecticut, Rhode Island, Maryland and New England — who brought about this constitutional change. Indeed, the history of Canadian constitutionalism cannot be understood apart from Canada’s ongoing relationship with the United States. It will be part of my argument that this close connection is as evident today as it was 200 years ago.

The migration of the loyalists into Canada brought into this country an indigenous North American political culture best described as popular, egalitarian and communal. The task of this paper is to make explicit these American political principles and to assess the impact of the American loyalists on Canadian politics and constitutionalism.

The loyalists have been misunderstood largely because of the development of a loyalist myth. There is a Canadian version of this myth that depicts them as a noble people who endured hardship, suffered deeply, possessed undying loyalty to the British Crown, and had a strong sense of grievance. But it is the American version that has come to dominate our perceptions. As J. M. Bumsted said when he delivered the Winthrop Pickard Bell lectures, the problem in perception developed because the history of the American loyalists has served two different national agendas. The American historical myth maintains that the loyalists are “losers” and “tories” having lost the American revolutionary war, and further, that they are exiles without a coherent political philosophy other than an emotional or patriotic attachment to the

* I would like to thank my friend and colleague, Ruthanne Wrobel, for discussing this paper with me, and for reading and commenting on a final draft and Elizabeth MacRae for her interesting comments on the American loyalists

1 Jo-Ann Fellows “The Loyalist Myth in Canada” Historical Papers 1971 (Canadian Historical Association)

2 J. M. Bumsted Understanding the Loyalists (Sackville, New Brunswick 1986) 12
British empire. This paper takes issue with this description of the loyalists: the analysis presented here attempts to debunk the American myth by exploring its implications in the Canadian context. It is organized around four main themes: the politics of the loyalist myth, the idea of sovereignty, toleration of political opposition, and the frontier. Each raises questions concerning the standard interpretation of the loyalists in Canada.

Approach, Methodology and Definitions of Terms

The problems with the term “loyalism” are legion. The term did not come into use until after the fighting began. It was a label used in Britain, like the “U.E.” (Unity of Empire) badge of honour in Canada, to give a positive interpretation to the story of the loyalist exile. If you were a patriot, you were “loyal” to America. If you were not a patriot, you were, by implication, “loyal” to Britain. The problem, as Mary Beth Norton explains, is that “loyalism can be defined only in a negative sense, only through its relationship to the movement it opposed.”

Over time, that is, as the myth developed, the similarities between the patriots and the loyalists were forgotten. The sharp contrast drawn between patriots and loyalists in the redefinition of loyalism as myth has obscured the fact that loyalty to Britain was the norm until 1774; that many loyalists had changed sides, or had difficulty deciding which side to support; or, even more radically, that many remained friendly with their American counterparts during and after the revolutionary war (such as Daniel Leonard and John Adams). The result of this confusion is that the loyalists, as Brown and Senior put it in 1984: “To this day . . . remain an enigmatic group, widely interpreted, but little understood.”

Christopher Moore, also writing in the year of the loyalist bicentennial, agrees: “Still they have maintained their distance.”

The “distance” can be accounted for by recognizing that the original loyalists have been lost in the development of the loyalist myth. In what follows an attempt will be made to change the standard mythical perception; that is, an effort will be made to define the loyalists both objectively (as much as this is possible in historical research) and positively (the loyalists will not be portrayed as “losers” or “victims”). The term loyalist will deliberately be used in the lower case form to emphasize the point that it is the actual people that are the subject of this study rather than the loyalists of the myth.

Canadian historiography, in other words, needs to go back to the core of what these migrants were themselves. In the language of R.G. Collingwood, this means reliving the past as it was lived by the historical subjects themselves. This paper will argue the loyalists were not imperialists and they were not tories: they were American democrats and nationalists, having had over 150 years of their own history to which

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3 Mary Beth Norton The British Americans: The Loyalist Exiles in England, 1774-1789 (Boston 1972) 8
4 Wallace Brown and Hereward Senior Victorious in Defeat: The Loyalists in Canada (Toronto 1984) 3
5 Christopher Moore The Loyalists: Revolution, Exile, Settlement (Toronto 1984) ix
they were deeply attached. But, as will become evident later, the myth that the loyalists were “Tories, Imperialists and Losers” is extremely hard to correct, even when as Bumsted says: “Loyalists came from all classes and segments of society, and those who ended up in Canada did so for a variety of motives and circumstances.”

The Politics of the Loyalist Myth

The most important issue regarding the American loyalists concerns the development of the myth. This dimension of the loyalist story is critical because the myth pervades all other themes. First, however, something of the nature of myth must be explored. Myth is timeless: it purports to explain the past, the present, and the future. A good example is William Caniff’s 1869 comment on the loyalists: “In 1812, in ’37, and at all times, their loyalty has never wavered.” However, it is also important to understand that a myth by nature contains some truth. If it did not it simply would not be believed. The project therefore, is to sort out as much as possible the actual from the mythical.

Myth operates at the societal level. Ernst Cassirer writes: “Myth is an objectification of man’s social existence, not of his individual experience.” Speaking specifically on the loyalist myth, Jo-Ann Fellows states that “the myth is intimately associated with the value system of a society. The myth is, in fact, the value system of a society writ metaphorically.” There is a direct unmediated and unreflective dimension to mythology which is linked specifically to the participant’s own identity. It is the emotionalism of myth that explains the development of revisionist versions in both America and Canada, for these accounts were written by children of the loyalist elite who distorted the record in the attempt to set it straight. Egerton Ryerson was on the right track when he asserted that loyalist history had “been written by their adversaries” and that the loyalists were somehow “strangely misrepresented,” but he did little himself to clear up the confusion.

Myth is used to cover up contradiction, ambiguity and outright conflict between different interpretations of the same historical story. On this educative function of myth, Northrop Frye writes: “Myths have a . . . distinctive social function. That function is mainly to tell the society the important things for that society to know. . . . They play a leading role in defining a society, in giving it a shared possession of knowledge, peculiar to it. Its proclamation is not so much ‘This is true’ as ‘This is what

7 Bumsted Understanding the Loyalists 39
9 Ernst Cassirer The Myth of the State (New Haven and London 1946) 47
10 Fellows “The Loyalist Myth in Canada” 96
11 This is the point Willard Mullins, of Carleton University, makes in his work on myth
12 See Egerton Ryerson The Loyalists and Their Times: From 1620 to 1816 (Toronto 1880)
you must know.' "13

A look at the Canadian-American myth reveals that the actual history of the American loyalists has been turned upside down: to this day they are portrayed as tories, despite evidence to the contrary. A classic contemporary example of this insistence on toryism is the work of Seymour Martin Lipset. The final chapter in his influential Continental Divide, published in 1990 is called "Still Whig, Still Tory." 14 The first page of this book informs the reader that "Americans are descended from winners" while "Canadians, as their writers frequently reiterate, from losers." A few pages later Lipset writes: "These fundamental distinctions stem in large part from the American Revolution ...." 15 He continues: "The United States has a pantheon of heroes in its founding fathers. Canada remembers the names of some of the people who struggled across what became the New England border into Nova Scotia and New Brunswick, and over the Niagara frontier in the area that would be called Ontario, but there were no inspired national heroes, no ideologists, no political theorists who continue to influence debate today." 16

It is striking the degree to which Lipset feels no pain in making these sweeping generalizations. A very similar comment appears in an otherwise interesting and thoughtful analysis by Richard Gwyn in The 49th Paradox: Canada in North America, published in 1985: "It is exceedingly difficult to know the political ideas that motivated the Loyalists. Few of them wrote much. They harboured no poets or philosophers. Their silence is remarkable in contrast to the extraordinary outpouring, so original and so eloquent, that the American rebels, turned into patriots, produced. Nor was there a Loyalist leader to compare, remotely, with Thomas Jefferson, Benjamin Franklin, John Adams, Patrick Henry, or George Washington, a company indeed for whom there are few equals in Western history." 17

The comments about silence in both Lipset and Gwyn need to be explored. Lipset and Gwyn are not alone in offering this standard, yet biased, interpretation of the loyalists. A.L. Burt writing in 1963, also declared that there were no politics "in the real sense of the word," that is, "until the termination of the War of 1812 awakened the spirit of controversy in the province." 18 But silence, to the degree that there was silence (because this is not completely evident) should be understood as at least partly due to arbitrary government. It was the hierarchical, royalist political culture, not a disposition to remain silent, that prevented the original loyalists from saying their full piece in the future Canada. Indeed, a look beneath the layer of imperial government in the new loyalist settlements reveals a different sort of political culture altogether, as

13 Northrop Frye Words With Power: Being a Second Study of "The Bible and Literature" (San Diego 1990) 30-31 and 33
14 Seymour Martin Lipset Continental Divide (New York 1990)
15 Lipset Continental Divide 8
16 Ibid. 1-2
17 Richard Gwyn The 49th Paradox: Canada in North America (Toronto 1985) 19. Emphasis added
well as a different conception of leadership — one which was based on consensus, and a sharing of political power. The kind of society that the American loyalists were used to was markedly democratic at the local or township level, with a wide diffusion of popular power.

The loyalist idea of local government is particularly significant in view of Lipset’s and Gwyn’s comments about the loyalists’ lack of political theory. It is very clear, contrary to what Lipset and Gwyn say, that the loyalists did have their own conception of the kind of society they wanted to build, otherwise they would not have lobbied as hard as they did for the two new provinces in Quebec and Nova Scotia. That they were successful in both cases, with the birth of New Brunswick in 1784, and Upper Canada in 1791, shows further that the British government was very much aware of their political history and values. It shows, moreover, that the loyalists had political clout: the British were afraid of American conceptions of politics and liberty.

The Idea of Sovereignty

The politics of sovereignty, or the question of who holds the legitimate authority in the polity, was played out on a grand scale in America’s war for independence from Britain, and the conflict, brought into Canada as a direct result of the loyalists, erupted in the form of constitutional battles between the legislative and the executive branches of government. The question here is that perennial political problem of who shall rule.

A combination of the ideas of Jean Jacques Rousseau, (freedom comes from popular participation and sovereignty resides with the people), John Locke (citizens are bearers of natural rights), and Edmund Burke (government is based on barter and compromise) can all be found in early America. But whether these theories were consciously adopted, or whether they were interpretations developed after the fact (that is, after the development of American political models) is open to debate. It can be argued that democracy was invented in America and travelled eastward to its destination in Europe, rather than the other way round.19

The important point is that in America the popular understanding (that is, the understanding available in the discourse of the times) was that sovereignty was vested in the people and that government was instituted to protect rights: indeed the new American state, hammered out in the 1770s, specifically guarantees these protections, as did the American townships and colonial assemblies before 1776.

The idea of popular sovereignty (although first articulated in Britain by the Levellers in 1646-9) dates as far back as 1680 in America, and is an idea that made a remarkable resurgence at the time preceding the revolutionary war.20 It is connected intimately to the rise of American legislative assemblies in the eighteenth century, (an idea which eventually spread to the other non-revolutionary British colonies in

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19 See Mario R. Di Nunzio American Democracy and the Authoritarian Tradition of the West (Lanham New York 1987) 8-10

Canada and elsewhere and is embodied, in a modified form, in the American concept of the town, with its corporate structure and its townhall meetings: it is here that the ideas of Burke are evident.

Richard Gwyn acknowledges the influence of Burke on the loyalists, despite his comment on the absence of loyalist political theory: "The Loyalists took their political ideals from Burke rather than from Locke and Hobbes; above all they would have agreed with Burke that 'Every virtue and prudent act is founded on compromise and barter.' " What Gwyn fails to realize, however, is that "compromise and barter" is a democratic notion creating a dialogue between rulers and ruled. Certainly, the political ideas of Edmund Burke merit the status of political philosophy, even though, interestingly, Burke has been criticized for being "too empirical." It is moreover, precisely the empirical level which is so important for local studies. It was at the level of the town that the democratic, whig and tory elements were combined in early America. Thus, it was the town, rather than the colonies, that reflected the notion of a balanced constitution which was so essential to British constitutional theory.

This populist, democratic notion of popular sovereignty carries with it that genuinely American idea which is a marked suspicion of authority of any kind; the political culture of America is decidedly anti-state. The inevitable question is as follows: how is it that these American loyalists, with their strong sense of rights, and their sophisticated political culture, are turned by the Canadian-American myth into state-loving, deferent, monarchists?

It is known that the loyalists pushed hard against entrenched authority when they came to Canada. The election contests in both Nova Scotia and New Brunswick in 1785, and the turbulent session of the Nova Scotia Assembly in 1790 are good examples of the lack of deference of the American loyalists. The collapse of the 1791 constitution and its suspension in 1838 is, of course, the ultimate example of the conflict between the people and the Crown. As Arthur Johnston said in 1908: "In

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21 Bailyn The Origins of American Politics: “The true culmination of the institutional development [of the American assemblies] described lies not in its termination in the thirteen mainland colonies but in its fulfilment in the nineteenth-century British empire and the twentieth-century commonwealth” 10
22 Gwyn The 49th Paradox 20
24 J.R. Pole puts the point a slightly different way in Political Representation in England and the Origins of the American Republic (London 1966): “the town, with its own meetings, interests, and separate character, contributed materially to the complex texture of a political life that could be called ‘Whig’ — in contrast to monarchy on one side and democracy on the other” 54. However, as is very evident in reading Pole, he has a firm understanding of the significance of the term “Whig” and does not use it lightly, nor does he take it out of its proper historical context, the way Lipset does
26 MacKinnon ibid.
Canada, there was a rebellion resembling, in many of its features, that of the thirteen colonies.”27 The friction between state and people is also evident in the quarrels over land. Promised land, like promised rights, did not always materialize.

To repeat the thesis, the terms empire, monarchy, loyalty, and toryism are all abstractions, or symbols, that have very little to do with the original American immigrants. These terms have been brought into the historical language and mythology in Canada after the fact: in Upper Canada after the war of 1812;28 and in the Maritimes, after the first centennial in 1884,29 when Canadian-British nationalism reached an all time high with the establishment of various imperial leagues.

Tolerance of Opposition

Bernard Bailyn traces the idea of legal opposition in America to an article that appeared in the New York Gazette in 1733, “well before the time when such views would gain even incidental recognition in England.” He quotes: “Parties are a check upon one another, and by keeping the ambition of one another within bounds, serve to maintain the public liberty. Opposition is the life and soul of public zeal and without it, would flag and decay for want of an opportunity to exert itself . . .” 30

An understanding of the politics of opposition or dissent, that is, the right to offer an alternative opinion — something which was lost completely in the American revolutionary years from 1774 to 1783 — is essential to any understanding of the loyalists. As Brown and Senior put it, the loyalist was “cursed with an open mind” which was “no equipment for a Patriot.”31 The loyalists were able to see both sides of the argument with Britain. As Janice Potter explains: “Loyalists simply could not join with Patriots like John Adams in proclaiming that in America of 1775, ‘one understanding governs, one heart animates the whole body,’ ‘one great, wise, active and noble spirit, one masterly soul animates one vigorous body.’ ”32

This does not mean, however, that there were differences between the patriots and the loyalists regarding their view of the oppressive tax and other punitive measures of Great Britain. They “differed only in their mode of opposition:” the loyalists simply could not tolerate mob violence and anarchy. It was only on this one

27 Arthur Johnston Myths and Facts of the American Revolution: A Commentary on the United States History as It is Written (Toronto 1908) 188. An excellent example of the loyalist myth in what Bailyn calls the “heroic” mode can be found in Johnston’s dedication: “TO THE MEMORY OF THE LOYALISTS: TRUE ‘HEROES OF THE REVOLUTION, ‘WHO SACRIFICED THEIR LIVES AND FORTUNES IN AN ATTEMPT TO PRESERVE THE INTEGRITY OF AN EMPIRE THAT HAS FORGOTTEN THEM, THIS LITTLE BOOK IS INSCRIBED BY THEIR FELLOW-COUNTRYMAN, THE AUTHOR.”
28 Fellows “The Loyalist Myth in Canada”
29 Bumsted Understanding the Loyalists 13-14
30 Quoted in Bernard Bailyn The Origins of American Politics (New York 1968) 126
31 Brown and Senior Victorious in Defeat 15
issue, then, which the loyalists saw as the illegitimacy of resorting to extra-constitutional measures, that the loyalist and patriot disagreed. There are far more similarities between the patriots and the loyalists than there are differences. Both patriots and loyalists had grievances against the King, George the Third. Thomas Jefferson's Declaration of Independence, and the loyalist parody of the patriot declaration, published in 1781, list many of the same concerns.33

Although the idea of a legal opposition, which was so effectively drummed out of the thirteen colonies by the patriots, is implicit in English political theory — the words "Her Majesty's Loyal Opposition" are used today, for example — it was not the way the British thought at the time of the American Revolution. The idea that factions, parties and partisanship might be good for the polity, ensuring liberty, rather than suppressing it, was a progressive notion, not yet articulated in Britain, and one which anticipated later society-centred theories of politics. On this last point, Brown and Senior write: "The Loyalists deserve admiration for being less parochial and more cosmopolitan than the patriots. They looked beyond Republican ideology to a pluralistic society and produced 'the first significant justification of partisanship in American political thought.'" 34

Indeed, it would seem that a good revisionist account of the loyalists would make much of this important idea of lawful opposition, rather than doing what scholars generally do, which is to reconceptualize the loyalist ideology in terms of "Empire, Loyalty and Monarchy." What the loyalists wanted is the constitutional form of disciplined debate which is evident in British liberal democracies today.

The Frontier

An analysis of the politics of the frontier is important because the traditional interpretation of the frontier really only serves the American myth. The myth — what Louis Hartz calls "the master assumption of American political thought" defined as "the reality of atomistic social freedom"35 — cannot possibly be accurate except at the most general level. It is of primary importance to put some balance back into the account. On the one hand, the frontier did produce a levelling effect, as Richard Gwyn notes: "the soil was just too hard for the British class system to take root."36 The equality produced by the harsh conditions of a pioneer society did prevent the development of an indigenous aristocracy.37

33 See "A DECLARATION OF INDEPENDENCE BY THE LOYALISTS" published in Rivington's Royal Gazette in 1781, and reprinted in Claude Halstead Van Tyne The Loyalists in the American Revolution 309-17
34 Brown and Senior Victorious in Defeat 8
36 Gwyn The 49th Paradox 19
37 See Helen Taft Manning British Colonial Government After the American Revolution, 1782-1820 (New Haven 1933) 330-38
But, on the other hand, pioneer societies are communal societies. Thus, as much as this paper may seem to disparage the standard mythical loyalist history, in reality the Canadian “Red Tory” view, which is so universally accepted in explaining Canadian politics, is actually closer to the truth about pioneer societies, or the frontier, than the American mythical account of rugged individualism. That is to say, Canadian mythology is right, but for the wrong reasons. Toryism in Canada, like that of America, was the result of the frontier economy as historiography of the early American town shows: “The process of settlement seems to have been more orderly and communal than individual, and motivated less by religious factors than economic ones. With the exception of a few squatters, most settlers did not go to the frontier to escape the restraints of society, but rather moved with others.”

The toryism that did indeed come from America grew out of the corporate culture of the American town. It was the towns, the well-planned communities of early America, which brought toryism into Canada. In this sense, Louis Hartz’s analysis of new societies, applied to the American loyalists, makes a great deal of sense: were not the loyalists a fragment frozen and congealed in time?

This paper argues that the loyalists were indeed a fragment, but not the way Hartz and Kenneth McRae conceive it. The problem with their interpretation of the loyalists “as a defeated fragment” is that the victim label appears once again. The terms, so confrontational, do not allow us to see the real similarity between the patriots and the loyalists. Other aspects of McRae’s analysis, however, are illuminating: he acknowledges, for example, that the loyalist fragment is indeed a liberal fragment. Thus, both Hartz and McRae significantly improve on the mythical tory interpretation, which is reduced to mere slogans or labels in the work of Lipset and Gwyn. Yet even McRae thinks that, “Most Loyalists believed fervently in monarchy and in Empire unity.” The late loyalists certainly make it appear that they believed in empire and unity, but this was because in the newly settled British colonies, especially in what became Ontario, they had to make it appear this way in order to survive. “In the transplanted British society of Upper Canada, loyalism became the key to survival, the first rung on the ladder of success, and the hallmark that distinguished true ‘Canadians’ from later American immigrants. . . . The first loyalists were not vocal or vehement about their loyalty, but their children were forced to be.”

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38 J.M. Bumsted and J.T. Lemon “New Approaches in Early American Studies: The Local Community in New England” Social History (1968) 107
40 McRae “The Structure of Canadian Politics” 239
41 Ruthanne Wrobel “United Empire Loyalists in Canada: The Loyalists on the Bay of Quinte, 1784-1815.” Paper presented to members of the Department of History, Syracuse University, January 1981
Although McRae and Hartz improve on the traditional interpretation, they do not go far enough. They do not reach down to the communal or local level, the level of the town. They diminish the deeply democratic character of the populism of the loyalists at the local level, by failing to take this sub-national political model sufficiently into account.

What is the political culture of liberal loyalism then? The answer is related to the New England idea of the town, the “polis” of America according to J. R. Pole. The polis was a corporate, orderly, yet self-governing and almost autonomous, highly populist community: it inspired a high degree of real and felt participation by all its members, including the minority who did not have a vote.

The New England town was completely unlike what was only the “semblance of municipal government” in Quebec and Nova Scotia. The town ran the affairs of its people, and, as Pole points out, it provided “a strong sense of collective responsibility for the spiritual and economic welfare of the community together with care for its own members in distress.” Here the towns constituted the basic electoral constituency of the provincial assemblies (from 1644 to 1857) and, unlike in Canada, there was a direct form of representation that led from the town, up to the assembly level. In Massachusetts this principle of representation was evident even in the executive council, for under the Charter of 1691, the assembly elected the council.

The attachment of the inhabitants of Massachusetts to their towns has been well portrayed by Pole: “the townspeople of New England loved their towns far more than they loved their provinces. . . . the record always abounds with questions about ‘our meeting house,’ ‘our school,’ ‘our pulpit,’ ‘our highway,’ and ‘our town.’ There is nothing in the least sentimental about this. It was their town, and no one else’s.”

In this communal setting, there was a democratic, consensual conception of leadership. Janice Potter argues that the consensual nature of the New England town was related to their seventeenth century Puritan heritage. She writes that, “a widely accepted belief was that the community should be knit together by the bonds of consensus, achieved at the local level at the town meeting, so that unity, harmony, and order would prevail.”

