Constitutionalism, Citizenship and Society in Canada

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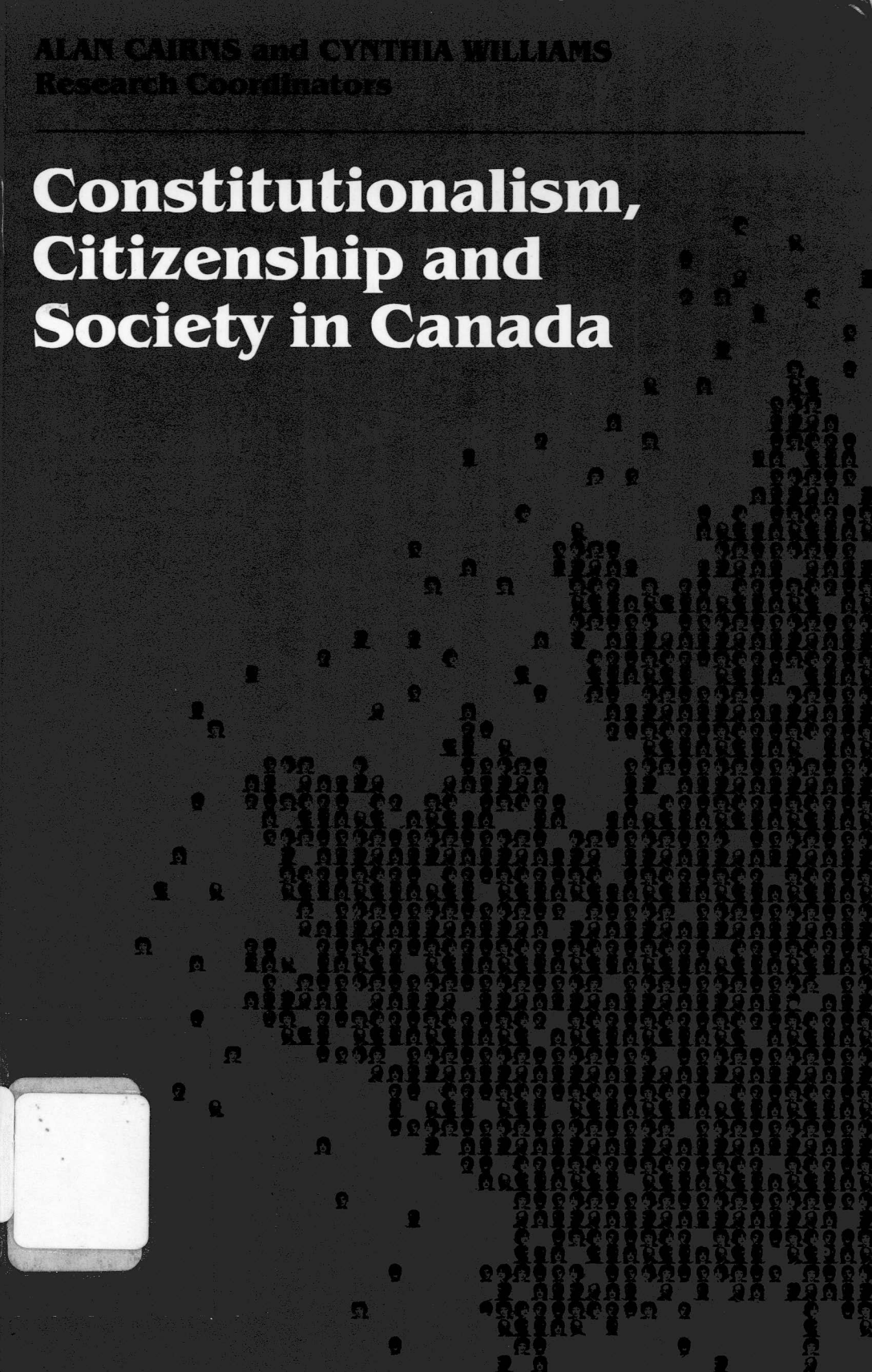
ALAN CAIRNS and CYNTHIA WILLIAMS
Research Coordinators

Constitutionalism, Citizenship and Society in Canada



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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

ACKNOWLEDGMENTS

The issues in the volumes on Constitutionalism, Citizenship, and Society in Canada by their very nature demanded interdisciplinary research and reflection. The intellectual stimulation and reward for the editors of this interdisciplinary collaboration was immense. We gratefully acknowledge the patience and enthusiasm of the authors who contributed to this project. Regrettably, illness prevented Allan Moscovitch of the Carleton University School of Social Work from completing a paper on the welfare state in Canada for inclusion in these volumes.

In addition to the authors, the Research Advisory Group for this area of research included Dr. John Chenier, Policy Analyst, Secretary of State; Dr. Michael Ray, Professor, Department of Geography, Carleton University; and Dr. Frank Vallee, Professor Emeritus, Department of Sociology and Anthropology, Carleton University. The comments and suggestions of members of this group on early drafts of these papers and on the formulation of issues in our overview paper helped improve these volumes. The papers have also benefited from comments and assessments of referees who must remain anonymous.

Special thanks are due to several members of the Royal Commission staff — in particular, Karen Jackson, Executive Assistant to the Director of Research (Institutions) for her contribution to the content of our arguments and her assistance in administrative matters. Special thanks are also due to Kent Roach for valuable research assistance in the summer of 1984, Françoise Guilbeault and Donna Stebbing for secretarial support, and Ruth Crow, who coordinated the editing of these papers for publication.

Our deepest thanks are extended to Pat, Lynn, Wendy, and Elaine in Vancouver, and to Doug in Kingston who tolerated our long absences from home during the mandate of the Royal Commission. The intellectual pleasure and reward we enjoyed through our association with the Royal Commission were made possible only by the encouragement and understanding of our families.

A.C. AND C.W.

1

Constitutionalism, Citizenship and Society in Canada
An Overview

ALAN CAIRNS
CYNTHIA WILLIAMS

The two volumes introduced by this overview contain nine articles which explore, from various perspectives, the complex relationships between citizenship, social change, the evolution of political communities in Canada, and constitutional government.

A guiding premise of this research section for the Royal Commissions was that in addition to its role in managing the economy, the contemporary state has a role in managing society. This will occasion little surprise to students of Canadian history knowledgeable about Riel, conscription crises, language controversies, and ethnic tensions in British Columbia between Orientals and the majority white population. Nevertheless, this social management role receded with the Depression of the 1930s, which stressed the economic responsibility of government as manager of a mixed economy.

This focus on the economic role of the state was also fostered by the prevalent assumption that modern industrial capitalism would progressively reduce the political salience of cleavages based on region, religion, ethnicity, and language. The class system was held to constitute the dominant cleavage, along the lines of which the political party system both would and should divide. The presumed dominance of class supported the central significance of the government's role as manager of the Keynesian welfare state. Success in minimizing business cycle fluctuations and alleviating social tensions by welfare state programs was considered the political recipe for social cohesion in a class-divided society.

The continuing importance of these state responsibilities is undeniable, but they have not dominated the public agenda to the degree anticipated by the scholars and commentators of the 1940s and '50s.

Language controversies, the challenge of Québécois nationalism to Canadian federalism, demands by aboriginal groups, and the feminist critique of the gender division of labour in private and public spheres, have fueled much of Canadian politics in the past quarter-century. They are explored in this book and the companion volume on *the Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the Commission's research series.

These two volumes not only single out the social role of the Canadian state and the social conditions to which it is a response, but also clearly attribute discretion, some autonomy, and political leadership to federal and provincial governments. The governments are not viewed as passive recipients of society's demands, mechanically translating public pressures into policy outputs. State elites have their own agenda, derived from their visions of desirable futures and from their official responsibility for the long-run health of the government and people over whose affairs they preside. Policies relating to language and the Charter, in particular, underline this leadership role of governments in Canada.

Initial Reflections

Those who are engaged in the study of the constitutional order face the constant task of interpreting, evaluating and revising the arrangements they have been bequeathed by history. There is a never-ending dialectic between traditional arrangements and emerging requirements, and between new experiences and their interpretation. Accordingly, constitutional arrangements and the broader environmental context in which they are set require ongoing monitoring and appraisal. Such a requirement is particularly imperative in periods of turbulent change in citizen-state relations, such as Canadians have experienced in recent decades. In one sense, almost the whole research output of the Royal Commission, as well as its *Final Report*, is a response to that requirement.

This overview and the studies in these two volumes are exploratory efforts to illuminate some of the basic societal factors which play on the evolution of our constitutional system. Our major focus is on the evolution of citizenship and community in Canada and their impact on the practice of constitutional government. These are large and elusive concepts with ill-defined boundaries, contested meanings, and disputed relations with each other. Our subject matter is pervaded with philosophical and ideological concerns. It cannot be otherwise. The relations between citizens and states, between the market and the polity, and between rights and obligations involve the classic themes of Western political philosophy and the ideological controversies of the present era. The issue of the appropriate boundaries between the public and private spheres has been reopened as the seemingly settled postwar consensus on the Keynesian welfare state has partially unravelled. Gender, language, and ethnicity have supplemented class as primary sources of

political conflict. The practice of rights, the nature of political community, and the constitutional order itself have evolved significantly since World War II.

Our beginning point is the observation that individual Canadians, by a steady progression culminating in the recent Charter, have become increasingly rights conscious. We expect this trend to continue. Our focus on rights is complemented later in this overview by reflections on duties and obligations, matters which receive less attention in the rhetoric of the contemporary political arena. A political order in which rights consciousness is highly developed is prone to instability unless counterbalanced by norms of duty, obligation and responsibility. On the other hand, a political order in which duties are stressed and rights are only weakly developed suggests a shallow definition of citizenship and a limited popular capacity to control the powerful governments of the modern era.

Our second focus is conceptions of community by which Canadians define themselves as a people. These definitions have undergone remarkable changes in the last half-century. Although not exclusively driven by rights consciousness, these evolving community definitions are logically and directly related to the evolution of rights, for every recognition of a right is accompanied by an altered conception of community. Recognition of a right changes the relationship of community members to each other and shifts the balance between the public and private realms. These consequences are especially evident in positive rights, such as the social rights of the welfare state and the language rights of the Charter of Rights and Freedoms,which oblige the state to allocate resources to particular privileged purposes. Further, as the federal-provincial controversy leading up to the Charter illustrated, rights and which jurisdiction recognizes them are not matters of indifference to the federal and provincial governments. The nationalist supporters of the Charter hoped to strengthen Canadian identities as a check on provincialism. Provincial opponents sought not only to defend the principle of parliamentary supremacy at the provincial level, but also to give provincial authorities the capacity to develop particular packages of rights and duties specific to their individual provinces.

Changing boundaries of community modify the coverage of the moral order governing relations of citizens with each other and with the state. The day after Newfoundland joined Confederation in 1949, Newfoundlanders became Canadians and participants in the highly developed language of constitutional and moral discourse which a few hours earlier had not been applicable to them. British Columbians and Newfoundlanders, separated by thousands of miles and the products of distinctive histories, were henceforth tied to each other as citizens of a national community by norms of rights and obligations, laws, and common national institutions.

Our units of analysis — citizenship, community and constitu-

tionalism — have not been stable. Conceptions of community have been transformed, as demonstrated by the displacement of the image of Canada as a British country with a weak francophone component concentrated in a culturally distinct but politically weak Quebec, to a country that is now officially bilingual and multicultural. Citizenship changes have been no less dramatic, as is evidenced by the discontinuous but steady advance of the language of rights, culminating in the recent Charter, which alters the criteria by which citizens and governments assess their relations with each other. Finally, "the living Canadian constitution," a complex historic arrangement of norms and institutions, has continued to evolve in response to these and other domestic and international changes in the role of the state. As J.R. Mallory notes in his study in this volume, the resultant pressures to update our political and constitutional vocabulary are not easily met.[1]

Driving the interrelated evolution of citizenship, community and our system of constitutional government is the expansion of the role of government at both federal and provincial levels, and the politicization which that expansion brings in its wake. Politicization refers to the penetration of political considerations into more and more spheres of life, with an accompanying increase in the relative incidence of political calculations in the pursuit of individual and group goals. Like other states throughout the developed Western world, the contemporary Canadian state is not a distant entity largely irrelevant to private citizens in their daily rounds.[2] It is an omnipresent actor never far removed from even the most intimate concerns.

The fusion of state and society locks citizens and governments in an ever tighter reciprocity in which each party develops an increasing need to influence the other. The pursuit of state objectives, in the economy and elsewhere, now makes heavy demands on the citizenry not only for compliance but for positive cooperation. The revived popularity of corporatist thinking, especially in tripartite relations of business, government and labour, is testimony to the state's recognition that it cannot go it alone. From the perspective of the individual, the proliferation of pressure groups and the multiplication of professional intermediaries between citizens and governments — accountants, tax lawyers, and consultants — reveal the incentives for private actors to manage their own relations with the state more effectively.

As the domain of state action grows, the domain of citizenship grows correspondingly. Inevitably, the conduct of citizens encompasses a larger sphere of activity and becomes ever more consequential for the polity at large. It logically follows that the contemporary state requires a broader and more subtle concept of citizenship than was needed in earlier times when state and society were more insulated from each other.

The relation of community to the practice of constitutional government is no less direct. The extent to which citizens view state action as legitimate, identify with the political order, are willing to perform multiple citizen roles

and to forbear from exploiting strategic positions of power in society are all positively linked to their view of the nature of community membership, the rights and obligations of citizens, and the feeling that they, as community members, are treated equitably and honourably by the state. The minimal state may be able to preside aloofly over a people with limited and contradictory senses of itself. For modern interventionist states and politicized peoples, this is not so. A state which routinely places heavy burdens of responsibility on its citizens requires a people with a strong sense of common identity and widely shared perceptions that the state's policies are fair. Otherwise its authority will founder on the discontents and frustrations of citizens, who view the political authorities as powerful and unjust arbiters of life chances.

The fostering of a sense of community commensurate with demanding contemporary requirements is not easy. In the Canadian case it requires the knitting together of two languages, many cultures, visible minorities, aboriginal communities, coexisting federal and provincial loyalties and identities, and the regional and class divisions of a political economy heavily influenced by the interdependence of state and private actors. To these must be added the newly politicised cleavages of gender and divergent lifestyles, and new notions of equality which challenge yesterday's distributions of status and reward and definitions of acceptable behaviour. The blending of these multiple diversities into complementary national and provincial communities is made more difficult by the interdependence of domestic and international phenomena, with the consequence that the rise and fall of domestic cleavages is increasingly influenced by developments external to the state. The porousness of state boundaries, washed over by new values, identities and fads — discussed in more detail below — complicates the fashioning, and the integrity of senses of community.

In addressing the themes of citizenship and community, we are concerned with the health of the overall order of constitutional government that Canadians have inherited. Constitutional government means, at a minimum, a political order in which the state is responsive to the citizens, and in which arbitrary power is curbed. In Canada these goals are achieved to the extent that the principles of parliamentary government and federalism, now joined by the Charter, retain their viability. As Mallory observes in his Commission study, the democratic values of majority rule do not necessarily sustain a system of constitutional government "unless they include a recognition of rules of conduct that curtail the arbitrary abuse of power."

More generally, as students of politics, we seek to understand the complex dialectic between state and society in Canada, a dialectic whose intensity has increased as their mutual isolation has eroded. Central to that dialectic has been the evolution of our civic selves fostered by the tighter integration of state and society.

Bernard Blishen, in his Commission study in volume 34, confirms that

Canadians have experienced significant changes in values in the last half-century.[3] We have become a different people. We no longer think of ourselves as persons and as citizens in the fashion of our grandparents. At the citizen level, the evolution of rights consciousness over the last half-century is itself a profound change. The collective identity of citizens has been transformed to incorporate more fully Canada's linguistic dualism and multicultural heritage. Our multiracial composition is next on the agenda. Probably the most important change in our civic consciousness is increasing willingness to employ the state for a broadening range of individual and group purposes. Studies in these two volumes analyzing aboriginal goals, the women's movement, language policies, multiculturalism, and the ubiquitous politics of rights all confirm that political calculations in our daily lives have significantly increased relative to market calculations and private decision-making in formerly apolitical spheres regulated by tradition and non-state actors. Our political and public selves have gained ground relative to our economic and private selves. In pursuing our goals we respond to a very different mix of public and private incentives than prevailed half a century ago. Increasingly, we relate to each other through politics. It would be unreasonable to assume that such profound changes in our self image and behaviour have been inconsequential for our system of constitutionalism, which traditionally presupposed a separation of state and society — and an autonomy for the latter — which no longer exist. A speculative interpretation of those consequences will be the focus of our concluding section.

The International Dimension

Citizens, communities, and governments do not exist in self-contained national contexts. Frontiers, now as always, are permeable. The territorial distribution of the world's population at any given time is only a snapshot of a never-ending movement of individuals, groups and peoples in response to the pull of new opportunities and the push of hardship, discrimination and expulsion. The burgeoning world population of refugees provides poignant testimony to the territorial instability of contemporary populations. On a per capita basis, in the postwar years Canada has been a major recipient of refugees expelled or deported from distant corners of the globe or simply fleeing persecution.

Since Confederation, Canada has been fed by two great waves of immigrants, first the two decades of massive immigration preceding World War I, and later the extensive immigration after World War II. Both waves of migration changed the ethnic and cultural composition of the Canadian people, generated new questions about the state's relations to society, and affected the meaning and practice of citizenship.[4]

The movement of peoples is only the most obvious indicator of the

permeability of frontiers. The ongoing specialization of the international division of labour draws the economies of contemporary nation-states into ever tighter bonds of interdependence with economic actors beyond their borders. The adjustment problem this poses to the governments and peoples of individual states is commonplace to contemporary economic policy makers. The global movement of goods and capital sits uneasily with territorially delimited, geographically fixed state systems.

The fact that many of the non-economic aspects of our existence are equally subject to international trends and social forces is less often noted. The adjustment problems they pose for the relationships between states and peoples are no less challenging, although less clearcut, than those produced by economic interdependence. The world external to individual states increasingly transforms domestic values, shapes citizen identities, and generates social movements hostile to the status quo. This is most obvious with respect to such dramatic phenomena as the student eruptions of the late 1960s, and the recent global explosion of ethnicity manifested in sub-state nationalism in Western countries. These, however, are only the most visible manifestations of non-economic challenges to governing practices and established policies fed by the international arena.

The Canadian women's movement is part of a movement throughout the Western world. This provides strength to each of its component parts through the benefits of shared experience, a common literature, and an identification with leading figures in other countries. Quebec nationalists, especially those with indépendentiste orientation, looked for encouragement and positive models to the example of the breakdown of European empires and the explosion of small states into the international system. More generally, the evocative language of nationalism and ethnicity was commonplace in the 1960s and 1970s in Western societies and provided a readily available political currency for domestic use within Canada by Quebec nationalists and others.

The civil rights movement in the United States and the new independence of the formerly colonized peoples of Africa and Asia have contributed to the awareness and self-confidence of racial minorities in Canada. The Canadian aboriginal movement is part of a broader aboriginal self-consciousness around the world which facilitates the sharing and elaboration of aspirations and strategies. The Canadian Inuit, seeking to carve out a province in the Northwest Territories, are linked with their ethnic brethren from Greenland and Alaska in the Inuit Circumpolar Conference. The Métis National Council argues that the Canadian government must provide the Métis with a land base under the International Covenant on Civil and Political Rights.

The counterculture and student radicalism in the 1960s and contemporary ecology movements were and are linked with counterparts elsewhere. The movements for gay and lesbian liberation in the United

States have played a pioneering leadership role for similar movements throughout the Western world, especially in Canada. Even the Charter, the most recent major change in our domestic institutions, was in part a response to an international rights-consciousness initially manifested in such documents as the United Nations Universal Declaration of Human Rights in 1948. This consciousness in turn stimulated and strengthened domestic advocates of constitutionally guaranteed citizen rights, and governments in Canada ultimately responded.[5]

Examples could be multiplied easily, and all lead to the same conclusion. Not only our economy, but also our society has been internationalized. It is not just cars, calculators and European wine which flow across our borders, but political aspirations, new identities, competing values, and evolving definitions of the appropriate relations between men and women, young and old, parents and children, and citizens and states. Opinions may differ on whether these phenomena are liberating or baleful. What cannot be denied is that they complicate the task of governing, by increasing the significance of social forces and ideas with external roots which no single state can control.

Nevertheless, the assertions by some that the state is in danger of becoming an anachronistic institution are clearly exaggerated. There is no alternative institutional arrangement with sufficient support to qualify as a potential successor. The tension between the geographical fixity of the nation-state and the international diffusion of values and pressures which play on the citizenry does not threaten the state system as such. It is true that many domestic cleavages have international roots, that what citizens expect from the state is influenced by international comparisons, and that how states respond is influenced by state-citizen relations in other countries.

This only suggests that the international state system, and the global cultural, economic and ideological environments in which it exists, provide evolving definitions of the practical meaning of statehood. The ever more encompassing coverage of the planet by the state system, now extending to the oceans and the stratosphere, has been accompanied by a tightening of the links between citizens and individual governments. In the Western world,increasing global interdependence has coincided with a general enhancement of citizenship as a public status invested with rights and duties, relative to more private definitions of the self.

Multiple Identities and the Self-Consciousness Explosion

Modern democratic capitalist societies are characterized by multiple politicized cleavages and identities. Democracy and capitalism, especially in a context of relative affluence, stimulate individual, group and national self-consciousness. This results in a diminished respect for tradition. The breaking of the bonds of custom is accompanied by beliefs

that identities can be chosen, social arrangements reconstructed, and society transformed by human action. As Daniel Bell observes,

> Modern culture . . . is defined by this extraordinary freedom to ransack the world storehouse and to engorge any and every style it comes upon. Such freedom comes from the fact that the axial principle of modern culture is the expression and remaking of the "self" in order to achieve self-realization and self-fulfillment. And in its search, there is a denial of any limits or boundaries to experience. It is a reaching out for all experience; nothing is forbidden, all is to be explored.[6]

The sources of these basic assumptions are multiple. Consumer choice in affluent capitalist societies encourages the belief that life styles, as well as commodities, can be purchased in the marketplace. As a growing percentage of the population gains access to higher education, and the culture and theories of the social sciences and their analytical approaches gain wider acceptance, citizens have greater confidence to question traditional values. The spread of literacy, exposure to the global village through the mass media, and increasing international travel reveal the diversity of social existence and contribute to the view that societies are human artifacts rather than unalterable arrangements. The manipulation of society and the economy by governments carries the same message — that many contemporary socioeconomic arrangements are a product of will rather than unchallenged historical givens. Since the Depression of the 1930s, the economic order is no longer seen as produced primarily by inexorable laws which must be accepted, but as subject to human intervention. In marked contrast to the experience of our ancestors, consciously designed structures and social arrangements are increasingly prominent in our lives.[7] The general recognition that society is a human product encourages the modern citizen to appraise the conditions of existence with a calculating eye. This tendency is encouraged by the widespread contemporary practice of consciousness-raising, by which groups emphasize their distinctiveness, seek the sources of their discontent and the remedies available for their removal. These intellectual and psychological orientations make the acceptance and legitimacy of particular arrangements increasingly tentative and conditional.

It is somewhat surprising, nevertheless, that the focus of reformers in recent decades seems to have shifted relatively from society or the economy as a whole to particular aspects of social existence.[8] The political dynamism of ideological movements seeking the total transformation of society has been eroded in the past half-century. The contemporary impetus for change is accordingly much less driven by class considerations of total economic transformation than formerly, and its direction has drifted to more specialised, localised and particular arenas. There is also a discernible tendency for reformers to direct their

proposals more at social arrangements and less at the economic arrangements of society. The widespread recognition of existing Communism as a god that failed is integral to the relative shift of focus from market to society and from class to other cleavages. Where large-scale change is still sought in Western societies, it is more likely to be driven by ethnicity and nationalism and to aim at transforming the political structure through the attainment of independence, rather than being driven by class and directed to the conquest of political power in order to challenge seriously the existing economic order. Put differently, the contemporary challenges to existing socioeconomic arrangements are fragmented and plural. They aim as much at the society as at the economy, and reflect and contribute to the widely noted decline of parties.

The feminist critique of contemporary society illustrates the relations between self-consciousness, social criticism, and policy advocacy. The sexual division of labour, family size, and roles of men and women in the home and elsewhere are now clearly influenced by public policy and political debate.

Feminists deny that family roles are biologically determined:

> Feminists have challenged the definition of women by their reproductive status and have argued . . . that when motherhood is used as a mystique, "it becomes an instrument of oppression." The contemporary women's movement has worked to give women a choice *not* to mother — hence, struggles for birth control and abortion rights and for legitimation of forms of sexuality, including lesbianism, separated from reproduction. Feminists have emphasized the rights of all women, whether or not they are mothers, to have access to activities beyond motherhood — hence, efforts to bring women into an equal position in the labour force and to diminish their ideological encapsulation by the family.[9]

In the language of another author:

> Coming to have a feminist consciousness is the experience of coming to know the truth about oneself and one's society. . . . The very *meaning* of what the feminist apprehends is illuminated by the light of what ought to be. . . . The feminist apprehends certain features of social reality as intolerable, as to be rejected in behalf of a transforming project for the future. . . . Social reality is revealed as deceptive. . . . What is really happening is quite different from what appears to be happening.[10]

The scope of the feminist critique of contemporary society should not be underestimated. It is a basic challenge to male dominance and male privilege. Feminists criticize society as dominated by male voices and male values. According to Carol Gilligan, a social psychologist, "the failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation."[11] In reality, she argues, there are two voices, those of men and women, but the latter

have been denied expression and recognition. The goal of the women's movement, from this perspective, is to replace the male monopoly with a dualism of ethics and social interpretation based on coexisting visions representing the divergence of male and female experience.

Gilligan's argument that social psychology has been dominated by male definitions of adulthood which do not incorporate women's different paths to and means of maturity is paralleled in feminist criticism of other social sciences as leaving out the experiences and differing values of half of society.[12] The long-run significance of the feminist and women's movement, therefore, is less in the specific social arrangements it challenges than in the comprehensive reinterpretation of the meaning of social existence to which it leads. Changes in particular arrangements simply represent the fallout from that larger enterprise.

A similar breakthrough to self-consciousness is reiterated in gay and lesbian literature. A long-time Canadian gay activist writes:

> I got hooked, I guess, on empowerment, The transformation of the Helpless Queer with no history and an unlikely future into Someone, into a *group* of Someones who uncovered a history, who found heroes, who grabbed today and shook it till tomorrow fell out of its pocket and there was a place there in it for us.[13]

The gay movement provided "that quick, sharp snap with the past that lifted people out of their frightened, reflex hesitations about their sexuality."[14] The movement propagandises the thesis that gay is good, in order to lead lesbians and gay men "from the prison of social condemnation. Affirming the validity of a homosexual identity is a political act and challenging the social and intellectual control of our sexual lives is a political struggle."[15]

Developing self-consciousness was accompanied by a proliferation of gay organizations, which grew from halting beginnings in the 1960s to a presence in every province but Prince Edward Island in the 1980s. Expansion brought specialization and separate organizations for gay academics, lesbian mothers, support groups, and others.[16]

Analogous phenomena — the crystallization of positive group identities, unwillingness to accept negative evaluations by the larger society, adoption of positive group labels to support self esteem, and political mobilization to enlist the power of the state on behalf of one's group — are also characteristic of aboriginals, visible minorities, and others. New group labels reflecting and stimulating new identities have proliferated — Québecois, Inuit, Dene, aboriginal peoples, gays and lesbians. The increasing use of the word "nation" — the Dene nation, the Inuit nation, the Indian Nation of First Peoples, and the Québécois nation capped by the state of Quebec — indicates an escalation of group identities which challenges the accommodative capacities of the larger political community in which they reside.

The simultaneity of these developments suggests that they are not isolated or random occurrences but interrelated responses, which develop from diverse and pervasive cultural inducements to introspection and self-affirmation and which presuppose that politics is the vehicle to transform unacceptable social arrangements. Bernard Blishen, in his Commission study, identifies an "emerging communalism" of minority groups, frequently defined by ascriptive criteria and seeking enhanced status and recognition as one of the most salient socio-political developments of recent decades. These movements typically challenge historic patterns of authority and dominance, and invidious ethnic, gender or lifestyle distinctions.

The process feeds on itself. State involvement heightens group identities and politicizes cleavages. The response of the federal government to Québécois nationalism required and stimulated a heightened group consciousness among francophones outside Quebec. The federal government's concentration on Quebec and francophones, in turn, generated fears of status loss among Canadians of neither British nor French background, and led to the policy of multiculturalism. In a period of growing aboriginal consciousness, the federal government's treatment of status Indians is closely monitored by Métis and other non-status aboriginals. Government responses to the former feed into the policy demands of the latter. The equality rights of the Charter in Section 15(1) and the affirmative action possibilities sanctioned by Section 15(2), which lists nine criteria — race, national or ethnic origin, colour, religion, sex, age, mental or physical disability–can only strengthen the process of multiplying and politicizing identities which provide state-supported levers for upward mobility. Raymond Breton, in his Commission study in volume 34, observes:

> The growth of state intervention means that groups are not only competing with each other in the market place, but increasingly in the political arena as well. This is the case with regard to symbolic as well as material interests. Access to the resources of the state has become more important for the improvement of one's symbolic and material condition.[17]

"The relations of individuals," as William Goode reminds us, "are subject to continuous renegotiation as people try to gain or keep advantages or cast off burdens."[18] This process of renegotiation of relations is likely to accelerate. The continuing enhancement of group self-consciousness will manifest itself in unpredictable ways in the future with respect to new species of group self-categorisation. Evidence abounds of the proliferation of ever-more-refined categories into which individuals group themselves. Human rights acts, which began with a 1947 Saskatchewan statute identifying six categories as protected from discrimination, now encompass 30 categories in the legislation of federal, provincial and territorial governments. There has been a steady move

from stigmatic criteria such as race to life cycle criteria such as age, to life choice criteria such as sexual preference.[19]

The ongoing renegotiation of social relationships of status, power and income, and of the limits of socially acceptable behaviour and permissible diversities of life style, does not leave the state untouched. The state becomes the major instrument to facilitate or block changes. The resultant group politics of competitive affirmation politicizes newly emergent cleavages. Drawing on the rhetoric of rights, citizen groups seek to employ the state for their own advancement.

Although the significance of the use of the state by economic actors has long been recognized by students of a politicized economy, the state role pertaining to non-economic aspects of society has received less attention. Yet its impact here — dealing as it does with profound questions of ethnic identity, status, language use, relations within the family and between the sexes — is in some ways more basic than its role in the economy. The competitive mobilization by rival groups around the issues of abortion and language is indicative of the passion which accompanies state policies dealing with core values related to identity and the meaning of life.

For society, the result is a plurality of identities, and the coexistence of competing values and lifestyles. The "losers" in the process are formerly privileged groups which experience loss of centrality and of the easy assurance of special social significance they once enjoyed. Thus, those of British background have lost their control of the symbols of Canadian nationhood, which now must be shared with Québécois, francophones outside Quebec, and other contending ethnic groups. The historically privileged status of whites is subtly altered by the political emergence of visible minorities and by aboriginals defining themselves as "First Nations" and insisting on self-government based on a claimed right to self-determination. The status of housewives is challenged by feminist critiques of the family as a system of exploitation of women. Supporters of the traditional nuclear family are placed on the defensive by the liberalization of divorce and the acceptance of homosexuality as an alternative sexual life style which has come out of the closet.

The recent and continuing changes in male/female relationships illustrate the nature of the phenomenon under discussion. William J. Goode asserts that "the most important change in men's position, as they experience it, is a loss of centrality, a decline in the extent to which they are the center of attention." Contemporary conditions, he suggests, "are different from those of any prior civilization, and they give less support to men's claims of superiority than perhaps any other historical era." The process of change reflects "the decreasing marginal utility of males," a decline in the belief that what men do is "indispensable, nonsubstitutable, or adds such a special value to any endeavor that it justifies his extra 'price' or reward." Men are increasingly seen as

"having no claim to *extra* rewards solely because they are members of the male sex-class."[20]

The critical, questioning stance toward social arrangements to which this pluralistic self-consciousness leads immensely complicates the state's task and burdens the public agenda. By extending the domains of social existence that are politically challenged, it imposes on the state the task of legitimating, by its policies and indications of approval and disapproval, a proliferating host of subject matters formerly handled in private social realms and regulated by accepted tradition. The state's task is compounded by the fact that most of the claims it encounters are contested and involve deeply felt values and standards. Also, it is improbable that we are only experiencing a transition period after which a new equilibrium will be reached. Status is always relative; the potential for group self-consciousness knows no obvious boundaries, and the ongoing process of technological and social change will continuously disrupt existing patterns. The prospect therefore is for a never-ending pursuit by political means of an unattainable equilibrium.

The supplementation of economic interest groups by new groups based on gender, ethnicity, life style, and physical disabilities interacts with state policies and agencies in subtle and complex ways. If the state is extending benefits or privileges and the boundaries of the affected groups are fluid, there will be inducements for individuals to redefine themselves to enhance their capacity to receive state support. In the same way that the supply of unemployment increases with the liberalization of unemployment insurance, the number of self-defining Métis will increase with the extent of advantage accruing to that status. From this perspective, affirmative action programs, sanctioned by the Charter, will induce individuals to rearrange their self-definitions wherever the categories are flexible and there are benefits to be gained. The overall result is to fragment society as a by-product of the governmental distribution of advantage. Centrifugal tendencies in state and society become mutually reinforcing at the expense of more holistic conceptions of community and of citizenship. We will return to this theme in our conclusion.

The Community Base of Constitutional Government

The formation, evolution, integration and disintegration of political communities is a central concern of both scholars and statesmen. In a world in which political boundaries seldom coincide with linguistic, ethnic or tribal boundaries, the lack of congruity between state and society must be overcome by political leadership. The society whose support the state seeks, and with which it must establish rapport and empathy, is fluid. Even an "ethnic community constantly defines and redefines its name, its institutional rules, its conventions and its visible structures in the face of a changing situation."[21] The boundaries of

ethnic groups are subject to change, sometimes rapid change. Thirty years ago there were no "aboriginals" and no "Québécois" in Canada. These labels and the communities they reflect and fashion are emergent phenomena of the past quarter-century.

Accordingly, the contemporary state is engaged in the never-ending task of fashioning a social coherence and normative integration for a citizenry subject to multiple and changing cleavages. In Canada and other liberal-democratic polities, the underlying social reality to which the state responds is increasingly fragmented, pluralist and centrifugal. Our identities have simultaneously multiplied and become politicized. The accommodationist task of the state has therefore grown in difficulty. As Allan Smith argues of both Canada and the United States,

> This ongoing struggle to keep in being a system of ideas which can be used to aid in the consolidation of the nation has become particularly taxing. Maintaining an ideological complex capable of doing what is required of it has in fact required national ideologues and policy-makers to make a series of dramatic changes in the character, substance, and position of the nation-defining ideas which compose the complex.[22]

In Canada that task must include a response to the particulars of Canadian federalism, with its strong provinces and a francophone majority in Quebec.

Community changes since 1867 have been extensive. There were no Canadians in 1867, only the hope that they would emerge as the nation-building enterprise proceeded. From four provinces, the national community has expanded to ten and two territories. No prior community boundaries required the drawing of the particular lines on the map which divided future residents of Alberta from future residents of Saskatchewan.

Our collective self-definitions of who we are as a federal and provincial people have evolved continuously since 1867. That evolution has reflected the diminished significance of our British imperial connection, our participation in two world wars and the advances in our national autonomy to which that contributed, our post World War II role as a middle power, our developing multicultural and multiracial composition, and internal developments in Canadian federalism, especially the aggressive nationalism of recent Quebec provincial governments.

Our evolution has been a halting journey, not a plan. Nevertheless, we have not been simply a plaything of circumstance. State elites have played a key role in shaping communities as opportunities or challenges emerged. The long-run trend has been toward an enhanced state role in both the substance and the symbolism of our collective existence. This reflects the relative increase in the significance of politics in our daily lives. Recent scholarship on the significance of ritual in political life[23] and on the symbolic order[24] have underlined the subtleties of the state role. The state not only manages the economy and modifies the market

allocation of goods and services, but also intervenes directly in the status order and modifies the distribution of honour and social esteem.

As Raymond Breton observes, the development of societies includes the "symbolic order . . . the definition of a collective identity . . . as to who we are as a people." Individuals, he continues, "expect some consistency between their private identities and the symbolic contents upheld by public authorities, embedded in the societal institutions, and celebrated in public events. Otherwise, individuals feel like social strangers; they feel that the society is not *their* society."[25]

In the pages which follow, we can only scratch the surface of the complex and turbulent state-society relations which lie behind the recent transformations of community we have experienced. Several phenomena, however, deserve underlining. In the last forty years Canadian governments have transformed the symbolic order of the country. The federal and Quebec governments have been particularly active in redefining their people. On occasion, their efforts have been politically explosive and profoundly divisive. Policies pertaining to language and ethnicity have a powerful capacity to inflame our passions and mobilize our identities.

It is essential to note that the material and symbolic aspects of policy are deeply intertwined. Language policy, for example, involves restructuring the distribution of power and income in society, as well as changing conceptions of community. It has both an instrumental and a symbolic dimension. The welfare state not only distributes income and security, but also downplays the distribution of status associated with the market allocation of income. A particular measure such as Family Allowances, generally paid to mothers, not only links over three and a half million women (1981 figures) directly to the federal government, but also readjusts the gender division of power and status within the family.

The Welfare State and Community

The Canadian welfare state is a classic example of incrementalism. Its development was ad hoc and subject to the complexities of the division of powers. No articulate social philosophy guided its halting early development and subsequent consolidation. Its most significant programs were introduced in the prosperous quarter-century following World War II, when economic growth allowed policy makers to avoid hard questions of costs and priorities which were to emerge in subsequent periods of recession. In comparative OECD terms, the state welfare role in Canada is below average. In Canada, as in other democratic, mixed economies of the Western world, the viability and efficacy of the welfare state are on the public agenda.

In spite of these considerations, the basic programs of the welfare state have broad public support in Canada. In addition, specific indica-

tions of particular inefficiencies or shortcomings must be set against the contribution of the welfare state to the national and class integration essential to the overall survival of democratic welfare capitalism in Canada.

From a broad, comparative, historical perspective, one of the primary functions of the welfare state is to foster and maintain an integrated community in defiance of the competitive individualism and class inequalities of capitalism. The welfare state is an instrument of social solidarity which counters tendencies to atomization and insecurity inherent in economic individualism and in cyclical patterns of economic activity. According to a recent general assessment clearly relevant to the Canadian situation:

> The contribution of income maintenance, health care and other social programmes towards social integration — sustaining minimal standards and thus helping to maintain social peace and the idea of a national community — remains the single most important prop of the welfare state. Indeed, with rising unemployment this shock-absorber function of social welfare has become more evident.[26]

Canadian support for this conclusion is found in the fact that recent economic recessions, with unemployment figures which only two decades ago would have been considered politically unacceptable and seriously disruptive of social order, have had minimal consequences of that kind. In marked contrast to the Depression of the 1930s, when federalism, the capitalist system, and to a lesser extent democracy were under serious intellectual and political challenge, and four new parties — CCF, Social Credit, Union Nationale, and the Reconstruction Party — made their appearance, the recent period has been relatively quiet politically. The welfare state, which combines democracy and capitalism with an extensive state interventionist role, has helped to inhibit the emergence of anti-regime class parties seeking the overthrow or drastic transformation of the Canadian constitutional system. By strengthening the bonds of community, it has made a major positive contribution to the survival of constitutional government.

In Canada, the welfare state has not only had the task of preserving stability in the face of potential class tensions, but also the task of fostering national integration in a regionalized society of continental extent. As Keith Banting observes of one central strand of the welfare state:

> Modern Canadian politicians view income security, not so much as a means of preserving democracy, but as an instrument of cultural and political integration, as an underpinning of the stability of the federal system, or at least of the role of the central government in it. Some see income security as central to the sense of community in Canada, arguing that the major federal programs are both an indicator of the strength of the Canadian community, and an instrument for its further reinforcement.[27]

The extensive welfare state provisions in place in 1980 were positive resources for federalists in the defeat of the Quebec government referendum on sovereignty association. Without the link of direct payments to individual Québécois from the central government, and without Quebec participation in such nationwide programs as unemployment insurance, medicare, and others, the referendum results might well have been different. In an earlier referendum, the carrot of family allowances and old age pensions was significant, probably decisive, in the marginal decision of the Newfoundland population to become Canadian in 1949.

The evolution of the Canadian welfare state reflects the interaction of the nineteenth century division of powers, which allocated important welfare responsibilities to the provinces and essential revenue-raising capacities of the federal government, and the development in the twentieth century of a powerful nationalizing thrust of the federal government to prevent or restrain the balkanization of social rights on a provincial basis. The federal leadership role derives from the premise that social rights in the welfare state should be countrywide, and should be possessed by individuals as attributes of Canadian citizenship. As Banting notes of the income security field:

> In the welfare field, the residency requirement is..[a] sensitive indicator of the outer boundaries of the network of obligations embodied in income security, defining as it does who is a member of the policy community, who is not a member and therefore . . . a "stranger" to whom little is owed, and what the stranger must do to become a full member. In the Canada of the interwar period, residency tests stood as symbolic statements that recognized obligations stopped at the municipal limits. Today they stop at the national borders, and the excluded are limited, in some programs at least, to the recently arrived immigrant.[28]

In general, the welfare state, particularly when it provides direct payments to individuals, helps to sustain a sense of national citizenship and a national community. Given a national party system which often excludes entire provinces and regions from the government side of the House of Commons, and the pervasive provincialist tendencies of recent decades, this is a crucial counterweight to centrifugal pressures.

The welfare state is built upon an expanded definition of citizenship captured in the concept of social rights. Social rights are defined by T.H. Marshall, a leading British sociologist of the welfare state, as rights to a "modicum of economic welfare and security [and] the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[29]

These rights are not constitutionally entrenched. They are found in legislation, and are consequently subject to parliamentary supremacy conditioned by the political consequences expected to flow from their modification. Since World War II they have experienced frequent changes and an incremental overall expansion as new schemes have

been added. Social rights, therefore, are conditional. They represent, in Ramesh Mishra's words, a "temporary institutionalization of a given pattern of resource distribution"[30] allocated by political authority.

The flexibility in the provisions of the welfare state, however, should not be overestimated. The basic welfare state programs carry an impressive accompaniment of symbolism. They speak to us in our capacities as citizens, which explains the emotive appeal of universality. "Equality" with all its admitted ambiguities, is available to those who resist retrenchment. Welfare state supporters have the powerful weapon of a language of citizen rights at their disposal which, in a system of competitive mass electoral politics, militates against major cutbacks.

Nevertheless, social rights which involve extensive claims on community resources presuppose an ethic of mutual obligation which coexists uneasily with the market norm of self-interested individualism, and with the resource requirements of capitalism for growth. In the long run, a viable welfare state requires a supporting public philosophy which has a clear understanding of the necessary mix of rights and obligations appropriate for the citizenry, and which delineates with equal clarity the division of labour between the economic order — still primarily in private hands — and the state role in meeting human needs outside of the market.

British observers have noted that advocates of the welfare state have tended to assume the capacity of the economy to provide the fiscal base for welfare programs, an assumption which is no longer unquestioned in an era of recession and heightened international competition. William A. Robson goes further in asserting that "the term welfare state offers no guide to the proper limits of individual freedom or governmental action. . . . There is at present no philosophy of the welfare state and there is an urgent and deep need for such a theory."[31] What is required is a public philosophy of citizenship and community appropriate to an era of welfare state consolidation, compatible with the conditions of international competition faced by all states, and consonant with our traditions as a parliamentary and federal people operating a mixed economy.

Albert O. Hirschman has suggested that the welfare state is subject only to growing pains, not to a systemic crisis, and that a natural learning process will both improve future performance and generate more realistic expectations.[32] Such optimism may be misplaced. The expansion of the welfare state in Canada was unaccompanied by intellectual rigour or any clear understanding of the relationships between market and state to which it was taking us. Ad hocery and the complications of federalism deflected attention from the issues of citizen-state relations which are central to the long-run viability of the welfare state. Further, in Canada we have lacked the sort of sophisticated academic analyses of the welfare state that is provided by the social administration perspective in the United Kingdom.[33]

An instructive exercise is to contrast the provable evolution of a jurispru-

dence to govern citizen-state relations with respect to Charter provisions, and that likely to evolve in the area of social rights. The former evolution, with the judiciary playing the leading role — albeit assisted by a host of commentators — promises to develop a more subtle, articulate and philosophical sense of political community and of the place of citizens within it than Canadians possessed in pre-Charter days.

There is as great a need for analytical and moral clarity with respect to citizen-government and state-market relations in the welfare state arena, but Canada has no institution with a focussed responsibility to take the lead in that endeavour. The process of competitive party politics provides limited positive evidence that the task of educational leadership can be left to the political arena as presently constituted. The task of creating a viable community and a workable polity in the era of the positive welfare state requires intellectual clarity and normative subtlety. We have a long way to go.

Language and Community in Quebec

It is easy to exaggerate the discontinuities between the Duplessis era and the Quiet Revolution of the 1960s in Quebec. However, it is difficult to deny that the 1960 assumption of provincial power by the Quebec Liberals led by Jean Lesage triggered a process of convulsive change in Canadian federalism and in French-English relations in Quebec and throughout Canada.

The new government quickly bent its efforts to the construction of a positive Quebec state as an instrument of social and economic transformation. The institutional predominance of the Church was eliminated; the bureaucracy was transformed into an efficient agency for the pursuit of public purposes; the provision of social assistance was taken over by professionals; the educational system was expanded, secularized, and taken over by the provincial state; the public sector was developed. In sum, Quebec francophones were transformed into a political people who came to look to the provincial government to readjust the linguistic division of labour in the Quebec economy to their advantage. Their political status as a Quebec majority was elevated above their Canada-wide status as an ethnic and linguistic minority. State and society were drawn together into an intimate embrace based on a nationalism which no longer saw the state as an enemy. The link between the Catholic Church and the English business class in Quebec, in which both shared an interest in a weak provincial state, was broken by these developments.

The francophone majority began to acquire a new political identity as Québécois, which defined them in relation to the only political system over which French-speaking Canadians have majority control and stressed territory as the basis of identity. In the process, the older definition of a country-wide French Canada defined by ethnicity, religion and language was sundered. This had profound consequences for fran-

cophones elsewhere in Canada. They too were becoming secularized and urbanized. The striking postwar decline in entry into the priesthood meant that the Roman Catholic Church had lost its capacity to unite the diaspora and the Quebec homeland. The official country-wide organization of francophones, federally funded, is labelled la Fédération des Francophones hors Québec, an anomalous title which defines an aggregation of communities by what they are not — Québécois. As these francophones lose their country-wide links with their linguistic brethren in Quebec, their provincial settings acquire a new significance. This is reflected in the "emergence of a new collective identity, as the French Canadians of Ontario become Franco-Ontarians," for example.[34] This provincialising process is fostered by their declining isolation, their resulting increased contact with the English-speaking majority, and their need for the support of provincial governments, especially in education, if they are to preserve their language. This provincializing of identity changes the requirements for leadership. Formerly, leaders of the French Canadian community were to be found in the cultural sphere, while today "the new Franco-Ontarian elite is located in the political arena where it faces a State controlled by another historical community."[35] While Franco-Ontarians and other francophone minorities have been provincialized, their capacity to survive in provincial settings has been partly sustained by federal government political pressure, and most recently by the linguistic rights of the Charter.

Francophones outside Quebec were caught up in the larger constitutional struggle between the federal and Quebec governments, and their survival was seen by the federal government as an instrument to undercut the inward-looking nationalism of Quebec. These francophones acquired a national significance and became provincial residents "pas comme les autres," not because they were politically powerful, but because their treatment and their fate was of concern to other powerful actors in the struggle over the future of Canada.

Within Quebec, language planning, particularly Bill 101, "is more than . . . language legislation; it is an attempt by the [P.Q.] government to move political consciousness away from its previous content to a Québécois content. Language legislation in Quebec, as it is in many 'new nations' of Africa and Asia, is now a nation-building mechanism."[36] In addition to practical measures to increase the use of French throughout Quebec, the provincial government symbolically enhanced its prestige by declaring French the official language of the province. This manifestation of government power in language legislation was in part a response to demographic developments, particularly the marked decline in francophone fertility since World War II, and to the powerful assimilative pressures on francophones outside of Quebec and the bilingual belt in Ontario and New Brunswick. The declining proportion of francophones in Canada, which was stable at about 30 percent from 1871 and began to decline in the post World War II years to 25.6 percent in

1976,[37] generated insecurities which were to be redressed by the use of state power.

Within Quebec, provincial language policies have clearly reduced the status of the English language. They have also isolated and weakened the once powerful English-speaking minority and split it between those who have a right to education in English and those who are required to have their children educated in French regardless of personal choice. The probable long-run consequence will be a reduction in the numerical and hence political strength of the English-speaking minority and a strengthening of its internal ethnic homogeneity as it loses, at least in relative terms, its capacity to swell its numbers by the addition of Greek, Italian and other immigrants.[38] The long-run viability of the community institutions of the anglophone minority is threatened by emigration, especially of the well educated.

The transformation of the majority French-speaking community promises to be equally profound, although it is less often noticed. As Quebec language policy pertaining to education and work modifies Quebec society, it changes the nature of the French-speaking majority. The recruitment of non-francophones into the French-speaking majority through language policy simultaneously increases its numbers, dilutes its homogeneity, and generates a visible pluralism which cannot be ignored by the provincial government which brought it into being. With the passage of time, that enlarged majority will contain increasing numbers of French speakers who do not share in the history of the bulk of their linguistic confrères, and for whom the Conquest happened to somebody else's ancestors. At that time the Quebec motto on licence plates and once dominant in political rhetoric — "Je me souviens" — will become divisive. The use of language policy to strengthen the French-speaking majority has therefore, as a by-product, reduced the future significance of history as a political resource to make claims on the rest of Canada. No longer will Quebec nationalism be based on a tight integration between language, a distinctive culture, and a common history. The changing cultural component in Quebec nationalism is evident simply by comparing the Tremblay Report of 1956 with the Parti Québécois white paper for the referendum — *Quebec–Canada: A New Deal*. The former document stressed the cultural distinctiveness of Quebec, a distinctiveness based on religion, a rural way of life, anti-materialism, and an anti-state tradition, all in the context of a common history and a common language. The Parti Québécois paper, by contrast, suggested a cultural difference which it did not define and of which its pages provided minimum evidence. In general, it spoke the political language of modernity, advocated a very political state-centred form of nationalism, and portrayed a North American French-speaking society whose goals differed little in substantive terms from those of English-speaking Canadians.

The diminution of large cultural differences between Québécois and other Canadians, accompanied by the increasingly multicultural nature of the French-language community in Quebec, means that the differences between Quebec and the rest of Canada are now based primarily on language. This does not necessarily suggest a long-run decline in levels of intergovernmental conflict between Quebec and the central government, or a permanent decline in Québécois nationalism. It does, however, suggest a possible change in the nature of such nationalism and it logically also holds out the possibilities of increased collaboration across linguistic lines, based on shared endeavours springing from an increasing similarity of life style and goals between francophones and anglophones. The relative decline in the status and influence of the provincial state and of nationalism, both of which may be short run, may facilitate private sector collaboration across linguistic and provincial boundaries.

The general decline of optimism about the capacity of the state for social engineering has affected Québécois as others. Some Quebec scholars are now drawing attention to the dangers implicit in the provincial-state-centred nationalism characteristic of the 1960s and 1970s. They fear that an identity which comes increasingly to be politicized and focussed on the state becomes potentially rudderless as the provincial state loses its lustre. A related concern is the decline of a distinctive Quebec culture, which recently evoked a Québécois version of George Grant's *Lament for a Nation* in an address by Marc-Adélard Tremblay on the crisis of the Québécois cultural identity. Tremblay argues that in recent years Quebec has developed a political nationalism devoid of cultural content and focussed on the state. The loss of faith in the Quebec state logically produces a crisis of Quebec cultural identity and leads to a dangerous undefended openness to cultural Americanization. This openness is also linked to a virtual disappearance of the cultural significance of history, a "profound disaffection to history," in Tremblay's words. He notes the complications posed by ethnic pluralism for a provincial state leadership role in fostering cultural distinctiveness, and concludes, pessimistically if debatably, that "the ethnic specificity of the Quebec francophones, with the exception of linguistic patterns, is in the process of becoming a folkloric imagery."[39]

Future predictions are hazardous.[40] One may anticipate, however, that the Quebec government will have to pay growing attention to the developing multi-ethnic, multi-historical nature of the emerging French-speaking language community. As Eric Waddell observes in his Commission study in volume 34, a process of "disengagement of language from ethnicity in Quebec" is now working itself out:

> Hitherto promoted and used almost exclusively as the language of an ethnic group, French has now become, through legislation, the language of a

province. Hence it is quite evidently in the process of becoming the principal language of communication between diverse cultural communities, in much the same way as English has evolved elsewhere in Canada.[41]

There will be continuing pressure to make the public bureaucracy more representative of the growing diversity of backgrounds of French speakers and of anglophones. The meaning of being Québécois will have to overcome its present ambiguity between descendents of the original French-speaking settlers, French-speaking immigrants, and the emergent French-speaking Québécois produced by language policies. It will also have to incorporate the diminishing English-speaking population. That task will be facilitated by the increasing bilingualism of the English-speaking minority and the probable continuing decline in its numbers. There will remain, however, a continuing tension between the views of some anglophones that Quebec society is a dualist province composed of two Charter populations, and the dominant francophone view of Quebec as a French-speaking province with an anglophone minority. The latter view will probably triumph, although the former will never be entirely crushed, for it is sustained by history and by the English-speaking majorities in Canada and North America.

The present coincidence of a diminished confidence in government and an increasing similarity of values and life styles with the rest of Canada should not be viewed as a permanent correlation. Québécois who view themselves as a nation will experience a recurring sense of disillusionment if language differences with English Canada seem to be unaccompanied by differences in values and cultural expression. When that concern develops, stimulated by the competition of democratic politics, the provincial state will be involved as a key actor, for its status as the prime collective instrument of Quebec society is unlikely to be challenged. The cultural differences it will then stress will be variations within a common modernity which encompasses anglophones, francophones and Americans alike on the North American continent.

Federal Dualism, Language and Multiculturalism

The politically inspired transformation of official definitions of community at the federal level has been no less significant than the provincially inspired changes in Quebec. Nationalism in Quebec, along with the greater ethnic diversity in English Canada, have led to the displacement of the former British definition of Canada, initially by a dualist definition which was quickly supplemented by the addition of a multiculturalism component. The dualist response emerged as federal elites recognized that the English face of the central government, in political and bureaucratic terms, was incompatible with the government's need for legitimacy in the competition with nationalistic provincial governments in Quebec seeking to extend their psychological hold over the

French-speaking population of that province. The federal counter-strategy of the Liberal government — to extend bilingualism in the public service, declare English and French as the official languages of Canada, try to enhance the viability of French-speaking communities outside of Quebec, and increase the saliency of French power in the governing party — transformed the symbolism of the federal government and the definition of Canadians as a people. Central to the federal purpose was the protection of official language minority rights, especially in education, as a constitutional expression of "pan-Canadian nationalism which, at the level of ideology, is the counter to the nationalism of Quebec separatism."[42] The reconstruction of the overall symbolism of the Canadian community displaced the definition, so comfortably held by Canadians of British descent, of Canada as a British country with a francophone minority which had only limited power at the federal level and made only nominal use of its provincial power in Quebec.

