

CHAPTER 1

Can the Canadians Be a Sovereign People? The Question Revisited

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In 1991 I published an article entitled “Can the Canadians Be a Sovereign People?”¹ The article was my presidential address to the Canadian Political Science Association. Subsequently this question (with the verb “be” changed to “become”) became the subtitle of *Constitutional Odyssey*, a book-length account of Canada’s constitutional politics.² Though my question angered some and puzzled others, and after another decade of constitutional politics I still do not have a firm answer to it, I continue to think that asking it is a good way to explore the most profound difference between Canadian and American constitutionalism. The question also illuminates the tension in Canadian constitutional politics between the way a generation of Canadians wished to resolve their constitutional differences and the kind of resolution that suits their present circumstances.

What Does the Question Mean?

In raising this question, I did not mean to impugn Canada’s claim to being a sovereign state. The claim of the governments of Canada to having a monopoly of legitimate force over Canadian territory is as good as that of other members of the United Nations. And as a country that is either one of the world’s strongest middle powers or one of its lesser great powers, this claim is more than legal bravado. Still, as Stephen Clarkson and other Canadian political economists continue to show us,³ given Canada’s tight fastening to the American economic orbit, this formal sovereignty should not be equated with policy independence—especially in the economic realm. But my question is not aimed at this (and other constraints) on what our governments can do with their constitutional powers. The target of my question is concern about the legitimacy of the constitutional order through which Canadians aspire to govern themselves.

Nor in asking my question do I mean to deny that Canadians are already *in some sense* a people. The Canadian people are certainly defined juridically by

Canada's citizenship laws, and can be—and often are—discussed in terms of their defining characteristics, as diverse as they may be. I would go further than this and claim that with respect to outside interference in Canada's constitutional affairs, the Canadians are a "people" with the right to self-determination. Canadians may be deeply divided on certain constitutional issues, the most fundamental of which is recognition of the Québécois and the aboriginal peoples as "peoples" within Canada who have the right to self-determination (including the right to secede). Nonetheless, I believe that Canadians—Québécois, the aboriginal peoples, and all the rest—would and should assert their collective right to self-determination against any outside power that might try to intervene and sort us out.

What I have in mind in questioning whether Canadians can become a sovereign people is a constitutional ideal. It is the ideal of Canadians with all of their diversity agreeing formally and democratically to their constitutional order. It is the ideal of the social contract in classical European political thought. It is the ideal of Canadians constituting themselves "a people" in John Locke's terms by agreeing to form a political community with a common system of government. It is the ideal of Canadians being a "We the people," as in the opening words of the U.S. Constitution. It is the ideal of a constitution expressing the will of a sovereign people. That is the ideal that came to enthrall so many Canadians in the last three decades of the last century but that proved to be so illusive. It is the possibility of realizing that ideal through some grand final resolution of their constitutional differences that I call into question.

Now, of course, the actual "We the people" who participated in the making and adoption of the U.S. Constitution were a very exclusive "we." The majority of the people, including women, Afro-Americans, and Indians, were excluded. But over time, as the American political community became more inclusive, the idea that the U.S. Constitution expresses the will of the American people became a popular, legitimating myth at the very center of its people's sense of national identity. In this sense the Constitution constituted the American nation.

In Canada, by way of contrast, there was no founding myth of the people as a constituent power. The point is not that the actual process that produced the Canadian federation's founding constitution in 1867 was remarkably less democratic than the founding of the United States. Elite accommodation among elected politicians was the crucial process in the founding of both federations. True, the Canadian politicians did not submit the product of their constitutional bargaining to popular conventions, nor (with one exception)⁴ did they submit themselves to the approval of the electorate before the constitution they had designed came into force. But the debate of the Confederation proposals in the legislative assemblies, newspa-

pers, and public meetings of the British North American colonies was about as robust and participatory as that which preceded the American founding.⁵ The real difference was that unlike the American founding fathers, Canada's did not believe that the people were, in principle, sovereign. They made this very clear in leaving the sovereign power to amend Canada's constitution in the hands of the British Parliament.

The Fathers of Confederation's willingness to leaving custody of Canada's constitution in British hands was not the result of any absence of mind nor failure to deal with some difficult unfinished constitutional business. No, these British North Americans believed that that is where constitutional sovereignty over Canada belonged—in the imperial parliament. As three of them wrote in a letter to the British colonial secretary, explaining how “the basis of the Confederation now proposed” differs from the United States: “It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus remedying any defect.”⁶ Canada's founders were divided on many weighty constitutional matters, including the merits of federalism and the nature of the new nationality they were fashioning. But they were not divided on where the locus of constitutional sovereignty should be. They did not subscribe to the doctrine of popular sovereignty. Nor did they think of the constitution as a great charter setting out, comprehensively, how the country was to be governed. The most important principles and practices of parliamentary government they were happy to leave to unwritten political conventions. Thus, at Canada's founding there was no basis in fact or in thought for an American-style Lockean constitutionalism in which the constitution is understood as expressing the will of a sovereign people.

The constitutionalism of Canada's founders I have characterized as Burkean rather than Lockean. I don't mean by this that they were greatly influenced by the writings of Edmund Burke. They were, generally, much less philosophically inclined than the American founders, and those who did read political philosophy probably knew Locke better than Burke. But their practice and working assumptions conformed with Burke's skepticism about the Enlightenment's unbridled optimism in the capacity of the rational individual to discern absolute political truths. In their constitutional rhetoric one will find no talk about natural rights. The rights and responsibilities they (and Burke) believed in were quite concrete and man-made, growing out of the understandings and conventions that over time hold a society together. If they believed in any social contract, it was one unfolding along Burkean lines as each generation passes on to the next the product of its collective wisdom. In Daniel Elazar's terms, the constitutionalism they practiced was organic, not convenantal.⁷ For them the constitution was not a single document drawn up at a foundational moment inscribing a people's agreement on the governance of their political community, but a collection

of laws, institutions, and political practices that survive the test of time and are found to serve well the needs of a society.

For most of the Canadian federation's first century its constitutional system evolved in an organic manner along Burkean lines. Canadians settled into being a thoroughly federal country, much more so than the United States, whose founders had been so philosophically lucid about federalism. Around the edges adjustments were made, and the federation was completed territorially and institutionally through political practice, intergovernmental accords, judicial decisions, and statutes creating new institutions (like the Supreme Court of Canada). These "informal" constitutional changes were augmented by a handful of constitutional amendments, formally made in Britain but always at Canadian governments' behest. From 1867 right up to the early 1960s, constitutional politics were of little interest to the Canadian people. All this changed in the mid-1960s, when Canadian governments, and increasingly the people who elected them, became intensely engaged in constitutional debate. This period of constitutional turbulence went on almost non-stop for a quarter of a century, coming to an end with the defeat of the Charlottetown Accord in the 1992 Referendum. What plunged Canadians into this constitutional maelstrom is a complex story.⁸ Suffice it to say, the proximate cause was the Canadian governments' getting serious about what was now seen—universally—as a serious piece of unfinished constitutional business, namely, a "constitutional patriation," the project of transferring the power to amend the constitution from Britain to Canada. That project involved much more than technical, legal issues. Deciding who can amend the formal constitution, the country's highest law, raises nothing less than the question of who or what is constitutionally sovereign. And that question leads pretty quickly to a debate over what kind of a political community Canada is—a community of equal individual citizens? a community of equal provinces? a community formed by two founding peoples? or a multinational federal partnership of English-speaking Canadians with the Québécois and the aboriginal peoples?