But at the same time, the liberal nature of the loyalists is evident in the fights for and over land, the assembly contests for control over money bills (and thus by implication, for local autonomy), and the demand for “face to face” democracy in the form of town meetings. Town meetings were disallowed on the basis of their seditious nature: “. . . there have been Meetings & Assemblies of the People at different times, in several of the Townships in this Province Which have been call’d & held for various

42 Pole Political Representation 55
43 Robert Calhoon The Loyalists in Revolutionary America, 1760-1781 (New York 1973)
44 Pole Political Representation 38-9 and 49
45 Janice Potter The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts (Cambridge MA 1983)
purposes contrary to the Public Good etc., etc.”46 In dismissing every trace of populism as bad and “contrary to the public good,” the British deliberately trivialized the importance of these indigenous American traditions and thus the subsequent loyalist history has not been properly recorded. American populism is presented in a distorted, caricatured way.47

As soon as the loyalists arrived, they petitioned for popular assemblies. The 1791 constitution granted this privilege but it was superficial, a mere appeasement: all the significant decisions were left out of assembly hands. The Canada act was progressive on the surface only because it contains within it opposing principles: “The Constitutional Act, while requiring that the assembly be summoned at least once a year, also empowered the governor to prorogue it at pleasure.”48 In Canada, unlike in Britain, there were no guards or protections against the Crown’s right to dissolve the house, and thus local control was removed from the people. “In England the necessity of securing supplies by act of parliament placed a most effective check on the resort to dissolution. No such restraint existed in Canada, where the governor, by carefully husbanding the revenues of the crown, was able to continue the administration of government without resort to the assembly.” 49

The loyalists tried within this very limited constitution to oppose all form of elitism: they demanded a separation of powers between the people and the Crown in all three colonies where they settled. They were unsuccessful. They demanded, by petition, that Crown abuse in the 1785 New Brunswick election, held in Saint John, be rectified. It was not.50 Instead, an act “against tumults and disorders” was passed prohibiting popular petitions of more than twenty signatures. A significant number of the loyalist refugees, disappointed with the result of their experiment in their new country went back to America both before and during the war of 1812.

Loyalist liberalism did not die at the time of the American migration into Canada, but it was subdued. The loyalists’ relative silence had more to do with the structure of British colonial politics than it did with clearing the land in the wilderness,51 or a lack of poets and philosophers. Nevertheless, as this paper has argued, far from disappearing, loyalist liberalism was just being built. Populist

46 Executive Council proclamation quoted in John Bartlet Brebner The Neutral Yankees of Nova Scotia: A Marginal Colony During the Revolutionary Years [1937] (Toronto 1969) 146
47 S. D. Clarke points out that the anti-authoritarian attitude of the Nova Scotia mind resembled the American revolutionary mind: “Compelled to act on their own, and dependent largely on their own resources, they had no strong interest in the affairs of the state. . . . It was because of this close relationship between local movements of independence and the larger movement of colonial independence that such developments as the increase of smuggling, the holding of town meetings, and the Newlight religious revival assumed such importance in Nova Scotia.” See Clarke “The Frontier Thesis” in George A. Rawlyk ed Revolution Rejected, 1775-1776 (Toronto 1968) 48
48 Adam Shortt and Arthur G. Doughty eds Canada and its Provinces: A History of the Canadian People and Their Institutions By One Hundred Associates (Toronto 1914) 449
49 Ibid.
50 Condon The Envy of the American States: 147-48; Rawlyk “The Federalist-Loyalist Alliance” 144
51 McRae “The Structure of Canadian Politics” 240
objectives were sometimes realized; the loyalists got their way in the significant reform of the 1791 victory over money bills in the assembly in Nova Scotia, something denied to the assemblies in both Upper and Lower Canada; and they fought off the “Petition 55” in New Brunswick: “the early request by certain Loyalist gentry for 5000 acres of land in recognition of their special merit.” In Upper Canada, the loyalists also successfully lobbied against the suggested practice of using hereditary titles in the executive and legislative councils.

The politics of the frontier, then, reveal the discrepancy between the actual communalism of the local settlements and towns, and the mythologized account of rugged individualism found in American history books.

Conclusion

If the political culture of pre-revolutionary America was freer than that of Great Britain, as this paper claims, it follows that the migration into Canada of the American loyalists can only be perceived as good, that is, as a positive influence on Canada. The four themes: the loyalist myth, the idea of sovereignty, tolerance of opposition, and the frontier, all show that the culture that was brought into Canada from America is best described as comprising a strong community, and weak state model: one that is highly populist, democratic, and egalitarian, as well as communal and corporatist. In sum, the American influence on Canadian constitutionalism has been positive: the ultimate legacy consists of an infusion into Canada of popular government. This paper suggests, therefore, that Canadians and Americans have much to learn from their own national histories. If the goal really is a “better” North America, then Canadians should be prepared to forgive America for many of the real and imagined hostilities directed at this country; they must be willing to learn the true meaning of populism as it once existed in the American and Canadian past.

Americans, on the other hand, might look at what Canadians have done with the political culture that was brought into Canada by the loyalists. It is arguable that the Canadian modification of the loyalist fragment built a better nation through an emphasis on social rights and social welfare. But we might ask whether the populism and vigour of political life, so characteristic of both countries in the early years has been lost. To conclude: much of what Canada became is due to America, and much of what America can become could come from Canada.

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52 Condon The Envy of the American States 108
The Constitutionalism of Etienne Parent and Joseph Howe

Janet Ajzenstat

Two sharply different political ideologies — two visions of good government — shaped colonial politics in the British North America of the 1830s. Proponents of the first argued that the constitutional tradition inherited from Britain had subjected the inhabitants of British North America to the rule of intolerant and unjust elites. The Constitution of 1791 had to be overturned, by force if necessary. When power had been seized from the imperial party in the colonies, it would be possible to establish a true democracy, government by "the people."

The second ideology rejected the idea that colonial grievances could be remedied by the introduction of a more democratic form of government. Its proponents argued that although the attempt in 1791 to introduce the principles of the British constitution had not been successful, it was still the case that the colonists' best hope for freedom and prosperity depended on establishing in British North America a form of government closely modeled on the British. The great merit of the British constitution, according to this line of thought, was that it held in check all tendencies toward extremism, including the extremism that went by the name of democracy.

In this paper the first ideology will be called "democratic," and the second, "constitutionalist." Papineau and Mackenzie exemplify the democratic vision; Etienne Parent and Joseph Howe, the constitutionalist.

The drama of Canadian events in the 1830s tends to obscure our perception of these ideologies. The contest between reformers and the local elites in each province overshadows the story of the ideological differences in the reform camp. Parent and Howe were closely associated with the popular party and the popular cause, on occasion allies of Papineau and Mackenzie, in opposition to British officialdom and

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1 In the 1830s Howe was a member of the legislative assembly in Nova Scotia and editor of the Novascotian. Parent, associated with the Parti patriote, was editor of the influential journal le Canadien. J. Murray Beck calls Howe "the greatest Nova Scotian." Joseph Howe, Conservative Reformer 1804-1848 (Kingston 1982) vii. Jean-Charles Falardeau argues that Parent exemplified in the highest degree the virtues of the intellectual and political class of that period. Etienne Parent 1801-1874, Biographie, textes et bibliographie (Montréal 1975) 12. And see Jean-Charles Falardeau "Etienne Parent" Dictionary of Canadian Biography, Volume X, 1871-1880 (Toronto 1971). Both Howe and Parent played a significant role in the politics of their respective provinces in later decades. Parent's admiration for British institutions and political traditions is especially impressive when we remember that he was imprisoned for three months by the British administration for cataloguing the injustices of the "English" party in the provincial councils.
the oligarchic cliques entrenched in the legislative and executive councils. When they list the injustice of life in British North America, Parent and Howe echo arguments of the democrats.

The fact that in the 1830s Parent and Howe recommended the introduction in the colonies of the constitutional principle we now call responsible government is another factor contributing to the idea that constitutionalists and democrats pursued similar political goals. Responsible government requires the cabinet, or political executive — in the colonies of this period, the executive council — to secure the support of the majority of the representatives in the popular house. It is the central feature of the parliamentary system today. Their endorsement of responsible government suggests that Parent and Howe were forward-looking reformers who deserve as much as Papineau and Mackenzie to be called democrats. It is true that the democrats usually argued for an elective executive council, preferring the idea that the executive should answer to the people directly. But in the usual interpretation this suggests merely that Papineau and Mackenzie favoured the Jacksonian democracy of the United States while Parent and Howe supported democracy in its the parliamentary form.

Papineau for one argued that the constitutionalists and democrats worked for the same objectives. In the grand scheme of things, he said, the "liberals, radicals [and] constitutionals" were enlisted in the democratic cause, against an opposition comprising "serviles, royalists and tories." Commentators on this period of Canadian history seldom fail to mention that there were ideological differences of interest among the reformers during the 1830s. But the substance of those differences remains obscure.

In this paper I suggest that the debate within the reform camp between constitutionalists and democrats was more important for the future of Canada, and teaches us more today, than the contest between reformers and the official parties. The two nineteenth-century British North American ideologies represent two important trends of political thought in the modern era. I believe indeed that they represent the most important trends.

The democratic vision in the nineteenth-century colonies, like any political ideology, is a constellation of not always compatible ideas. It includes the dream of a

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2 The United States was often held up by the colonial radicals as an instance of the democracy they favoured. It was the Jacksonian ideal they admired, not the system of checks and balances described by men like Hamilton and Madison. For an argument suggesting that the U.S. founders express the kind of reservations about democracy that I find in Parent and Howe, see Thomas L. Pangle "The Federalist Papers' Vision of Civic Health and the Tradition Out of Which that Vision Emerges" Western Political Quarterly 39:4 (December 1986)

3 See the Ninety-Two Resolutions, reprinted in W.P.M. Kennedy Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929 (Toronto 1930) 277, the 37th Resolution
simple life, and the idea of political "virtue." It owes much to Rousseau, and at times looks like a forerunner of today's communitarianism. It has a high idea of the importance of politics, regarding it as the vehicle for the realization of a way of life. Papineau's political vision in these crucial years was both progressive and particularist. As a democrat he could represent himself as spokesman for the aspirations of all men everywhere. As leader of the Parti patriote, he was the voice of a particular nationality and way of life.

Central to democracy in both its nineteenth-century form and later manifestations is the idea that political power belongs to "the people." "The people" in the language of nineteenth-century democracy does not denote the shifting and continually changing aggregation of groups and interests that Canadians have in mind today when they think of a popular majority. "The people" is a homogeneous and permanent body of citizens — a permanent class. Papineau pinned much of his case on the fact the majority of the populace in Lower Canada indeed comprised a more or less homogeneous group defined by language, history and way of life, a group that had been excluded from politics by the minority "official" party. The history and politics of Lower Canada lent veracity to his claim to represent a single body of people, a class that had suffered real grievances, and known real injustice. When Papineau looked to the future he envisaged the rise of the Parti patriote to power, and justified patriote capture of power on the grounds that it was the people's party. Conspicuously lacking in his arguments from the 1830s is evidence that he was prepared to entertain the idea of the alternation of parties in office.

Parent and Howe utterly rejected the idea of democracy represented by Papineau. They were friends of the popular cause in the sense that they hoped to benefit the inhabitants of British North America. But they were not "democrats." I suggest that "constitutionalist" is an appropriate name for their vision of good government because it was used in their period but also, and more importantly, because Parent and Howe adhered to principles and ideas that are still today regarded as central to constitutionalism. In the first place they were advocates of party government. They recommended responsible government because they regarded it as

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6 Fernand Ouellet finds a contradiction between Papineau's progressive political ideas and his social thought. He argues that Papineau's idea of a simple agrarian society was highly conservative. "Louis-Joseph Papineau" Dictionary of Canadian Biography. No doubt Ouellet is right to argue that in the Lower Canada of the period seigneurial tenure bolstered hierarchy, not equality. But on the theoretical level there is no contradiction in Papineau. Rousseau would have applauded Papineau's dream of a nation of small farmers, living in the simplicity of poverty, and would have had no difficulty with the idea that such a society could be governed by the democratic general will

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161 Janet Ajzenstat
the constitutional principle that best ensures the alternation of political parties in office. Moreover they assumed, as constitutionalists do today, that government should not determine all aspects of life in a polity. In other words they were proponents of what we now call limited government.

Above all Parent and Howe opposed absolutism. They are famous in Canadian history for their opposition to the absolutism of the colonial oligarchs. What is less well known is that with equal energy they opposed the absolutism that surfaced in the reform camp during this decade. They feared Papineau's democracy because they believed that it would lead to rule by one party in the name of the people. What they called democracy we would describe as democratic absolutism, that form of total government so familiar today because until recently it characterized the regimes of Eastern Europe and the Soviet Union.7

The clue to their doctrine lies in the fact that they took as their model of good government the institutions of eighteenth-century England. “Let us ‘keep the old paths,’ ” wrote Howe in one effusive passage. “Let us adopt the good old practices of our ancestors.” He explicitly dissociated himself from the “new experiments” in government prescribed by men like Papineau and Mackenzie.8

I do not mean to suggest that Parent and Howe regarded reform of the British constitution as impossible or undesirable. Both admired the spirit of political change evident in the Britain of the Reform Bill years. Nevertheless they believed that there was an essential guarantee of political freedom in the British constitution that had been present from 1688 or early in the eighteenth century, and was beautifully evident in the mother country in their own time. “The principles of our constitution ought to be those of the constitution of the Mother Country,” said Parent.9 They depicted even responsible government as a long-established constitutional principle. Neither suggested that it was a recent innovation in Britain, or a measure that had only recently recommended itself to the colonists.

Commentators have had difficulty with this backward-looking aspect of their argument. In the usual description the British constitution of the eighteenth century is not particularly admirable: it is said to have bolstered the privileges of the aristocracy and ignored the welfare of the mass of the people.10 The Constitution Act of 1791 is similarly depicted as a set of political institutions enshrining the autocratic notions of

7 See the excellent description of democratic absolutism in Douglas V. Verney The analysis of Political Systems (Glencoe 1959). Verney's term for this form of absolutism is "convention government," and he traces its history from "the notorious Convention of 1792-5" to the modern communist period
8 Howe to Lord John Russell, September 1839. Kennedy Statutes, Treaties and Documents 410
9 Le Canadien 8 September 1824 [my translation]. The articles of Parent's from Le Canadien cited in this paper can all be found in Falardeau Etienne Parent, 1801-1874
10 See for example, H.T. Dickinson Liberty and Property: Political Ideology in Eighteenth-Century Britain (London 1977) and A.H. Birch Representative and Responsible Government (Toronto 1964). Contrast the better view in a standard text in political science, Mark O. Dickerson and Thomas Flanagan An Introduction to Government and Politics (Scarborough 1988). For Dickerson and Flanagan 1688 marks the introduction of constitutionalism in England. It is fair to say that most but not all historians regard eighteenth-century Britain as an aristocracy while most but not all political scientists see it as a modern polity grounded on the principle of equality under the law
the British upper classes — a regressive document for the period, not to be compared with the American constitution, or the Declaration of the Rights of Man and Citizen. Commentators who adhere to this picture of British institutions in the eighteenth and early nineteenth-centuries find it difficult to entertain the idea that Parent and Howe, known above all as advocates of responsible government, could ever regard them as a model.

In defending the principles of the British Constitution during a period of social disorder and rebellion Parent and Howe followed a difficult and sometimes dangerous course. They opposed the democrats while working with them to expose the injustice of government by the official parties. They set themselves against British officialdom while insisting that the British institutions were the best possible guarantor of political freedom. It is remarkable, and I would argue very fortunate for this country, that their views triumphed. In the end they persuaded British administrators of the justice of their cause. They humbled the local elites, and converted the democrats. It is the constitutionalists’ vision that shapes Canadian politics in the ensuing decades, and until well into our own time.

The heart of constitutionalism is the idea that for all politically relevant purposes human beings are equal. No individual, class, hierarchy, or political interest has a natural title to rule. Priests, the wealthy, the high born, are not privileged in political debate. In the British tradition this idea, often termed equality of right, stems from the teaching of Hobbes and Locke. It is the ground of the argument against the absolute monarchs of the seventeenth century. It shapes the politics of eighteenth-century Britain — no doubt it was sometimes forgotten in the press of day-to-day politics, but it was always the standard — and it is crucial for Parent and Howe.

Their adherence to equality of right fueled their argument against the colonial elites; they regarded the oligarchs’ claim that wealth and family connection gave them title to rule as an absurd attempt to ape the absolutism of the seventeenth century. Equality of right led Howe to oppose Colonial Office meddling in the affairs of Nova Scotia. He saw no reason why the discretionary opinion of a British official should automatically compel attention in the colony. Equality of right led Parent to reject the argument, a favourite one with the “English” party in Lower Canada, that those of British stock could naturally claim positions of power. He rejected as well — although

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11 Jean-Pierre Wallot Un Québec qui Bougeait, trame socio-politique du Québec au tournant du XIXe siècle (Québec 1973); Pierre Tousignant “Problématique pour une nouvelle approche de la Constitution de 1791” Revue d’Histoire de l’Amérique Française 27:2 (September 1973)

12 Hobbes Leviathan Chapter XIII; Locke A Letter Concerning Toleration. We find a perfect expression of this central tenet in Section 15 (1) of the Canadian Charter of Rights and Freedoms: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law.” I explore the importance of the equality tenet for the colonies in The Political Thought of Lord Durham (Kingston 1988); Rainer Knopff describes its implications for a later liberal in “The Triumph of Liberalism in Canada: Laurier on Representation and Party Government” Journal of Canadian Studies Special Issue on Canadian Political Thought (Summer 1991)

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he was deeply patriotic—demands for a privileged status for the French Canadian way of life. In the constitutionalist view, the threat of absolutism hovers around nationalist claims. Neither “race” nor nationality should be elevated above the law.13

What is important for the argument in this paper is the assumption by Parent and Howe that constitutionalism is as hostile to an assertion of constitutional privilege by political leaders professing to speak for “the people,” as it is to any other assertion of privilege. Parent writes: “The idea that some have sought to spread that the Chamber [the legislative assembly of Lower Canada] alone is capable of leading the country, and that the body . . . and the reputations of the members who compose it are little sacred, inviolable idols. . .is monstrous.”14

He depicts attempts by the Third Estate in France to usurp the powers of the executive branch of government “on the pretext that the voice of the people was the voice of God” as instrumental in bringing about the excesses of Robespierre and Marat. Parent was certainly not alone in suggesting that the Terror was the consequence of an unchecked concentration of power in the hands of popular leaders in revolutionary France. The argument was a favourite one with British whigs and tories at this time. Moreover, it certainly the case that writers in French Canada had many prudent reasons to dissociate themselves from those French revolutionaries. But in these passages Parent is not aping others, and is not simply taking the expedient course. He has appropriated as his own the idea that the voice of the people cannot be accorded privileged status in the good constitution. The “people” and the people’s leaders have no more title to privilege than a priestly caste that claims to speak for God.

In the articles he wrote in 1820s Parent describes the British constitution as a form of “mixed” or “balanced” government. He does not make an outright argument for the constitutional principle we now call responsible government until the 1830s. But whether he is using the language of mixed government or responsible government, he argues against the unconstitutional aggrandizement of the “popular branch of the legislature.”

He begins from the assumption that the legislators of 1791 wished to give the Canadas a version of the British parliamentary system. Parliament in Parent’s description comprises three branches: the monarchic branch (in Britian, the ministers of the Crown; in the colonies the executive council); the aristocratic branch (the House of Lords, and legislative council) and the democratic branch (the House of Commons, and legislative assembly). Each branch should be “independent,” with

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13 Le Canadien 17 October 1838, 7 October 1839, 23 October 1839, 21 October 1842. David J. Bercuson and Barry Cooper explore the idea that privileged demands made in the name of ethnicity and nationality cannot be tolerated in liberal democracies. Deconfederation, Canada without Quebec (Toronto 1991)

14 Le Canadien 18 February 1824
distinctive constitutional powers. At the same time no branch should function alone; the three together are said to "balance" or "harmonize."\textsuperscript{15}

He maintained that the problems of Lower Canada did not stem from supposed flaws in British institutions but from a failure to put British principles into practice. In particular the principle of the "independence" of the three parliamentary branches had been allowed to lapse. The colonial monarchic and aristocratic branches were both nominated by the Governor, and far from being "independent," took up the same causes and had the same goals.\textsuperscript{16} A single oligarchic elite was ensconced in the executive and legislative Councils, furthering their own interest and thwarting efforts by the majority party in the assembly to initiate measures on behalf of the populace.

The Ninety-Two Resolutions, a statement on colonial grievances published in 1834, lists the sins of the oligarchy. The colonial executive had used provincial revenues to provide salaries for "sinecure offices" and to support "other objects" for which the House after deliberation had denied funds.\textsuperscript{17} The Receiver General of the Province had paid away large sums of money from the public purse "without any regard to the obedience which is always due to the law."\textsuperscript{18} The executive had created new and wholly unauthorized revenues through the sale of Crown lands when existing revenue proved insufficient to satisfy official party greed.\textsuperscript{19} That Parent argued against such practices hardly needs to be said. He was a staunch and unflagging opponent of the oligarchic party. It is his remedy that needs careful examination.

He did not accept the democratic argument that the transgressions of the executive and legislative Councils made it necessary to reduce the powers of these bodies. The patriote formula called for the legislative assembly to assume the powers of government from the councils. Parent disagrees: "The Assembly forms only one branch of the legislative body, and can do nothing with respect to the passage of laws without the agreement of the two other branches." Were the assembly of Lower Canada to take on itself the powers of government, confusion and disorder would result: "The idea that the Assembly forms a legislative body separate from the other

\textsuperscript{15} Le Canadien 18 February 1824, 8 September 1824. This view of the parliamentary system was standard among liberals in Britain and the colonies at the time.

\textsuperscript{16} Le Canadien 8 September 1824

\textsuperscript{17} Resolution 65. Kennedy \textit{Statutes} 283. A number of the Resolutions derived from \textit{le Canadien} and bear Parent’s stamp. But as Kennedy notes, the publication of the Resolutions marked the parting of the ways among the reformers: "They illustrate better than any other document the matured attitude of Papineau and his followers, and distinguish them from the moderate and constitutional radicals" (\textit{Statutes} 270n). And see the description of the Resolutions, probably by John Neilson, cited in W.P.M. Kennedy, \textit{The Constitution of Canada, An Introduction to its Development and Law} (London 1922) 108: "eleven stood true; six contained both truth and falsehood; sixteen stood wholly false; seventeen stood doubtful; twelve were ridiculous; seven were repetitions; fourteen consisted only of abuse; four were false and seditious; and five were good or indifferent." Neilson disagreed with at least two-thirds of the resolutions. We could make the same claim for Parent.