For Canadians of neither British nor French descent, the language of "Charter peoples" and "founding peoples" which accompanied federal language policies was seen as demeaning, placing them outside the privileged circle and thus relegated to the status of second-class citizens. The resultant pressure to respond to those of non-British and non-French background partly reflected their increasing numerical significance, from 12 percent of the Canadian population in 1901 to 20 percent in 1941 and 26 percent in 1981. The federal government policy of multiculturalism was the next step in its attempt to devise a broader definition of Canada, capable of encompassing the ethnic communities who demanded recognition in the symbolism of the Canadian state. The angry reaction of these ethnic groups to their apparent exclusion implied by bilingualism, and the federal government's response of multiculturalism, were both stimulated in part by the concurrent global revival of ethnicity in Western societies generally. At the symbolic level, the commitment to multiculturalism was consolidated by Section 27 of the Charter: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This section is "an explicit recognition of the 'mosaic' character of Canada."[43] Waiting in the wings are the "visible minorities" — a phrase unknown a few years ago — whose claims extend beyond the multicultural demands of the "white ethnics" to stress Canada's multiracial character. They are pressing their claims for equality, for enhancement of status, for better treatment, and for affirmative action. The shift of emphasis to race relations, manifested in the creation of a Race Relations Unit within the federal Multiculturalism Directorate in 1982 and the Report of a Special Parliamentary Committee on Visible Minorities in 1984 portend growing pressures to transcend the image of "being a white society [which] is profoundly embedded in the Canadian collective identity."[44]

Any assessment of these federal policies runs up against the difficulty

of determining the appropriate criteria and assessing what would be considered reasonable success in meeting them. The strategy has been to respond to dualism in terms of language and to cultural pluralism in terms of multiculturalism. This obviously required a separation of language and culture. The attempt simultaneously to elevate French and English to privileged and equal status while treating all cultures even-handedly within a bilingual framework was fraught with political difficulties. For example, the "failure to provide multiculturalism with a linguistic base especially displeased the Ukrainians; the loosening of the ties between language and culture angered the francophones who disliked any suggestion that the status of their culture was on a par with that of other ethnic groups."[45] The solution was to accord low status to multiculturalism in contrast to bilingualism, which was the centrepiece of the Liberal government's constitutional strategy from 1968 to the Constitution Act, 1982.

The shortcomings of the overall federal policy are many. Bilingualism in the federal civil service has been costly. Little progress has been made in making French a language of work in the civil service. In many parts of the country services are not available in the minority official language. Western "alienation" in the Trudeau era and the decline of the Liberal Party in western Canada were clearly related to a perception in the four western provinces that bilingualism and its symbolic overtones were based on central-Canadian definitions of the Canadian reality, with little recognition of the very different ethnic and linguistic mix west of the Great Lakes. The multiculturalism policy, of more relevance to the West, was clearly viewed as an inadequate trade-off, however welcome in symbolic terms. Also, federal concentration on the Quebec issue was seen as deflecting attention from the different and pressing concerns of the West. In addition, although judgment may be premature at this stage, the long-run viability of francophone communities outside of Quebec, given powerful assimilationist pressures, is at best problematic outside of the bilingual belt from Ontario to New Brunswick.[46] Increased support for the French language by means of the Charter confronts the socioeconomic environmental inducements to assimilation as francophone communities lose the isolation which historically, shielded them to some degree from a hostile linguistic environment. Furthermore, as recent events in Manitoba and New Brunswick indicate, bilingualism is still capable of generating passionate opposition in some segments of the community. It should also be noted that the sociopolitical premise behind federal policy in the Trudeau era — that should the territorial boundaries of Quebec coincide with linguistic boundaries the breakup of Canada would inexorably follow — is debatable. A rival school of thought asserts the reverse, that strong linguistic fences make good neighbours in the same country.

The federal bilingualism policy has also had unanticipated con-

sequences. Enhanced francophone representation in the federal civil service has come disproportionately from francophones outside Quebec,[47] thus logically reducing somewhat the policy's capacity to link Québécois to the federal government. Also, the surprising success of immersion programs in English Canada promises (or threatens) to produce a pool of bilinguals from English Canada with a greater competitive capacity for bilingual positions in Ottawa than is possessed by native French speakers. This is of particular concern to francophones outside Quebec, who may well experience a diminished ability to compete with the bilingual sons and daughters of middle and upper class English Canadians. Finally, diminished federal government support for minority-language training in the federal civil service may in effect partially disenfranchise English-speaking Canadians who have not become bilingual — clearly the vast majority — from access to the federal bureaucracy, with negative effects on federal government legitimacy in English Canada.

In spite of these problems, the federal bilingualism policy, in all its dimensions, has much to its credit. Clearly by the 1960s the scant recognition accorded the French language in the federal government and more generally in English Canada had become intolerable for Quebecers. The Official Languages Act was a symbolic gesture of profound significance in its clear recognition that French Canadians had a distinctive status and that their existence was central to the meaning of Canada. The national capital, the federal bureaucracy, the national parties, and the overall symbolism of the Canadian state have been transformed in the direction of a greater recognition of dualism.[48] Visible exceptions to the contrary, the Canadian people have moved a long way toward acceptance of Canada as, in a limited sense, bilingual. It is likely that had the federal government and English Canada continued to view the country and the federal government in the manner which prevailed for most of our post-Confederation history up to the 1960s, the 1980 referendum outcome in Quebec would have been different. It is also surely the case that the evolution of Canada to autonomy would eventually have necessitated a definition of the country no longer tied to the Empire or to Britishness. The increasing ethnic heterogeneity which ultimately led to the multiculturalism policy pressed in the same direction.

The change is overwhelmingly impressive purely in terms of the magnitude of officially engineered sociolinguistic change, with its deep symbolism for the self-definition of the Canadian people, and given the short span of time involved — it is only twenty years since the Laurendeau-Dunton Commission was established and fifteen years since the Official Languages Policy of 1969. Before World War II, as Hugh Thorburn observes, the Canadian community was "composed of the dominant British element, the quiescent French-Canadian one and an even less assertive immigrant community. (The adjectives 'ethnic' and 'new

Canadian' were not yet in use.)"[49] English-speaking Canada has had to adapt to its loss of control of the symbols of statehood, which was based on a no-longer-acceptable equation between being an English Canadian and being Canadian. Within English-speaking Canada those of British background have also had to adjust to the increasing ethnic heterogeneity of the English language community and the symbolic recognition of multiculturalism which flows from it. Within Quebec, the language policies of successive Quebec governments have contributed to an equally profound and basic transformation of the relative power and status of the French and English languages in Quebec, manifest in the changed language use in the Quebec economy, the effective takeover of the provincial state by the French-speaking majority, and the understanding that a new linguistic political community has emerged in Quebec. In both Quebec and Canada, the modification of language regimes and the resultant reshaping of community reveal the ability of democratic governments under committed leadership to readjust state-society relations in response to new requirements.

Aboriginal Peoples, Self Government and the Canadian Community

At the end of World War II, status Indians lacked the vote, had negligible political power, mainly lived on reservations, and were still viewed by some as a disappearing "race." Non-status Indians were poor, politically weak, devoid of any special rights, and lacked the focussed concern of a specific agency of government comparable to the Indian Affairs Branch of the federal government. Neither status nor non-status Indians posed significant issues of public or governmental concern.

Forty years later, the situation has been transformed. Aboriginal issues are highly visible and aboriginal groups are organized and extensively funded. Growing proportions of status Indians now live off reserves, often in depressed conditions in major metropolitan centres. Non-status Indians and the Métis are making demands on the governments and people of Canada. The interaction of aboriginal issues and women's issues has made the situation of Indian women who lost their Indian status when they married non-Indians a complex ethical and practical policy concern to which the federal government has recently responded. In northern Canada, aboriginals are numerically significant and "provinces" may be created in which they would be a majority. In the "south," political and/or constitutional changes designed to enhance self-government capabilities for reserve-based status Indians could produce major jurisdictional complications in the working of Canadian federalism. Aboriginal issues, therefore, are now a matter of major concern to Canadians.

What we have earlier described as the "self-consciousness explosion"

extends with particular cogency to the aboriginal peoples of Canada. Aboriginals do not base their claims on a multiculturalism ideology which treats all cultures equally. Their claims, like those of French Canadians, derive from history and are based on their pre-eminent status as founding groups who had lived in North America for thousands of years before the Europeans arrived.

An understanding of aboriginal issues requires a clear appreciation of the constitutional, legal and policy significance of the distinctions between treaty and non-treaty Indians, status and non-status Indians, and Métis, as well as on-reserve versus off-reserve location.[50] These distinctions determine which government has jurisdiction — status Indians are subject to the federal Indian Act based on federal authority under 91(24), "Indians and Lands reserved for the Indians," whereas other aboriginals (excluding Inuit) are basically subject to the normal division of powers between federal and provincial governments. These distinctions also affect the utility of policy instruments — for example, self-government normally presupposes a territorial base and thus, although it has been the most prominent item on the aboriginal agenda in recent years, it has limited application to the 75–80 percent of aboriginals who lack a land base. Along with other factors, these distinctions and divisions work against aboriginal political unity and weaken aboriginal political power.

Aboriginal policy, most clearly revealed in the history of status Indians, has been a tortured essay in the difficulties of finding a recipe and status for Indians which would simultaneously do justice to their distinctiveness and incorporate them in an acceptable manner into the larger Canadian community. From this perspective, policy towards aboriginals can be usefully viewed through the lens of citizenship.

For most of the post-Confederation period, status Indians lacked the vote and were frequently described as wards of the Crown. Although there were procedures for individuals, and on occasion even for bands, to relinquish their Indian status and related benefits in order to acquire the full rights of citizens — a process called enfranchisement — few Indians took advantage of it. For an Indian woman, however, enfranchisement was an automatic consequence of marriage to a non-Indian man. The enfranchisement policy was based on the assumption that Indians were in a state of dependency which conflicted with the possession of full citizenship rights implied in the franchise. The latter had to be earned.

This policy was repudiated by the Conservative government of John Diefenbaker which, in 1960, extended the federal franchise to all status Indians while leaving their Indian status intact. This overthrew a tenacious and enduring assumption that status Indians did not constitute an integral part of the Canadian community and were outside the conventional boundaries of citizenship.

The 1960 extension of the federal franchise, which was opposed by many Indians, was an attempt to reconcile citizenship as a universal attribute, with a continuing distinctiveness of Indian status and treatment based on history, the Constitution, and the existence of a traditional branch of government with an ethnic clientele. It brought Indians into the political community as full participants on an individual basis.[51]

The subsequent history of thought and policy up to the more recent emphasis on self-government includes the attempt of the Hawthorn Report in the mid-1960s to define and advocate a "citizens plus" status for Indians[52] and the Trudeau government's 1969 white paper on Indian policy, which in effect proposed to terminate all special rights of Indians.[53] These can be viewed as competing analytical and normative frameworks for grappling with the complexities of the degree of coexistence possible between Indian rights and status and Canadian citizenship.

The most important recent policy issue which raises citizenship questions is the aboriginal claim of self-government as a right. The rapid escalation of aboriginal demands for self-government is driven by the imperative that a people can preserve its collective integrity only by the possession of an autonomous political system. The dramatic and rapid emergence of the rhetoric of self-determination, of the self-description of aboriginal peoples as nations, of the political systems they wish to construct as states, and of the status they wish to achieve as sovereignty are based on the underlying premise that government in the modern world is too important to be in the hands of outsiders.

The issue of aboriginal self-government is the focus of the paper by Roger Gibbins and J. Rick Ponting published in the accompanying volume 34.[54] We wish to underline the conclusion of that paper, that there is a clear conflict between certain versions of the aboriginal claim for self-government and the basic status of citizenship as a bundle of rights and obligations held by all Canadians. This conflict, in turn, reflects the potential tension between collective aboriginal rights and individual rights.[55] For example, will or should individual rights as enshrined in the Charter of Rights and Freedoms be available to a member of a self-governing aboriginal community who wishes to challenge the collective decision of such a community. To Gibbins and Ponting the answer is clearly yes. That answer is not always given by aboriginal organizations, which "prefer internal codes, tribunals and commissions rather than the external protection provided by the Canadian judicial system and the new Charter of Rights and Freedoms."

In our earlier discussion of the welfare state, we noted the halting, imperfect manner in which the political process contributed to the political education of the citizenry in the normative and practical questions involved in the state welfare role. A similar criticism can be made of the public discussions and much of the literature addressed to the self-

government issue. It is not simply an academic penchant for clarity that lies behind our concern, but a basic belief that poorly conceived policies are costly for the future generations that have to live with them. Equally, we suggest that in the contemporary era, which requires a subtle and comprehensive sense of citizenship, obfuscation and failure to face hard issues are luxuries we can no longer tolerate.

Rights Consciousness and Constitutional Change

Government has a more powerful presence in our day-to-day life than at any earlier time in Canadian history. Individuals and groups turn to governments with increasing frequency for the satisfaction of an ever-expanding array of wants and desires. In recent decades there has been a noticeable trend for these demands to be expressed in the language of citizen rights.

The worldwide concern with human rights since 1945 owes much of its existence to the efforts of the United Nations and its agencies. The 1948 Universal Declaration of Human Rights set the stage for a postwar politics premised on the obligation of governments to guarantee and enforce an unprecedentedly wide range of citizen rights. As Cynthia Williams notes in her essay in this volume, pronouncements, declarations and conventions of the United Nations have further elaborated and expanded notions of both individual and collective citizens' rights and have contributed to the pace and direction of domestic public policy in many Western countries. The International Year of Women declared by the United Nations in 1975 precipitated an intensive review of the status of women in Canada and a flurry of government policies to enhance the equality of women. It also provided a focal point for the activities of women's groups and served to activate and reinforce a consciousness of "women's rights" in the broader public. The same is true of the more recent United Nations years of the handicapped and of youth, among others.

The United Nations initiative on human rights in the 1948 Universal Declaration reflected the world's abhorrence at human rights violations in Nazi Germany during the 1930s and 1940s and the oppression of colonized peoples around the world. But as longtime human rights advocate John Humphrey has noted, the concern with protecting human rights survived well beyond these immediate and arresting postwar concerns, to address such issues as the right to collective bargaining, the equality of women, equal pay for work of equal value, and an end to all forms of discrimination.[56]

United Nations conferences and meetings have focussed international attention on the human rights claims of various groups. The third United Nations Conference on Women, held in the summer of 1985 to commemorate the tenth anniversary of the United Nations International Year of Women, was one such occasion.[57] Three thousand delegates represent-

ing 159 countries attended the official conference, while another 12,000 representatives of non-governmental organizations conducted a more informal "Alternative Forum '85." The events, stretching over a three-week period, were covered by 1,500 media representatives.[58]

In such ways, the human rights concerns of the United Nations have been relevant to domestic circumstances in developed as well as less developed countries. The international jurisprudence on alleged violations of UN guarantees argued before the International Court of Justice has also on occasion had a profound effect on domestic national governments.

The American civil rights movements in the 1960s and its spin-off social movements also had a powerful demonstration effect throughout the Western world and especially in Canada. The unprecedented interventions by the U.S. government in matters of school integration, educational opportunities, affirmative action programs, and through a host of social policies, seemed to show how successful governments could be in changing attitudes and advancing equality. The manifold impact of international human rights initiatives on Canadian expressions of rights consciousness was reflected in Canadian preoccupations and realities.

The increased interaction of citizen groups and governments has been discussed in the context of the newly politicized self-consciousness of individuals and the politicization of an increasingly broad array of human activities and identities. Drawing on the rhetoric of human rights, citizen groups have sought to employ the state for their own advancement. Turning to government for the protection and enhancement of an ever-expanding array of interests, groups have refined a popularized language of citizen rights which demands active government intervention and state-directed social engineering as the means of securing the promises of human rights.

Groups have enjoyed considerable success in expanding discussions of human rights and in securing positive government responses through a wide range of public policies as well as through the legal and constitutional validation of various rights claims. The success of one group spreads quickly to another. This is perhaps nowhere clearer than in recent equality claims and demands for programs to achieve a government-directed redistribution of opportunity. As political scientist Jill McCalla Vickers has argued, equality aspirations are contagious.

> We know from historical evidence that women in the nineteenth century in the United States came to a consciousness of their inequality by applying the analysis of slavery and racial inequality to their own situation. A similar process gave shape to the contemporary women's movement in North America when affirmative action legislation aimed at blacks was seized on as a tool for achieving more equality for women.
>
> . . . Nor has the contagion been limited to the level of analysis and ideology. Modes of organizing and instruments of correction also spread from group to group. Hence, individual competence tests which will certainly emerge to ascertain whether individual retirees should or should not

> continue to enjoy the right to work where mandatory retirement provisions are declared discriminatory may well also be transferred to the context of deciding when individual young people may gain the right to be treated as adult persons rather than as members of a "protected" group with very limited equality rights. Similarly, affirmative action mechanisms are already being transferred from the context of women's aspirations for equality to the context of the handicapped.[59]

As Vickers confirms, the language of rights is an expansive language, easily molded to the aspirations and demands of a broad range of interests. In addition, the language of rights is a powerful political resource, as claims garbed in the language of citizen rights have an aura of moral righteousness that is disruptive to normal processes of political discussion.[60]

Governments in Canada have also contributed to the recent popularizing of a language of citizen rights, viewing rights as a powerful tool for shaping society. State elites have their own agenda, derived from their visions of desirable futures. The recognition of citizen rights has been a means of achieving these visions. Prime Minister John Diefenbaker believed the 1960 Bill of Rights could symbolically affirm his vision of "One Canada," educating all Canadians to the pan-Canadian rights of citizenship. The 1960 Bill of Rights emphasized racial and ethnic equality, matters on which the prairie Prime Minister of German descent had strong views. He believed the possession of citizen rights could be a cornerstone of Canadian citizenship and would underpin a strong sense of national unity.

The political objectives of the Trudeau governments from 1968 to 1984 in promoting the constitutional entrenchment of citizen rights are discussed in the study by Rainer Knopff and F.L. Morton in this volume.[61] The federal/provincial controversy leading up to the Charter of Rights and Freedoms in 1982 illustrated the high stakes involved for the governments of Canadian federalism. While the federal government hoped to strengthen a pan-Canadian identity and secure a non-territorial, pan-Canadian bilingualism, the Quebec government believed that its own provincial Charter of Rights had established an effective code of human rights guarantees. The debate over which rights would be guaranteed often veiled a more fundamental point at issue: which level of government would benefit most from a national Charter of Rights? In the end, the Charter reflected the difficulty of resolving this issue. The restrictions of mobility rights and the inclusion of a general override provision respecting fundamental, legal and democratic rights were the cost of securing sufficient provincial support for the project as a whole to succeed. Special provision was also made respecting the application of language rights in Quebec.

Whether in response to pressures from the international arena and citizen demands or in pursuit of government objectives, the recognition of citizen rights through legislation has had an increasingly significant

effect on the self-definitions of communities in Canada. As we argued earlier, for better or for worse, every recognition of a right carries with it an altered sense of community and of what membership in the community entails.[62]

Legal frameworks live in a symbiotic relationship with society. They are not immutable simply because they are legislated. Viscount Sankey's characterization of the Canadian constitution as a "living tree"[63] is as true of the Canadian constitution in 1985 as it was in 1930. J.R. Mallory's paper in this collection explores the substance of the living Canadian constitution by examining the evolution of some of our traditional governmental institutions, including Cabinet, the Crown, the Prime Minister, and the traditions of responsible parliamentary government.

At least as powerful as its capacity to adapt to changing circumstances, however, is the stability and continuity which a constitutional framework provides by establishing parameters within which orderly change can occur in a political community. Constitutions articulate the rules and procedures for the conduct of government and the terms and conditions on which a people agree to live with one another in a political community. In this sense, a major change in the constitutional framework, such as was introduced in Canada in 1982, can be expected to have an equally profound change on the nature and meaning of membership in the national community.

The implementation of the Charter signals a profound change in the Canadian constitutional system of government, in our political culture, and in citizen-state relations. The long-run consequences of the Charter as a third pillar of Canadian constitutionalism, taking its place alongside parliamentary government and federalism, are not predictable in detail. However, expectations are high among potential "users" that the Charter will have a profound and positive effect on the status, legitimacy and goals of particular sets of interests. Women's groups, for example, have recently organized an umbrella association to assist in education and litigation of Charter issues that will advance the equality of women.[64]

The Charter's effect will not be limited to the interests of particular groups who use it for their own purposes. As the third pillar of constitutional government in Canada, the Charter will have a transforming effect on the general conduct of politics and indeed on the very nature of consensus and understanding that underpin constitutional government in Canada.

In the limited space at our disposal in this introductory overview, we will not undertake a detailed analysis of the historical evolution of the theory and practice of citizenship rights in Canada. Instead, we propose a selective look at basic trends in the protection of fundamental citizen rights to single out features of the changing system of Canadian constitutional government that appear to have special relevance to our focus on citizenship and community.

To the Fathers of Confederation, comfortable with their received British political tradition and wanting to differentiate themselves from their neighbours to the south, the idea of an entrenched Charter of Rights, like the related concept of popular democracy, had negligible appeal. The principle of parliamentary supremacy presupposed that political executives and legislators could and should be trusted, that a constitutional monarchy in which freedom resided in tradition, the common law and practice which had produced the rights of British subjects, was preferable to the American arrangement in which rights resided in the people. Furthermore, the Canadian Fathers were not creating a new polity based on a revolutionary repudiation of past traditions or of the mother country. With the unavoidable exception of federalism, the principal characteristic of the political rearrangement of the British North American colonies in 1867 was continuity. Canada, as the preamble to the British North America Act stated, was to have a constitution "similar in principle" to that of the United Kingdom. Confederation was the handiwork of practical politicians with limited predilections for theorizing about the rights of citizens. Moreover, the new central government was given immense nation-building responsibilities for which constitutionally entrenched rights could only have been perceived as an unnecessary restraint on executive leadership.

The limited nature of citizen rights explicitly guaranteed in the 1867 constitution were responses to circumstances specific to British North America and thus were not subsumed in the traditional "rights of Englishmen" implicit in the new constitution. The Fathers of Confederation guaranteed the continuation of certain minority denominational education rights existing in Canada at the time of Confederation (Section 93) and guaranteed (in Section 133) the continuation of English and French in the Parliament of Canada and the Legislative Assembly of Quebec.[65] Section 121, the precursor of modern notions of protecting rights in the economic union, guaranteed that no tariffs would be levied on the movement of goods across provincial borders. Democratic rights to vote in regular free elections were not explicitly guaranteed, although they were clearly understood to be a part of both the English and the British North American practice of government. Provisions were included guaranteeing the powers of the popularly elected House of Commons and the principles of representation, as well as the five-year maximum life of any Parliament. But again, these guarantees were not expressed as the rights of individual citizens, as would have been the case if Confederation had taken place a century later — or in the United States a century before. Instead, they were a code of guarantees that could be deduced from the limitations placed on the supremacy of parliaments.

The Fathers of Confederation did not view the individual citizen as the source of political legitimacy. The dominant principle guiding the work of the constitution makers in 1867 was responsible government under a

constitutional monarchy, modified in the Canadian case to accommodate a system of federal government. Their approach did not imply an indifference to rights, but rather the assumption that their evolution and protection required no special institutional arrangement or guarantees outside the British tradition.[66]

The 1867 arrangement for protecting the rights of citizens appears to have been generally accepted in the post-Confederation period. A constitutionally guaranteed code of rights did not have wide appeal or public support until the mid-twentieth century. Although there were scattered precursors such as the social-democratic CCF in the 1930s, the erosion of support for parliamentary supremacy and advocacy of entrenched citizen rights can be dated from World War II. In the postwar period, the perception of what a right is, which rights should be protected or fostered and how, changed significantly as public opinion, organized group effort, changing intellectual currents, and the developing purposes of governments all converged to produce a radically new political environment.[67] As Cynthia Williams outlines in her paper in this collection, a steady if discontinuous evolution in public opinion and elite responses since World War II has caused support for the entrenchment of rights to grow, culminating in the Charter of Rights and Freedoms in 1982.

The differences between the 1960 Bill of Rights and the 1982 Charter reveal the time-bound character of rights-consciousness. The 1960 Bill of Rights was primarily concerned with individual legal rights, the growth of the administrative state, and violations of the rule of law. It did not address social rights; paid no special attention to language rights, aboriginals, or multiculturalism (the word was not in common usage at the time); and lacked the equivalent of Section 15(2) of the Charter, which invites affirmative action on behalf of disadvantaged groups. In addition, it was not entrenched and did not apply to the provinces. The inadequacies of the Canadian Bill of Rights, due partly to judicial philosophies hostile to an activist role for courts and partly to the increasing sense that its clauses could not end discrimination even if they were given full effect, became relevant fodder for the next stage of discussion. On the one hand, the 1960 Bill of Rights further accustomed Canadians to a language of rights and the idea of a constitutional document for their protection. On the other hand, the shortcomings of the Bill of Rights contributed to efforts to replace it by a stronger, more comprehensive document.

A major change since the 1960 debate on the Diefenbaker Bill of Rights related to support for entrenchment. Although under some pressure from the CCF and others to entrench the civil liberties guarantees in the 1960 Bill, the Diefenbaker government was unwilling to wait for the unlikely agreement of the provinces to the project and, believing entrenchment only at the federal level had no effective meaning, therefore proceeded with simple legislation.

Several developments in the 1960s and 1970s contributed to changed thinking about entrenchment. The demonstrated weaknesses of the 1960 Bill of Rights, and the general unwillingness of the courts to approach it as other than a piece of simple legislation, led many to the view that constitutional entrenchment was necessary if a Canadian Bill of Rights was to be an effective check on parliamentary supremacy. Discussions on constitutional reform that began in 1967 in response to emerging Quebec nationalism also focussed attention on the inclusion of individual language rights guarantees in the Canadian constitution. The federal government began to view a constitutional charter or bill of rights as the centrepiece of a federal strategy to counter powerful centrifugal forces in Canadian federalism.

The constitutional recognition of citizen rights in the 1982 Charter demonstrated the interplay and convergence of government efforts to shape conceptions of political community in Canada, and the demands and pressures exerted by mobilized, organized citizens able to adapt notions of fundamental citizen rights to the particular interests they represented. The federal government found a welcome and powerful ally in the citizen groups appearing before the Joint Committee on the Constitution in 1980–81.

Ottawa's skillful cultivation of a broadly based public civil rights constituency during the hearings of the Special Joint Committee on the Constitution in 1980–81, described in detail in the paper in this volume by Rainer Knopff and F.L. Morton, finally secured the entrenchment project. Though by no means unanimous, there was widespread support for an entrenched Charter of Rights and Freedoms by the early 1980s and for the view that entrenchment was a useful and appropriate constraint on parliamentary majorities.

Premier Sterling Lyon of Manitoba was the strongest opponent of entrenchment, on the grounds of its general interference with parliamentary supremacy, although the 1978 constitutional position of the British Columbia government had also strongly supported parliamentary supremacy. Other premiers objected to entrenchment of specific subjects, most notably Quebec Premier René Levesque's strong opposition to minority language education rights — as part of his general opposition to a Charter binding on the provinces. In the House of Commons, the overwhelming majority of MPs, including leaders of opposition parties, favoured entrenchment.

Some of the premiers argued that entrenchment would hinder each government's ability to pursue legislation *on behalf* of minority interest, but such objections were met through special "notwithstanding" provisions of the Charter, such as the general override power (Section 33), the affirmative action clause respecting equality rights (Section 15(2)), and the limited power to override mobility rights guarantees (Section 6(4)).

In terms of constitutional principles, the general override provision

(Section 33) was a concession to both parliamentary government and federalism. It permits governments to pass laws over matters within its jurisdiction that are inconsistent with the Charter's guarantees of legal, democratic and fundamental rights when those governments believe such actions are warranted in their community. Limiting such overrides to a five-year period, however, ensures that the Charter provisions are the "normal" state of affairs. The burden of justifying departures from the Charter provisions is placed squarely on the shoulders of those who would so legislate, subject to the mechanisms of parliamentary approval.[68]

As with most examples of social change, it is easy to overstate the extent of institutional innovation heralded by arrival of the Charter of Rights and Freedoms. Federalism and parliamentary government, and the traditions of citizenship they have imparted, remain the primary historical referents for Canadians; these two principles have underlaid the institutional basis of the Canadian constitutional order for over a century, during which time the very conception of Canadian citizenship emerged. But these traditional notions no longer enjoy a monopoly. They must now jostle with notions of citizenship expressed in the guarantees of the Charter. The citizen has a new status as a bearer of rights. Government activities must be consistent with Charter guarantees. Parliamentary supremacy has been curtailed.

The Charter has changed the constitutional status of citizen rights. In the past the dominant view was that legislative powers in Canada were exhaustively distributed between the two levels of government and that within their respective spheres of legislative competence, the federal and provincial legislatures were supreme. By the late 1950s, through a number of *causes célèbres*, the Supreme Court of Canada had taken the view that provincial legislatures had very circumscribed powers to legislate respecting civil liberties. Only a few judges suggested, however, that some rights and freedoms were beyond the authority of the federal government by virtue of the preamble to the 1867 Constitution Act.[69]

This constitutional arrangement has changed with the Charter. With it has changed the constitutional status of the Canadian citizen, who no longer need rely on the consent of one of the two levels of government for the protection or guarantee of fundamental rights and freedoms. On the contrary, through successful appeals to the Charter of Rights, citizens will be able to make authoritative claims against certain government actions previously under the legislative jurisdiction of that level of government. The Charter is now part of the fundamental law of the land[70] and Section 1 states unequivocally that the Charter is not subject to simple parliamentary override but only to limitations that are "demonstrably justified in a free and democratic society."

The Charter has thus given Canadian courts an enhanced role in the constitutional order. Important as federalism remains, many issues of

civil and human rights which were formerly decided by the courts on the basis of spheres of federal or provincial legislative competence will henceforth be decided on the basis of the Charter of Rights and Freedoms. Speaking recently to the Canadian Bar Association, Chief Justice Brian Dickson spoke of the Court's response to its new role:

> Canadian courts, including the Supreme Court of Canada, have accepted the new responsibility which has been thrust upon them by the Parliamentarians. They recognize the vital role they will play in determining the kind of society Canada is and will become under the *Charter*. . . . At the same time the judiciary have assumed a greater prominence in determining how the fabric of Canadian society is to be woven and cut.[71]

It is too early to tell how openly the courts will embrace an activist policy role through their new responsibilities as guardian of the constitutional rights of citizens, although it is already clear that the Charter will not suffer the same fate as the Canadian Bill of Rights in the hands of the judiciary. Undoubtedly, the role the courts define for themselves under the Charter will have a long-term effect on the eagerness with which others will seek authoritative court decisions. Would-be reformers may find that the Charter is more effectively used as a reference in discussion and negotiation with other political actors than it is as positive law in the hands of the judiciary. In either case, however, as the experience of the first three years has amply demonstrated, the Charter now figures prominently in discussions of Canada's constitutional order.

Citizens now will participate directly in shaping the constitutional order, using the Charter of Rights and Freedoms as a springboard for advancing various claims on government. The opportunity to use the Charter as a way of placing issues on the political agenda was apparent to many groups during the discussions and negotiations leading up to its final approval. Sandra Burt, in her paper in volume 34 of the Commission series, discusses the organization of women's groups around the issue of constitutional reform, as they realized the opportunities to advance discussion of women's rights in the context of constitutional equality guarantees.[72] Similarly, the fact that women have organized the Legal Education and Action Fund, to ensure that women use the Charter to achieve equality and other rights, suggests that the interest group activity first organized around the content of the Charter will continue to influence its interpretation and impact.

As was clear from the range of groups appearing before the Joint Committee on the Constitution, the Charter has given a new prominence to certain interests and cleavages in Canadian society. In the process, it altered the balance of competing citizen identities. Knopff and Morton, in their study in this volume, discuss in considerable detail the political purposes of the Charter's contribution to redefining the Canadian identity in pan-Canadian terms. The Charter was an integral part of federal

government efforts in the late 1970s to stem the forces of centrifugalism that were popularly perceived as threatening Canadian national unity. The language rights and personal mobility rights in the Charter were only the most obvious efforts to arrest the forces of balkanization by directly challenging some provincial programs and policies already in place. More subtle in effect is the Charter's appeal to non-territorial identities of citizens — race, ethnicity, gender, age, and others. The Charter draws attention to identities and cleavages in Canada that cut across regionalism and may in the long run generate pan-Canadian identities and a more nationally-based political discourse.

The emergence of strong political identities based on ethnicity, race, gender and age in turn generates pressure on political elites to ensure that these identities are appropriately represented in the institutions of government. Recent efforts by federal and provincial governments to increase the visibility of women and ethnic minorities by appointments to high profile positions are evidence of the governmental response. The Supreme Court of Canada will be prone to these same pressures. As the Charter of Rights and Freedoms attaches new legitimacy to various citizen identities, there will be mounting pressure for the Court to become more socially and politically representative.[73] Justices may become increasingly conscious of their special responsibility to particular subgroups in society which they may be taken to "represent." For example, in reflecting on whether to accept an appointment to the Supreme Court of Canada, Madame Justice Bertha Wilson has said; "I knew if I were asked there wasn't a choice — too many women were counting on me."[74]

The belief that a national code of rights guarantees would aid in the consolidation of pan-Canadian identities underlay the federal government's strategy of nation-building through the Charter. In the end, the necessities of political negotiation with the provinces resulted in a number of provisions that moderated this pan-Canadian thrust. The general override clause, permitting all legislatures to pass laws that could conflict with the fundamental legal or equality guarantees, has already been invoked on a blanket basis by the Government of Quebec. As a consequence, in that province discussions of these rights have focussed on provisions of provincial legislation, reinforcing the symbolic presence of the province as guarantor of fundamental rights and freedoms — contrary to the objectives of the federal government through the national Charter of Rights and Freedoms. Similarly, the special provision exempting Quebec from the minority-language education rights guarantees of Section 23(1)(a) until acceded to by the Quebec legislative assembly or government demonstrates to Canadians that at least until such consent is granted, these language rights remain under provincial jurisdiction in that province. Other provisions moderating the nationalizing thrust of the Charter were agreed to by the federal govern-

ment as a cost of securing approval for the project as a whole. They are discussed at length in the paper by Knopff and Morton, who nonetheless conclude that the Charter may have a profoundly nationalizing effect on the Canadian political community.

What these developments illustrate is that a constitution does not just establish the machinery and instruments of government. It also embodies and reflects the values and beliefs of a political community, and the terms and conditions on which its members have agreed to live with one another and in relation to the state. While constitutions must adapt to evolving circumstances over time if they are to survive, the notion of a "living constitution" at best tells only half a story. Over time, constitutions shape and mold a people as much as they are shaped and molded by one. Constitutions embody the highest principles and ideals of a political community, linking the past with the present and future, breathing life into and giving form to the very conception of citizenship.

Under the 1867 Constitution Act, Canadians were to be a parliamentary and a federal people, under the Crown of the United Kingdom. The "rights of the Englishman" were part of the British heritage of Canadians. In the journey "from colony to nation" citizen rights were subject to the division of powers and to the self-restraint of cabinets and legislative majorities. This arrangement changed in 1982, when the twinned principles of Canadian constitutional government were made a triumvirate — parliamentary government, federalism and the Charter of Rights and Freedoms. In the process the very basis for determining Canadian citizenship has been changed. Several of the papers in this collection speculate on the implications of the evolution of a chartered people, as we have here portrayed this process, from its effect on the future nature of federalism and parliamentary government, to the identity and self-consciousness as political actors it will instill in Canadian citizens, both individually and in groups, and on the changes in citizen-state relations it portends.

Conclusion: Citizens and Government

This overview and the nine chapters in the two volumes it introduces portray a complex dialectic between state and society. In attempting to understand the contemporary context of their shifting encounters, we have admittedly taken a one-sided view of both state and society. Neither the international role of the modern state in Canada, nor its role in economic management receive more than passing attention. Our neglect of the former reflects in part the internal division of research labour within this Royal Commission, as well as the need to keep our own agenda administratively and intellectually manageable. While the same justification applies equally to our neglect of the economic role of the state, our singling out of the social management role is also designed to

counter the bias which, since the Depression of the 1930s, has overstressed the state's role in the economy to the neglect of analysis of its other responsibilities.

The social role of the modern Canadian state emerges from our studies as variegated, complex and growing. Raymond Breton's study also reminds us that the state has a specific responsibility to manage the symbolic order, and that individuals and groups seek not only highways, grants and tax reductions from the state, but also recognition, status, and honour. Indeed, every increase in the role of the state generates demands for more finely tuned structures and practices of representation, of both a broadly symbolic and narrowly functional nature.

Both state and society have been transformed by the extent and intimacy of their contemporary interdependence. As the state's relations with society proliferate, its own internal structure becomes increasingly honeycombed with multiple discrete centres of bureaucratic power and discretion. Those charged with the task of providing coherent political leadership struggle against internal divisions in the state. Cohesion and coherence within government are always partial and limited in duration, and require constant renewal.

Society, little of which escapes the purview of the contemporary state, is itself fragmented by the proliferating systems of classification involved in the state's policy linkages with the citizenry. The role of the modern state, and in particular its key position as the major catalytic agent of social transformation, politicizes the group basis and cleavages of society and engenders an increasing resort to political action as competing groups play the political market in pursuit of their self-interest. The result is a mushrooming pluralism of specific demands, feeding on and stimulating the multiple, self-conscious identities described earlier in this overview, and seeking advantage from the state. Centrifugal tendencies in state and society become mutually reinforcing at the expense of more holistic conceptions of community and citizenship.

Elsewhere one of the authors has argued:

> We approach the state through a multiplicity of classificatory systems derived from state policies, state agencies, and the discretion of administrators which define us by gender, age, ethnicity, region, producer or consumer status, and whether we are French-speaking or English-speaking. We are politicized and fragmented simultaneously. Some of our traits are privileged; others are ignored. We approach the state as fragmented selves, calculating the advantages of stressing our ethnicity, our age, our gender, our region, our language, our sexual preferences, our doctorates or our disabilities. . . . In political terms we come to exist as a multiplicity of those discrete selves which the state has singled out for attention. We act as managers of our shifting selves in the same way as business adjusts to changes in tax laws and regulations. We are like Kremlinologists constantly looking for clues. The flexible, multiple identities fostered by our interac-

> tions with the state work against our civic sense of wholeness . . . the politicization of multiple cleavages, in conjunction with the extensive social differentiation characteristic of modern society, erodes our identity as citizens concerned with the whole. . . . The fragmentation of society simultaneously generates an urgent need for political leadership and social cohesion, and works against their appearance. Our political selves get in the way of our civic selves.[75]

The paradox of the contemporary situation is that we require a fuller, richer and yet more subtle understanding and practice of citizenship than existing citizen-state relations encourage. That richer citizenship is required because what the state needs from the citizenry cannot be secured by coercion, but only by cooperation and self-restraint in the exercise of private power. The general situation is well described by William A. Robson:

> Industrialism integrates the community. It makes all its members dependent on one another and the different sectors of the economy interdependent. The government and the people are also brought closer together. When an industrialised nation becomes a welfare state the need for a strong sense of individual, group and institutional responsibility and the need for social discipline become far greater because irresponsibility and indiscipline cause disruption, fear and suffering of many different kinds.[76]

The pressure of international competition and the recession have led to significant increases in the use of consultative forums. These involve various combinations of labour, management and government who are brought together to share information and contribute to the solution of major economic problems.[77] These arrangements, which have recently multiplied, are practical attempts to broaden the meaning and operational significance of citizenship. More sustained attempts to mute the antagonisms of capital and labour by systems of social corporatism involving unions, business and the state have been widely employed in Europe, with mixed results.[78] All of these efforts testify to the almost universal assumption that the relations between capital and labour and between both of them and the state are not matters of indifference to the national (or provincial) community in an increasingly competitive world. Concerns related to health, the environment, and other policy areas also require positive citizen input if optimum policy results are to be achieved.

The practice of a participant citizenship imbued with community concerns is not easy in contemporary mass democracies characterised by big government. Part of the difficulty is that the very language of citizenship seems out of place and faintly embarrassing to modern sophisticates. Citizenship has not been treated with sufficient seriousness by scholars or practitioners. Obscure clauses in the British North America Act, now termed the Constitution Act, 1867, have received more scholarly attention.

As Janowitz justly observes, "Citizenship is a complex term with various meanings. Its past political success does not imply that its currency has rested on clarity or unity of perception on the part of the electorate, political leaders, or intellectuals."[79]

The almost unfathomable complexity of the operations of the modern state inhibits understanding and identification with state purposes supportive of attitudes of civic responsibility.[80] More generally, as Michael Sandel writes of the contemporary United States but with almost equal relevance to Canada, "Except for extraordinary movements, such as war, the nation proved too vast a scale across which to cultivate the shared self-understanding necessary to community in the formative, or constitutive sense."[81]

The multiplicity of our contacts with the state, their great complexity and their practical significance for us as we pursue our objectives have negative effects on the quality and nature of our citizenship. A common reaction is a widespread spirit of calculation as we act as entrepreneurs on our own behalf. In this task we are aided by an army of intermediaries who advise us on how to maximise the benefits from our interactions with the state.

To several observers the problem of citizenship is defined as an imbalance between rights and duties, with the former far more highly developed and embedded in the psyche of the contemporary citizen than the latter.[82] Impressionistically, at least, there has been a dramatic assimilation of the language of rights by the citizenry, a trend which the 1982 Charter can only strengthen, but which has not been accompanied by an equivalent assimilation of a rhetoric of duty, responsibility or obligation. While it is not easy to translate an imbalance of rhetoric into an empirically based statement that this may have generated a similar imbalance in behaviour, it seems prudent to assume that over time there will be a relation. The dramatic growth of the underground economy, recently estimated to be in the range of 10 to 15 percent of GNP in Canada and growing,[83] clearly reveals a disenchantment with the state and a willingness to evade some of its compulsions.

The imbalance between rights and duties is fed by the politics of democracy, which stresses the benefits of policies and minimizes their costs. The desire to make taxes as painless and invisible as possible, of which income tax at source is the classic example, leads in the same direction. Not only is this bias productive of a magnified state sector, but it contributes to a distorted and thin conception of citizenship. It fosters an exploitative attitude toward the state which is destructive of civic conscience and in the long run threatens the integrity of the citizen base of constitutional government.

The difficulty confronting contemporary citizenship is intellectual as well as moral. Or to put it differently, what looks like a moral failure is partly an intellectual failure. The widespread intellectual disarray over

the role of the state inevitably generates confusion about the role of citizens. We lack even the rudiments of a political theory which puts in context the citizen's role in the coexisting arrangements of a market economy, a democratic system of pluralist politics, and big interventionist governments. In the absence of such a theory diffused and understood throughout society, the most likely recourse of the citizen actors at the base of the polity is to apply the market canon of self interest to the overall citizen role. This response is facilitated by the fact that so few of our relations with the state involve simple clear-cut issues where we are addressed in our general capacity as citizens and right and wrong can be clearly perceived.

It would be comforting to conclude this overview with a clear response to the dilemmas confronting contemporary citizenship in Canada and other democratic capitalist societies. We have opted instead for an exploration of the issue, for an attempt to underline its importance and an implicit request that more thought and attention be directed to it. The issue is posed and one answer given in the paper in this volume by Charles Taylor. He defines the issue clearly:

> The society has "legitimacy" when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. It undergoes loss of legitimacy when this willingness flags or fails . . . legitimacy increases in importance, the more weighty the disciplines and burdens that must be voluntarily assumed . . . in contemporary industrial democracies, the everyday operations must call on an ever-present fund of positive identification.

Or, in the language of Suzanne Berger, whose remarks are no less applicable to Canada: "The critical issue for Western Europe today is the capacity of the principal agencies of political life — party, interest group, bureaucracy, legislature — to manage the problems of society and economy, and, beyond coping, to redefine and rediscover common purposes."[84] To that list of principal agencies we would add citizens.

Notes

We wish to thank Karen Jackson, Jennifer Smith and Doug Williams for comments on drafts of this paper.

1. J.R. Mallory, "The Continuing Evolution of Canadian Constitutionalism," in *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
2. See George Lermer, ed., *Probing Leviathan: An Investigation of Government in the Economy* (Vancouver: Fraser Institute, 1984) for various essays on the growth of government in Canada. Richard Rose, *Understanding Big Government: The Programme Approach* (London: Sage, 1984) is an insightful comparative analysis of the growth of government.
3. Bernard Blishen, "Continuity and Change in Canadian Values," in *The Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the research studies pre-

pared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).

4. In both world wars, Canadian citizens of enemy origin were discriminated against. In World War I the franchise was removed from "not only all naturalized British subjects born in an enemy country and naturalized *after March 31, 1902*, but [from] all who even spoke an enemy language habitually and were naturalized after that date" (Norman Ward, *The Canadian House of Commons: Representation* (Toronto: University of Toronto Press, 2d ed., 1963), p. 227, italics in original). In World War II Japanese Canadians were forcibly relocated from their West Coast homes. Their property was expropriated and sold at knockdown prices. Their wartime treatment fed on anti-Oriental sentiments endemic in British Columbia from the late nineteenth century.
5. See John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms," *Supreme Court Law Review* 4 (1982) for a discussion. This argument is also developed in reference to Canada by Cynthia Williams, "The Changing Nature of Citizen Rights in Canada," in *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
6. Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1976), pp. 13–14.
7. Tom Flanagan, "Hayek's Concept of Constructivism," in *Sophia and Praxis: The Boundaries of Politics*, edited by J.M. Porter (Chatham, N.J.: Chatham House Publishers, Inc. 1984), passim.
8. See, however, the discussion of feminism below.
9. Barrie Thorne and Marilyn Yalom, eds., *Rethinking the Family* (New York: Longman, 1982), p. 11.
10. Sandra Lee Bartky, "Toward a Phenomenology of Feminist Consciousness," in *Rethinking the Family*, edited by B. Thorne and M. Yalom (New York: Longman, 1981), p. 86.
11. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982), p. 173.
12. See Angela Miles and Geraldine Finn, eds., *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982), for feminist criticisms of other academic disciplines. Similar gender issues exist in the arts. Thelma McCormack reports that "Feminist artists . . . are more interested in the grants given to them as feminists than they are in the grants given to them as artists. They seek not only the funds but the symbolic mandate to create a feminist aesthetic" ("Culture and the State," *Canadian Public Policy* X(3) (1984), p. 275).
13. Gerald Hannon, in Ed Jackson, "Introduction," in *Flaunting It! A Decade of Gay Journalism from the Body Politic: An Anthology*, edited by E. Johnson and S. Persky (Vancouver: New Star Books, 1982), p. 3.
14. Ibid.
15. Ibid.
16. Ibid., p. 225.
17. Raymond Breton, "Multiculturalism and Canadian Nation-Building," in *The Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
18. William J. Goode, "Why Men Resist," in *Rethinking the Family*, edited by B. Thorne and M. Yalom (New York: Longmans, 1981), p. 146.
19. Thomas Flanagan, "The Manufacture of Minorities," paper presented to the Conference on Minorities in Canada, Banff, May 21–24, 1984, mimeo, cited in Cynthia Williams, "The Changing Nature of Citizen Rights," this volume.
20. Goode, "Why Men Resist," pp. 140, 145, 146.
21. Danielle Juteau-Lee, "The Franco-Ontarian Collectivity: Material and Symbolic Dimensions of its Minority Status," in *The Quebec and Acadian Diaspora in North*

America, edited by Raymond Breton and Pierre Savard (Toronto: Multicultural History Society of Ontario, 1982), p. 171.

22. Allan Smith, "National Images and National Maintenance: The Ascendancy of the Ethnic Idea in North America," *Canadian Journal of Political Science* 14(2) (June 1981), p. 234.
23. Clifford Geertz, *Negara: The Theatre State in Nineteenth Century Bali* (Princeton: Princeton University Press, 1981).
24. Raymond Breton, "The Production and Allocation of Symbolic Resources: An Analysis of the Linguistic and Ethnocultural Fields in Canada," *Canadian Review of Sociology and Anthropology* 21 (2) (1984).
25. Ibid., p. 125. Italics in original.
26. Ramesh Mishra, *The Welfare State in Crisis* (Brighton: Harvester Press, 1984), p. 19.
27. Keith Banting, *The Welfare State and Canadian Federalism* (Montreal: McGill-Queen's University Press, 1982), p. 119.
28. Ibid., p. 107.
29. T.H. Marshall, *Class, Citizenship, and Social Development* (Garden City, N.Y.: Doubleday, 1965), p. 78.
30. Ramesh Mishra, *Society and Social Policy* (Atlantic Highlands, N.J.: Humanities Press, 1981, 2d ed.,), p. 33.
31. William A. Robson, *Welfare State and Welfare Society* (London: Allen & Unwin, 1976), pp. 36–37.
32. Albert O. Hirschman, "The Welfare State in Trouble: Systemic Crisis or Growing Pains?" *American Economic Review* 70 (2) (May 1980).
33. See, in particular, the various writings of Richard Titmuss.
34. Danielle Juteau-Lee, "The Franco-Ontarian Collectivity," p. 173. See also Danielle Juteau-Lee and Jean Lapointe, "From French Canadians to Franco-Ontarians and Ontarois: New Boundaries, New Identities," in *Two Nations, Many Cultures, Ethnic Groups in Canada*, edited by Jean Elliott (Scarborough: Prentice-Hall, 1983, 2d ed.).
35. Juteau-Lee and Lapointe, "From French Canadians to Franco-Ontarians," p. 184.
36. P.E. Laporte, cited in Alison d'Angeljan, "Language Planning in Quebec," in *Conflict and Language Planning in Quebec*, edited by Richard Y. Bourhis (Clevedon, England: Multilingual Matters Ltd., 1984), p. 43.
37. P.E. Laporte, "Status Language Planning in Quebec," in *Conflict and Language Planning in Quebec*, edited by Richard Y. Bourhis (Clevedon, England: Multilingual Matters Ltd., 1984), p. 55.
38. For an insightful analysis see Gary Caldwell, "Anglo-Quebec: Demographic Realities and Options for the Future," in *Conflict and Language Planning in Quebec*, edited by Richard Y. Bourhis (Clevedon, England: Multilingual Matters Ltd., 1984).
39. Marc-Adélard Tremblay, "The Quebecois Identity: Theoretical Perspectives and Trends," paper presented to the Royal Society of Canada, Guelph, 1984, mimeo, pp. 13, 22.
40. See, however, the various chapters in *Conflict and Language Planning in Quebec*, edited by Richard Y. Bourhis, for suggestive analyses.
41. See Eric Waddell, "State, Language and Society: The Vicissitudes of French in Quebec and Canada," in *The Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
42. Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983), cited in Ministry of the Attorney General, Ontario, *Sources for the Interpretation of Equality Rights under the Charter: A Background Paper* (January 1985), p. 89.
43. Ministry of the Attorney General Ontario, *Sources for the Interpretation of Equality Rights*, p. 91.
44. Breton, "Multiculturalism and Canadian Nation-Building."

45. Manoly R. Lupul, "The Political Implementation of Multiculturalism," *Journal of Canadian Studies* 17 (1) (Spring 1982), p. 98. See also Smith, "National Images and National Maintenance," pp. 253–56 for a discussion of the tensions between bilingualism and multiculturalism.
46. See Commissioner of Official Languages, *Annual Report 1984* (Minister of Supply and Services, 1985), Part IV, for a generally pessimistic assessment.
47. Waddell, "State, Language and Society."
48. "The duality theory signifies that official-language minorities are not like other minorities. The constitution grants special and additional protection to them with respect to those areas of the constitution that reflect duality. Ethnic minorities will take the point hard, but the thesis of our new constitution is that, with respect to the language of government jobs, government services, religious instruction, schools and culture, anglophone and francophone minorities stand in a preferred position. The reason is wholly political. It is an attempt to forge a working reconciliation between Quebec and the rest of Canada" (Joseph Eliot Magnet, "The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism," *Supreme Court Law Review* 4 (1982), p. 175).
49. H.G. Thorburn, "Canadian Pluralist Democracy in Crisis," *Canadian Journal of Political Science* XI(4) (December 1978), p. 726.
50. For a discussion see Roger Gibbins and J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada," passim, in *The Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
51. See H.B. Hawthorn, *A Survey of the Contemporary Indians of Canada*, (Ottawa: Queen's Printer, 1966), Vol. 1, pp. 261–262 for the development of Indian voting rights in the provinces.
52. There "is a category of rights which can be called charter rights which derive from history and long respect. They relate ultimately to the fact that the Indians were here first; that a series of bargains were made by the ancestors of the present generation of Indians and Whites by which the latter were allowed to develop peacefully the northern half of a richly endowed domain, in compensation for which the original possessors . . . were accorded a special status, partially contained in the treaties, and partially sanctioned by long usage in the Indian Act. In retrospect it is clear that the privileged position to which Indians are entitled was historically used as a justification for depriving them of services of a quality and quantity equal to those received by non-Indians. By any standard of measurement a privilege was turned into a millstone. . . . The position we strongly hold is that Indians are citizens plus; that in addition to the normal rights and duties of citizenship they also possess certain rights simply by virtue of being Indians" (ibid., p. 377).
53. See Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970*, (Toronto: University of Toronto Press, 1981).
54. See also House of Commons, Special Committee on Indian Self-Government (1983) *Report* (Ottawa: Queen's Printer), known as the Penner Report; and Paul Tennant, Sally M. Weaver, Roger Gibbins and J. Rick Ponting, "The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments," *Canadian Public Policy* 10 (2) (June 1984).
55. The conflict is effectively captured in a statement by the Metis and Non-Status Indian Constitutional Review Commission in its report, *Native People and the Constitution of Canada* (Ottawa, 1983), p. 2, which states: "The value system of the dominant socio-cultural system in Canada is liberalism which places emphasis on the individual, individual rights and private property. This is in contrast to the value system of Native peoples which places a far higher value on the collectivity or upon the community. It is ironic that non-Native Canadians, with all their liberal ideological baggage, cannot understand the significance to the Native peoples, or for that matter to any self-conscious minority group, of being recognized as a collectivity. They do not realize that a cultural minority faces certain death by assimilation if the political system forces

it to deal with the majority culture as individuals" (cited in Gibbins and Ponting, "An Assessment").