As Canada swirled through five rounds of exhausting efforts to resolve not just the patriation issue but also all the other constitutional matters it inevitably opened up, the Canadian people became ever more insistent that their constitutional sovereignty be recognized. When Clyde Wells, then premier of Newfoundland, stated in 1990 that "The constitution belongs to the *people* of Canada—the ultimate source of sovereignty in the nation,"⁹ no one disputed his view. The people of Burke had become—at least for a season—the people of Locke. The problem was that this "people" was so deeply divided over what kind of a people it was that it could not act in democratic concert as a single sovereign people expressing its will in a grand constitutional charter.

It was at that time, and in that context, that I asked my question.

The Legacy of Our “Mega” Efforts

I dubbed the five intense rounds of constitutional politics Canada went through between 1967 and 1992 as exercises in “megaconstitutional politics.” They were “mega” in the sense of aiming at a grand-slam solution to our constitutional difference, and precisely because they were so ambitious they were also “mega” in the sense of monopolizing the political attention of Canadians. When one of these rounds was on and reaching a climax, nothing else seemed to matter to the country. The constitutional issue was all-absorbing at these moments—like a squabbling family trying finally to sort out its differences. As they recall the Victoria Charter, the attempt at a whole new constitution in the Trudeau government’s Bill C-60, patriation and the peoples’ package, Meach Lake and Charlottetown, Canadians are apt to blush. So much was attempted, so little achieved.

These “mega” efforts, though far from providing a final constitutional solution, did have enduring effects. To begin with, the patriation project, which had initiated the country’s gargantuan constitutional efforts, was—at least in a formal legal sense—completed. In 1982, the Canadian constitution was patriated. Britain terminated its formal legal authority over Canada’s constitution, and a new and complex all-Canadian process of amending the constitution came into force. Along with patriation, and taking star billing in what Trudeau called his “people’s package” of constitutional reform, came the Canadian Charter of Rights and Freedoms, a full-blown constitutional bill of rights with many distinctively Canadian bells and whistles. In that package, too, but only after some strenuous lobbying by indigenous-support groups, was a constitutional declaration recognizing and affirming the “existing” aboriginal and treaty rights of Canada’s Aboriginal peoples.

The Constitution Act, 1982, containing the only formal constitutional changes resulting from the five “mega” rounds, does look like quite an achievement. Certainly, for Pierre Trudeau, the patriation package’s political architect, it was enough—enough to ensure “the federation was set to last a thousand years.”¹⁰ For many Canadians, probably a majority, who like Trudeau think of their country primarily as a community of equal rights-bearing individuals, the 1982 changes were enough to settle the country’s biggest constitutional issues. But Trudeau and his supporters had not converted sections of the Canadian population who have a different sense of national identity from the Trudeauian vision of Canada. Quebec nationalists and aboriginal peoples did not accept the patriation package as an adequate response to their aspiration to be recognized as nations within Canada. Quebec’s National Assembly, the only provincial legislature that voted on the patriation package, and the legislature of the only province whose government did not agree to the package, passed a decree, on 25 November 1981,

rejecting it. The Canada-wide organizations that represented the Indian and Inuit peoples were united in their opposition to the package.¹¹

For Quebec nationalists, the patriation package fell well short of their conditions for supporting the patriation project. First, it failed to give Quebec the additional autonomy that its governments, both federalist and *indépendentiste*, had been insisting were necessary if Quebec were to be truly *maitre chez nous*. More fundamentally, the new rules for amending the constitution denied Quebec a veto over constitutional changes that affect its vital interests in the structure of the federation.¹² If Quebec is viewed as just one of ten equal provinces forming the Canadian federation, then denying it a veto is unobjectionable. But for a majority of Quebecers—then, now, and in the past—the Province of Quebec is not viewed as a province like all the rest but as the homeland of a founding people. Denying Quebec constitutional security for its existing status as well as its demands for additional autonomy by a deal pushed through by an antinationalist federal prime minister, Pierre Trudeau, and the premiers of the nine provinces with English-speaking majorities was widely viewed in Quebec as an act of betrayal. Rather than settling the so-called national unity issue, patriation in this manner meant that the constitution was brought back from Britain to a home more bitterly divided than ever.

The constitutional turbulence created by the struggle to accommodate Quebec nationalism enabled aboriginal leaders to get a hearing for their peoples' claims for national recognition. Though recognition of "existing" aboriginal and treaty rights in the Constitution Act, 1982 was an important breakthrough, the word "existing," inserted at the insistence of some recalcitrant provincial premiers, suggested that the rights being recognized were only a small residue that had survived over a century and a half of colonial domination by the settler majority. Aboriginal peoples who had never consciously surrendered their right to self-government would now insist on explicit recognition of that right as a condition of their consent to the Canadian constitution. The 1982 patriation package acknowledged the need to clarify "existing aboriginal rights" by scheduling a constitutional conference for this purpose with representatives of the aboriginal peoples.

The unsettled "nationalist" claims of the Québécois and the aboriginal peoples, while the most unsettling blemishes of patriation, were by no means its only shortfalls. The people and governments of "regional Canada"—i.e., the four Atlantic and four western provinces—had developed a battery of proposals to better secure their interests in the Canadian federation. Of central importance was reform of the Senate, the upper house of the federal parliament. With all of its members appointed by the federal prime minister, the Senate was a total failure in providing a counterweight to central Canada's (i.e., Ontario's and Quebec's) domination of the elected House of Commons. Testimony to the inadequacies of patriation and the fissures it deepened were

the sweaty but abortive efforts at constitutional reform that followed in its wake: four constitutional conferences on aboriginal rights, the attempt to appease Quebec with the Meech Lake Accord, and then the Charlottetown Accord with its potpourri of sixty proposals—a little something for everyone but hardly enough for anyone.

Though these rounds of “megaconstitutional” politics did not produce a new Canadian social contract, they had a decisive effect on the country’s constitutional culture: they democratized it. Making changes to the written constitution the most important political issue in the country for an entire generation, constant talk about the constitution as ideally incorporating a “vision” of the country, a mirror in which all Canadians should be able to see themselves, a document inscribing “what we are all about”—all of this convinced the Canadian public that the constitution was far too important to leave to the politicians and that they must have a crucial say in making any important changes in it.

In Canada, political elites will still play the leading role in negotiating and drafting proposals for constitutional change—as they do in all democracies—but to be legitimate, proposals that are seen as of primary importance must be ratified by the people voting in referenda. This is essentially a political rather than a legal imperative. At the time of the Charlottetown Accord, although only two provinces, Alberta and British Columbia, had legislation requiring a referendum before their legislatures could consider proposals to amend the constitution, and Quebec was legislatively bound to have a referendum by 26 October 1992, the federal leaders and premiers of provinces not committed to referenda knew that it would be political suicide not to seek the direct approval of all Canadians for the accord they had fashioned. In effect, the country’s political leadership accepted Clyde Wells’s verdict that the constitution belongs to the people of Canada. The trouble was that in rejecting—by a 54 percent majority—an accord agreed to by the federal government, the governments of all ten provinces, the leaders of what at that time were Canada’s three main political parties, and the leaders of four Canada-wide indigenous organizations, Canada’s sovereign people were too divided to be able to act as a constituent power.