\textsuperscript{18} Resolution 34

\textsuperscript{19} Resolution 66
branches is false and dangerous.”

Nor did he endorse that other favourite remedy of the democrats, an elective legislative council. He agreed with the radicals that the machinations of the legislative council were contributing to the colony’s problems, but maintained that what was required was an appointed and “independent” upper house: “We must have an independent aristocratic branch, which owes nothing for its existence to another branch, a body that finds its interest in the general prosperity of the country and not in exhorbitant salaries.” Parent’s remedy, in short, was “independence” for the three parliamentary bodies. All would be well when the principles of the British constitution were at last fully realized in Lower Canada.

By the 1830s Parent’s language has changed. Gone are the references to the monarchical, aristocratic and democratic branches of the legislature. He now espouses the principle we call responsible government. But it is still his assumption that the colonial constitution should be modeled on the British: “Under pain of renouncing their portfolios, the Ministers in England must command the confidence and the majority in the Chambers, and above all that of the Commons, in all great measures, which almost always in England emanate from the government.” In the colonies the introduction of this practice would mean that the King would nominate the executive councillors. “They would be his councillors as today, but with the great difference that they could be held accountable for all acts of government by the Chambers.”

The standard view of mixed government holds that the doctrine flourished in the age of aristocracy, and died out in the early- to mid-nineteenth century with the introduction of responsible government. The notion of three “independent” branches of parliament was abandoned, to be succeeded by the “fusion” of political executive and popular house that characterizes the modern parliamentary system. It is not a view that will help us with Parent.

We have already noted that he writes about responsible government as a doctrine that had long been a feature of the British system. He maintains indeed that it had been familiar to constitutional thinkers in the colonies from 1812. How did Parent think of responsible government in relation to his earlier understanding of the British constitution as a mixed regime? Did he believe he had been mistaken in describing the British constitution as balanced government?

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20 Le Canadien 18 February 1824
21 Le Canadien 8 September 1824
22 In March 1825 le Canadien went out of circulation, resuming in May 1831
23 Le Canadien 19 June 1833. Falardeau’s title for this article is “Nécessité d’un gouvernement responsable.” The phrase “responsible government” does not come into common use until after the publication of the Durham Report, and Parent does not use it in this article. “Nécessité” was reprinted as a preface to Marcel-Pierre Hamel’s edition of the Durham Report. “Retrospective d’Etienne Parent” Le Rapport de Durham (Québec 1948)
24 Le Canadien 19 June 1833

Janet Ajzenstat 166
His most comprehensive discussion of responsible government includes this picture of the tribulations of assembly members under the colonial practice: "One has generally so little time to give to public affairs that the sessions pass in demanding one piece of information after another, document after document, testimony after testimony, and years pass before a committee is able to unravel the chaos that is before it. The session ends, everyone returns to his particular affairs, and one returns at the next session as innocent as one was at the beginning of the last. And if in response to popular demand, one passes a law, it is nothing but an outline that has to be retouched at each subsequent session." 25

He continues: if legislation were prepared by ministers (from either chamber) who headed administrative departments, it would reach the assembly "already digested," and one would have someone to call on for an explanation of the bill. In short, a "provincial ministry" is need, modeled on the "imperial ministry." Responsible government for Parent is ministerial government, and ministerial government yields more coherent legislation, more efficient administration, and better accountability.26

Notice that his analysis of grievances is not very different from the one he advanced in the 1820s. His argument is still that the oligarchy entrenched in the executive and legislative councils had the will and power to impede the legislators in the popular house. Moreover, he is no more ready in the 1830s than in the 1820s to accept the idea that the assembly should bypass the obstructive party in the upper houses and assume executive powers. On the contrary, his depiction of ministerial government suggests that what is required is an executive council with strong powers. In keeping with the principle we know as responsible government they will be chosen from among those who have the sympathy of the lower house, but they will not be ordinary members of the lower house. They will wield the powers of the Crown, and have responsibility for the departments of government. Parent points out that in Britain legislation is initiated by the executive branch. He recommends the same practice for Lower Canada. The executive branch of government is to initiate legislation, and account for it in the assembly. The doctrine of responsible government in Parent’s description requires a political executive that wields concentrated powers of government.

To enable the lower house to perform its function of calling for explanations and holding the executive accountable, the assembly is the guardian of the public purse.27 It is the constitutional right of the the lower house to vote on spending legislation introduced by the executive branch.28 Parent depicts the power of the purse as a counterweight to "the kind of tyranny that the Executive is able to exercise over its

25 Le Canadien 19 June 1833
26 Le Canadien 19 June 1833
27 Parent tells the story of the legislative assembly's long struggle to exercise this right in "Pierre Bédard et ses deux fils." Falardeau Etienne Parent 1801-1874 37-8. And see Le Canadien 7 October 1839
28 Le Canadien 18 February 1824, 7 October 1839
subjects." The assembly must act as a check on the executive. At the same time he opposes the idea — so often endorsed in these years by Papineau — that the popular house should disburse public funds according to its own program. In the 1820s he argued that a popular house raising and spending public funds could be led to imitate the excesses of Third Estate. He is of the same view in the 1830s. The dispersal of public monies must remain a prerogative of the executive. Just as the assembly checks the executive, so the executive must check the assembly.

In other words, Parent’s espousal of responsible government did not require him to abandon the idea that the cabinet and popular house are two “branches of the legislature,” and in an important sense, independent. The two constitutional bodies are inseparable, but distinguishable. Each has its proper constitutional powers.

In the passage in which he says that responsible government was known to the men of 1812, Parent points out that their successors “have made progress in constitutional knowledge and can formulate the demand more precisely.” When he adopted the language of responsible government he found new ways to formulate old demands. He was not describing a startling new development. The constitution he described in the 1820s as a mixed regime, he can now write about in terms of a plea for responsible government.

What is supremely excellent about this constitution, whether responsible government or mixed government, what enables Parent to describe it as the best possible guarantee of political freedom, has yet to be seen.

Like Parent, Howe confronted a governing clique bent on frustrating proposals for reform of the economy and constitution. The executive and legislative councils of Nova Scotia were dominated by a “small knot of individuals” who owed their seats to the influence and intrigues of their friends and relatives. United by their common interest in “promoting extravagance, resisting economy, and keeping up the system exactly as it stands,” they remained in power whatever the outcome of elections and whatever the composition of the legislative assembly. They enjoyed the best salaries in the country, and distributed “nearly all the patronage.”

29 Le Canadien 18 February 1824
30 Le Canadien 18 February 1824
31 Compare Verney The Analysis of Political Systems 57, where it is argued that in both presidential and parliamentary government, the executive and legislative functions are “separated,” “to a greater or lesser degree”
32 Howe to Lord John Russell Kennedy Statutes 405-6, 409
33 Kennedy Statutes 387-8, 406. Howe makes a distinction between “political” parties, defined as parties that are “pledged to approve certain principles of . . . policy which the people for a time approve,” and “official” parties, that is, parties “pledged to keep themselves and their friends in office and to keep all others out.” See page 406. Political parties were characteristic of England; an official party dominated the politics of Nova Scotia.
Responsible government, the “cornerstone of the British Constitution,” is Howe’s remedy.\textsuperscript{34} In 1839 he wrote four open letters to Lord John Russell arguing that colonial grievances would cease only with the implementation of the British constitution in the colonies.\textsuperscript{35} In England, he writes, “the government is invariably trusted to men whose principles and policy the mass of those who possess the elective franchise approve and who are sustained by a majority in the House of Commons.”\textsuperscript{36} They govern until they find their “representative majority diminished” and some “rival combination of able and influential men” are in a position to “displace” them.

Howe defines responsible government as requiring the political executive to “answer” to the majority in the popular house. It would “place” the government of the colony, “as it always is in England, in a majority in the Commons, watched, controlled and yet aided by a constitutional opposition.”\textsuperscript{37} He means, as Parent did, that the government is sustained by the majority in the lower house. Responsible government concentrates the power of government in the cabinet. The cabinet must take the lead in public affairs, with “energy and ability.”\textsuperscript{38} No more than Parent is Howe thinking of the cabinet as a subordinate institution, docilely carrying out the assembly’s instructions.

Howe’s idea of the prerogatives proper to the executive branch of Parliament are illuminated by his discussion of patronage. The official party in Nova Scotia appointed some 900 administrative officers.\textsuperscript{39} Howe’s objection to these appointments is not made on the ground that patronage is wrong or distasteful. What was intolerable about the situation was that the 900 appointments were made by an executive council that did not have the support of the people of the province.\textsuperscript{40} The distribution of patronage took no account of the wishes of the populace.

Responsible government in Howe’s analysis, would place patronage and spending powers in the hands of a party that was required to maintain the support of the assembly and the electorate. He regarded the patronage prerogative as an aspect of what is sometimes called the executive spending power, or “royal

\textsuperscript{34} Kennedy Statutes 384-7. Howe uses the term responsible government, by now accepted usage. Parent was familiar with Howe’s arguments. See le Canadien 23 October 1839

\textsuperscript{35} Russell’s speech on the union bill, 3 June 1839, was the immediate occasion for the four letters; Russell argued that responsible government was inappropriate in colonial dependencies. Howe draws on the arguments of the Durham Report, pitting Durham against Russell. The four letters were widely read in the period, and highly regarded. Howe never wrote anything better. For Russell’s address, see Kennedy Statutes 383-3

\textsuperscript{36} Kennedy Statutes 386. And see 389-90, 405-6. Beck writes: “Howe’s acceptance of the Durham Report represented a fundamental change in attitude on his part... A single reading of the Report had made him an instant convert.” Joseph Howe, Conservative Reformer, 1804-1848 (Kingston 1982; 2 vols) 2, 199. It might be more accurate to say that in Durham Howe found arguments to lend his position focus

\textsuperscript{37} Kennedy Statutes 407

\textsuperscript{38} Kennedy Statutes 408

\textsuperscript{39} Kennedy Statutes 408

\textsuperscript{40} Howe assures his readers that there would not be a constant turnover in the public service. A new party in office would not necessarily dismiss all previous appointments. Kennedy Statutes 408
recommendation,” the constitutional principle requiring that spending legislation be introduced in the lower house by a minister of the Crown.\(^{41}\) The important consequence of this principle is that the popular house does not raise and spend public funds on its own initiative. The patronage prerogative, concentrating the power to govern in the cabinet, enables the executive to present the assembly, and the public, with a coherent program to accept or reject. The executive branch of the legislature governs, while the popular branch — and the public — scrutinize, criticize, and approve or disapprove. Howe regards the fact that the cabinet, not the assembly, wields the patronage power as a necessary condition of governmental accountability.\(^{42}\)

The old language of mixed government surfaces occasionally in Howe’s argument.\(^{43}\) At one point for example, he speaks of the Governor’s power of dissolution as his means to “adjust the balance of power” — harking back to the idea that the political executive, upper house and lower house must “balance.” From the context it is evident that he is thinking of a situation where an executive council that has lost the confidence of the house refuses to leave office. The executive has attempted to override the constitutional powers of the assembly, upsetting the “balance.” Howe suggests that in such a situation the Governor would exercise his power to call an election, presumably freeing him and the country of the offending party, in this way redressing the balance.\(^{44}\) But whether he uses the new terminology or the old it is clear that like Parent Howe holds to that central tenet of the mixed constitution as it was expounded in the early eighteenth century: the political executive and lower house are connected, but nevertheless distinct branches of the legislative power, each with its constitutional powers.

As long as Parent and Howe inveighed against the injustices of the official party, their arguments had a simple appeal. Whether they were addressing their home constituency or British officialdom, they had a sound case and a wealth of undisputed grievances to cite. They were the friends of freedom and the foes of oligarchy. But consider their difficulties when they began to set out the case for the assumption of power by colonial parties. Both, as we shall see, felt it necessary to disguise the fact that colonial elites might be as ambitious as the imperial ones. Both take care when they are describing the perhaps unsavoury constitutionalist teaching about the nature of politicians.

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\(^{41}\) Howe found the following formula in the Durham Report: “No money-votes should be allowed to originate without the previous consent of the Crown.” C.P. Lucas ed *Lord Durham’s Report on the Affairs of British North America* (Oxford 1912, 3 vols) II, 328

\(^{42}\) *Kennedy Statutes* 406

\(^{43}\) See also *Kennedy Statutes* 407, where in arguing against an elective upper legislative chamber — that favoured measure of the democrats — he says that an appointed upper chamber is useful to review measures and check undue haste or corruption in the popular branch. If legislative councillors held their seats for life, he goes on “their independence of the Executive and of the people would be secured”

\(^{44}\) *Kennedy Statutes* 390. Howe in fact thinks that parties would seldom or never cling to office after losing the confidence of the lower house
Parent must explain to his readers that once the "official" clique has been voted out the leaders of the popular party will take up salaried offices in the executive council, spending the public revenue, and dispensing patronage. He knows very well that many of those readers, especially, as he says, the ones "who take pleasure in calumniating the free and honest motives of the liberal press," will conclude that the advocates of responsible government are advancing the measure for no other reason than to obtain positions for themselves and their friends.45

If we were merely interested in promoting our friends' interests, he says, we would recommend careers in commerce for those attracted by the glamour of money, or in the liberal professions for those who desire honour and distinction. Politics offers only a false glamour and uncertain prospects. The reason for recommending responsible government, he continues, is that it will put representatives of the people in a position where they are able to render the services that the people need. Parent's difficulty is that, as he knows very well, the argument for responsible government does not presuppose disinterested, high-minded politicians. It assumes rather that politicians are eager for the rewards of office, and is intended precisely to accommodate and contain ambition. Parent knew that political leaders of all parties want the glamour of public office as much or more than the chance to serve the public interest, but he could not be entirely forthright with a population still unfamiliar with the political game of ins and outs. The passage glosses over, and yet reveals, Parent's understanding that one of the secrets of good government is the utilization of low human motives.

Howe's reasons for not being forthright with readers arose from the fact that the popular parties in the Canadas had endorsed armed rebellion against the British government. Howe cannot deny that under responsible government the leaders of the popular party of the day occupy places in the cabinet. But it will do him no good with his readers in Britain, or with his own moderate reform constituency in Nova Scotia, to speak favourably about the "Canadian demagogues," leaders of the "maddest rebellions on record."46 Sir Francis Head apparently considered it a sufficient argument against responsible government to say that if it had been in operation, demagogues like Papineau and Mackenzie would have been ministers in their respective provinces.47

Howe first suggests that Papineau and Mackenzie would never have grown to importance under responsible government, because they lacked "sound sense," and "prudence." Agitators like them arise only under conditions of injustice: "who dreams that, but for the wretched system upheld in all the Colonies, and the entire absence of

45 Le Canadien 19 June 1833
46 Kennedy Statutes 410. See his praise of the brave and able men who crushed Mackenzie's rebellion, 396
47 Kennedy Statutes 410
responsibility, by which faction or intrigue were made the only roads to power, either of the Canadian demagogues would ever have had an inducement or been placed in a position to disturb the public peace?"48

The argument is not entirely convincing. Indeed Howe soon abandons it, going on to say that if responsible government had been introduced Papineau and Mackenzie might after all have become "conspicuous and influential." He then admits outright that it is not improbable that they would have been executive councillors, guiding the internal policy of the colony and dispensing the local patronage. Remember that Howe's four letters have made the case for concentration of governing power in the cabinet. Now he is involved in arguing that responsible government could put that concentrated power in the hands of demagogues and rebels.

As he continues his careful presentation in these passages, it becomes apparent that Howe regards it as an advantage — not a disadvantage — that the British constitution concentrates power in the hands of men of the type to become demagogues and rebels. Such men exist in every society. They will always make a bid for power. The remarkable thing about the British constitution is that men of this character wield power under conditions that require them to act in statesmanlike fashion. Howe asks: "if the sovereigns had continued, as of old, alone responsible; if hundreds of able men all running the same course of honourable ambition had not been encouraged to watch and control each other. . . .who, I ask, will assure us that Chatham and Fox, instead of being able ministers and loyal men might not have been sturdy rebels?"49

Papineau and Mackenzie are now compared to Chatham and Fox! The argument that began with the suggestion that under a good constitution demagogues will never be admitted to power, now says that if ambitious men are not allowed into power they will become demagogues.

Howe's argument at bottom is that the incomparable British constitution encourages demagogues to act like the great statesmen of British history because it rewards their ambition under institutions that curtail it. They find that they can gratify their ambitions only by maintaining the support of a party that has the support of the country. Their use of the power of the Crown is subject to the scrutiny of the opposition and public. Rebels "have become exceedingly scarce at home [in England]" he says, "yet they were as plentiful as blackberries in the good old times when the sovereigns contended." He goes on: "Turn back and you will find that they began to disappear altogether in England about 1688."50

Given this account of the salutary clash of elites under a good constitution, we can see why Parent and Howe cling to the idea that the cabinet is a separate branch of the legislature, and why they regard this feature of the British constitution as one of

48 Kennedy Statutes 410
49 Kennedy Statutes 411
50 Kennedy Statutes 411
the great guarantees of freedom, a guarantee especially against democratic absolutism. It is above all a way of denying to the ambitious men in the branch of the legislature that can fairly claim to represent “the people,” the right to wield the power of the Crown. The political executive, the executive council, represents the majority in the lower house, and speaks for many, perhaps a majority, in the electorate, the majority of the moment. But it cannot claim to speak for “the people.” There is always that vocal and ambitious minority in the legislative assembly ready to oppose and criticize the party in power, a constant reminder that the title to govern can be revoked.

The lower house has a much better claim to represents “the people” because it contains members from every constituency. But in the British constitution this representative house is denied the power to govern. The constitution thus ensures that no political leader may govern in the name of all. It provides government in the interest of the majority of the moment, while guaranteeing freedom from democratic tyranny.

That political leaders must compete for their rewards under rules that force them to seek the approval of the public is what gives England government in the public interest. What does the ambitious man do when he loses office? asks Howe. He does not mourn his loss as if it were “an irreparable stroke of fortune.” Nor need he start a rebellion. He “rallies his friends,” and connects himself “with some great interest in the state whose accumulating strength may bear him into the counsels of his sovereign.”51 “Under English government,” Parent argues, “public opinion is everything; the authorities challenge its power in vain; they are obliged to submit to it.”52 Government in the public interest with security against popular absolutism: the parliamentary system that Parent and Howe describe is a better formula for pleasing the people than the democracy favoured by Papineau and Mackenzie.

Parent’s conviction that the British constitution was the best possible form of government for Lower Canada tells us that he regarded it as a universal prescription. The fact that the constitution originated in England in the eighteenth century did not mean that it was suitable only for Englishmen. French Canadians were as capable as the British of appreciating the benefits of good political institutions, and as capable of using them to their own advantage. Howe compares the British constitution to the “unerring principles of science.” Like the principles of science, he says, it is as applicable to “one side of the Atlantic as to the other.”53

Howe sums up his case for responsible government in this passage: “Until it can be shown that there are forms of government, combining stronger executive power with more of individual liberty; offering nobler inducement of individual ambition, and more security to unaspiring ease and humble industry” it cannot be assumed that the

51 Kennedy Statutes 386
52 Le Canadien 7 May 1831
53 Kennedy Statutes 386
inhabitants of the provinces of North America are "panting for new experiments." What he means by individual ambition and the necessity for strong executive power we have seen. By the phrase "security to unaspiring ease," I suggest, he indicates that there is, and should be, a sphere of social and economic activity beyond politics. In other words he is an advocate of limited government. J. Murray Beck describes him as "a vigorous advocate of freedom from the unwarranted restriction of individual activity." Could Beck's description be as easily applied to Parent? H.D. Forbes argues that Parent was willing to see governments use their power to equalize political opportunities. "Parent believed ... it was not sufficient that [government] enforce contracts, prohibit the use of violence and undertake a few public works; it also had to adopt policies respecting education and taxation that would give the poor man's sons some real help in competing with the rich man's son for the leading positions in society." But if Parent was more tolerant of government activity than Howe, he would never have countenanced its extension into all spheres of society. Neither Parent nor Howe accepted the idea of politics as an all-encompassing human activity, a panacea for all social ills.

In a constitutional regime the alternation of parties in office is the condition of political freedom. Limited government is the condition of individual freedom. Both features protect citizens from their political leaders, the first by pitting elites against each other for the approval of the electorate, and the second by curtailing government intrusion. They are the guarantee against the absolutism of leaders who claim title to govern on the basis of birth, wealth or "race," and the absolutism of those who would argue that they govern in the people's name. For the democrats of the 1830s, flushed by revolutionary excitement, these principles of constitutionalism must have seemed antiquated indeed. When the people's representatives had at last attained the positions in government office to which they were entitled, when the demos had triumphed, constitutional provisions that might unseat "the people's party," or limit the scope of government, would be unnecessary.

In the 1830s it was apparent to all that the colonies could not continue under the practices that had grown up in the decade succeeding 1791. It was a period of founding, or re-founding. To participants in the debates of this crucial decade it must have seemed as if two very different futures stretched ahead. But with the introduction of responsible government the democrats' arguments went down to defeat. Constitutionalism triumphed. The form of government established in 1867 had already been determined by the ideological debates of the 1830s. This is not to say that the democratic vision was entirely forgotten. In the late nineteenth century the

54 Kennedy Statutes 385
56 H.D. Forbes "Etienne Parent: Nationalist and Liberal" manuscript 1983
57 In public lectures given in the 1840s he argued for the expansion of commerce and industry in Lower Canada. See especially those reprinted in Falardeau Etienne Parent 1802-1874 113-199
argument for “balance” and the mixed regime lost credence. Mixed government came to be depicted as an outmoded notion of the eighteenth century, irrelevant in a liberal democratic society like Canada.\(^{58}\) The idea that the democratic and the liberal (or constitutionalist) elements in liberal democracy are in tension was no longer in the forefront of political debate. The result was that although liberal democratic practices continued, and appeared to be as well entrenched as ever, the way was opened for a revival of the democratic ideology. Peter J. Smith, describing Papineau’s political vision, says: “the political ideology of agrarian democracy was not to be extinguished in Canada. It emerged as powerful as ever on the prairies in the twentieth century, giving sustenance to radical movements of both the left and the right.”\(^{59}\)

Proof that the democratic vision lingers in Canada’s political subconscious might be found in today’s constitutional debate. Among the arguments made on behalf of constitution-making by means of a constituent assembly is the suggestion that the representative character of such an assembly would be enough to ensure its responsiveness to Canadian interests. No further formula for accountability (like responsible government) is required. The democratic thrust in the argument for a constituent assembly does not support agrarian democracy, or the simple life; it is not the nineteenth-century vision in all its purity. But it rings with echoes of the nineteenth century.