56. John Humphrey, "The World Revolution and Human Rights" in *Human Rights, Federalism and Minorities*, edited by Allan Gotlieb (Canadian Institute of International Affairs: Toronto, 1970), 47. For a discussion of the popularized language of human rights in postwar western societies, and Canada in particular, see Maxwell Cohen, "Human Rights: Programme or Catchall? A Canadian Rationale," *Canadian Bar Review* 46 (Dec. 1968), 554–564.
57. The July 1985 UN World Conference on Women in Nairobi, Kenya was the third in a series of UN Conferences on Women. The others had been convened in Mexico, 1975 and Copenhagen, 1980. The UN "Decade for Women" ended in 1985.
58. *Toronto Star*, July 14, 1985, A19, and July 27, 1985, B6.
59. Jill McCalla Vickers, "Major Equality Issues in the Eighties" *Canadian Human Rights Yearbook* (Ottawa: University of Ottawa, 1983), p. 53-54.
60. For a provocative and critical discussion of the growth of a popular language of human rights see T. Pocklington, "Against the Inflation of Rights" *The Windsor Yearbook of Access to Justice* (Windsor: University of Windsor, 1982) and discussion.
61. Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms," in *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
62. For a discussion of the negative consequences for a sense of local community of contemporary "rights consciousness" see Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada," in *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
63. *Henrietta Muir Edwards v. A.G. Canada* [1930] A.C. 124 at 136. For a more general discussion of the adaptability of the 1867 Constitution Act see Alan C. Cairns, "The Living Canadian Constitution", *Queen's Quarterly* 76 (4) (Winter 1970).
64. For a discussion of the importance of the Charter for Women's rights, for example, see M.E. Atcheson, Mary Eberts, Beth Symes with Jennifer Stoddart, *Women and Legal Action* (Ottawa: Canadian Advisory Council on the Status of Women, 1984).
65. An excellent discussion of the debate over language and minority denominational education rights is found in A.I. Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982), ch. 3. On the English minority in Lower Canada see D.V. Smiley, *The Canadian Political Nationality* (Toronto: Methuen, 1967), pp. 12–13.
66. See John Farthing, *Freedom Wears A Crown* (Toronto: Kingswood House, 1957) for an elaboration of the protection of citizen rights under a British constitutional monarchy.
67. In his discussion in volume 34 of changing social values in the post-war period, Bernard Blishen gives several examples of the relationship between changing values and changing notions of citizen rights.
68. Writing before the issue of a legislative override had been seriously addressed by First Ministers, Professor Paul Weiler suggested that there was a great deal of merit in the notion of a federal legislative override permitting Ottawa to pass laws notwithstanding certain Charter provisions. He argued that by subjecting overrides to the close scrutiny of electors, the burden of justifying such actions would serve as a check on its abuse while still making adequate provision for the majority will to prevail in some circumstances. Professor Weiler was less enthusiastic about extending a legislative override to the provincial legislatures. See Paul Weiler, "Of Judges and Rights or Should Canada Have a Constitutional Bill of Rights," *Dalhousie Review* 60 (1980), pp. 205–237, esp. pp. 231-236.
69. Notably, Duff in *Alberta Press Case* [1938] SCR 100, 133-134; Rand, Kellock and Locke in *Saumur* [1953] 2 SCR 299, 354 per Kellock and 363 per Locke; and Rand and Abbott in *Switzman* [1957] 285, 307 per Rand and 328 per Abbott.

70. By virtue of Section 52 of the Constitution Act, 1982. As discussed elsewhere in this overview, the Charter includes provisions for legislative override respecting certain provisions (Section 33), and to override mobility rights guarantees in certain circumstances (Section 6(4)).
71. An address by the Rt. Honourable Brian Dickson, Supreme Court of Canada, untitled, to the Mid-Winter Meeting of the Canadian Bar Association, Edmonton, Alberta, Feb. 2, 1985, mimeo.
72. Sandra Burt, "Women's Issues and the Women's Movement in Canada since 1970," in *The Politics of Gender, Ethnicity and Language in Canada*, volume 34 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
73. For a discussion of how these new factors should be reflected in the process for selecting Supreme Court justices, see A. Wayne MacKay and Richard W. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," in *The Courts and the Charter*, volume 58 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), esp. section VI(b).
74. Quoted in Sandra Gwyn, "Sense and Sensitivity" *Saturday Night* 100 (7), pp. 13–19, p. 18.
75. Alan C. Cairns, "The Embedded State: State-Society Relations in Canada," in *State and Society: Canada in Comparative Perspective*, volume 31 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
76. William A. Robson, *Welfare State and Welfare Society* (London: Allen & Unwin, 1976), p. 41.
77. For a helpful survey see Pierre Fournier, "Consultation in Canada: Case Studies and Perspectives," in *The State and Economic Interests*, volume 32 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
78. For a valuable assessment see Leo Panitch, "The Tripartite Experience," in *The State and Economic Interests*, volume 32 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
79. Morris Janowitz, "Observations on the Sociology of Citizenship: Obligations and Rights," *Social Forces* 59 (1) (September 1980), p. 2.
80. In the succinct language of G.A. Kelly, "Confusions of the public, the social, and the private bewilder the goals of the citizen, just as they obscure his rights and duties. The dynamic of the state is to expand the public realm; the propensity of the citizen is to get lost in it" ("Who Needs a Theory of Citizenship?" *Daedalus*, Fall 1979), p. 31.
81. Michael J. Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12: 1 (February 1984), p. 93.
82. Robson, *Welfare State and Welfare Society*, pp. 38–39, 82, 174, 178; Janowitz, "Observations on the Sociology of Citizenship."
83. Rolf Mirus, "The Invisible Economy: Its Dimensions and Implications," in *Probing Leviathan*, edited by George Lermer (Vancouver: Fraser Institute, 1984), p. 123.
84. Suzanne Berger, "Politics and Antipolitics in Western Europe in the Seventies," *Daedulus* 108 (Winter 1979), p. 27, cited in Thomas A. Hueglin, "Comparing Structural Change: The Politics of Scarcity," mimeo, presented to the Canadian Political Science Association Annual Meetings, Montreal, 1985, p. 15.

2

The Continuing Evolution of Canadian Constitutionalism

J.R. MALLORY

A political system works because its members share a vocabulary of political terms whose meaning includes shared values. The system will continue to function well if its basic values and institutions reinforce one another. However, many of the terms used are code words which may mean different things to different people. Moreover, institutions may be incompatible with their purposes and the values they were established to maintain. The result is that the institutions themselves may undermine the efficacy of the system.

But political institutions have remarkable resiliency. They can adapt to meet different needs and may change their substance substantially while retaining their form. Institutional change is very often a matter — as J.A. Corry once observed — of "pouring new wine into old bottles." Furthermore, the institutional structure may shape and constrain the pattern of change so that the options open in response to new values or demands are limited by the familiar and available institutional forms.

Since the people within the system are constantly changing as a result of birth, death, and migration, it is necessary to reinforce the meaning and purposes of the values and institutions that sustain the political process. In many cases, values and institutions derive from remote political experience and may have lost their meaning or be inappropriate to support the system as it moves toward the end of the twentieth century. It therefore becomes necessary to identify the enduring values of the Canadian polity and the extent to which they are supported and embodied in political institutions.

Basic Norms and Constitutional Rules

Central to the discussion of norms in Canada is the notion of constitu-

tionalism. As C.J. Friedrich suggested more than forty years ago, the central value distinguishing free societies from more or less totalitarian states is the basic norm of a constitutional order, based on rational norms that apply equally to all.[1]

Friedrich's purpose was to warn that an emphasis on the purely democratic values of majority rule could lead a political system to miss the important point that democratic values themselves are insufficient, that there must be a recognition of rules of conduct that curtail the arbitrary abuse of power. What he called the totalitarian regimes of Germany, Italy, and the Soviet Union claimed unqualified mass support but lacked the institutions of constitutional government. Friedrich stressed two elements with deep roots in British and American traditions. First was the notion of restraint on the exercise of government power so that it diffused in such a way that it cannot be exercised at the whim of one person. The second and interrelated idea was that arbitrary rule is contained through checks and balances which limit arbitrary discretion.

The basic norms are expressed in constitutional rules, whose vocabulary may change over time even though the basic values remain the same. If the basic rules governing the system are sufficient to preserve and transmit its values, the Canadian polity will survive and thrive. The important thing about constitutional rules, which are restraints on the abuse of the rights of others, is that the rules need to be understood and need to be reinforced. Enforcement of constitutional rules is more than the capacity of the state's apparatus to compel conformity through the use of a monopoly of legitimate force. Above all, enforcement depends on the internalization of values (so that citizens respect and therefore obey the rules) and on the voluntary acceptance of restraints by those invested with the power of the state.

The underlying values of the system are also expressed in constitutional rules. These values have been affirmed in the past and represent a particular mixture of freedom and civility, which takes the form of a federal state operated by a specific type of parliamentary constitutionalism. In any particular time it is necessary for citizens to find ways of accommodating new values (for example, the recognition of the equality of the sexes) and to redefine some institutions in the light of the way that historically important values are currently understood (for example, attitudes toward native peoples).

Constitutional rules in Canada are based partly on law and partly on conventions of the Constitution. Some rules are expressed in the Constitution in a form that only constitutional amendment can change. Others are in statutory form, which legislation can alter. However, a number of rules are found neither in the ordinary law nor in the Constitution. The written Constitution establishes representative and parliamentary government but does not specify the system of cabinet government. Con-

sequently, what we call responsible government is regulated largely by conventions of the Constitution, not by enforceable laws.

These conventions are nowhere authoritatively defined. The public may know instinctively when these rules are violated but has no legal remedy against violation if politicians do not accept these rules as a moral restraint on conduct. It therefore becomes important to consider how norms are acquired and transmitted. Who defines them, and how are they conveyed to participants in the political process?

Purely legal norms are defined by the courts and can be altered only by an open and deliberate process of changing the law. Conventional norms arise from practice and are followed because they are recognized as necessary to the functioning of the system. Norms are transmitted and reinforced by the recollection of symbolic events — a usable past that inspires present generations to accept and defend inherited values.

The vocabulary of the legal and political system may alter and such change may indicate either a change in basic values or a new way of expressing existing values. A contemporary example of this is the way we have thought about basic legal and political rights since the end of the Second World War. One of the basic constitutional values enshrined in the British North America Act was that Canada was to have a constitution "similar in principle to that of the United Kingdom." What that meant, among other things, was the continuation of the central principle of the British Constitution: that sovereignty was vested in the legislature, which could alter the law in any way it wished without external restraint. The legislature can confer new rights on the citizen, but it is equally free to take away or alter rights that have existed for centuries. The law promulgated by the legislature is the law, and no court can nullify it by finding it in conflict with higher constitutional principle. This was, in Bora Laskin's words:

> a consequence of the revolution of 1688 and the ultimate triumph of Parliament over both the Crown and the courts. However, the antecedent history of the matter involved a conscious attempt by that great exponent of the common law, Edward Coke, to fasten a different theory upon the institutional relations of Parliament, the executive, and the courts.[2]

Although the Courts in England were never able, despite Coke's attempts, to subject Parliament to the control of the courts and the common law, the necessities of federalism in Canada and the United States, as Laskin pointed out, gave Coke's theory "an authority which it never attained in England." However, the application of Coke's theory was strictly limited in Canada because the courts implicitly accepted the basic constitutional notion that the legislature had unlimited power to make law, however absurd, oppressive, or unreasonable. The only question was to determine which legislature possessed the power. Consequently, the judicial interpretation of the Canadian Constitution has

been almost entirely based on the single issue of reconciling federal and provincial jurisdiction.

This is not a very elevating way of looking at our much-cherished liberties of speech, conscience, and religion. But before the Charter, where do we find the great and inspiring case law dealing with these ultimate values of a civil polity? We find them based on a reconciliation of the federal power over criminal law in Section 91 (27) and the provincial power over property and civil rights in Section 92 (13) of the Constitution. Provincial attempts to restrict proselytizing by religious groups (the numerous Jehovah's Witnesses cases in Quebec) were struck down as beyond provincial powers, although Parliament clearly has the power (as in the Lord's Day Act) to make an indeterminate number of laws in relation to religion. In practice, the only protection of freedom of religion was that Parliament, which had the power to interfere, chose not to do so. Similarly with freedom of the press, where the landmark case was based on the infelicitously named Accurate News and Information Bill in Alberta in 1937. We know from the experience of the War Measures Act that Parliament's power in these matters was unlimited. Under that act, the federal executive had abrogated such cherished freedoms as habeas corpus, instituted censorship of the press, and arbitrarily incarcerated thousands of Canadian citizens of Japanese ancestry.

Before the enactment of the Charter, the dialogue in constitutional terms about basic political and civil rights was confined to the narrow issue of jurisdiction. These rights were articulated in a political vocabulary that has deep roots in Canadian and British history. Legally, they only existed to the extent that they had been put in legislative form, as, for example, safeguards in the Criminal Code. These rights had a strong and rich political life, but they existed in law at the whim of Parliament and the provincial legislatures.

Changing Meanings

When Donald Fleming was suspended from the House of Commons in the pipeline debate of 1956, John Diefenbaker solemnly intoned, "Farewell, John Hampden." The Conservative opposition in that famous debate was making an issue of freedom of debate in parliament, and Diefenbaker chose to evoke the memory of a seventeenth century English politician. People were expected to know what Diefenbaker meant, and many did. Diefenbaker's attempt to move the vocabulary of rights from the realm of political discourse into the law of the Constitution had limited success, but the Bill of Rights of 1960 was part of a long process in which, as we now see, the terms of discourse have changed.

Responsible Government

John Diefenbaker, in 1956, could appeal to the historic value of the

independence of parliament from the executive by appealing to the memory of the struggle between the English Crown and Parliament with some expectation of being understood. How many would understand that reference today?

Another example of an appeal to a usable past, this time Canadian, is the once-evocative term "responsible government": the principle that the government of the day is in effect the choice of the majority of the elected legislature, which can at any moment withdraw the authority of that government by a successful vote of want of confidence. For nearly a century, the concept of responsible government was the pivot around which English-Canadian historians developed the theme of evolving Canadian autonomy and the building of a Canadian nation. It was one of the few concepts about Canadian politics that stuck in the minds of generations of Canadian schoolchildren. It became a central part of the mythology of Canadian history, an outstanding example of the use of the past to create a sense of national identity in a colonial people.

Responsible government means majority rule, but majority rule of a particular sort — majority rule not by the electorate, but by a majority of the electorate's representatives. The development of political parties, concurrent with the development of responsible government, ensured the stability of government. Over a period of years, the elected House ceased to be able to destroy a government almost at will: governments that had the support of secure majorities were assured of staying in power until the next election.

Majority government of this sort, based on strong party discipline, means that a government has almost dictatorial power between elections. The result has been a decline in the power of parliament. In Richard Crossman's words, "The debate on the floor of the House becomes a formality, and the division which follows it a foregone conclusion."[3] In Britain, the House of Commons is becoming one of the dignified parts of the constitution as defined by Bagehot, and much the same has happened in Canada.

Majority rule is a great democratic principle. Most appropriate to homogeneous communities, it can have awkward and destructive consequences in polities made up of a number of distinct minorities. Canadian politicians instinctively recognized this danger from the beginning of the Confederation period. Sir John A. Macdonald was at pains to construct a representative cabinet, in which each province was represented and in which regional ministers became the focal points of sectional accommodation. Successful cabinets ever since have contained authoritative representatives of all parts of the country, whereas the periods of greatest strain on the whole Canadian political system have been those times when a government party has been unable to represent and accommodate a significant group, whether they be French Canadians or Western Canadians. Similar situations have existed in provincial government from time to time.

A recent and painful example of the periodic tension between the democratic doctrine of majority rule and the need to accommodate other historic values occurred within the past year in Manitoba. The government of that province, in an effort to avoid a further court test of its constitutional obligation to conform to the limited bilingual requirements of the Manitoba Act, which had been nullified by a provincial government in 1890, sought to extend bilingual services in government agencies. This move encountered widespread opposition, which was not appeased by legislative committee hearings. When the reeve of one rural municipality was asked by a committee member if he wanted to "deprive Franco-Manitobans of their acquired rights," he replied, "If they're going to be satisfied with things as they've been done for 113 years, that's fine. But if they're going to push themselves and cause problems in our province, then I suggest the Constitution be amended to concur with the wishes of the majority."[4]

The original demand for responsible government contained another element, derived from Jacksonian democracy: a desire to gain access to political jobs that had hitherto been the monopoly of a governing class. Patronage was gradually removed from the public service by a reform movement that began about a century ago and replaced by a merit system.

However, the introduction of the merit system into the public service and the emergence of a vast bureaucracy of senior officials have profoundly altered the nature of ministerial responsibility. Who is responsible and who is accountable has become one of the major ambiguities of modern cabinet government. It was the efficient blending of political control and bureaucratic management which Walter Bagehot himself saw as an important element of the system of government he was describing in the middle of the nineteenth century.

> The truth is that a skilled bureaucracy . . . is, though it boast of an appearance of science, quite inconsistent with the true art of buiness. . . . One of the most sure principles is, that success depends on a due mixture of special and non-special minds — of minds which attend to the means, and minds which attend to the end.[5]

In the nineteenth century, the final decision on policy was made by ministers, who were thus responsible. But responsible to whom? Ministers must answer to the House of Commons, but nowadays it is not the House that can hold them to account and punish them by dismissal: the prime minister and their colleagues will defend ministers against all comers, no matter how severe the criticism. Later, perhaps when the House is in recess, the prime minister may quietly drop ministers or shuffle them to less exposed posts. For everyone knows that a departmental policy and the countless administrative decisions that make it up are formulated in the bureaucracy and that partly because of the sheer

weight of government business, ministers can do little but acquiesce. Thus, if ministers are vulnerable to anything, it is to the immense power of the prime minister. Meanwhile an attempt to hold the bureaucracy accountable is thwarted by appeals to the sacred principles of responsible government.

It is therefore important to distinguish between accountability and responsibility. The responsibility of ministers is a political responsibility, which is a public matter. The accountability of civil servants is an internal one, which ministers have the authority to deal with. It has been argued that to hold officials publicly accountable, for example, to parliamentary committees, would seriously affect their willingness to advise ministers on policy. In a great many cases, ministers have to take the decisions of their officials on trust. However, if things go wrong, the minister must take the public heat, while with the bureaucracy, an official's career may suffer eclipse.

In recent years, this issue of the distinction between accountability and responsibility has been confused in part because of a belief that it is possible to make the perfect rational decision. A particular kind of modern management philosophy has deluded both ministers and senior civil servants into thinking that much of the problem of accountability would go away if decisions could be made thoroughly rationally. This belief ignores the high probability of error because of necessarily imperfect knowledge.

In short, the emergence of the modern state has created, under our system of cabinet government, a tremendous centralization of decision making in the bureaucracy and has enhanced the power of the prime minister. The projection of the highly personalized office of prime minister through the media has greatly strengthened the prime minister's control over his own party and gravely weakened the rather limited checks and balances, whose effectiveness derived in large measure from the extent to which parliament was an independent force in the political process.

Checks and Balances

Checks and balances existed in our system's early days but have been eroded or have lost their persuasiveness in the face of modern democratic values. The result is that the very concept of checks and balances has all but disappeared from the popular understanding of the process of government. Let us look at what has happened to a few of them.

In the nineteenth century, in the conditions of colonial government, Canadian political leaders were subject to the influence and — to some extent — the power of the governor general and, behind him, the British government. This restraint, although occasionally salutary, was not appreciated in Canada, and we have long since gotten rid of it. The point

is that it was a restraint. The discretionary powers of the sovereign were real in the nineteenth century. Today they have largely disappeared.

Similarly the Senate. It was deliberately created to be a check on the power of the majority in the House of Commons acting through the government in power. How far the Senate was intended to protect propertied interests and how far it was seen as a safeguard of regional (as distinct from provincial) interests may be a matter of dispute. Although acceptable and natural in the middle of the nineteenth century, a non-elective Senate seems more difficult to justify today. That is why attempts to restore the Senate to an independent role hinge (as does the latest proposal) on making it elective.[6] However worthy a goal an elective Senate may be, the real problem is defining what the Senate is to protect. Furthermore, Senate reformers persistently ignore the significant role the Senate now plays as a revising and supervisory chamber and as the author of a number of major policy inquiries. Many of these functions are well done simply because senators are relatively non-partisan and hold their positions for long periods. A sharp redefinition of the role of the Senate could easily obliterate its present functions, which are valuable and not readily done otherwise. As long as uncertainty, disagreement, and confusion remain about the proper role of the Senate, reform is not likely to proceed far.

In seventeenth century England and in nineteenth century Canada, the elected part of the legislature emerged as a check on the power of the executive government. However, the Commons was not a rival government, but a controlling device. "The only meanings of parliamentary control worth considering, and worth the House spending much of its time on," says Professor Crick, "are those which do *not* threaten the parliamentary defeat of a government, but which help to keep it responsive to underlying currents and the more important drifts of public opinion."[7] This role as a controlling device may also mean that the opposition in the House may properly consider opposing and delaying to be its duty when it feels that a government, with the apparent strong support of public opinion, is acting in a way that threatens important constitutional values. Such awkward choices existed for opposition parties in recent years in such instances as the October crisis, in 1970, and the government's announced intention in 1980 to proceed with unilateral constitutional amendment.

Initially the Commons exercised this control through the power of the purse, because nearly everything that governments do must be funded by an annual vote of money. For various reasons, this ultimate control is no longer effective, and the extent to which a legislative body can act as a check on government, except through the limited technique of deliberate obstruction, has weakened steadily over the years. If some sort of balance is to be restored to the major organs of government, new methods to strengthen the legislature in its proper role must be devised,

and this new role must be expressed in language both understood and supported by the public and consonant with the established values of the constitutional system.

The third branch of government, whose role is keeping the other two operating within the law, is the court system. Until now, this restraining role of the courts, although not insignificant, has been modest. For one thing, part of the heritage of British constitutionalism is that our courts have always displayed a marked deference to the other two branches of government. Even Dicey's vaunted Rule of Law makes government officials legally accountable in civil litigation only if they acted illegally and beyond the scope of their powers (see the discussion of the rule of law in the section on the Charter and Constitutional values). But governments and parliaments have conferred such wide powers on themselves that almost anything they do is legal. What they do may be foolish, outrageous, or oppressive, but in the end it usually turns out to be legal and therefore beyond the judgment of external standards of political morality. The new Charter, which seeks to impose such standards, will make a difference only if the courts embrace those standards and have the authority to impose them. In the past, the courts have shown a certain caution, particularly in constitutional cases, because their method of appointment and lack of entrenchment in the Constitution have weakened public confidence in their impartiality.

Are We the Victims of System Failure?

Almost every political institution in Canada is less effective than it should be. Like most political systems, ours was not constructed in one great act of creation, with all of the parts engineered to fit together. The various parts came into being in an evolutionary process, part of it the adaptation and inheritance of institutions transplanted from the United Kingdom, part of it grafted on to deal with problems of our own. The system of representative government has had to adapt: to the needs of a hierarchical society, in which power was confined to a small, but changing elite; to the strains imposed on it by the creation of a mass electorate; and now to an age in which methods of communication have revolutionized the political system so that sophisticated polling and live television coverage control the perception of government. In the process, the party system has undergone striking change, and the federal system, adopted somewhat gropingly to reconcile diversity with unity, has undergone substantial changes and seems on the threshold of another.

To some extent the perception that some parts of the machine are in fact inhibiting the operation of others can lead us to institutional reforms which get the whole machine working again. Political societies work better with good machinery, but they do not work just because the machinery is in place. There must be a collective will to survive, and a collective under-

standing of what the important values of the community are which are important to preserve. This depends on the extent to which the enduring values of the community are preserved, transmitted, and understood. An indication of how imperfectly this process of socialization takes place is given in a study of civic education in Canada published in 1968.[8] There is little reason to believe that matters are a great deal better now. To the extent that our political values and institutions, created with anxious care by our forebears, are failing us, the failure must to a degree be because our political language has failed us. We cannot find the right words, and we have forgotten the meaning of the old ones.

Monarchical Institutions

> The crown under the monarchical principle also lends, I think, stability and dignity to our national life, and I am sure that we all agree that it is important in a democratic system based on the free and active play of party controversies. The crown as head of the state and as represented in our country standing above all such controversies, commanding and deserving the respect and loyalty and affection of us all, ensures a more solid and secure foundation for national development than might otherwise be the case under some other form of democratic government.[9]

This fulsome statement, made by Lester Pearson when he was secretary of state for external affairs, reflects the pious sentiments of a coronation year. And yet one gets the impression that the relevance of the monarchy has declined in the past thirty years. Even the Queen's signing in Ottawa of the proclamation bringing the Constitution Act, 1982, into force had an air of incongruity about it. Not because a proclamation by the Queen was constitutionally inappropriate — it was not — but because so much of the rhetoric surrounding patriation was inevitably cast in the old-fashioned Liberal vocabulary that flourished from the age of Laurier to the age of Mackenzie King. That vocabulary had identified Canadian nationhood with casting off the remaining symbolic shackles of a past colonial status. As the generation born in Canada with the legal status of British subject gradually dies off, the emotional link with the Crown as a constitutional symbol will no doubt die off too. If the somewhat artificial link with the Crown of the United Kingdom ultimately disappears, will we preserve — in the somewhat inappropriately named office of governor general — the separation between the functions of head of government and head of state that persists in many constitutional regimes today? If we do, we shall need to make more explicit both the constitutional values involved and the language appropriate for expressing them.

The Constitutional Act, 1982, has had the incidental effect of closing off serious debate about the head of state. The reason is that the offices of the sovereign, governor general, and lieutenant-governor of a province

have been firmly entrenched in the Constitution, and any change relating to them must have, by virtue of Section 41(a), the unanimous consent of Parliament and all the provincial legislatures. Nevertheless, it remains important to understand the nature of the office of the head of state and, if possible, to dissociate it from the inappropriate and outdated rhetoric with which it is all too often surrounded.

It is still useful to look at the matter in the light of Walter Bagehot's distinction between the "dignified" and the "efficient" roles the head of state performs. Bagehot himself, who had recently contemplated the emergence of Louis Napoleon in France, was by no means the only nineteenth century observer to see the danger of elected politicians' transforming themselves into modern Caesars. The retention of the ceremonial functions of government in a person largely removed from ordinary politics takes some of the imperial glamour from elected politicians. Furthermore, in a century that still distrusted the democracy created by an ever-widening franchise, it was comforting to think that the attachment of the unreflecting and uneducated masses to the pomp of monarchy would reduce the appeal of dangerous demagogues. Today, this belief conflicts with our faith in the virtue of democratic institutions and with our belief in the ultimate good sense of an electorate sufficiently educated to resist this kind of corruption. If democratic values are in danger, they are not likely to be immunized by the existence of the trappings of a monarchical system long since deprived of reality.

Nevertheless, there is something seemly in having great and solemn national occasions characterized by a ritual that dissolves the normal passions and divisions of everyday politics. Even the United States, with its deeply ingrained traditions of democracy and civility, must dissociate the president, who personifies the political party in power, from the divisiveness of party politics when the occasion demands it. Franklin Roosevelt successfully transcended this difficulty during the Second World War by emphasizing his role as commander-in-chief, which had fewer political connotations than the office of president. More recently, Americans, deeply troubled by the scandals of Watergate, hung back from impeaching President Nixon because of the damage it might do to the office of the presidency. Impeachment seemed too much like regicide to be an acceptable remedy in the circumstances.

Accordingly, the dignified role adds a touch of necessary ritual to a variety of functions that need to be sanitized of the smell of politics. The governor general's act of commissioning a prime minister confers a legitimacy on the office that no party leadership convention can, and the conferring of honours and awards for distinguished literary or artistic achievement or for exceptional courage is not a function appropriate to political men, no matter how exalted.

Nor should we forget that the offices of sovereign, governor general, and lieutenant-governor still perform important, though intermittent

roles. In a constitutional crisis caused, for example, by the death of a first minister, finding and conferring legitimate authority on a successor is a duty so appropriate to a head of state that such a presidential role is common in most constitutional regimes. Should Canadians find themselves with an electoral and party system made up of a number of parties, the role of the head of state will become more common and more visible. Even on the rare occasions when there exists, by constitutional convention, discretionary power to resist a first minister's attempt to abuse the right to seek the dissolution of Parliament, the role of the head of state is part of the checks and balances of the Constitution.

One may not like conventions of the Constitution, and one may not like this one in particular, but it is by no means easy to find a clear rule of law to replace a decision that requires judgment in the light of particular circumstances. The government's clumsy and probably unworkable attempt in the constitutional amendment bill of 1978, to define the circumstances under which a government's loss of confidence in the House of Commons is followed by dissolution of Parliament reveals how difficult this matter is and suggests that it might better be left alone. Fortunately, for reasons unconnected with this particular issue, the bill was allowed to die on the order paper.

Constitutional entrenchment may have secured the functions of the head of state from ill-considered change, but there remains a feeling that the role is sufficiently important to be better understood and possibly enhanced. No doubt the indefatigable appearances of governors general at all sorts of ceremonies, particularly in the less accessible and generally neglected parts of the country, may create a climate of continuing acceptance. Attempts to make of the various government houses discriminating centres of the best in Canadian art and culture are a further natural role for the office.

The late Jules Léger, who carried out his role as governor general with rare dignity, distinction, and humanity, was perhaps too eager to expand the bounds of his office beyond what the constitutional system could tolerate. He thought, rightly, that the role is not an easy one to master and could with advantage be extended to an eight-year term, which would normally carry through at least two general elections. He was eager to have transferred some of the less necessary functions of the queen, such as the signing of letters of credence for ambassadors, to the governor general, and he succeeded to some degree. In the past, when the number of countries in the world to which Canada accredited ambassadors was small, this was not a difficult matter to have processed through Buckingham Palace. Today, the number is so large and posting frequent enough that the whole process can lead to awkward delay and frustration. It is also becoming more common for the governor general, as the virtual head of state in Canada, to represent the country in foreign states on appropriate ceremonial occasions.[10]

In general, the practice, instituted by the Clark government in 1979, of carrying the swearing in of a new administration live on radio and television is a salutary method of increasing public awareness of what the office of the head of state involves. The same thing was done at the installation of the Trudeau government in 1980, but Mr. Turner, for reasons of dubious relevance, did not follow the practice in 1984. However, Mr. Mulroney revived the open and public ceremony on his installation on September 17.

The powers of the governor general, as set out in the Constitution, are formidable, though vague. According to Section 12, they are to be exercised "with the Advice or with the Advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any Member thereof, or by the Governor General individually, as the Case requires, . . ." a phrasing substantially repeated in the letters patent constituting the office of governor general. In fact, it is by no means clear where the line is between powers exercised on advice and on the responsibility of the government of the day and powers the governor general may exercise in his or her discretion. Under the well-established conventions of responsible government, most of the governor general's powers are in the hands of the prime minister and the cabinet. However, some powers are recognizably discretionary: the appointment of the prime minister, which does not rest on advice, and the possibility of discretion in granting a dissolution of Parliament. But is that all?

In the past, lieutenant-governors have dismissed provincial first ministers,[11] but no Canadian governor general has done so since the institution of responsible government in 1848. Does that mean that the power of dismissal is constitutionally obsolete? As recently as 1975, the governor general of Australia, which has a constitution very similar in wording to that of Canada, dismissed his prime minister and installed the leader of the opposition in his place. The action of Sir John Kerr in Australia may have been both surprising and politically unwise, but it was legal.[12] It would not be unreasonable to conclude that in a sufficiently grave constitutional crisis, dismissal could happen in Canada.

The office of the head of state must be seen as one of the checks and balances of the Constitution, with powers that might some day be brought into play to preserve constitutional government from unforeseeable subversion. At a more practical level, the office of head of state can act as the link of legitimacy in the system. On the death in office of a first minister (Macdonald in 1891, Thompson in 1894, and in Quebec Maurice Duplessis in 1959 and Paul Sauvé in 1960), it is the head of state who confers constitutional legitimacy on the transfer of political power. The centrality of the function of the head of state in the Constitution emerges in such crises, and that centrality will not be easy to modify. Under the constitutional arrangements that came into force in 1982, the office of governor general has become well-nigh untouchable, and it thus

becomes even more important that the nature and role of the office be understood.

The Political Executive

What will happen to the office of prime minister and to the cabinet system itself in the next generation is not easy to determine. Because the executive arrangements, such as the composition of the cabinet and its relationship to the prime minister, are largely governed by constitutional convention, not by law, the cabinet is by far the most flexible and adaptable of our political institutions. Its size and composition and the way it does its business are subject to instant change, according to the inclinations of the prime minister. At the end of the Second World War, Canadian cabinets contained 19 ministers; Pierre Trudeau started with 27 and ended with 37. Joe Clark instituted the peacetime innovation of a small inner cabinet of 12, and the cabinet during the Turner interregnum contained 29 ministers. The Mulroney cabinet has risen to 40.

The most important developments to watch are the changing position of the prime minister, the representative role of the cabinet, and the way the cabinet carries out its policy-making functions in relation to the bureaucracy. All of these appear to have undergone substantial transformation in the Trudeau years, and further significant changes are highly likely in the next decade or so.

The Changing Position of the Prime Minister

The most important political office in Canada is not mentioned in the Constitution, and its powers are nowhere defined in law. It is true that "the person occupying the recognized position of First Minister" is one of the exempt offices mentioned in the Senate and House of Commons Act that can be held without disqualification from sitting in Parliament. Since the early 1920s its inclusion in the ministerial Salaries Act has made it possible for the prime minister to be paid a salary as such. Louis St. Laurent was the first prime minister to hold no other office, and holding only one office is now generally the case. However, a prime minister sometimes temporarily holds another important office, such as secretary of state for external affairs — as John Diefenbaker did — until an appropriate minister can be found for the other office.

Although the law nowhere defines the prime minister's powers, they stem basically from his sole right to advise the governor general on the appointment and dismissal of ministers. Furthermore, the prime minister can act in place of another minister with full authority. The prime minister not only presides over the cabinet but also controls its agenda and determines who may attend its meetings. The nineteenth century notion that he occupied a position of first among equals is thus only partly true. How his role is carried out is a matter of individual style. The

prime minister may work in the style of a chief executive officer who dominates his colleagues, or he may operate in a more permissive, chairman-of-the-board style, giving wide authority to his ministers.

Nevertheless, the prime minister is not a chief executive surrounded by colleagues who are legally his subordinates, as an American president is with his cabinet. The Canadian cabinet is a collegial body whose members must agree on policy matters because the prime minister's survival depends on the support of a majority of the House of Commons for the cabinet as a whole. A vote of confidence supports Her Majesty's government, headed by a prime minister, who is also normally the leader of the governing party in the House.

The most important change has been a fairly rapid transformation in the relationship between the prime minister and the House, a transformation brought about largely by television. It is clear from reading his diary that Mackenzie King had first to retain his mastery over his cabinet colleagues, second to retain the support of his caucus, and only third to retain, through his party supporters, control of the House of Commons. Only at election time did he clearly reach out to the electorate, and his success there depended very much on the effectiveness of strong regional lieutenants, who were his colleagues in the cabinet.

A modern prime minister operates within a different system of supports. He tends, far more than even his strongest colleagues, to attract the attention of the news media. Wherever he goes he is followed by a scrum of reporters and cameramen. For this reason, both his ministers and caucus supporters depend on him, because he is visible and they are not. To an extent hard to imagine forty years ago, the government itself has been personalized around the prime minister. From now on, it will be hard to escape the development of a cult of the leader in Canadian politics.

But the prime minister is more than a personality floating almost godlike above the political system, behind whom the process of government goes on much as it did before. The whole process of cabinet government has responded to this change in the field of force. In the past, a prime minister did not possess the resources to control his ministers, who, with the support of their departmental officials, could retain the initiative and control over policy in their own fields. A modern prime minister does possess such resources and it is fairly certain that this trend will continue. The prime minister's office has a substantial staff, whose duties are by no means confined to seeing that his mail is answered, his appointments scheduled, and his travel taken care of. He has expert advisers, outside the regular bureaucracy, on matters important to him, such as constitutional reform, foreign policy, or economic policy. These advisers resemble nothing so much as the White House establishment, which gives an American president the bureaucratic support to maintain an organization independent of the established

officers of his cabinet. Observers in Canada have, since the early days of the Trudeau regime, detected a presidentialization of the office of prime minister. It may well be that some of this criticism is exaggerated, but the trend is real and can be expected to continue. It arises out of the changed environment of the office, not merely from the personal style of a particular prime minister.

The growing capacity of the prime minister, with his high visibility in the media, to go over the heads of elected politicians directly to the electorate may involve a profound change in the nature of parliamentary government in Canada. It is not a prospect that appeals to those who remember the fondness of the dictators of the 1930s for plebiscites. To a younger generation, it may appear to be merely Gaullist. In any event, it represents an unwelcome deviation from established ways of running the political system.

The Representative Role of the Cabinet

There is a second long-established method of political accommodation through the cabinet system which is in terminal decline and will have to be replaced by some other method. Canadian cabinets since Macdonald's time have been very much institutions of federal accommodation. Cabinets consisted of strong regional ministers firmly based in the party structure so that regional tensions could be diffused by political accommodation within the government party. This intrastate federalism was central to the negotiation of conflicts that could otherwise become divisive enough to threaten the survival of the system. When this mechanism failed to work, as was the case in the Manitoba schools question in the last quarter of the nineteenth century and in the conscription crisis during the First World War, it led to the crippling of a major political party. But the system survived because the other party was able to revive a similar system of intraparty accommodation. The country can survive the emasculation of a political party, but the country may be in greater peril if no alternative political party can move into the political space created. To the extent that this may be a consequence of the electoral system, it will be considered elsewhere.

The causes for the decline in the importance of the regional minister are not hard to find. His power base in the nineteenth century depended to a considerable extent on the substantial federal patronage that flowed from countless jobs in public works and other kinds of employment by the federal government. The era of reform that first created a merit system in the public service and subsequently placed the great bulk of contracts under a system of public tender removed a vast area of patronage. Major internal changes within the party system, which broke the intimate nexus with provincial party organizations, have also played their part.

A more important and clearly irreversible change has been in the

government decision-making process. With the immense growth in the scale of government, the old instinctive process — Bagehot's true match of non-specialized and specialized minds, in which the non-specialist politicians had the final say[13] — is no longer a characteristic of the system. Supported by a large and skilled bureaucracy, ministers now reach decisions after pondering thick briefing books, in which the alternatives have been set out in cost-benefit terms as part of a rational whole. As it filters upwards, this governing process squeezes away the political imponderables until they disappear in a calculus of rational considerations. The cabinet system, based on mirror committees of officials and operating finally in areas of interdepartmental, rather than interregional concern, alters the basis under which decisions are made.

Finally, the growth of central agencies as a means of integrating the entire process of government shifts the balance of the system from departments to the centre — and at the centre is the prime minister.

The old system of cabinet government in Canada was unable to survive the quantum leap in the role of government that has taken place within a couple of generations. The old representative cabinet was based primarily on regionalized participatory democracy, in which strong ministers were able to work out a consensus and make it stick. This system worked partly because the issues were few enough for a relatively small group to handle. One of the side effects of the growth of government was that the group became too large to function effectively in the old way. The last Trudeau cabinet numbered 37, and John Turner was able to bring the number down only to 29. Joe Clark did better, with an inner cabinet of twelve, but his government did not last long enough to see whether such drastic surgery would work.

The outcome of the 1984 election has confirmed a long-term shift in the role of the cabinet at the summit of the executive government. With 40 members, the cabinet has long passed being capable of negotiating any significant issue. The cabinet has become simply a meeting at which members may be informed about major policy issues decided elsewhere, about which they can complain to a limited degree. In other words, cabinet is a mini-caucus, not a decision-making body. The sustaining myths about the cabinet have been that it was accountable, through our system of representative and responsible government, to a majority of the House of Commons and, above all, representative of different regions and interests in the country. Today's cabinet may be representative to the extent that the governing party has a significant foothold within regions and particular groups, but that is all. If there is a representative and negotiating role to be performed, that role has shifted to the Committee on Priorities and Planning, which now numbers 14, a little above the optimum size for an executive body. As far back as 1919, Britain's Machinery of Government Committee had argued that "the Cabinet should be small in number — preferably ten, or, at most,

twelve."[14] It was wise of Mr. Mulroney not to make Mr. Clark's mistake of calling the committee the inner cabinet, but the reality remains.

Government will continue to be dominated by the prime minister, supported by the central agencies. Responsible government — the collective accountability of all ministers to the House for every issue of policy — now has only ritual significance. The more public and directive role of the prime minister has shifted the focus of his life so much that the public may more and more question the need for his presence on the floor of the House: it saps his energy and uses up time that might more profitably be spent elsewhere. Whether we know it or not, we may be close in the next generation to presidential government on the American model, which at least has the advantage of the checks and balances that flow from a clearer separation between the executive and the legislature.

Although the trend in the evolution of cabinet government is as yet unclear, the evolution of the cabinet into a mini-caucus suggests that our political vocabulary is now inadequate to relate the cabinet to the basic constitutional conception it represents. The centralization of decision making in the Committee on Priorities and Planning, which is likely to confirm the dominant role of the central agencies, is likely to make the whole system insensitive to regional requirements. Administrative decentralization may mitigate the problem, but is not likely to solve it. The buckle role of the cabinet in bringing together effective political control through the legislature has been attenuated by changes in the role, scope, and structure of government.

In a sense, what has happened is a new kind of democratic relationship with the executive. The prime minister has emerged as a highly visible chief executive, reaching over his colleagues' heads in a direct link with the public through his exposure in the media and imposing, with the aid of his support agencies such as the Privy Council Office, a different kind of democratic control over the administration of the state. This process has problems of its own, one dimension of which has been described by Robert Stanfield:

> Because of the changes in our society it is much more difficult than formerly to find a consensus upon which the country can be governed. The effect of the breakdown in tradition has been vast in itself. Party loyalty, for example, is a very thin reed for a government to rely on today. When tradition breaks down and voters get their impressions from the radio or television, governments acquire powerful tools to manipulate public opinion, but a public which can be manipulated is volatile and shifting and consequently a consensus is difficult to maintain.[15]

Clearly Mr. Stanfield is expressing a concern that surpasses either his feeling that the reach of government has exceeded the capacity of the cabinet and parliamentary system to function effectively or his dismay at what he sees as the erosion of a strong system of national parties. The

societal change to a volatile and fickle electorate may threaten the efficacy of long-established political institutions. However, more sensitive procedures for consultation with interested and informed publics may mitigate this effect.

Participation, Consultation, and Semi-Autonomous Agencies

At any time, a variety of publics have important interests at stake in policy issues. One of the by-products of the administrative reform movement was an attempt to diminish the ability of interest groups to bend policy to their own selfish ends. Since around the end of the past century, there have been various attempts to immunize particular kinds of decisions by placing them in separate, independent agencies, sometimes deliberately bipartisan in nature (such as the Interstate Commerce Commission in the United States). In Canada, such agencies took the form either of Crown corporations, like the Canadian Broadcasting Corporation, or of regulatory agencies, such as the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission.

However, autonomous agencies can develop their own policy objectives in serene disregard of both the government of the day and the public interest. Lacking the means to engineer public consent to often complex and recondite policies, such agencies may become vulnerable in the face of a widespread desire for more direct control of their policy areas by ministers, who are still somewhat sensitive to public demands. This in itself may be undesirable on various grounds. The issues agencies have to decide are both arcane and politically sensitive. Only the exceptionally well-informed understand them at all. Ministers, already overburdened with decisions, may blanch at the prospect of taking over such decision making, with all of the possibility of mistake and political obloquy. This is a view which no doubt they would be encouraged to hold by their bureaucratic advisors.

Consequently, in recent years, the agencies themselves, as well as some ministries, have held public hearings and even financially supported the work of public interest lobby groups, such as consumers, environmentalists, and native peoples, to try to open up debate and make public acceptance of policies more likely.

These efforts reflect the recognition that a variety of special publics are affected by most policy issues and that open debate among the publics will help achieve better policies. The development of fractionalized democracy has the advantage, from the point of view of administrators, of engineering public consent to sometimes difficult policy decisions. The extension of this kind of participatory democracy builds up patron-client relationships between the regulators and the interest groups concerned. With some interest groups, such as those from industry, knowledge is an important aspect of power since the

interest group knows more in a technical sense than the regulators themselves. Accordingly, a regulatory body may be in danger of becoming a captive of the industry it regulates. When an agency seeks to balance power by funding weaker interest groups, the very fact of funding is a source of power, which is reinforced because the permanent employees of supported groups unconsciously develop an empathy for the officials with whom they are in regular contact.

Nevertheless, the growth of this fragmented consultative process, outside the normal channels of politics, is one of the important and growing aspects of the modern state. It has overtones of the corporatism that was a subject of much anxious debate in the 1920s and 1930s. That debate was perhaps somewhat clouded by the unlovely image of the most noticeable corporate states of the time — Germany, Italy, and subsequently Spain. But the issue, which seemed starkly simple fifty years ago, has clearly arisen in a different form.

Parliament

"It is a wonder," said Robert Stanfield, "that the House of Commons does not destroy the minds and souls of its members."[16] Parliamentary government, designed as it was to be the point of interaction of the relatively small elites that mattered two hundred years ago, is today a somewhat exotic form of representative democracy. Can parliamentary government be adapted to the needs of a twentieth century polity, let alone to the unforeseen requirements of the next century? It is perhaps an unduly dour view to see parliamentary government merely as a soul-destroying experience for those misguided few who find themselves in an elected chamber, where they all too often turn its proceedings into a rather unattractive form of guerilla theatre. The surly debates, the ignored bells, the frequently uncouth behaviour of members cooped up too long in the constricting atmosphere of the chamber may in fact be part of the role of the House of Commons. When Walter Bagehot spoke of the educative role of the Commons, he thought of it as a place where public issues were simplified and dramatized so that the public could understand them. His model was rational: the present one seems more Freudian, but it is still theatre.

Within living memory, the work environment of members of Parliament has changed beyond recognition. Parliamentary life is more structured and less informal than it was, and it is hard to recall what that life was like. Members were often compelled to live much of their lives in the vicinity of the House when it was in session. One member from the period feels that "this informal element of parliamentary life has enormously diminished, however, by the ease with which members can now return to their constituencies."[17] That many members now go home every weekend has meant, he thinks, "the ruination of parliament." He

recalled that in the past many members were unable to go home at all during the session and that such members came to know members of all parties. Such acquaintance provided an opportunity for not only establishing greater corporate identity without regard to party but also transmitting the lore and values of the House.

Whereas once all members' offices were in the Centre Block and members frequently shared an office and a typist with another member, members' accommodation today has expanded out of the Centre Block and into adjacent buildings, and members have suites of offices. Members now have substantial staffs, who work not only on constituency business but also on the mountains of paper that come daily into members' offices from the House and from government departments.

These improved office facilities, both in Parliament and in their constituencies, have improved and perhaps altered the life of the average MP. He or she is now able to provide much better advice and help to constituents at a time when the reach of the state has expanded rapidly. This ombudsman-like role now occupies much of the time and resources of members, and there is no question that they find it a rewarding contrast to the impersonal character of the rest of their political lives. This role may incidentally improve the electoral chances of sitting members, but the main thing is that the role provides a sense of achievement in a world where there are few other such opportunities.

These changes have also undoubtedly contributed to the pressure for a change in members' role and have enhanced members' capacity for a more constructive place in the relationship between the executive and Parliament. The pressure for change arises because there can be a good deal of frustration among parliamentarians. However, the frustration falls unequally on the two sides of the House because of the special adversary relationship that obtains. As Robert Stanfield pointed out, "The House of Commons and the government are not normally adversaries. Only the government and opposition parties are normally adversaries."[18] The problem a government has with its own members is to keep them busy at safe occupations. Because most members aspire to office, a considerable number — at least sixty at any one time — can be kept in a state of hopeful busyness as committee chairmen or parliamentary secretaries. Mr. Trudeau adopted the expedient of changing them around at least every two years, a practice made more palatable because only the parliamentary secretaries were paid extra stipends. It would make a great deal of sense to provide similar emoluments to committee chairmen, whose task may be more exacting. But the problem remains. Maintaining party discipline and advancing the government's program in the House require that government backbenchers refrain most of the time from time consuming debate, both in the House and in committee. They can let off some steam in the secrecy of caucus, but unless they can be found a more creative role — mainly through improvements in the

committee system — government backbenchers are likely to find their inconspicuous role irritating.

For the opposition parties, the frustrations are different, arising in part from a sense of helplessness as a group. The opposition's arguments seem to fall on deaf ears, their amendments are stolidly voted down, and their efforts to leave their mark on the legislative process are rebuffed at every turn. Since opposition parties lack both the responsibility of power and the rewards and punishments that encourage conformity, opposition parties often have problems achieving discipline and coordination in their long and patient role, which basically is jockeying for position in the next election campaign.

But Parliament is not merely a collection of voting robots and ombudsmen. It ought to play a significant role in the process of government. What that role should be and might become is a more difficult question. Seductive as it may sound, the American congressional model is not necessarily the best way to reform. Free voting without the party whip — or just a more limited interpretation of votes of confidence to permit more free votes — is not necessarily the best solution. Modern government needs legislation, and it needs a lot of it. Without party discipline, the complex lobbying for votes in the House would complicate the necessary legislative process without making the resulting legislation any better.

A more profitable approach is to concentrate on two things: streamlining the legislative process in the House and enhancing the role of committees. Streamlining seems obvious but has to overcome one major difficulty: that the control methods of recent years have greatly reduced the resources available to the opposition. These control methods include moving supply votes off the floor and simultaneously making it virtually impossible for the opposition to hold up supply, increasingly using allocation-of-time orders to curtail debate, and imposing a variety of time limits on particular debates, on question period, and on speeches. Opposition parties have been driven to revive such old tactics as disguising a filibuster as a plethora of points of order, introducing frivolous amendments, and boycotting sessions while the bells continue to ring. These tactics are the most visible evidence of the opposition's frustration and a surly, bad-tempered House.

Procedural reform is never easy since it is most acceptable when based on consensus and is most likely to happen with a new government that has not yet fallen into the arrogant habits to which all governments are prone. Paradoxically, one of the virtues of minority government is that it seems more conducive than majority government to generating a consensus on desirable reform. It is possible that more frequent changes of government would have the same effect. A government that suspects it may be in opposition in the near future may be more accommodating to useful reform, as will an opposition aware that it may soon have to

govern. That postwar Britain has had six Labour and six Conservative governments may have something to do with parliamentary reforms having taken place there. Such reform has not occurred in Canada.

Two useful reforms in the legislative process ought therefore to be high on the agenda. The first of these is to open up public consultation on legislation before the government is completely committed to the legislation. This consultation sometimes takes the form of issuing white, green, or other-coloured papers, which are then widely canvassed by committees, which often have public hearings. This approach is worthwhile when a major policy change is contemplated, as with taxation, immigration, or some such issue. A different method, tried successfully in the Quebec national assembly, is to refer bills to committee for hearings after first reading. Interested publics thus get a chance to air their views before the government has committed itself to both the principle and most of the details of a bill.

A second reform, limiting debate on second reading, has been strongly urged by John Stewart.[19] Little can be said at second reading, which is concerned only with the principle of the bill and not its details. Nevertheless, debates on second reading tend under the present rules to be almost interminable since opposition parties use second readings to consume valuable time — the only weapon the opposition now has in the House. Of course, in return for limiting debate on second reading, the government must allow time for constructive opposition. Such change will enhance the role of Parliament, which endless debate does not.

The most fruitful place for parliamentary reform lies in the committee system, but the low visibility of committees (which are seldom reported at all in the media) will limit the attractiveness of such reforms to parliamentarians.

Much of the most important work in Parliament is done in committees. This was not always so. In the distant past, before cabinet government had been firmly established, committees were an important part of the process of government. For one thing, there was much more private legislation, dealing with such important public projects as the chartering of railway companies. Committees investigating a variety of issues, from scandals to controverted elections, were much more common than they later became. By the end of the nineteenth century, the life of Parliament was increasingly dominated by public legislation, which invariably went through the committee stage in the Committee of the whole; the committee system therefore languished. The growing pressure of government business and the need to siphon some of it off the floor of the House and into smaller committees finally led to a number of tentative steps in the 1960s. These steps resulted in the present system, under which a series of standing committees deal not only with estimates but also with practically all bills except financial measures. It is as well to remember that this was a difficult step to take. On the whole, governments wanted

this change because it opened up the prospect of a speedier disposition of legislation. But the proposed change met with stubborn opposition from the backbenchers of all parties; members were most reluctant to give up their right to speak on any measure whatsoever.

The present committee system has been in operation for over fifteen years. It is not without problems. Since the committees themselves, as is normal in parliamentary government, are a microcosm of the House in reflecting the party balance, the same rigid enforcement of the government's will, spiced with party wrangling, means that the committees reflect the mood, tone, and quality of the House. In addition, committees were overloaded: there were too many committees and too few members willing and able to serve on them. Party whips therefore resorted to extensive substitution; as a result, a given committee could seldom count on having in attendance a significant number of members familiar with the business before the committee. Members found this situation frustrating and exhausting, and committee work fell well short of expectations.

One of the reforms frequently advocated was the provision of adequate staffs to committees so that members could be supported by expert advisers. This seemingly necessary device has worked well in the relatively few situations where committees have been provided ad hoc with specialist staffs; nevertheless, the suggested reform has encountered objections based on both principle and practice. Governments are seldom happy with the prospect of such reform, since it might institutionalize a set of experts to rival those in the regular bureaucracy. Pierre Trudeau, when prime minister, was occasionally given to arguing that the reform was part of an attempt to introduce the American congressional system which — by implication — was a bad thing to do. Other critics have noted the danger that committee staffs could usurp the role and functions of MPs. There is also the practical problem that committee load varies in both intensity and subject matter and that it would be difficult to assemble and hold an appropriate pool of expert staff. Furthermore, experience has shown that ad hoc staff, although expert in such arcane subjects as taxation, are sufficiently ignorant of the working of the parliamentary system that much of their usefulness is vitiated. On most issues, committee members are sharply divided on partisan lines so that the question of to whom the staff is responsible — the chairman, the majority, or the opposition parties — arises. Alternatively, should there be minority and majority staffs?

None of these difficulties is insuperable. With a wide variety of experts, the staff of the Library of Parliament is becoming increasingly capable of serving committees, and this development may be sufficient to provide a workable nucleus of expert and impartial research staff. There remains the question of how much independence committees ought to have under our system. Giving them so much independence

that they replicated the American model would fundamentally alter the whole system, but few have suggested this much change. A greater difficulty is perhaps the institutional resistance of the House leaders and party whips, particularly on the government side. Committees are generally small bodies. Recent experimental changes in standing orders have reduced the size of committees, a necessary move given the size of the House as a whole and the excessive burden on members in recent years. To the extent that this change reduces substitution, it means that a fairly small body of members, working closely together and sharing the same information, will exhibit the small-group tendency to have more in common with one another than party managers are likely to welcome. Committee work may blunt the hard edges of partisanship too much for the adversary arrangements of the House of Commons.

Experience since 1980 with the so-called task forces — small, ad hoc subcommittees mandated to study and report on a policy area, provided with adequate research staff and an opportunity to hold hearings about the country — has been encouraging. It is true that the reports of task forces have not had the unmixed approbation of governments, but the reports have affected the agenda and style of discussion in a number of important policy areas. Members have been happy with task forces, which may also represent an extension of the all-too-rare direct contacts of parliamentarians with both the general and the specialized publics, thus adding a little bit of popular participation on the fringes of policy making.

Elected politicians are more and more becoming full-time professionals. Their representative function is therefore somewhat different than it was in the days when they were simply members of a particular community who represented their fellows in a small part of its time in a very part-time legislative body. Even the most obscure backbencher today is something of a specialized professional, with a set of skills that go with the job. The problem in modern societies, and particularly in urban ones, is to retain a link between the elected politician and the people he or she represents. As government becomes more remote and impersonal, new links must be invented between governors and the governed. That is why the machinery of parliamentary government is important.

"Constitutional government," says Professor Clifford Orwen, of the University of Toronto, "represents an attempt at a nonpopulist democracy. It seeks to secure the loyalty of the leaders to the people, while sheltering them from merely temporary vicissitudes of popular opinion."[20] The elaborate machinery of representative democracy creates much more distance between leaders and people than any known system of direct democracy. This distance can lead to what is nowadays called alienation and imperil the mutual trust on which the system is based. Nevertheless, the distance is valuable because it increases the likelihood of rational leadership and reduces the possibility of subversion of the

system's values through the temporary enthusiasm of an ill-advised majority.

The problem is to make government both responsible and responsive. Strong governing parties can distance themselves from temporary threats from irrational and sometimes mean-spirited outbursts of popular opinion. However, obsessive resort to polling to manipulate the electoral process may present an overwhelming temptation to governments and legislators to become followers of perceived opinion trends rather than leaders, and to resort to less reputable kinds of advertising involve the manipulation of opinion. These phenomena demonstrate the enduring tension between populism and representative government. Democratic government needs to be responsive to public opinion but also needs to distil from public opinion a coherent sense of the public interest.