The sovereign people were not only divided, they were now absolutely exhausted by all that had been tried to bridge their differences. Constitutional exhaustion is the other major consequence of the “mega” rounds. This exhaustion was not short term—it continues. The one post-Charlottetown attempt to initiate a round of megaconstitutional change was prompted entirely by Quebec. On 30 October 1995, Quebec had its second “sovereignty” referendum. The first took place in May 1980 when René Lévesque’s Parti Québécois government asked the people of Quebec for a mandate to negotiate an arrangement that would give Quebec political sovereignty but an economic

association with Canada, on condition that whatever was negotiated would be submitted to a second referendum. On that occasion Quebecers refused—by a 60 percent majority—to give such a mandate. The referendum question in 1995 was equally fuzzy. Voters were asked to approve an effort by Quebec to negotiate sovereignty/association with Canada, but this time a win for the “yes” side would mean that Quebec’s independence would automatically come about if the negotiations failed. The vote was much closer than in 1980: a paper-thin majority of 50.58 percent said “no” to the proposal. After this, few on either side in Quebec had any stomach for rushing into a third referendum. The near majority of Quebecers voting for the breakup of Canada may have shown how deeply divided Canada was, but the closeness of the vote and the passions the referendum campaign aroused showed equally how deeply divided Quebec was.

A Return to Organic Constitutional Change

Since 1992, contrary to rumor, Canada has not been in a constitutional “deep freeze.” To Canadians who became addicted to the grand-slam efforts of the “mega” rounds, it may seem that nothing has been happening on the constitutional front. But they are wrong. Constitutional development has been taking place not through a great new social contract, but, in Elazar’s terms, organically “in bits and pieces.”

Among the “bits and pieces” were four formal constitutional amendments. All four were done bilaterally, with the federal government cooperating with a province to use the part of the amending formula that provides for changes that apply to some but not all of the provinces.¹³ In 1993, the New Brunswick Act was amended, giving “equality of status and equal rights and privileges” to that province’s English and French communities.¹⁴ This amendment made New Brunswick Canada’s only province that is officially bicultural as well as bilingual, a development very much in keeping with the historic position of New Brunswick’s Acadian people (34 percent of the population). Such an amendment had been requested by New Brunswick’s government in both the Meech Lake and Charlottetown rounds. In that same year, Prince Edward Island’s Terms of Union with Canada were altered to permit a ferry-boat service to the mainland to be replaced by a bridge. This change, involving as it did a wrenching challenge to Islander identity, came after a warmly contested island referendum. In 1997, in response to a unanimous resolution of Quebec’s National Assembly, the federal parliament supported an amendment making the guarantee of denominational school rights inapplicable in Quebec.¹⁵ In effect this amendment responded to the secularization of Quebec society and the desire of English and French Quebecers to organize

schools around language communities rather than around religious communities. Secularization was also evident in the important change made in 1998 to Term 17 of the Terms of Union Newfoundland agreed to in 1949. Term 17 had granted six religious dominations the right to publicly supported school systems. The 1998 amendment finally removed the constitutional guarantee of a costly and divisive educational system and replaced it with a provision requiring the provincial legislature to provide for courses in religion that are not specific to any denomination and permitting religious observances in schools where requested by parents. The 1998 amendment (which replaced a 1997 amendment providing for interdenominational schools in Newfoundland) was approved by a 73 percent majority in a province-wide referendum.

While none of these amendments involved any changes to the structure of the federation, each was important to the people of a particular province. In Canada, provincial constitutions, unlike state constitutions in the United States, are very underplayed; in Nelson Wiseman's words, they "barely dwell in the world of the subconscious."¹⁶ Many of their most important terms involve the conditions on which a province became part of Canada, and on these matters the federal parliament continues to play a role. The spate of amendments in the 1990s adjusting individual provinces' constitutional arrangements shows how this dimension of patriation has introduced an element of flexibility into Canada's constitutional system, and displays yet another facet of Canadian diversity. Quebec, which had rejected the patriation package, did not spurn this part of the new all-Canadian amending process.

During the 1990s the structure and functioning of the Canadian federation was changing, but through informal political agreements rather than formal constitutional amendments. Changes in the federal system were now quite self-consciously not promoted as attempts to accommodate Quebec. Instead they were advertised, especially by the federal government, as designed to make the federation more efficient. In reality, they were motivated in large measure by the federal government's effort to reduce its staggering fiscal deficit, and also in part they were a response to the pressures of the global economy. The most important example of the latter was the intergovernmental Agreement on Internal Trade (AIT), which was signed in July 1994 and came into effect a year later.

The AIT was a classic effort to achieve by informal political agreement what had proved to be impossible to accomplish through the legal instruments of the constitution. Canada's original constitution contains a free trade clause (section 121) that requires "Articles of the Growth, Produce or Manufacture of any one province to be admitted free into each of the other provinces." This section has been virtually a dead letter of the constitution. The courts (and Canadian business) have largely ignored it. In the modern period the Supreme Court of Canada has made federal jurisdiction over international

and interprovincial trade virtually a plenary power, but federal governments have been too timid to use this power to dismantle the many ways in which the provinces have restricted internal free trade. During the patriation round, the Trudeau government failed to get the provinces to agree to a strengthening of section 121. A much watered-down constitutional commitment to “Canadian economic union” was a casualty of the Charlottetown Accord debacle. Eventually it was the embarrassing possibility that Canada’s internal market might become more restrictive of trade than the external markets that NAFTA and GATT were opening up for Canada that induced federal and provincial leaders to enter into an internal agreement on trade.

The AIT is a big disappointment to economic liberals. It leaves ample scope for provincial governments to restrict access to provincial markets by pursuing “legitimate policy objectives,” and it lacks effective monitoring and enforcement provisions. Still, AIT has contributed to Canada’s economic integration in a number of areas, including government procurement, labor mobility, and the harmonization of professional and occupational standards. It represents about as much as can be achieved through the consensual ways in which Canadians have come to operate their federation.¹⁷

After the defeat of the Charlottetown Accord in 1992 and the election of the Chrétien Liberal government the following year, a quiet process of adjusting federal relationships through intergovernmental agreements got under way. In effect this was a return to the method of managing the federal relationship that was dominant in the years immediately following World War II before Canada plunged into megaconstitutional politics. The instruments of this process, political agreements between governments, are not in the formal sense constitutional amendments. However, if the constitutional system is understood in the larger Burkean sense as the understandings and conventions that hold a society together, this emergent system of accords should be seen as having constitutional significance. This intergovernmental process has had three general characteristics: first, it has been broadly decentralizing; second, it has been religiously symmetrical—not offering deals to one province that are denied to others; and third, it has been thoroughly elitist, government-driven, and largely out of sight politically.¹⁸

A program of federal “rebalancing” with at least the first two of these characteristics fitted well the changing political climate of Canada in the 1990s. By the mid 1990s, the most dynamic challenges to the political status quo were coming from the right-of-center Reform Party, the only party in English Canada that opposed the Charlottetown Accord, and from similarly oriented Conservative governments led by Mike Harris in Ontario and Ralph Klein in Alberta, committed to shrinking government in general and federal government in particular. In the run-up to the Quebec referendum, the federal government also saw advantage in promising decentralizing

changes that, while available to all provinces, might demonstrate to Quebecers how Canadian federalism could give them room to be *maitres chez nous*. This strategy seems to have had negligible effects in increasing support for the “no” side in the referendum. But after the referendum, when Prime Minister Chrétien brought Stéphane Dion, a brilliant Quebec political scientist, into his cabinet to manage intergovernmental affairs, it gained momentum and a higher political profile. Rebalancing the federation to make it more efficient and consensual became Plan A for responding to being at the brink of breakup in the October 1995 referendum. Plan B, by way of contrast with the cozy, quiet style of Plan A, would involve risking the dangerous politics of clarifying what should happen, constitutionally, were the Quebec sovereignists to win a referendum.