How freely Canadians today speak of “the people” — and appeal to the idea of a national general will, in very much the accents of the democrats of the 1830s. Today’s populists and democrats, I would argue, are most like the democrats of the nineteenth century when they become impatient with constitutional forms, like the parliamentary system and the principle of limited government, because forms are seen as impeding progress toward worthy political goals.

Constitutionalism and democracy are the two poles of modern political thought; in the British North American debates of the 1830s we see one swing of the pendulum. At the democratic pole cluster the demand for political virtue, equality of condition, the sense of nationality, hopes for community and the idea that government should be of “the people.” Constitutionalism may well appear less attractive: it does not ask for high-minded leadership, expects little from the populace in the way of citizenly virtue, and if we are to believe its critics, fails to respect the human need for community.\(^{60}\) It demands equality of right, but tolerates inequality of condition. It stands on solid ground when it opposes the absolutism of the few, but its opposition to the absolutism of the many can easily appear like a betrayal of popular interests.

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\(^{59}\) Smith “The Ideological Origins of Canadian Confederation" 29

What we find in Parent and Howe is an argument that illuminates the constitutionalist pole. They explain and defend the nineteenth-century doctrine, especially its anti-democratic thrust. And they usefully remind us today that democracy may not be a sufficient formula for government in the popular interest.
Why Lord Watson Was Right
Paul Romney

In the *Prohibition* judgment of 1896,\(^1\) Lord Watson set out guidelines for construing the division of legislative powers under the British North America Act, 1867.\(^2\) Watson's judgment was the last chapter in a long conflict between two notions of the provinces' place within the Dominion of Canada. According to one idea of the constitution, the provinces were subordinate units within a sovereign dominion, and their legislatures must not be suffered to encroach upon the prior and sovereign power of Parliament. According to the opposing idea, the provinces were constitutionally equal to the dominion and endowed with an ample sphere of legislative autonomy, which Parliament must not be allowed to usurp. The *Prohibition* judgment endorsed the latter view, but it conceded that circumstances might arise to justify Parliament in acting on matters normally coming within the provincial jurisdiction.

Between the wars, some Canadians blamed the Judicial Committee of the Privy Council for refusing to see such extenuating circumstances in a series of cases, culminating in the overthrow of the Bennett government's "New Deal" legislation in 1937. Their censures were summed up in W.F. O'Connor's report to the Senate on the enactment of the BNA Act and its subsequent construction by the courts. O'Connor told a story of progressive deviation from the framers' intentions, and he traced the rot back to Watson's guidelines, alleging that Watson had perverted the text of the act in order to justify an illegitimate conception of provincial autonomy. "I dislike Lord Watson's assumption of the guardianship of the autonomy of the provinces," wrote O'Connor. "His proper function was merely that of an interpreter of the meaning of the words of a statute. When the London Conference framed its terms and the Imperial Parliament enacted them the true guardians of the autonomy of the provinces had done, in their way, what Lord Watson was later presuming, without the necessary equipment, to do in his way."\(^3\)

Where O'Connor's judicial history featured Watson as the prime villain, Donald Creighton's political history highlighted the perfidy of Oliver Mowat. Mowat's advocacy of provincial rights was "a new theory of Canadian federalism," and as

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1 AG for Ontario v AG for the Dominion [1896] A C 348
2 30 and 31 Vict c 3 (UK); hereafter BNA Act
Mowat well knew, having taken part in the Quebec Conference, one that "completely contradicted . . . the original conception of Confederation." According to Creighton, "the knowledge that he was repudiating that which he had previously endorsed and attacking a constitution which was partly his own handiwork apparently did not cause him a moment's concern . . . He utterly denied the tacit assumption of the Quebec Conference that the "local" governments would decline in importance to virtually municipal levels." 4

O'Connor's and Creighton's accounts were complementary rather than contradictory. Centralists agreed that the BNA Act had been designed to establish a dominant federal jurisdiction, and that Lord Watson's arrogance had permitted him to destroy that design by imposing his own "theoretical views on the nature of federalism." 5 This thesis came to dominate English-Canadian historical writing and has only recently been recapitulated in its essentials in a leading journal. According to this restatement, the Confederation accord, though ostensibly federalist, was in reality "crudely centralist," a character which "was not a result of shoddy draughtsmanship but the conscious effort of the framers of the Act." This intention was thwarted by the Privy Council, which—not merely in the Prohibition Reference but even earlier, in Citizens' Insurance Co. v. Parsons 6 and the centralists' beloved Russell v. The Queen 7 —was preoccupied by the need to restrain the dominion for the sake of provincial autonomy. 8

Given the constant controversy surrounding constitutional politics in Canada, and the frequent criticism of the centralist history of Confederation from a Québécois perspective, 9 the persistence of the centralist conception is remarkable. It was espoused, of course, by many revered figures of the Canadian intelligentsia, some of whom have only lately left the scene: men of the calibre of F.R. Scott, Bora Laskin, A.R.M. Lower, W.L. Morton, W.P.M. Kennedy and Eugene Forsey, to say nothing of O'Connor and Creighton. One suspects, however, that its persistence is owing to something more than its intellectual pedigree. The centralist interpretation of Confederation is a nationalist myth, and the idea that the Judicial Committee subverted the Founders' intentions is the Canadian nationalist version of the Dolchstoss, the notion that the German drive for victory in 1918 was thwarted by civilian treachery.

4 Donald Creighton Canada's First Century, 1867-1967 (New York 1970) 47. Creighton's first essay on the subject was contemporary with O'Connor's: Creighton British North America at Confederation: A Study prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa 1939)

5 Donald Creighton Dominion of the North: A History of Canada (rev ed Toronto 1957) 379

6 (1880) 4 SCR 215; aff'd (1881) 7 App Cas 96

7 (1882) 7 App Cas 829


9 G.F.G. Stanley "Act or Pact? Another Look at Confederation" Canadian Historical Association Report (1956); Richard Arès Dossier sur le pacte fédératif de 1867 (Montreal 1967); A.I. Silver The French-Canadian Idea of Confederation, 1867-1900 (Toronto 1982)
Such myths carry a powerful emotional, or even spiritual charge; but it should not be supposed that the centralist interpretation has been clung to in defiance of reason and the evidence. I would contend, rather, that the very strength of the myth has diverted inquiry from avenues that might have brought it into question. For the most part, Canadian nationalism has been an anti-American nationalism, and it has fostered a national historiography which exalts the conservative tradition—a tradition imagined as running from the United Empire Loyalists, through John A. Macdonald, to John Diefenbaker—as the principle of resistance to American hegemony. Set against this conception, the opposing reform-liberal tradition appears as anti-national: tainted with “Yankee” tendencies in the early decades and annexationism in the 1890s; lukewarm towards the Canadian Pacific Railway and hostile to the National Policy; and finally, after the Second World War, the vehicle of a debilitating continentalism. This record of weakness tinged with perfidy has not invited close scrutiny. Laurier and Mackenzie King could hardly be ignored, but little has been done to recover the Upper Canadian Reform tradition apart from the efforts of Frank Underhill, who approached it with inappropriate preconceptions and found it sadly wanting.10

Because of this bias, the idea that Confederation was “centralist” in intent—or, more precisely, the analysis that has been founded on that premise—has never been effectively challenged. The recent reprise, to be sure, marches against a newer orthodoxy which defends the Privy Council’s treatment of the BNA Act; but in fact, as regards the origins and intent of the act, the discussion actually demonstrates the persistence of the old orthodoxy. Two of the scholars named as representing the “new orthodoxy” frankly admit the validity of the centralist jurisprudential critique. Alan Cairns concedes that the Privy Council’s decisions were biased towards the provinces from the start and speaks of their “injection of a decentralizing impulse” into the constitution; Peter H. Russell refers to the Privy Council’s “anxiety to preserve a division of powers appropriate for ‘classical federalism’ and thereby resist the strongly centralizing tendencies of the constitutional text.”11 A third target, G.P. Browne, does try to vindicate the Privy Council’s jurisprudence, but he does so by means of a narrow textual analysis of the BNA Act which says nothing about its intent.12

Browne’s analysis cannot by its nature prevail against the centralist Dolchstoss-myth. No more can criticism from a Québécois perspective. It was not Quebec but Ontario which carried on the campaign for provincial rights, at first without allies; and if Lord Watson and his colleagues wielded the dagger, it was Oliver Mowat who


suborned the deed. It will not do, then, to suggest that the French-Canadian or the Maritime Fathers of Confederation, or some of them, contemplated the sort of decentralized federalism that Mowat fought for. The myth can be laid to rest only by showing that Mowat’s campaign for provincial rights conformed not merely to the intent of the founders as a whole but to the understanding upon which Reformers like him had accepted Confederation. That is the purpose of this paper.

To that purpose, the question of provincial autonomy is crucial. The Ontario Reformers of the 1880s purported to be fighting, like those of the 1820s, to obtain responsible government for their province. Oliver Mowat, like William and Robert Baldwin before him, claimed a broad sphere of provincial legislative autonomy on the basis of a certain conception of the status of the provincial polity within a larger confederacy. In this paper, therefore, I show that Confederation was designed to fulfill the Reformers’ long-cherished dreams of local autonomy and that the Prohibition judgment is best understood as an endorsement of that view, which Mowat had been pressing upon Ottawa and the courts for more than two decades. Finally, I sketch the process of historical amnesia which engendered the centralist Dolchstoss-myth.

Centralists condemned the Prohibition judgment as a perversion of the plain meaning of the BNA Act, but they also attacked it on historical grounds, as a violation of the framers’ intent. Noting the founders’ anxiety to contain the sort of sectional strains that had shattered the United States, they insisted that the final accord had deliberately subordinated provincial autonomy to the imperative of political stability. They relied above all on two features of the Confederation accord as they read it. One was Ottawa’s power to reserve and disallow provincial legislation just as the imperial government was empowered to reserve and disallow dominion legislation. The other was the reservation to the dominion of two important powers which were assigned by the United States constitution not to Washington but to the states; namely, the residuary legislative power and the power to regulate trade and commerce. Centralists saw these provisions as vesting in the dominion a quasi-imperial pre-eminence, and they condemned as fatuous presumption Lord Watson’s perversion of the division of powers in the name of provincial autonomy.

In the 1820s and ’30s, British statesmen had seen similar presumption in the efforts of colonial politicians to establish responsible government in Upper Canada. In 1829 Tory ministers cited an assortment of arguments against the idea; a decade later the liberal Whig Lord John Russell dismissed it as a constitutional absurdity. According to orthodox legal doctrine, as expounded in the Commentaries of Sir William Blackstone, sovereignty was indivisible and the imperial government its sole

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13 The aptness of the imagery is indicated by John Wellington Gwynne's comment on the Judicial Committee's constitutional jurisprudence to James R. Gowan: “Old as I am I fully expect that both you and I shall be present at the funeral of Confederation cruelly murdered in the house of its friends.” Letter, Gwynne to Gowan, 24 Dec 1889, in National Archives of Canada, MG27 I E17 A1 (Gowan Papers)

repository in the British empire. However desirable it might be to have Upper Canada governed according to colonial public opinion, the administration could hardly be formally responsible to a provincial legislature which was not by nature sovereign.¹⁵

The Upper Canadian Reformers, however, seem never to have deferred to this perception. Inspired by an Irish Whig constitutionalism of older provenance than Blackstone’s, they roundly asserted the claim of British colonies to co-ordinate status with the mother country in the governance of the empire. According to the anonymous “Letter on Responsible Government” of 1829 (or rather to “Canadiensis,” the pseudonymous author of the treatise which the “Letter” purported to summarize), the colonial legislature enjoyed exclusive competence in all matters of internal policy that did not affect the integrity of the empire. The King in Parliament at Westminster could not act in such matters without the concurrence of the legislature. “The Government of the Empire is constitutionally lodged in the Imperial Parliament, conjointly with the several Colonial parliaments throughout the Empire,” asserted Canadiensis. “Colonial Parliaments are not the mere gifts of the Imperial Parliament, or of the King to the respective Colonies, but a part of those rights to which as British subjects the Colonists were entitled.”

On this premise “Canadiensis” erected an argument as to the scope of the colonial jurisdiction: “Self government being the first principle of every free Constitution, nothing short of absolute necessity can be a sufficient excuse for a violation of it. As therefore the people of U.C. are represented in the Provincial, not in the Imperial Parliament, it follows that in the former must be vested the powers of Government generally, and in the latter only those special powers of Government which for the preservation of the safety and integrity of the Empire at large, it is absolutely necessary to have lodged in the hands of one body only for the whole Empire.” That imperial jurisdiction was confined to trade, navigation and military affairs. As for the colony’s charter, the Constitutional Act of 1791, this was a treaty between Great Britain and the colonists, which could not be materially altered without the latter’s formal concurrence.¹⁶

The views of “Canadiensis” have long been on record, but they are now known to have been shared by William and Robert Baldwin, the leading Upper Canadian campaigners for responsible government.¹⁷ This discovery is important, because it shows that those views were more than the idiosyncracies of a single, anonymous individual; they were, in fact, the ideological motor of the movement for Upper Canadian autonomy. Nor were they abandoned in the aftermath of the rebellions. In


¹⁶ The Letter is reprinted and discussed in K.D. McRae “An Upper Canada Letter of 1829 on Responsible Government” Canadian Historical Review 31 (1950) 288-96; quotations at 292-3 (italics in original)

1841, in language redolent of "Canadiensis," Robert Baldwin proposed in the legislature of the new province of Canada "That the most important as well as the most undoubted of the political rights of the People of this Province is that of having a Provincial Parliament for the protection of their liberties, for the exercise of a Constitutional influence over the Executive Departments of their Government, and for Legislation upon all matters, which do not, on the ground of absolute necessity, constitutionally belong to the jurisdiction of the Imperial Parliament, as the paramount authority of the Empire."18

Baldwin allowed the provincial government to amend his resolution, but only on the understanding that the government's vaguer phraseology meant "substantially the same" as his own. This enabled the Reformers to cite the amended resolutions as an official admission that what they had fought for since the 1820s was now the constitution of United Canada.19 In 1844, therefore, during the constitutional crisis of Sir Charles Metcalfe's governorship, Baldwin's cousin, Robert Baldwin Sullivan, could write: "It . . . would be quite unprofitable to discuss the question here, whether or not we should have a Government conducted according to popular opinion, as a matter of inalienable and inherent right as British subjects, or whether we hold such a constitution, by the force of orders from Her Majesty's Ministers. We have it, in fact, both ways theoretically; and have only to insist on our rights, whether inherent or conceded, to have it practically."20

The Reformers insisted on their rights to good effect, and by 1864 they no longer complained about relations between Canada and the mother country. Their chief goal was still responsible government for Upper Canada, but now their target was the Act of Union of 1840—which, by uniting Upper and Lower Canada into a single province, had denied Upper Canadians that autonomy which responsible government ought to have afforded them. In 1859 the Reform party resolved to pursue autonomy through the conversion of the united province from a legislative into a federal union. This was the party's policy at the time of the conferences at Charlottetown and Quebec.21

To Upper Canadian Reformers, therefore, both their theoretical understanding of the colonial relation and their practical experience of colonial governance since the 1840s will have suggested that a confederation analogous in structure to the empire would afford an ample guarantee of the sort of autonomy they sought for their province. Why, then, should Oliver Mowat's campaign to establish that conception of provincial autonomy under the BNA Act cause him to stand accused of betraying an understanding that Confederation was intended to create something different? The

18 Debates of the Legislative Assembly of United Canada vol I (ed Elizabeth Gibbs, Montreal 1970) 790 (3 Sept 1841)
19 Examiner (Toronto) 8 Sept 1841; Michael S. Cross and Robert Lochiel Fraser "Robert Baldwin" in Dictionary of Canadian Biography VIII:49-50
21 This argument is elaborated in Paul Romney "The Nature and Scope of Provincial Autonomy: Sir Oliver Mowat, the Quebec Resolutions, and the Construction of the British North America Act" Canadian Journal of Political Science 25 (1992) 9-17
answer lies partly in the vicissitudes of historical recollection and partly in the incontinence of George Brown. Historians have "nationalized" the ideology of responsible government, treating it as a matter touching the colonial relation only and forgetting its relevance to the rights of the Upper Canadian community, not merely within the empire but within Canada. Convinced that Confederation was meant to create a dominant federal jurisdiction, and predisposed to believe that Brown's party subscribed to that intention, they have been able to cite in evidence remarks in which the Reform party leader belittled the importance of the provinces and magnified that of the federal veto.22

Recently, Robert Vipond has argued that Brown's ebullitions were less centralist in tendency than historians have assumed.23 I am not sure that Vipond has made his case, but the issue may be irrelevant. Brown's centralist enthusiasm was repudiated by the Quebec Conference, after all, and there is no reason to suppose that it compromised any Reformer but himself—certainly not his fellow-delegate Oliver Mowat. Brown's attempt to limit the provincial legislatures to one chamber, on the ground that the full panoply of responsible government would be inappropriate to their quasi-municipal status, was roundly rejected: "We must have miniature responsible governments," insisted one delegate. The practical question was resolved by allowing each province to determine the constitution of its own legislature, but the question of principle was decided in favour of provincial responsible government.24 As to the veto, Brown's assertion that it would ensure "that no injustice shall be done without appeal in local legislation"25 went far beyond any claims that Macdonald made for the power until he disallowed Ontario's Rivers and Streams Act in 1881,26 but it was also inconsistent with imperial practice with respect to Canadian legislation, and thus with the imperial analogy on which centralists were to place such reliance.

The disallowance controversy is crucial to the Dolchstoss-myth, because the Quebec Conference adopted the federal veto in terms proposed by Mowat himself. Historians have been quick to dismiss Mowat's retrospective explanations of the delegates' intent as a positive lie. Creighton accused him of "falsifying the official record" of the Conference. John Saywell quoted Mowat's account of the proceedings, only to conclude: "Unfortunately Mowat's novel testimony clashes with other evidence." Despite his own observation that the confederationists of the 1860s spoke with forked tongues, representing the veto as strong when speaking to supporters of legislative union and weak when addressing committed federalists, Saywell took it for

22 J.C. Morrison "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896" in Three History Theses (Toronto 1961) 5. This thesis, written in the 1940s by a student of Creighton's, is the fullest statement of the anti-Reform case
23 Robert C. Vipond Liberty and Community: Canadian Federalism and the Failure of the Constitution (Albany 1991) 20-36. The argument of this paragraph is elaborated in Romney "Nature and Scope of Provincial Autonomy" 8-9
24 G.P. Browne, ed Documents on the Confederation of British North America (Toronto 1969) 113-14
25 Canada, Legislative Assembly Parliamentary Debates on the Subject of the Confederation of the British North American Provinces (Quebec 1865) 108
26 Vipond Liberty and Community 126-31
granted that this "other evidence" discredited Mowat's testimony.27 Yet Mowat never denied that Ottawa had a perfect legal right to disallow any and all provincial legislation; he merely said that the Conference had agreed that the federal powers "should not be used except within the limits in which the Imperial veto had theretofore been exercised," and that the disallowance of the Rivers and Streams Act was an intolerable breach of that understanding.28 Mowat's statement conforms to the centralist contention that the dominion was modelled on the empire and to the terms of both the Quebec Resolutions and the BNA Act.29 I shall now show that his explanation of the division of legislative powers, as ratified by the Prohibition judgment, was similarly justified.

O'Connor denounced Watson for bringing the question of constitutional status to bear on the division of powers, but in Watson's day this was done by all systematic interpreters of the constitution. The question was seen as possessing three aspects. One was the relationship between the exclusive provincial jurisdiction, as detailed in section 92 of the BNA Act, and the federal powers specially enumerated in section 91. Another was the significance of the general definition of the federal jurisdiction, also in section 91, as a residuary power: the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." The last, and most fundamental, was the nature of the two jurisdictions. The rival views of the division of powers were founded on conflicting conceptions of the provinces' status vis-à-vis the dominion.

Perhaps the most authoritative statement of the centralist position was that of John Wellington Gwynne, the foremost judicial exponent of Macdonald's idea of Confederation.30 According to Gwynne, the BNA Act had combined the confederated colonies in a union "which would in the progress of time become a nation, identical in its characteristics with that from which it had sprung." To this end, it had constituted the dominion "as a quasi Imperial Sovereign Power, invested with all the attributes of independence ... whose executive and legislative authority should be ... as absolute, sovereign and plenary as consistently with its being a dependency of the British Crown it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local or private character [belonging to] certain subordinate divisions, termed Provinces[,] carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given."

27 Creighton Canada's First Century 47; John Saywell The Office of Lieutenant-Governor (Toronto 1957) 192-3
28 Globe (Toronto) 4 July 1887; ibid. 1 March 1888; C.R.W. Biggar Sir Oliver Mowat: A Biographical Sketch (2 vols, Toronto 1905) I:131-2; Browne, ed Documents 86
29 Browne, ed Documents 162, 30 & 31 Vict c 3 ss 55, 56, 90
This distinction, between a “supreme” and “sovereign” federal jurisdiction and a “subordinate” and “municipal” provincial jurisdiction, was confirmed by the structure of the division of powers and by the federal veto. Comparing Canada and the United States, Gwynne described the republic as “a confederation of several distinct, independent states, which, while retaining to themselves sovereign power, have agreed to surrender jurisdiction over certain matters to a central government.” Canada, by contrast, consisted of “one supreme power,” having jurisdiction “over all matters, excepting only certain specified matters . . . of a local, municipal, domestic or private character, jurisdiction over which is vested in certain subordinate bodies . . . and which jurisdiction is subject to the control of the Dominion Executive, as the legislative power of the Dominion Parliament is itself subject to the control of Her Majesty in Her Privy Council.” This divergence from the American model was “necessary in a constitution founded upon, and designed to be similar in principle to, that of the United Kingdom,” though Gwynne noted that it had probably also been adopted in order to avoid one of the supposed weaknesses of the United States constitution.