In a federal country in which there are strong and deeply entrenched regional interests, it is difficult to evolve a generally acceptable national interest, and the institutional arrangements of a federal system in which the units have parliamentary forms of government can seriously militate against harmony in the system. At the centre, in Ottawa, the consequence of representation in the House of Commons on the basis of representation by population is that particular regional interests are crushed by being outnumbered. When being outnumbered is combined with virtual exclusion from the government caucus — as was the case with Western Canada in recent years — the result is a sense of alienation based on exclusion. Thus, provincial governments, whose majoritarian characteristics tend to suppress minority opinions in their own provinces, acquire a role that further polarizes the federal system. Even reintegration into a governing caucus, in which members from Central Canada greatly outnumber members from Western Canada, may present an almost equally repellent prospect to Western Canada. In the end, both political parties and the parliamentary system need to be more regionally sensitive, although no workable ways of achieving this sensitivity have yet emerged.

Administration, Decision Making, and the Rule of Law

An important part of government is the control that may be exercised over the administration to prevent illegal or abusive use of the powers of government exercised by ministries and other executive agencies. One would think that this is a role assigned to the courts in accordance with the rule of law that, in Dicey's terms, included the principle that no one should suffer penalties without a distinct breach of the law and that no one, not even the highest ministers of the Crown, is above the law. Since in the daily business of life the citizen is surrounded by a complex web of regulations made by government departments, resort to the courts —

both an expensive and a time-consuming remedy — is possible in only a small number of cases. With the courts as a last resort available to only the few, what machinery exists for controlling the vast regulatory machine?

Control over the administration is one of the functions of Parliament. However, a legislative chamber is made up of many people whose behaviour is governed principally by the complex ritual of political parties' playing out their role of government and opposition. Since governments largely control the parliamentary timetable, how can Parliament exercise some kind of control over administration? For at least two centuries, control has been exercised through control of the purse. Each year, the funds for each program are, at least in theory, voted by the House of Commons. However, this process is no longer an effective check on administration. It is true that the estimates of expenditure must be tabled in the House, examined by committees, and ultimately voted in the supply bill. Although members can raise questions about particular programs, government majorities can always ensure a program's passage, and it is now practically impossible under present standing orders in the Canadian House of Commons for the opposition to hold up the supply process in exchange for concessions.

If the ordinary parliamentary process can do little to control the details of administration, what remains? One method is to scrutinize regulations, not necessarily to second-guess the policy involved (which, it is presumed, Parliament has already approved in the enabling statute), but to ensure that the powers claimed are legal, do not conflict with basic constitutional principles, or are not in some other way abusive or unfair. The first of these criteria can be definitively decided only by the courts, but much abuse can be avoided if a government agency can be persuaded to withdraw or alter an offending regulation without the expense and delay of litigation. Parliaments in our system have used committees to scrutinize delegated legislation. This device is not new, but it took an unconscionably long time for it to be introduced in Canada.[21] What we now have is a Standing Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments.

The committee, which has been functioning for about a decade, has done a great deal to improve the process of regulation. However, the committee can do so only by persuasion. With the support of a small expert staff, it painstakingly reviews regulations. Where the committee finds regulations objectionable, it tries to persuade departments to amend them. The committee's proceedings reveal how effective this persuasion is. Although departments and agencies are open to persuasion in some cases, in many they are not. They assert that in their view and in the view of their legal advisers, the regulations are legal and proper. When pressed, departments and agencies assert that they have been advised in the same sense by the Department of Justice. When

asked to produce the ruling from the Department of Justice, they invariably reply that there is a constitutional rule against disclosing the opinion of the law officers of the Crown. Stalemate ensues. All the committee can do is report the matter to both Senate and House, but it is rare, particularly in the Commons, where the government controls the timetable, for the committee's reports even to be debated. Matters would be substantially improved if procedures (which now exist in only a handful of enabling statutes) were introduced to compel the House to consider either an affirmative order to confirm a regulation or a negative order to annul a regulation. Even if the negative order invariably lost because of the automatic government majority, the attendant publicity might be sufficient to soften the offending regulation.

Other methods to improve the process have been suggested by the joint committee on statutory instruments. Since a large number of dubious regulations are founded on vague and excessively wide powers contained in past statutes, one method of improving matters would be to keep a close watch on the enabling clauses of current bills. The enabling clauses of bills already in a subject matter standing committee could be simultaneously referred to the committee on statutory instruments so that future acts of Parliament will more strictly define the regulation-making powers. Another possibility would be for the committee to examine past statutes, submit improved amending clauses in a bill that, by all-party agreement, could be disposed of by the Senate, thus avoiding overcrowding the already heavy Commons legislative timetable.

If the balance of the system is to be restored, Parliament must increase its detailed oversight of the actions of executive agencies and Crown corporations through a much greater use of committees. However, there are limits to the effectiveness of such oversight. First, oversight requires expert knowledge and a good deal of hard work on the part of already overburdened MPs. Like all committee work, oversight tends to be invisible. There is a limit to how much MPs and political parties (mainly those in opposition) can afford to put into politically unrewarding activity. Second, if opposition members uncover reprehensible or scandalous activity, governments will be confirmed in their standard policy of discouraging such activity, certainly by giving it the legitimacy of a committee inquiry and possibly a report.

One of the characteristics of the modern state is its impersonality — a necessary quality when it comes to applying rules and benefits to a large number of people. However, impersonality has inherent problems. Rules have to be made to cover a large number of cases, but no two people are in like circumstances, and there must be some way of dealing with anomalies without the favouritism that might be the result of political intervention from on high.

To a considerable extent, we have shifted from a society in which many important rights of the citizen were protected only if asserted

through civil action in the courts to an entitlement society, in which rights are conferred on collectivities rather than on individuals. The price of this shift is that in return for these administered rights, the citizen is often denied legal remedies that existed before. For example, workers' compensation is determined by rules laid down and administered by an executive agency, but the claimant has no remedy in the ordinary courts. The result is that many individual hardships are created by the operation of the rational bureaucracy of the state. These inequities can be meliorated by the office of ombudsman.

The office of ombudsman has been adopted by nearly all Canadian provinces but does not exist as such at the federal level. The ombudsman's function is perhaps best described by his title in Quebec —*protecteur du citoyen*. His role is to take up the case of a citizen who feels unjustly treated by some administrative agency, through, for example, the denial of some social benefit. Although the ombudsman has the legal status and immunity of a judge and the right to demand agency records, he does not have the power to impose a legal remedy.

Countries with a system of government similar to Canada's have imposed two limitations on the office. It was objected that to place such an officer in authority over administrators would be contrary to the sacred principle of ministerial authority and responsibility. (How often has that argument been advanced against proposals to reform the machinery of government?) Accordingly, all an ombudsman can do is persuade an agency that its action in a particular case was unreasonable or blatantly unjust and that discretion should be exercised to right the injustice. Second, the ombudsman is not a court of law and therefore cannot provide legal remedies. A grievance based on illegality and not on maladministration should be pursued in the courts, not through the ombudsman. That such legal remedies may be beyond the means of the aggrieved citizen should not affect the matter.

The advantage of the ombudsman is that his services are available at no cost — which is important for the poor and the helpless. When a complaint is received, the first thing to do is determine whether action by the ombudsman is appropriate. In effect, free legal advice is given. If a complaint is justified, it is usually necessary to help the complainant make his or her complaint in suitable written form and then help him or her take up the complaint. It should be obvious that for the office to work, it should be both small and informal, for the ombudsman or his assistant will have to deal with the case in person. It may be that Quebec, with offices in both Quebec and Montreal, is about the largest unit that can preserve the necessary informality for the office to work properly. There appear to have been complaints that the office in Ontario has become so bureaucratized and legalistic that it has become little more than a large bureaucracy with the mission of watching over the even larger bureaucracy of the province.

The question of size and scale may be one of the reasons why the office has not been introduced at the federal level in Canada. There do exist officers of Parliament with specific ombudsman-like roles, such as the Human Rights Commissioner, the Official Languages Commissioner, and the Information Commissioner. The roles of all such officers is to protect citizens against abuse by a government authority, and all have powers that are initially persuasive, not the capacity to enforce or to institute action in the courts.

It was initially feared that legislators would oppose the introduction of an ombudsman because they value their role in assisting their constituents and would not want to share it with someone else. In fact, the experience so far seems positive: legislators are happy with the ombudsman, so happy that they show little inclination even to debate his reports and seem to treat the whole office with benign neglect. This attitude may be a good thing, enabling the office to establish strong roots. Although the office of the ombudsman cannot be seen as an enhancement of the rule of law (in part because the actions overseen are normally legal in themselves), perhaps the office imparts the notion of equity into the process of administration. What the office certainly does is mitigate the necessary impersonality of large-scale administration with a humanizing and personalizing touch.

The Unstable Base — Electoral Reform?

It may well be that nothing has changed as much in Canada in the past century as the electoral process. At one time, elections were a popular amateur sport that any number could play (provided they were male and on the voters' list). Although it was rough, often corrupt, and totally unscientific, the sport depended on a small permanent force of party activists skilled at getting out the vote and motivated partly by zeal for the sport and partly by hope of a rewarding political job. It was difficult to see this as a high-minded culmination of the democratic political process, even though the age was dominated by great issues of policy.

One of the process's characteristics was the stability of the voting pattern. Nearly everybody was "a little Liberal or else a little Conservative." One might speculate that long-run changes in government depended a good deal on the generational changes of birth and death, together with internal migration and massive immigration.

Based as it was on territorial constituencies (many of them multi-member), the electoral process produced broadly based, stable governments across the country. In the intervening century, much of the process has been sanitized by electoral reform to eliminate the more blatant forms of political corruption and to remove the whole process of electoral boundary-making from political influence. Legislation on electoral financing has done much to regulate the conduct of political parties by reducing the corrupting influence of money in elections.

And yet the whole system is a cause of persistent worry. The first-past-the-post system of electing members, far from enabling the party system to play a meliorating role in the polity, seems to have become positively dysfunctional, as Alan Cairns suggested as far back as 1968. "The party system," he said, "importantly conditioned by the electoral system, exacerbates the very cleavages it is credited with healing."[22] The elections of 1979 and 1980 neatly illustrated the problem. In 1979, the Conservative party elected only a handful of members from Quebec (reduced in 1980 to one) and in 1980, the Liberals could elect only two members west of Ontario. Yet the Conservative vote in Quebec and the Liberal vote in Western Canada were substantial, but wasted. Even if, as seems quite possible, the election of 1984 has created a realignment of parties as substantial as that of 1896, an important part of the problem remains. What was created in this election was a different party with broadly-based national support, after a period when no party could avoid being a mostly regional party. But despite there being at least one party with substantial representation from all significant parts of the country, the politics of numbers leaves substantial parts of the country insufficiently represented in the House and the cabinet to feel that their interests — as they see them — are adequately protected. Thus, in the aftermath of September 4, 1984, many Westerners found that they had lost the dominant place they had held in the Conservative caucus simply because of the sheer size of Quebec's and Ontario's representation in the same caucus.

It appears that the whole electoral system is an important contributor to the general sense that governments are unresponsive and insensitive to what the electorate — particularly in the peripheral regions — seems to want.

The new class of political experts, including pollsters, image makers, media manipulators, and rainmakers, has signally failed to cure this ailment. Inevitably the ailment has created a market for intellectuals with an urge to tinker with institutions. For much of the twentieth century, notably in the twenties, there have been advocates of proportional representation. It seemed neater, fairer, and somehow right that the parties should be represented in the legislature in exact proportion to their electoral strength. Political parties shattered by electoral defeat were tempted to embrace the idea but promptly forgot it when they were able to achieve power under the old dispensation. Widespread calls for electoral reform came to be a recurrent theme of the seventies. One of the first and most earnest advocates of such reform was Claude Ryan, then editor of *Le Devoir*, who was appalled by the gross underrepresentation of the Parti Québécois in the 1970 Quebec election (which he thought was a major causal factor in the October crisis) and in the minority federal government of 1972. For Ryan, the only solution was proportional representation and coalition governments on the European model.

A compromise between the two systems, which would retain single-

member constituencies but add seats on the basis of proportional representation to ensure minority representation on a regional basis, found its way into the report of the Task Force on Canadian Unity, in 1979, into the Quebec green paper on electoral reform of the same year, and into the beige paper of the Quebec Liberal party, in 1980. Professor William Irvine canvassed the matter thoroughly and reached a similar conclusion in 1979.[23]

But does Canada need a new electoral system? Even assuming that these proposals would reduce regional alienation without altering the system for the worse, is reform likely to happen? In the short run, there is one difficulty with these proposals: they must convince the very legislators whose life would be changed by them. If there were two classes of MP, one of which represented a definable constituency and the other of which was spared the cares and joys of being his constituents' ombudsman but who would be likely to have stronger claims to cabinet posts or other preferment, it is fairly certain that these newcomers would not be a welcome addition to any party caucus. However attractive the idea may be to party leaders and party managers, it may turn out to be difficult to persuade caucus to adopt it.

Kenneth McNaught is skeptical about the whole issue on historical grounds:

> The historical evolution of constituencies as collective entities and the electing of legislators to represent them are even more important than academic adjustments to the popular vote across the country or across individual provinces. A West German model or a Scandinavian model may be intellectually gratifying, but it does not conform to Canadian history. As Mackenzie King said to Earl Grey, who tried to promote proportional representation in 1909, the governor-general was a "faddist."[24]

Our experience of coalitions has not been a happy one, and the destructive effect of the Union Government of the First World War on both political parties is not easily forgotten. In the Second World War, the perverse demand of the Conservative party for a national government aroused no public enthusiasm whatever. Both the Conservative and Liberal parties suffered substantially from wartime coalitions in British Columbia and Manitoba. If there is a collective memory in the electorate, coalitions will not be a popular expedient. Whether the present and future Canadian electorates, for most of whom Canadian political history is not part of a family political culture, will feel the same way about coalitions is, however, uncertain.

History and experience are strong elements in a political culture, but they are not immutable. It may be that the intractable problem of the volatile electorate may force the political elites of the next generation to alter the electoral system along the lines so fashionable in the seventies. Political parties and voters may learn to manipulate the system to some

extent to their own ends and thus defeat its purpose. Nevertheless, it is probable that the party system will fragment in the long run. If that fragmentation comes about, we shall have to learn to live with not only minority governments but also coalitions. There will be a surface change in how the parliamentary and cabinet system works, but the system's basic character may be unaffected. The political parties of the past were thinly veiled coalitions of rather different regional interests. If the system changes, the main difference would be that the coalition would form at a different point.

The Future of Constitutionalism

Federalism: Which Communities Matter in a Community of Communities?

A federal constitution is primarily an instrument to confer legitimate authority on designated territorial units for limited purposes while reserving authority to a central government for other purposes. In a constitutional order, the preservation of social peace may impose restraints other than those limited to the distribution of power. For if federalism is a device for reducing conflict by unloading some policy areas where tension is too high for their successful management by a single government, federalism also needs to protect regional minorities from abuse by their own majorities. It is unlikely that it will be possible to find appropriate territorial units that completely diffuse conflict. This point is best illustrated by considering what happened in the Confederation period.

It is a useful oversimplification to regard Confederation, as Harold Innis did, as a reoganization onto a larger credit base to achieve common economic goals through economic development and western expansion. But it is an oversimplification nevertheless. Apart from economic weakness in the face of American expansion, the most serious problem — which was much more serious in the Province of Canada than elsewhere at the time — was that internal divisions over the serious policy issue of education led to political stalemate and unstable government. The educational issue (which in Canada East included the language and cultural issues as well, since all francophones were Catholics, whereas the majority of anglophones were Protestant) bedevilled attempts to achieve stable governing parties. Any solution on a territorial scale would create minorities still vulnerable to abuse in the post-Confederation provinces. Accordingly, Section 93 of the British North America Act protected the educational rights of Her Majesty's Catholic and Protestant subjects which they had enjoyed by law or custom before the union. Significantly, language was afforded the same protection only in particular federal institutions and in the province of Quebec. But protected it was, and

both of these entrenchments were significant limitations of provincial autonomy in what were essentially fields of provincial jurisdiction. It is not surprising that both issues have continued to bedevil provincial politics in a number of provinces ever since.

This arrangement emphasizes the importance in constitution-making of special provision for what are perceived at the time as significant groups. The division between Protestant and Catholic was central to Canadian politics in the nineteenth century and indeed later; the division therefore took pride of place among the special arrangements at Confederation. By contrast, the arrangements to diffuse conflict between the French and English were slight and ambiguous. That issue soon became an agenda issue in its own right in Manitoba and the Northwest and has coloured almost all conflicts since. Another problem, the place of native peoples in the constitutional order, remained a non-issue for a century because the group involved was politically invisible. However, the question of native rights had been part of basic constitutional issues since the Royal Proclamation of 1763. Why the difference?

Partly it was the common and, in modern eyes, arrogant nineteenth century belief that Indians (and later Inuit) were part of an inferior culture, and that conversion to Christianity and assimilation would lead to their disappearance as a distinct group. Today, native peoples have none of the attributes necessary for fitting easily into our constitutional arrangements. It is difficult for native peoples to achieve sufficient self-government to preserve their cultural distinctiveness because they lack the numbers to sway enough votes, lack the political space in which to operate, and on the whole do not have the distinct territorial space (except perhaps in the territories) to organize institutions of government. Native peoples' only appeal is to the collective conscience, reinforced by the fact that some of them have somewhat undefined rights to the resources in the lands which they claim or occupy.

To the extent we have accommodated native peoples, it has been outside the federal system, in the new mechanism of the Charter. Like many other problems Canadians must confront in the future, the accommodation is likely to lie outside the federal Constitution. It is thus necessary to remember that the federal Constitution, which has in the past excluded almost all other issues in Canadian constitutional law, is only one part of our constitutional arrangements.

The striking thing about the Canadian federal arrangement is that the distribution of legislative power in the Constitution, as described in Sections 91 and 92, has undergone only minimal change by amendment since Confederation, and it is quite probable that the present wording will persist for a long time to come. This does not mean that the meaning of these constitutional provisions has remained unchanged, but that the process of change has taken place almost entirely outside the phrasing of the written Constitution. The federal bargain, in terms of the distribution

of roles between governments, has in a sense remained remarkably stable. What has changed is the nature of the interests to be accommodated, the perceived role of governments, and both the meaning of the terms and the mechanisms by which the political system operates.

A standard theme of Canadian constitutional history has been the process by which the courts, in interpreting the Constitution, have adjusted it to conform to the pressures of changing conditions on the constitutional framework. The theme needs to be repeated only in summary form. In 1867 the provinces, which were given limited and inelastic revenues, were not expected to do much. The steady growth of state intervention in the life of the economy had yet, except by chartering railways and the like, to overtake a predominantly rural and underdeveloped country in any significant way. The definition of provincial jurisdiction was perhaps more to keep the federal government out than to provide scope for provincial legislation. Within a decade or so, a massive change had begun, with new demands on provinces to regulate aspects of the marketplace, to seek new revenues, and to provide the infrastructure for resource-based industries. In interpreting the Constitution, the Judicial Committee of the Privy Council legitimized this expansion in the role of provincial governments by a generous interpretation of the property and civil rights clause of Section 92, largely at the expense of the federal commerce power. In the event, the committee created something much more like the classical model of federation than the original Constitution had appeared to provide.

This arrangement worked until the strains of the interwar period created problems of regulation and social administration beyond the financial and administrative capacity of the provinces. In both world wars, the pendulum swung heavily toward the federal government, whose role was sanctioned by the invention by the courts of an emergency power, first articulated by Lord Watson in 1896. In contrast to the strict construction of the interwar period, the courts after the Second World War adopted a more lenient attitude toward mixed federal and provincial jurisdiction. This attitude provided the legal underpinning of the era of cooperative federalism, which, under federal leadership and funding, created the modern welfare state in Canada.[25] What was remarkable about this period was that change and policy innovation took place by intergovernmental agreement and that the courts were hardly involved at all. This period lasted as long as the objectives of both levels of government were in harmony, but conflict escalated when there emerged irreconcilable differences over such issues as energy policy and industrial strategy.

One of the consequences of the shift in the balance of power in the federal system, which was in part the consequence of greatly increased sophistication in the provincial bureaucracies, was to make the Canadian federal system one of the most decentralized in the world. Voices

were soon raised to create a balance more appropriate to modern requirements. Thus, in 1972, the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, while advocating greater provincial responsibility for culture and social policy, felt that there should be "greater centralization . . . in the regulation of the economy" in such matters as "air and water pollution, international and interprovincial trade and commerce, incomes, securities regulation, financial institutions, unfair competition, and foreign ownership."[26]

Although some of these changes would undoubtedly require constitutional amendment, some federal powers could be strengthened by judicial interpretation. One of the perils of prediction on the basis of apparent trends is illustrated by the observation of Richard Simeon in 1972 that the "Canadian Supreme Court . . . has not so far established itself as an important factor in federal-provincial relations. . . . It appears unlikely that the Court will play a much larger part in the future."[27] In fact, the Court has played a far more important role in settling federal-provincial conflict than at any time since the end of the war. One need only note the strengthening of the federal commerce power in the CIGOL and Amax Potash cases,[28] the role of the Court in forcing accommodation on the 1981 constitution proposals,[29] and the recent decision on Newfoundland offshore oil. Inevitably, new policy issues will force governments, both federal and provincial, into new legislative ventures, and these ventures must in the end be fitted by the Court into the wording of the Constitution.

One of the features of political debate in the seventies was the number of proposals for a new constitution. Everyone from the Joint Parliamentary Committee on the Constitution to the Task Force on Canadian Unity, plus provincial governments, private organizations, and political parties, sought to replace the mid-Victorian and colonial British North America Act with a constitution clothed in the rhetoric of today. Even the federal government, in its constitutional amendment bill of 1978, produced such a constitution. It is rash to predict, but it is not unreasonable to expect that the culmination of all this energy in the 1982 Constitution has probably closed off these exercises for some time to come. Like it or not, we still have the old Constitution glued onto the new one, and the old Constitution contains the main parts of the federal bargain.

This is not to say that there will not be piecemeal adjustments. The new amending formula, which makes possible changes in jurisdiction without unanimous consent and allows a dissident province to opt out, may well lead to some amendments that will create a federation much less symmetrical than that of the past.

The politics of federalism in Canada is played out as a matter of routine in jurisdictional conflicts in the courts and in intergovernmental negotiations. We can expect these to continue as the system responds to new policy demands. There is, however, another aspect of Canadian fed-

eralism that plays and will continue to play a major accommodative role in the system. If we describe the relations between governments, either as litigants or negotiators, as interstate federalism, we must also take account of a phenomenon as old as the federation itself, namely, intrastate federalism.

Intrastate federalism is another name for the interpenetration of one level of government by the other. In the beginning, this interpenetration was partly informal, through sectional representation in the federal cabinet and through the diffusion of conflict within an integrated party system. However, intrastate federalism also had its formal side: the lieutenant-governor was appointed by the federal government and subject to instructions in the exercise of his constitutional discretion in the reserving and withholding of assent to bills. The capacity of the federal government to intervene inside provincial governments is now a phenomenon of only historical interest. On the other hand, for the past decade or so, there have been a variety of proposals for provincial penetration of federal institutions. There have been suggestions for provincial participation in the selection of judges of the Supreme Court and for direct provincial representation on such federal agencies as the Bank of Canada and the Canadian Transport Commission. Suggestions for reforming the Senate, including changing it to a body made up wholly of provincial government nominees on the Bundesrat model or having half of its members indirectly elected by provincial legislators and the other half by Parliament, have been made. It is unlikely that any of these suggestions will be revived in the near future. They bear too close a resemblance to Mackenzie King's description of proportional representation: fads.

The most likely possibility is that the federal Constitution will evolve, quite possibly in the directions so sensibly suggested in that neglected document, the 1972 report of the Joint Parliamentary Committee on the Constitution.

The Charter and Constitutional Values

The debate that preceded the introduction of the Charter was one that went to the roots of our constitutional arrangements. The terms of that debate were foreshadowed as far back as 1949 by one of the greatest of our constitutional lawyers, Frank Scott. He wrote:

> One purpose of a Bill of Rights is to protect the citizens against the tyranny of legislative majorities, and to substitute the sovereignty of the people for the sovereignty of Parliament. On the other hand the inescapable effect is to shift the burden of defining the protected rights from our elected representatives to our nominated judges. Ultimately the question narrows down to a choice between a faith in the courts and a faith in legislatures. History has shown that either may become the enemy of freedom.[30]

The Charter of Rights and Freedoms, now enshrined in the Constitution Act, 1982, sets out a list of legal and political rights acquired in the past and purports to prevent governments and legislatures from taking these rights away by the ordinary process of law. There are, however, two important limitations that leave open the possibility that these rights are not totally protected. The first is contained in the first section of the Charter, in which these rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In other words, the courts will decide what the reasonable limits are in any particular instance. The second qualification is the override clause in Section 33. Under that clause, either Parliament or a provincial legislature may legislate notwithstanding the provision of the sections on fundamental freedoms, legal rights, and rights of equality for a renewable period of five years. This clause might lead Parliament or a provincial legislature to override a decision it considered unacceptable. It appeared at the time that this provision was not likely to be invoked, since governments would wish to avoid the public obloquy that would arise. Nevertheless, Quebec, which asserts that it does not accept the validity of the Constitution Act, 1982, has attached a notwithstanding clause to all bills introduced into the national assembly. On the other hand, it may well be that the existence of the notwithstanding clause may strengthen the resolve of the courts to second-guess the legislature in the expectation that if their interpretation turns out to be unacceptable to the public, it can be overturned by the legislature.[31]

There has always been a certain tension between the ideas of democracy and liberty, and this tension comes out clearly in such nineteenth century writers as John Stuart Mill and Walter Bagehot. In essence, bringing democracy to terms with constitutional government was susceptible to two different solutions in the nineteenth century. The first of these was a reliance on declarations of rights as a fundamental principle of the constitution, as in the case of the Bill of Rights in the Constitution of the United States. In this case, the courts emerged as protectors of rights against legislative encroachment.

The second solution was articulated by A.V. Dicey.[32] Dicey enunciated the concept of the rule of law, by which everyone was subject to the law in the same way under the authority of the ordinary courts, although this law did not interfere with the notion of parliamentary sovereignty. This left it open for Parliament to redefine or remove historic rights if it chose. The rule of law did not mean that the British system was less free than one subject to a fundamental law relating to human rights. Dicey argued that the important thing is not rights, but remedies. Unless the rights so grandly described in declarations of the rights of man are enforceable they have little meaning, and in the British system, rights exist only if they are enforceable in the courts. In Britain, these rights

exist in the common law and have been confirmed from time to time by statute; and judges, in spite of their traditional deference to the will of the legislature, have a strong tradition of independence from the executive.

Nevertheless, for over sixty years, proponents of the traditional form of British constitutionalism have been increasingly uncomfortable with the inability of traditional remedies to curb the ever-widening discretionary powers of executive agencies. Initially, this discomfort generally took the form of a nostalgic yearning for a return to a long-lost laissez-faire world. However, this discomfort also led to an increased awareness of the problem created by needlessly loose delegated administrative power — a power that could be considerably curbed by greater vigilance and a strengthening of judicial control to restore the rule of law.

These preoccupations were also reflected in such bodies as the Canadian Bar Association, which during the war years was critical of wartime regulations that infringed traditional resort to the courts and curtailed historic economic liberties. The widening of concern to deal with infringements on liberty of conscience and other basic freedoms came a little later.[33] The causes of this wider concern were both international and domestic. The exposure of the horrors of the Nazi regime in Germany, which led to the adoption of the United Nations Declaration of Human Rights, had a spillover effect in Canada and added to the demand for a Canadian charter. Several issues in Canada gave momentum to demands for some kind of bill of rights to control the abuse of power by both governments and legislatures. The setting up of the Gouzenko spy inquiry in 1946 by secret order in council and the royal commission's subsequent in-camera hearings, which showed scant respect for the traditional rights of the accused, dismayed many lawyers already unhappy at the growth of arbitrary state power in wartime. Furthermore, the sense of shame at the treatment of Japanese-Canadians during the war, the persecution of Jehovah's Witnesses in Quebec, and the efforts of constitutional lawyers such as Frank Scott all contributed to a hardening of the position of the Canadian bar on a new approach to the whole issue.

Protest and litigation over the wide powers that Parliament had given ministers in such matters as taxation and immigration came after the event and in any event were relatively ineffective. The issues raised tended to be too abstract to arouse public opinion sufficiently, and oppressive laws and regulations fell most heavily on the poor, minorities, and other helpless groups. The remedy seemed to be a bill of rights, and its achievement was largely the indefatigable effort of John Diefenbaker.

Nevertheless, the effect of Diefenbaker's Bill of Rights on the Canadian legal system was slight. Efforts to persuade the provinces to entrench it in the Constitution having failed, its sole application was to the federal government. Thus the considerable capacity of provinces and municipalities to curtail rights of assembly and free speech through the control of public places remained unrestrained. Furthermore, the courts

on the whole did not take the Bill of Rights seriously. Judges trained in the old common law tradition were not comfortable trying to fit broad and novel principles into the law. Since the Bill of Rights had declared that particular rights had always existed, it was difficult for judges to accept the view that an act of Parliament was inconsistent with them. Following the normal judicial practice of preferring to settle cases on narrow grounds rather than on broad general principles meant that if judges could find a remedy in the protections already included in the Criminal Code or other laws, it was unnecessary to invoke the wider principles of the Bill of Rights. With their inherited deference to the superior position of the legislature, judges were reluctant to substitute their own judgment for that of Parliament.

In spite of the shift in opinion in the direction of the idea of a charter of rights which had taken place over the years, the confrontation between the first ministers at the federal-provincial conference was the final round in the debate over the Charter. Against the federal proposal two familiar arguments again were displayed. Premier Sterling Lyon, of Manitoba, revived the traditional Dicey argument that the central point of our system of government is the supremacy of the legislature as an expression of the will of the people and that the rights that matter are founded on legal remedies enforceable by the courts, not on grand statements of general principle. Premier Blakeney echoed somewhat the same argument but stressed the deep-seated attachment to popular sovereignty as well as a distrust, based on American history, of the ability of the courts to be as tender to popular rights as they would be to the rights of property.

Now that the Charter has been achieved, what will be the result? In all probability, not as much as its proponents had hoped nor its critics have feared. One thing is certain. There has been more litigation on the Charter in its first year than there ever was on the Bill of Rights. Many extreme and even frivolous arguments have been made in lower provincial courts, but few have survived. Nevertheless, there are already a significant number of important cases, some of which have reached the Supreme Court. When the first batch has been decided (probably before the end of 1984), some tentative conclusions can be reached. At the moment, it is possible only to speculate.

The courts will probably be somewhat cautious in the beginning. Although the present generation of judges attained maturity under the regime of parliamentary sovereignty and black-letter law, they are the first generation of lawyers for whom the whole debate about human rights is part of their experience. In this sense, they differ from the judges who were exposed to the Bill of Rights. And the next generation of judges, who will be appointed in the next twenty years, will have been at law school through the whole debate on the Charter and on the new conceptions of constitutional law now being generated.

The initial effect will probably be, as Peter Russell has suggested, that the effect of the Charter will be procedural rather than to create a wave of judicial law-making. First, the existence of the Charter has already affected police and law-enforcement procedures: much greater care is now exercised to ensure that the accused are apprised of their rights, that searches are legal, and that evidence is not tainted by dubious investigative and interrogating procedures. Second, a more scrupulous judicial scrutiny of the procedural aspects of law will impel those drafting legislation and regulations to adhere to the principles of the Charter. Even if nothing else happens, this adherence will do much to remedy the abuses that exist.

Alan Cairns has seen, in the new emphasis on rights, a process by which there can be a new bonding of the citizen to the state:

> Charters generate loyalty both by their symbolism and the capacity to redress grievances which they provide. Further the citizens of a fragmented society may achieve an integrating collective sense of themselves from their common possession of rights and the availability of a common language of political discourse.[34]

The Charter will thus have a nationalizing effect.

That may be so. Perhaps the point could be put another way. We have seen, in the past two or three years, a much greater interest by the media in what is going on in the courts. The late Bora Laskin once complained that the press gallery in Ottawa devoted substantial resources to covering both Parliament and the major government departments but paid practically no attention to the Supreme Court. This was evident in the hurried scramble to find anyone who knew enough about the matter to cover the proceedings in the Supreme Court on the patriation procedure in 1981. In time, the media will develop sufficient competence to cover judicial proceedings, and in the next few years many of these cases will involve the Charter. Since the public rarely perceives anything unless it receives the message from the media, this coverage could be of enormous importance, adding to political discourse a dimension previously absent — even among political scientists.

The Charter may alter the pattern of Canadian politics because it opens new avenues for the achievement of political goals by interest groups. Whereas in the United States the separation of powers made it worthwhile for interest groups to lobby legislators, the dominant position of the executive in the process of policy making in Canada meant that well-informed lobbyists found the most useful access points within the bureaucracy. Once policy had been congealed by a cabinet decision, it became very difficult to change or modify it. Weak and diffuse groups might take to the streets or take advantage of occasional opportunities to appear before parliamentary committees, but these activities were seldom successful.

Now a new avenue had opened up through the possibility that public interest groups and others will litigate to try to influence substantial policy issues by invoking the Charter. How far will this litigation be effective? It will probably not be too successful, at least in the short run. Peter Russell already discerns a tendency on the part of the courts to avoid challenging "the reasonableness of the overall purpose of the legislation" but nevertheless to scrutinize it very carefully and to consider "whether to achieve the legislative goal it was necessary to adopt means that abrogate Charter rights."[35] He concludes, "Here, in effect, they are prodding the legislature to be a true legislator and not leave the behaviour of citizens to be regulated by the whims of bureaucrats."[36] In other words, we are unlikely to have anything as spectacular as the decisions of the American courts bringing about desegregation when all efforts to achieve it by legislation had failed.

Nevertheless, these preliminary campaigns in the courts may well be of considerable assistance to public interest groups trying to get the major political parties to adopt and implement policy changes. The attendant publicity will be substantial and useful in the difficult process of convincing public opinion of the merits of changes. Furthermore, these efforts will be perceived as having greater legitimacy than demonstrations and mass rallies, which probably unnerve the many Canadians who have an instinctive bias toward "law and order." The courts have a perceived legitimacy, which makes them part of the constitutional order. In Patrick Macklem's words:

> A constitutional democracy is premised not only on the concept of majority rule, but embraces the value of the protection of minority rights in the face of the majority. Through the protection of minority rights . . . the judiciary thereby becomes an integral aspect of a democratic system of government.[37]

In the past, the courts have not relished a policy role. They have also lacked the authority to play the role. Although the Supreme Court of Canada is now somewhat protected in the Constitution, the Court's role has been weakened in recent years because it was perceived, particularly by provincial politicians, as biased in favour of the federal government. Like the Leaning Tower of Pisa, as René Lévesque is fond of saying, the Court always leans the same way. This centralist leaning explains the aversion, in the sixties and early seventies, of provincial governments to resorting to the courts to manage federal-provincial conflict. As long as the Supreme Court judges are appointed by the federal government, their impartiality will be suspect in intergovernmental litigation. Given the long tradition of judicial independence this suspicion is unfounded and unsupported by the evidence. Nevertheless, the suspicion has weakened the authority of the Court and thus its capacity to settle grave and difficult questions in a way the public would wholly support.

How judges are appointed is therefore crucial. In recent years, appointment by the federal government includes prior consultation with the Canadian Bar Association. This wholly informal process is clearly insufficient and appears to have been ignored altogether for the appointment of Hon. Yvon Pinard to the Federal Court.

If the Charter does substantially transform the Canadian political process, Canadian political values will change significantly. The flexible, unwritten rules of responsible government, together with the constant necessity of compromise in a plural community, have given Canada a long tradition of bargaining and compromise. However valuable and necessary that may be for the continued survival of the country, it is a very different tradition from one based on the ultimate and overwhelming authority of strict legality. It will require a change in community values, as well as exceptional performance by the legal system, to change Canada into a successful example of a law-oriented rather than a politically oriented society. This may well be the most difficult challenge to the system for the next generation.

The Survival of Constitutional Values

The institutional arrangements described in language may change a great deal even when the terms used to describe them seem unchanged. Alternatively, a term may have several meanings which are of varying importance at different times in history. Consider the word "constitution." In the province of Canada before Confederation, the most important meaning of "constitution" was not so much the institutions of government created by the Constitutional Act of 1791 or the modifications made by the Act of Union, which came into force in 1841. What the Constitution meant above all to the political men of the time was responsible government, which had been superimposed on the Canadian Constitution by the adoption of a constitutional convention derived from the British Constitution. Once self-government of that kind had been achieved and sustained through several decades, the term "constitution" changed its emphasis.

The reason for this was that the constitutional changes of 1867 had added a new and important element in the form of a federal system. As time went on, the crucial constitutional questions came to revolve around which of two constitutionally protected governments possessed legitimate power to legislate on a particular topic. For almost a century, constitutional lawyers and politicians concentrated on this distribution of powers, and casebooks and texts dealt with nothing else. Constitutional law began and ended with the prescribed limits between two legislative sovereigns: Parliament and the provincial legislatures. The only checks and balances (to revert to Friedrich's emphasis in his definition of constitutional government) lay in the judicial allocation of sovereign powers. The other checks and limits in parliamentary institu-

tions, such as the power of the Senate and the independent power of the Commons over the executive, had been eroded by the development of strictly disciplined political parties.

And yet there was another element, clearly understood in the confederation era, to the constitutional tradition in Canada. Macdonald referred to this element in the Confederation debates when he said:

> We will enjoy here that which is the greatest test of constitutional freedom — we will have the rights of the minority respected. In all countries the rights of the majority take care of themselves, but it is only in countries like England, enjoying constitutional liberty, and safe from the tyranny of a single despot or of an unbridled democracy, that the rights of minorities are regarded.[38]

That clearly was the spirit of the Constitution. The values it embodied were given no substantial protection in fundamental law but were supported both by the division of powers, which secured some minorities by guaranteeing provincial powers, and by such institutions as the representative cabinet. The protection in terms of fundamental law was minimal, the division of powers as a means of protecting minorities was imperfect because each "provincial" minority had another minority within it that it could — and sometimes did — oppress.

The inclusion of the Charter of Rights and Freedoms in the Constitution, however half-heartedly, marks a return to an emphasis on constitutional liberty for both individuals and minorities. In that sense, the Charter has the capacity to become a lesson in civic values to new generations of citizens and public men and women. The Charter lacks the ringing eloquence that came so easily to our forebears of the eighteenth century for it is constructed in the uninspiring style of lawyers' language. However, the Charter's style may be an advantage, since the important thing about rights — as Dicey pointed out long ago — is that they be translatable into remedies.

One of the striking things about our political system is the resiliency of our political and constitutional institutions. They are fallible, but they persist and adapt. In two centuries, representative institutions have changed from essentially oligarchic forms to agencies through which political parties distil, anticipate, and manipulate public opinion. Nevertheless, these institutions retain the capacity to restrain the arbitrary power of government.

Although there have been substantial shifts in the prevailing pattern of political ideas, political institutions in Canada have on the whole been remarkably resilient in adapting to new demands while making few visible changes in form. Their survival may be a part of the support system of the Canadian polity simply because familiar names reassure the public even when much of the substance has changed. Somehow the system has survived despite apparent dissatisfaction to the point of

rejection of the system's principal features in significant regions of the country. Two examples of this rejection are Western Canada's alienation from the national party system through much of the twentieth century and Quebec's perception of the burdens of the federal system in the past generation. Neither affliction seems to have been fatal, but their treatment will require a statecraft that the deep-rooted traditions of strong governments and strong leaders at both federal and provincial levels may, paradoxically, facilitate.

It may therefore be a serious error to conclude that the basic constitutional values of restraint and checks and balances, which Friedrich argued go to the heart of constitutionalism, have been seriously eroded. That opinion polls found wide public support for the basic idea of the Charter showed how persistent these fundamental ideas are. Whether the significant institutional changes foreshadowed by the Charter will materialize is yet unknown, but the response to the basic idea was reassuring.

At the very time it had become too easy to demonstrate the decline of Parliament as a check on the executive, when the bureaucratization of decision making in the hands of autonomous and apparently unreachable regulatory agencies seemed complete, and when the vast power of governments seemed concentrated in the hands of first ministers with ample resources to manipulate opinion, a number of institutional innovations based on old-fashioned public sensitivity to fairness and restraint in government were taking place.

First, consultation by ministries and regulatory agencies with informed public interest groups is enabling such groups to involve themselves more directly in the formation of policy. The growing use of legislative committees to consult the public has the same effect. The result will be more open government, government based on wider participation.

Second, the increase in the number of ombudsman-like institutions has affected the growing involvement of the government in administering entitlements to the citizen. These institutions have injected new checks and balances into the system. Whereas in the past it was necessary to muster either large political or expensive legal resources to rectify manifest injustices, access to redress is now much more widely distributed.

Our traditional political vocabulary has not fully caught up with these new and important aspects of the Canadian polity, but they do reflect the notions of fairness and equal treatment, which have deep roots in our constitutional culture. The survival of the Canadian polity will depend, as it has in the past, on our ability to adjust political institutions to the values that underlie the system.

Notes

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3. In his introduction to Walter Bagehot, *The English Constitution* (London: Collins/Fontana, 1963), p. 43.
4. The *Gazette*, September 24, 1983.
5. Bagehot, *The English Constitution*, p. 197.
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10. For Leger's views see *Jules Leger, Governor General of Canada 1974–1979: A Selection of His Writings on Canada* (Montreal: les Éditions La Presse, 1982). The constitutional amendment bill of 1978 (which probably reflected his views) described the governor general in Section 42 as the one "who shall represent the Queen of Canada and exercise for her prerogatives. . ." while section 44 gave to the governor general "precedence as the First Canadian." It stopped short of calling him head of state.
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13. Walter Bagehot, *The English Constitution* (London: Collins/Fontana, 1963). Richard Crossman, in his introduction to this book, notes that Bagehot did not foresee the extent to which his description of Cabinet government was to be modified by the rise of modern bureaucracies (pp. 47ff).
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15. Robert L. Stanfield, "The Present State of the Legislative Process in Canada: Myths and Realities," in *The Legislative Process in Canada*, edited by W.A.W. Neilson and J.C. MacPherson (Montreal: Institute for Research on Public Policy, 1978), p. 40.
16. Ibid., p. 45.
17. Interview with Howard Johnston, *Canadian Parliamentary Review* 7 (Summer 1984), p. 23.
18. Stanfield, "The Present State of the Legislative Process," p. 45.
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20. Clifford Orwen, "Democracy and Trust: A Lesson from Thucydides," *The American Scholar* (Summer 1984), p. 325.
21. For a summary of these developments see J.R. Mallory, "Curtailing Divine Right: The Control of Delegated Legislation in Canada," in *The Administrative State in Canada*,

edited by O.P. Dwivedi (Toronto: University of Toronto Press, 1982), pp. 131–49; and J.R. Mallory, "Can Parliament Control the Regulatory Process?" Second Commonwealth Conference on Delegated Legislation, *Documents of the Conference*, vol. 2, pp. 161–69. Recently the legislature of Quebec has produced a challenging report on the whole process, suggesting novel and interesting means of scrutinizing both the form and content of regulations. See report of the Study Committee on Parliamentary Control of Delegated Legislation, *Parliamentary Control of Delegated Legislation* (Quebec: The National Assembly, 1983).

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28. *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan* (1975), 65 D.L.R. (3d) 79; *Amax Potash v. Saskatchewan*, [1976] 6 W.W.R. 61.
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3

The Changing Nature of Citizen Rights

CYNTHIA WILLIAMS

It is tempting to adopt a formal constitutional perspective in discussing citizen rights. After all, in many countries citizenship has a formal constitutional status and bills of rights have a special and visible place in constitutional machinery. The constitutional perspective is particularly tempting for analysis of postwar citizen rights in Canada. Numerous constitutional proposals since 1945, culminating in the constitutional entrenchment of the Charter of Rights and Freedoms in 1982, provide ample evidence of an expanded rights-based citizenship.

In an important sense, however, the constitutional perspective does not capture one of the most interesting characteristics of thinking on citizen rights since World War II — the development of a popular language of rights that has become commonplace in political rhetoric and has altered conceptions of citizenship in more subtle, less formal, ways.

One observer discussed this postwar phenomenon in a 1968 paper:

> Human rights . . . within the past twenty years [have become] an important piece of "debating" language . . . No one could have predicted in 1945–46 the power or the semantic consequences of this kind of language, or its absorption into the wider arena of political debate in this generation, and the ease with which it has become part of the political dialogue, part of the debating experience of peoples in all parts of the world . . . Canadians have been able to pour into these words rising standards of social, economic, political, and legal behavior, in rich variety, so that they have become a large "catchall" for social claims . . .[1]

The development of a widespread, popular language of rights, and the casual use of this language to describe relations between citizens and governments, has had far-reaching consequences for popular notions of

citizen/state relations and the perceived rights of citizens. In this sense, it does not really matter whether the rights *claimed* are in fact rights *granted*. A popular language of rights creates a sense that rights do exist and could be claimed if the need arose, or that alleged rights cannot easily be suspended or revoked by government.

This paper traces the changing nature of citizen rights in Canada since 1945 from both a constitutional and political perspective. It focusses on the main events marking the development of citizen rights since 1945, and the underlying shift in attitudes and discourse. The major milestones included in the study are the Special Senate Committee on Human Rights and Fundamental Freedoms in 1950 (the Roebuck Committee); the 1960 Bill of Rights; the proposed Charter of Rights in 1971; the Special Joint Committee on the Constitution in 1972 (the Molgat-MacGuigan Committee); and the events leading up to the 1982 Charter of Rights and Freedoms, including the hearings of the Special Joint Committee on the Constitution in 1980–81. The concluding section reviews the trends and reflects on the implications of changing notions of citizen rights for evolving Canadian constitutionalism.

The Movement Toward a Bill of Rights

Through the 1940s and 1950s, support for better protection of civil rights in Canada came from several quarters. Various hopes were pinned on the potential promise of a bill of rights. Some supporters sought greater protection of legal rights. Others believed a bill of rights would help create a sense of national integration and demonstrate Canadian traditions of freedom and liberty. Many also felt that Canada should be a world leader in the area of human rights, and that a bill of rights was essential to this role.

Although there were scattered precursors, pockets of support developed across the country since the 1920s for more stringent controls of government power respecting civil liberties. The concerns gained early expression in the 1933 Regina Manifesto of the Co-operative Commonwealth Federation over excessive police powers to interfere with freedom of speech and assembly, the endorsement of racial discrimination by government policies such as the Immigration Act, and the denial of a wide range of equality rights for women. The new party's concerns were not limited to protecting individuals from the state. The Regina Manifesto and later CCF policy statements also called on government to intervene actively to bring about greater equality in Canadian society by combatting poverty and other forms of social and economic injustice.

The first proposal for a bill of rights in Canada was introduced in the House of Commons in 1945 by Alistair Stewart, a CCF member. Although the motion was defeated, it was the beginning of a long CCF campaign in Parliament to include a bill of rights in the Constitution.

By the end of the Depression, provincial bar associations across the country had also become concerned with violations of basic civil liberties. In contrast to the CCF, the bar associations were more concerned with so-called "economic rights." They wanted protection of the right to choose one's place and type of employment; to buy and sell goods in the open market; to fix or bargain for prices; to import and export; to enter into or expand business; to be free of price controls, etc. When the Canadian Bar Association established a civil liberties section in 1943, its concern was to ensure that the various restrictions on civil liberties regarded as justifiable in time of war would be revoked when the war was over.[2] The civil liberties section remained actively involved in this project until 1949, when it reported that "the tide of encroachments on civil liberties seems for the moment to have ceased to flow . . . "[3] The association then turned its attention to the broader project of a bill of rights.

Two measures taken under the authority of the War Measures Act in the 1940s generated a broader base of public concern for the better protection of civil rights — the treatment of Japanese Canadians during and after World War II and the secret spy trials of 1945.

After hostilities with Japan broke out in 1941, the federal government announced plans to relocate 22,000 people of Japanese origin living along the Pacific coast to the interior of British Columbia. Most Canadians supported the plan, but public opinion soured when the government announced plans to relocate Japanese Canadians to places east of the Rocky Mountains after the war and to offer "voluntary repatriation" to Japan for those unwilling to be relocated. Even in British Columbia, where there was a longstanding prejudice against people of Oriental descent, the repatriation scheme was unpopular. The government policy of voluntary repatriation was officially announced nonetheless in the spring of 1945, but was rescinded less than two years later under pressure from massive public opposition.[4]

Public concern over the violation of civil liberties at this time was also fuelled by events surrounding secretly conducted "spy trials" which followed the defection of Soviet cipher clerk Igor Gouzenko in 1945. Using order-in-council authority under the War Measures Act, the Minister of Justice arrested 26 people suspected of being involved in espionage, and held them incommunicado without laying formal charges. Two Supreme Court justices were later appointed to a royal commission to inquire into the detentions and recommend legal actions. The commission proceedings further added to the violations of criminal procedure. For example, the report concluded that some of the detainees were guilty although they had not yet been brought to trial and many of the witnesses were not permitted to consult counsel or informed that their testimony might be used against them. When news of these violations became public in early 1946, the federal government was severely castigated from several quarters. One of the most vociferous critics was

the civil liberties section of the Canadian Bar Association, which viewed such measures as totally unacceptable in peacetime and a threat to Canadian democracy and the rule of law.[5]

These two events helped to crystallize public concern over the state of civil liberties protection in Canada. Both actions had been taken under the authority of the War Measures Act, and in both cases concern focussed on the government's apparent willingness to extend its special wartime authority into peacetime to deny basic civil liberties.

In the postwar period another force pushing Canadians toward the constitutional recognition of human rights was the establishment of the United Nations in 1945 and the 1948 UN Universal Declaration of Human Rights. The declaration was itself a radical departure from earlier statements about human rights, particularly in its view of the inalienability of certain rights, including economic and social rights, of the individual. It posed a very basic difficulty for Canada. The interpretation of human rights in the declaration conflicted with the longstanding British tradition of parliamentary supremacy. Nonetheless, the Canadian government was eager to be an exemplary member of the new international assembly and to advance the cause of individual freedom and human rights around the world. Accordingly, in 1949 a special Senate committee was appointed to look into these matters and recommend measures that should be taken to enhance the protection of human rights in Canada.

Interest in a bill of rights was also stimulated in the immediate postwar period by discussion surrounding the 1946 Citizenship Act. Canada had emerged from the Allied victory of World War II with a new self-confidence in its identity as an independent nation. The creation of Canadian citizenship distinct from British citizenship was to provide an opportunity to affirm Canada's maturity from colony to nation. During the debates it was argued that Canadian citizenship must be made meaningful to the waves of postwar immigrants, many from countries unfamiliar with British traditions of freedom and liberty. Some politicians suggested that a bill of rights could also serve this useful educative purpose for Canadians.[6] In the forefront of this movement was Saskatchewan MP John Diefenbaker, who introduced an amendment to the 1946 bill to this end. Over the next 14 years, until the enactment of the Canadian Bill of Rights, Diefenbaker made this project one of his highest priorities, in the hope that it would contribute to his vision of "One Canada" — a people sharing the rights of citizenship equally, undivided by their racial and ethnic origins.

These three factors — an active civil liberties lobby concerned mainly with political, legal, and economic rights of Canadians; a swelling international human rights consciousness; and a confident approach to changing the symbols of government appropriate to an independent nation — were the immediate postwar forces pushing for a review of constitutionally protected citizen rights in Canada. The three factors came together in the Canadian consciousness to sustain a fourth com-

pelling justification for pursuing a constitutional citizen rights project — to protect Canadians from developments that might be conducive to the spread of Communism in this country. The interplay of these factors guided popular discussions of a bill of rights throughout the 1950s. Several examples from the decade illustrate their interrelationship.[7]

The official Canadian government position in the 1950s in regard to bringing Canadian laws into conformity with the UN declaration was that a constitutional bill of rights was not necessary in this country. The government's view was that the mechanism of parliamentary supremacy, supported by longstanding and deeply rooted traditions of respect for human rights and fundamental freedoms, would ensure that Canada's performance on human rights would be exemplary in the future, as it had been in the past. External Affairs Under-Secretary Lester Pearson outlined the Canadian government's position before the United Nations in 1949 when he said:

> We do not believe in Canada that legislation should be placed on our statute books unless that legislation can indicate in precise terms the obligations which are demanded of our citizens, and unless those obligations can be interpreted clearly and definitely in the courts. . . . The freedoms to which I refer have developed in Canada within the framework of a system of law derived both from statutes, and from the judgments of the courts. We have depended for the protection of the individual upon general declarations. Because this method is in accord with our tradition, we shall continue to depend on it and to expand it as the need may arise. While we now subscribe to a general statement of principles such as that contained in this Declaration, in doing so we should not wish to suggest that we intend to depart from the procedures by which we have built up our own code under our own federal constitution for the protection of human rights.[8]

This remained the official government position until the election of a Progressive Conservative government in 1957.

Some support for human rights developed from a revival in natural law ideas following World War II. This revival was fostered by the UN Declaration itself. The document was crafted to appeal to the common thread of human rights ideas in all of the member nations and to provide a framework on which all countries could model their own bills of rights. The preamble firmly grounded the declaration on rights based on the "inherent dignity" and "equal and inalienable rights of all members of the human family."[9] Similarly, in Canada the final report of the Special Senate Committee on Fundamental Rights and Freedoms (the Roebuck Committee) in 1950 grounded its discussion of rights in the claim that:

> The brotherhood of man results from the Fatherhood of God, and a fundamental equality among men necessarily follows. . . . Such rights are not created by men . . . nor are they the gift of governments. They are above the power of men to create.[10]

In the postwar period, a more sensitive approach was also taken to race relations and racial equality. The 1945 decision in *re: Drummond Wren* set in motion the antidiscrimination trend that characterized postwar legal decisions. This judgment struck down a racially discriminatory property covenant that attempted to prohibit sale to "Jews or persons of objectionable nationality." In seeking to establish public policy regarding racial discrimination, Mr. Justice MacKay of the Ontario High Court looked to a variety of international sources, including the United Nations Charter which, he noted, Canada had signed and must therefore also have agreed to observe.[11] The judgment represented a major shift in jurisprudence on matters of discrimination. It was followed soon after by a number of legislative changes prohibiting various forms of discrimination. Before this, such prohibitions had been rare and inconsistent.[12] Saskatchewan, in 1947, was the first province to legislate a comprehensive bill of rights. During the 1950s a number of provinces legislated fair accommodation and fair employment acts, and several also enacted equal pay legislation prohibiting wage discrimination between men and women. Over the 1960s, the various antidiscrimination laws were consolidated into provincial human rights codes and human rights commissions were established as enforcement agencies.

A number of civil liberties "causes célèbres" judgments rendered by the Supreme Court of Canada in the 1950s also had a powerful effect on civil liberties thinking. Six cases from this decade stand out in particular — *Boucher*, *Saumur*, *Chaput*, *Birks*, *Switzman*, and *Roncarelli*.[13] By the end of the decade, the Supreme Court of Canada had outlined the framework of many of the rights considered to be attached to Canadian citizenship. Five of the six landmark cases, all except the *Roncarelli* case, were decided primarily on division-of-powers grounds, and all six cases arose from allegations that the Quebec government had attempted to limit such basic freedoms as freedom of speech, of association, of religion, and of assembly. The majority opinions were framed to answer only the question before the court, which accounts for the impression the judgments created that the division of powers was the best protection against infringements of civil liberties in Canada. Some of the concurring judgments went considerably further in suggesting that by virtue of our parliamentary system of government, there exists in Canada a range of freedoms which no government can infringe upon.

The effect of these judgments was reflected in the 1950s in the legal writing on civil liberties and in Canadian law schools, where there was a new interest in civil liberties issues. Their effect was also apparent in Parliament where, for example, there was extensive reference to these cases during the proceedings of the 1960 special House of Commons committee to discuss the scope and content of the proposed Bill of Rights.