Much of the federal rebalancing was achieved by the federal government agreeing to stop spending money on activities that are mainly, if not entirely, under provincial jurisdiction.¹⁹ Thus, Ottawa largely withdrew from the sectors of mining and forestry, recreation and tourism—all of which it had been prepared to do as part of the Charlottetown Accord. The federal government also agreed to permit provinces and territories to take over full responsibility for job training with money from the unemployment insurance fund. Though federal “interference” in this dimension of education had been the reason given by the Quebec government for backing out of the Victoria Charter in 1971, by 1995 Quebec nationalists had raised the ante way past the point where federal withdrawal from this field could pacify their objections to the constitutional status quo. In other areas, where a strong federal presence was still recognized as necessary, progress was made to better define and coordinate the functions of the two levels of government. A 1998 agreement on environmental harmonization is a prime example.

The biggest move in this intergovernmental process, the agreement that cut across a number of program areas and dealt with issues of process as well as of substance, was the Social Union Agreement of 1999, signed with a great deal of fanfare on 4 February 1999.²⁰ The “social union” terminology was a bit of constitutional hype borrowed from the Charlottetown Accord. Only its elite inventors and a few academics had a clue what it meant. The “Framework to Improve the Social Union for Canadians” targeted areas of social policy largely under provincial jurisdiction—education, health, and social welfare—in which the federal government, using its superior taxing capacity and a spending power subject to few constitutional constraints, had come to play a leadership role in building the Canadian welfare state. Over the years the principal opposition to Ottawa’s interventions in these areas came from Quebec. The idea behind the Social Union was not to curtail federal involvement in social policy but to manage it in a more cooperative and consensual manner through its Council of Ministers.

The Social Union agreement accepts the legitimacy of federal spending in areas of provincial responsibility, but requires the approval of a majority of provinces for any new social policy initiatives that are to be funded through intergovernmental transfers. Governments that opt out can still receive their share of federal funding so long as their own programs meet Canada-wide objectives and satisfy accountability standards. The provinces must be consulted three months before introducing any new federal social programs that transfer funds directly to individual citizens or organizations (for instance, the Millennium Scholarship Fund). Though these restrictions on federal spending went further than those agreed to by the Quebec Liberal government that negotiated the Meech Lake Accord, they did not go far enough for Lucien Bouchard's Parti Québécois government. The Social Union agreement was signed by the federal government and all of the provincial and territorial governments—except Quebec. Confronted with a strategy designed to treat it as simply a province like all the rest, Quebec was insisting on its special status.

The difficulty in achieving more than a *de facto* recognition of Quebec's distinctiveness was demonstrated by Prime Minister Chrétien's attempt after the Quebec referendum to make yet another effort to appease Quebec nationalism through constitutional reform. In opposition, Chrétien had taken his constitutional cues from his mentor, Pierre Trudeau, and bitterly opposed both the Meech Lake and Charlottetown Accords. But in the final days of the referendum campaign, as prime minister and a desperate captain of the federalist team, he promised Quebeckers that under his leadership Canada would recognize Quebec as a distinct society and restore its full veto over constitutional change. Chrétien's promise probably had little effect on the outcome of the referendum, but his effort to fulfill it surely dampened Canadians' interest in renewing the old megaconstitutional game.

On 28 November 1995, less than a month after the referendum, Chrétien announced that he would keep his promise to Quebeckers by three unilateral federal initiatives. The House of Commons would pass a resolution recognizing Quebec as a distinct society, and the federal government would introduce legislation under which constitutional amendments would have to be consented to by Quebec as well as by Ontario, provinces representing 50 percent of western Canada's population and two provinces representing 50 percent of Atlantic Canada's population, respectively—before the federal government would support them. The third item was the promise to devolve labor-market training to the provinces.²¹ The Chrétien package of "semiconstitutional" changes went over like the proverbial lead balloon. It was immediately repudiated as too little too late by Quebec sovereignists and failed to win endorsement by Quebec federalists as a satisfactory basis for reengaging in a process of constitutional renewal. As for the English-speaking provinces, a number of premiers were quick to condemn Chrétien's distinct society resolution (which

was already watered down from the version in the Meech Lake Accord) as endangering the principle of provincial equality.²² Eventually, in September 1997, the premiers of the English-speaking provinces and the heads of the two northern territories came up with their own version, the so-called Calgary Declaration, according to which “All provinces, while diverse in their characteristics, have equality of status,” but at the same time, “the unique character of Quebec society, including its French-speaking majority, its culture and its tradition of civil law” is recognized as “fundamental to the well-being of Canada.”²³ To which Lucien Bouchard growled, “Quebec will accept nothing less than to be recognized as a people, as a nation capable of deciding its political future.”²⁴ Mercifully, this put an end to the foolish attempt to solve Canada’s national unity problem by playing definition games.

The second part of Chrétien’s semiconstitutional package, committing the House of Commons not to play its necessary role in the constitution-amending process without the approval of Canada’s regions, was equally a fiasco. The very idea of Ottawa “lending” its constitutional veto to the four regions was bizarre. It seems to have come right off the top of the prime minister’s head, catching even his justice minister, Alan Rock, by surprise. Roger Gibbins, an Alberta-based political scientist, said it was “little short of a constitutional *coup d’état* by the Prime Minister.”²⁵ Chrétien’s proposal went down particularly badly in Alberta and British Columbia, the most rapidly growing Canadian provinces, whose chattering class could not abide the idea that they were just two provinces of western Canada and not on a par with Ontario or Quebec. British Columbia seemed to bleat the loudest. So within a few days Justice Minister Rock persuaded his cabinet colleagues to lend Ottawa’s veto to British Columbia, too.²⁶ Thus, the final version that came into force in February 1996 superimposes five regional vetoes on the operation of the “7/50” amendment rule in the constitution.²⁷ So long as this legislation stands, amendments to most parts of the constitution must have the support of the federal parliament, British Columbia, Ontario, Quebec, at least two of the prairie provinces comprising 50 percent of their combined population (at current population levels, this means Alberta plus either Manitoba or Saskatchewan), and at least two of the Atlantic provinces with 50 percent of that region’s population. As a result, the consent of provinces representing at least 92 percent of Canada’s population is now required for any important constitutional amendment. The Chrétien legislation is worded so that the regional approvals can be given by referenda—which indeed is how the politics of the day dictates they must be given. And so the “little guy from Shawinigan” has succeeded in putting Canada’s sovereign people into one very tight constitutional straightjacket.