Because the federal jurisdiction was generally defined as residuary, Gwynne declared that the first question to be asked of any legislation was whether it concerned a matter confided exclusively to the provinces. This was self-evident; the crucial question was the basis upon which matters were to be identified as belonging to the provinces rather than the dominion. Guided by his belief that the two jurisdictions were different in nature, Gwynne read the subsequent enumeration of exclusively federal subject matters as a declaration “that, notwithstanding anything in the Act, notwithstanding, therefore, any thing . . . enumerated in the 92nd section, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the class of subjects enumerated in the 91st section.” This constriction of the provincial power was reinforced by the “deeming” clause, which Gwynne construed as providing that “any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they [sic] may appear to do so.” Although the federal sphere was generally defined as encompassing all that was not provincial, then, no matters that might be brought within the federal enumerata were to be considered as coming within the provincial realm.

To Mowat, this was nonsense. Stressing words that Gwynne ignored, he remarked that the enumeration of specific federal powers in section 91 was said to be made “for greater certainty, but not so as to restrict the generality of the foregoing terms of this section.” Thus the enumerated powers were themselves limited by the foregoing general definition, which confined the federal jurisdiction to what was not provincial. As Mowat put it: “The enumeration may contain some particulars which, unless so specified, would not have been held to be included in the general words; but . . . each article in the enumeration is, wherever possible and as far as possible, to be so
construed as not to include the powers assigned exclusively to the Legislatures of the Provinces.”31 In short, the federal enumerata must be subordinated to the provincial powers set out in section 92, not vice versa.

Next Mowat warned against over-hasty recourse to the general words of section 91 as authority for federal legislation on subjects not coming within the enumerata. Premising that the enumerated particulars of sections 91 and 92 together “embraced all possible subjects of legislative action in Canada not expressly excluded by the Act”—that is, that they exhausted the available powers—he concluded that federal legislation should be authorized under the general definition “in the event only of a case happening to arise which could not by any just construction be brought within any of the enumerated particulars of either section.” The clause must be taken a priori as having no substantive content whatever.

So far, so good; but Mowat’s claims as to the scope of the provincial jurisdiction could not prevail unless it was recognized as being of the same kind as the federal. At issue, after all, was the basis on which matters were to be identified as “coming within” subjects which together comprised, according to Mowat, the conceivable totality of two mutually exclusive jurisdictions. Anxious to discredit the approach taken in certain recent Supreme Court decisions, which had subordinated the provincial jurisdiction to the federal,32 Mowat was intent on showing that the provincial subjects should be construed expansively and the federal subjects narrowly. Yet it was futile to claim a broad sphere of provincial autonomy at Ottawa’s expense if, as Gwynne said, the federal jurisdiction was sovereign and supreme and the provincial subordinate and municipal. And so Mowat, like Gwynne, had to address the issue of constitutional status.

He approached the question differently in Ottawa and in London. Before the Supreme Court he argued that “The provincial legislatures are not in any accurate sense subordinate to the parliament of Canada: each body is independent and supreme within the limits of its own jurisdiction... If the local legislature has jurisdiction respecting the subject-matter... it has the most full and ample jurisdiction—plenum imperium—it has sovereign power within its own limits.”33 For the Privy Council he turned the argument inside out, leaving it to his opponent to distract their Lordships with talk of the sovereignty of colonial legislatures. Citing Gwynne’s reference to the dominion’s “supreme national sovereignty,” he argued that, since the BNA Act had parcelled out the available powers between the provinces

31 My italics. Mowat’s analysis was printed in Ontario Sessional Papers (1882 no 31)
32 In Severn v The Queen (1878; 2 SCR 70) the Court struck down a provincial licence as a potential interference with the federal taxing power; in City of Fredericton v The Queen (3 SCR 505) it placed prohibition intra vires the dominion on the ground that it could not be a provincial matter because it concerned the regulation of trade and commerce
33 Citizens’ Insurance Co v Parsons (1880) 4 SCR 215 at 229-30
and the dominion, the dominion necessarily enjoyed less authority than the old colonies, and no one had ever supposed them to possess “supreme national sovereignty.”

Like the argument of “Canadiensis” and the Baldwins for Upper Canadian autonomy within the empire, then, Mowat’s pitch for an “ample” sphere of provincial autonomy within the dominion rested on the presumption of local sovereignty. I have shown that Upper Canadian Reformers might have accepted Confederation on that understanding, but the question arises as to how it was enshrined in the BNA Act. The Reform conception of the colonial relation was, after all, legally heterodox; and besides, even setting aside the federal veto, which I have suggested might not have meant the same to Reformers as it did to Gwynne, it is undeniable that the act included a wealth of linguistic evidence which might appear to exalt the dominion above the provinces.

Mowat’s argument rested on two implicit premises. One was inherent in the so-called compact theory of Confederation. This was the idea that the provinces had passed the caesura of Confederation with their constitutional status unchanged. Before Confederation they had incontestably enjoyed the highest status available to a colony, and the dominion could enjoy no higher, Gwynne’s talk of “supreme national sovereignty” notwithstanding. The second premise was Blackstone’s definition of sovereignty as the power to make laws. From this point of view the BNA Act had formed two legislative jurisdictions which, being mutually exclusive and constitutionally identical, were of necessity constitutionally equal. I know of no document in which Mowat stated this idea explicitly, but it is inherent in the very order of his analysis (so conspicuously the reverse of Gwynne’s), which first juxtaposed the federal enumerata and provincial powers in a manner that suggested their constitutional equivalence, then discussed “peace, order, and good government” in terms which reinforced that suggestion, and finally hinted at the impropriety of Gwynne’s idea that the dominion could be constitutionally superior to the provinces.

Set against Gwynne’s account of the division of powers, Mowat’s may strike most Canadian readers as bizarre. It is standard doctrine that John A. Macdonald wanted a dominant central power, and that he successfully demanded the assignment of the residuary power to the federal parliament as a necessary means to that end. Such teaching cannot be squared with the notion that the dominion and the provinces were born equal and that “peace, order and good government” was but a rag. Yet Mowat’s explanation of that clause conformed to that of the colonial secretary, Lord

34 Ibid. 346; Ontario Sessional Papers (1882 no 31) 4
35 See, e.g., Saywell Office of Lieutenant-Governor 9-16
36 Ramsay Cook Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921 (Ottawa 1969). We now see that this theory was preceded in Reform political thought by a “compact theory” of the Constitutional Act
37 Blackstone Commentaries 1:49

Paul Romney
Carnarvon, in Parliament,\textsuperscript{38} and his idea of the division of powers as a whole, and its bearing on constitutional status, was perfectly consistent with the record of the Quebec and London Conferences.

At Quebec there was a row between delegates who insisted that only the federal legislative powers be specified, as in the United States constitution, and others who favoured the opposite arrangement. It was generally assumed that the former scheme would render the general government inferior to the local and vice versa. The final resolutions embodied a compromise: each legislature was assigned a list of itemized powers, and each list concluded with a catch-all category. That for the "General Parliament" read: "And Generally respecting all matters of a general character, not especially and exclusively reserved for the Local Governments and Legislatures." That for the "Local Legislatures" read: "And generally all matters of a private or local nature, not assigned to the General Parliament."\textsuperscript{39}

Thus the Quebec Conference did not confide the residuary power as a whole to either government: it did not empower the general parliament to legislate "generally respecting all matters not especially and exclusively reserved for the Local Legislatures," nor did it empower the latter to legislate "generally [respecting] all matters not assigned to the General Parliament." On the contrary, it itemized the powers of each legislature as fully as possible and assigned any unenumerated "matters of a general character" to the general parliament and any of a "private or local nature" to the local legislatures, with the proviso that no matters pertaining to the itemized powers of the general parliament should be considered local and vice versa. In view of the preceding quarrel, this arrangement can only signify a deliberate refusal to divide the legislative powers in a way that implied the constitutional superiority of either government.

This compromise passed unaltered into the London Resolutions of 1866 and thence into the rough draft of a statute which was prepared by a committee of the conference.\textsuperscript{40} Then the British got into the act. The first British draft transmuted the federal residuary power into the "peace, order and good government" clause as we know it and moved it to the head of the federal powers as a general definition of those powers. Its local counterpart was replaced by a different category, also a catch-all but vastly different in character; it read: "Such other Classes of Subjects (if any) as are from Time to Time added to the Enumeration in this Section by any Act of Parliament

\textsuperscript{38} Carnarvon said: "I ought to point out that... the residue of legislation, if any, unprovided for in the specific classification... will belong to the central body" (my italics). Oddly enough, centralists frequently quoted this to support their position: see, e.g., Vincent C. MacDonald "Judicial Interpretation of the Canadian Constitution" University of Toronto Law Journal 1 (1935-6) 263; O'Connor Report annex 1 59; ibid. annex 4 77; Creighton British North America at Confederation 50; Scott Essays on the Constitution 23-4; W.P.M. Kennedy "The Interpretation of the British North America Act" Cambridge Law Journal 8 (1943) 150.

\textsuperscript{39} Browne, ed. Documents 81-3, 122-5, 157-61; Donald Creighton The Road to Confederation: The Emergence of Canada, 1863-1867 170-4

\textsuperscript{40} Browne, ed. Documents 221-4, 237-41
of the United Colony." The subjects in question can only have been residuary, for it can hardly have been supposed that the general legislature, in the absence of express authority, could alienate to its local counterparts powers which the imperial Parliament had assigned to it and not to them. The effect of the change, then, was to give the general parliament a monopoly of the residuary power with discretion to alienate portions of it to the local legislatures according to the requirements of peace, order and good government.42

Whatever its object, the change was resisted.43 Draft followed draft, and the local catch-all flickered like a candle in a gale. Both versions vanished; the original reappeared; it gave way again to the substitute. At last, in the draft submitted to Parliament, the substitute was ousted by section 92(16) as we know it: “Generally all matters of a merely private or local nature in the province.”44 Its status as a counterpart to the general residuary power was now obscured by the intervening contextual changes; the two clauses were no longer parallel in their placement and wording, and the bill lacked the copious references to “general” and “local” governments and legislatures that illuminated the peculiar significance of the word “local” in the conference resolutions. Yet the wording of section 92(16) reflected the decision of the two conferences to create two residuary powers rather than one. In due course it would be so construed by the courts, and Mowat’s vision of a confederation marked by broad local autonomy and a restricted federal sphere would be upheld.45

Mowat’s analysis was presented to the Supreme Court and the Privy Council in Citizens’ Insurance Co. v. Parsons,46 and it stemmed the centralist tide. Both tribunals rebuffed Gwynne’s effort to disqualify, as an infringement of the trade and commerce power, provincial regulation of the terms of insurance contracts. The Judicial Committee also rejected Gwynne’s grand scheme of the division of powers as a whole, recommending a piecemeal approach instead. Two years later, in another Ontario case, Hodge v. The Queen, it formally endorsed Mowat’s premise as to the constitutional equivalence of the federal and provincial jurisdictions: the latter comprised “authority as plenary and as ample . . . as the Imperial Parliament in the

41 Ibid. 258
42 This was the draft in which the lieutenant-governors became “superintendents” and local legislation mere “ordinances.” Creighton suggests that it reflected the influence of Lord Carnarvon and the governor-general, Lord Monck, two ardent centralists, both of whom were on hand: Creighton Road to Confederation 418-19
43 Hector Langevin’s letters from London show him constantly on guard against the centralizing pressure of Carnarvon, Monck and Macdonald: Andrée Desilets Hector Louis Langevin: un père de la confédération canadienne (1826-1906) (Quebec 1969) 164-7
44 Brownie, ed Documents 275, 293, 326. The federal catch-all also went through some odd changes, but “peace, order and good government” remained in place and the others are not germane to this discussion
45 G.F.G. Stanley long ago pointed out the lack of a consolidated residuary power in the Quebec and London Resolutions (Stanley “Act or Pact?” 21-3), and see K. Lysyk “Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-making Authority” Canadian Bar Review 57 (1979) 535-8
46 Cited above, note 6
plenitude of its power possessed and could bestow."\textsuperscript{47} What Lord Watson did in the *Prohibition* decision was to fulfil the promise of *Citizens' Insurance* and *Hodge* by abandoning the piecemeal approach in favour of a general scheme of construction which resembled Mowat's in its approach to the federal residuary power and in the relationship it established between the provincial jurisdiction and the federal enumerata. The differences between the two readings reflected the difficulty presented by the Privy Council decision in *Russell v. The Queen*.\textsuperscript{48}

*Russell* was essentially an appeal against *City of Fredericton v The Queen*,\textsuperscript{49} in which the Supreme Court had upheld the Scott Act, a local prohibition measure, as a valid exercise of the federal power to regulate trade and commerce.\textsuperscript{50} The Privy Council upheld the act on the ground that, while it might incidentally affect certain provincial powers, it was in essence a measure for the "public" or "national" safety. Even if each province might have enacted regulations identical to those of the Scott Act as a matter of internal police, the measure "was clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion." The decision concluded that "Laws of this nature designed for the promotion of public order, safety, or morals . . . fall within the general authority of Parliament to make laws for the order and good government of Canada." It did not say whether or not the Scott Act came within the trade and commerce power but remarked that the Judicial Committee "must not be understood as intimating any dissent from" the Supreme Court's opinion that it did.\textsuperscript{51}

This reading was the antithesis of Mowat's. Instead of exhaustively canvassing first the provincial subject matters and then the federal enumerata before resorting to the "peace, order, and good government" clause, it seemed to treat that clause as creating a distinct head of federal power—and one, moreover, which overbore the provincial power. Worse still, it apparently granted Parliament absolute discretion in deciding whether or not to overbear the provincial power. Once the courts had determined that an act of Parliament was a national police measure, it seemed, they had no obligation (perhaps even no power, given the doctrine of legislative supremacy) to inquire as to its necessity. Read this way, the decision seemed not merely to constrict the provincial jurisdiction in the manner favoured by Gwynne but to extinguish provincial autonomy entirely. Rag or no, "peace, order and good government" now fluttered atop a lofty pole.

\textsuperscript{47} (1883) 9 App Cas 117 at 132  
\textsuperscript{48} (1882) 7 App Cas 829  
\textsuperscript{49} (1880) 3 SCR 505  
\textsuperscript{50} The Canada Temperance Act, 1878 (41 Vict c 16); and see above, n. 33  
\textsuperscript{51} 7 App Cas 829 (quotations at pp 837-42)
Macdonald did read *Russell* this way,\(^5\) and he tried to exploit it by carrying the McCarthy Act,\(^5^3\) a licensing measure identical in essence to Ontario's Crooks Act.\(^5^4\) As he understood it, *Russell* had placed the liquor trade as a whole, including licensing, within the federal power to regulate trade and commerce. If so, the Crooks Act was *ultra vires*; but in case this understanding was incorrect, the McCarthy Act was carefully equipped with a preamble stating that it was enacted for the sake of the peace, order, and good government of Canada. Since the Privy Council upheld the Crooks Act soon afterwards in *Hodge*, this was the basis on which the McCarthy Act had to be defended. It turned out, however, that not even Gwynne could stomach the notion that Parliament could legislate at its whim upon matters that were normally within the provincial jurisdiction; such an idea was utterly inconsistent with any idea of federalism. Remarks in the Supreme Court suggest it was common knowledge that the case against the Scott Act had been ineptly argued in the Privy Council.\(^5^5\) The court struck down the McCarthy Act unanimously and the Judicial Committee followed suit.

Unfortunately, neither court published its reasons, and the world was left without an authoritative statement as to why the Scott Act was valid and the McCarthy Act invalid. The *Prohibition Reference* resulted from steps taken by Mowat in order to elicit such a statement. In the Supreme Court, counsel for the dominion had suggested that local prohibition no less than regulatory licensing might be *intra vires* the provinces; yet the Scott Act was indisputably lawful. It followed that *Hodge*'s affirmation of the Crooks Act need not jeopardize the McCarthy Act.\(^5^6\) This idea gave Mowat his opening. In 1890, he carried a local option law identical in essence to the Scott Act. If his law was not *ultra vires*, the courts would have to explain why the Scott Act was valid and the McCarthy Act invalid. They would be obliged to define the nature of the federal residuary power.

Watson did this and more. The tangle of contradictions represented by *Russell*, *Hodge*, and the *McCarthy Act Reference* had so discredited the Privy Council's old piecemeal approach that he set out guidelines by which to construe the division of powers as a whole. These were about as close to Mowat's analysis as one could get without using the same words. The federal enumerata were defined as powers in the exercise of which Parliament might "occasionally and incidentally" encroach upon the provincial sphere. This formula corresponded to Mowat's contention that, "wherever possible and as far as possible," they should be defined so as not to encroach on that sphere. Likewise, Watson's definition of "peace, order and good government" was

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\(^{52}\) Letter, Macdonald to Sir A. Campbell, 28 Aug 1882, in Archives of Ontario, Campbell Papers  
\(^{53}\) The Dominion Licensing Act, 1883 (46 Vict c 30)  
\(^{54}\) The Ontario Liquor Licence Act, 1876 (39 Vict c 26)  
\(^{55}\) *Canada Sesional Papers* (1885 no 85) 74 (per Blake, QC), 127 (per Strong, J.); this is the verbatim transcript of the Supreme Court hearing. See also Romney "Nature and Scope of Provincial Autonomy" 23  
\(^{56}\) *Canada Sesional Papers* (1885 no 85) 153ff (per Bethune, QC, for the Dominion). Strong, J., was adamant as to the essential identity of the two measures, though to him it suggested that *Russell* was erroneous: ibid. 51-3, 65, 74, 75, 91, 127, 128, 169, 183, 192, 200
consistent with the idea of an exceptional or emergency power, such as “Canadiensis” and the Baldwins (and no doubt Mowat) might have conceded to Westminster by virtue of imperial paramountcy. Such legislation “ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon” the provincial sphere. Any other construction would “not only be contrary to the intention of the Act, but would practically destroy the autonomy of the provinces.”

Although Watson claimed that his construction conformed to “the intendment of the Act,” O’Connor accused him of perverting the division of powers out of an unjustified concern for provincial autonomy. Watson’s scheme rested on the idea that the “deeming” clause authorized Parliament to legislate under the enumerata on matters that might otherwise have appeared to come within the provincial sphere. To O’Connor, however, such authority flowed from the declaration that matters coming within the enumerata belonged to the “exclusive legislative authority” of Parliament “notwithstanding anything in this Act;” in his view, the “deeming” clause was a barrier to provincial legislation under section 92(16) on matters coming within the enumerata. Noting that Watson had contradicted an obiter dictum in Citizens’ Insurance that the clause applied only to sec. 92(16), and not to section 92 as a whole, O’Connor accused him of wilfully falsifying its meaning in order to split the enumerata from the “peace, order and good government” power (to which the “deeming” clause did not apply) and thereby strip the latter of the force which allowed the former to override the provincial jurisdiction.

In reality, though, it was the enumeration itself, by its very existence, which distinguished between the enumerata and the residuary power. It did so by creating a presumption in favour of legislation under the former which did not extend to legislation under the latter. Gwynne and Mowat both read it this way, and only the loose language of Russell existed to suggest another construction; Watson invoked provincial autonomy in order to protect the true meaning of section 91 from that loose language. So far from malignly perverting the sense of the “deeming” clause, in fact, he was simply following the centralist Gwynne, who expressly rejected O’Connor’s preferred construction as pedantic. The important question concerning the “deeming” clause was not whether it applied to section 92 as a whole or to 92(16) alone; it was whether, in either case, it was to be read as a barrier to provincial legislation or an aid to federal legislation. Gwynne took the former view and the Privy Council the latter in both Citizens’ Insurance and the Prohibition Reference. The Council’s position conformed to Mowat’s contention that the provincial power enjoyed a general priority upon which Parliament might encroach only when acting under the enumerata.

57 [1896] AC 348 (quotations at 359-61). Though he did not mention it at this point, Watson was no doubt influenced by his perception that section 92(16) represented a local residuary power analogous to the federal power: ibid. 365, and see Lysyk “Constitutional Reform” 537

58 O’Connor Report, annex 1 39-49; 7 App Cas 96, at 108

59 City of Fredericton v The Queen, 3 SCR 505, at 566; In re Prohibitory Liquor Laws (1895) 24 SCR 170, at 212

Paul Romney 192
The difference between Gwynne and O'Connor as to the meaning of the "deeming" clause illustrates a larger difference which distinguished nineteenth-century centralists from their successors. In contending that all federal legislation enjoyed priority over the provincial power, O'Connor was reasserting the idea upon which the McCarthy Act had been founded: the idea that "peace, order and good government," as a national police power, could overbear the provincial jurisdiction as a matter of course. As we have seen, Gwynne rejected that idea as incompatible with federalism. To him, the great object in construing the division of powers was to establish the priority of the federal enumerata over the provincial power. Although he exalted "peace, order and good government" as symbolic of that priority—a priority which flowed, in the last analysis, from the dominion's constitutional superiority to the provinces—there is no evidence that he relied on it as a major source of substantive federal power. In his view, the crucial issue in the Prohibition Reference was the scope of the trade and commerce power, under which the Scott Act had been upheld in Fredericton. It was a last chance to assert the pre-eminence of that power and of the federal enumerata as a whole—a pre-eminence which had been doubtful, though not perhaps absolutely discredited, ever since Citizens' Insurance. 60

Half a century later, the idea that the federal enumerata enjoyed a pre-eminence based on dominion's "supreme national sovereignty" was no longer tenable. Hopes of an expansive federal role in the Canadian economy now depended on the courts' willingness to activate the "peace, order and good government" power as Watson had defined it in 1896. O'Connor's strained reading of section 91, like the centralist history of Donald Creighton, was born of the traumatic disappointment of those hopes, and—like Creighton's history—it was the product of an act of forgetting. Creighton's history was made possible by forgetting the Upper Canadian Reform tradition, and especially by forgetting the importance of Confederation as the fulfilment of long-cherished dreams of Upper Canadian autonomy. To forget that was to forget what was wrong with Russell. With that forgetting, Macdonald could be apotheosized as the architect of a new nation; Russell could be exalted, along with the BNA Act itself, as the true record of his design; and Mowat and Watson could be traduced as the destroyers of that noble dream.

60 24 SCR 170, at 213-29
Blake and Liberty

R.C.B. Risk

Introduction

This paper seeks to reconstruct Edward Blake's understanding and use of the word "liberty" and I hope it will illuminate not only his own thought, but constitutional thought generally in Canada in the late nineteenth century, especially the understandings of rights, federalism, and legislatures. Because liberty was a pervasive and powerful strand of Blake's thought, my reconstruction leads into many different corners of his mind, and into many different incidents and issues in the world around him. My undertaking is like tracing a strand in a web — a strand that is both meandering and crucial to the structure and strength of the web (if webs do have such strands).