The Bill of Rights, 1960

On August 20, 1960, the *Canadian Bill of Rights* — the crowning achievement of Prime Minister John Diefenbaker's early political career — became law. Several characteristics and provisions of the bill reflect the predominant themes in civil rights thinking at that time.

The bill applied only to matters under the jurisdiction of the Parliament of Canada and was not entrenched in any constitutional document. After his convincing electoral victory in 1958, Prime Minister Diefenbaker announced that he would not delay or postpone the project in the unlikely expectation that provincial agreement would be achieved. Nonetheless, after enactment of the bill in 1960 he repeatedly expressed his hope that the necessary steps would be taken and that the Bill of Rights could become an entrenched part of the basic constitutional document.

Until the Conservative election victory in 1958 assured the project's success, the Liberal Party was opposed to the bill of rights proposal and to the notion of entrenchment, arguing that parliamentary supremacy was a better vehicle for protecting civil liberties in Canada. When Liberal leader Lester Pearson supported the proposal in 1960, he emphasized the inspirational and symbolic functions that a bill of rights could perform. In the 1960 debate on the proposed bill, Mr. Pearson said:

> If it is to be the document that we have been told by the Prime Minister it is meant to be, it should not only be broad and deep in its meaning but should be inspiring in its language; something that will stir the pulse, stimulate our national patriotism, something that could be read and be remembered by school children on July 1 . . .[14]

Although the 1960 project did not capture the imagination of the public in the way that the 1982 charter would, nor indeed as the 1971 proposed charter did, it was nonetheless clear that a broad base of public interest in the project had developed through the 1950s. Unfortunately, this broad public interest was not well demonstrated during the proceedings of a special House of Commons committee to discuss the bill in 1960. The committee met late in the 1960 parliamentary session and potential witnesses were given only one or two days notice to prepare briefs. Therefore, during fourteen days of hearings, the committee heard from only nine individuals, six organizations, and the Minister of Justice.

Divided jurisdictions, entrenchment and provincial powers preoccupied the Committee. Not surprisingly, opinion on the matter of entrenchment was divided, though a majority of the witnesses favoured some degree of constitutional recognition of basic rights and freedoms. Among the most passionate advocates of entrenchment was Frank Scott, McGill law professor and long time civil libertarian, who said the

proposed Bill had "no teeth" and was "about the least and smallest bill of rights we could imagine ourselves to be adopting."[15] The Canada Labour Congress, the Canadian Jewish Congress, the Seventh Day Adventists, and the Association for Civil Liberties also called for entrenchment. Opponents of entrenchment were concerned that an entrenched bill of rights would diminish the supremacy of parliament and elevate the courts into a policy-making role. Professor Bowker of the University of Alberta law school summarized the position in these words:

> While the courts have done a great deal to secure our basic rights, I think that in a democracy we can properly look to Parliament to perform this task. I do not think that Parliament is doing it in the best way, when it passes a bill like this which leaves it to the courts to tell everybody whether parliament has passed unfair legislation or not . . . I do not favour a constitutional bill, putting limits on the power of parliaments.[16]

The issue of application to provincial jurisdictions was related in part to the question of entrenchment. Some members of the committee felt strongly that many matters of civil rights belonged under the jurisdiction of the provinces. An influential paper by Professor Louis Pigeon contributed to this view.[17] There was no dispute over the federal government's power to legislate over matters within its sphere of legislative competence, but opinion was divided on the possible benefits of a bill of rights applicable only to the federal jurisdiction. Several witnesses pointed to recent judgments of the Supreme Court of Canada which had established a significant federal interest in various human rights and fundamental freedoms,[18] but it was clear that the provinces had a substantial interest in the field. This led many witnesses who favoured entrenchment, as well as the opposition of the Committee, to argue against proceeding with the bill until provincial support was probed more fully.

The government disagreed, fearing that delaying the project in order to search for an effective means of entrenching the bill would risk having it derailed completely. In its view, since there could be no acceptable and meaningful entrenchment confined to the federal level, the government should proceed with simple legislation.[19]

The provisions of the 1960 Bill of Rights have been competently reviewed elsewhere.[20] However, in terms of contrasts with later Charter proposals, some of its provisions should be highlighted.

The 1960 Bill of Rights was a short document of only six sections, protecting mostly the traditional civil liberties of its day. While it had no official constitutional status even at the federal level, the intent was that no federal legislation would be interpreted as overriding the bill unless this intention was expressly stated.[21]

Had the government foreseen the limited effect of the bill on legal decisions and the courts' reluctance to take and develop a more activist

judicial philosophy, Mr. Diefenbaker might well have insisted on different provisions and stronger wording. As it was, civil libertarians in the 1960s pointed to the Bill of Rights as the best evidence of the need to give stronger protection to citizen rights in Canada. As Mark MacGuigan, then professor of law, wrote in the mid-1960s:

> The real significance of the Canadian Bill of Rights lies not in its content but in the way in which it has served as a focal point for and stimulus to arguments about civil liberties . . . The very existence of this Bill of Rights, limited in scope, uncertain in concept and feeble in language though it is, both acts as a milestone on the road to increased consciousness of civil liberties and itself serves to encourage their further development.[22]

Mr. MacGuigan argued that the Bill of Rights contributed to rights-consciousness in Canada by being "an indication of a further growing away from the traditional view that the sovereignty of Parliament is incapable of legal limitation,"[23] and thus that citizens could successfully claim rights that place inescapable obligations on government. Certainly the weak protection provided by the Bill of Rights in the courts was a clear signal that entrenchment was a necessary condition for more effective judicial enforcement of fundamental rights and freedoms.[24]

Popularizing Human Rights in Canada: The 1960s

By the end of the 1960s popular human rights discourse in Canada had three characteristics which were not significant in the 1950s. Interest groups had mobilized around various human rights issues, fitting the language of rights to the special interests of their members. A sociological rather than legalistic approach to citizen rights was increasingly apparent. And there was a new concern with equality rights and with the socioeconomic prerequisites of equality.

Mark MacGuigan, in the article cited above, wrote that:

> If the 'fifties may accurately be described as a decade of judicial protection of civil liberties in Canada, the 'sixties are beginning to appear as a period of popular and (perhaps not unrelatedly) legislative concern for them.[25]

As well, government concern at the federal level turned to a category of citizen rights capable of generating a deeper sense of national unity as to the more traditional civil liberties.

A number of changes in thinking about human rights were evident in the 1960s. Starting with Ontario in 1962, provincial governments established human rights commissions with mandates to investigate and arbitrate incidents of alleged discrimination. Today there are human rights commissions in all the provinces and at the federal level. Their powers have become more extensive, their staffs and investigative capability are larger and more professional, and their mandates have

mushroomed from a limited number of prohibited grounds of discrimination in the early 1960s to at least 30 prohibited grounds today. Moreover, the nature of prohibitions has changed. Political scientist Thomas Flanagan recently categorized prohibited grounds according to whether they address lifelong, permanent "stigmata" such as race, national origin, and sex; "life cycle" characteristics such as age or pregnancy; or "life style" characteristics such as alcohol or drug dependence or homosexuality. After reviewing the introduction of new prohibited grounds since 1962, Professor Flanagan concluded that:

> There is a clear pattern in the way in which these thirty criteria have entered into legislation. The stigmata came first; their adoption largely took place in the 1960s. Debates over life cycle criteria dominated the 1970s and early 1980s . . . life style criteria . . . will . . . increasingly dominate the human rights agenda now that the stigmata and life cycle variables are *faits acccomplis*.[26]

A comparison of the equality guarantees in the 1960 Bill of Rights and the 1982 Charter indicates a similar expansion. To the 1960 list of race, national origin, colour, religion and sex as prohibited grounds of discrimination, the 1982 Charter adds age and mental or physical handicap,and reinforces the prohibition of gender-based discrimination. The 1982 Charter also expands the scope of the equality guarantees — the 1960 Bill guaranteed to every individual "equality before the law and the protection of the law" but in the Charter these guarantees read:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . .

These changes were largely the result of public dissatisfaction with judicial interpretations of the Bill of Rights. In particular, they were responses to sustained pressure during the public hearings on the Charter of Rights in 1980 and 1981 by groups such as those representing women and disabled persons. More generally, they reflect changes in public understanding of equality since the 1960s. Supplementing the guarantee of equality *before* the law with a guarantee of equality *under* the law and the *equal protection* clause with an *equal benefits* clause reflected the change in emphasis from ideas of procedural equality to ideas of substantive equality, and from equality of opportunity defined in terms of formal legal status to equality defined in terms of outcomes or results. These changes can be more clearly illustrated by considering the particular example of equality for women.

Changing Notions of Equality from the 1950s to the 1970s: The Case of Women

In the 1950s, discrimination was thought of largely with respect to race and religion. Discrimination against women was not a prominent issue

on the civil liberties agenda. To the extent that sexual equality did attract attention, it was understood largely in procedural terms. For example, W.F. Bowker, one of the more outspoken critics of Canada's civil liberties record, was satisfied in 1959 that:

> It is not necessary to examine in detail the removal of disabilities of women. They have equality with men in holding office and voting. Recently, Parliament passed an Act providing equal pay for women, and a number of provinces have similar Acts.[27]

To be sure, during the 1950s there had been a number of initiatives addressing the equality of women. The United Nations adopted the Equal Remuneration Convention, calling for equal pay for work of equal value, in 1951, and ratified the Convention on the Political Rights of Women in 1952. In Canada the federal government established a Women's Bureau in the Department of Labour in 1954. This was the first permanent federal office to deal with problems facing women in the labour market, and in announcing the creation of the office the Minister of Labour acknowledged that some women in the labour force were handicapped by common prejudices of employers not founded on fact. The bureau was mandated to identify and monitor problems facing working women in the public and private sectors, to undertake research on various issues, and to report regularly to the minister. Among the issues highlighted in early studies and reports were daycare facilities, educational and vocational training, working conditions, labour standards, equal pay, maternity leave, and pensions.

In 1956 the federal government legislated the Female Employee's Equal Pay Act, prohibiting wage discrimination. The act was based on the principle of equal pay for equal work, but it was up to aggrieved women to lay complaints.[28]

Thus, significant legislative progress was made during the 1950s toward gender equality in the labour force, and various institutional responses such as the establishment of the Women's Bureau provided organizational support for groups to coalesce around these "women's" issues. But as female participation rates in the labour force continued to grow during the 1960s, issues such as daycare, substantive equality, and systemic gender discrimination gained greater prominence.

In legal terms, claims based on sexual equality during the 1950s were concerned with narrow notions of formal equality of opportunity — for example, laws prohibiting women from holding certain jobs or visiting certain places — and did not acknowledge underlying factors such as socialization, family structures, and the like, which effectively excluded women from full and equal participation in the community. This notion of formal equality was expressed in the 1960 Bill of Rights as the guarantees of "equality before the law" and "protection of the law." It was several years before the Supreme Court of Canada was asked to interpret these clauses with respect to gender equality. The decisions of *Lavell*

(1974)[29] and *Bliss* (1979)[30], based on the narrowly legalistic interpretation of the gender equality guarantees, were markedly out of step with the more sociological understanding of systemic gender discrimination that had gained widespread currency by the 1970s. Indeed, as will be clear later in this paper, the efforts of women's rights groups during the negotiations leading up to the 1982 Charter of Rights and Freedom were directed primarily at ensuring that the by-then anachronistic approach to gender equality contained in the 1960 Bill of Rights would be broadened significantly.

This change in thinking about gender equality from the 1950s to the 1970s is one of the most spectacular examples in Canada of the revolutionary nature of changing human rights thinking in the postwar period. This change cannot be fully comprehended without mentioning the social consciousness and values associated with the so-called "counter-cultural revolution" of the 1960s.

The notion of a "counterculture" within the dominant traditions of liberal democratic societies was an attempt to capture the profound changes in values and social attitudes that found popular expression in a number of social movements in the 1960s. The activities and targets of these movements were diverse. In the United States, where the counter-culture had its spiritual and political home, movements mobilized around a variety of issues. As American sociologist Jo Freeman recently noted, "The term *The Movement* was originally applied to the civil rights movement by those participating in it, but as the activity expanded into a general radical critique of American society and concomitant action, the term broadened with it."[31]

The early civil rights movement in the United States was an explicit critique of the denial to Black Americans of the civil rights of other citizens. Equal citizenship was the early rallying call. As the movement developed and progress was made through legislation such as the 1964 U.S. *Civil Rights Act* and through forced integration programs, the civil rights movement developed into a more generalized cultural critique of American society. Demands expanded from equal access opportunities to the inclusion of Black American culture in the dominant cultural paradigm of the country.

The objectives of the women's liberation movement show a similar progression. Demands for equal rights by changing laws, institutions and discriminatory practices went back more than a century, but the younger branch of the women's liberation movement put as much or more effort into consciousness-raising activities for women and later for society as a whole. The new targets were the deeply rooted cultural traditions that systematically discriminated against women. This approach of consciousness-raising generated a far more radical critique of society, which was indeed its objective:

> Consciousness-raising — studying the whole gamut of women's lives, start-

> ing with the full reality of one's own . . . would be a way of carrying theory about women further than it had ever been carried before, as the groundwork for achieving a radical solution for women as yet attained nowhere.[32]

The consciousness-raising approach had wide appeal among social movements in the 1960s. One catch-phrase of the women's liberation movement that grew directly out of this strategy captured the new challenge better than any other. The message that "the personal is political" set the stage for a radically new approach to understanding the pervasive and systemic inequality that permeated all aspects of society. The social movements of the 1960s had taken the political issues of equality and liberation into the most personal and private corners of daily life. Governments were called on to create and enhance equality by redistributing the burdens and benefits of citizenship in the context of everyday life.

Constitutional Reform, 1968–71

While the social movements described above were becoming more politically mobilized in Canada, proposals for constitutionalizing citizen rights got their biggest push in the 1960s not from the demonstration effect of the counterculture, but from the Canadian federal government. Federal government papers published in 1968 and in 1969[33] outlined the federal approach to constitutional reform in Canada. The proposal to entrench fundamental rights and freedoms was central to the federal government strategy of constitutional reform. The government proposed that reform proceed in three phases — discussion of an amending formula and a Charter of Rights; examination of the reform of national political institutions; and examination of the division of legislative powers. This federal strategy remained constant throughout the Trudeau governments of the next fifteen years and was repeated in essentially the same form in the Liberal government's 1978 constitutional proposal.[34] The federal strategy was calculated to give Ottawa relative advantage over the provinces in the successive phases of reform. The Charter of Rights proposal was integral to this strategy in two ways.

First, the charter proposal was designed to place the relationship between the citizen and the state at the centre of the governmental process. The government's 1968 paper on *Federalism and the Future* made the point clearly:

> In agreeing to place this item first on our agenda the federal and provincial governments have in no way overlooked the critical importance of determining which of the functions of government should be assigned to the two orders of government in Canada. Rather we have developed our belief that the rights of people must precede the rights of governments.[35]

Closely related to the charter proposal was the federal government's

emphasis on a rousing preamble; it was to be something which, to borrow the 1960 words of Lester Pearson, would "stir the pulse." As Prime Minister Trudeau wrote in 1969:

> The Constitution must express the purpose of Canadians in having become and resolving to remain associated together in a single country, and it must express so far as this is possible in a Constitution what kind of country Canadians want, what values they cherish and what objectives they seek.[36]

Secondly, the 1968 Charter proposals were designed to give Ottawa and the national interest an advantage vis-à-vis the centrifugal forces of emerging provincialism. As one commentater noted of the 1968 strategy:

> Ottawa believed that if Canadians came to feel more secure in their rights by way of an entrenched charter and changes in the institutions of the central government they would be less disposed than otherwise to support a wider scope of provincial powers.[37]

The strategy counselled that having a charter proposal come early in the constitutional reform process would make it easier for the federal government to advance to the next two phases of reform.

The charter proposal was directed especially at countering the most powerful centrifugal force in Canadian federalism during the reform project — rising Quebec nationalism and the threat of separatism. In the federal government's view, Quebec nationalism would be stemmed not just by the preamble's affirmation of national unity and the nation-building strategy of entrenched citizen rights, but also by including language and minority education rights in an entrenched charter of rights. These provisions, building on the recommendations of the Royal Commission on Bilingualism and Biculturalism, moved well beyond more traditional civil rights notions by guaranteeing official language rights and minority language education rights for all Canadians.

By establishing a nationwide code of linguistic rights, the federal proposal provided a framework for a non-territorial approach to language in Canada. Quebec would not be the only area of the country where the French language was secure. The 1968 proposal extended section 133 of the then BNA Act, 1867 (now the Constitution Act, 1867) to the legislatures of Ontario and New Brunswick, as well as any province where more than 10 percent of the population was francophone or where English and French were the declared official languages. Among other things, the proposal also extended the provisions of section 133 to judicial and quasi-judicial bodies established by Parliament, and affirmed the right of individuals to communicate in either official language with departments and agencies of governments with a declared official languages policy.

To the Quebec government, the most controversial federal proposal was the guarantee of French and English language instruction in publicly supported schools where there were "a sufficient number of persons to

justify the provision of the necessary facilities."[38] The Quebec government had long regarded education as one of the most important provincial jurisdictions affecting the future of the French culture in Canada. Moreover, the federal proposal of free parental choice came at a time when Quebec's Union Nationale government was moving in the opposite direction in its education policy in order to counter the trend of declining enrollment of immigrant children in French language schools in Quebec.

The 1968 proposal was the basis for the first of a series of federal-provincial meetings on constitutional reform in 1968. By 1970 the federal agenda was all but off the rails. Quebec nationalism had continued to develop momentum even with the 1970 election of the Quebec Liberal Party. At the insistence of the western and Atlantic provinces, the issues of regional disparity and regional representation in national institutions were given higher priority. As part of an effort to return to the strategy of cultivating a counterpoint to the provincial governments and to reassert federal leadership and a national focus in the discussions, in October 1970 the federal government acceded to the demands of Parliament by establishing a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. The committee, referred to hereafter as the Molgat-MacGuigan Committee, was co-chaired by Senator Maurice Lamontagne (replaced in June 1971 by Senator Gildas Molgat) and MP Mark MacGuigan.

While the First Ministers negotiated in the closed intergovernmental forum, the Molgat-MacGuigan Committee held public hearings in 47 cities and received over 1,700 briefs and interventions. It was a massive public consultation on the entire package of constitutional reform. Not surprisingly, many of the public interventions focussed on those parts that citizens felt would affect them most — the scope and contents of the proposed charter. A reading of these briefs makes clear that the language of citizen rights had become a flexible and expansive garment for dressing up a number of citizen interests.

Some of the claims of witnesses before the Molgat-MacGuigan Committee are extreme examples of how a popularized language of rights had been adopted to express a wide range of citizen interests. For example, one witness asserted that mandatory helmet laws for motorbike riders should be prohibited on the basis of "the right to be perhaps a little bit crazy."[39] More typical of the interventions, however, were proposals by interest groups that the basic philosophy of antidiscrimination should be extended to their group. These groups, including women and disabled persons, argued that their claims required no special departure from basic principles of antidiscrimination. The nature of their particular disadvantage, and the negative stereotyping and discrimination they endured, was not unlike that suffered by other groups discriminated against on the basis of ethnicity or other prohibited grounds.

The Molgat-MacGuigan Committee also heard from newly popu-

larized interest groups and lobbies in Canada. Environmentalists, for example, presented claims which turned on such notions as the right to a clean environment. Jim Egan, Vice-President of the Society for Pollution and Environmental Control, argued for:

> Constitutional guarantees of full protection for every aspect of our environment and as an irreducible primary right without which all other rights become meaningless. The right of the individual to clean air, uncontaminated water and wholesome nutritious food free of chemical residues and harmful or unproven additives. In addition we feel that if these essential rights be violated immediate redress through the Courts should be available and further, that all levels of government be held liable in the event that they either contributed to the impairment of air or the environment or through dereliction of duty, knowingly allowing the environment to suffer deterioration.[40]

A number of anti-poverty groups argued before the committee for the inclusion of various social and economic rights in the Charter. For example, the Greater Victoria Low Income Group argued that the constitution should provide protection "with respect to the type of living accommodation in which we can live in the future . . . because shelter is the next most important thing to food."[41] The Greater Montreal Anti-Poverty Coordinating Committee argued that a Charter should give "due consideration . . . not only to the affluent in our society, but equal consideration to the poor."[42]

Some of the groups argued that the recognition of a right need not take the form of a constitutional provision, but rather could be a recognized moral obligation informing the mindset of policy makers. For example, Abbé Banville of Opération Dignité appealed to the reform of political and economic processes rather than the official recognition of rights.[43] Groups representing physically disabled persons argued that amendments to building codes would be as useful for meeting their needs as constitutionally recognized equal rights.[44]

The final report of the Molgat-MacGuigan Committee and its proposed Charter of Rights for Canadians did not accept many of the claims of these groups. The proposed Charter, for example, did not provide equality guarantees for physically or mentally disabled persons, prohibit discrimination on the basis of age, or recognize the claims of the environmentalists. Nonetheless, by providing an opportunity for these groups and individuals to come forward, the committee did much to bring these issues onto the public agenda and to develop rights consciousness among members of special interest groups. The committee proceedings clearly indicated that the language of rights had been adopted in the rhetoric of interest-group politics in Canada. It was equally clear that this language could expand to accommodate a very broad range of claims and interests. In contrast to the limited range of what may be termed the "classic" civil liberties, the proceedings of the Molgat-

McGuigan Committee signalled the arrival of a widespread rights-consciousness in Canada and the adoption of a language of rights by a wide array of social movements and interests.

This development was reflected in discussions before the committee on the classification schemes of human rights that had been developed by Bora Laskin in 1959.[45] Laskin had argued that political and legal liberties were more basic than economic and egalitarian liberties, and for this reason stood on a more "exalted plane."[46] In the Laskin system, these more basic liberties were regarded as negative obligations of government which limited governmental behaviour but placed no particular obligation on government to intervene positively by using public policy measures to secure the rights of citizens. Moreover, political and legal liberties were not tied to any particular phase of economic development, but economic and egalitarian rights were.[47] In keeping with the rights thinking of the 1950s, the Laskin classification scheme emphasized liberties *from* government intervention, and prohibitions of action or intent by the public or private sector. This view of civil liberties as essentially negative prevailed in most academic legal discussions of rights during the Molgat-MacGuigan hearings. For example, legal scholar Walter Tarnopolsky argued that a claimed right to a minimum standard of living must be rejected on the grounds that such a right was not legally enforceable.[48] Prime Minister Trudeau seemed similarly persuaded and argued in 1968 that economic rights could not be constitutionally secured because they could not be judicially enforced.

It was indicative of the change in popular human rights thinking, however, that many laymen appearing before the Molgat-MacGuigan Committee viewed this approach as excessively legalistic. Indeed, many intervenors, such as Abbé Banville cited above, seemed more concerned that a particular claim for a particular right find a place in the political process and be reflected in positive public policy than that it be constitutionally entrenched as a "judicially enforceable" right.

The Molgat-MacGuigan Committee also gave considerable attention to the matter of cultural rights. As noted above, the primary impetus for reaffirming and extending the constitutional status of some cultural rights was the federal effort to stem a rising tide of Quebec nationalism. But the government soon found it difficult to discuss cultural rights in Canada with respect to only one cultural group. The cultural equality considerations of the "official languages" approach put in place conditions which allowed other cultural groups to claim constitutional guarantees on the basis of their own special contribution to the cultural mosaic of Canada. Two sorts of groups in particular found resources in the federal government's approach to language rights. Multicultural groups claimed that the recognition of their cultural distinctiveness was undervalued by the emphasis on bilingualism and biculturalism. In many respects this development was foreseen by the Royal Commission on

Bilingualism and Biculturalism, and was treated in Book IV of that commission's final report. In the short term, the federal response was the establishment in 1971 of a Multiculturalism Directorate in the Department of the Secretary of State to administer various cultural programs. The constitutional recognition of multiculturalism came, however, in 1982 when the Charter of Rights and Freedoms provided that the Charter must be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Canadian aboriginals also benefitted from the general attention to cultural rights that was signalled in the language and education rights provisions in the 1968 Charter proposal. The approach of the federal government in its 1969 proposal for Indian reform was the antithesis of its approach to official language groups.[49] Whereas the government was looking for ways to assure the maintenance of the French language and culture in Canada, the white paper on Indian reform was an assimilationist document. In contrast to the language proposals, it was unsympathetic to claims that the aboriginal culture needed special protections in order to survive, let alone flourish. The aboriginal groups rejected the white paper proposals, which were withdrawn in 1971. Since then, the federal government has moved steadily — and in recent years enthusiastically — toward recognizing the right of aboriginals to the preservation of their culture. While the aboriginal rights movement is not as obviously or directly related to the government's language policy as is the emerging concern with multiculturalism, it became increasingly clear throughout the 1970s that the government could not respond unsympathetically to the cultural rights claims of aboriginals while encouraging other cultural groups to preserve and enhance their cultures and heritage. Again, in constitutional terms the crowning achievement of the aboriginal rights movement was the affirmation of aboriginal rights in the 1982 Charter and the Constitution Act, 1982.

In short, the inclusion of language and education rights in the 1968 proposal for a charter of rights was a major departure from earlier constitutional rights thinking. Though the recognition of cultural rights was intended to address the unique issue of English/French dualism in Canada, it was soon found to be an effective springboard for claims by other cultural groups as well.

After the nationwide hearings of the Royal Commission on Bilingualism and Biculturalism, the Royal Commission on the Status of Women, and the Molgat-MacGuigan Joint Committee on the Constitution, a number of parliamentary task forces, committees and royal commissions continued to popularize various notions of citizen rights. Many of these investigatory bodies held extensive public hearings, often visiting the major centres and sometimes paying the travel costs of witnesses to ensure that the relevant publics were consulted. In recent years, for example, there have been committees investigating the rights

of the disabled, visible minorities, and aboriginals. In addition, a number of federal government agencies with explicitly client-oriented mandates have emerged. These specialized agencies and investigatory bodies have been used increasingly by government to develop public policy. They have also become an important bridge between citizens and policy makers. By focussing on the special needs of various groups of citizens, the government response has itself reinforced redefinition of a political community composed of groups with special needs.

The Charter of Rights and Freedoms, 1982

Discussions of the public consultations leading up to the 1982 Charter of Rights and Freedoms could be the subject of an entire book — and have been well analysed at greater length by Rainer Knopff and F.L. Morton in this volume.[50] Remarkably, given the pattern of widespread public consultation through the 1960s and 1970s, it was not clear that the government planned to take the proposals of the 1982 Charter directly to the people if agreement could be reached at the intergovernmental level. However, because of the difficulty of winning provincial government support for the constitutional package, an opportunity for direct public participation emerged. A proposed resolution including a proposed Charter of Rights was tabled in Parliament and sent in October 1980 to a special joint committee of the Senate and House of Commons which was to conduct hearings on the proposed resolution. After much negotiation and pressuring by opposition interests, the government agreed that the committee hearings would be televised.

Public response was overwhelming. Over only three months of hearings, the committee reviewed more than 950 submissions and heard from 97 witnesses. Public interest in the Charter settled disproportionately on the "new" rights themes, especially on substantive equality and affirmative action programs, native rights, and multicultural rights, in addition to language and education, as indicated in Table 3-1.

As in 1971, the federal government soon realized that it had a powerful ally in public support for the proposed charter. The federal government gained temporary relief and even vindication, as strong support for the contents of the Charter took some of the steam out of provincial complaints about the process.[51] After agreement was reached on a variety of amendments recommended by the joint committee, the federal government, now with significant and vocal public support for the contents of the Charter, was in a strengthened position in dealing with the reluctant provinces.

The special joint committee was the primary vehicle for public input into the content of the Charter ofRights and Freedoms. There was no guarantee, however, that the changes made by the joint committee would survive the next round of federal-provincial negotiations. After all, the

TABLE 3-1 General Principles Addressed by Intervenors

Subject	Total Number of Comments		Agree		Disagree	
	Groups	Individuals	Groups	Individuals	Groups	Individuals
Unilateral patriation with substantive changes	56	134	23	42	33	92
Entrenchment of a Bill of Rights	75	96	54	53	21	43
Entrenchment of:						
Fundamental freedoms and democratic rights	7	11	6	6	1	5
Mobility rights	10	7	9	7	1	0
Legal rights	1	8	1	8	0	0
Equality rights	18	7	18	5	0	2
Official languages	27	37	22	16	5	21
Minority language education rights	27	27	24	17	3	10
Denominational school rights	26	66	26	62	0	4
Native rights	43	29	42	27	1	2
Multicultural rights	20	5	20	5	0	0
Provision for equalization in the Constitution	7	7	7	6	0	1
Use of referenda for constitutional change	11	57	5	41	6	16
Victoria formula	4	12	2	5	2	7
Vancouver consensus	8	13	7	10	1	3

Constituent assembly	7	4	7	4	0	0
Senate reform	7	16	7	16	0	0
Proportional representation for the House of Commons	0	6	0	6	0	0
Resource control:						
Federal	0	1	0	1	0	0
Provincial	2	6	2	4	0	2
Increased powers:						
Federal	2	6	0	5	2	1
Provincial	3	9	2	5	1	4
Inclusion of a preamble in the Constitution	6	4	6	4	0	0

Source: Special Joint Committee of the Senate and House of Commons on the Constitution, 1980–81, *Minutes of Proceedings and Evidence*, 1981, 57:92

committee had been struck to facilitate unilateral federal action. The federal resolution had been tabled on October 6, 1981, four days after the government first announced its intention to proceed unilaterally. A provincial counter-strategy was in motion by October 14, and before the end of the month a majority of the provinces had agreed to proceed with three legal challenges to the federal resolution and the federal strategy of unilateralism. These provinces had the support of the federal Progressive Conservative Party, which also rejected federal unilateralism. It was possible that if the court challenges succeeded, the joint committee hearings and amended resolution would be ignored.

In a complex play of moves between the federal government's agreement to several changes arising from the committee hearings and the final agreement of the House to the amended resolution, the Conservative Party succeeded in stalling the unilateral project until an important unanimous decision of the Newfoundland Court of Appeal was rendered on March 31, declaring the federal proposal unconstitutional. An earlier judgment in Manitoba had supported the federal initiative, although the decision was a close 3-2 split. A third decision — from the Quebec Court of Appeal — was not rendered until mid-April.

The Newfoundland decision was the important turning point in the federal strategy. The following day the federal government announced that it would not proceed to patriate the Constitution unilaterally until it was assured by the Supreme Court of Canada of its authority to do so. The stalling tactics of the Progressive Conservatives in the House of Commons had succeeded in delaying the proposed unilateral package, already amended to reflect public input in the committee hearings.

The Supreme Court of Canada rendered its decision on September 28, 1981. The federal proposal to proceed unilaterally was found to be constitutionally legal, but in violation of conventional constitutional practice in Canada. This decision effectively returned the issue to the federal-provincial arena and paved the way for one more effort at intergovernmental accord. The final federal-provincial conference was held five weeks later, with the original amended federal resolution as the basis for discussion on the Charter of Rights and Freedoms. At the time no one could be certain about what would emerge in an accord, or if accord would be achieved.

A number of changes were made as a consequence of this intergovernmental meeting, including the introduction of a general override clause covering the sections of the Charter dealing with fundamental freedoms, legal rights, equality rights, and the Section 28 guarantee of gender equality. Changes were also made to the protection and recognition of aboriginal rights in Section 34 of the proposed Constitution Act, leaving the negotiation of the scope and content of these rights to future federal-provincial meetings. Other changes were also agreed to.

The reactions of citizen groups that had participated in the earlier

special joint committee hearings were mixed. Alan Borovoy, president of the Canadian Civil Liberties Association, was relieved:

> They did not emasculate the charter. The process is a rather ingenious marriage of a bill of rights and a parliamentary democracy. The result is a strong charter with an escape valve for the legislatures. The "notwithstanding" clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to override the Charter. Political difficulty is a reasonable safeguard for the Charter.[52]

Women's groups and aboriginal groups were less pleased with the outcome. Representatives of these groups mobilized one last time to reinstate the rights they believed had been guaranteed in the federal government's original amended resolution. The women's groups succeeded in having the Section 28 gender equality provisions excluded from the ambit of the general override clause, and the aboriginal lobby succeeded in having a new Section 35 introduced which recognized and affirmed existing aboriginal and treaty rights (although the Minister of Justice did not believe the new clause in fact altered the meaning of the agreement in the November 5 Accord).

One of the most remarkable results of the process leading up to the 1981 Accord was that it brought together the public and the intergovernmental actors, and that at both levels there were meaningful accommodations of interests and concerns. The outcome was far from ideal; indeed, the failure to resolve the outstanding issue of dualism and the status of Quebec in the Canadian federation is a major weakness. But the process also had its successes, the most remarkable being the balance reached in the difficult issues of nationally held citizen rights and a federal political system.

The debate over the balance of responsibilities and interests between the federal and provincial governments, which had been avoided in the 1960 Bill of Rights, was confronted head-on in debates over the 1982 Charter. The form the Charter took reflected this. The various legislative overrides available to the federal and provincial governments, the special provisions affecting mobility rights, and of course the refusal by the Quebec government to sign the final accord were all reminders of the difficulties of negotiating a national code of citizen rights in the Canadian federation. With the entrenchment of the Charter the reverse is now also true in Canada — hereforth federalism will co-exist with a national code of citizen rights. The Charter establishes new limits for governmental action and new standards of government performance. In matters of human rights, where parliamentary supremacy formerly reigned, the Charter of Rights and Freedoms is now the authoritative guide.

The Charter contains many reminders and reflections of the politically divisive issues on the agenda of Canadian politics in the early 1980s — the affirmation of aboriginal rights; the exclusion of gender equality from

the the ambit of the general override clause; the prohibition of discrimination against the mentally and physically disabled; the provision enabling affirmative action programs to assist the disadvantaged; the guarantee of equal benefit of the law and equality under the law; the recognition of Canada's multicultural heritage; and other provisions included in the Charter in response to the representations of groups to the joint committee and directly to the provincial premiers.

One critic of the process which produced the Charter has commented that:

> the debate on the Charter emphasized special claims rather than those rights possessed by all Canadians, and in particular there was relatively little debate on what the Charter itself designates as "fundamental freedoms.[53]

The parade of special groups arguing their particular interests before the joint committee in 1981 is in marked contrast to the proceedings of the 1960 House of Commons Committee on the Bill of Rights, when the few special interest groups who did appear — the Seventh Day Adventists and the Canadian Jewish Congress, for example — addressed themselves almost exclusively to the broader issues of fundamental freedoms and human rights protections.

As in 1970–71, charter discussion in the early 1980s became a new site for interest group activity in Canada and encouraged groups to formulate or reformulate their interests and demands as matters of citizen rights. The momentum that developed around the Charter took some groups by surprise and left them scrambling to fit their interests into the language of rights. For women's groups, for example, constitutional reform was a low priority until the 1980s, when they recognized that entering the constitutional reform discussions was the best way to keep women's equality issues on the political agenda into the 1980s. Women's rights activist Chaviva Hosek has written that "until the spring of 1980, the women's movement in Canada had not focussed primarily on the fight for equal rights in the constitution" and that even then the drive "did not spring spontaneously from within the women's movement"; rather "it developed in response to the determination of the federal government to entrench a Charter of Rights and Freedoms during the patriation process."[54] The constitution issue served the additional function of providing a unifying activity and focal point for the women's movement, which by the late 1970s was showing signs of becoming highly fragmented and dispersed. Although not all the concerns of women's groups were accommodated in the Charter of Rights and Freedoms, and a fierce eleventh-hour effort was needed to protect the gender equality guarantee from the general legislative override, nonetheless the women's lobby was highly successful during the constitutional negotiations in 1980–81. Many of the concerns of women's groups were met and the women's movement emerged from the process stronger, more unified, and more

self-confident. Constitutional recognition has reinforced and enhanced the concept of women's "rights" in Canada.[55]

The women's lobby was perhaps the most successful of the organized citizen groups during the constitutional renewal process of 1980–82, but a similar story could be told of the efforts of groups representing aboriginal peoples, physically and mentally disabled persons, and others. The Charter project provided an occasion for a wide array of groups to express their interests in the powerful and passionate language of citizen rights. The political determination of the federal government to achieve a Charter of Rights in the early 1980s and its recognition of the need to build a broad base of public support for the project enhanced the probability that these group efforts would be successful.

Of course, there were losers as well.[56] Groups and interests, such as the New Democratic Party and the Canadian Labour Congress, could perhaps have capitalized on the federal government's eagerness to win public support for the Charter proposal by demanding more forcefully that the Charter respond to their political agenda as well — the better protection of social and economic rights. Some commentators on the process wondered why these groups passed up such an opportunity for partisan gains.[58]

There were also groups whose issues were politically out of favour with the times and with the politicians on the joint committee. These groups were painfully aware that, because the debate had become so highly politicized, their particular interests were likely to be excluded from the Charter. One such group, the Canadian Association of Lesbians and Gay Men, implored the members of the committee to adopt a broad perspective of fundamental rights rather than a narrow one based on the popularity of each group's claim. As one member of the group said to the committee:

> I was not really optimistic about the chances of getting your support . . . because human rights has ceased to be the kind of issue of morality and justness that it ought to be and has become basically a political issue.[58]

The popularized and politicized language of human rights had moved debates from broad principles to specific applications in response to the claims of particular groups.

Rights, Entitlements, and Constitutionalism

In looking over the major changes in the nature of rights thinking in Canada since the end of World War II, the following appear to be the main developments and their implications for constitutionalism in Canada.

1. *Rights demands on the state have come to focus less on the negative civil liberties which predominated in the 1950s and more on demands that place expectations and obligations on governments to intervene through public policies, particularly in the areas of social and cultural policy including language policy.*

From a constitutional perspective this change is clearly demonstrated by section 15(2) of the 1982 Charter of Rights and Freedoms, which enables governments to pursue affirmative action programs to redress discrimination against groups such as women, disabled persons, and members of ethnic groups. At the less formal level, as was clear in many of the representations to the Molgat-MacGuigan Committee, the popularized language of rights in many instances has been little more than a rhetorical device for voicing demands for public services.

Closely related to the shift from negative to positive rights has been redefinition of the concept of equality in the postwar period. There have been at least two phases of equality thinking. The preoccupation with procedural equality in the 1950s centered on equality before the law. This view informed the 1960 Bill of Rights and was later held by the Supreme Court of Canada to have quite limited effect, extending to neither circumstances of inequality *under* the law nor, as the *Bliss* case indicated, to equal benefit of the law.

During the 1960s and later, however, popular equality claims turned to more substantive concerns, and a new focus on equality of opportunity included the demand that citizens be guaranteed equal benefits from society. Attention focussed in particular on unequal benefit of the law for groups such as women, disabled persons, and visible minorities.

Constitutionally, the new Charter of Rights reflected this change from procedural to substantive equality by, among other things, expanding the Bill of Rights protection of "equal before the law" to include the new guarantees of equality "before and under the law" and the right to "equal protection and equal benefit of" the law.

These equality notions imply an ever-broader role for government, not only in performing a policing function but also in supporting or providing a range of often very costly public programs.

The shift from negative to positive rights and from procedural to substantive equality claims is itself closely associated with a second change in rights claims evident in the postwar period.

2. *There has been a shift of concern at the popular level from political and democratic rights to egalitarian and cultural rights.*

During discussion of the 1982 Charter the most contentious issues were not the sections dealing with fundamental, legal, democratic and political rights but rather the provisions respecting equality (in particular, the equality of economically and socially disadvantaged groups), official languages and minority language education rights, denominational

school rights, native rights, and multicultural rights. Closely related to this concern with egalitarian and cultural rights is the shift in emphasis from the rights of individuals to the rights of special groups. To use the affirmative action clause as an example, the new equality provisions will work toward achieving equality for distinguishable groups of citizens — women, youth, disabled persons, members of ethnic minorities, and others. Such a group-based approach to equality is markedly different from equality notions in the 1960 Bill of Rights. It also creates an environment in which individuals are highly conscious of their identity as members of particular groups and are encouraged to organize and lobby for their special interests.

What is especially significant is that the change in rights thinking from a preoccupation with individual rights to a concern with group status and rights has created opportunities for a new style of interest-group mobilization and activity.

3. *Group rights claims by cultural groups have been especially prominent and successful in the postwar period.*

While the 1960 Bill of Rights contained individual rights guarantees against discrimination on racial or national origin grounds, it had no equivalent to the Section 27 provision of the 1982 Charter, which requires an interpretation of the provisions of the Charter "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." While we await a judicial interpretation of this section, it could well be an effective springboard for multicultural groups and ethnic associations to claim equal benefit of government-funded cultural enhancement programs.[59]

The most extreme cultural rights claim is the right to self-determination. This too has a postwar history in the "revolution of rights thinking." The recognition of the right of self-determination in the 1948 Universal Declaration was directed primarily at the colonialized peoples of the Third World. However, in the postwar years many subgroups within developed countries have also claimed a right to various forms of self-government and self-determination,[60] including the Québécois nationalist movement and the aboriginal self-government movement in Canada. On a number of occasions Canadian aboriginals have invoked arguments in support of their claims based on provision of the Universal Declaration. These nationalist movements and claims to self-determination on the part of special groups have serious implications for the Canadian political community and Canadian principles of constitutionalism.

The granting of rights to cultural subgroups — or, for that matter, to any group in a political community — necessarily implies the creation of different classes or categories of citizenship, since only members of the entitled collectivity can claim the right. The establishment of different

categories of citizens can create difficult political problems. Some groups may feel that their own status in the political community has been displaced by the recognition of the special rights of other groups, as was the case with non-francophone ethnic groups in Canada during the 1960s, for example. Preferential treatment for some is also reverse discrimination for others and can lead to public backlash, such as the complaints of non-francophones about the preferential hiring practices aimed at increasing bilingualism in the federal public service in the 1970s.

Moreover, the recognition of collective rights must sooner or later conflict with notions of individual rights — such as, for example, the issue raised by Section 12.1(b) of the Indian Act which deprives Indian women of their rights as status Indians when they marry a non-status person but allows Indian men to retain their status. Aboriginal groups have defended this inequality on the grounds that it is consistent with traditional native law. For the broader Canadian community there is a continuing dilemma. How can the individual rights of women, including native women who marry non-native men, be balanced with the collective right of aboriginal communities to control and define membership in their own self-governing territories? Individual and collective rights simply do not coexist comfortably.

Many groups can point to special historical needs and entitlements to justify their collective rights claims, and some groups can convincingly claim the collective right of self-determination. The political community as a whole must decide which of these claims it will admit as legitimate and why. These decisions will have profound consequences for defining the rights of all citizens, not just those who are members of the select collectivity.[61]

4. *The constititutional recognition of human rights in Canada has always been hotly contested in the federal-provincial arena.*

As Rainer Knopff and F.L. Morton convincingly argue in their paper in this volume, the 1982 Charter was a nation-building tool in the hands of the federal government. It was viewed by the federal government as an instrument for establishing a nationally based sense of shared citizenship rights. The new third pillar of constitutionalism created by the entrenchment of the Charter has diminished some of the authority of the traditional pillars of federalism and parliamentary supremacy. This will undoubtedly affect future discourse about citizen rights in Canada and future relations within the federation.

This development is not only the consequence of the particular provisions of the 1982 Charter. Even if the 1960 Bill of Rights had been constitutionally entrenched and applicable to both levels of government, the resulting diminution of legislative power at both the federal and provincial levels would probably have resulted in federal-provincial

acrimony. However, some features of the 1982 Charter and the events leading up to its proclamation exacerbated the potential for feelings of ill-will between the federal and provincial governments. A particular example of this is the Charter's language provisions, which were enacted with the full knowledge that they would conflict with some clauses of the controversial language provisions of Quebec's provincial language legislation, in spite of the fact that Quebec repeatedly rejected the language provisions of the Charter.

5. *At the less formal level of rights recognition, recent developments in rights thinking also portend changes in informal constitutionalism and the way politics is conducted in Canada.*

The consequences for political community of a popularized language of rights can be very significant. Canadian political philosopher Tom Pocklington argues that a popularized language can result in an "inflation" of human rights, with deleterious consequences for the political process.[62] According to Pocklington, many contemporary rights claims are barely related, if at all, related to traditional notions of human rights. They are political demands that have been dressed up in the persuasive language of human rights.This "inflation" of the idea of human rights is disruptive of the process of normal political negotiation, since the language of rights comes replete with heavy moral considerations of their inalienability and sanctity. As Pocklington writes:

> Those who advance political claims under the aegis of human rights, believing that their causes are sanctified by the most powerful of all moral considerations, are in no frame of mind to negotiate . . . confronted by such massively heavy artillery, opponents of causes whose advocates invoke human rights are virtually compelled to resort to unduly heavy weaponry themselves . . . the human rights perspective tends to extend political controversies beyond their plausible limits and thereby inhibits reasonable political debate.[63]

Significantly, the consequences described by Pocklington result when such a popularized language enters the political arena. They do not depend on the legal or constitutional recognition of such rights claims per se, but on the fact that claims are made in the political arena, *as claims of rights*.

If these consequences seem removed from the real world of Canadian politics or unlikely or exaggerated outcomes, it is perhaps useful to note the observations of H.L. Laframboise, a seasoned Ottawa civil servant, writing in 1982 about the future of public administration in Canada and the challenges of governing in what he termed the "rights-seeking society."

> The exquisite refinement of the overall field of human rights into a multitude of rights-seekers and rights-protectors has been a major development over

> the past ten years, and as the principal growth industry in government, rights have become a major preoccupation of public administrators. . . . Canada is in danger of becoming a rights-ridden country. . . . there is very little that can be done to contain the growth of the rights movement, given the difficulty of justifying opposition to any kind of right.[64]

Others have made similar observations and concluded that governments must find some new means for distinguishing legitimate from illegitimate rights claims. Even so, there may be more legitimate claims than can be managed and governments will also have to find ways to keep the flow of claims at manageable levels. Failure to establish and enforce an effective valve to control the flow of claims may endanger the government's own legitimacy, as well as its manoeuvrability.

The developments traced in this essay have altered citizen/state relations and the fabric of the Canadian political community in ways which are unlikely ever to be reversed. As the politics and lobbying surrounding the events leading up to the 1982 Charter of Rights and Freedoms gave way to the constitutional settlement itself, Canadians resolved to tie their political fate to a third pillar of government — the language and justifications of entrenched citizen rights.

Notes

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1. Maxwell Cohen, "Human Rights: Programme or Catchall? A Canadian Rationale," *Canadian Bar Review* (December 1968) p. 557.
2. *Proceedings of the Annual Meeting of the Canadian Bar Association*, 1943, p. 53, quoted in W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. Toronto: (McClelland and Stewart, 1975), pp. 5–6.
3. Ibid., p. 6.
4. Even so, many British Columbians supported the repatriation scheme. A 1944 poll indicated that 80 percent of British Columbians favoured deporting Japanese aliens, and 33 percent favoured "repatriating" Canadian citizens of Japanese origin. Ann Gomer Sunahara, *The Politics of Racism* (Toronto: James Lorimer, 1981), p. 116. For a more complete discussion, see chap. 7.
5. For discussion of the violations of civil liberties, see *Proceedings of the Annual Meeting of the Canadian Bar Association*, 1946, and especially p. 144.
6. For a discussion of the debate on the 1946 Citizenship Act, see Mildred Schwartz, "Citizenship in Canada and the United States," *Transactions of the Royal Society of Canada*, 1976. Special joint committees were established in 1947 and 1948 to examine and recommend measures to ensure the protection of human rights in Canada but recommended against a legislated Bill of Rights.
7. For an excellent discussion of various factors and forces underlying the 1960 Bill of Rights see Kent Roach "The Intellectual and Political Origins of the Canadian Bill of Rights, 1945 –60," unpublished manuscript, University of Toronto, Department of History, 1984.

8. "Canadian Statement on the Universal Declaration of Human Rights," *External Affairs Bulletin* 1 (January 1949), pp. 23, 24.
9. "The Universal Declaration of Human Rights," reprinted in *Human Rights, A Compilation of International Instruments* (New York: United Nations).
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11. Re: *Drummond Wren* (1945) O.R. 778, 4 D.L.R. 674.
12. See W.S. Tarnopolsky, *Discrimination and the Law* (Toronto: Richard de Boo, 1982), chap. 2.
13. *Saumur v. Quebec and Attorney General of Quebec*, [1953] 2 S.C.R. 299; *Boucher v. The King*, [1951] S.C.R. 265; *Switzman v. Elbling and A.G. Quebec*, [1957] S.C.R. 285; *Chaput v. Romain*, [1955] S.C.R. 834, *Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.
14. Canada, House of Commons, *Debates*, July 4, 1960, 5664. Thanks to Peter Russell for drawing this to my attention.
15. Canada, Special Committee of the House of Commons on Human Rights and Fundamental Freedoms, in *Minutes of Proceedings and Evidence* (Ottawa, 1960), p. 23.
16. Ibid., p. 158.
17. Louis Pigeon, "The Bill of Rights and the BNA Act" (1959), 37 *Canadian Bar Review* p. 66.
18. *Supra*, note 15.
19. *Proceedings*, 1960, ibid., pp. 406–09.
20. See, in particular, Tarnopolsky, *The Canadian Bill of Rights*.
21. For a useful discussion see Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1981), pp. 435–38 and Tarnopolsky, *The Canadian Bill of Rights*, pp. 125–63.
22. Mark MacGuigan, "Development of Civil Liberties in Canada," *Queen's Quarterly* 72 (2) (1965), p. 273.
23. Ibid., p. 274.
24. The judicial position was exemplified by Mr. Justice Bora Laskin in his judgement in *Curr v. The Queen*: "compelling reasons ought to be advanced to justify the court . . . [employing] . . . a statutory (as contrasted with a constitutional jurisdiction) to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its power in accordance with the tenets of responsible government which underlie the discharge of legislative authority under the *British North America Act, 1867*" ([1972] S.C.R. 889, 899).
25. MacGuigan, "Development of Civil Liberties," p. 272.
26. "The Manufacture of Minorities," paper presented to the Conference on Minorities in Canada, May 21–24, 1984, Banff, Alberta, p. 27.
27. W.F. Bowker, "Basic Rights and Freedoms: What Are They?" (1959). *Canadian Bar Review* 61.
28. For a discussion of the developments of Canadian legislation affecting women in the labour force see Thomas Eberlee, "Labour Canada: A History of Its Accomplishments," in Canada, Department of Labour, *Sexual Equality in the Workplace*, Proceedings of a Conference, March 17–19, 1982, Toronto (Ottawa: Minister of Supply and Services Canada, 1982), pp. 12–16.
29. (1974), S.C.R., 1349.
30. (1979), 1 S.C.R., 183.
31. Jo Freeman, "On the Origins of Social Movements" in her *Social Movements of the Sixties and Seventies* (Longman: New York, 1983), p. 13.
32. Kathie Sarachild, "Consciousness-Raising: A Radical Weapon," quoted in J. Freeman, "A Model for Analyzing the Strategic Options of Social Movements" in ibid., p. 202.
33. 1968: Rt. Hon. Lester B. Pearson, *Federalism for the Future*.
    Hon. Pierre E. Trudeau, *A Canadian Charter of Human Rights*.

1969: Rt. Hon. Pierre E. Trudeau, *The Constitution and the People of Canada* (Ottawa: Minister of Supply and Services, 1969).

34. For a perceptive analysis of the general framework from 1968 to 1978, see Alan Cairns, "Recent Federalist Constitutional Proposals: A Review Essay," *Canadian Public Policy* 5 (1979): 348–65.
35. Pearson, *Federalism for the Future*, p. 8.
36. Trudeau, *The Constitution and the People of Canada*, p. 6.
37. Donald V. Smiley, *The Canadian Charter of Rights and Freedoms, 1981*, Discussion Paper Series (Toronto: Ontario Economic Council, 1981) p. 11.
38. Trudeau, *The Constitution and the People of Canada*, p. 58.
39. Molgat-MacGuigan, *Transcript of Hearings*, 28:59.
40. Ibid., 28:29.
41. Ibid., 28:78.80.86.
42. Ibid., 70:48.
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4

Nation-Building and the Canadian Charter of Rights and Freedoms

RAINER KNOPFF
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Introduction

For many observers of Canadian affairs, the territorial dimension of our public life has become so dominant as to threaten national unity. This opinion was shared by the Liberal government under the leadership of Pierre Elliott Trudeau. From the beginning, the Trudeau government made the moderation of centrifugal territorialism the central element in its strategy of constitutional reform. The Charter of Rights and Freedoms was a key component of this strategy; it was intended not only to protect rights, but also to promote national unity. This paper explores the nation-building potential of the Charter.

The national unity function of the Charter can best be understood in the context of the wider political conflicts underlying the constitutional reform process that led up to the Constitution Act of 1982. These conflicts turned in part on the question of where and how Canada should situate itself on the continuum between interstate and intrastate federalism.

Interstate federalism emphasizes the division of powers between the two levels of government in a federal state and rests on the assumption that local and national concerns can be coherently distributed to the appropriate level to lessen the overlap and diminish conflict. In this view, questions of truly national scope should be handled by the central government while local questions should be reserved to the component units.[1] The desire for such a hermetically sealed division of power was evident among the Fathers of Confederation from the old united province of Canada, who had experienced the governmental paralysis that can result when sectional and common concerns are mixed and were

determined to avoid it in the future. George Brown's speech to Parliament in favour of Confederation clearly expresses this sentiment.

> I am further in favour of this scheme because it will bring to an end the sectional discord between Upper and Lower Canada. It sweeps away the boundary line between the provinces so far as regards matters common to the whole people . . . and the members of the Federal Legislature will meet at last as citizens of a common country. The questions that used to excite the most hostile feelings among us have been taken away from the General Legislature, and placed under the control of the local bodies. No man need hereafter be debarred from success in public life because his views, however popular in his own section, are unpopular in the other — for he will not have to deal with sectional questions, and the temptation to the government of the day to make capital out of local prejudices will be greatly lessened, if not altogether at an end.[2]

If one accepts the premise that national and local spheres can be separated, it is unnecessary to make the central institutions of government sensitive to regional or local concerns. This helps explain why the Fathers of Confederation chose to combine federalism with parliamentary institutions, which most observers agree are not well suited to the accommodation of regional interests. Jennifer Smith contends that the founders consciously chose parliamentary government over the American congressional system precisely because they thought the hierarchical unity and discipline of a parliamentary system better suited to the non-regionalized national politics they preferred. That it was not hospitable to regional concerns was a distinct advantage in their eyes.[3]

A federalism of "watertight compartments" based on the distinction between national and local has never proved possible in Canada, however. As Donald Smiley notes, "In the interdependent circumstances of the contemporary world there can be no hiving off of [local] matters. What economists call 'spill-overs' of state or provincial policies are so ubiquitous that a matter of jurisdiction which concerns only the residents of particular regions will not be of crucial concern even to them."[4] The reverse is also true: policies clearly within federal jurisdiction have differential regional effects and arouse different regional responses. In this context, Smiley and others have found the marriage between federalism and parliamentary institutions to be less than adequate. Starting from the premise that a non-regionalized national politics is not possible, these authors argue that the perceived insensitivity of the national parliament to regional interests forces those interests to express themselves primarily through provincial governments. Regional input into national policy is brought to bear on Ottawa by way of pressure from provincial governments. The result is national policymaking by intergovernmental negotiation, with a good deal of intergovernmental conflict in the bargain. Such conflict is the chief consequence of interstate federalism in a parliamentary system, and is an unwanted consequence

at that. The leading interstate response to this conflict is to reform the federal division of powers in order to reduce jurisdictional overlap.