Prime Minister Chrétien’s personal contributions to this period of organic constitutional adaptation are surely the “bits and pieces” that are least

deserving of respect by future generations. A Burkean constitutional culture does not thrive on prime ministerial fiat.

Since the 1995 Quebec referendum, Canada's only heavy duty bout of constitutional politics has concerned Plan B—establishing the constitutional ground rules for Quebec secession. This saga was played out in two episodes—one judicial and the other legislative. The judicial part was initiated by Guy Bertrand, a former Pequist politician, who had undergone a total conversion to federalism and challenged the assumption of his former party that if a majority of Quebecers voted for independence, Quebec legally—under international law, if not under Canadian law—could secede from Canada unilaterally. Bertrand began his challenge before the 1995 referendum, as the legitimacy of unilateral secession was implicit in the referendum question.²⁸ A Quebec trial judge ruled that Bertrand's challenge had merit but refused to give him the remedy of stopping the referendum. After the referendum Bertrand returned to court to challenge the PQ's declared intent to continue to pursue sovereignty on its terms. While Premier Bouchard was in no hurry to have another referendum—he said he would wait for “winning conditions”—he and his government were anxious to establish that Quebec's constitutional future was to be determined solely by a majority of Quebecers. At this point the federal government decided it could no longer avoid the dynamite question of the legality of a unilateral Quebec secession and referred Bertrand's challenge to the Supreme Court of Canada.

On 20 August 1998, the Supreme Court rendered its historic decision. To the question of whether Quebec, following a referendum win by the sovereignists, could unilaterally separate from Canada, the court's nine judges gave a firm “no” answer. While the democratic principle requires that the will of a provincial majority expressed in a referendum be given real weight, the court recognized that other principles at the foundation of Canada's constitutional system are equally important—namely, the rule of law, federalism, and minority rights. The rule of law requires that any constitutional change, including removing a province from the federation, must be carried out according to the legal rules governing constitutional amendment.²⁹ As citizens of a federation, all Canadian citizens, including Quebecers, exercise their democratic rights by participating in the building of two majorities, one national and one provincial. Both majorities must participate in fundamental constitutional change. Majoritarian democracy in Canada at both the federal and provincial levels must be balanced by a respect for minorities—in particular, the English in Quebec, the French in the other provinces, and aboriginal peoples, all of whose rights are enshrined in the constitution. The combination of these principles means that for Quebec to declare its independence of Canada solely on the basis of a majority vote of the province's electorate would be to violate both the letter and the spirit of Canada's constitution.

The Supreme Court also gave a firm “no” to the question of whether under international law the principle of the self-determination of peoples gives Quebec a right to secede unilaterally.³⁰ The court sidestepped the delicate question of whether a Quebec people exists or whether such a people encompasses the entirety of the Quebec population by finding that under international law as it has evolved, the right to self-determination gives rise to a right to secede only for a people suffering oppressive colonial subjugation, conditions that, it concluded, “are manifestly inapplicable in Quebec under existing circumstances.”³¹

The Supreme Court’s decision was not entirely negative for the Quebec sovereignists. In what is undoubtedly the most creative part of their judgment, the justices held that if in Quebec “a clear majority on a clear question” vote for secession, the rest of Canada is constitutionally bound to negotiate with Quebec. The aim of such negotiations is not necessarily to effect Quebec’s secession but to see whether through good-faith bargaining Quebec’s status can be changed in a manner that is fair to the rights and interests of all Canadians affected by such a change. The court acknowledges that these negotiations would be extremely difficult, involving all of the players in Canada’s constitutional process—the ten provinces, representatives of the aboriginal peoples, and the federal parliament and government—and raising questions possibly as volatile as the borders of an independent Quebec. The court did not speculate on what happens if the negotiations fail—except to say that the legitimacy of actions taken by Quebec or Canada would depend on the extent to which “the legitimate interests of others” were respected.³²

The Supreme Court’s decision on Quebec secession was one of those very rare occasions when the governments of Canada and of Quebec, federalists and sovereignists, shared positive feelings about anything constitutional. The denial of a unilateral right to secede coupled with the affirmation of a duty to negotiate if a secession referendum succeeds gave both sides something to cheer about. The same cannot be said for the federal legislative initiative that followed—the so-called Clarity Bill. On 10 December 1999, the federal government introduced legislation designed “to give effect” to the Supreme Court’s decision by identifying the circumstances under which it would be obliged to negotiate the terms of secession with Quebec (or any other province). The Supreme Court said that questions concerning what constitutes a “clear question” and a “clear majority” must be settled by the “political actors,” not by the courts. Now one of the political actors, the federal government and parliament, was legislating its treatment of these questions.

According to the Clarity Bill, when the government of a province indicates the question it intends to submit to a provincial referendum on secession, the House of Commons will decide whether the question could result “in a clear expression of the will of the population of a province on whether the

province should cease to be part of Canada and become an independent state.”³³ The legislation rules out a referendum question like that used in the 1980 referendum asking only for a mandate to negotiate, and a question like that used in 1995, which envisages softer alternatives to secession such as continuing economic or political arrangements with Canada. In the event that a secession referendum takes place on a question that passes the clarity test, again the House of Commons will decide whether a win for the “yes” side can be treated as expressing a clear majority of the population of a province. The legislation does not stipulate any numerical requirement but implies that a bare majority of 50 percent plus one of those voting might not be enough.

The Clarity Bill was opposed in the House by the Bloc Québécois and the Progressive Conservatives, and after a rough ride in the Senate was enacted at the end of June 2000. It was bitterly opposed by the Bouchard government in Quebec, which answered back with its own “Self-determination Bill” asserting “the right of the Quebec people to self-determination” and of the Quebec people alone “to decide the nature, scope and mode of exercise” of that right.³⁴ The Quebec bill became law on 5 December 2000. The Quebec legislation does not assert an intention to change Quebec’s constitutional status unilaterally and Premier Bouchard’s acceptance of the Supreme Court’s ruling (and indeed his entire leadership of the Quebec sovereignist movement) suggests that after a referendum win (on his question) he would prefer to negotiate a change in Quebec’s status with the rest of Canada rather than undertake a radical and unilateral break with Canada. What the exchange of legislative missiles over the secession process shows is that Burkean organic change can shape the terms on which a society is held together, not the terms on which it can be torn asunder.

In this period of organic constitutional change, the most substantial progress has been made in relations with aboriginal peoples. After the Charlottetown Accord, aboriginal leaders had no interest in resuming efforts to achieve a restructuring of their relationship with Canada through some grand amendment of the Canadian constitution. Instead they preferred to return to the process through which relations between indigenous peoples and the settler society had originally been ordered and have individual native communities make treatylike agreements with the Crown, a Crown represented now by federal and provincial governments.