Edward Blake was a major figure in law and politics in Canada in the second half of the nineteenth century, but despite his stature, historians and lawyers have not written much about him. He appears from the little they have written as a "noble failure:" moody, prickly and aloof, and erratic in politics, but deeply principled, although the principles have not been fully explicated. He was the son of William Hume Blake, who emigrated from Ireland in 1832 and, after a brief try at farming, became a lawyer, a reform member of Parliament, a member of Baldwin's government, and the first Chancellor of Ontario. Edward, his first son, was born in 1833, and educated at home and at Trinity College, where he received a B.A. in 1853 and an M.A. in 1858. He became a lawyer in 1856, and soon a leading counsel. He was elected to both the Ontario Parliament and the House of Commons in 1867, although he soon gave up his Ontario seat. A Liberal, he was a member of Mackenzie's cabinet in the 1870s, became leader of the party in 1880, and lost the general elections of 1882 and 1887 to Sir John A. Macdonald. Throughout the 1870s and 1880s, he was involved in most of the major constitutional issues: provincial rights, the Rivers and Streams Bill, the C.P.R. contracts, the franchise, the incorporation of the Orange Lodge, the execution of Louis Riel, and language in the North West. He resigned as leader in 1888, and left the House of Commons and Canada in 1892, when he went to Britain, to become a member of Parliament from Ireland and plead the cause of Irish Home Rule. He returned to Canada in 1907, and died in Toronto 1912.

* This paper is part of a study of constitutional thought in the late nineteenth century. I wish to thank two people: Louise Collinson, for her wonderful research help, which has greatly enriched not only this paper but the entire project, and Rob Vipond, for three years of conversations about constitutional thought. This paper shares some of its subjects and interests with his book, Liberty and Community (Albany NY 1991)

1 F. Underhill "Edward Blake" in C. Bissell ed Our Living Tradition: Seven Canadians (Toronto: University of Toronto Press 1957) 3
During his political career, he continued his legal practice, founding a firm that continues today and arguing some of the major constitutional cases of the late nineteenth century, including *Re Goodhue,*\(^2\) *St. Catherines Milling,*\(^3\) the *Executive Power* case,\(^4\) the *Insolvency Reference,*\(^5\) and the *Local Prohibition Reference.*\(^6\) As well, he found time to be Treasurer of the Law Society from 1879 to 1893, and Chancellor of the University of Toronto from 1873 to 1900.\(^7\)

Liberty was the dominant element of his constitutional thought and a symbol that he regularly invoked on public occasions. For example, his best-known speech is probably his “Aurora” speech, given in 1874, in which he called for a “national spirit” for Canada. In its conclusion, he described himself as “one who prefers to be a private in the advanced guard in the army of freedom to a commanding place in the main body.” He continued by speaking of “the true liberty of a free utterance,” and ended by reciting Tennyson’s tribute to freedom in Britain, adding the hope that it might also become applicable to Canada.\(^8\) Whatever else he may have meant, he meant that the national spirit of Canada must be an expression of liberty. Throughout his long career, his faith remained essentially unaltered.

**Constitutional Liberty**

My reconstruction of Blake’s understanding of liberty can best begin by describing a distinction between political and civil liberties. Political liberties were the rights of the people to influence their government, especially the right to make government responsible to them, and civil liberties were the rights of individuals about their own conduct, especially their rights to liberty from restraint by government. This distinction appeared in England during the eighteenth century, and was pervasive by the early nineteenth century. It was not a sharp, firm divide. Both kinds of liberty shared a sense of liberty as liberty from arbitrary and unjustifiable government; some liberties could be found on both sides of the division. Liberty of speech was both an individual liberty and a crucial safeguard for constitutional liberty; and, more generally, the flourishing of each was understood to depend upon the flourishing of

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\(^2\) (1872), 19 Grant Ch. 366

\(^3\) (1888), 14 A.C. 46, aff’g (1886), 13 S.C.R. 57, aff’g (1886), 13 O.A.R. 148, aff’g (1885), 10 O.R. 196


\(^5\) *A.G. Ontario v. A.G. Canada* (1894), A.C. 189, rev’g (1894), 20 O.A.R. 489

\(^6\) *A.G. Ontario v. A.G. Canada* (1896), A.C. 348, rev’g (1894), 24 S.C.R. 170


\(^8\) *Speeches,* October 30, 1874. The speeches used in this paper are all in the Blake Papers in the Public Archives of Ontario in five boxes 110–114; they will be referred to by date, except for “Election Speeches,” which will be referred to by date and number assigned by the publisher

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**R.C.B Risk** 196
the other. Nonetheless, the distinction was a central one, and Blake assumed it, even though he never made it explicit. The terms “political” and “civil” were not the only ones used; “constitutional” and “individual” were also used, especially during the nineteenth century, and they are more useful for my undertaking.

Blake spoke more often about the constitutional liberties; his language was powerful and passionate, and the occasions that evoked it were often pressing political issues. His most expansive version was set out in a speech about Ireland given in 1902: “Liberty is not license. Freedom consists in living under a reign of law, which law is made by the consent of the people who are ruled by it and administered by officials responsible to and appointed by the people who are ruled by it . . . The essence of freedom is that the law should be made practically by the people who are ruled and administered by persons who are responsible to those people.”

This passage expressed a basic faith for Blake’s generation, but it needs much explanation for ours. Two meanings of liberty were implicated; the first was “natural liberty,” which was the liberty of all persons to do whatever they wished. If this form of liberty were permitted, people’s aggressive and selfish instincts would lead quickly to anarchy. Therefore, this liberty could not be permitted, and restraints imposed by laws were necessary for social life. True liberty, “civil liberty,” was the liberty to act within restraints.

The appropriate restraints for this purpose were Blake’s “reign of law,” which had two requirements: the laws must be made by a responsible government, and they must be general and applied indifferently to all individuals. These characteristics can best be illustrated by considering the antithesis of liberty, arbitrariness, which was unrestrained and irresponsible government — the rule of the Stuart kings. Liberty required restraints on government. Earlier, the restraint had been the law itself, but this understanding had faded during the eighteenth century at the latest, as law came to be understood as the expression of the will of the sovereign. From the late eighteenth century onwards, restraint became responsibility to those who were governed, and particularly to the people assembled in Parliament. Closely related to this requirement of responsibility was the requirement that the law be general and apply indifferently to all individuals, for a law that singled out an individual without justification was the law of an arbitrary despot.

Blake’s beliefs about constitutional liberty were demonstrated in his speeches about four major topics: control of the executive, provincial rights, independence for Canada, and Home Rule for Ireland. For the first of these topics, the control of the executive, the general principle of responsible government was manifested in the responsibility of the executive to the Commons, which was for Blake the central feature of parliamentary government. The function of the cabinet was to propose policy and legislation, and the function of the Commons was to debate these proposals

9 Speeches, October 21, 1902; see also Canada, H.C. Debates, May 12, 1890, and Speeches, March 13, 1902
10 See M. Kamen Spheres of Liberty (Madison 1986), J.P. Reid The Concept of Liberty in the Age of the American Revolution (Chicago 1988), and J.A. Gunn “A Measure of Liberty” in J.A. Gunn Beyond Liberty and Property (Kingston 1983)
and assent — or withdraw its confidence. To permit the executive to have legislative power was to permit despotic and arbitrary government. Over and over again, Blake condemned John A. Macdonald’s government for violating this principle. No delegation of any significant discretion could be permitted. Throughout, Blake demonstrated great faith in balanced government, the ability of Commons to undertake substantial and independent debate, and the separation of legislative and executive powers.11

His two best speeches about the responsibility of the executive were made in August, 1873, about the investigation of the Pacific Scandal, which erupted when Macdonald was accused of taking a bribe from a railway promoter. In the first he stated: “... [I]n free Constitutions the Executive power must be guarded, limited, and restrained, and must not be permitted to encroach on the rights of the people and the representatives. Executive power it is which has at all times been the great foe of liberty. The name under which this power is exercised is wholly immaterial. Whether it be a King, President or Cabinet which wields the Executive power, the constant tendency of those possessed of such power, is to invade the domain of the other branches of the Government and enlarge their own jurisdiction. In the great struggle which subsisted for so many years in England, out of which the liberties you now hold gradually evolved, this was the main subject of contention.”12

The British constitution continued to be his inspiration in the second speech, delivered two days later. “It is one of the greatest securities for liberty that the people’s representatives, responsible directly to them, and liable to be by them dismissed in case they fail in their duty, should have this exclusive right...” The corruption of Sir John’s efforts to derail the investigation were demonstrated by making him into a Stuart despot. Nothing as corrupt could be found in history, except, perhaps, in “the evil days which preceded the great rebellion.”13

The second example of Blake’s use of the word “liberty” — the campaign for provincial rights — was the richest and most complex of the four. It was a set of claims about the nature of the provincial legislatures and about legislative and executive powers, expressed by Blake and other Liberal politicians, such as Oliver Mowat and David Mills, as claims for liberty and responsible government, and was made in both the courts and the political arenas.

In the courts, the issues were contests about the interpretation of the British North America Act, especially the nature of the provincial legislatures, the extent of their prerogative and executive powers, and scope of sections 91 and 92. Blake’s most important argument was in the Executive Power case, which was part of the battle with the dominion and Macdonald to expand the provincial executive powers. In a magisterial way, he argued that the fundamental principle of the British North

11 E.g. Speeches, January 1875, March 29, 1881, Canada, H.C. Debates, April 29, 1880, April 21, 1882, May 16, 1882, April 24, 1883, February 23, 1885, May 21, 1885, July 1, 1885, April 29, 1886, May 2, 1886, May 4, 1886, May 6, 1886, June 1, 1886 and June 2, 1886
12 Speeches, August 26, 1873
13 Speeches, August 28, 1873
America Act was responsible government, the cherished reward of the struggle for constitutional liberty, and that it required that the executive powers of the province be co-extensive with its legislative powers and independent of the dominion — for if they were not, the executive would not be responsible to the provincial legislature.14

In the political arena, the major issue was disallowance. Throughout the 1880s, Blake argued that the dominion power to disallow provincial legislation was inconsistent with responsible government — with liberty and the rights of “British freemen.”15 The best examples of this argument were in his speeches about the disallowance of Ontario’s Rivers and Streams Act, which permitted loggers use of streams that had been improved by riparian owners, and imposed an obligation to pay reasonable tolls. The dominion disallowed the act, and the ensuing debate in Parliament in April, 1881, was an intense examination of constitutional principles.16

Blake spoke about “the spirit of the British constitution,” and its slow and peaceful progress towards “the principles of freedom” and “popular rule” — towards responsible government. As he spoke about this liberty, his terms shifted, and the liberty of the British people to determine their affairs free from despotic monarchs became the liberty of people of Ontario to determine its affairs free from a despotic dominion. And near the end of this passage, this liberty became the “right as a state which each of us has as a man — the right to go wrong.” History, the spirit of the British constitution, and the powerful language of liberalism, were all used as powerful support for his attack on disallowance.

The third and fourth examples of Blake’s language about constitutional liberty, independence for Canada, and Irish Home Rule, were, like the language about provincial rights, claims that a people — a political community — should have liberty from arbitrary government. His vision of independence for Canada appeared in many different contexts, throughout which he expressed a belief that Canada should control its own affairs and its own destiny. One manifestation was his campaign for abolition of appeals to the Privy Council. Another was his belief that Canada should have liberty to make its own commercial treaties. His speech in Parliament in 1882 was an

14 Blake’s argument was printed privately and is in the Blake papers in the Public Archives of Ontario.
15 Canada, H.C. Debates, June 23, 1885. Some of his speeches about provincial rights were Canada, H.C. Debates, April 17, 1885, Speeches June 2, 1875, September 16, 1884, October 7, 1884, October 17, 1884, January 15, 1885, Election Speeches, 1886, #2 and #13.
expression not only of this belief, but of much of his general understanding of liberty. He began by talking about the values of an unwritten constitution, especially its capacity for "beneficial change, for development, for progress," and continued,

The underlying principle and spirit of the constitution has been the development of the popular principle of government; and this has been continuously enforced and realized, to a greater and greater extent, as there existed and were made apparent, greater capacity in the people to exercise the powers of self-government, greater knowledge, greater information, greater training on the part of the people to take a larger share in their own government; and what applies to the constitution as it exists with reference to the internal organization of the United Kingdom, applies in quite as marked a manner, in later years, to the relations of the Empire to the colonies and to the political condition of the various dependencies of the Empire. ... [With regard to the relations of the Empire to the colonies ... you perceive a principle of growth, of vitality, of development, and of progress.

The progress was towards liberty. The empire resembled a federation, and the "exact range of subjects committed to the charge of the local community ... are questions which you cannot answer precisely. The answer varies from year to year and from generation to generation." Considering its population, its experience with self government, its territory, and its economy, Canada had reached a stage at which it should have responsibility for determining its own commercial affairs. Only this "local freedom" could preserve loyalty to the empire.

The campaign for Home Rule for Ireland had deep roots in his family's past. He made a few appeals in Parliament during the 1880s, and many more after he returned to England. Again, the plea was for constitutional liberty — responsible government and the rule of law. Canada was the model for the future of Ireland.

Blake said little about the authority or source of the constitutional rights, but what he did say suggests that the major source was the constitution itself — the British constitution that was both timeless and embedded in every age of the history of the nation. He never invoked natural law as a source, and never suggested that the rights were positive rights, or granted by the Crown or the state. He did invoke rights expressed in the British North America Act, but in a way that linked them to this timeless constitution, for example, by speaking of it as an "organic" document, or by expanding on the phrase in the preamble that invoked the British constitution.

17 Canada, H.C. Debates, April 21, 1882
18 See, for example, Canada, H.C. Debates, May 4, 1886, May 6, 1886, April 15, 1887, and April 22, 1887
19 Examples of speeches he gave outside of Great Britain after leaving Parliament are Speeches, August 4, 1892, January 31, 1894, and October 21, 1902. See also Speeches, January 11, 1896
20 For example, "I am arguing from Canada, once discontented and rebellious, but which Home Rule has made peaceful, contented and law-abiding — to Ireland, which has been for want of Hume rule agitated, alienated, and lawless, but which from my soul I believe will, under Home Rule, become peaceful, contented, and law-abiding." Speeches, August 4, 1892
Blake was not a profound thinker, and none of this structure was original. His understanding of liberty was drawn from British constitutional history, especially the whig interpretation of the first half of the nineteenth century. Here, the central story of British history was the struggle for constitutional liberty. Beginning in the early medieval times, the basic principles — the limited monarchy, the role of Parliament, and liberty — were continually refined and defended through the centuries, especially in the Glorious Revolution. Among the writers who expressed this vision, Blake seems to have read Hallam more than others. Over and over, his speeches invoked this story, and his faith in progress towards liberty and the unwritten constitution. He saw the story continuing in Canada, where the people had wrested their liberty, first from Britain, and then from local oppressors, and usually he spoke expressly or implicitly of the people of Ontario.

He did not, however, adopt the whole whig constitution. Most important, he did not believe that governing was the responsibility of a privileged few, and he did not make the link between property and liberty, which made private property crucial to the protection of constitutional liberty and the protection of property the central purpose of liberty. Instead, he had faith in democracy: liberty was the liberty of the people to govern themselves. Speaking in London about the Pacific Scandal, he said, "...the rights of Parliament are the rights of the people. ... We are not separate from you; from you we spring, to you we return...." In 1885, he told the Young Men's Liberal Club that they should not forget that "we live in a democratic age," and that the "reign of the common people" was approaching. He said several times that Parliament ought to be the "mirror" of the opinions of the people of the country; he looked to a society with few distinctions among classes; and he called for "a true aristocracy of energy, learning, ability, and integrity."

The vote was fundamental to this liberty: it was "the crowning badge" and the "flower" of freedom. His faith in democracy meant a preference for a wide franchise, although his campaign for provincial rights imposed the overriding principle that the franchise should be settled by the provinces. "The true tests to my

22 Canada, H.C. Debates, April 21, 1882. See also, Speeches August 26, 1873, August 28, 1873, March 29, 1881, Canada, H.C., Debates, February 22, 1877, April 14, 1882, April 21, 1882, February 28, 1884, and April 17, 1885
23 Speeches, August 28, 1873
24 Speeches, January 15, 1885
25 For example, Canada, H.C. Debates, February 12, 1883, and Election Speeches, 1886 #2
26 Election Speeches, 1886 #5. He believed this aristocracy had an obligation to participate in public life; about this obligation, see also Speeches, August 21, 1880, and January 15, 1885
27 Canada, H.C. debates, May 5
mind are citizenship and intelligence."28 There were, though, limits: faced with the question of giving the franchise to women, he took refuge behind the principle of provincial choice, but waffled long enough to seem to be unwilling; most native persons were not free enough or educated enough to be worthy; and Chinese were beyond consideration.29

Entangled with his faith in the whig constitution and responsible government was a call for virtue. The liberty of self-government demanded virtuous citizens — and virtuous politicians. Speaking about the Pacific Scandal, he said,

We recalled, sir, in anticipation of this great contest, the fundamental principles of liberty. We were not forgetful of the maxim that public virtue is the foundation of popular Government; we were not forgetful of the great truth that unless there exists in the people a high degree of public virtue, they will be unequal to the grave responsibility of self-government. We remember that whatever tends to the destruction of popular Government, which is endangered by the introduction of motives conflicting with that principle, and must, the moment such motives become prevalent inevitably fall. When that high sense of public virtue has been so far weakened as to leave the country practically at the mercy of men who, by money or influence, control the exercise of the suffrage, they have succeeded in converting that which has been regarded as the shield of liberty into an instrument of tyranny.30

Here were echoes of the tradition of civic virtue, its fear of corruption, and its core belief that individuals realized themselves through participation in the public life of their community.31 This sense of virtue and responsibility illuminated Blake’s vision for Canada. Its proper destiny and the measure of its maturity was its virtue — the practice of liberty.

The major parts of Blake’s vision were shared by other powerful Liberals, especially Oliver Mowat and David Mills, and gave them a language for making political and legal claims. To make Macdonald into a Stuart despot, or to claim capacity and powers for a provincial legislature by reference to the liberal individual invoked powerful images. Their vision had deep roots in the Ontario political

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28 Speeches, September 9, 1877. See also Debates, February 12, 1883, and April 17, 1885, and Speeches, June 2, and Election Speeches 1886 #2, #5, and #9

29 Canada, H.C. Debates, March 14, 1881, April 18, 1882, February 12, 1883, April 17, 1885, April 30, 1885, May 2, 1885, and May 26, 1885, and Election Speeches, 1886 #5 and #9

30 Speeches, August 26, 1873

31 This brief reference does not, I hope, require a full account of the literature about virtue and commerce; the various meanings of liberty are set out in J. Appleby Capitalism and the new Social Order (New York 1984) 15-23, and J.H. Hexter “Republic, Virtue, Liberty, and the Political Universe of J.G.A. Pocock” in J.H. Hexter On Historians (Cambridge, MA 1979) 255 at 293-303
experience, in a reform tradition which stretched back through Blake's father and the Baldwins, and which perceived Ontario's politics as dominated by its struggle for the liberty of the community against a series of oppressors.32

**Individual Liberty**

Constitutional liberties were one kind of liberties in the implicit framework of Blake's understanding; individual liberties were the other. Speaking to the Young Men's Liberal Club in 1885, he said, "I want you to remember that there are three great freedoms that have been wrestled from unwilling rulers in olden time . . . freedom of opinion, freedom of person and freedom of property."33 The form of this list of freedoms varied on different occasions, but the substance remained the same.34 Like the constitutional liberties, their major source was English history and ultimately the constitution itself. Freedom of opinion embraced freedoms of conscience, speech and religion. Speaking about the C.P.R. scandal, he said, "...who is there that does not know that freedom of speech is liberty? Not the greatest security for liberty — it is liberty itself. Freedom of speech! Give me freedom of speech for a people and I will undertake that this freedom shall secure for them every other freedom, freedom of life, freedom of person and freedom of property."35

A closely related issue was presented by the bill to impose the use of English in the NorthWest, introduced by Dalton McCarthy in 1890. Blake spoke eloquently about the fears and sensitivities of minorities and about the conflagration that might occur if their fears drove them to unite race and creed in one party. Twice he asked the majority of English-speakers to "put themselves in the French-Canadian's place," and pleaded for understanding and toleration of "rights and sensitivities." Diversity was a challenge for Canada, and respect for minorities was a measure of her progress towards maturity. He proposed an amendment that declared Parliament's firm rejection of the principle of community of language, and left the question to be determined after the NorthWest had developed.36

Blake believed in a fundamental separation of religion from politics; in speaking about the incorporation of the Orange Order, he declared, "our religious opinions should be held entirely separate from our political leanings," and he gave the warning he gave in the NorthWest debate: "No greater calamity can befall a community than

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32 See Paul Romney's writing about the reform tradition, especially "From Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism" Canadian Historical Association, Historical Papers 1988 86

33 Speeches, January 15, 1885

34 Freedom of the person was essentially the freedoms and protections of the criminal process, for example, habeas corpus, and the right to a trial by jury

35 Speeches, August 28, 1873

36 Canada, H.C. Debates, February 13, 1890
when the cleavage of political parties is coincident with the cleavage of religious bodies... Our political differences are bitter enough, without introducing into them religious differences.”

Blake’s beliefs about the third of the individual liberties on his list, property, were different. His most expansive statement came in 1881: “... amongst the most valuable liberties in connection with property is freedom to sell or exchange it to the best advantage, freedom to dispose of it where you will, to whom you will upon the best terms you can... We think that a free and voluntary exchange is to the mutual benefit of both parties who effect the exchange, and we believe that that position is established by the mere fact that it is a voluntary exchange, because if it had not been suitable to both parties it would not have taken place at all.”

Here liberty was liberty from regulation by the state to participate in a private market, not the liberty to participate in the public life of the community. Blake’s speeches about this liberty were, however, tinged by the hope that the “class distinctions of the old world” would be diminished, and he judged the health of a society, not by the riches of a few and “a false scale of civilization, which I am disposed to call luxury” but by the state of “the many” or “the lowest class.” He hoped that they could gain independence, through their own “self-denial, energy and intelligence.”

He often expressed a belief in competition, but occasionally spoke in a way that suggested a competition among equals. He also often expressed fears of monopolies, especially private monopolies, and he was enthusiastic about industrial partnership and cooperation as solutions to the gulf between labour and capital, although they depended upon a “practical and felt community of interest.”