Intrastate federalism, on the other hand, begins from the premise that no perfect demarcation between national and local is possible, that there will always be overlap and hence the possibility of intergovernmental conflict. It attempts to reduce and manage conflict not by seeking a more perfect division of powers but by making the national policymaking arena responsive to regional concerns — by bringing the regions to the centre, as it were. Intrastate federalism abandons George Brown's desire for a national politics free from, and hence more lofty than, sectional concerns. Instead, the national interest is to be discovered and articulated precisely through the clash of regional concerns and the process of accommodating them. In Canada a move toward intrastate federalism is usually thought to require modifications of the parliamentary system. The discipline and unity of parliamentary government so coveted by the founders is precisely what renders that form of government anomalous to proponents of intrastate federalism. The latter prefer the fragmentation of power of the American congressional system and the consequent openness of that system to regional interests. This fragmentation of power, manifest in such phenomena as the undisciplined party system, depends on the separation of powers between the executive and legislative branches of government. Not surprisingly, many of the proposals for reforming our central institutions of government along intrastate federalist lines can be understood as attempts to introduce this principle of separation of powers into the parliamentary system. Some advocates of this shift are not afraid to admit that this involves the abandonment of what distinguishes the parliamentary system.[5]

Alan Cairns has identified two versions of intrastate federalism. The first, which he calls provincialist intrastate federalism, involves restructuring the central institutions of government in order to provide for the input of provincial governments. The leading proposal in this respect is a new upper house to replace the Senate, whose members would be delegates of the provincial governments. Inspired by the German *Bundesrat*, this proposed chamber has appropriately been called the "House of the Provinces." By contrast, centralist intrastate federalism reaches over the heads of provincial governments for its regional input. It attempts to provide within the national institutions spokesmen for regional concerns who are independent of and potentially in competition with provincial governments. A second chamber along the lines of the American Senate is the centralist intrastate answer to the proposed House of the Provinces. Clearly, as their names suggest, provincialist intrastate federalism underlines the role of the provinces in the governmental system, while centralist intrastate federalism diminishes their authority and strengthens that of the central government.[6]

In the on-going Canadian constitutional struggle between the federal

and provincial governments, the latter have relied on the arguments of both inter- and intrastate federalism. Most frequently, the provinces have claimed that the insensitivity of Ottawa to the regions should be remedied by a decentralizing revision of the federal division of powers. In addition, some provinces have proposed a shift in the direction of provincialist intrastate federalism, particularly through a House of the Provinces. Ottawa has consistently opposed both arguments.

The Charter of Rights and Freedoms can be understood as part of the Trudeau government's strategy to counteract provincializing trends. Trudeau had entered federal politics in order to oppose what he considered to be excessively decentralist opinions, especially in Quebec. He wished to restore the federal balance against arguments which "had magnified provincial autonomy into an absolute, and were reducing federal power to nothing."[7] The response of his government to the perceived threat was twofold. First, it was prepared to contemplate some moves in the direction of centralist intrastate federalism to enhance the regional legitimacy of the federal government. However, Ottawa under Trudeau was never entirely comfortable with the central premise of intrastate federalism — namely, that the national interest is found primarily in the accommodation of regional interests, a premise more enthusiastically embraced by the Progressive Conservative Party under Joe Clark, who was fond of describing Canada as a "community of communities." In the words of Jennifer Smith, "Intrastate federalism, even the centralist version, risks an identifiable national discourse by promoting a self-consciously regional one. It unavoidably promotes while it accepts and placates regionalism, in which case the remedy exacerbates, not cures, the political ill."[8] The Trudeau government was resolutely opposed to the idea of Canada as nothing more than a "community of communities"; it always held that there was a national community that transcended the regions and that was properly represented by the central government. The Charter of Rights was one of the ways in which the Trudeau government sought to give symbolic and practical expression to a national citizenship independent of regional location.

This perceived national unity function of the Charter is probably the primary reason for its ultimate success. According to Peter Russell, the Charter had two political purposes. The first, and most obvious to the average citizen, was the better protection of rights and freedoms. This had been the original motivation behind the call for a constitutional charter, which emerged in response to foreign and domestic human rights violations during and immediately after World War II. It was this purpose, moreover, that accounted for the widespread public support enjoyed by the Charter. Far more important to the Liberal Party, on the other hand, was the view that the Charter might help to offset centrifugal political forces, which had become increasingly powerful since the late 1950s. "This national unity function of the Charter," says Russell, "is most relevant to explaining why politicians, especially those who led the

federal government, pushed so hard for a charter."[9] In fact, as long as debate was focussed on a charter's ability to protect rights and freedoms, the project did not receive an enthusiastic welcome from the "Government Party," and the only progress was left to the Diefenbaker "interlude," when the Canadian Bill of Rights was enacted. When the federal Liberal Party enthusiastically embraced the idea of an entrenched charter in 1968, it was chiefly because its national unity function was apparent to Mr. Trudeau.[10]

The American experience with their Bill of Rights, after it was applied to the states through the Fourteenth Amendment, appears to corroborate the idea that an entrenched charter can serve a nation-building purpose. If the view that a Canadian charter could serve a similar purpose is the main explanation for the federal government's enthusiasm for the project, it also helps to explain why some of the provinces opposed it despite the significant public support it received. This opposition was formulated as a defence of the tradition of parliamentary supremacy, but in the context of a federal system, parliamentary supremacy is a formula for decentralized legislative policymaking. Alan Cairns goes so far as to suggest that parliamentary supremacy was not the real issue at all. "The language of parliamentary supremacy," he says, "was a rhetorical device to protect province-building against the nationalizing philosophy of the charter."[11] We are inclined to take a more generous view of the provincial arguments. The fact that an argument coincides with one's interest may make one more inclined to adopt it but does not in itself impugn the validity of the argument; nor does it preclude genuine attachment to the argument in its own right, quite apart from its tendency to support one's interest. The debate between proponents of parliamentary and judicial supremacy is a real one, and some of the premiers seemed to support parliamentary supremacy out of genuine, principled conviction. Nevertheless, there is no doubt that this support was made easier by the fact that the doctrine served the interests of province-building. In the end, the provinces did not entirely lose this debate. When in the final compromise they traded support for the Charter for their version of the amending formula, they nevertheless managed, in the name of parliamentary supremacy, to inject the section 33 override power.

Except for patriation itself, the Charter is the only component of the centralist program to have been put in place by the Constitution Act of 1982. And even patriation was not an unambiguous victory for the centralists. They hoped that bringing the constitution home would provide symbolic support for a sense of Canadian identity. But patriation was achieved by entrenching a new amending formula, thereby removing the last vestiges of British participation in our constitutional life, and this amending formula represented a victory for the provincialist side in the constitutional debate. The federal government had lobbied for a formula, modelled on the Victoria Charter, that stressed the consent to

constitutional amendments of regions and people rather than provincial governments. The consent of Ontario and Quebec was required not because they were provinces, but because of their status as major regions. The same principle precluded the equal treatment of provinces from the West and the Maritimes. Thus, in all its various incarnations, this formula required the consent of only two provinces in each of these regions. The October 1980 version of the formula further emphasized regions at the expense of provinces by insisting that the required two western and Maritime provinces contain at least 50 percent of the population of their respective regions, a provision that was later dropped.[12] Although this formula emphasized regions, it still permitted the expression of regional consent through the voice of the provincial legislatures. Ottawa's 1980 suggestions went even further, however, and proposed that the provinces/regions otherwise stipulated by the formula could also express their consent through referenda initiated by the federal Parliament. This alternative formula, while maintaining the importance of regions, eliminated provincial governments from the amending process altogether.[13]

The amending formula that finally found its way into the Constitution as part of the final compromise originated in Alberta and was supported by the so-called "gang of eight" provinces that opposed the federal patriation initiative. It emphasized the role of provincial governments in the amending process by requiring the consent of a specified number of governments and by permitting provinces to opt out of amendments reducing provincial powers. If the Charter was intended to symbolize a non-provincialized Canadian identity, the amending formula did precisely the opposite. According to Garth Stevenson, the formula implies "that there is no Canadian nation, but merely an arrangement of convenience among sovereign provinces. . . . In the last analysis, the compact theory, that malignant legacy of Canadian history, triumphed over democracy, freedom and national unity."[14] Or, as Alan Cairns puts it,

> Either the Alberta amending formula and no Charter, or the federal amending formula and a strong Charter lacking a non-obstante clause would have been internally consistent in their basic assumptions about the nature of community in Canada. The constitutional settlement which combines a nationalizing Charter and a provincializing amending formula is a contradiction posing as a compromise.[15]

Other constitutional reforms have been left for the future. However, there are many reasons for doubting that this process will soon be seriously renewed, or if it is, that it will be successful.[16] In this paper we address the question of whether the nation-building purposes of the Charter are likely to be realized, especially in a context where the institutional supports of intergovernmental conflict remain intact and are likely to persist for some time. In terms of the American comparison, we

ask whether the nationalizing effect of the American Bill of Rights depended on a dominant national government in a system of intrastate federalism — whether it was as much an effect as a cause of nation-building.

Our analysis begins by situating the postwar drive for a Charter of Rights in the politics of Canadian federalism during the 1960s and 1970s. Having identified how a Charter fits into the national unity strategy of the Trudeau government in its struggles with Quebec nationalists and antagonistic Western premiers, we then elaborate some ways in which the Charter might have a unifying influence on Canadian politics. Concluding that the greatest potential for such a unifying influence is likely to come from the new policymaking authority that the Charter tacitly confers on the Supreme Court of Canada, the paper evaluates the forces and institutions that could enhance or inhibit that potential. The role of interest groups in shaping and using the Charter is the first topic of this inquiry. Next we assess the ability and willingness of the Supreme Court to use the Charter to take a more prominent and influential role in national politics. Finally, we show how the persistence of centrifugal forces in Canadian politics could pre-empt the nation-building potential of the Charter.

Federalism and Constitutional Reform

The national unity "crisis" to which the Charter is a partial response began in the 1960s. The Depression and World War II inaugurated a period of centralism in Canadian federalism which lasted until the late 1950s. From that time onward the provinces have become increasingly assertive, and the pendulum has swung in a decentralizing direction. There have, of course, been other periods of decentralization and it would be wrong to suggest that there were no provincial challenges to federal dominance from the Depression to 1960. One need only remember the Social Credit government of William Aberhart in Alberta and the Union Nationale in Quebec under Maurice Duplessis. Nevertheless, the provincialist challenge since the late 1950s has been particularly acute. It began in Quebec in the aftermath of the Quiet Revolution of the 1960s, but soon spread to the English-speaking provinces, especially those of the West.

The explanation for the growth of modern provincialism in Canada is multifaceted and complex.[17] One of the most important factors, however, is the increasing importance of provincial areas of jurisdiction in the development of the welfare state since World War II. The possibilities for province-building inherent in the use of these powers fired the imaginations and ambitions of provincial political elites, especially the secular nationalists who came to power in Quebec in the 1960s. Provincial governments were unable to act effectively, however, as long

as Ottawa monopolized tax resources and used them to intrude upon provincial jurisdiction through conditional grants. Overcoming this situation thus became the first item on the provincialist agenda.

Creating room for provincial initiative could not solve the problem, however. A government with the ability to enact important policy across a significant range of crucial areas naturally wishes to achieve policy coherence, and the provincial governments were no exception. In a system of overlapping jurisdictions, and in an era of active, interventionist government, this desire was bound to be frustrated by the policy initiatives of the federal government, even when they were unambiguously within federal jurisdiction. The actions of the federal government, in short, introduced unwelcome uncertainty into the environment in which provincial policy was made and to which it had to respond. The provinces naturally attempted to manage and reduce this uncertainty by gaining some control over federal policymaking.[18] As the Task Force on Canadian Unity reported in 1979, "Aggressive, well-staffed provincial governments have come . . . to represent the people of the provinces they serve in a number of ways, and not solely in the ways set out as provincial responsibilities in our constitution."[19] The result has been government by negotiation between the executive branches of the federal and provincial governments — what Donald Smiley calls "executive federalism." This pattern of government is the hallmark of interstate federalism.

The provincial claim to a say in the making of national policy was strengthened in the West by the fact that the federal government was controlled by a party whose members were drawn chiefly from central Canada. As a result, Western provincial politicians were able to argue that the government in Ottawa was not really a national government, reflecting and responding to all parts of the country in its policymaking, but the property of eastern Canada and its interests. It followed that only the provincial governments of the West really spoke for the interests of that region and that national policy would be truly national only to the extent that the views of provincial governments were taken into account.

Quebec, on the other hand, has always been well represented in the "Government Party." This did not prevent provincial governments, of whatever political stripe, from invoking nationalism in their struggles with the federal government. The constitutional claim was the same — that the federal government could not speak adequately for Quebec interests in areas of national policy.[20]

A new dimension of constitutional politics was introduced by this growing conflict between governments. In the past, the struggle between centralization and decentralization was most often phrased in terms of conflicting interpretations of the Constitution, which was not itself under attack. Since 1960, however, the legitimacy of the Constitution has been increasingly called into question.[21] Explicit constitutional reform of a wide-ranging nature has thus played a greater role in the contemporary

national unity debate. The most dramatic of the proposed reforms is, of course, the separation of Quebec. Separatist movements have also emerged in the West, but with less success. Short of separation, the most common proposal emerging from the provinces is a significant decentralization of the constitutional distribution of powers between the two levels of government. In the 1960s, this proposal emanated from Quebec in the form of a demand for special status, and since then it has been generalized. Some provinces have also sought the restructuring of the central institutions of government in a manner that would institutionalize the influence of provincial governments over federal policymaking in those areas that remained to Ottawa. The proposal to transform the Senate into a chamber populated by direct delegates of provincial governments is a leading example.[22]

The federal government consistently rejected such a decentralization of Canadian federalism. To counter provincialist demands, especially those emanating from the West, it proposed an alternative constitutional project which would make the federal government more regionally responsive, thus undermining the justification for decentralization. If regional interests could be visibly channelled through the institutions of the central government, it was argued, provincial politicians would no longer be able to contend that they were the most legitimate representatives of their regions in areas of national policy. The handling of regional conflicts within the federal government, moreover, would have an integrative effect because there are typically more incentives for conflict resolution in intragovernmental than in intergovernmental relations. As Donald Smiley points out,

> The normal workings of British parliamentary institutions provide a number of devices for the authoritative resolution of conflicts between elements of particular governments — between the electorate and the House of Commons, between a Prime Minister and his cabinet and/or parliamentary colleagues, between a ministry and the House of Commons, between elected and appointed officials. Thus to the extent that regional interests are channelled through the national government, a permanent deadlock between them is almost impossible. In Canadian circumstances it is otherwise when such interests are opposed in federal-provincial relations.[23]

The problem is that the very parliamentary institutions that could perform an integrative function if regional interests were channelled through them in fact encourage those interests to find other, intergovernmental modes of expression. It is generally agreed, for example, that the parliamentary system is one of the main causes of the skewed regional representation in the House of Commons that has fueled Western alienation. Cabinet responsibility ensures discipline in the government party, which will always be dominated by representatives of central Canada. This leads to the perception, if not always the reality, that Western

interests will inevitably be submerged in the government caucus room. The frustration thus generated may take the form of votes for the major opposition party or for a regional protest party. Such voting trends are magnified by the single-member-constituency electoral system, which overvalues the voting strength of the strongest party in the region and undervalues that of the runner-up.[24] In the context of hinterland protest voting, this means that votes for the party that wins nationally will be underrepresented and opposition votes overrepresented in the final seat tally. With little or no representation on the government side of the House, the regional perception of impotence in the halls of national power intensifies and a truly vicious circle is established. More important in the present context, a perceived vacuum of representation occurs which provincial political elites are only too happy to fill. Nor does the Senate counter this tendency by providing effective regional representation at the centre.

In order to remedy this situation, the federal government toyed with the idea of proportional representation for the House of Commons. Its most serious attempt to develop the conditions of intrastate federalism, however, was a proposal in 1978 to reform the Senate.[25] In contrast to the provincial attempt to turn this body into a "House of the Provinces" composed of delegations from the provincial governments, Ottawa was primarily interested in establishing regional spokesmen independent of the premiers. This approach was clearly set out in Prime Minister Trudeau's parliamentary speech on the 1978 Constitutional Amendment Bill.

> Now it may be asked: why not have the provinces appoint the members of the second chamber in a system which would be somewhat attuned to the system of the government in the Federal Republic of Germany? Our view is that the provinces have a function within the Constitution which is to exercise the jurisdiction contained in the Constitution, and particularly in Section 92, or some modification thereof, with authority over the citizens of those respective provinces in areas of provincial jurisdiction. We do not think it would be the right approach to tell the provinces, whose authority is absolute within their spheres of government in the provinces, to determine also how the national government shall be managed and how the national parliament shall be run.
>
> We think it is important for the people of the regions to know that they, as regions, have spokesmen in the second chamber.[26]

In effect, the centralist proposal sought to weaken the centrifugal claim that provincial governments were the best spokesmen for regional interests in national policy.[27]

As indicated above, the Trudeau government was never content to rest its national unity strategy on centralist intrastate federalism. Indeed, it never conceded the inarticulate premise of intrastate federalism, even in its centralist form — namely, that the national interest is primarily the product of the interaction of regional interests. This premise suggests

that regional communities and identities are primary and the national identity is derivative. In opposition to this, the Trudeau government attempted to establish or articulate the conditions of a national citizenship and identity which transcended regional identities.

The earliest example of this second strategy is the Official Languages Act, enacted in 1969, which was designed to defuse provincialist tendencies in Quebec not by restructuring the institutions of the central government but by ensuring that more government employees spoke French and that government services were more widely available in French. In this way, Ottawa attempted to undermine the claim of Quebec nationalists that Quebec is the only real homeland of francophones in North America and that only the government of Quebec can therefore represent the Québécois. The policy of the Official Languages Act has now been enshrined in Sections 16 to 20 of the Charter. These sections also reiterate the guarantees of Section 133 of the Constitution Act of 1867 (the British North America Act) regarding the use of English and French in Parliament and the courts. Both kinds of guarantees are also entrenched for New Brunswick. In addition, Section 23 of the Charter guarantees the rights of the French or English linguistic minority in any province to have their children educated in the minority language where numbers warrant. An indication of the relative importance of these provisions in the Prime Minister's mind is the fact that they, unlike the rights protected in Section 2 and Sections 7 to 15 of the Charter, are not subject to the legislative override.

For a time, the policy designed to lessen alienation in Quebec exacerbated it in the West. One of the reasons for this was a tendency to associate bilingualism with biculturalism, a link that was made by the Royal Commission on Bilingualism and Biculturalism. According to this argument, language is the primary vehicle of culture and culture is a way of life, a way of "being, thinking and feeling."[28] Other ethnic groups have interpreted this to mean that official bilingualism entails official biculturalism and that those adhering to other cultures have been consigned to the status of second class citizens.[29] In fact, the Trudeau government never accepted this link between bilingualism and biculturalism. Arguing that official languages, in addition to being a vehicle of culture, can serve a culturally neutral, utilitarian function of communication among citizens of different cultures, the government has insisted on the compatibility of bilingualism and multiculturalism.[30] As early as 1971, just three years after Trudeau became Prime Minister and two years after the enactment of the Official Languages Act, multiculturalism became official government policy. Early in its history it was given its own ministry; more recently, it has occupied a branch of the Secretary of State. Multiculturalism too is now constitutionally recognized in Section 27 of the Charter, which enjoins the courts to interpret it "in a manner consistent with the preservation and enhancement of the

multicultural heritage of Canadians." As for bilingualism, the expanding demand for French immersion education in the West indicates that opposition to the concept in that region may be declining.

Constitutionally entrenching the policies of bilingualism and multiculturalism in the Charter of Rights and Freedoms was clearly intended to enhance their symbolic status as central attributes of Canadian citizenship and components of the Canadian identity, and thus to improve their nation-building potential. This national unity function of the Charter, however, was not meant to be limited to the fact that these two policies were embedded in it. The document as a whole, it was hoped, would serve to strengthen a non-regionalized Canadian identity by encouraging citizens to perceive themselves as bearers of rights that know no local boundaries.[31] An analysis of the nation-building potential of the Charter is our next topic.

The National Unity Function of the Charter

In 1979, the Task Force on Canadian Unity remarked,

> To many foreign observers, the fact that Confederation is widely evaluated from the particular point of view of how given provinces have fared over the years is a remarkable feature of Canadian life. In other countries, cleavages such as social class, religion, race or creed have been of decisive importance to the collective lives of their citizens. In Canada, how much the people of any given province or region have participated in the benefits of the federation, or shared its costs, has been at the forefront of our politics.[32]

Fourteen years earlier, John Porter wrote of our national unity obsession and asked whether a politics based on crosscutting cleavages, rather than on those cleavages that coincided with regional and political boundaries, might not be the answer. His particular recipe was a class-based left-right polarization that would divide the country on a national basis.[33] Developing this insight, Gad Horowitz pointed to the "vicious circle" created by our national unity obsession.

> In the long run Canada can be united only by increasing polarization on left-right lines. But it is difficult for us to pay attention to the long run. There is, after all, always an immediate, urgent, short run need to deal with the perpetual crisis of national unity. There is a real dilemma here, a truly vicious circle. The ethnic and regional conflicts must be dealt with. They cannot be ignored. We cannot move towards a more creative politics simply by exhorting people to think in terms of left-right rather than unity-discord. But since we are constantly dealing with the national unity question, the left-right polarization is constantly being suppressed; and since it is always being suppressed, regional and ethnic divisions just keep on rolling along.[34]

Those who see a nation-building potential in the Charter hope that it can break this vicious circle, that it will give greater prominence to crosscutting cleavages in Canadian public life.

Our system of interstate federalism is a leading cause of the emphasis on territorial cleavages in Canadian politics. Because it provides provincial elites with strong incentives to exploit and even to fan the flames of regionalism, regional issues are emphasized at the expense of crosscutting cleavages. As Richard Simeon explains,

> Potential cleavages may or may not become politicized; they may or may not be defined in regional terms. For example, a poor New Brunswick logger may explain his poverty by saying he is disadvantaged because he is a New Brunswicker, or because he speaks French, or because loggers everywhere always get a poor deal. Which attitude or perception he and others like him develop will have very important consequences for whether or not political conflict comes to take the form of conflicts between regions or takes some other form.[35]

In the context of interstate federalism, such issues will tend to "take the form of conflicts between regions."

In the past, judicial review of the Constitution probably exacerbated this tendency of most political issues to transform themselves into issues of federalism. The British North America Act emphasizes governments and has very little to say about relationships between government per se and the people.[36] Thus, to the extent that questions of rights and freedoms became the subject of constitutional review under the BNA Act, they had to be formulated in the language and categories of federalism. According to Reg Whitaker, this constitutional emphasis on governments, inasmuch as it obscured the more fundamental sovereignty of the people, robbed the country of one of the most powerful sources of national identification and thus of national unity.

> Even a federation — perhaps *especially* a federation — needs some mass attachment of an emotional or sentimental nature to the national level. A functioning federal state must strike some stable balance between regional, provincial or subcultural identities, and an identity of citizens *qua* citizens with their national state. The recognition of the principle of the sovereignty of the people is a way of encouraging such attachment over more limited identities.[37]

In 1978, the Liberal government based the package of reforms contained in Bill C-60 on the same argument. "The renewal of the Federation," declared an explanatory document, "must confirm the pre-eminence of citizens over institutions." This elevation of the stature of citizens, the document continued, would be achieved by a Charter of Rights and Freedoms which would "guarantee their rights and freedoms and ensure that these rights and freedoms are inalienable."[38] In this view, the Charter may help break the vicious circle described by Horowitz. It ensures that the Constitution is at long last concerned "at least as much with relationships between citizens and the state" as it is with relationships between governments. Sovereignty of the people is thus emphasized.

A charter emphasizes the sovereignty of the people because the idea of rights entails the notion that government exists to serve the people. This connotation of the term "rights" may be traced to the state-of-nature teaching with which it was originally associated. According to that doctrine, rights are pre-political goods, the protection of which is the primary reason that people consent to government. Although the idea of a state-of-nature is no longer in vogue, the perception of rights as inherent in human beings as such, rather than as a grant from government to its citizens, retains its vigour, as does the corollary that government exists to protect rights. It is because of the vitality of these connotations that Trudeau, soon after he became Prime Minister, was able to defend the idea of a charter by declaring that "Government should not be an end in itself, but instead a means of promoting the well-being of the people." He made this statement in the context of explaining why a charter should precede such questions as the reform of the federal division of powers on the agenda of constitutional reform. "In the process of constitutional review," he said, "we should therefore look to the needs of people before we look to the needs of government."[39] The same thinking was evident in his description of the Charter during the debates of 1980–81 as a "people's package" which did not change the relative strengths of governments but gave power to the people against governments as such.[40]

The Charter's contribution to nation-building is not limited to its emphasis on popular sovereignty. More concretely, a public discourse based on the language of rights, which the Charter will surely encourage, has nationalizing and centralizing implications. On the one hand, it is beyond question that rights are not absolute, especially in relation to each other — a truth that is recognized in the reasonable limitations clause of the Charter. On the other hand, the term "rights" implies universality. Within their proper (reasonable) boundaries, rights, to the extent that they are considered "human" rights, are something to which every human being is entitled. This is why when certain social benefits are described as rights, the notion of making them available only on the basis of testable need or only to the "worthy poor" becomes suspect. This universalist connotation of the term "rights" formed part of the federal government's claim that the Charter ought to apply to both levels of government and was the basis of its opposition to a "notwithstanding" provision. The argument was that if something was a "right" worthy of inclusion in the Charter, it ought to be available to all Canadians regardless of geographical location. The centralizing implications of this vocabulary are obvious.

In a related but more immediately practical way, the Charter can promote national unity through the judicial policymaking it generates. Many observers have pointed out that an entrenched charter transfers policymaking powers from legislatures to appointed judges. To admit

this during the process of constitutional reform would not have served the rhetorical purposes of the federal government, which preferred to present the Charter as transferring power from governments to the people. To the extent that the government spoke of the Charter's contribution to national unity, it focussed on its symbolic function. Ironically, it is judicial policymaking based on the Charter that holds the greatest promise of promoting national unity, or at least centralization.

According to Martin Shapiro, judicial policymaking through appeal courts has historically been associated with the attempt by the centre to control the periphery. Shapiro points out that an appellate hierarchy flowing upward beyond first appeals at the local level to a single final court of appeal for the entire political unit cannot be understood simply as providing another opportunity to achieve justice for the individual litigants in a case. He argues that courts most closely approximate the standard of independent arbiters of disputes between two parties when they apply and interpret rules chosen by the litigants themselves. As law replaces such consensual rules, however, a third interest — that of the regime — is introduced and the court is made the guardian of that interest. At this point, courts no longer simply resolve disputes: in the context of doing so, they also articulate and often make legal policy. This function becomes the dominant one as we move up the appellate ladder, and a centralized appellate hierarchy makes sense only as an attempt to establish centralized social control. The establishment of such court systems, says Shapiro, is a classic formula for consolidating and legitimizing imperial conquest.[41]

Shapiro's comments about judicial systems are pertinent to a consideration of the centralizing function of the Charter. To the extent that the Charter transfers policymaking power to the judiciary, it transfers it to a centralized, national — Shapiro might say imperial — institution.[42] With the advent of the Charter, important policy determinations that were previously the prerogative of legislatures will now be made by the Supreme Court, sitting at the apex of a single judicial hierarchy. Once the Supreme Court has ruled that a particular provincial policy violates the Charter, that decision sets a uniform minimal standard that all provinces must obey. Roger Gibbins has distinguished decentralized and centralized forms of federalism by the extent to which the programs of the territorial governments are "open to the political, legislative, bureaucratic, and financial influence of the national government."[43] What he leaves out is the judicial influence of the Supreme Court, considered as a national institution of government. The Charter supplies this national institution with a new and powerful lever of influence over the policies of provincial governments.

This observation retains its force whether or not the Supreme Court enjoys constitutional independence from the central government, and whether or not the provincial governments have a say in judicial selec-

tion. The point is that however independent it may be and however it is selected, the court that sits atop a national appellate structure is a single and unified institution that applies uniform standards to the country as a whole. In Canada we have long had a debate about how to make the Supreme Court become, or at least appear, more an institution of the federal system than a creature of the federal government. Constitutional entrenchment of the Court and provincial input into the appointment process have been the most common proposals in this regard. But such devices do not diminish the nationalizing and centralizing effect of Charter-based jurisprudence, although, ironically, they may serve to legitimize it. A uniform standard is a uniform standard, whether it is imposed by an entrenched court that the provinces help to choose or by a court that exists at the sufferance of the federal government and whose judges are appointed by that government alone.

The Charter also applies to federal law, of course, but it is likely to have a disproportionate impact on provincial policy. A study of first-year Charter decisions found that provincial statutes were more than twice as susceptible to successful Charter challenges as were federal statutes.[44] There are good reasons to believe that this trend is not a passing phenomenon. It is confirmed by the experience in the United States, where over 950 state laws have been declared unconstitutional (850 after 1870), compared with only 123 federal statutes (only 49 after 1937).[45] The same social and political dynamics that account for the American experience are present in Canadian society. Local and provincial statutes, reflecting the greater homogeneity and intensity of regional majority opinion, are more likely to restrict the liberties of regional minorities. This has been true in the past — as the Quebec Jehovah's Witnesses cases or the British Columbia Chinese cases indicate — and will just as certainly be true under the Charter. When the Charter came into force, the English minority in Quebec immediately challenged the language policies of the French majority.[46] Recent events in Manitoba indicate that anti-francophone sentiment is still a powerful political force in that province and could well generate Charter litigation under the Section 23 rights to minority language education. Numerous city councils across Canada are under considerable local pressure to introduce bylaws regulating the display and sale of pornographic materials. Such bylaws would inevitably provoke Charter challenges under the Section 2 rights to "freedom of the press and other media of communication."

Such situations have two things in common: the strong vulnerability of a policy to a successful Charter challenge and the even stronger popular support for the policy at the local level. A significant portion of Canadian public policy has traditionally been made at the provincial level and has reflected the diversity of those jurisdictions. The Charter has the potential to change this radically by establishing "uniform national standards" in many policy areas.[47] This has certainly been the principal impact of

civil liberties activism in the United States over the past 30 years, and the trend of first-year Charter litigation suggests that this may already be happening in Canada. Such standardization or homogenization of Canadian public policy will set "limits to the capacities of provincial governments to build distinctive provincial communities based on separate bundles of rights or their denial specific to particular provinces."[48] Shapiro contends that this is characteristic of judicial policymaking by appellate hierarchies. "What we often mean by an independent judiciary," he writes, "is one that serves upper class and nationalizing interests rather than dominant local interest and thus one more satisfactory to persons trying to break through the web of local interests." In his view, centralized court systems "aid the central authorities in breaking into the cake of local custom and bringing government influence down into the villages."[49] By judicially reducing differences in the territorial incidence of citizenship, the nationalist supporters of the Charter hoped to "strengthen Canadian as against provincial identities."[50]

There may be centralizing and nationalizing effects even when the federal government is on the losing end of a Charter challenge. This is so in part because a loss by the federal government is imposed by another central institution of government — the Supreme Court. Every successful Charter challenge, whichever government is its object, confirms the power of the Court as a national policymaking forum. When the provinces lose, they do so both in the immediate sense and also in the sense that a rival, centralized, policymaking institution is legitimized. When the federal government loses, centralized policymaking does not suffer a similar setback. In addition, even a "loss" by the federal government is imposed in the name of rights and thus legitimizes a public discourse based on the language of rights. To the extent that this helps to create a consciousness among Canadians that they are primarily bearers of non-regionalized rights, it strengthens the national community, which is then available as a resource to the federal government in future contests with the provinces.

The Charter may also further the cause of national unity by providing a symbolic and practical alternative to policymaking by intergovernmental negotiation. As we have seen, legislative policy is made by elected politicians who belong to disciplined parties in cabinet-dominated legislatures and who derive their policymaking power from a constitution of divided but overlapping jurisdictions. The result is a system of interstate federalism that emphasizes the role of governmental conflict in the policymaking process. Policies generated by the Charter, on the other hand, will ultimately be made by nine appointed judges sitting in Ottawa, interpreting and applying a document that extends equally to both levels of government.

The Charter thus has the potential for emphasizing popular sovereignty not only symbolically, but in the policy divisions it occasions.

When the people divide on a Charter-related policy question, their division will be articulated in a single national institution and formulated as an issue concerning relationships between citizens and the state, rather than an issue between governments. In other words, the Charter makes possible the posing of issues based on national rather than territorial cleavages. Previously, issues were publicly articulated chiefly through political elites, who often emphasized the relationship of an issue to intergovernmental conflicts. Many issues of crosscutting significance will now be raised in a way that bypasses these political elites.

American experience with the Bill of Rights illustrates the potential for a Charter to place national issues on the political agenda. Gibbins points out that since about 1960 a new set of political issues has emerged in the United States which has divided the nation more along ideological than regional lines. Included are race relations, poverty, urban decay, law and order, foreign policy, sexual equality, abortion, and environmental protection. No comparable set of national issues has arisen in Canadian politics.[51] Indeed, the period since 1960 has seen the strengthening of territorialism in Canada. What Gibbins neglects to point out is that most of the domestic issues on his list have been heavily influenced by judicial interpretations of the U.S. Bill of Rights. In the 1984 presidential election, for example, more than half of the non-economic domestic issues — abortion, capital punishment, school prayer, affirmative action — gained their prominent place on the political agenda in part because of highly contentious Supreme Court decisions. The cause of national unity (in the territorial sense) would no doubt be served if the Charter had a similar influence in Canada.

Interest Groups and the Charter

The incentives offered by the new national policymaking forum created by the Charter will be particularly attractive to Canadian interest groups, which possess the resources and the will to sustain costly and lengthy court proceedings that individual litigants often lack. In the past, Canadian interest groups have not made extensive use of constitutional litigation as a political tactic. While various economic interest groups have sporadically challenged government regulatory policies on federalism grounds, there has been no Canadian parallel to the American interest group practice of extensive litigation of "test cases" supported by "legal defense funds." This past lack of organized constitutional litigation can probably be explained by the absence of significant constitutional prohibitions other than the federal division of powers, and by the widely-held perception in the Canadian legal community that policy reform is not the proper business of the courts. Based on this experience, one might well have predicted that the Charter of Rights, once enacted, would disappear into a political vacuum.

That this will not be the case is strongly suggested by a review of the politics of charter-making. A new "civil rights constituency"[52] played a prominent role in shaping the language of the Charter of Rights and in generating popular support for the entire package of constitutional reforms. The role of civil liberties and human rights interest groups in the politics of charter-making may well be a preview of the politics of Charter litigation. Not only can we identify a new set of political actors willing and able to use the Charter, but the early success of these groups in shaping it has created expectations of further gains through Charter litigation.

Although interest groups are unlikely to abandon the lobbying of political elites, Charter litigation will be an important addition to their arsenal because it allows them to present national issues unencumbered by the snares of federalism. A federal system provides opportunities and imposes costs on interest groups attempting to influence legislative policymaking. On the plus side, the existence of many governments increases the chances of having a policy accepted somewhere. Furthermore, once a policy has been instituted by one province or state, there is often a ripple effect whereby it is gradually adopted by other, less adventuresome federal subdivisions. Human rights commissions in Canada have relied on this phenomenon in obtaining the steady expansion of prohibited grounds of discrimination in the legislation they administer.[53] Similarly, the existence of two levels of government can be an advantage, as interest groups that fail on one level can appeal to the other. On the other hand, interest groups can be "caught in the vice of federalism," especially when the system is characterized by a high degree of intergovernmental conflict.[54] The latter phenomenon occurs because public support, including interest group support, is an important resource for governments in their struggles against each other. Governments will compete for this support, attempting to influence or even coerce interest groups. In short, "demands may flow from government to group as well as group to government."[55] Indeed, governments may even create interest groups in order to increase their public support system. Alan Cairns observes that "the deliberate creation and fostering by governments of interest groups to whose induced demands they wish to respond is a primary weapon for government survival in circumstances of aggressive intergovernmental competition."[56] The consequence is that the public policy concerns of interest groups may not be publicly articulated in their pure form, but may become enmeshed in the imperatives of intergovernmental conflict. Again, issues involving the relationships of citizens to each other or to government are subordinated to the question of relationships between governments. Interest groups concerned with rights and freedoms may avoid this phenomenon by pursuing their policy objectives through Charter litigation.

An interesting example of the dynamic relationship between interest

group politics and intergovernmental conflict is provided by the politics of charter-making itself. In pursuing its project, the federal government was faced with two conflicting sets of demands. On the one hand, tradition required at least a substantial measure of provincial consent (if not unanimity), but many of the provinces were hostile to the Charter. On the other hand, interest groups concerned with human rights and freedoms pressed for a strong Charter. Ottawa modified its proposals depending on whether it was courting the provinces or the interest groups.

During the summer of 1980, Ottawa was chiefly concerned with gaining the agreement of the provinces. The Charter that emerged from the negotiations reflected this desire. As Justice Minister Jean Chrétien was later to admit, the original version of the Charter "was the result of compromises achieved . . . in negotiations between the federal government and the provinces" and thus contained "the type of compromise which weakens the effectiveness of constitutional protection of human rights and freedoms."[57]

In September 1980, the First Ministers Conference ended in stalemate and a frustrated federal government declared its intention to proceed unilaterally. In October a resolution including the "compromise Charter" was placed before Parliament and a special joint committee of the Senate and House of Commons was established to examine it. Testifying before this committee during November and December, an informal and impromptu coalition of civil liberties, human rights, feminist and native groups took turns criticizing the wording of specific sections of the proposed Charter and recommending alternative — that is, much broader — language. The attitudes of most of these groups was summed up by J.S. Midanik, former president of the Canadian Civil Liberties Association, when he told the special committee that if the October 1980 version of the Charter was the best the government could offer, then his organization's response was "Thanks, but no thanks."[58]

The federal government was originally reluctant to prolong the debate by establishing the joint committee but soon found its deliberations useful in defusing the criticism of unilateralism and in building support for the Charter. Most of the groups that addressed the committee "focussed their arguments not on the propriety of change without provincial consent, but on the need to improve and tighten the Charter of Rights, thus legitimizing and building a vocal constituency for the federal proposals."[59] In January 1981, three weeks before the joint committee's proceedings were to conclude, the federal government attempted to solidify the support of this "civil rights constituency" by dramatically announcing comprehensive changes to the Charter. Most of these changes had been recommended to the committee by interest groups, and the groups were suitably impressed. "It's incredible," exulted Walter Tarnopolsky, president of the Canadian Civil Liberties Association,

"They've responded to just about everything that we . . . asked for. . . . I will have to take a closer look [at the changes], but it appears that they have given us just about exactly what we asked for."[60]

In response to criticisms of the Canadian Civil Liberties Association, the "reasonable limits" clause of Section 1 was substantially rewritten to place the burden of proof on the government. Rights against illegal search and seizure and illegal arrest were broadened to "unreasonable" search and seizure and "arbitrary" arrest. The right to counsel was reinforced by the right "to be informed of that right." A clause that allowed illegally obtained evidence to be used in criminal trials was deleted. (Several months later — over the protests of police and Crown counsel organizations but to the delight of civil libertarians — a partial "exclusionary rule" was added.) Where the original version had no "remedy clause," the government proposed to add an explicit authorization of judicial remedies for any Charter violation.

Feminist groups fared equally well under the Liberal government's new strategy. They too had lobbied for tightening the language of the "reasonable limitations" of Section 1. More importantly, the "non-discrimination" rights clause had been renamed and rewritten according to feminist specifications. Feminist spokesmen had urged the government to rename the clause "equality rights" in order "to emphasize that equality means something more than non-discrimination."[61] Justice Minister Chrétien and the Liberal cabinet were persuaded. "First, I want to state," declared Chrétien, "that I agree with the proposal made by the Advisory Committee on the Status of Women and the National Association of Women and the Law that the section be entitled Equality Rights so as to stress the positive nature of this important part of the Charter of Rights."[62]

The government also incorporated, verbatim, the feminists' proposals for rewriting the new "equality rights" section. The wording of the original "non-discrimination" clause spoke of the right to "equality before the Law and the equal protection of the Law," the same wording as used in the 1960 Bill of Rights. Testifying before the special committee, feminist groups had vehemently criticized the government for repeating this wording. Referring to the *Lavell* and *Bliss* cases, two controversial Supreme Court decisions during the 1970s that went against female plaintiffs, it was alleged that the right to "equality before the Law" had already proven inadequate for protecting the interests of women. Worse yet, it would serve to perpetuate the legal authority of the *Lavell* and *Bliss* precedents.[63] Responding to this criticism, Chrétien introduced two new formulations of equality rights — equality "under the law" and "equal benefit of the law" — designed specifically to reverse the *Lavell* and *Bliss* precedents. To ensure that feminist leaders did not fail to appreciate the government's change of heart, these changes were purposely leaked to the press the day before Chrétien

actually presented them to the special committee. The press duly complied with this tactic by publishing appropriate front page headlines: "More Rights for Women in Changes to Charter."[64]

The tactic worked. Commenting on the proposed changes, Doris Anderson, then president of the Advisory Committee on the Status of Women, described them as a "considerable improvement. . . . On the whole we're pretty pleased. . . . The women of Canada should be fairly pleased."[65] The government subsequently consolidated this new and important source of political support by conceding to feminist leaders their primary remaining objective. After two months of private negotiations with members of the feminist Ad Hoc Committee on the Constitution, the government agreed in March 1981 to an additional guarantee of sexual equality (now Section 28) intended to take precedence over the "reasonable limitations" loophole of section 1.[66] The strength of the government's new ally was demonstrated a month later when Parliament unanimously approved this addition.[67]

Finally, the government revised the proposed Constitution Act in an attempt to obtain native support. The original October 1980 draft contained only a loose reference, in what was then Section 26, to the "rights or freedoms that pertain to the native peoples of Canada." At least 17 native groups had appeared before the special committee, all critical of the failure of the proposed constitutional changes to do justice to native claims and aboriginal rights. The government responded by offering a new clause, now Section 25, stating that "aboriginal, treaty, or other rights" of native groups shall not be negated by anything in the Charter. When this failed to elicit a positive response, the government went even further two weeks later in proposing the addition of Section 34 (in amended form, now Section 35) that "recognized and affirmed . . . the aboriginal and treaty rights of the aboriginal peoples of Canada." According to the *Globe and Mail*, on January 30, "MPs, native leaders, and friends wept openly as the three political parties announced an agreement to recognize aboriginal rights unequivocally in the constitution."[68] While this euphoria turned out to be short-lived,[69] it is yet another example of the government's tactic of strengthening constitutional wording to gain interest group support.

Meanwhile the question of the constitutional propriety of unilateral amendment had been referred to the Supreme Court. The Court rendered its decision in September 1981, finding that although unilateralism was constitutionally legal, it would violate constitutional convention. By giving each side only half a loaf, this decision effectively forced the federal government and the provinces back to the bargaining table. Once again the government had to curry favour with the provinces and the result was a perceived weakening of the Charter, particularly through the introduction of the Section 33 legislative override. Furthermore, some of the specific gains achieved by interest groups were weakened or lost in

the famous November 5 accord between the federal government and all of the provinces except Quebec. In particular, Section 28 appeared to be subject to the new override and Section 34 was dropped altogether.

These changes infuriated the interest groups, who felt that they had been betrayed. Their perspective on these compromises was best expressed by feminist leader and lawyer Marilou McPhedran: "What went in as a Charter of Rights, came out as a Charter of federal-provincial relations."[70] When the groups objected, the federal government responded in part by pointing an accusatory finger at the provinces and encouraging the groups to lobby the premiers. This is precisely what happened. In a remarkable show of political force and effective lobbying, feminists persuaded all ten provinces to exempt Section 28 from the "legislative override" provision, and indirectly helped to have a modified aboriginal rights section reinstated in the Charter.[71]

In brief, civil liberties, feminist, and other human rights groups provided new and needed support for the government's constitutional proposals. The vocal and visible support of these groups lent credibility to Trudeau's threat to amend the constitution unilaterally, and contributed to the pressure on provincial leaders to return to the bargaining table after the Supreme Court's ruling on the constitutionality of unilateral amendment. Without these new allies, Trudeau's proposals for constitutional reform, like all their predecessors, might well have been prevented by provincial opposition. On the other hand, it seems unlikely that the interest groups would have achieved as much had the provinces been willing to agree to the original, weaker version of the Charter. Interest group gains were at least in part attributable to the federal government's need for their support in its battle with the provinces. As is so often the case in Canadian politics, interest group success depended in part on the vagaries of federal-provincial relations.

With the Charter in place, interest groups have gained some independence from the imperatives of federalism. No longer will their ability to place an issue on the national political agenda be determined by the calculations of political elites embroiled in federal-provincial conflicts. Now they can go directly to court, bypassing the political elites and their preferred agendas. According to Peter Russell,

> This point is confirmed by the experience of other countries which some time ago superimposed a constitutional charter on an established legal order. In West Germany and Ireland for example constitutional litigation has led to judicial review of old laws and a consideration of relatively new policies quite independently of the priorities of the politicians and officials who control the other branches of government.[72]

The interest groups are certainly aware of their new opportunities. Many have initiated ambitious projects to realize the potential policy reforms they believe to be possible through Charter litigation. The Canadian

Civil Liberties Association has initiated a new "Special Charter Fund" to support Charter litigation.[73] Feminist organizations have undertaken similar projects in anticipation of Section 15 taking effect in April 1985. The National Action Committee on the Status of Women has established a Canadian Charter of Rights Committee to monitor provincial reviews of existing legislation for possible instances of sex discrimination. The Canadian Advisory Council on the Status of Women has published a major report, *Women and Legal Action*, which declares that with the adoption of the Charter "we find ourselves at the opportune moment to stress litigation as a vehicle for social change."[74] It goes on to recommend establishing a single nationwide "legal action fund" to coordinate and pay for the litigation of "test cases" capable of advancing feminist goals.[75] A third feminist group, the National Association of Women and the Law, has organized several national conferences on feminist issues and their relation to the Charter.[76] In addition, the Charter has inspired the formation of entirely new groups. Within weeks of its proclamation, a group of Toronto film-makers formed the Ontario Film and Video Appreciation Society and challenged the legality of the Ontario Board of Censors.[77]

These groups have little concern for the politics of federalism, at least when it affects their special issues and concerns. They will be opportunistic in using the Charter to attack legislation, federal or provincial, that they perceive as contrary to their policy goals and principles. While either level of government can, in most instances, resort to its Section 33 "legislative override" to negate a successful Charter challenge, the political costs of doing so may be high. The politics of charter-making during 1980–81 proved how powerful the rhetoric of rights has become in Canadian public opinion. Employed by groups that are well organized on a national scale, this rhetoric may make governments reluctant to exercise their override power. On the other hand, as we note below, the kind of question that will typically arise under the Charter is not the primary question of whether or not the essence of a right is being infringed, but the secondary question of where to fix the outer limits of a right or freedom in order to avoid or diminish conflict with other political goods, including other rights. This way of perceiving the problem is particularly attractive to the provinces, for it assumes that issues raised by the Charter will be ones on which reasonable people, and hence provinces, can legitimately differ, and for which a nationally uniform answer is not required. Use of the override may be justified by such reasoning.

Before leaving the subject of interest group use of the Charter, it should be pointed out that enthusiasm for judicial policymaking under an entrenched charter is not universal among members of these groups. There are elements in both the Canadian Civil Liberties Association and the feminist movement, for example, that are inclined to trust legislators more than judges to support their preferred policies. Such people point

to what they consider the dismal record of the Supreme Court in interpreting the Diefenbaker Bill of Rights and wonder why we should expect a sudden change of heart from our judges.[78] They also point out that the liberal activism of the U.S. Supreme Court under Chief Justice Earl Warren was preceded by the conservative activism of the "substantive due process" era and is now being succeeded by a new era of judicial conservatism. In this view, conservative jurisprudence is the rule and the liberal activism of the Warren Court the exception. For these reasons there were civil libertarians and feminists who were opposed to transferring policymaking authority to the courts via an entrenched charter.[79] We may expect these elements within the civil rights constituency to inject some strategic caution into interest group plans to secure policy aims through litigation.

The Development of a Policymaking Court

The impact of the Charter of Rights on the Canadian political fabric cannot be separated from the institution responsible for its interpretation and enforcement — the Supreme Court of Canada. In the final analysis, the Charter will mean what the Supreme Court says it means. The Supreme Court judges must give concrete application and significance to the "vague but meaningful" principles embodied in Canada's amended Constitution. The nation-building potential of the Charter thus depends on the collective (or at least dominant) judicial philosophy of the nine judges responsible for its interpretation.

The adoption of the Charter of Rights will force Canadian judges to confront the legitimacy of judicial lawmaking more directly than they have in the past. The broad wording of the enumerated rights and liberties, and the lack of any binding precedents, will force appellate court judges into a conscious creation of new legal meanings with identifiable public policy consequences. Where and how judges will look for this new meaning is an important issue but one that need not concern us here.[80] Of greater relevance to our present concern is the more basic issue of the legitimacy of judicial lawmaking per se and the extent to which judges should defer to legislative judgments regarding the "reasonable limits" of the enumerated rights.

The alternatives are quite clearly defined. On the one hand is the path of judicial self-restraint. This self-limiting view of judicial review emphasizes the moral authority of legislative decisions grounded in popular consent, and the corresponding absence of such democratic authority in courts. In Canada this view of proper judicial behaviour is reinforced by the long tradition of parliamentary supremacy and influence of legal positivism. While the philosophy of judicial self-restraint does not preclude judicial review, it narrows its scope and counsels judicial deference to legislative judgments.[81]

The alternative — judicial activism — conceives of judicial lawmaking as much less problematic. From this perspective, the explicit declaration of the supremacy of the Charter over ordinary statutes, and the equally explicit provisions for judicial review and enforcement, create the necessity and thus the authority for judicial lawmaking. In effect, the Charter makes the Supreme Court the constitutional equal of parliamentary legislatures. As an equal, the Supreme Court is responsible for discerning the meaning of Charter rights independently of Parliament and the provincial legislatures. It is true that judicial activism does not necessarily entail conflict with legislatures. Judges may give broad or novel interpretations to constitutional phrasing in order to sustain challenged statutes. But it is also true that in the contemporary context, judicial activism has a close and immediate association with broad, libertarian interpretations of rights, which are usually at odds with both legislative and popular opinion. If a majority of the Supreme Court judges adopt this approach, the Charter is likely to have the broad policy impact that its supporters hoped for and its critics feared.

In interpreting the 1960 Bill of Rights, the Supreme Court was consistently guided by the philosophy of judicial self-restraint. Many commentators expect this trend to continue under the Charter, minimizing its policy impact. While it is reasonable to expect a fairly high degree of continuity in the judicial philosophy of the Supreme Court justices, this view ignores a number of important institutional and procedural changes in the Supreme Court during the past several decades. Taken together, these changes indicate a slow but steady evolution of the Court away from the strictly adjudicatory role that it once fulfilled and toward a predominantly constitutional court that is more willing and better equipped to play a policymaking role. If this trend continues, it could displace the traditional judicial conservatism of Canadian appellate court judges, and significantly increase the policy impact of the Charter of Rights. This section of our study surveys these institutional changes and elaborates their political significance.

The institutional shift toward a greater policymaking role for the Supreme Court began with the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) in 1949. This was the single most important reform, for as Bora Laskin said long before he joined the federal bench, the Supreme Court could not become a potent element of Canadian government until it became final.[82] So long as the Supreme Court was subject to being overturned on appeal or bypassed altogether (via direct appeal to the JCPC from provincial courts of appeal), it lacked both the authority and the prestige to be a significant force in Canadian politics. The abolition of appeals to the British imperial court thus marked a crucial and necessary first step toward the enhancement of the Supreme Court's political influence.

It should also be recalled that the "judicial nationalism" that sparked the drive to abolish appeals to the JCPC had a heavy centralist bias. Even

at this early date, Laskin and the other predominantly English "abolitionists" clearly hoped that an "independent" Supreme Court would abandon the decentralist jurisprudence of the Privy Council precedents and serve as "an agent of centralization."[83] These expectations have been at least partially met. During its first 16 years as the final court of the land, the Supreme Court did not strike down a single federal statute as *ultra vires*.[84]

Despite its self-professed attempts to steer a middle course on federal-provincial constitutional disputes, the Court has been repeatedly attacked by provincial leaders as too pro-Ottawa in its decisions.[85] While the record does not support this charge, the perception remains widespread among provincial rights advocates.[86] While these critics are wrong in attributing any intentional bias to the justices as individuals, their perception is correct in that the Court's decisions have been more supportive of federal policy initiatives than were the rulings of the British JCPC before 1949. The post-1949 decisions have modestly broadened the scope of the two principal heads of federal legislative power — "trade and commerce" and "peace, order, and good government" — and legitimized and thus encouraged federal initiatives in the important policy areas of energy and communications.[87]

The adoption of the Charter of Rights arms the Court with yet another set of constitutional restrictions to apply to the lawmaking activities of both levels of government. If, as we predict, Charter restrictions tend to fall more heavily on provincial legislation, the potential for the Supreme Court to serve as a centralizing agency may be further enhanced.

A second important change was the abolition in 1975 of appeals as of right in civil cases with a value over $10,000.[88] This has permitted the Supreme Court to control its own docket, to choose those cases that raise sufficiently important questions of law or policy to merit its time and energy. The impact of this change has been dramatic. Between 1970 and 1975, 72 percent of the Supreme Court's docket came from appeals as of right and only 23 percent from its own decision to grant leave to appeal. This situation was reversed after 1975. Between 1976 and 1980, 75 percent of the Court's cases were chosen by granting leave to appeal, while only 20 percent were heard as a matter of right.[89]

The ability of a final court of appeal to control its own docket is a well-recognized political asset. It provides a court with greater institutional autonomy and discretion, similar to that enjoyed by its legislative and executive counterparts. It allows a court to allocate its scarcest resource, time, to those cases that it deems most important. This in turn enhances the prestige of the court. Discretionary control of its docket also enables a court to avoid or at least defer politically controversial cases that threaten to place it in a no-win situation and thus erode its authority.[90] These are all assets that the U.S. Supreme Court has used to advantage for over 50 years.

The freedom to control its own docket has allowed the court to

transform itself into a public law court, concentrating its attention on such things as the Criminal Code and the Constitution. This decision to specialize in public law has coincided with an increased litigiousness in the constitutional area. Between 1950 and 1975, the Court heard only two or three constitutional cases a year. Beginning in 1975, this number began to increase, reaching an annual rate of ten or more in recent years.[91] The additional constitutional litigation generated by the Charter of Rights is just beginning to reach the Supreme Court and will at least double the 1975–82 rate. At the beginning of the third year of the Charter (May of 1984), there were 31 Charter cases waiting to be decided or heard by the Supreme Court. This changing composition of the Supreme Court's caseload is transforming it more and more into a constitutional court.

The political implications of this change are numerous. Constitutional decisions have a much broader policy impact than judicial decisions involving private law and most other kinds of public law. The fate of major government policies often hangs in the balance, with corresponding social and economic impacts. Affected interest groups are equally concerned with the Court's decisions and are often the initiators of the litigation. In short, the more that constitutional law comes to dominate the work of the Court, the more the Court will be thrust into the central arena of national politics.

The recent abandonment of strict adherence to *stare decisis*, the law of precedent, is yet another indicator of the Supreme Court's acceptance of a greater policymaking role. *Stare decisis* was the cornerstone of the common law, the source of certainty and continuity in the judicial protection of private rights. Yet it poses problems for a court that acknowledges and accepts responsibility for the public policy impact of its decisions. Changing circumstances and new demands often render precedents archaic. When this occurs, policymaking courts, like their legislative and executive counterparts, must be free to reverse or modify past decisions in light of changed circumstances.