The groundwork for proceeding in this way was laid by the Supreme Court and a royal commission. In 1990, in the *Sparrow* case,³⁵ the court rendered its first decision on the “existing Aboriginal and treaty rights” recognized and affirmed in the Constitution Act, 1982. It said that these rights must be given “a generous, liberal interpretation” and that, among other things, they protected aboriginal peoples’ right to carry on activities that are an integral part of their distinctive culture. The court’s decision in the 1997

Delgamuukw case made it clear that included in the constitutionally protected aboriginal rights is “native title” to land occupied at the time British sovereignty was asserted and not surrendered or clearly extinguished by Britain or Canada.³⁶ The court urged that unsettled native title claims be dealt with through negotiation, not litigation. Only in that way, it argued, can “a genuine reconciliation” be achieved. Two years later, in the *Marshall* case,³⁷ the Supreme Court found that the Nova Scotia Mi’kmaq, under a 1760 treaty securing their alliance with Britain, had a right to harvest and trade fish and other wildlife to provide the “necessaries” of life. This capped a long series of decisions in which there was an effort to interpret historic treaties in a way that “best reconciles the interests of both parties at the time the treaty was signed.” Treaty rights, like all aboriginal rights, could be infringed by government, but only by meeting a strict justification test of public interest and in as consensual a manner as possible.

The Royal Commission on Aboriginal Peoples (RCAP) was appointed by the Mulroney Conservative government in 1991 in the wake of the Oka crisis in which the Mohawks of Kanasatake and Kahnawake, resisting the building of a golf course on traditional burial grounds, through the summer of 1990 confronted the Canadian army over barricades outside Montreal. RCAP was the first time in the history of settler-native relations—anywhere on earth—that leading representatives of native and non-native societies reviewed together their past and present relations, and agreed on a plan for improving their relationship in the future.³⁸ The plan set out in RCAP’s 1996 voluminous final report has two branches: one aimed at pulling up living conditions from the third-world standards experienced by most aboriginal Canadians and the other at restructuring political relationships through treatylike, nation-to-nation agreements.³⁹ The plan’s two dimensions are interrelated. The commissioners recognize that enabling native Canadians to rebuild self-governing and economically self-reliant societies requires a massive commitment to overcoming the poverty, poor health, family violence, and educational failure that beset so many indigenous communities.

While the Royal Commission was sitting, the federal and provincial governments agreed to implement the aboriginal right of self-government *within Canada*,⁴⁰ which they had agreed to recognize in the abortive Charlottetown Accord. The method of implementation would be negotiated agreements with individual aboriginal communities—some of these would be historic Indian nations, others more contemporary groupings. In the Northern Territories the federal government alone represents the Crown, but south of the 60th parallel provincial governments are also parties to agreements. In many cases the negotiations deal with unsettled land claims as well as self-government, and aim at agreements that, like land-claim agreements, have the constitutional status of treaties.⁴¹ By the end of the

1990s self-government negotiations were underway at some eighty “tables” involving aboriginal peoples in all parts of the country.

This project of reconciliation with indigenous peoples is unprecedented in world history. As I have written elsewhere, “In no other political jurisdiction, ancient or modern, has there been such an effort to reverse the subjugation of one set of peoples by another and to establish new relationships based on mutual respect and consent”⁴²—and, I would add, a relationship involving shared citizenship.⁴³ This effort at ordering relations with indigenous peoples through agreements that are truly consensual is in its earliest stages. So far, its major achievements have been in Canada’s far north. In 1999 an agreement between Canada and the Inuit people of the eastern Arctic that took over twenty years to negotiate and that was ratified by the Inuit in 1993 came into force. The agreement carved Nunavut (which means “our land”), a new self-governing territory, out of Canada’s Northwest Territories. Nunavut encompasses over 2 million square kilometers, 23 percent of Canada’s land mass.⁴⁴ Under the land settlement part of the agreement, the Inuit have collective ownership of 350,000 square kilometers of land. The self-government part, which takes the form of an Act of Parliament, gives its 27,000 people, 85 percent of whom are Inuit, self-government powers analogous to those which Greenlanders have as part of Denmark. Progress was also made in Yukon, the westernmost of Canada’s northern territories, in implementing a 1993 umbrella agreement on land and self-government with individual first nations in the territory.⁴⁵ Earlier, in 1984, the Inuvait people in Canada’s western Arctic had made a land settlement treaty with Canada, and in the 1990s similar agreements were negotiated with the Sahtu Dene, Metis, and Gwichin peoples further down the Mackenzie River Valley in the western part of the Northwest Territories.⁴⁶

Progress has been much slower in the provinces where negotiations raise land and governance issues of vital concern to provincial governments and non-native majorities. A major breakthrough came with the 5,500 Nisga’a people of the Nass Valley in northwest British Columbia.⁴⁷ For over a century the Nisga’a had been endeavoring to make a treaty with Canada.⁴⁸ It was their persistence that led to the inauguration of comprehensive land-claim agreements in Canada in the 1970s. The Nisga’a were unwilling to settle land issues until it was possible to include self-government rights in a modern treaty. While the 1998 Nisga’a Agreement they signed with Canada and British Columbia, and ratified through a referendum, gives them ownership of only 10 percent of the lands and waters they claimed as traditional lands, it recognizes that the Lisims (central) and village governments of the Nisga’a nation may exercise extensive powers. In areas such as health, social services, transportation, environmental protection, and public order, Nisga’a laws have to give way if they conflict with federal or provincial legislation.⁴⁹ But in matters

that are essential to their enduring as a distinct self-governing people—their constitution, membership, language, culture, and collectively owned land—Nisga'a laws prevail over conflicting federal or provincial laws.⁵⁰ Thus, through the agreement the Nisga'a are recognized as having a share of sovereign law-making power in Canada. It is this implication of the agreement, more than any other, that has provoked a great deal of concern among the non-native majority—particularly in British Columbia. British Columbia's NDP government pushed ratification of the agreement through the legislature by curtailing debate. The Nisga'a Agreement again encountered considerable opposition in the Canadian Senate, some of it from Liberals, but was finally fully ratified and became law on 13 April 2000. In July 2000, Justice Paul Williamson of the British Columbia Supreme Court rejected a court challenge to the constitutionality of the Nisga'a Agreement brought by the opposition B.C. Liberal Party.⁵¹

Opposition to the Nisga'a Agreement was not confined to the non-native side. Some Nisga'a and many other aboriginal people, including representatives of First Nations involved in the British Columbia Treaty Commission,⁵² criticized the agreement for giving up too much land and too much self-government. Canada has made as much, if not more, progress than any other settler country in reaching a postcolonial relationship with its native peoples. Still, the struggle over ratification of the Nisga'a Agreement shows that native and non-native Canadians are still far from a genuinely consensual and popular resolution of their constitutional differences.

Can the Sovereign People Learn to be Multi-National?

Nearly a decade has gone by since the last attempt in the Charlottetown Accord to have the Canadian people act in a deliberate Lockean way as a constituent sovereign power. During these years—except for the 1995 Quebec referendum—Canadians have enjoyed constitutional peace, and a little bit of constitutional progress. The federation has been tidied up and made to work more efficiently. Provinces have updated their constitutions. The groundwork has been laid for restructuring relations with aboriginal peoples. But, it must be conceded, big unresolved constitutional issues remain unresolved. The question is not whether matters that deeply divide Canadians constitutionally can be left as they are. In history the status quo is always an illusion. The real question is whether the resolution of these issues is to be worked out quietly and gradually in a Burkean manner or through yet another heroic effort at a popular Lockean social contract.