The Majority and the Minority: The Strength of Rights

Much of the protection for these liberties was the responsibility of the courts, and enshrined in great constitutional documents and principles — Magna Carta, habeas corpus, and the rule of law. These protections were a large and secure part of Blake’s faith, but they did not occupy an especially distinctive or substantial part of his legal or political lives. His thoughts about legislatures were much more interesting, especially their role in limiting and protecting rights.

Individual liberties are claims against the state, but they are not absolute. Thinking about limits presents two questions: i) What are the limits that can properly be imposed? Another way of asking this question is to ask, what is the strength of the right — what sorts of considerations, policies, or principles can overcome it? ii) How

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37 Canada, H.C. Debates, March 17, 1884. See also Speeches, September 24, 1877, and February 21, 1887
38 Speeches, March 29, 1881. See also Speeches, January 15, 1885
39 Speeches, August 21, 1880, and January 15, 1885, and Election Speeches, 1886 #5
40 Canada, H.C. Debates, December 15, 1880 (railways), January 17, 1881 (railways), March 27, 1882 (public lands), March 27, 1882 (timberlands), Mah 14, 1882 (telegraphs), May 4, 1883 (railways), June 11, 1885 (railways), June 30, 1885 (beet sugar), and July 16, 1885 (liquor)
41 Speeches, undated
should these limits be imposed — through what process and by whom? Blake’s answers to these questions suggest understandings that are in some ways deeply different from ours.

In his speech about disallowance of the Rivers and Streams Bill, after claiming autonomy for Ontario, Blake invoked the “spirit of the constitution,” and said, “I am a friend to the preservation of the rights of property . . . but I believe in the subordination of those rights to the public good . . . I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.”

On the hustings in 1886, he spoke even more strongly.

I said in Parliament that I care not whether the Act is just or unjust, whether it is right or wrong, whether it is good or bad, whether it is robbery or not. I inquire as to this only, is it a law passed by the Local Legislature, within the exclusive competence of that Legislature, and not substantially affecting Dominion interests? If so, you have no right to touch it, . . . I admit and I rejoice that there is an appeal from the power that made that law. But I will state to you where that appeal lies: THAT APPEAL IS FROM THE LEGISLATURE WHICH PASSED THE LAW TO THE PEOPLE WHO ELECTED THAT LEGISLATURE, and who can elect another to their minds. . . Are you not satisfied to live under the rule of your own people: Are you not equal to self-government? Are you not content to rely upon the sense of fairness and right, of honesty and expediency of your fellow-citizens of Ontario in reference to their and your own affairs? Do you feel so doubtful as to your own knowledge of what is just, expedient, honest and right, that you must allow governors to set themselves up over you to determine for you whether your laws are good or bad?

These comments beg to be explained; they are provocative and represent statements about rights that were widespread among lawyers in the late nineteenth century. Civil liberties, and rights generally, were limited by the needs of the community, and the community assembled in the legislature would determine its needs and the strength of rights, according to the its own “good sense and right feeling.” The legislature was a place where persuasive debate could occur and the various interests in the community could be represented. The protection for the minority was the opportunity to persuade the majority in the legislature, and ultimately to appeal to the people. In the end, the majority would — and should — prevail, but it had an obligation to be sensitive to the rights and feelings of the minority, and to respect the “spirit of the constitution,” and “the true principles of legislation.” These should shape its “good sense and right feeling.”

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42 Canada, H.C., Debates, April 14, 1882

43 Election Speeches, 1886 #4. See also Speeches, September 16, 1884
Blake did not face many difficult choices about the strength of individual rights, probably because he sat in the dominion legislature and had a strong sense that the provinces should have responsibility for “property and civil rights.” Clearly, he gave some rights great strength. Freedom of speech was crucial to constitutional liberty, and he would not have permitted any significant limits on political speech, but the course of politics did not push him to declare whether he would have permitted different limits for other kinds of unpopular speech. He seemed to accord freedom of religion the same strength as well, although he never had an opportunity of speaking about a specific and substantial restriction of an individual’s choice of worship. Perhaps he was more willing to countenance limitation of liberty of property than liberty of speech or religion, but the evidence is only suggestive.

What, then, was the nature of the protection that rights gave, especially against a majority? Blake could have had no doubts about parliamentary supremacy, and could have had no sense that liberty, rights, law or the “spirit of the constitution” were restraints on legislative power. And yet his understanding was not simply a confused hope for protection for rights in a world of unrestrained legislative power located — from our perspective — between the eighteenth century and the Charter. The obligation of the majority was a constitutional one, and rights were constitutional rights. Blake did not make the distinction between law, and politics and values that leads the twentieth century to separate the powers of the legislature from the values of the majority, and that has contributed to the dissolution of compulsion in Blake’s constitution. Rights were to be limited by public discourse of the community about shared values. This discourse made the rights more than hopes that might be ignored by the politics of a majority, but less than rights protected by entrenchment against politics and the legislature.

These understandings about limitations on rights and the power of a majority were grounded in the mainstream of nineteenth-century English constitutional thought. In the background were the waning of natural rights, the power of utilitarianism, and positivist understandings of sovereignty. In the realm of constitutional thought itself during first half of the nineteenth century, the dominant faith was that the best possible protection of individual rights was given by the existing constitution — the matchless constitution of the late eighteenth century, with its mixed forms and its balances, which slowly became the Parliamentary government of

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44 J. Waldron, ed Nonsense Upon Stills (London: Methuen 1987)
45 M. Francis “The Nineteenth Century Theory of Sovereignty and Thomas Hobbes” (1980) 1 History of Political Thought 517: “Sovereignty had become the graveyard of political philosophy instead of its summit. Authority, obligation, consent, right, and many others disappeared in it, and never seemed to have much meaning afterwards.” Another figure in the background is Locke, although I think the influence here is distant. Blake’s justification of majority rule and the ultimate authority of the good sense of the community echoes the Two Treatises of Government and the influence may have come through Story, whose discussion of the majority referred to Locke, and used a construction and language that is very similar to the language Blake used in his speeches about the Rivers and Streams Act (J. Story Commentaries on the Constitution of the United States (1st ed. 1833 reprinted New York 1970) Book 3 Ch 3 ss 327, 330, and 337)
the nineteenth century. Whatever else this meant, it meant that the legislature had a substantial role in the protection of the rights; constitutional liberty was a protection of individual liberty. In 1823, Lord John Russell said, "As long...as the supreme power of the state is placed in the hands of one or many, over whom the people have no control, the tenure of civil and personal liberty must be frail and uncertain. The only efficient remedy against oppression is for the people to retain a share of that supreme power in their possession.

I can offer two specific landmarks to support my suggestion that Blake's understandings were grounded in mainstream English constitutional thought. The first is Paley's Moral and Political Philosophy, which was a dominant text for university students in England in the late eighteenth century and first part of the nineteenth. It was used even longer in Ontario, and Blake read it at Trinity College — or at least he should have read it. In his analysis of civil liberty, Paley said, "Civil liberty is the not being restrained by any law, but what conduces in a greater degree to the public welfare. To do what we will is natural liberty; to do what we will, consistently with the interest of the community to which we belong, is civil liberty." And in speaking of toleration, he said, "the jurisdiction of the magistrate is limited by no consideration but that of general utility. . . . There is nothing in the nature of religion as such which exempts it from the authority of the legislature, when the safety or welfare of the community requires his interposition." The legislature could justly take away life, liberty and property, "for any reason which in the judgment of the legislature renders such a measure necessary to the common welfare." This structure did not, however, necessarily provide meagre rights; from this foundation, Paley built a powerful argument for religious toleration. As well, Paley expounded the ways the composition and processes of the legislature encouraged "expedient and salutory" laws and avoided the "formation of a junta.

My second landmark is Mill's Considerations on Representative Government, published in 1861, just after Blake graduated from Trinity. For Mill, one of the great dangers of representative government was that a majority might prefer its own "sinister" or "class" interests to the "general good of the community," and unfairly oppress a minority. His responses to this danger were to ensure that all interests be represented proportionally (the Hare scheme) and plural voting. A legislature so composed was a forum for deliberation and persuasion. "I know not how a representative assembly can more usefully employ itself than in talk. . . . A place where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions, can..."

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46 See M.J.C. Vile Constitutionalism and the Separation of Powers (Oxford 1967) ch 8

47 I have not found a reading list from Trinity College for 1853, the year Blake graduated, but in 1854, Paley was specified for the course in "Civil Polity" and included in the general reading list for the final examinations for candidates for medals. (Fisher Rare Book Library, University of Toronto, University of Toronto Archives). Considering the widespread use of Paley, it seems a reasonable assumption that his works were on Blake's reading lists as well. See A.B. McKillop A Disciplined Intelligence (Montreal 1979) 62-65 for an account of the importance of Paley's natural theology in Canadian education

48 Paley clearly specified that the legislature (the sovereign) was to determine whether the public welfare outweighed private interest
compel them to listen, and either comply, or state clearly why they do not, is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere and one of the foremost benefits of a free government . . .”49

But in the end, the majority must prevail: “In a representative body actually deliberating, the minority must of course be overruled.”50 Blake often spoke, implicitly or expressly, about the need for deliberation in Parliament, and proposed the Hare scheme, saying, “Our principle of Government is that the majority must decide . . . But if the minority must bow to the voice of the majority, the majority is all the more bound to see that the minority has its fair share of representation, its fair weight in the councils of the country. The majority must remember that it may become the minority one day . . .”51

At this point, I can finally try to answer an examination question that Blake might have thought about. It appeared on the final examination at Trinity, in a course called “Civil Polity,” in 1856. Some evidence of the difficulty of reconstructing the thoughts of another generation is that even after knowing the question and cramming for several years, not only do I fear I may not get an A, I don’t have any firm idea of the kind of mark I deserve.

a) Shew that a person confined to a quarantine station by due course of law cannot justly complain of any infringement of his civil liberty.

b) What kind of liberty is infringed by it?

c) Shew in what manner the liberty of individuals is secured by the British Constitution.

d) What kind of constitution makes the best provision for the liberty of a community?52

Parts a) and b) are easy, and require only remembering a couple of pages from Paley, which contain the definitions and the very example of the quarantine station: the confinement is imposed “consistently with the interest of the community,” and therefore civil liberty is not infringed; it is “natural liberty” that is limited.

Parts c) and d) separate civil and political liberties. I think that part c) calls for a lot of writing about Magna Carta, habeas corpus, the rule of law, the courts, and the protection of civil liberties by political liberty. Part d) worries me, though. The basic principle is responsible government — at least, I’m certain Blake would have thought it was — but I’m not sure what version the examiner expects me to present. This is

49 Mill Representative Government (Reprinted Buffalo 1991) 117
50 Ibid. 145-146
51 Speeches, October 3, 1874. See also, Speeches, June 2, 1875, in which he justified the Hare scheme by saying, “By such a system, minorities who do not agree with me in my views would get their fair share of representation in the country
52 Fisher Rare Books, University of Toronto Archives
1856; does he (and whoever he was, he was a male) want me to talk about the debate about the franchise? or about the cabinet? I'd like to have taken the course before answering at any length.

These individual liberties — liberty of the person, conscience, speech, religion, and property, and the ways of protecting them, were derived from English experience, but in Canada, Blake considered them in distinctive contexts and, perhaps, adjusted them in small but distinctive ways. Most of the major political episodes entangled rights with federalism. The first and most obvious thread in this tangle was that the campaign for provincial autonomy implied that individual liberty might be left to the mercy of unsympathetic provinces. The excerpts from the Rivers and Streams speeches demonstrate that Blake realized this implication full well, and he proclaimed the autonomy of Ontario — its right to be wrong. But again, the Rivers and Streams Act could reasonably have seemed to be a modest imposition. He was not pushed to make a firm, clear choice between autonomy and liberty in a situation where provincial legislation was a vital restriction of liberty. The second thread suggested that federalism was a way of protecting rights. Each of the provinces shared a distinctive history and a distinctive culture, and therefore tended to share a common "good sense and right feeling." Oppression of a minority was less likely than in a more heterogeneous state. Closely related is his understanding of groups. Many of the major episodes involved claims about the rights of a group, especially the Roman Catholics. He did not though, make any significant effort to think how the rights of a group might be different from the rights of an individual. Instead, the rights of groups tended to be represented by the autonomy of the provinces.

Federalism apart, Blake may have been more willing than his English texts to permit limitations for the benefit of the community. The texts tended to rejoice in the way the constitution protected individual rights, but, in contrast, Blake said, "I am content that my rights of property, shall belong to the Legislature . . . to be disposed of subject to the good sense and right feeling of the people." Is there a suggestion here of responsibility to the community, contrasted to protection of individual rights; or was he carried away by the political moment? One short passage is not enough to support more than a suggestion. If, though, there is a distinctive sense of community here, it may have been shaped by the history of Ontario's struggles for liberty — for responsible government. This experience, which was so important to Blake, may have made a sense of community — a community assembled in parliament.

**Perspective**

After Blake died, J. Clark Murray wrote in the *Week*, "The work that has been done by the retired leader forms a significant episode in the history of Canada. For it is not difficult, if one will look with earnest eyes at the struggles of these years, to see in Mr. Blake's work the old task of liberalism — a struggle against the old foes of

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53 The New Brunswick schools issue and the debate about language in the North West should be considered. In short, Blake's speeches gave the provinces great autonomy, but whether this autonomy would always have trumped liberty isn't clear.
constitutional government in a new form. The foundation and security of constitutional government consist in the minute and perpetual control of the Executive by the people."54

Murray was correct in seeing the struggle for constitutional liberty at the centre of Blake’s life, and in seeing that his ideas were rooted in the past. But his struggle was not limited to the control of the executive, and, more important, he glimpsed a vision of social and political life that the tribute did not suggest. His beliefs about public virtue, social structure, the economy, and the destiny of Canada all illuminated his understanding of liberty, and combined to suggest a vision of a society based on liberty—a society based on equality, wide dispersal of economic power, and participation in public life.

Today, our thinking about rights and liberty are dominated by the Charter of Rights and Freedoms: section 7 gives each of us a right to “life, liberty, and security of the person . . .” which is subject, in section 1, to “such reasonable limits prescribed by law as can be demonstrably be justified in a free and democratic society,” and subject, in section 33(2), to the “override” power. What illumination can a reconstruction of Blake’s understandings about liberty yield for us?

My story suggests that section 1 and section 33(2) have firmer grounding in our history than we might have thought. The express acknowledgment in section 1 of the needs of the “free and democratic society” resembles Blake’s belief that individual liberty must be limited by the needs of the community. The crucial difference is that the decision under section 1 of the Charter is made by courts, not the community assembled in parliament. Liberty has become a right to be protected from the community—by courts and a written Charter, and not a right entrusted to the community. The story of how this happened is complex, but one of the strands is a transformation in legal thought during the late nineteenth century. Courts became central to the constitution, and a radical gulf was imposed between law and politics—and community, a gulf that Blake did not perceive.

The power given in section 33(2) resembles Blake’s belief that the majority of the community should in the end prevail, and may suggest to us that a passionate belief in rights is not as profoundly inconsistent with legislative supremacy as looking at American constitutional faiths might suggest. The question for us is whether we have the sense of community, respect, and toleration that is needed for Blake’s vision.

But what about section 7, and the word “liberty” itself? Can Blake’s experience help us find meanings? We share his principled faith in democratic government, rational discourse, the rule of law, and the dignity of the individual—and liberty, and his passion can be an exemplar for us. But his age is not ours, and his particular meanings cannot be ours. Consider some of our pressing questions: What kind and degree of limitation of the discretion of an administrative agency will meet the requirement of “prescribed by law”? What sorts of liberty should we have to chose our occupations in a state that is so intensely regulated and upon which we are so profoundly dependent? And should our liberty include some decent minimum liberty from want? These questions are ours, not Blake’s. There is no still point, in Blake’s

54 The Week July 7 1887 511-2
mind or anywhere else in our past, that will give us interpretations of the word "liberty." We must make our own, thinking about the basic principles that we share with him.
Frank Scott, the League for Social Reconstruction, and the Constitution

Michiel Horn

"Study the historian before you begin to study the facts," Professor E.H. Carr advises us: "... The facts are really not at all like fish on the fishmonger's slab. They are like fish swimming about in a vast and sometimes inaccessible ocean; and what the historian catches will depend, partly on chance, but mainly on what part of the ocean he chooses to fish in and what tackle he chooses to use... By and large, the historian will get the kind of facts he wants. History means interpretation."

Carr's insight, whose truth anyone acquainted with the writing of history will recognize, illuminates the contributions that Frank Scott made to our knowledge of Canadian constitutional history. Someone may object that Scott was not an historian and that therefore Carr's advice is irrelevant. My response to any such objection is that Scott's method was historical as well as legal. Moreover, no one discussing the development of the constitution can avoid being to some extent an historian. Finally, it may be worth noting that Scott studied history before he studied law.

What do we know about the Frank Scott of the 1930s? He was an Anglo-Quebecker who had been born and raised as a member of a double minority, English speaking and Protestant in a community that was predominantly French speaking and Roman Catholic. He was a child of the manse. He was educated at Bishop's, Oxford and McGill. He was a poet and a lawyer. And he was a man with a quest. His biographer, Professor Sandra Djwa, writes: "If the young Scott of the twenties had been preoccupied with the search for a vocation, for a Canadian art and morality, in the thirties he became caught up in the larger issue, the reshaping of Canadian society through politics and law."

The reason for this change was the Depression and the responses to it by Canadian governments and business corporations. These responses clashed with Scott's ethical convictions, shaped by his father, Canon F.G. Scott. The younger Scott

* This paper is akin to an act of filial piety. Frank Scott and I were not related by ties of blood, but I came to be associated with him in the preparation of his last book. This fostered a relationship somewhat like the one between father and son. When A New Endeavour finally appeared, Frank had been dead for almost a year. It is a source of satisfaction to me that he learned not long before his death that the University of Toronto Press had agreed to publish the book; and that the news gave him pleasure at a time when pleasures for him were few and far between. My paper is dedicated to his memory.

1 E.H. Carr What is History? (Harmondsworth, Middlesex 1964) 23
2 Sandra Djwa The Politics of the Imagination: A Life of F.R. Scott (Toronto 1987) 120
had a keenly developed sense of noblesse oblige; he was predisposed to see himself as a knight *sans peur et sans reproche*. In the 1930s the knight found his cause: the welfare of the common people and the preservation and enhancement of their rights.³

Scott's constitutional thought expressed his desire for a society both more efficient and more just than Canada was in the 1930s, a desire that also led him to become active in the League for Social Reconstruction (LSR) and the Cooperative Commonwealth Federation (CCF). According to Professor Alan C. Cairns: "The general centralist basis of the critics is most clearly found in the writings of the socialist law professor, F.R. Scott, the 'unofficial constitutional advisor' of the CCF. On numerous occasions Scott criticized the Privy Council for departing from the centralist federalism established in 1867 and for leaving Canada with a constitution which gravely hampered attempts to solve important public problems."⁴ As an introduction to Scott's constitutional writings in the 1930s Cairns's comment will serve as well as anything else. Whether prepared for the LSR or the CCF, or simply to state his personal views, Scott's articles and addresses on the constitution made the point that a centralized federation was what had originally been intended and was, in view of the Depression, in the best interests of the great majority of Canadians.

The first important statement of this view antedates Scott's emergence as the chief constitutional spokesman for the political left. In 1931 he read a paper to the Canadian Political Science Association (CPSA) on "The Development of Canadian Federalism," which laid a basis for his writings later in the decade. I shall devote my attention mainly to this paper, to his booklet *Social Reconstruction and the BNA Act* (1934), to the chapter on the constitution that he contributed to the LSR's book, *Social Planning for Canada* (1935), and to "Canada: One or Nine?"; the LSR brief to the Royal Commission on Dominion-Provincial Relations that Scott prepared in late 1937. Throughout, the position Scott adopted was not a dispassionate legal construct but was rooted in moral outrage and in the desire to shape a workable constitution for the country's present and future.

The Scott who spoke to the CPSA in the summer of 1931 had recently begun to take a strong interest in politics and economics. Furthermore, his view of Canadian society was becoming steadily more critical. The first owed much to a circle of friends in Montreal, among them Brooke Claxton, John Farthing, Eugene Forsey, Ronnie McCall, Terry MacDermot and Raleigh Parkin. They made up an informal discussion group that by early 1930 was drafting a book intended to propose "remedies" to the "political, economic and social" problems of the country.⁵ The book was never finished, perhaps because some of its authors had become more radical in their views than others. By early 1931 Scott's own Depression-spawned criticism of Quebec society found expression in a letter he wrote to the editor of the Montreal *Gazette*.

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3 Michiel Horn "F.R. Scott, the Great Depression and the LSR" in Sandra Djwa and R. St J. Macdonald eds *On F.R. Scott* (Kingston and Montreal 1983)
4 Alan C. Cairns "The Judicial Committee and Its Critics" *Canadian Journal of Political Science* 4:1 (September 1971) 309
5 National Archives of Canada, Brooke Claxton Papers, Brooke Claxton to Burton Hurd, 2 February 1930

Michiel Horn 214
Scott was protesting against the actions of the Montreal police who had been breaking up meetings called to demand relief for the unemployed.\textsuperscript{6} Nowhere in Canada was provision for such relief close to being adequate, but it was probably worst in Quebec. To Scott the lawyer it was outrageous that the police should act highhandedly; to Scott the humanitarian it was outrageous that people should first be denied the means of subsistence and then be muzzled when they sought to protest. The letter became a turning point in his life. The criticism he received as a result hardened him in his opinion that he was right, and pushed him further along the course of social criticism. It also shaped his attitude to constitutional questions, as he became aware that federalism had developed in such a way as to make any kind of uniform or fair provision for the unemployed difficult.

Scott's new attitude was evident in the paper he read to the CPSA in 1931. Its title was "The Development of Canadian Federalism;" it asked the question: "What has become of our federalism?" Scott answered: "It is a legal morass in which ten governments are always floundering: a boon to lawyers and obstructionist politicians, but the bane of the poor public whose pathetic plea is simply for cheap and efficient government."\textsuperscript{7} It need not have been this way. Adopting a line he would hold to throughout the 1930s, Scott argued that the sources indicated that "the basis for the distribution of legislative powers was to be this — all matters of national importance were to go to the national parliament, all matters of merely local importance in each province were to remain subject to exclusive provincial control."\textsuperscript{8} But the residual power was clearly assigned to the dominion: "... When the national interest demands legislation by the Dominion the exclusive powers of the provinces must give way to the extent necessary to permit the Dominion to act. It was never intended that the provinces should be able to obstruct general legislation for the good government of Canada on the ground that such legislation might happen to deal incidentally with a subject over which they have exclusive control when the national interest is not involved."\textsuperscript{9}

What had gone wrong? Scott held the courts responsible. "... The courts have drawn a totally unjustifiable distinction between the general power of the Parliament of Canada to legislate for the peace, order and good government of the whole country, and its special powers over the twenty-nine topics enumerated in section 91."\textsuperscript{10} As a result the residual power had all but vanished except during war and national emergencies.