The case for abandoning a strict adherence to precedent is especially strong in constitutional law. Not only is policy impact more probable, but constitutional law lacks the flexibility of common law and statutes. If the courts make a "mistake" in the latter areas, it can be corrected by remedial legislation. But if the Supreme Court makes a constitutional decision with undesirable policy consequences, the only direct way to correct the damage is through formal constitutional amendment, an extremely cumbersome and difficult process.[92]

Predictably, the U.S. Supreme Court was the first court of appeal in a common-law nation to abandon *stare decisis* as an absolute requirement. By contrast, until recently the Canadian Supreme Court considered itself bound not only by its own previous decisions but also by those of the British House of Lords. Ten years passed after the abolition of

appeals to the Judicial Committee of the Privy Council before the Supreme Court declared its independence from British precedents as well.[93] It did not declare a similar independence from its own past decisions until much later.

It was under the leadership of Bora Laskin that the Canadian Supreme Court finally relaxed its commitment to *stare decisis*. In 1972, before his appointment as Chief Justice, Laskin had written that *stare decisis* was "no longer an article of faith in the Supreme Court of Canada, but it still remains a cogent principle."[94] Speaking as the new Chief Justice at the Centennial Symposium of the Supreme Court in 1975, Laskin repeated that *stare decisis* was no longer "an inexorable rule," but rather, "simply an important element of the judicial process, a necessary consideration which should give pause to any but the most sober conclusion that a previous decision or line of authority is wrong and ought to be changed."[95] Practising what he preached, Laskin led the Supreme Court to overturn four precedents during the next four years, including an old Privy Council decision dealing with the federal division of powers.[96]

Another important change in the internal procedures of the Supreme Court has been the trend to sit as a full nine-judge bench, rather than in panels of five. The practice of five-judge panels has long been followed and has been defended on the grounds of efficiency. After the Supreme Court assumed final responsibility for overseeing the legal dimensions of Canada's constitutional development in 1949, this practice began to be criticized as introducing a haphazard element into the Court's decisions. A case might be decided differently depending on how the five-judge panels were selected, a matter totally at the discretion of the Chief Justice. This was considered particularly inappropriate in constitutional cases. After his appointment as Chief Justice in 1973, Bora Laskin exercised his new administrative prerogative to implement his preferred policy of nine-judge panels. The results have been significant. In the three terms preceding his appointment, nine-judge panels heard only 10 percent of the cases argued before the Supreme Court. In the eight years following Laskin's elevation to the chief justiceship, the average increased to 36 percent, and since 1976 there have been more nine-judge than five-judge panels.[97] The cumulative effect of this trend is to increase the authority of the Supreme Court's pronouncements on constitutional issues, making it a more influential participant in the process of constitutional politics.

A related development of recent years, again at the initiative of Bora Laskin, has been to enhance the potential for collegiality among the nine Supreme Court justices. Collegiality is an intangible matter, but it has a cumulative effect on the opinion-writing of final appellate courts. Traditionally, all common law judges write their opinions separately and without reference to one another. This practice, known as seriatim opinion writing, often results in a variety of judicial arguments being

advanced to support the same result. At the outset of the American republic, Chief Justice John Marshall recognized that this practice threatened to dilute the authority of the U.S. Supreme Court as it tried to develop the novel practice of judicial review. To minimize this problem, Marshall initiated the practice of formal conferences as a means for the judges to share their opinions, to discover common ground as well as differences, and so to facilitate the production of a single "opinion of the court." The politically astute Marshall saw this as a method of enhancing the then fragile authority of the court. In addition, the policymaking capacity of the court is enhanced by the greater coherence of reasoning that comes with the abandonment of seriatim opinion writing. In the adjudication of a particular dispute, where the interests of the litigants are of primary concern, the final result may be as important as the *ratio decidendi*, or the lack of one. On the other hand, if one focusses not on the interests of the particular litigants but on the policy embodied in a decision, a coherent *ratio* is indispensable. Seriatim opinion writing is not well suited to producing such coherence.

Until recently, the Canadian Supreme Court followed the traditional British practice of seriatim opinion writing. The resulting diversity of opinions in support of a single judgment came under increasing scholarly criticism after the abolition of appeals to the judicial committee in 1949. During his tenure as Chief Justice, Bora Laskin initiated a number of concrete reforms to mitigate this problem. He formalized the judges' conferences by scheduling them on a regular basis. He rearranged the Court's schedule so that during its three annual sessions it hears cases for only two out of every three weeks and no cases are scheduled for Fridays. Last, but in his own opinion not least, he had a private dining room installed so that the judges could lunch together and confidentially continue discussing the business before the Court that day.[98] These changes all contribute to enhancing that elusive quality of judicial collegiality.

There is some evidence that these reforms have begun to bear fruit. Since 1978 there have been six cases where a decision has been delivered simply as the decision of "The Court." Prior to this there had only been one such case, the 1967 *Offshore Minerals Reference*.[99] In these six cases, the decision was unanimous and there was no indication of which justice authored the opinion. Most of these cases dealt with politically volatile issues — minority language rights in Quebec[100] and Manitoba;[101] Quebec's claim to a unilateral veto over constitutional amendments;[102] the federal government's claim to unilateral authority to reform the Senate;[103] and Newfoundland's jurisdictional claim to the offshore Hibernia oil fields.[104] It is tempting to speculate that the Supreme Court, aware of the political sensitivity of the issues raised in these cases, may have purposely presented a united front to strengthen the authority of its decisions in the minds of the losing parties. While this trend is potentially significant, such decisions remain rare.

Even in the more typical cases, the Supreme Court is gradually abandoning the classical seriatim style of having each judge write his own opinion. There has been an increase in the tendency of judges simply to concur with the written opinion of another judge. There have also been instances of group authorship of single majority and dissenting opinions.[105] Taken together, these developments indicate that the old practice of seriatim opinion writing is being quietly replaced by a more collegial and more coherent style. This new style will serve to enhance the authority of the Court as it enters the new and often controversial area of Charter litigation, and will increase its ability to make coherent policy.

Another politically significant change in Supreme Court procedure has been a dramatic easing of the requirements to obtain standing to bring a case before the court. Traditionally, access to the courts has been strictly limited to individuals who could prove that they had a specific and legally recognizable interest that had been injured or was threatened with imminent injury. This strict control of access to courts was consistent with the traditional "adjudication of disputes" function of common law courts. In the realm of constitutional law, mere distaste for or opposition to a particular statute or government policy was not sufficient to constitute a dispute. This requirement served to reduce the quantity of constitutional litigation, and thus the political involvement of the courts.

A series of Supreme Court decisions during the 1970s dramatically reversed this situation.[106] In the last of these cases, the *Borowski* case, the majority ruled that:

> [To] establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court.[107]

This decision seems to remove the traditional requirement that a would-be litigant demonstrate a concrete personal interest that is affected by the legal issue raised. In effect, it now seems that almost any person or group can go to the courts and raise any issue of constitutional law at any time. This was reflected in Chief Justice Laskin's dissent in *Borowski*, which warned that "the result would be to set up a battle between parties who do not have a direct interest, to wage it in a judicial arena."[108]

Access to the courts has been further broadened by the Charter of Rights. Section 24(1) of the Charter creates a general right for anyone who thinks one of his new Charter rights has been violated to apply to "a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Section 24 appears to allow a person to litigate any Charter issue without demonstrating a personal interest distinct from the public at large. The traditional requirement for a *lis* or dispute to obtain standing is replaced by a

much broader right to ask the judges to force the government "to behave constitutionally." This interpretation of Section 24(1) was confirmed by the Federal Court of Appeal's decision in the Cruise Missile Test case in 1983.[109] On the other hand, a right to initiate litigation does not entail a right to take the case all the way to the Supreme Court. The Supreme Court remains free to deny leave to appeal.

The net effect of the *Thorson*, *McNeil*, and *Borowski* decisions, combined with the new Charter of Rights, has been to increase dramatically the potential for judicial policymaking by Canadian judges. There would appear to be no remaining legal barriers to prevent the litigation of the constitutionality of almost any government decision or policy. If U.S. practice is any guide, the "losers" in the legislative arenas are almost certain to take advantage of this new forum to challenge government policies that they oppose. As noted earlier, numerous interest groups are ready and willing to do so. It will thus be difficult for the courts to avoid becoming entangled in the major political controversies of the day.

Interest groups can also participate indirectly in politically important cases through the intervenor device. This is a procedure that allows interested third parties to participate in cases in which they are not principal litigants. In cases challenging the constitutional validity of a statute, the Supreme Court of Canada and most provinces allow the Attorneys-General of interested governments to intervene. In both federal and provincial reference procedures, courts are authorized to notify "any person interested" and allow them to be heard.

The manner in which the Supreme Court exercises its discretionary authority to grant intervenor status to third parties is an indication of its perception of proper judicial function. Emphasis of the traditional "adjudication of disputes" function tends to preclude the admission of such third parties. In this view, the court's responsibility is to do justice to the principal litigants to the dispute, and the effect of its decision on other parties should be of no concern. On the other hand, a court that frankly acknowledges the broader impact of its decisions on public policy should allow other individuals and groups likely to be affected to present evidence and argue their positions.

Historically, the Supreme Court has been reluctant to grant intervenor status to private parties. The Court broke with this pattern in the 1976 *Anti-Inflation Reference*. In addition to granting intervenor status to five provincial governments, the Court also allowed five groups of labour unions to participate in the presentation of written and oral arguments. Peter Russell has commented that this use of the intervenor device compensated "for the relatively cautious policy of Canadian courts in granting access to the judicial process . . . [and] enabled the major political contestants to do battle in the judicial arena."[110]

The Supreme Court's generous use of the intervenor device in the *Anti-Inflation Reference* led to speculation that the Court had become

more willing to acknowledge the impact of its constitutional decisions on public policy and to accept responsibility for informing itself of such impacts. With the adoption of the Charter of Rights in 1982, it was widely thought that this trend would continue. However, on at least one occasion — the appeal of the *Ontario Board of Censors* case — the Supreme Court rejected an application from the Canadian Civil Liberties Association for intervenor status. It is too early to judge the significance of this one rejection.

Another significant judicial innovation in recent years has been a new willingness on the part of the Supreme Court to use non-traditional types of evidence in constitutional law cases. Historically, Canadian judges have been very reluctant to admit or use any factual evidence that is not part of the dispute before the court. Socioeconomic facts relevant to the larger policy issues often implicit in constitutional cases, tellingly labelled "extrinsic evidence," have been excluded as being beyond the proper scope of judicial inquiry. Following British practice, Canadian judges have traditionally used a textually oriented form of judicial reasoning. The written opinions accompanying the Court's decisions have tended to be highly conceptual and poorly grounded in the socioeconomic contexts that gave rise to the cases. This problem is further aggravated in reference cases, where there are not even any facts from a trial record to guide the judges' reasoning.[111]

This approach contrasts sharply with American practice. Since 1908, the U.S. Supreme Court has allowed relevant socioeconomic evidence, known as Brandeis briefs, to be presented.[112] This practice is consistent with the greater policymaking role of the U.S. Supreme Court, and distinguishes it from other final appellate courts. The High Court of Australia does not even receive a written factum or brief before oral argument, thus precluding any Brandeis brief presentations of "social facts." The same is true of courts in Great Britain and New Zealand. The refusal of these courts to use written factums is an implicit commentary on their self-perception as adjudicators, not policymakers.

The Canadian Supreme Court's 1976 decision in the *Anti-Inflation Reference* represents an important departure from its past practice. Recognizing the inadequacy of the traditional factum and oral argument procedures to deal with the policy dimensions of the case, Chief Justice Bora Laskin permitted the submission of factual evidence and provided an opportunity to rebut evidence prior to oral argument. The result was a new chapter in Canadian constitutional development. The federal government submitted its white paper on inflation, the documentary basis of its legislative policy, and also a Statistics Canada bulletin showing changes in the monthly consumer price index. The Canadian Labour Congress, one of the intervenors opposed to wage and price controls, submitted a 64-page economic study of inflation in Canada which had been especially commissioned for the occasion. It was later supported by telegrams from 38 Canadian econo-

mists. On the rebuttal date, the federal government and Ontario made additional submissions responding to the economic arguments advanced in the CLC's original submission.[113]

While the Court's final opinion in the case made only passing references to the extrinsic evidence that had been submitted, the *Anti-Inflation Reference* set a new precedent for the use of social science briefs in Canadian constitutional law. Some commentators have suggested that this aspect of the case will have the most enduring significance.[114] Henceforth, the Supreme Court may resurrect the procedures elaborated by Laskin whenever it finds them appropriate to the case at hand.

A related matter is the judicial use of "legislative history" (in the form of *Hansard*, political speeches, and government white papers) in determining the constitutional validity of a statute. While "legislative history" is not the same as "social facts," it can serve the similar purpose of situating a case in its real-world context. Historically, no common law courts permitted themselves to go beyond the actual text of a statute in interpreting its meaning. With the advent of ever-increasing governmental social and economic regulation, courts have felt the need to look beyond the texts of statutes to discover their legislative purposes. U.S. courts began to use legislative history in constitutional cases during the 1920s and now do so extensively. Legislative history has usually been held inadmissible in Canada, but again the 1976 *Anti-Inflation Reference*, with its use of the government white paper, marked a departure from tradition. Since then, the Supreme Court has made extensive use of *Hansard* and other historical sources in the *Senate Reference* of 1980 and the *Constitutional Patriation Reference* of 1981.

This new trend toward using non-traditional forms of evidence is likely to be accelerated by the large number of Charter of Rights cases now working their way through the judicial system. Several Charter sections seem to require some presentation of socioeconomic facts. Section 1, for example, declares that the subsequently enumerated rights are not absolute, but subject to "such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society." Chief Justice Brian Dickson has suggested that it may be appropriate to compare challenged Canadian practices with practices of other "free and democratic societies."[115] A similar need for comparative factual data seems implicit in the Section 23 right to minority language education "where numbers merit." Charter provisions such as these will place increasing pressure on Canadian judges both to allow and to use more extrinsic evidence and "social facts" than they have in the past. To the extent that they do, the Supreme Court will move that much closer to becoming a policymaking institution.

The cumulative effect of these recent changes is the gradual transformation of the Supreme Court from an essentially adjudicatory body into an institution better equipped to play a policymaking role. Whether the

judges who operate this redesigned judicial machinery will use it to expand judicial policymaking remains to be seen. Skeptics point to the extreme cautiousness of the Supreme Court under the 1960 Bill of Rights and predict that we can expect more of the same. But as Peter Russell has pointed out, there are several reasons to doubt that the Bill of Rights experience is a dependable guide for Charter interpretation.[116]

Where the Bill of Rights was hopelessly ambiguous on what judges were supposed to do with statutes that violated its provisions, the Charter is explicit and clear. The Charter is declared to be part of the "supreme law of Canada," and any laws inconsistent with it are "to the extent of the inconsistency, of no force or effect."[117] Still more important is the background and training of judges who will be responsible for interpreting the Charter. The Bill of Rights fell into the hands of a generation of judges steeped in the black-letter law traditions of parliamentary supremacy and legal positivism. By contrast, the Charter of Rights will be interpreted by a new generation of lawyers and judges who as law students were "exposed to the influence of professors who have contrasted unfavourably the Supreme Court of Canada's restrained treatment of the Canadian Bill of Rights with the much more activist approach of the U.S. Supreme Court, particularly during the era of the Warren Court." Russell has predicted that "as a result of such influences . . . we are likely to see persons with a much more activist philosophy appointed to the Supreme Court and other courts of appeal."[118] There are indications that this "changing of the guard" is already underway. Two of the individuals most influential in drafting the Charter have been appointed to Appeal Court judgeships by the Trudeau government — Walter Tarnopolsky, past president of the Canadian Civil Liberties Association, to the Ontario Court of Appeal; and Barry Strayer, former Deputy Justice Minister and the Trudeau government's principal in-house Charter expert, to the Federal Court. While this process may not yet have affected appointments to the Supreme Court, it inevitably will. As it does, it will enhance the policy impact of the Charter of Rights and thus its nation-building potential.

The Charter vs. Interstate Federalism

We thus have a Charter that transfers a degree of policymaking power to the courts and a Supreme Court better equipped to handle this function than at any time since the idea of an entrenched charter was placed on the Canadian political agenda. However, this does not guarantee that the nation-building hopes for the Charter will be realized. For one thing, many intergovernmental disputes concern jurisdiction over social and economic regulation, matters not much affected by the Charter. Also, one must remember that the major institutional supports of interstate federalism were left untouched by the Constitution Act of 1982. The

tendency of our institutional structures to produce or exacerbate intergovernmental conflict thus remains. Furthermore, the political process out of which the Constitution Act emerged did nothing to ease intergovernmental tensions. "Indeed, it can be argued," says Roger Gibbins, ". . . that the constitutional process further strained an already fragile national political fabric and crippled whatever integrative potential the new Constitution Act might have had."[119] Donald Smiley raises a similar question explicitly about the Charter. He contends that "there is ample evidence to demonstrate the ongoing strengthening of provincial against national allegiances," and asks, "but what *are* the capacities of the Charter to resist such provincializing currents in the Canadian political culture?"[120] The answer to this question depends largely on the extent to which political elites embroil Charter jurisprudence in intergovernmental conflict.

Given the centralizing and homogenizing effects of the Charter, it is entirely possible that the dynamics of interstate federalism involved in the process of charter-making will also affect the politics of Charter jurisprudence. One may speculate, for example, that the federal government will approve the centralizing effect of Charter-based policymaking and may therefore look with favour upon interest group challenges to provincial legislation. Indeed, in some cases such challenges will be brought by groups created or funded by the federal government. Government funding may also be made available more directly to groups or individuals involved in specific cases. Such financial assistance is already available for litigation involving language rights under the Charter through the Court Challenges Program administered by the Department of the Secretary of State. Clare Beckton argues that the government has an "obligation" to provide such financial assistance more generally, "particularly where the decisions are likely to have an effect on others and will be instrumental in shaping the future direction of human rights in Canada."[121] Furthermore, there will undoubtedly be cases in which the federal government is tempted to intervene directly in the legal proceedings on the side of those challenging provincial legislation. Conceivably, Ottawa could even use the reference procedure to launch its own challenge to provincial legislation under the Charter. Such actions would simply confirm the provinces' suspicions that the Charter was intended to undermine their jurisdiction. It was because of such suspicions that the notwithstanding clause was introduced; confirmation of those suspicions is likely to provoke use of the clause.

Such a reaction from the provinces is made more likely by the fact that judicial policies made under the Charter will not involve questions of fundamental rights but will instead turn on secondary questions, upon which reasonable people can differ and for which a nationally uniform answer is difficult to defend.[122] For example, there is no serious disagreement in Canada about the principle of government by consent and

its corollaries, such as freedom of religion or freedom of speech and press. And, as some of the provincial premiers pointed out at the 1980 constitutional conference, if such disagreement did exist, it could not be settled by judicial interpretation of a charter of rights. This was the point of Premier Blakeney's quotation of a famous statement by American judge Learned Hand: "This much I think I do know, that a society so riven that the spirit of moderation is gone no court can save, that a society where that spirit flourishes no court need save."[123]

The kinds of question that courts can handle, and that will in fact come before them, are secondary matters concerning the outer limits of agreed-upon principles — whether, for example, freedom of religion entitles one to disobey an otherwise valid law on the basis of religious conscience, or whether freedom of expression protects not only reasoned public discourse but also obscene entertainments. As Peter Russell notes, the question about rights "is not whether or not we will 'have' them but what limits it is reasonable to attach to them and how decisions about these limits shall be made."[124] To such questions about limits, countries with unquestioned liberal democratic credentials, with and without charters, have given different answers. And if different liberal democracies can proceed differently in fixing the "outer limits of fundamental rights and freedoms while preserving their inner core,"[125] one may well wonder why Canada's provinces should be deprived of a similar freedom to differ. From this perspective, what the Charter does is not so much to protect rights and freedoms as such, as to transfer the power to determine their outer limits from a political policymaking process that is federally divided to a judicial process that is not. The language of rights is itself a cause of this shift of power. If one chose to describe the boundary-setting questions that will dominate Charter jurisprudence as policy questions rather than matters of fundamental rights, the necessity of judicially imposed uniform answers would not be so readily apparent. Whereas the language of rights implies universality, the language of policy does not. Charles Taylor comes to a similar conclusion in his contribution to this volume. He points out that a public discourse of rights is hostile to the idea of participation, especially to the extent that this ideal requires decentralized decision making. At the 1980 constitutional conference, Saskatchewan Premier Allan Blakeney expressed the same reservations about the Charter.

> Canadians ought not to have taken away from them the fundamental right to participate in political choices, in particular they ought not to have eroded under the guise of advancing their freedoms their right to make important social choices, and to participate in those decisions.[126]

If one thinks of the Charter as posing mainly questions of policy rather than questions of fundamental rights, the advantages of transferring the power to decide them from the decentralized legislative arena to the

centralized and politically independent judiciary are not self-evident, especially to the provinces. As the government of Alberta noted in 1978, "One of the consequences [of the U.S. Bill of Rights] has been to involve the courts in the adjudication of a wide range of social questions, which in the interests of society are best debated and resolved in legislatures."[127] Sterling Lyon, then Premier of Manitoba, made a similar point in 1980.

> Bills of rights define general rights in such eloquent terms as "freedom of religion, freedom of expression" but what rights do such broad phrases actually confer and by whom are they determined? Does freedom of religion mean that we can no longer have prayers in our schools? Does it mean that governments cannot combat cult activity? Does freedom of expression mean that we cannot combat pornography or censor or classify films to reflect our community values? Does freedom of religion mean we can no longer exempt church property from taxation? Of course an entrenched charter can recognize justifiable limitations to fundamental rights, but who decides what limitations are justifiable?[128]

Premier Lyon clearly thought the legislature should decide. So did Premier Blakeney. Referring to the issue of Sunday and holiday closing laws, he decried the court-imposed U.S. solution.

> I say that many of these issues are better left to be dealt with at a provincial level where possible or at a national level, but at least at a level where we can respond to the felt needs of Canadians as they exist today, and change it 10 years later if the felt needs of Canadians are different. I feel . . . very, very strongly, that we are making a mistake to turn over many of these difficult issues to the courts for decision because I believe that the citizen believes that he has a right to a voice in those decisions . . .[129]

To the extent that the provinces and their relevant publics view the issue in this way, the likelihood that the legislative override will be used is increased.

It might be suggested that the courts could forestall such a reaction by recognizing the value of diversity in their interpretation of the reasonable limits clause of the Charter. This cannot mean, however, that a law which is "unreasonable" and hence unconstitutional in one province could be upheld as reasonable in another. Once the Supreme Court has struck down a law, it unavoidably sets at least a negative national standard. The value of diversity could save a provincial law only if it saved all provincial laws on the same subject that did not obviously and blatantly violate a Charter right — only, that is, if diversity itself became a test of reasonableness. On this account, the differences between jurisdictions that have not obviously abandoned the liberal democratic *jus gentium* might be taken to reflect reasonable differences between liberal democrats, and thus to deserve the protection of the reasonable limitations clause. This interpretation is unlikely, however, if only because it would render the Charter a practical nullity. Under it, the Charter would apply only to

policies that transgressed virtually unquestioned norms and would not apply to policies about which reasonable differences exist — that is, to the kind of policy most likely to be challenged under the Charter. Furthermore, the wording of Section 1 is hostile to such an interpretation. The original version of this clause spoke of "such reasonable limits as are generally accepted in a free and democratic society." The words "generally accepted" were considered unacceptable and were replaced by "demonstrably justified."[130] If general acceptance among liberal democrats is not enough to save a limitation, surely the fact of disagreement cannot "demonstrably justify" one. In brief, the reasonable limitations clause can reduce the number of uniform, nationwide standards set by the Court; it cannot, without emasculating the Charter altogether, dispense with the necessity of setting such standards. For this reason it is unlikely to forestall provincial opposition to the imposition of national policy on matters in which, from the provincial point of view, reasonable differences between the regions ought to be permissible.

Skepticism about the nation-building prospects of the Charter is confirmed by comparing the historical and institutional contexts in which judicial review of an entrenched charter or bill, applicable to both levels of government, emerged in Canada and the United States.[131] It is important to recall that the nation-building potential of the U.S. Bill of Rights dates only from the Civil War. One of the results of this war was the passing of the Fourteenth Amendment, which declares in its first section that no state shall "deprive any person of life, liberty, or property, without due process of law." Over time this language has been interpreted as incorporating most of the Bill of Rights, thereby making it applicable against the states. Prior to the passing of the Fourteenth Amendment, and indeed for some time thereafter, it was beyond dispute that the Bill of Rights applied only to the federal government.

Thus the centralizing effect of the Bill of Rights was impossible prior to the Civil War and the Fourteenth Amendment. It would likely have been impossible during this period even if the Bill had applied across the board, however. It is true that during his long tenure as Supreme Court Chief Justice (1801–35), John Marshall, a Hamiltonian Federalist who supported strong national government, wrote a series of landmark decisions that laid the legal foundation for federal dominance. Nevertheless, for some time the national government lacked political prestige and was confronted with a strong, militant states rights movement. The Supreme Court, as a branch of this government, shared its relative weakness and could not have sustained the centralizing civil liberties activism it displayed later in its history.[132] Indeed, it is arguable that the famous doctrine of "political questions" was devised during this era to insulate the Court not so much from "partisan" issues per se, as from those partisan issues that were "inconvenient or impossible for the Court to decide."[133]

Usually, the inconvenience stemmed from serious problems of state

compliance, problems arising in part because of the inability or lack of will of the national government to enforce the decisions. An interesting example is the case of *Worcester v. Georgia*.[134] At issue was Georgia's claim that it possessed sovereign authority over Indians and Indian lands. During the administration of John Quincy Adams, this claim had been contested by the national government, which denied the validity of a treaty allegedly entered into by Georgia and the Cherokees extinguishing Indian title. The Cherokees contested the very existence of such a treaty and made a separate agreement with Washington. When Georgia took steps to survey the land, Adams threatened to employ force and Georgia's governor responded by calling out the state militia. Impending civil war was averted when Congress refused to back the President, thus handing victory to Georgia.[135] Some years later Samuel Worcester, a missionary, was convicted of violating a state law forbidding whites to live on Cherokee land without a licence. Worcester appealed to the Supreme Court, where John Marshall declared the state law void and insisted that only the federal government had the constitutional authority to extinguish Indian title. Andrew Jackson, then President, favoured the extinction of Indian claims and was not inclined to contest Georgia's jurisdiction.[136] This, in addition to his dislike of Marshall, no doubt helps explain his alleged response to the judgment in *Worcester v. Georgia*: "Well, John Marshall has made his decision, now let him enforce it." However, one cannot ignore the additional explanatory fact that Jackson had no wish to consolidate a growing and worrisome states rights movement. By contrast, in 1957 President Eisenhower was willing to call out federal troops to enforce *Brown v. Board of Education* against recalcitrant Southern states, despite the fact that he personally was not an enthusiastic supporter of the decision.[137]

The point is that in the United States the constitutional basis for a national Bill of Rights, the Fourteenth Amendment, coincided with the defeat of the states rights movement by the forces of national dominance. Furthermore, the gradual incorporation of the Bill of Rights into the Fourteenth Amendment advanced with the consolidation of this national power. By contrast, our national Charter of Rights comes at a time when the federal government, though not exactly weak, is faced by much stronger provinces than in the past. (One may note that judicial activism against provincial legislation and policies in the 1950s occurred at a time of more obvious federal dominance.) As in the ante-bellum United States, our Supreme Court shares the illegitimacy with which Ottawa is viewed from the provincial capitals. The symbolism of its previously unentrenched status may have exacerbated the problem but did not cause it; neither does its present entrenchment (if indeed that is the effect of Section 41(d) of the Constitution Act of 1982) provide the solution. One symptom of the strength of the provinces and the relative weakness of the Supreme Court is the fact that the former were successful in getting the override into the Charter. This clause provides a

constitutional mechanism of legal non-compliance with Supreme Court decisions.

There is another major difference between Canada and the United States that makes it less likely that the centralizing influence of the U.S. Bill of Rights can be duplicated by the Charter — namely, the absence in Canada of an issue equivalent to the race issue in American politics. At the founding of the American nation, nothing contributed more to the strengthening of states rights than the issue of slavery and the determination of the Southern states to protect their "peculiar institution" by maximizing state autonomy.[138] By contrast, in the last 30 years, no issue has contributed more to centralization than the race issue, as first the Supreme Court and eventually Congress methodically dismembered the principle of states rights in order to eradicate the policies of racial discrimination that it sheltered.

The Supreme Court has played the leading role in this attack on racial discrimination. In the decade following World War II, the United States faced increasing domestic and foreign pressure to do something about racial injustice in the Southern states. Reform could only be initiated from above, as the white majorities in the South were not about to dismantle their discriminatory laws and practices voluntarily. Congress, however, was hopelessly deadlocked on the issue. While there was considerable general support outside the South for reformist intervention by the national government, Southern senators and representatives controlled the chairmanships of strategic congressional committees and used their power to block attempts to pass national civil rights legislation.[139] In frustration, the leadership of the civil rights movement turned to the federal courts instead. The National Association for the Advancement of Colored People devised a systematic litigation strategy of carefully selected test cases to challenge segregationist policies and institutions.[140] This strategy reached a successful climax in *Brown v. Board of Education*, the historic Supreme Court decision striking down segregated schooling in the South as a violation of the "equal protection" clause of the Fourteenth Amendment to the Constitution.[141]

The struggle to implement *Brown* against Southern reluctance forged new tools of judicial intervention and established the habit of using them.[142] Equally important, by the early 1960s *Brown* and its progeny had greatly enhanced the moral authority and prestige of the Supreme Court outside of the South. These developments were absolutely necessary to support the subsequent activism of the Warren Court in the field of civil liberties.

The influence of *Brown* in fashioning a new role of civil liberties activism for the Supreme Court cannot be overestimated.[143] As Jeremy Rabkin has observed,

> In hindsight, the *Brown* decision has indeed assumed the dimensions of a founding myth, the *Marbury v. Madison* of the modern judiciary. To the

> defenders of judicial activism in the 1970s *Brown* became the shining model of the proper judicial role — breaking through official timidity and political deadlock to champion the cause of the oppressed — and the ultimate rejoinder to all arguments for judicial restraint.[144]

Where in Canada is there a similarly compelling issue, crying out for judicial intervention with the support of a national majority against recalcitrant provincial minorities? None is apparent. Indeed, the Canadian dynamic cuts in the opposite direction. The protection of minority rights is equated by many with the protection of provincial autonomy, especially in Quebec.[145] In the words of André Tremblay,

> To my mind, collective rights mean justice for minorities who want to survive, who want to develop. I am not against the protection of individual rights, but Quebec's legitimate demands for collective rights have yet to be met. . . . What worries me is that this Constitution is the product of confrontation and means fewer collective rights, less justice for minorities, and more bitterness for Quebec.[146]

Such sentiment diminishes the prospects for a Canadian version of *Brown v. Board of Education* and with it the prospects for a centralizing influence for the Charter of Rights.

Judicial Statesmanship

We conclude that viewed from the standpoint of nation-building potential, the Charter poses a dilemma which can only be resolved by a high degree of judicial statesmanship. On the one hand, an activist jurisprudence (by which we do not necessarily mean a "liberal" jurisprudence) is necessary if the nation-building purposes of the Charter are to be fulfilled. If judges do not hold out the hope of success for individuals and interest groups, litigation will dry up. There will be no incentive to pursue extra legislative strategies for policy change or development. Furthermore, without practical vitality the symbolic utility of the Charter will surely decline. On the other hand, an overly activist jurisprudence, especially at the outset, is likely to engender the opposition of powerful provincialist forces and may trigger easy resort to the notwithstanding clause.

Some observers have argued that the existence of the legislative override frees the courts from the obligation of caution and self-restraint in the application of at least those sections of the Charter to which the override applies. Since the legislatures have the authority to overrule the courts, it is suggested, traditional judicial deference to legislative judgment in constitutional matters need no longer stand in the way of bold and liberal jurisprudence. Such judicial deference is based on the difficulty of constitutional amendment in the face of a wrong-headed judgment, but the override, in simplifying the task of legislative reversal,

removes this objection to judicial activism.[147] This argument entails a generally unacknowledged corollary, however — namely, that legislatures should feel uninhibited about invoking the notwithstanding provision when they disagree with the courts. If conventional scruples against the use of the provision are strong, then legislative reversal remains difficult in practice and the reason for judicial deference is unimpaired. Bold judicial activism can be justified by the notwithstanding clause only at the cost of justifying the easy use of the clause. Nor can it be doubted that such activism is calculated to encourage legislative employment of the override. But frequent and easy resort to Section 33 can only undermine the moral authority of the Charter and the Court. Certainly, it cannot enhance the nation-building capacities of the Charter. Even in the United States, where Constitution-worship is well established, the perception has become widespread that the Court, in the name of constitutional "penumbras," has gone too far in the making of policies upon which reasonable people can differ, and which are therefore difficult to justify as matters of essential and fundamental rights. On the assumption that many of these policies are more appropriately made by democratically elected legislatures (including state legislatures), some of the relevant U.S. publics have been proposing a wide range of court-curbing measures.[148] For reasons discussed in the previous section, the potential for such court-curbing is even greater in Canada. The Court will therefore have to be careful in selecting its cases and rendering its decisions.

The Court's decision in the *Patriation Reference* — the case that played such an important role in bringing the Charter to fruition — is perhaps an apt paradigm of the necessary judicial statesmanship. As several commentators have observed, the Court's decision, while flawed in terms of jurisprudence, was politically astute[149] — although it is not clear whether the political dexterity was purposeful or accidental.[150] Not the least of the political virtues of this decision was the fact that the Court, by not allying itself wholeheartedly with either party, removed itself as an object of attack in the ensuing intergovernmental political process. It thus preserved and even enhanced its fund of political legitimacy and authority — something it has not always managed to do in the past. We believe the Court will find occasions for similar statesmanship in cases arising under the Charter.[151]

Notes

This paper was completed in October 1984.

1. Alan Cairns, "From Interstate to Intrastate Federalism in Canada." Discussion Paper 5 (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979).
2. Quoted in Donald V. Smiley, *The Canadian Political Nationality* (Toronto: Methuen, 1967), pp. 7–8.
3. Jennifer Smith, "Intrastate Federalism and Confederation," in *Political Thought in Canada: Contemporary Perspectives*, edited by Stephen Brooks (Toronto: Irwin, 1984).
4. Donald V. Smiley, "The Structural Problem of Canadian Federalism," *Canadian Public Administration* 14 (1971): 328.
5. Roger Gibbins, *Regionalism: Territorial Politics in Canada and the United States* (Toronto: Butterworth, 1982), p. 196.
6. Cairns, "From Interstate to Intrastate Federalism in Canada."
7. Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968), p. xix.
8. Smith, "Intrastate Federalism and Confederation," p. 273.
9. Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983): p. 31.
10. Ibid., pp. 32–33.
11. Alan Cairns, "The Politics of Constitutional Conservatism," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), p. 42.
12. Peter W. Hogg, *Canada Act Annotated* (Toronto: Carswell, 1982), p. 89.
13. Roy Romanov, John Whyte, and Howard Leeson, *Canada Notwithstanding: The Making of the Constitution 1976–1982* (Toronto: Carswell/Methuen, 1984), p. 106.
14. Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, rev. ed. (Toronto: Gage, 1982), pp. 122–23.
15. Alan Cairns, "The Canadian Constitutional Experiment: Constitution, Community and Identity," Killam lecture, Dalhousie University, November 24, 1983 (Revised Draft January 30, 1984), pp. 29–30.
16. See Keith Banting and Richard Simeon, "Federalism, Democracy and the Future," in their *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), pp. 349–50.
17. For a list of explanatory factors see Donald Smiley, "Federal-Provincial Conflict in Canada," in *Canadian Federalism: Myth or Reality*, 3d ed., edited by J. Peter Meekison (Toronto: Methuen, 1977), pp. 3–4.
18. Task Force on National Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979), p. 14: "Indeed, part of the explanation of the current political conflict is to be found in the struggle between the central and provincial governments for control over the vastly expanded powers which the process of modernization vests in the state."
19. Ibid., p. 30.
20. Donald Smiley, *Canada in Question*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980), p. 115.
21. Ibid., pp. 54–58.
22. Alan Cairns, "Recent Federalist Constitutional Proposals: A Review Essay," *Canadian Public Policy* 5 (3) (1979): 349.
23. Donald Smiley, "Federal-Provincial Conflict in Canada," p. 10.
24. Alan Cairns, "The Electoral System and the Party System in Canada," *Canadian Journal of Political Science* 1 (1) (1968).

25. *The Constitutional Bill: Text and Explanatory Notes* (Bill C-60) (Government of Canada, 1978), ss. 62–70.
26. Canada, House of Commons, *Debates*, 30th Parliament, 3rd Session (Ottawa: Queen's Printer, June 27, 1978), reproduced in *The Confederation Debate: The Constitution in Crisis*, edited by R.D. Olling and M.W. Westmacott (Dubuque: Kendall/Hunt, 1980), pp. 57–58.
27. Cairns, "Recent Federalist Constitutional Proposals," p. 356.
28. Hugh R. Innis, ed., *Bilingualism and Biculturalism: An Abridged Version of the Royal Commission Report* (Toronto: McClelland and Stewart, 1973), p. 4.
29. Task Force on National Unity, *A Future Together*, pp. 15–16: "It was indeed the very definition of the country in dualistic terms both in the mandate and outlook of the B&B Commission, which helped to stimulate the assertiveness of these ethnic groups. . . ."
30. See Rainer Knopff, "Language and Culture in the Canadian Debate: The Battle of the White Papers," *Canadian Review of Studies in Nationalism* 6 (1) (1979).
31. Alan Cairns, "Recent Federalist Constitutional Proposals," p. 354.
32. Task Force on National Unity, *A Future Together*, p. 29. Ultimately the task force was not a critic of this approach. As Cairns points out ". . . the basic constitutional philosophy of the Task Force is a modern version of the compact theory in which Ottawa exists on sufferance, and the federal government, as Premier Duplessis used to say, is the child of the provinces" (Cairns, "Recent Federalist Constitutional Proposals," p. 363).
33. John Porter, *The Vertical Mosaic* (Toronto: University of Toronto Press, 1965), p. 369.
34. Gad Horowitz, "Creative Politics, Mosaics and Identity," *Canadian Dimension* 3 (1965), reprinted in *The Canadian Political Process*, 3d ed., edited by R. Schultz, O.M. Kruhlak, and J.C. Terry (Toronto: Holt, Rinehart and Winston, 1979), p. 75.
35. Richard Simeon, "Regionalism and Canadian Political Institutions," in ibid., p. 294.
36. Reg Whitaker, "Democracy and the Canadian Constitution," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), pp. 246–47.
37. Ibid., p. 250.
38. Pierre Elliott Trudeau, *A Time for Action* (Ottawa: Minister of Supply and Services Canada), p. 2.
39. Pierre Elliott Trudeau, *The Constitution and the People of Canada* (Ottawa: Minister of Supply and Services Canada, 1969), p. 14.
40. See Romanow et al., *Canada Notwithstanding*, pp. 216–17.
41. Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), chap. 1.
42. Russell, "The Political Purposes," p. 40.
43. Gibbins, *Regionalism*, p. 42.
44. Only 36 of the 171 cases involving federal statutes, or 21 percent, were successful, while 17 of the 31 challenges to provincial statutes, or 55 percent, were successful. The larger absolute number of the successful challenges to federal statutes can be attributed to the disproportionately high number of challenges to the Criminal Code and the overwhelming predominance of "legal rights" cases in general — 93 percent of all first year Charter Litigation. Given the constant quantity of Criminal Code Litigation, it was predictable that in the first year of Charter operation, the legal rights sections of the Charter (ss. 7–14) would generate a large proportion of Charter Litigation. It is equally predictable that the number (both absolute and proportional) will decline as the Supreme Court gives authoritative interpretations to the most frequently litigated issues — e.g. the "reverse onus" clause of the Narcotics Act, the meaning of "right to counsel" in the context of breathalyzer check-stops, etc. See F.L. Morton, "Charting the Charter — Year One: A Statistical Analysis," *Canadian Human Rights Yearbook (1984–85)* (Toronto: Carswell, 1985). Moreover, the section

15 equality rights promise to be a fertile new source of Charter Litigation when they take effect in April, 1985. Unlike the legal rights sections, the section 15 prohibitions will weigh with equal force against both federal and provincial governments.

45. Henry J. Abraham, *The Judicial Process*, 4th ed. (New York: Oxford University Press, 1980), pp. 296–97. These figures were current as of Fall 1979.
46. The Montreal Protestant School Board's challenge to the education provisions of Bill 101 has recently been upheld by the Supreme Court of Canada. *A-G. Quebec v. Quebec Association of Protestant School Boards* (July 26, 1984), not yet reported.
47. Peter Russell also makes this prediction in "The Political Purposes," pp. 40–42.
48. Alan Cairns, "Recent Federalist Constitutional Proposals," p. 354.
49. Shapiro, *Courts*, p. 24.
50. Cairns, "Recent Federalist Constitutional Proposals," p. 354.
51. Gibbins, *Regionalism*, pp. 44, 171–72.
52. We borrow the term from Alan Cairns, "The Politics of Constitutional Conservatism," p. 41.
53. See Thomas Flanagan, "The Manufacture of Minorities," in *Minorities and the Canadian State*, edited by Neil Nevitte and Allan Kornberg (Oakville, Ont.: Mosaic, 1985).
54. Richard Schultz, "Interest Groups and Intergovernmental Negotiations: Caught in the Vice of Federalism," in *Canadian Federalism: Myth or Reality*, 3d ed., edited by J. Peter Meekison (Toronto: Methuen, 1977).
55. Ibid., p. 394.
56. Alan Cairns, "The Government and Societies of Canadian Federalism," *Canadian Journal of Political Science* 10 (4) (1977): 716–17.
57. *Globe and Mail*, January 13, 1981.
58. Quoted in a February, 1981 newsletter of the CCLA, "CCLA News Notes on the Constitution."
59. Banting and Simeon, "Federalism, Democracy and the Constitution," in *And No One Cheered*, p. 7.
60. *Globe and Mail*, January 13, 1981.
61. Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Educational Press, 1983), p. 35.
62. *Globe and Mail*, January 13, 1981.
63. See testimony of the Canadian Advisory Council on the Status of Women, 9: 23–52; National Action Committee on the Status of Women, 9: 57–65; National Association of Women and the Law, 22: 50–73; all in the *Minutes of Proceedings and Evidence* of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. First Session of the Thirty-second Parliament, 1980–81, November 6, 1980 to February 13, 1981.
64. *Globe and Mail*, Jan. 12, 1981.
65. *Globe and Mail*, Jan. 13, 1981.
66. See Kome, *The Taking of Twenty-Eight*, pp. 75–77.
67. *Globe and Mail*, April 24, 1981.
68. *Globe and Mail*, April 17, 1981.
69. For an account of its disintegration see Douglas Sanders, "The Indian Lobby," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), pp. 315–16.
70. Kome, *The Taking of Twenty-Eight*, p. 85.
71. The lobbying effort is chronicled in *ibid.*, pp. 89–95.
72. Russell, "The Political Purposes," pp. 48–49.
73. "CCLA News Notes," April 1982.
74. M. Elizabeth Atcheson, Mary Eberts, Beth Symes, with Jennifer Stodart, *Women*

and Legal Action: Precedents, Resources and Strategies for the Future (Ottawa: Canadian Advisory Council on the Status of Women, 1984), p. 163.

75. Ibid., pp. 163–72.
76. *Globe and Mail*, Jan. 13, 1983.
77. *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983), 41 O. R. (2d) 583.
78. For an academic prediction of continued conservatism on the part of our judges see Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," *Canadian Bar Review* 61 (1) (1983).
79. For an account of feminist opposition see Chaviva Hosek, "Women and the Constitutional Process," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by K. Banting and R. Simeon (Toronto: Methuen, 1983), p. 285.
80. Since the triumph of legal realism in the U.S., there has been an on-going search for appropriate standards to guide judicial discretion when interpreting broadly worded constitutional rights. Competing sources of such standards have included the behavioural sciences, history, and most recently political theory. Important examples of the latter include John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978); Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980); and Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1983). According to Roger Smith, the turn to political theory as a source for constitutional values represents a desire "to provide less ambiguous guides for decision-making and firmer grounds for achieving reformist results." ("Constitutional Interpretation and Political Theory: American Legal Realism's Continuing Search for Standards," *Polity* 4 (1983): 482–574). Smith argues that the theory oriented approaches of Ely, Dworkin, Choper, Perry, et al. raise as many new problems as they solve old ones. For another recent critique of this position, see John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, N.Y.: Cornell University Press, 1984).
81. The best known advocate of judicial self-restraint in the post-*Brown* era was the late Alexander M. Bickel. See *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), and *The Morality of Consent* (New Haven: Yale University Press, 1975).
82. Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians," *Canadian Bar Review* 29 (1951): 1058.
83. Alan Cairns, "The Judicial Committee and Its Critics," *Canadian Journal of Political Science* 4 (3) (1971): 301.
84. Peter H. Russell, "The Political Role of the Supreme Court of Canada in its First Century," *Canadian Bar Review* 53 (1975): 589.
85. The late Chief Justice, Bora Laskin, once became so upset by these criticisms that he personally arranged a speaking engagement with the press to defend the impartiality of the justices. See "Judicial Integrity and the Supreme Court of Canada," *Law Society Gazette* (1978): 118.
86. For a review of both the controversy and the record, see Peter W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" *Canadian Bar Review* 57 (1979): 722.
87. See Russell, "The Political Role," p. 590.
88. A right of appeal still exists in criminal cases when there has been a dissenting opinion in the provincial Court of Appeal.
89. S.I. Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance," *Supreme Court Law Review* 1 (1982): 479.
90. See Alexander Bickel's discussion of the "passive virtues" in *The Least Dangerous Branch*, chap. 4.

91. The figures for the period of 1950 to 1964 were drawn from John J. Cavarzan, "Civil Liberties and the Supreme Court: The Image and the Institution," Master of Laws Thesis, Osgoode Hall Law School, 1965. The figures from 1965 onward were taken from the Osgoode Hall Law Journal's annual statistical analyses of the Supreme Court Reports.
92. This is not true of judicial decisions based on sections 2 and 7 through 15 of the Charter of Rights, which are subject to the section 33 "Legislative override" provision.
93. *Fleming v. Atkinson*, [1959] S.C.R. 513. In 1966 the British House of Lords officially declared that, when appropriate, it would no longer follow its own prior decisions. However, the Supreme Court of Canada continued to profess strict adherence to its prior decisions until the 1970s.
94. Bora Laskin, "The Institutional Charter of the Judge," *Israel Law Review* 7 (1972): 341.
95. "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada," *Canadian Bar Review* 53 (1975): 469.
96. *Hill v. The Queen*, [1977] S.C.R. 827; *R v. Paquette*, [1977] 2 S.C.R. 189; *McNamara Const. Western Ltd. v. The Queen*, [1977] 2 S.C.R. 654; and *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.
97. Bushnell, "Leave to Appeal," p. 479.
98. These changes are recounted in an article based on an interview with Bora Laskin only several months before he died. See Peter Calamai, "Laskin has made Canada's court supreme," *Calgary Herald*, Dec. 28, 1983.
99. [1967] S.C.R. 792.
100. *A.-G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.
101. *A.-G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032.
102. [1982] 2 S.C.R. 792.
103. [1980] 1 S.C.R. 54.
104. Released March 8, 1984, unreported.
105. See *Re-Exported Natural Gas Tax*, [1982] 1 S.C.R. 1006.
106. *Thorson v. A.-G. Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575.
107. *Borowski v. Minister of Justice of Canada*, [1982] 2 S.C.R. 575.
108. Ibid.
109. *Operation Dismantle v. The Queen* (1983), 49 N.R. 363 (F.C.A.).
110. Peter H. Russell, "The Anti-Inflation Case: The Anatomy of a Constitutional Decision," *Canadian Public Administration* 10 (4) (1977): 646.
111. See Paul Weiler's discussion of an extreme example of this, the 1976 Chicken and Egg Reference, in *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974), pp. 156–64.
112. *Muller v. Oregon*, 208 U.S. 412 (1908).
113. See Peter W. Hogg, "Proof of Facts in Constitutional Cases," *University of Toronto Law Journal* 26 (1977): 386.
114. Russell, "The Anti-Inflation Case," p. 632.
115. "Address at the University of Calgary Faculty of Law," Sept. 12, 1983. An excellent example of just such a case was the recent challenge by the National Citizen's Coalition to Bill C-169. The NCC successfully argued that the federal government's attempt to prohibit "political action committees," or "pacs," from participating in federal elections violated the "freedom of speech" provisions of the Charter. The trial in Calgary saw a total of four "expert witnesses" called to testify on the issue of whether Canada's election act was a "reasonable" restriction on the "freedom of speech" provision of the Charter. These included a Canadian and an American political scientist, a Canadian constitutional historian, and Canada's Chief Electoral Officer.

116. Peter H. Russell, "The Effect of the Charter of Rights on the Policy-Making Role of Canadian Courts," *Canadian Public Policy* 25 (Spring 1982), pp. 15–16.
117. *Canada Act 1982*, s. 52.
118. Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts," p. 16.
119. Roger Gibbins, "Constitutional Politics and the West," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by K. Banting and R. Simeon (Toronto: Methuen, 1983), p. 122.
120. Donald Smiley, *The Canadian Charter of Rights and Freedoms, 1981* (Toronto: Ontario Economic Council, 1981), p. 61.
121. Clare Beckton, "The Impact of the Charter of Rights and Freedoms on National Institutions," a paper prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, Dec. 6, 1983, p. 6. Ottawa.
122. The argument of this paragraph draws heavily on Russell, "The Political Purposes," pp. 43–46.
123. Canadian Intergovernmental Conference Secretariat, *Federal-Provincial Conferences of First Ministers on the Constitution* (Ottawa: September 8–13, 1980), p. 493. Hereafter cited as *Federal-Provincial Conference 1980*.
124. Russell, "Political Purposes," p. 43.
125. Ibid., p. 46.
126. *Federal-Provincial Conference 1980*, pp. 485–86.
127. Alberta, Department of Intergovernmental Affairs, *Harmony in Diversity: A New Federalism for Canada* (Edmonton: Government of Alberta, 1978), p. 22.
128. *Federal-Provincial Conference 1980*, p. 480.
129. Ibid., p. 490.
130. See Hogg, *The Canada Act 1982 Annotated*, p. 13.
131. The next four paragraphs are a revised and expanded version of an argument previously published by Rainer Knopff. See "Federalism, the Charter and the Court: Comment on Smith's 'The Origins of Judicial Review in Canada'," *Canadian Journal of Political Science* 16 (3) (1983): 588–89.
132. Ward E.Y. Elliot, *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1945–1969* (Cambridge, Mass.: Harvard University Press, 1974), p. 51.
133. Ibid., p. 48.
134. 6 Pet. 515 (1832).
135. Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: Appleton-Century, 1935), pp. 426–29.
136. Robert K. Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press, 1968), p. 57.
137. See Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: Wiley and Sons, 1976), pp. 77–100.
138. Consider James Madison's observation: "States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These causes concurred informing the great division of interests in the United States. It did not lie between the large and small states. It lay between the Northern and Southern." Winston U. Solberg, ed., *The Federal Convention and the Formation of the Union* (Indianapolis: Bobbs-Merrill, 1958), p. 194.
139. See James Sundquist, *Politics and Policy* (Washington, D.C.: Brookings Institution, 1964), pp. 221–86. Civil Rights Acts were finally passed in 1957 and 1960, but were watered down versions of the original Bills. It was not until 1964 that an aggressive Civil Rights Act was passed.
140. See Clement Vose, "Litigation As a Form of Pressure Group Activity," *Annals of the American Academy of Political and Social Sciences* 319 (1958): pp. 20–31. Also, Richard Kluger, *Simple Justice* (New York: Knopf, 1976).

141. *Brown v. Board of Education of Topeka* (No. 1), U.S. 483 (1954).
142. Consider the remarks of Judge Frank M. Johnson, Jr., formerly the Chief Justice of the Middle District Court of Alabama, and an outspoken defender of judicial activism: "If we judges have learned anything from *Brown v. Board of Education* and its progeny, it is that prohibitory relief alone affords but a hollow protection to the basic and fundamental rights of citizens to equal protection of the law." The John A. Sibley Lecture in Law, University of Georgia, 1977. Reprinted in Walter Murphy and C. Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process*, 3d ed. (New York: Random House, 1979), pp. 66–71.
143. See "Commentaries" by Walter Berns, p. 68, Paul Murphy, p. 69, and Aryeh Neier "Enforcing a Bill of Rights," in *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms*, edited by W.R. McKercher (Toronto: Ontario Economic Council, 1983).
144. Jeremy Rabkin, "The Judiciary in the Administrative State," *The Public Interest* 71 (1983): 62–84, 66.
145. For a more detailed discussion of this problem see F.L. Morton, "Group Rights versus Individual Rights in the Charter: The Special Cases of Natives and Quebecois," in *Minorities and the Canadian State*, edited by Neil Nevitte and Allan Kornberg (Oakville, Ont.: Mosaic, 1985), pp. 71–86.
146. See André Tremblay in "Commentaries," in *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms*, edited by W.R. McKercher (Toronto: Ontario Economic Council, 1983), p. 142.
147. Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations," in *The Canadian Charter of Rights and Freedoms: Commentary*, edited by Gerard A. Beaudoin and Walter S. Tarnopolsky (Toronto: Carswell, 1982), p. 28.
148. In 1981, there were 27 bills introduced in Congress to restrict or reverse Supreme Court decisions. Most took the form of amending the Court's appellate jurisdiction to prevent it from hearing certain kinds of cases–e.g. abortion, voluntary school prayer, bussing for school integration. See *C.Q. Weekly Report*, May 30, 1981, pp. 947–51.
149. See Peter Russell, "Bold Statescraft, Questionable Jurisprudence," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), and Eric Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada," in *The New Constitution and the Charter of Rights*, edited by Edward P. Belobaba and Eric Gentner (Toronto: Butterworth, 1982).
150. For the latter view see Edward McWhinney, *Canada and the Constitution 1979–1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982), chap. 9.
151. For a more detailed discussion of judicial statesmanship see Rainer Knopff and F.L. Morton, "Judicial Statesmanship and the Canadian Charter of Rights and Freedoms," in *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms*, edited by W.R. McKercher (Toronto: Ontario Economic Council, 1983).

5

Alternative Futures
Legitimacy, Identity and Alienation in Late Twentieth Century Canada

CHARLES TAYLOR

The Malaise of Modernity

Contemporary society suffers from a certain malaise of impending breakdown. This is not to say that we all worry about this all the time. On the contrary, we are often unbearably smug, particularly in this country. But from time to time, when some new dislocation looms or tension rises, the fear surfaces of a collapse in our political or legal order, betokening at best a dissolution of our polity, and perhaps even removing our safeguards against a condition of arbitrary violence and despotism of which each day's international news offers us vivid images from less fortunate parts of the globe.

What else is new? All societies at all times have suffered from such fears. In the case of all previously existing civilizations, not without reason, for they all ultimately did break down. What is special about our case is that we see the breakdown coming about in a particular way. We see it coming through hypertrophy, through our becoming too much what we have been. This kind of fear is perhaps definitive of the modern age: the fear that the very things which define our break with earlier "traditional" societies — our affirmation of freedom, equality, radical new beginnings, control over nature, democratic self-rule — will somehow be carried beyond feasible limits and will undo us. The hard-boiled optimist will perhaps see this fear as a relic of atavistic beliefs in divine nemesis as an answer to our hubris, but it is hard to conjure it away altogether in this fashion.