The most fundamental issue dividing Canadians has to do with identity—about who “we” are. There are two groups of Canadians who identify

primarily with a “we” who form a “nation” or “people” within Canada. These are the nationalist-inclined French-speaking Quebecers and most aboriginal people. Many—I would think a majority—in both groups identify also with Canada, but that identity is of a weaker kind, too weak for them to feel comfortable thinking of their participation in Canada, their Canadian citizenship, as the core of their national identity. Quebec nationalists and aboriginal peoples want their societies recognized as “nations” or “peoples” within Canada. The only Canada to which they can give their allegiance is a multinational Canada, one that has room for nations within. A handful of English Canadian intellectuals can identify with a multinational Canada (including the author),⁵³ but most English-speaking Canadians do not. They believe in a Canada, albeit a federal Canada, with a single, undivided sense of national identity—truly a nation-state. Tom Flanagan is surely empirically right when he tells us that a multinational Canada is not the vision of Canada he had when he immigrated in 1968, nor is it “what most Canadians want for themselves and their children.”⁵⁴

The situation is complicated by multiculturalism. Canada has pioneered in building a multicultural society that respects the cultural diversity that immigrants from all parts of the world bring to the country. Canada was the first country to inscribe a commitment to multiculturalism in its constitution. As Will Kymlicka has so convincingly shown, Canada’s multicultural policies have not been barriers to the integration of immigrants into Canadian society.⁵⁵ Retaining the language and culture of their former homelands has not prevented “new Canadians” from learning English or French and participating fully in Canadian institutions. Though both multiculturalism and multinationalism respect cultural diversity, they entail very different constitutional aspirations. The Québécois and aboriginal peoples formed political communities on Canadian soil before the founding of the Canadian state. Their sense of distinct identity survived efforts by the British to conquer and assimilate them. These peoples’ only homeland is within the boundaries of Canada, and their consent to be participants in the Canadian state is conditional on having governmental powers sufficient to ensure their survival as distinct societies. By way of contrast, the ethnic groups who support and benefit from multiculturalism have ties to former homelands elsewhere. They do not seek the same level of constitutional recognition or the governmental powers sought by the Québécois and aboriginal peoples. However, many members of these ethnic group resent these “national minorities” receiving any special treatment beyond multiculturalism. Like most Canadians of British background, the nation with which they identify is Canada.

The conflict between these two views of Canada, these two different senses of who “we” are—the uninational and the multinational—begins to surface now whenever Canadians touch the hot buttons of constitutional

change. This was evident in the passions aroused by the 1995 Quebec referendum. It was evident in Prime Minister Chrétien's and the English-speaking premiers' efforts after the referendum to conciliate Quebec without recognizing its special status and the repudiation of those gestures by Premier Bouchard and other Quebec nationalists. It was abundantly clear in the showdown between the federal Clarity Bill and Quebec's Self-determination Bill. And it was evident again in the rough ride the Nisga'a Agreement had in being ratified in the British Columbia and federal legislatures and the equally rough ride aboriginal critics gave it from the opposite perspective.

Recent experience with constitutional politics has not whetted Canadian appetites for a return to the great megaconstitutional game. This is as much the case for Francophone Quebec as for the rest of the country. Premier Bouchard is having a devil of a time finding those "winning conditions" for another referendum. Perhaps he and those who support his moderation are learning that the people of Quebec, like the people of Canada, do not share a common sense of national identity, are not a single "we." The Quebec population contains members of nine Indian nations and the Inuit people of Nunavik, whose primary national identity is with their aboriginal community, as well as several million non-native federalists—French and English-speaking—whose attachment to Canada is as great or greater than their Quebec identity. Forcing a reopening of the big constitutional question of Quebec's relationship with Canada is bound to open up the equally troublesome question of restructuring Quebec—no matter what a majority of Quebeckers vote for in a referendum.

In English Canada, the main temptation to return to the big constitutional game is likely to come from Senate reformers. Even if the intent was to make Senate reform a single issue project, an attempt to restructure the Senate by formal constitutional amendment would lead inexorably to a heavy round of constitutional warfare. Canadians may be united on two *E*'s of Senate reform—on making it elected and effective—but they are surely deeply divided on the third *E* of equality. English Canada has the constitutional power to force through a reform of the Senate that treats Quebec as simply a province equal to all the rest, but not without serious risk of restoring the constitutional energy of Quebec nationalism. There are ways of attacking the democratic deficit in the functioning of our federal government that are more consensual and do not involve a difficult process of formal constitutional amendment. These include parliamentary reform and reform of the electoral system.⁵⁶

Whether Canadians like it or not, the possibility of their country with its present borders being based on the consent of its people—and all of its peoples—depends on their learning to be citizens of a multinational state. For sure, this is a tenuous kind of unity. It means maintaining a federal country

whose citizens do not share a common sense of national identity. It means conceding a right of secession to parts of the federation—something that must literally blow the minds of Americans glorying in their “perpetual union.” At the same time, on the part of those whose primary identity is with a nation within, it requires a willingness to participate with some interest and enthusiasm in the political institutions of the larger Canadian community, and in that sense share a common civic identity with their fellow Canadian citizens. Operating such a political community is no easy matter, in part because it is a matter the political science of modern states knows little about. And yet, as we watch the evolution of the European Union and the efforts of its present and future member states to accommodate their “nations within,” it can be argued that Canada’s management of the constitutional politics of a multinational community has much more salience for the twenty-first century than the American constitutional paradigm.

In his recent book on how we Canadians might “find our way,” Will Kymlicka suggests that Canadian unity could be strengthened by “moving in the direction of a more explicitly multinational federation.”⁵⁷ The “explicitness” he envisages need not produce a shared identity, but it should produce a shared political conversation or discourse about the conditions of justice in a multination federation. The bonds of social union in such a political community are surely nurtured best through the “bits and pieces” of Burkean organic constitutional growth rather than through a grand populist effort at reconciling differences. To adapt some language from the Supreme Court’s decision in the Quebec secession case, a multination political community “is built when the communities that comprise it make compromises, when they offer each other guarantees. The threads of a thousand acts of accommodation are the fabric” of such a state.⁵⁸

Notes

1. Peter H. Russell, “Can the Canadians Be a Sovereign People?” *Canadian Journal of Political Science* 24 (1991): 691–709.

2. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1992). A second edition was published in 1993 after the defeat of the Charlottetown Accord.

3. See, for instance, Stephen Clarkson, “Do Deficits Imply Surpluses? Toward a Democratic Audit of North America,” in *Democracy Beyond the State?*, ed. Michael Th. Greven and Louis W. Pauly (Toronto: University of Toronto Press, 2000).

4. The exception is New Brunswick, which had two elections just before Confederation. The pro-Confederation politicians lost the first badly, but, helped by the threat of a Fenian invasion from the United States, won the second.

5. For two excellent accounts, see Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863–1867* (Toronto: Macmillan, 1964); and P. B. Waite, *The Life and Times of Confederation, 1864–1867* (Toronto: University of Toronto Press, 1962.)

6. Quoted in Russell, *Constitutional Odyssey*, 3.

7. See Daniel J. Elazar, “Constitution-making: The Pre-eminently Political Act,” in *Redesigning the State: The Politics of Constitutional Change in Industrial Nations*, ed. Keith G. Banting and Richard Simeon (Toronto: University of Toronto Press, 1985).