\textsuperscript{6} Letter to The Gazette 3 February 1931, Frank R. Scott A New Endeavour: Selected Political Essays, Letters and Addresses Michiel Horn ed (Toronto 1986) 3-4
\textsuperscript{7} F.R. Scott "The Development of Canadian Federalism" Essays on the Constitution: Aspects of Canadian Law and Politics (Toronto 1977) 35
\textsuperscript{8} Scott "Development" 36
\textsuperscript{9} Scott "Development" 39-40
\textsuperscript{10} Scott "Development" 41

215
Scott's present-mindedness became evident as he discussed the inability of the dominion to deal with unemployment. "Unemployment is national in scope. Yet both political parties agree that labour questions are a purely provincial matter, and must be left to the provinces to handle. All that Ottawa does is to vote money for the provinces to spend; the unemployed have to wait until the same matter that was thrashed out in Ottawa gets thrashed out anew in the provincial legislatures and put into the form of a provincial statute."

What were the reasons for this and similar developments? Scott identified four. First of all: "... the distinction between matters of general, and matters of local, interest, adopted by the Fathers [of Confederation] is too vague to be pleasing to a court of law." Secondly, there was ... the not unnatural desire of the provincial legislatures to seize as much legislative power as possible, under the mistaken belief — and here I credit them with the highest motives — that they were serving the residents of their provinces best if they destroyed Dominion control." Thirdly, Scott noted the apparent desire by the leaders of the dominion parties, both William Lyon Mackenzie King and R.B. Bennett, "to hand over as much as possible to the local legislatures." But Scott found his final and chief reason in the legal interpretation of the BNA Act: "The courts have been most to blame for what has occurred; and here the decisive influence has been that of the Privy Council. Canada today has a constitution different from that which she plainly adopted in 1867 for the simple reason that the interpretation of sections 91 and 92 has not in the last resort rested with Canadians. ... The fact is that the Privy Council has been too handicapped by its ignorance of Canada to be able to give good judgments in Canadian constitutional law."

Let us for the time being leave aside a consideration of the soundness of Scott's analysis, and turn to his role as a reformer. The CPSA paper preceded his metamorphosis into a socialist, but not by many months. Before the end of the summer Scott had met the University of Toronto historian Frank H. Underhill and discussed with him the founding of a Canadian version of Britain's Fabian society. It took shape during the fall and winter of 1931-32, its members christening it the "League for Social Reconstruction." It grew rapidly, with seventeen branches from Montreal and Verdun, Quebec, west to Vancouver and Victoria, B.C., by 1933. In July Scott was one of several LSR members who attended the convention in Regina at which the fledgling CCF adopted its famous manifesto.

The LSR set out to prepare a book that would outline its critique of capitalism and proposals for change. But when it became clear that this volume would take much longer to produce than had been anticipated, the executive decided to publish four booklets dealing with various aspects of reconstruction.

11 Scott "Development" 45

12 All quotations in this paragraph are from Scott "Development" 46-7

These appeared in 1934; one of them was Scott’s *Social Reconstruction and the BNA Act*. It is more optimistic in its assessment of the constitutional situation than his CPSA paper. The booklet’s argument is that most of the redistribution of powers necessary to build the new society can take place within the terms of the BNA Act. Scott held the dominion residual clause to be the key. Conceding that this had come to be interpreted as a power usable only during war or national emergency, he added: “The present emergency [in the administration of unemployment relief] would seem to be as great as that which justified controlling newsprint in 1919. . . . A national crisis, if severe enough, will automatically increase Dominion legislative powers.”14 As another possibility he noted that the dominion Parliament might pass legislation giving effect to conventions of the International Labour Organization (ILO) in the areas of social welfare and labour relations. These were within provincial jurisdiction. But the Judicial Committee decisions of 1932 in the Radio Broadcasting and Aeronautics cases opened the way, Scott thought, to the dominion’s use of the treaty-making power under section 132 of the BNA Act to implement ILO conventions.

In reviewing the booklet, the Queen’s University political scientist Norman McLeod Rogers (later a Liberal cabinet minister) wrote that Scott and the LSR underestimated the changes in the act that would be necessary in order to implement their policies. Doubtless he was right. And Scott may have taken the criticism by Rogers to heart. In any case, in *Social Planning for Canada*, whose chapter on the constitution was written by Scott, he suggested that R.B. Bennett’s use of section 132 to justify elements of his so-called New Deal legislating 1935, “… though probably sound, is somewhat uncertain.”15 The preferable course of action would be to amend the BNA Act so as to permit the passage of social legislation by the dominion without reference to the treaty-making power. Scott judged further amendments to be necessary in order to permit the centralization of control over corporations, the rationalization of the fiscal system, the adoption and carrying into action of a national economic plan, and the abolition of the Senate.

How should amendments be secured? As they had been in the past: by action of the dominion Parliament. Scott resolutely rejected the “compact theory” of Confederation, which contended that all provinces must assent to an amendment. “Parliament alone represents all provinces, speaks for every Canadian, and should properly be held responsible for a matter of such national importance.”16 Scott proposed that certain sections of the BNA Act (51 and 51A, 92(1) and (12), 93 and 133, and the new amendment formula) be entrenched in order to protect minority rights. “Provincial powers over economic matters and social legislation . . . are not in this

14 *Scott Social Reconstruction and the BNA Act* (Toronto 1934) 7-8
16 *SPC 507*
group. Quebec's right to tolerate sweatshops whose existence holds down living standards in other provinces, is not a minority right."17 Civil liberties should be protected, however, by means of an entrenched Bill of Rights.

The essence of Scott's proposed amendment formula was summarized in four points: "(1) The power of amendment to rest within Canada; (2) Ordinary amendments to be by majority vote of the Dominion Parliament, assembled in joint session of the two houses: (3) Amendments affecting minority rights to require, in addition to Dominion approval, the assent of all the provincial legislatures; (4) Any province not dissenting within one year to be presumed to have given its assent."18 This was the outline of the formula Scott had proposed in his testimony before the Special Parliamentary Committee on Revision of the Constitution early in 1935. It should be our last request to the imperial parliament, he said, and would capture the "particularly unified form of federalism" that the Fathers of Confederation intended Canada to have.

The LSR's submission to the Rowell-Sirois Commission, entitled "Canada — One or Nine? The Purpose of Confederation," was written against the background of the judgments of the Judicial Committee in 1937 invalidating much of the Bennett New Deal legislation of 1935. Scott's mood as he analyzed these judgments was one of lamentation. "The most exaggerated doctrines of provincial rights have been accorded full recognition, and the national sovereignty of Canada in the international field has been destroyed," he asserted in the Canadian Forum.19 The LSR brief, presented to the Commission in January of 1938, was an attempt to show how Canada might recover from the debacle.

The brief also offered an outline of our constitutional history as Scott saw it. Again he argued that the Fathers of Confederation had intended a centralized federation. "Confusion and uncertainty now exist in Dominion-Provincial relations, but they are not due to weaknesses in the constitutional principles originally adopted."20 So what had gone wrong? Scott singled out the Judicial Committee for blame: over the years it had substituted "... a theoretical, inefficient and loose English concept of federalism for the practical, balanced and unified Canadian concept."21 Then, too, there was the decline in authority of the central government consequent upon the reduction of its legal powers, which has been followed by a great

17 SPC 508. Sections 51 and 51A deal with representation in the Dominion Parliament, 92(1) with provincial control over provincial constitutions, 92(12) with the solemnization of marriage, 23 with education, and 133 with the use of the English and French languages. SPC mistakenly used the number 135
18 SPC 509
20 League for Social Reconstruction Canada — One or Nine? The Purpose of Confederation (Toronto, 1938) 10
21 Canada — One or Nine? 11
revival of sectional feeling in Canada.” The divisive effect of provincialism had become starkly evident in the 1930s: “Today, for considerable sections of the Canadian people Ottawa has become almost the seat of a foreign power — a Geneva amongst a group of sovereign states.”

Even as this was happening, however, economic control was being centralized: the large corporations had come to rival Canadian governments in power. Monopoly capitalism had also brought about a great maldistribution of wealth and a new “industrial feudalism” that only a strong central government would be able to check.

In several basic respects the design of the Fathers of Confederation had not been realized. But at least as important was that Canadians in the 1930s wanted and needed more from government, “... the provision of a basic minimum of social security for every citizen” and the assumption of that measure of control and planning of the economy that is “... necessary to maintain economic stability, to eliminate unfair competition and waste, and to see that natural resources are developed in the best and most efficient manner.”

Here were new purposes that the dominion Parliament ought to adopt. If it were to pass the requisite constitutional amendments it would become possible to ease the fiscal burdens of provincial and municipal governments, redistribute wealth and income to create greater equity among individuals and regions, equalize the costs and benefits of living in Canada, and foster the growth of comprehensive patriotism at the expense of provincial loyalties.

Scott denied that provincial governments would thereby be reduced to municipal status. “Their exclusive power over local matters will remain; it will only be their present power to deal with matters of national concern which will be taken from them.” Doubtless some provincial premiers would object to a reduction in their power, but in the interest of the common good they should be ignored. The brief concluded with the words of Thomas D’Arcy McGee, spoken during the Confederation debates: “The principle [of federalism] itself seems to me to be capable of being so adapted as to promote internal peace and external security, and to call into action a genuine, enduring and heroic patriotism.”

In a conversation with me in 1978 Scott recalled that the Commissioners treated him and his co-presenter Leonard Marsh kindly, and that, by and large, the brief was politely received. But there is scant evidence of its recommendations in the Commission’s Report of 1940. That ought to occasion no surprise. It was basic to the LSR’s understanding of Canada that the country’s real problems were those not of federalism but of capitalism. This view commanded little support in the 1930s; it has commanded little since.

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22 Canada — One or Nine? 13
23 Canada — One or Nine? 18, 21-2
24 Canada — One or Nine? 28
25 Canada — One or Nine? 32
As we have seen, Frank Scott justified his centralist constitutional position on two main grounds. The first was historical: it accorded more nearly with the intentions of the Fathers of Confederation than did the views of the champions of provincial rights. The second was social: it answered the needs of Canadians in a period of economic crisis. It is hard to escape the conclusion, however, that the latter loomed larger in his thought than the former and that, indeed, the latter shaped his assessment of the former.

Scott assigned primary blame for the abandonment of the Macdonaldian constitution to the Judicial Committee. In so doing he severely underrated the strength of the provincial rights movement of the late nineteenth century. Professor Cairns has written: "It is . . . clear that the Judicial Committee was much more sensitive to the federal nature of Canadian society than were the critics. From this perspective at least the policy output of British judges was far more harmonious with the underlying pluralism of Canada than were the confused prescriptive statements of her [sic] opponents."26 Was Scott, cited by Cairns as one of the chef critics, confused or was he simply wrong in his criticism? In his CPSA paper of 1931 he noted that "the first great 'march on Ottawa' was led by Sir Oliver Mowat . . . "27 But by 1938 he seemed to regard Mowat's march as the result of the weakening of the dominion's legal authority. This put the cart before the horse. It is historically more correct to see Mowat's challenge to the dominion as a cause of the reduction of its legal powers.

Within a very few years of the Confederation agreement, Reform politicians in Ontario were dissatisfied with John A. Macdonald's management of national affairs.28 Of key importance was his attempt to draw Ontario's western boundary well east of where Ontario's government wanted it to be. Hostility to the federal government and suspicion of Macdonald's motives translated easily into hostility towards the centralization of power within the federation. The tension between Toronto and Ottawa lessened when Liberals were in office in both places from 1873 to 1878, but deteriorated once again after Macdonald's Conservatives regained power in the Canadian capital. The legal challenge to the BNA Act was linked to the political challenge to Macdonald's control of the dominion Parliament.

It is possible to write a counterfactual history in which Ontario Liberals would have controlled both Queen's Park and Ottawa between 1873 and 1896 and would have happily administered a centralized constitution. (In that case, of course, Quebec might have spearheaded an early challenge to Ottawa and the BNA Act.) But counterfactual history is an entertaining pastime, nothing more. In reality the dominion was soon at odds with the richest and most populous member of the federation. Something had to give; that something was Ottawa's power. And, had it not given, does it not seem likely that Ontario's politicians would have accomplished

26 Cairns "The Judicial Committee and Its Critics" 343
27 Scott "Development of Canadian Federalism" 46
in other ways what they could not get through the courts? By accommodating the legal claims of Ontario, the courts, including the much-maligned Judicial Committee, made Canada a more decentralized federation but helped to keep the country together.

Scott’s failure to recognize or acknowledge this was the result of the place and time in which he found himself. As a humanitarian and reform-minded Anglo-Quebecker he was profoundly out of sympathy with the Quebec governments of the 1930s, whether led by the Liberal L.-A. Taschereau or the Conservative Maurice Duplessis (to whom the Union nationale offered a flag of convenience, little more). In “The Fascist Province” (1934), “French Canadian Nationalism” (1936), and “Embryo Fascism in Quebec” (1938) — it is telling that all three were published under a pseudonym — Scott described a society where bigotry, intolerance and contempt for freedom of speech and association had official sanction and where business corporations got public assistance while the urban working classes were left to fend largely for themselves.29 The Padlock Act, passed in 1937, was the most obvious example of attitudes Scott found obnoxious in the extreme. But it was far from being the only one.

When he looked to other provinces he found little to cheer him. Ontario, the most powerful in the 1930s as it had been in 1867, was governed by men who scarcely yielded to Quebec’s leaders in defending provincial rights. Moreover, Howard Ferguson, George Henry and Mitchell Hepburn showed little concern for civil liberties or the welfare of the unemployed.

As for the dominion: with the exception of Bennett’s initiatives of 1935, federal leaders claimed their hands were tied not only with respect to the unemployed but also with respect to the rights and freedoms of unpopular groups. Ottawa refused to disallow the Padlock Act or even to refer it to the Supreme Court for an opinion on its constitutionality. As Scott noted in his constitutional writings, section 92(13) of the BNA Act, Property and Civil Rights in the Province, had become the effective residual clause except in times of national emergency.

Scott nevertheless looked to Ottawa for succour. If the dominion were only governed by the right people, and if these enjoyed the necessary power to do good, all might yet be well. No doubt he was influenced by a well-founded belief that minority rights at least, had generally fared better at Ottawa’s hands than those of the provinces.30 This was not irrelevant to a member of a minority group in his own province, one who was interested in expanding the rights of French Canadians in other parts of Canada.

What validity should be accorded to Scott’s constitutional views of the 1930s? Should we see them as fatally flawed because they got the country’s constitutional history wrong, accorded too little value to regionalism and misunderstood the centrifugal forces in a far-flung and disparate federation? Or should we recognize that

29 J.R. Keith “The Fascist Province” *Canadian Forum* 14 (April 1934); Quebecer “French Canadian Nationalism” *Canadian Forum* 15 (March 1936) and 16 (May 1936); S. “Embryo Fascism in Quebec” *Foreign Affairs* 16 (April 1938)

30 Scott “The Privy Council and Minority Rights” *Queen’s Quarterly* 37 (Autumn 1930)
there were sound reasons in the 1930s for being dissatisfied with Canadian federalism and with the course of Canadian and Quebec politics, and that Scott’s proposals for change had a good deal to recommend them? Different people will answer these questions differently, based on an assessment of the past that is inevitably shaped by their view of the present. And in Canada the constitution and the shape of federalism are very much current business.

"... We can view the past and achieve our understanding of the past, only through the present. The historian is of his own age, and is bound to it by the conditions of human existence."31 This is as true of me as it is of you and was of Frank Scott. Before concluding, therefore, I should offer some information about my own perspective on the present. I have recently stated in print that Canadians may be well-advised to resist yet further decentralization of our institutions and social policies, even if this is proposed in the cause of keeping Quebec in Canada.32 At the same time, the degree of centralization sought by Scott in the 1930s has always struck me as excessive. This may be because I spent ten of the formative years of my life in Victoria, B.C., where enthusiasm for centralization has never been high.

In the 1940s Scott himself retreated from the centralist position he adopted during the Depression decade. By 1943 he was assigning more responsibility to provincial governments than he had been prepared to grant earlier.33 The reason is not hard to find. In 1943 the CCF was the parliamentary Opposition in British Columbia and Ontario, and had hopes for an early victory in Saskatchewan. This encouraged interest in the role that provincial governments might play in the coming of the co-operative commonwealth. In 1967 Scott commented: “You are quite right in noticing a gradual readiness to accept decentralization as the thinking in the CCF evolved. Partly this was due to the simple fact that in the early days of the depression attention was focussed on Ottawa, as the only government capable of leading us out of the morass but as the victory in Saskatchewan came closer we were forced to think about provincial programs in a more realistic way, and there was seen to be a very wide area of provincial jurisdiction to be used for the socialist cause.”34 It was not irrelevant that the government of Adélard Godbout in Quebec (1939-44) was less obnoxious than its predecessors. In any case, power in the provinces had come to assume greater importance to Scott than at any time in the 1930s.

Did this mean “centralization if necessary but not necessarily centralization?” Up to a point, yes. Scott as a constitutional lawyer and historian tried to make sense of the past. As a political actor he tried to prescribe for the future. I began this paper by quoting E.H. Carr. I now come full circle as I quote him again: “... Objectivity in history does not and cannot rest on some fixed and immovable standard of judgement

31 Carr What Is History? 24
33 Scott “The Constitution and the Post-War World” Canada After the War Alexander Brady and Frank Scott eds (Toronto 1943); David Lewis and Frank Scott Make This YOUR Canada (Toronto 1943) 151
34 Scott to the author 8 November 1967
existing here and now, but only on a standard which is laid up in the future and is evolved as the course of history advances. History acquires meaning and objectivity only when it establishes a coherent relation between past and future.35 Scott sought to establish such a relation. His effort was limited, subject to bias and occasionally inaccurate. However, he was surely right in his recognition that by the 1930s Canadians needed more from government than had been the case in 1867, and that the dominion could supply these needs more adequately than the provinces.

The history of Canadian social legislation since the 1930s offers considerable evidence in support of this judgment. Unemployment insurance, family allowances, housing policy, old age security and pensions, higher education, hospital insurance and health insurance: each saw the creative intervention of the federal government during the years from 1940 through 1966. Two of these required amendments of the BNA Act: the remainder involved the application of Ottawa’s fiscal strength in areas in which most provincial governments, for financial or ideological reasons, were loath to act. The result has been a healthier, better educated, better housed and, we may safely assume, a happier Canada than otherwise would have existed.

35 Carr What Is History? 130
Contributors

JANET AJZENSTAT, an associate professor in the Department of Politics at Brock University, joins the political science department at McMaster University in 1993–94. She publishes in the field of Canadian political and constitutional thought.

DAVID J. BERCUSON is Professor of History at the University of Calgary. Among his many publications on Canadian history and recent political issues is the book he wrote with Barry Cooper, Deconfederation, Canada Without Quebec (Toronto 1991).

ALAN CAIRNS, Professor of Political Science at the University of British Columbia, has set the agenda on constitutional issues for a generation of scholars. His most recent book is Charter Versus Federalism: The Dilemmas of Constitutional Reform (Montreal 1992).

BARRY COOPER, Professor of Political Science at the University of Calgary, is the author of numerous works in political philosophy, and current political issues, including The End of History: An Essay on Modern Hegelianism (Toronto 1984), Action Into Nature: An Essay on the Meaning of Technology (Notre Dame 1991) and, with David J. Bercuson, Deconfederation, Canada Without Quebec.

LOUIS-GEORGES HARVEY is an assistant professor in the Department of History at Bishop’s University. He completed his Ph.D. at the University of Ottawa in 1990 with a dissertation entitled “Importing the Revolution: The Image of America In French–Canadian Political Discourse.”

MICHEIL HORN is Professor of History in Glendon College, York University. His books include The Dirty Thirties (Toronto 1972) and The League for Social Reconstruction (Toronto 1980). He is the editor of Frank R. Scott’s A New Endeavour: Selected Political Essays, Letters and Addresses (Toronto 1986).

RAINER KNOPFF is Professor of Political Science at the University of Calgary. His recent publications include Human Rights and Social Technology: The New War on Discrimination (Ottawa 1989) and, with F.L. Morton, Charter Politics (Toronto 1992). He is the founding editor of the Canadian Journal of Law and Society.

CONSTANCE MACRAE–BUCHANAN is a doctoral candidate in political science at the University of Toronto writing a dissertation on the state of social rights in Canada. She is a graduate of the University of Manitoba and Carleton University, and has lectured at the University of Winnipeg.

F.L. MORTON is Associate Professor of Political Science at the University of Calgary. Editor of Law, Politics and the Judicial Process in Canada, now in a second edition (Calgary 1992), and co–author, with Rainer Knopff, of Charter Politics, he has recently published Borowski v. Morgentaler: Abortion, the Charter and the Courts (Toronto 1992).
R.C.B. RISK, Professor of Law at the University of Toronto, publishes in Canadian legal history and administrative law. He is a past editor of the University of Toronto Law Journal.

PAUL ROMNEY is a Canadian historian living in Baltimore. He has written extensively on Canadian legal and constitutional history and is the author of Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791–1899 (Toronto 1986).

Hon. CLAUDE RYAN, Minister of Education and Science in the Government of Quebec, with responsibility for the administration of the French Language Charter, was Leader of the Quebec Liberal Party from 1978 to 1982 and Opposition Leader from 1979 to 1982. As editor of Le Devoir, he is the author of influential articles on the politics of Canada and Quebec.

LESLIE SEIDLE was Senior Research Coordinator for the Royal Commission on Electoral Reform and Financing at the time he wrote his article for this volume. He is now a Research Director for Governance Program at the Institute for Research on Public Policy in Montreal.

H.G. THORBURN, Professor Emeritus of Political Science at Queen’s University, writes on Canadian politics (especially pressure groups, political parties and public policy), and on comparative politics (France).

DOUGLAS VERNEY is Professor of Political Science at York University. Among his many publications on political systems and comparative politics is Three Civilizations, Two Cultures, One State: Canada’s Political Traditions (Durham NC 1986).