8. My own account is chapter 6 of Russell, *Constitutional Odyssey*.

9. Quoted in *ibid.*, 3.

10. Quoted in *ibid.*, 126.

11. The only major native organization that approved the package was the Metis Association of Alberta. See *ibid.*, 122.

12. While changes to a few provisions, such as the amending rules themselves, would require the unanimous approval of all the provinces and the federal parliament, most provisions, including changes in provincial powers, require approval of two-thirds of the provincial legislatures representing 50 percent of the population plus the federal parliament. A dissenting province can opt out of an amendment transferring jurisdiction to Ottawa (and receive fiscal compensation if the amendment relates to education or other cultural matters). Quebec’s main vulnerability would be to amendments reducing its role in the federal government and parliament.

13. This is section 43 of the Constitution Act, 1982. An amendment under this section requires approval by the federal parliament and the legislative assembly of the province(s) to which it applies.

14. For details on all of these amendments, see Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1999), 1–7.

15. For accounts of this amendment and the Newfoundland schools amendment, see Stephane Dion, *Straight Talk: Speeches and Writings on Canadian Unity* (Montreal and Kingston: McGill-Queen’s University Press, 1999), 80–92.

16. Nelson Wiseman, “Clarifying Provincial Constitutions,” *National Journal of Constitutional Law* 6 (1994–95): 269–94.

17. For two appraisals, see Robert H. Knox, “Economic Integration in Canada through the Agreement on Internal Trade,” and Daniel Schwanen, “Canadian Regardless of Origin: Negative Integration and the Agreement on Internal Trade,” in *Canada: The State of the Federation 1997, Non-Constitutional Renewal*, ed. Harvey Lazar (Kingston, Ont.: Institute of Intergovernmental Relations, Queen’s University, 1998).

18. For a critical appraisal of this intergovernmental process, see Roger Gibbins, “Time Out: Assessing Incremental Strategies for Enhancing the Canadian Political Union,” in *The Referendum Papers: Essays on Secession and National Unity*, ed. David Cameron (Toronto: University of Toronto Press, 1999).

19. For an account of these reforms of the federation, see Dion, *Straight Talk*, 93–102.

20. Anne McIlroy and Brian Laghi, “PM Gets Social-Union Deal but Quebec Won’t Sign,” *Globe & Mail*, 5 February 1999, A1.

21. Susan Delacourt, “PM Offers Quebec Distinct Status,” *Globe & Mail*, 28 November 1995, A1.

22. According to Chrétien’s distinct society resolution, the House of Commons (not the courts) would “undertake to be guided” by the reality that “Quebec is a distinct society within Canada.”

23. Brian Laghi and Graham Fraser, “Premiers Develop Unity Plan,” *Globe & Mail*, 15 September 1997, A1.

24. Rheal Seguin, “Bouchard Reviles Unity Proposal,” *Globe & Mail*, 17 September 1997, A1.

25. Miro Cernetig, “Chrétien’s Veto Proposal Backfires in West,” *Globe & Mail*, 29 November 1995, A7.

26. Susan Delacourt and Miro Cernetig, “BC Wins Constitutional Veto,” *Globe & Mail*, 8 December 1995, A1.

27. *Constitutional Amendments Act*, Statutes of Canada, 1996, chap. 1. (For more on the amendment process in Canada, see chapter 11 of the present volume, “Constitutional Amendment in Canada and the United States,” by Ian Greene.)

28. For an account of the background to the Quebec secession case, the Supreme Court’s decision, and comments on it, see David Schneiderman, ed., *The Quebec Decision* (Toronto: James Lorimer, 1999).

29. On how the constitutional amendment rules apply to an agreement on Quebec secession, see Peter Russell and Bruce Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty,” in Cameron, *Referendum Papers*.

30. The court’s negative answer to this question meant that it did not have to answer the third question in the reference, namely, if international law conflicts with Canadian constitutional law, which should prevail?

31. *Reference re the Secession of Quebec* (1998) 2 S.C.R. 217, #138.

32. *Ibid.*, #100.

33. Bill C-20, section 1(3).

34. For the text of the Quebec bill, see *Globe & Mail*, 16 December 1999, A11.

35. *R. v. Sparrow* (1990) 1 S.C.R. 1075.

36. *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010.

37. *R. v. Marshall* (1999) 3 S.C.R. 456.

38. Four members of the seven-person commission were aboriginal, and three were nonaboriginal. They were selected by the recently retired chief justice of the

Supreme Court after a countrywide consultation. The commission's administrative and research staff was similarly bicultural in its composition.

39. The report had five volumes. It was published by Canada Communication Group and can be obtained through the Internet at www.libraxus.com/RCAP.

40. The Royal Commission's 1992 commentary, *The Right of Aboriginal Self-Government and the Constitution*, set out the rationale for this recognition.

41. The first amendment to the patriated constitution stated "for greater certainty" that constitutionally recognized treaty rights include rights obtained through land-claims agreements. *Constitution Amendment Proclamation, 1983*.

42. Peter H. Russell, "Aboriginal Peoples Do Have Inherent Rights," *Cité Libre* 27 (fall 1999): 56.

43. On the importance of shared citizenship, see Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000).

44. For a detailed account of Nunavut and the events leading to its establishment, see Jens Dahl, Jack Hicks, and Peter Jull, eds., *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (Copenhagen: International Working Group for Indigenous Affairs, 2000).

45. Council of Yukon First Nations, *Understanding the Yukon Umbrella Agreement*, 4th ed. (Whitehorse, 1997).

46. For details, see Royal Commission on Aboriginal Peoples, *Report*, vol. 2, chap. 4.

47. This is not the first "modern treaty" within a province. The first comprehensive land claim was the James Bay and Northern Quebec Agreement of 1975, but it had very little in it by way of self-government rights.

48. For an account of the background to the Nisga'a Agreement and a range of opinions about it, see *The Nisga'a Treaty* (special issue of *BC Studies*, winter 1998/99).

49. The text of the Nisga'a Final Agreement can be obtained on the Internet at www.inac.gc.ca.

50. Section 9 of the agreement states that it "does not alter the Constitution of Canada," and section 9 states that the Canadian Charter of Rights and Freedoms applies to Nisga'a government.

51. Rod Mickleburgh, "B.C. Court Rejects Liberal Challenge of Aboriginal Self-Government," *Globe & Mail*, 25 July 2000.

52. For information on the B.C. Treaty Commission, go to www.bctreaty.net

53. I would include Samuel LaSelva, Philip Resnick, Charles Taylor, and James Tully in this group. For a discussion of this school of Canadian political thought, see Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000), chap. 1.

54. Tom Flanagan, *First Nations, Second Thoughts* (Montreal and Kingston: McGill-Queen's University Press, 2000), 5.

55. Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998), see esp. chap. 1.

56. Many alternatives to first-past-the-post method of representation could be introduced without formal constitutional amendment.

57. Kymlicka, *Finding Our Way*, 177.

58. The quoted words are from the oral submission of the attorney general of Saskatchewan. I have substituted “multination political community” for “nation” in the original. *Reference re the Secession of Quebec*, #96.