Various theories of modernity cast this fear of hypertrophy in different forms. According to some, modern society risks breakdown through the loss of meaning. What defines the modern break is the rejection of the

sense, seemingly universal among pre-moderns, that human beings and their societies were set in a broader cosmic order which determined their paradigm purposes and defined what the good was for them. Our modern idea of the free, self-defining subject is of an agent who finds his paradigm purposes in himself and can legitimately have them defined for him by a larger order only if he has consented to this subordination. The social contract theories of the seventeenth century embed this new understanding of the subject.

One form that the fear of breakdown takes is the sense that the rejection of all such encompassing orders must also put an end to all horizons of meaning. The ideally free agent faces total emptiness, in which nothing can be recognized any more as of intrinsic worth. The ultimate viability of all horizons rested on the sense of being embedded in an order. For a time, there can be a purpose to human life in the *liberation* from this, but once the destructive task is completed, no positive purpose remains.

A threat of this kind seems to be preferred in the famous Nietzschean image of the death of God. And another form of this fear surfaces in the work of Max Weber, who was deeply influenced by Nietzsche. Modern political life needs ever new doses of charismatic leadership in order to stave off a kind of emptiness and imprisonment in the routine.

In this version of the fear of hypertrophy, modern freedom undermines itself by destroying meaning. But there are other versions of the hypertrophy fear in which the very excesses of modern freedom and equality lead directly to self-destruction. In one variant of these, the modern exaltation of individual freedom ends up eroding the loyalties and allegiances to the wider community which any society needs to survive. This danger was first articulated in the period of the Restoration in France and was the starting point for the reflections of Tocqueville, who tried to determine how this consequence of modernity could be avoided, how indeed the Anglo-Saxon societies seemed at least provisionally to have avoided it. In a slightly different variant, influentially articulated by Burke, it is the modern aspiration to negate history and to create social structures from scratch, which has fateful and ineluctable self-destructive consequences.

According to another version again, it is not so much the hypertrophy of individual freedom but the insistence on political equality and mass participation which puts impossible demands on modern societies and leads to their downfall. The theorists of a revised, elite theory of democracy, who wrote in the wake of Schumpeter after World War II, entertained a view of this sort.[1] In the 1970s a new wave of theories arose whose purport was that modern democratic states were becoming "ungovernable," partly because of an overload of subjective demands, but also because the tasks of government in a contemporary technological-industrial society tend to escalate beyond its means.[2]

A rather different variant of the modern fear, which also stems from Weber, is the notion that capitalism, or modern industrial society, while depending on a certain ethic of austere self-discipline (the famous "Protestant ethic"), inevitably undermines this ethic by its very productive success, and fostering an outlook of hedonism and self-gratification which undermine the very success which gave rise to it. Daniel Bell has recently presented a view of this kind in his *Cultural Contradictions of Capitalism*.[3]

One of the most widely canvassed hypertrophy stories in our time is that propounded by the ecological movements — that modern society is in danger of destroying itself through its commitment to headlong growth. I will return to this critique in greater detail below.

The idea that modern society is bent on self-destruction through an excess of its own essential qualities is not necessarily pessimistic. Marxism presents a view of this kind about capitalism in which the outcome is for the best. The breakdown allows for a higher, socialist organization of society in which the good qualities of modern civilization are at last integrally rescued and made compatible. But toward the end of the twentieth century it is hard for anyone, socialist or conservative, to look on breakdown with this kind of optimism. Almost no one can believe that a solution to the modern dilemma might be achieved just by the collapse of capitalism. And so the hypertrophy fear tends to haunt everyone, left and right.

Framing the fear of breakdown in terms of hypertrophy tends to suggest the idea that the most successful modern societies are those that have an admixture of the traditional, those that somehow avoid going too far down the road to modernity. There is a long tradition of comment on British democracy based on this theme — that the genius (or good luck) of British democracy lies simply in the welding of highly traditional elements, rooted in earlier centuries, with the modern aspirations to freedom, equality and democracy. The formula for survival in this view is modernity only in moderate doses.

Another very common notion which accompanies this is of the view of recent centuries as a march through modernity into the post-modern danger zone of hypertrophy. In this image, some societies are ahead of others and presage the possible future fate of these others. The United States today (in particular certain parts of it, such as California) is cast in this role. This view sees the formula for survival as having modernity occur as slowly as possible.

These two views — moderation or slowness as the key to survival — offer satisfaction and assurance to Canadians. We have a commonly established self-image of being more rooted in the past than American civilization, with part of our society steeped in the British tradition (stemming from the Loyalists who refused the American Revolution), and stemming from a French community cut off from the mother country

before the Revolution. The very sense that we are "behind" the Americans can also be a source of reassurance and superiority when we think of the threatened rush of modernity into breakdown. These images provide the basis for a certain Canadian smugness which perhaps compensates for what we sometimes see as a certain unimaginative stodginess in the national character.

But perhaps this way of conceiving the danger in terms of "too much" or "too fast" is wrong. Or perhaps, to give it its due, it is close enough in certain respects to function as a tolerable first approximation, but fails to give real insight into the processes of modernity and the threats it can pose. This I believe to be the case. The straight hypertrophy story is too crude, because it understands the goods which have allegedly overgrown their limits — freedom, equality, technological control — from the outside only. Perhaps a finer-grained understanding of what they mean to moderns will put the issue in a quite different light. It will no longer just be a question of whether we have gained too much of them too fast; rather the difference between survival and breakdown may be seen to turn on our ability to realize these goods in an authentic form. Our agenda will then no longer be defined as limiting or slowing down the progress of modern values, but rather as finding a way to rescue them in their integrity, as against the distortions and perversions that have developed in modern history.

These two conceptions and their corresponding agendas — of limitation and rescue, respectively — belong to outlooks which one might describe as pessimistic and optimistic, and to some extent line up with policies which might be defined as conservative and reform, respectively.[4] I don't want to prejudge which of these approaches is right in this study, although I must admit that I belong to the second or "rescue" party. But I think that the issue cannot be properly joined until one abandons the merely external approach of most limitation theories and tries to define in a closer-grained fashion the understandings of the human good which have grown along with and underpinned the development of modern society.

This is what I intended to do first in this paper. My belief is that it is only against this background that we can fruitfully pose questions about the causes of (and potential cures for) breakdown, both in general and in the particular case of this country. So before considering the alternative futures which may lie before us in Canada, I want to attempt to define some relevant features of the spiritual climate of modern societies. Before embarking on this, I have a few preliminary remarks which will serve to define my question more clearly.

The danger of breakdown in modern societies can be understood in terms of another central Weberian concept, that of "legitimacy." This term is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when

members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails. Using the term in this sense, we could say that the danger of breakdown arises for us in the form of a legitimation crisis.

Of course, there are other kinds of possible dangers which arise from hypertrophy of modern development. Certain unintended negative consequences of scale, for instance, can create severe strain, such as the sclerosis which might arise from large-scale bureaucratization, or the notorious pollution effects of certain kinds of economic growth, or the skewed economic priorities which some allege to be the inevitable outcome of uncontrolled free-enterprise capitalism. But severe as they may be, they couldn't by themselves bring about a breakdown in our political or legal order. Or rather they would do so only through their effect on the legitimacy of this order. Bureaucratic sclerosis is a threat to our political order, for instance, just because this order is self-professedly democratic. A process which makes it less and less possible for people to make effective decisions about their lives threatens to bring society into conflict with its central justifying principles, and this cannot but bring about a loss of legitimacy.

The focus on legitimacy is especially relevant for modern societies. This is not because all societies at all times haven't required legitimacy in this sense. But two things mark modern societies. The first is that an important part of the background out of which they arose was that legitimacy became a central philosophical problem. Underlying Weberian "legitimacy" is the seventeenth century use of the term not to describe people's *attitudes*, but as a term of objective evaluation of regimes. Modern political theory is inaugurated in the seventeenth century around this central question of the conditions of legitimate rule.

The second reason why legitimacy is of particular importance in modern society is that the participation demands of this society are greater in two respects than previous ones.

First of all, modern industrial society is not only the fruit of an unprecedented degree of disciplined, dedicated, innovative productive activity; by an understandable reverse process, it comes to demand this kind of effort of its members. Firms operate in competition with each other, but so do all contemporary industrial societies. Any failure in that constellation of qualities which make for high productivity — which certainly includes a certain attitude toward work and certain patterns of investment — and the less competitive economy is threatened with relative de-industrialization and hence higher unemployment, slower growth, relative impoverishment, and all that goes with this. Contemporary societies cannot afford not to take production seriously — or rather, the costs of not doing so can be very high. Certainly some societies, like contemporary Britain, seem willing to pay these costs up

to a point. But presumably even Britons would consider some level of relative impoverishment too high, and at that point would feel the full weight of competitive demand.

The second respect in which modern societies are more demanding is that, at least in the "First World" (Western societies plus Japan), they tend to be liberal democracies. This means that they are based on the principles of political participation, self-voted taxation burdens, the citizen army as the ultimate instrument of defense, and the like. As I argue below, this aspect of modern societies as self-governing is of central significance to the understanding of the good which is constitutive of modern society.

In these two respects, we can see why the modern problem of legitimacy has peculiar significance for modern society. If we define this in terms of the attitudes and beliefs of members which dispose them to assume or refuse to assume the disciplines and burdens of membership in a given society, we can understand how legitimacy increases in importance, the more weighty the disciplines and burdens that must be voluntarily assumed. For the ideal despotism, legitimacy carries a much lesser weight, at least until that point where oppression drives the subjects to revolt. But in contemporary industrial democracies, the everyday operations must call on an ever-present fund of positive identification.

This provides the background to the contemporary concern with legitimacy and to fears of a "legitimation crisis."[5] But how can we get an intellectual grip on this? One very simple way would be to see legitimacy as a function of satisfaction, defined in relatively tough-minded terms, e.g., those of economic living standards (in relation perhaps to expectations). In this view, a regime gains or loses legitimacy as it delivers or fails to deliver the goods. This would make our problem easier; and certainly no one can deny that economic satisfaction is one important factor in the survival and breakdown of political regimes. But it is obvious, too, that it is absurdly one-sided to consider this alone.

If we want to go deeper into the bases for legitimacy and its loss, we have to understand more about the conceptions of the good life, the notions of human fulfillment, of human excellence and its potential distortion, which have grown up along with modern society. We need that finer grained understanding noted above, an understanding of the notions which have framed the identity of our contemporaries.

When I speak of notions of the good which have grown up with modern society, I don't refer to some merely accidental correlation. Rather I mean the understandings of the good which have helped constitute this society and hence are essentially linked to its development.

These conceptions, which I gather together under the loose title of the modern identity, could only have developed within a society with structures, institutions and practices like ours. Take for example our widespread conception of ourselves as autonomous individuals, choosing

our own values and modes of life. This self interpretation, and hence ideal, is not one that any one of us could have invented and sustained alone, in the midst, say, of a closed tribal society. It is one that is available for us because we live in a civilization where this conception has been formulated and defined. What is more, it is available to us because we live in a civilization in which this conception underlies many social practices.

For instance, we cast votes as individuals to reach social decisions. That is, we vote in isolation in a polling booth, and not in the sight of all in the ecclesia. We are expected to formulate our individual opinion and outlook, to arrive at them on our own, to take responsibility for them. Pollsters are constantly sampling for our individual opinions. Or again, we have a common practice of negotiation in which individuals or parties define their goals quite independently of the rest of society and then try to reach some agreed ground. Many of the ground rules that hold our institutions together are based on such contracts. We even have been induced to believe at various times that the most basic and ultimate framework, the political, was or ought to be established by contract. Or again, in our society the family is based on the freely chosen companionate marriage; you choose a partner according to your own affinities.

All these practices and institutions induce us to understand ourselves as individuals; more, they make it inevitable that we do so. I have *my* opinions, *my* values, *my* outlook, *my* affinities. We have developed in this direction to a degree unprecedented in history; some of our self attributions would be shocking or even incomprehensible to our ancestors. What would a medieval or any but a few sophists among the ancients make of "my values?" The very word "value" belongs to our "subjectivist" civilization. None of us except a tiny number gifted with imaginative genius could have stepped out of that medieval or ancient outlook into our contemporary one. If what was incomprehensible to them seems self-evident to us, it is because we live in a civilization in which practices like the above are dominant.

The relation between practices and conceptions can be put in this way: the notion of myself as an individual is constitutive of these practices, is presupposed in them. A social practice is a rule or norm-governed activity. It is defined by certain norms of failure and success, of honesty and turpitude, of excellence or mediocrity, etc. A certain conception of the human person is presupposed in a practice if it is essential to understanding the norms which define it. But the norms defining modern citizen voting, or the companionate marriage, presuppose the autonomous individual. It is an *infringement* if someone else can oversee my vote, because I must be free of any intimidation and vote according to *my own* conscience. I am expected to marry someone *I* love; caving in to my extended family or to social expectation is a falling off, an acquiescence in the second best.

This relation of presupposition is directly relevant to legitimacy. Institutions are defined by certain norms and constituted by certain normative conceptions of man. It is these conceptions that they sustain. But the relationship of support also works the other way. It is these normative conceptions which give the institutions their legitimacy. Should people cease to believe in them the institutions would infallibly decay; they could no longer command the allegiance of those who participate in them. Institutions demand discipline, frequently sacrifice, always at least the homage of taking their norms seriously. When they lose legitimacy, they lose these.

The question for the "internal" perspective is this: on a proper understanding of the modern identity — the set of conceptions of man which has grown with modern society, constitutive of its institutions and practices — has the development of these structures, institutions and practices tended to their own undermining, either by shaking men's faith in their constitutive norms, or by making these practices and institutions appear as perversions of these norms? I think that in fact something of this kind has been and is now taking place, and that is why an exploration of the modern identity can help us to understand our contemporary legitimation crisis, and perhaps to arbitrate between the optimistic and pessimistic, the "rescue" and "limitation" perspectives adumbrated above.

Strains of the Modern Identity

I want to turn now to that family of conceptions of human beings, of freedom, and of human nature which emerge roughly in the seventeenth century and which have been woven into our developing commercial and later industrial capitalist society. It is these concepts that I refer to collectively as the "modern identity." Two phases in its development continue to exert a strong influence in our time.

One of the key notions of the first phase was the new conceptions of freedom which emerged in the seventeenth century. This period saw a progressive rejection of world views in which humans were seen as forming part of some cosmic order, where their nature was to be understood by their relation to that order. Both the new conceptions of science and the new notion of autonomy pointed to a view of humans as beings who discover their purposes in themselves. "Nature" becomes internalized in the modern period. In this view, the free subject becomes someone who follows an internal purpose and who owes no a priori allegiance to a pre-existing order but gives it only to structures that were created by his/her own consent. Even the ancient conceptions of the freedom of the citizen, which were essentially defined as a certain relation to a whole — the polis or republic — go into eclipse, and we find atomist conceptions of freedom developing where persons are seen to enjoy "natural liberty" in a state of nature.

Along with this notion of freedom comes a new conception of what human nature demands. Traditional moral views grounded on nature, which descend from the ancients, offer what we might call a two-tiered view of the good life. This consists primarily in some higher activity distinct from the fulfillment of ordinary needs involved with the production and reproduction of life. Meeting these ordinary needs is of course unavoidable and good but is regarded simply as infrastructural to a distinct activity that gave life its higher significance. In one version this was defined as contemplation; in another influential version, the life of the citizen. In either version, lives which lacked the favoured activity and were entirely absorbed in meeting life needs were regarded as truncated and deprived. It followed that outside of very exceptional social contexts, the fullness of human life was only for the few.

To some extent Christianity worked against these aristocratic conceptions, but the Christian church too developed a notion of an exceptional vocation higher than that of the ordinary person, which was associated with celibacy. One of the central tenets of the Reformation was the rejection of this notion of the special vocation and the preaching of a vision of ordinary life as hallowed. A secularized version of this arises in the seventeenth century. The demands of nature, of the new internalized nature, just are the ordinary needs of life. There is no higher stratum of activity. Rather, what defines proper human activity is a certain manner of going about meeting these needs — in a sober, disciplined, clairvoyant, and rational way. This last term, "rationality," could be taken to sum up the properly human way of living. But it now, of course, changes its sense. It is defined less and less in terms of a vision of the true order of things and more and more in terms of instrumental reason. The rational pursuit of the needs of life crucially includes seeking them in an effective manner.

The ethic which rejects a class distinction in purposes and activities is also anti-aristocratic in social thrust. The norm of rational pursuit of ordinary life needs is, in a sense, the bourgeois ethic. An example of the remarkable penetration of this ethos into our whole civilization is the development of the modern notion of the family. From the seventeenth century on, in the higher classes of Anglo-Saxon societies and spreading outward and downward from these, we find a new outlook in which the companionate marriage and the life of the nuclear family come more and more to be seen as one of the central fulfillments of human life. This has become so much a part of our contemporary world that we find it hard to imagine a time when it was not so. But it is relatively recent in human history. The modern need for privacy is part of this same development, as is the growing emphasis on sentiment. One of the ways of understanding modern consumer society is as an attempt to make available for the vast majority the conditions of self-enclosed family life as this ideal has developed in the past three centuries.[6] A second facet of this outlook has

been the extraordinary development of forms of mass discipline — the regimenting of gesture and action to produce maximum effect — which begins in the eighteenth century in armies, schools, prisons, factories, and so on. This has been interestingly traced by Michel Faucault in his *Surveiller et Punir*.[7]

In connection with this last phenomenon, we can see a third leading notion developing in this period which I call "efficacy." The free individual meeting the demands of nature in the modern sense must aspire to a higher degree of control over himself and over nature. Exercising the control that enables one to effect one's purposes more fully and to a higher degree is a mark of rationality — i.e., one is pursuing one's life needs in a properly human way.

The modern identity can be sketchily characterized, I believe, in terms of these three notions — liberty, nature, and efficacy. They characterize what I call phase one. But there is another version of this identity which emerges in the late eighteenth century, partly in reaction to phase one. It is what we see in various forms in Rousseau, in Romanticism, and to some degree also in certain religious movements — arguably, for instance, in Methodism. Its secular variant can perhaps be identified as an alternative reading of the modern notion of life according to nature. In phase one, the rejection of aristocratic ethics takes place in favour of an ideal of the pursuit of ordinary purposes under rational control. The purposes themselves are not endowed with special significance. What is quintessentially human is the rational control. But for the new counter-tradition, the rejection of supposed higher activities means rather that our ordinary purposes are endowed with higher significance. To fulfill the true impulse of nature in us is not just to meet a biological need but also to satisfy a higher aspiration. It is, at the same time, a moral fulfillment. From Rousseau on, the true "voice of nature" is at the same time both the impulse of biological need and an aspiration to what is experienced as moral self-realization.

From this perspective the modern notion of life according to nature involves a *fusion* of the biological and the moral instead of their hierarchical ordering as with traditional moralities, or their setting in a relation of rational control as in the first form of the modern identity. This has been a tremendously influential idea in the last two centuries of modern culture, well beyond the epoch of Rousseau or the Romantics. Indeed, I would argue that it is central to the Marxist aspiration to a condition in which individuals would be creative (in the artistic sense) in their productive life. Closing the gap between creativity and production is another variant of this fused perspective.

This view has been the basis for many of the criticisms of modern industrial society, even as the first phase has provided much of the justification for it. For the fused perspective is naturally highly critical of the primacy accorded to instrumental reason which must presuppose

that ends were given independently of reason and which tends to make us look at nature merely as a set of obstacles or instruments for our purposes. But however critical of the first phase, this second phase is recognizably a variant of the modern identity. It grows unquestionably out of the modern notion of the internalization of nature, and it develops its own conceptions of freedom as the following of autonomously generated purposes. However much they come in conflict, these two variants cannot wholly repudiate each other, and this fact is reflected in the complexity of their relations in modern culture.

This conception of life according to nature, in its two versions, has grown up with modern society. It has been embedded in the structures, practices, and institutions of this society — in our relations of production; in our application of technology to production on a massive scale; in our sexual relations and family forms; in our political institutions and practices. Some of these institutions and practices have been of crucial importance in sustaining this modern identity. This has generally been lost sight of because the modern identity itself (in phase one) has stressed individual autonomy to the point where the necessity of social mediation has been lost. The modern identity has too easily bred myths of social contract — and is still doing so today in a transposed way.[8]

But we can single out several features of modern society which have played a vital part in developing and sustaining our sense of ourselves as free agents. The first is equality. Clearly, the modern identity is incompatible with the status of serf or slave. However, the requirement is stronger than this. The identity of the free subject establishes a strong presumption in favour of equality. In contrast, hierarchical societies are justified on the old conception of a cosmic logos. Different groups are seen as expressing complementary principles. This has been the traditional justification of hierarchy everywhere — different classes and functions correspond to different links in the chain of being. Each is necessary for the other and for the whole, and the place of each relative to the others is thus natural, right, and according to the order of things. Once this view is swept aside, the basic justification of hierarchy disappears. All self-determining subjects are alike in this crucial respect. There is no further valid ground for hierarchy as an unquestionable, unchanging order of precedence.

Equality is thus one dimension of the free subject's relation to society. Another very obtrusive dimension is that one must be the subject of rights. As a free subject, one is owed respect for one's rights and has certain guaranteed freedoms. One must be able to choose and act, within limits, free from the arbitrary interference of others. The modern subject is an equal bearer of rights. This status is part of what sustains his identity.

Perhaps these two conditions express the basic minimum status of a modern subject in society without which identity must either founder or

the predicament is experienced as intolerable. But there have been other important features of this status which are worth mentioning. One of the most important faculties of the modern subject is the ability to effect one's purposes. This is what I have called "efficacy." Subjects without efficacy, unable to alter the world around them to their ends, would either be incapable of sustaining a modern identity or would be deeply humiliated in their identity. To a considerable degree, each of us can have a sense of efficacy in our own individual action — getting the means to live, providing for the family, acquiring goods, going about our business, etc. The very fact that we command so much private space is important for our sense of efficacy. For example, the ability a car gives us to move around on our own notoriously gives many people the sense of power, of efficacy, of being able to do things and to get to places on their own, and also has affinities with a sense of sexual potency. But important as private efficacy is, it is not possible to make it the whole, to give no thought at all to one's efficacy as a member of society, affecting its direction or having a part in the global efficacy that society possesses relative to nature.

Thus, along with the sense of having equal rights, there are two other important features of our status in society which have played a role in sustaining the modern identity. The first is our status as citizens, in terms of which we collectively determine the course of social events. The modern West has taken up this ancient tradition — that only citizens are full persons capable of acting and making a name for themselves in human memory — and made this an integral part of our sense of efficacy. The fact that we govern ourselves is an important part of our dignity as free subjects.

The second dimension is that of production. As producers, in the broadest sense, we belong to a whole interconnected society of labour and technology which has immense efficacy in transforming nature, and produces more astonishing wonders every day. Insofar as we belong to this society, work in it, take part in it, contribute to it, we have a share in this efficacy. We can think of it as partly ours, as a confirmation of ourselves. This is an important part of our sense of what we are in an advanced industrial society. It is also an important source of malaise and of a creeping sense of unavoidable inferiority among Third World elites.

The modern subject, therefore, is far from being an independent, atomic agent. One may be so relative to the local community, but one cannot be so relative to the whole society. On the contrary, an individual is sustained, on one hand, by the culture which elaborates and maintains the vocabulary of his or her self-understanding and, on the other, by the society in which one has a status commensurate with free subjectivity — a status in which we have isolated four dimensions of the equal bearer of rights who is producer and citizen. All of this underpins one's identity as a free individual who could not long survive a state of nature.

The set of practices by which the society defines my status as an equal bearer of rights, an economic agent, and a citizen — practices such as the operation of the legal system, the political system of voting and elections, the practices of negotiation and collective bargaining — all have embedded in them a conception of the agent and his/her relation to society which reflects the modern identity and its related visions of the good. The growth of this identity can help to explain why these practices have developed in the direction they have — why, for instance, voting and collective adversary negotiation take a bigger and bigger place in our societies. But it may also help to explain why we experience a growing malaise today.

It is perhaps not hard to see how our contemporary society satisfies the modern identity. The first phase of the modern identity stressed three things: autonomy, fulfillment of our nature, and efficacy, the last being a confirmation of our control, our productive power, and hence our freedom from things. Modern consumer society satisfies these three demands, or appears to. It affords privacy, treats us as autonomous beings who are efficacious as producers and citizens, and seems aimed toward providing us a sense of fulfillment which we determine along with those with whom we have knit ties of intimacy. It also appears to satisfy some of the variants of natural fulfillment of the second version — particularly the Romantic-expressive ones — since much of our private fulfillment in our relationships and in our artistic and expressive life is drawn from expressive models. In a sense we are Romantics in our private existence — our love lives are drawn by a notion of Romantic mutual discovery. We look for fulfillments in our hobbies and in our recreation, while the economic, legal, and political structures in which we coexist are largely justified instrumentally.

But then this compromise between phases one and two which at times seems so stable at other times seems racked with tension. Now is one of those times. We can also understand some of the background for this. We have seen how phase two of our ideal of natural fulfillment can be turned into a powerful critique of the first version. So we immediately understand the strictures which are flung at our political, economic, and legal structures — that they are merely instrumental, that they deny community, that they are exploitative of humans and nature, and so on. In this we can see how closely interwoven both the affirmative and critical stances are to our contemporary society, how much they are from the same roots and draw on the same sources. But perhaps we can also hope to gain some insight into the dialectic between the two, how the balance tips now one way, now another.

What the efficacious industrial consumer society has going for it is, presumably, that it delivers the goods. But if we examine this society in the light of the modern identity, we can see that this achievement is not just a matter of meeting quantitative targets. Rather we see that in

phase one efficacy is valued as the fruit and sign of rational control. Increasing production originally became a value in our civilization, against all the temptations to sloth and all the blandishments of traditional ethics, because in producing we came to see ourselves as not just meeting our needs but also as realizing our status as autonomous, rational agents. Continued accumulation bespoke a consistent, disciplined maintenance of the instrumental stance to things; it was a realization of our spiritual dimension. Far from being an obsession with things or an entrapment in them, as it might be stigmatized in a Platonic conception, it is an affirmation of our autonomy in that our purposes are not imposed on us by the supposed order of things. The instrumental stance toward nature is meant to be a spiritual declaration of independence from it.

From this we can understand the potential vulnerability of this kind of society and way of life. The ways and forms of its accumulation have to go on appearing as affirmations of freedom and efficacy. Should they be seen as degenerating into mere self-indulgence, then the society undergoes a crisis of confidence. This is a moral crisis but one which is also inescapably a political crisis. For what is impugned is the definition of the good actually embedded in our practices. Should we come to repudiate this, our allegiance to these practices and therefore our society itself are threatened. Thus it follows that our society has always been vulnerable to a certain moral critique. It is in trouble if it stands self-convicted, in the eyes of its members, of pure materialism — that is, of aiming purely at material enrichment. This may not be evident because of certain commonplaces of sociological comment such as that which alleges we are more hedonistic in outlook than our ancestors.[9] There are some ways in which this is true, but it does not make any less important the underlying sense that our dignity consists in our capacity to dominate, and not to be dominated by, things. For this is rooted in the modern identity. If more people are willing to accept a "permissive" society today, it is because they see that such self-indulgence can be combined with the free self-direction whereby we determine our own purpose and fulfillment. In this they lean partly on certain post-Romantic notions of emotional fulfillment. Those who find this combination hard to accept are precisely those who are most worried and rendered most anxious by the permissive society. Even the revolutionaries who call for a total rejection of the work discipline of the "Protestant ethic" can do so because of a conception of freedom which is allegedly the fruit of such total abandonment. That this is not realistic should not blind us to the kind of hope it is — one still very much in line with modern identity.

Indeed, one could argue that the more a society is founded on the modern ideal of life according to nature in its first version, the more it should be vulnerable to doubts about its moral standing and the more these doubts will be unsettling. It is not surprising to find that this kind of

worry is a very old one in the United States. Fred Somkin[10] has shown how the prosperity of the republic in the early nineteenth century raised soul searchings. On the one hand, it was just what one might expect — a proof of efficacy and, hence, of the spiritual excellence of America. On the other hand, it seemed to threaten vice, self-indulgence, a forgetfulness of republican virtue, and the demands of the spirit. As Somkin showed, it was essential for many Americans of the time to prove that prosperity was indeed a fruit of the spirit. The alternative was too unsettling to contemplate.

My claim is that we have not left behind the era when we could be shaken by this kind of doubt. It is not a relic of an earlier "puritan" era. In a transposed way, many of the features of the puritan era have been recreated in our contemporary variant of the modern identity, but only now the relevance of this has spread well beyond the United States and beyond the Anglo-Saxon world. Many societies have been made over so that their dominant practices, not only of economic and public life but also family life, reflect the modern identity. With this in mind, let us look at the features of contemporary society which tend to undermine our confidence in it as moderns.

The first of these is alienation at work. For a great many people, work is dull, monotonous, without meaning, and "soul-destroying," to use Schumacher's word.[11] Connected with this is the fact that, in work relations most individuals are far from the equal, autonomous subjects that they are at home or feel themselves to be as consumers. For the most part they stand very much as subordinates in command relations and have very little say about how they will work or in what conditions.

We enter here onto Marx's terrain. It is impossible to make a sensible critique of consumer society without invoking Marx. But there is one very important amendment which I want to make at the outset. I want to see the present formula of consumer society, with its mix of fulfillment and distortion, as a kind of historic compromise in which most of us have acquiesced. Orthodox Marxists, however, are committed to seeing it as an alienating (provided they want to use this word) formula imposed on the working masses by the ruling class through a mixture of force, mendacious persuasion, propaganda, control of information, divisive tactics, and so on. But this seems to me very wrong. The working class of early industrial society was certainly pitched into the proletarian role against its will, with terrible conditions of sweated labour and blighted townscape, and was held in place by force where it tried to resist. But in the one hundred fifty years since then, our societies have become mass democracies. Work conditions under capitalism have been profoundly modified, workers receive much greater remuneration; and have substantial control over conditions through trade unions and political power. It is difficult to argue that what remains unmodified in capitalism remains so because of force and fraud when so much else has been changed,

often against the better resistance of industrialists. Rather the compromise of affluent society must be seen to represent a tacit acquiescence — for the present anyway — in subordinate relations of labour on the part of the mass of workers. It consists in accepting alienated labour in return for consumer affluence. This compromise can seem to make sense in the lives of many people in part because this alienation can be represented as the necessary condition of affluence — by not demanding citizenship in the workplace the worker allows the provident engine of industry to run untrammeled and generate ever-growing prosperity. But the compromise can also be appealing because alienation is the obverse of non-involvement, the condition of complete mobility. To become a citizen at work would require some commitment to the enterprise and the devotion of some of the worker's life energies to this community and its plans and decisions. Otherwise the participation becomes a mere sham or the manipulated instrument of active minorities. But this devotion is a price that the aspiring consumer-citizen may be unwilling to pay — a limitation on the self-contained life.

The development of the affluent society, in which the majority can preside over a self-contained life in adequate private space, has thus gone along with a tacit reluctance to challenge the regime of alienated, subordinate labour. This is the first distortion. The fact that it is connived in by the majority, rather than brutally imposed on them, does not make it any more healthy.

A second compromise that must be accepted in contemporary society is lack of control over priorities. The sense of the common interest that underlies this compromise is that the machine must run on. But the machine that we find ourselves with in our societies is a capitalist one — that is, it consists mainly of enterprises whose institutional goals are to grow through the accumulation and re-investment of profit. They have become immensely effective in some ways in the application of technology to this end. But they cannot easily tolerate interference which attempts to set priorities for the production process. A modern capitalist economy can take, indeed requires, much intervention to keep it going — fiscal and monetary controls, subsidies of all sorts. But basic to its operation is the principle that firms must be masters of their own investment, able to invest where they can accumulate the greatest profits, foster the greatest over-all growth, maintain market share most effectively, or some such objective. The condition of the machine running effectively is that no one tries to control its priorities too closely. Thus we get the culture that moral critics object to — the fixation on brute quantitative growth unalloyed by judgments of priority. The justification for this is an image of the good life in which the acquisition of more and more consumer goods — what the system is good at producing — is seen as a central purpose of life.

Once again, most of us acquiesced in this historic compromise for similar mixed reasons as we did to alienated labour. On the one hand the non-imposition of priorities seemed to be the condition of the machine's running continuously; on the other, the resultant mode of life satisfied us as modern subjects in certain ways. First, the disinvolvement, our collective silence on priorities, seemed the condition of our freedom severally to "hang loose," to build our own private spaces, and live our own self-contained lives. Secondly, the definition of the good life as continuing escalation in living standards has an inescapable appeal to unregenerated persons, which we all are. This Plato well knew. Appetite tends to run on to infinity unless controlled by reason. The consumer society appeals to the lowest in us. But this is only a half-truth. It is also the case that the consumer society comes to us dressed up in a form that meshes with some of the aspirations of the modern subject. Thus we are invited as consumers to acquire and furnish a private space as the condition of an autonomous, self-contained, unmediated existence. We need this space so that we and our family can grow and be close to nature (a garden, a house in the country). Much advertising plays on this aspiration to private space — the ads always show happy families filling those interiors, driving away in those cars, surrounding those barbecues, etc. Of course, what is not justified is the continued increase. Why should the mobile private space we travel in become ever more rapid and high-powered? Why must labour-saving mechanization continue without stop, even up to electric toothbrushes and similar absurdities? This could never be justified intellectually, but somehow the implication is that more and more powerful accoutrements mean more of the fulfillment that they are meant to make possible. The commodities become "fetishized" — in a non-Marxist sense, endowed magically with the properties of the life they subserve, as though a faster car might actually make my family life more intense and harmonious.

There is a third reason why this compromise appeals to us that also aids in the fetishization of commodities. The runaway machine, doing prodigies of technological mastery of nature, satisfies our sense of collective efficacy. Members of this society can feel that participative efficacy as producers that I spoke of above. At the same time personal efficacy is a theme often played on fetishized commodities. That is what is appealing about high-powered cars and powerful engines generally. This is turn taps feelings of machismo and sexual potency. Advertisers are aware of this. Thus we acquiesce in the consumer goods standard of welfare. And we accept the suspension of our sense of priorities which then allows us to see as normal some truly absurd inversions, such as supersonic flight, until we break the thrall and look afresh and astonished at what we are doing.

These features of industrial society — the meaninglessness and sub-

ordination of work; the mindless lack of control of priorities; above all the fetishization of commodities — all represent a challenge to our image of ourselves as realized moderns determining our purposes out of ourselves, dominating and not being dominated by things. To the extent that we let these negative features impinge on our self-understanding, we cannot but feel a fading confidence, an unease, a suspicion that the continued sense of efficacy by which we sustain our self-image within the modern identity is a sham. If we see ourselves as the playthings of mindless impersonal forces, or worse, as the victims of a fascination with mere things (and this in the very practices which are supposed to sustain our identity and our conception of good), then we cannot but lose confidence in these practices. We are threatened with a kind of anomie in which we cease to believe in the norms governing our social life but have no alternative except to live by them. There is a crisis of allegiance to our society.

I believe this is part of what underlies our present malaise. In order to understand why it arises now, we have to see why these features have begun to press themselves on us in recent years. Our consumer society is in several ways the victim of its own success — this is the relative truth in the hypertrophy story — and these ways compound to put it in crisis.

First, the very prosperity of this society cannot but produce doubts and hesitations around its fetishization of commodities. When the society was still struggling to make decent housing and basic consumer durables widely available, the connection of all this effort and production with the goal of securing these goods for all was clear enough. But now that most have them, efforts to achieve refinements — the introduction of higher power, more speed, new models, frills, etc. — begin to look more and more disproportionate. It is harder to believe in all this as a serious social purpose.

Of course, a substantial minority has not yet entered the affluent society. Production for them would make sense. But the continuation of the consumer boom does not seem to be very effective in helping these "pockets of poverty." Wealth does not "trickle down" very adequately. This is partly because the continued boom goes with an upping of the ante — a whole range of new products which one has to get to be well-equipped at home, in the car, etc. Much of each year's growth is pre-empted by the already affluent who expect a rise in their standard of living. It is very hard to prise some off to redistribute to the poor. When growth slows down or stops, as we have seen in recent years, the resistance to redistribution increases. We have only to think of the negative attitude of nearly all Western electorates to government spending, and in particular of the widespread attack on the welfare state. Canada is in fact more moderate in this regard than some other Western democracies, such as Britain and the United States, but resistance to the politics of redistribution has also had its impact here.

At the same time, the replacement of lower by higher technology can even make things worse for poorer people. It ups the cost of being poor, so to speak. One way is by making certain consumer durables essential. For example, if a society moves from the bicycle to the automobile, then cities are laid out accordingly and the proximity of housing to jobs is planned on the assumption that people have cars, so it becomes necessary to have a car in order to hold a job, at least a good job, and to get around safely on city streets. Another way is by raising the cost of housing. House prices and rents are far higher in Toronto than in less developed communities such as Sydney, Nova Scotia. Growth can thus make the lot of poor people worse.

The increasingly evident fetishistic character of the consumer standard and its steady rise do not seem able to alleviate suffering where it counts or to improve what is crying out for improvement. All of this contributes to a loss of faith in the consumer standard, in the value of an indefinite increase in consumer goods and services, and in indiscriminate growth. This may affect older people less, but it visibly emerges in skepticism, questioning, and rejection by younger people.

Among the things which may be cast into doubt in this crisis is the value of family life itself. This is particularly critical, because the version of the modern identity predominant in our society is one which aims toward a mobile subject who loosens the ties of larger communities and finds himself on his own in the nuclear family. But this gives a tremendously heightened significance to the nuclear family, which is now the main locus of strong, lasting, defining relations, and it has given family life and the emotions of family love a uniquely important place in the modern conception of natural fulfillment, beginning in the eighteenth century.

For this to be challenged is thus critical for the identity which has been dominant in our society. But it is under threat not only because it is associated with a (to some) discredited consumer way of life. It is also threatened by the very scope of the development of the modern identity. In effect, if the business of life is to find my authentic fulfillment as an individual, and my associations should be relativized to this end, in principle there seems to be no reason why this relativization should stop at the boundary of the family. If my development or even my discovery of self should be incompatible with a long-standing association, then it will come to be felt as a prison rather than a locus of identity. This places marriage under great strain, further intensified because the same aspiration to self-development and self-fulfillment leads women today to challenge the distribution of roles and emotional give-and-take of the traditional family.

Population concentration and mobility are other developments that are beginning to have social consequences which produce tension in our society. Beyond a certain threshold, the concentration of people in large

cities begins to have negative consequences. Unless cities are well-designed with multiple centres, the ordinary business of daily life becomes more time-consuming and stressful, and relations with other people become more full of tension. In addition, large cities cost more per capita to run. As Hugh Stretton puts it, "They generate more travel, congestion and local pollution per head. They force wasteful rates of demolition and rebuilding on their inner parts. Intense competition for central and accessible locations makes it harder to solve problems of density, shares of space and — above all — land prices."[12] So concentration begins to raise the overhead costs of social existence.

Concentration and mobility do this in other ways as well. The bleeding of local communities for the megalopolis forces a write-off of the excess, unused stock of housing and public capital in declining communities. The decline of the extended family means that society must pick up the pieces for the old, the abandoned, the chronically sick, and so on. In all these ways, concentrated and mobile life virtually forces an expansion of the public sector. The prevailing doctrines about the efficiency of concentration and giant organizations ensure that the state will compound the error by over-bureaucratizing the public sector.

But the enlarged public sector, both as cost and as bureaucracy, creates great malaise. As a cost, it forces higher taxes. But these are resisted by citizens, as we have come more and more to see ourselves as independent individuals. The link between high mobility — that is, the pattern of "hanging loose" from all partial communities — and the higher overheads of society is generally quite invisible to us. Ironically, it is just this pattern of hanging loose that makes us less capable of seeing the social costs of our way of life, and makes us look on the public sector as a barely necessary evil. So as we increase the need for public sector activity, we decrease our own readiness to assume the burden. This thoroughly irrational state of affairs leads to all kinds of tensions and eruptions of which the international surge of an aggressive "New Right" — advocating the impossible dream of a return to the negative state — is the most important consequence politically. What further justifies the revolt is the over-bureaucratization of the public sector. This not only makes it unnecessarily costly, but also less responsive to the public. Consequently, the process whereby we meet our needs through public mechanisms becomes even less transparent and this lack of transparency increases the alienation.

What is even worse is that the movement toward concentration and the break-up of partial communities is not entirely voluntary. Once the process goes a certain way, it acquires an élan which is sometimes hard to resist. One may want to stay in a smaller farming community, but may find it impossible to function there as the services move out and concentrate in larger centres, in response to earlier movements as well as general concentration. So more and more people follow the trend, and

more services move — schools, suppliers, outlets, etc. And then more people move, and so on.

Thus three "successes," or hypertrophies, of the consumer society are bringing about increasing malaise: the very success of the growth of consumption tends to discredit the importance attached to material gains; the increasing stress on the goal of self-fulfillment tends to fragment the family, which was previously its privileged locus; and the increased concentration and mobility of our society alienates us from government. These strains also undermine that sense of our status within the larger society which is supportive of our identity. Unresponsive bureaucracies make us less sanguine, or frankly cynical, about citizenship; sometimes we even fear for our rights. The discredit of what I have termed the consumer standard — pursuing an indefinite increase in consumer goods and services — makes us feel less positive about the efficacy of the whole society in which we have a part as labourers.

But the hypertrophy of this sense of collective efficacy is itself a fourth cause of malaise. As our awareness of belonging to an organized, technological, productive society grew, so did the confidence that we could solve any problem, given the will and the concentration of resources. This sense of bullish confidence probably reached its high point in the postwar period during the Kennedy era in the United States, when intelligence, good will, and organizing science were set to tackle the age-old problems of poverty, inequality, and racial alienation through programs of the New Frontier. The sense of new creation was heightened by the symbolism of an attractive young man at the head of the enterprise. Since then, however, things have gone sour. We are made more and more aware that some problems, including the most grievous social ones like intractable poverty and racial division, resist even immense resources. They are more than problems; they are human dilemmas. The sense of our efficacy has taken a grievous blow.

In sum, by this combined effect we have been led partly to lose confidence in our definitions of the good life, partly to feel alienated from and even cynical about our governmental institutions, partly to feel uncertain and tense about our social relations and even about our family life, partly to feel unsupported by the larger society in our identity as modern subjects.

All of this is likely to make for strains, tensions, and mutual aggressiveness. As it happens, a bout of social conflict was probably coming our way after the halcyon decades of steady consumer growth in the earlier postwar period. This was partly because of the growth of the public sector and its consequent burden on the productive sector and on taxpayers. But it is also because we live in a society which has become more equal and "classless" in style and spirit, in which workers and the less well-off have acquired greater bargaining muscle through trade unions, in which the general standard of education has risen, and in

which there is a prevailing belief that government can do anything, so that age-old poverty, or underdevelopment, or inequality, formerly seen as in the order of things, is now removable. Such a society will sooner or later make demands on government and the economy which by their very nature and number will be incompatible.

To face this, a society needs an even higher degree of cohesion, self-confidence, and mechanisms of effective self-management. Instead we confront this period with lower confidence, more inner tensions, and greater alienation from our institutions than before. The result has been a scramble for income and advantage in which powerful forces struggle to compete and maintain their position, but at the expense of the unorganized through inflation. We are being forced to return to more orderly consensus through the disastrous experience of inflation. But it is a slow and reluctant business and leaves many burning resentments and senses of grievance without vent, because we are being forced to decide about things that had previously been allowed to happen without planning, such as the distribution of income. We are being forced to take a greater hand in the collective direction of our economy. But agreement on this, hard enough at any time, is possible only with some sense of purpose. We would have found it much easier to agree on a wages policy in the 1950s. That, however, is exactly why we did not need one then. Because of our uncertain purpose and our faltering confidence in the overriding value of the society we are evolving through our economic efforts, the disciplines imposed by any incomes policy will often be felt as an imposition. And the angry reaction of one group, tearing through the limits, will stimulate others to do the same. High wage claims in one sector prompt similar claims in others. Taxpayers' revolts increase the bitterness of the poor. Inflation is the visible sign of our disarray and is itself an object of anxiety. It compounds our self doubt.

To sum up the argument, the modern identity and the accompanying moral visions give the background to both the affirmative and critical stances to our society. They show them to be closely related. But they also help us understand the balance between the two. In fact the affirmative view does not just praise endless accumulation. It must also be seen as an affirmation of efficacy, of productive power, which in turn is a sign of autonomy and of our domination over things. Thus the affirmative view is vulnerable to whatever presses on us an understanding of the extent to which we are not in fact autonomous, are not dominating, but are enslaved to things. The word "fetish" is redolent of this. It connects with the earlier rejection of idolatry and the modern's sense of superiority over the primitive, of having won freedom from an obsession in things, from an immersion in them, and from a shaping of his/her life on their model.

Now in fact we live in a society whose practices embody a certain notion of identity and the human good. This notion must be ours or we

cannot give it our allegiance; we are alienated from it. At the same time we rely to a great extent on these practices to maintain our sense of identity. If these practices which supposedly embody the modern identity can be shown to lead in fact to a failure to achieve it, as noted in the paragraph above, then our allegiance to them is shaken. Perhaps our faith in the conception of the modern identity is shaken as well. We turn to other models.

In the balance between affirmative and negative stances to our society, the affirmative relies largely on the first version of life according to nature, as this has become embedded in the political and economic, largely market-atomistic practices of our society. If we become convinced that we are dominated by mindless forces or enslaved to commodities which we fetishize, then we will withdraw allegiance from these practices and obviously from the first version, or at least this way of expressing the first version institutionally.

Participation and Rights

Does all this mean that the advanced, industrial-technological, capitalist, liberal society is on a course to self-destruction? Is some version of the hypertrophy story right after all?

Something like this might do as a first approximation. But if the above analysis is at all valid, this could turn out to be a dangerous oversimplification. The modern identity of the citizen producer who is a free and equal bearer of rights doesn't simply destroy itself when it is pushed beyond a certain point. A more accurate way of putting it would be to say that some sides of this identity threaten through hypertrophy to frustrate or undermine others, and hence endanger the whole. Part of the foregoing could be sketchily summarized by saying that our pursuit of efficacy as producers has come to threaten our efficacy as citizens. Another part could be explained by saying that freedom as mobility has begun to destroy the very conditions, in family and citizen community, of the identity of freedom.

But perhaps this catches the main point of the "too much" view. Of course, the modern identity is complex and many-sided. Its nemesis is that pushed to a certain point, some of its features must destroy the others. It cannot but self-destruct. But here again, reality is more complex. No one can deny that the modern identity is open to certain kinds of destructive, one-sided hypertrophy. That is to say, a civilization animated by this identity will always experience these temptations. For instance, it will always be tempting for us to go for a one-sided understanding of freedom as residing just in the experience of breaking away, of being on our own, a kind of social and historical atomism. "J'ai eu raison dans tous mes dédains: puisque je m'évade," as Rimbaud expresses it.[13] But to think of this as *the* drive of the modern identity, which

thus has to be tempered in order to avoid self destruction, is to fail to understand what has been going on over the last centuries — or so I have been arguing. It fails to see that the aspiration to family life, and also to citizen participation, are just as much part of the modern identity, that they grow from the same roots as and are inextricably connected with the drive to modern freedom. What we need in order to overcome the one-sidedness of atomistic freedom lies not in our past but in other facets of the modern identity itself.

This also puts in question that sense of the quasi-inevitability of breakdown which the "too much" story tends to breed, at least the sense that our only hope lies in slowing or moderating the movement to freedom, equality, control, etc. This is based on a misapprehension. The forms of modernity are multiple. There is more than one way of realizing the constellation of aspirations which make up the modern identity. There is even more than one successful way, as well as countless self-destructive ones, but the latter are not to be considered fuller realizations of modernity than the former.

Seen in this way, the principal challenge to contemporary Western liberal societies like our own seems to concern their nature as citizen republics. More broadly, we might say that the "community" dimension of modern life, both family and state, are under threat in face of "atomist" perspectives. In the remainder of this paper, I concentrate on the political dimension.

What emerges from the foregoing is that the contemporary development of the society of growth-concentration-mobility threatens citizen self-rule. Concentration and mobility increase the burden on government. At the same time, the felt need for coordination and more and more massive resources tends to concentrate the functions of government at the centre. As a consequence the functions of government tend to be both more bureaucratically rigid and more distant from the citizenry. Parallel to this development and aggravating it are the mobility and the decline of local communities, which undermine citizen identification and strengthen atomistic self-understanding. The result is a paradoxical and very threatening process in which the burdens of the public sector increase while the willingness of citizens to assume them steadily decreases. A sense of citizen impotence feeds the atomistic safeguarding of mobility, which in turn aggravates the impotence.

This is the truth behind the "ungovernability" or overload theory described in the first section, as well as behind the sense of threat in ever-increasing atomization and continuous unchecked growth. Contemplating it can easily lead to a fatalistic sense of the inevitability of breakdown, because concentration, growth and mobility seem so hard to stop. For instance, the demands of modern economic management appear to point irrevocably in this direction. As Huntington puts it, "An increasingly sophisticated economy and active involvement in world

affairs seem likely to create stronger needs for hierarchy, bureaucracy, centralization of power, expertise, big government specifically, and big organizations generally."[14] Although he is describing the American case here, it is hard to believe that we won't experience similar pressures in Canada.

But our degrees of freedom may not be so reduced. Not only may it be possible to moderate the trends to growth and concentration, but there may be more than one way of reacting to them even where they are unstoppable, as we shall see.

Of course, this is not to deny that the development I have been describing is potentially fatal for a modern society. Logically, one could imagine a stable condition in which citizens settled down to accept a semi-permanent condition of bureaucratic tutelage, tempered by the residual power available every few years to "throw the rascals out." Of course, in a highly bureaucratized government changing the top political team doesn't alter that much, but at least it offers a sort of catharsis to the public. This condition would approach that described in the Schumpeterian elite theories of democracy. What would be sacrificed definitively would be the aspiration to some kind of participatory self rule. Some people think that the United States, with its startling low level of voter participation, is settling into this pattern.

In fact, however, this condition cannot be stable. It is too obviously a truncated way of life relative to the full demands of the modern identity. Any form of tutelage must be unacceptable in the end. A Western society which proceeds too far down this road incurs the risk of a "legitimation crisis." The instructive comparison here is with Soviet society, which for a variety of reasons has been kept apart from the mainstream development of Western civil society. All the signs are that bureaucratic tutelage is considered a normal form of rule in the U.S.S.R. The contrast is striking if one moves over the border into Poland, a society which participated in early modern times in the Western republican tradition. Here the marriage of national identity with forms of self rule is a natural one, as the Solidarity movement strikingly illustrated.

Whether the Soviet Union can continue stable on this pattern of tutelage is, of course, an open question. Like all modern industrial societies, its success requires a high degree of disciplined, workmanlike and innovative productive labour. It is estimated now that the slowdown in the rate of growth in the U.S.S.R. in recent years is a sign that the gains of brute mechanization (i.e., of providing workers with machines) are beginning to decline; that in the current situation of labour shortage, gains could only come from increased productivity through better and more skilled use of plant. Whether Soviet society can bring this off without motivating their workforce in a new way, without developing something more of the Western-style modern identity with its rejection of tutelage, are still big and open questions.

In any case, in Western society a condition of tutelage is unacceptable because it conflicts with the dignity of a free agent as this is understood in the modern identity. It gives no place to citizen efficacy. So we can understand the strength of the reactions to bureaucratic distance and rigidity in the West.

One of the most important reactions has been the politics of the New Right,[15] which has come to power in both Britain and the United States and is gaining ground elsewhere. This seeks in a sense to reduce the overload on government by transferring a number of economic and even social matters back to the supposedly self-regulating mechanisms of the market. This is meant not only to allow government to work effectively again, thus restoring citizen efficacy, but also to restore to everyone a greater sense of personal efficacy in those matters, which are thus reprivatized. Private enterprise will supposedly give us back a sense of individual achievement.

I indicated above why I believe that this kind of politics is largely based on an illusion. The overload on government, as well as the increasing alienation from it, comes from the way of life generated by growth, concentration and mobility — trends which the politics of free enterprise can only accelerate. In spite of all the aggressive rhetoric, no government of the New Right will really be able to undo the welfare state, because it will be in effect increasing the needs which "welfare" measures are designed to meet. Bigger cities, less controlled suburban sprawl, a short-sighted reduction in anti-pollution measures, the erosion of local communities, all these will increase the long-term costs which will inevitably devolve on the public sector.

Less powerful but more coherent is the politics of the ecological Left. This involves coming to grips with the trends to growth, concentration and mobility in two related ways. The first consists in our taking a more selective attitude toward growth. The second attempts to decentralize power and decisions. Like the politics of the New Right, the aim is to decrease the overload on centralized, bureaucratized governments. Unlike it, the beneficiaries of the transfer are not individuals in a regime of free enterprise, but smaller, more accessible public authorities. The aim is to restore citizen efficacy both by reducing the weight of distant, insensitive power, and by making the link between public function and citizen input more palpable, as it can be in smaller or more tightly-knit political communities. Of course, this kind of politics presupposes that such smaller communities already exist, that they already constitute poles of identification for citizens. Just having a good plan on paper to hand over decisions to hitherto subordinate authorities will accomplish little if these don't correspond to living communities. The politics of the ecological Left may not be practicable everywhere.

Both the solutions just described, Right and Left, involve combatting bureaucratization, and the second comes to grips with the interlocking

trends to growth, concentration and mobility. But other responses are available to the crisis of overload and alienation, which involve not fighting them but rather living with them. Once again the contemporary American experience may offer a model.

A striking feature of American political culture compared to ours is their litigiousness. Americans tend to go to the courts to get their rights far more than we and most other Western societies do. They not only do this in suits for private damages — think of the virtual epidemic of malpractice suits which have had an important impact on the practice and economics of medicine in the United States — they also settle important issues of public policy in court. The most spectacular case in recent years was the celebrated decision in *Brown vs. the Board of Education* (1954) which outlawed racially segregated schooling.

One can argue that the emphasis on the courts as instruments of political change has increased in the United States over recent decades. And this can perhaps be related to the increasing centralization and bureaucratization of American political life, which has been proceeding for at least the last half-century, and in some respects longer.[16] It is not just that the courts as an instrument of change provide an alternative to the legislative process, and so the more unwieldy that process is, the more people will have recourse to the courts. Something more subtle is at work which has to do with understandings of dignity. This is that the sense of the dignity of the free agent has been identified more with the bearer of rights than with the citizen participator. There are alternative models of society here which are worth bringing out clearly in ideal types, even at the risk of some over-simplification.

In one model, the dignity of the free individual resides in the fact that he has rights which he can make efficacious if necessary even against the process of collective decision-making of the society, against the majority will, or the prevailing consensus. The rights he enjoys can be seen as "trumps," in Ronald Dworkin's memorable image;[17] that is, by appeal to them he can override what normally is decisive — the duly-determined outcome of majority will through the legislative process. In the other model, his freedom and efficacy reside in his ability to participate in the process of majority decision-making, in having a recognized voice in establishing the "general will."

Obviously, a lot more needs to be said to make this distinction clear. In what follows, I refer for convenience simply to the "rights" model and the "participatory" model, respectively. These names may give rise to misunderstandings, which I'd like to try to head off by some initial explanations.

The first point to stress is that the participatory society doesn't exclude the entrenching and security of rights. All modern Western societies are founded in some degree on the recognition of rights, and these are open to some degree to judicial defense and retrieval. This was

true of Canada before the Constitutional Act of 1982, and even before the Bill of Rights of 1960. Legislation and executive action infringing basic rights was upset in the Supreme Court in the Roncarelli case, for instance. It could even be plausibly argued that some recognition of a framework of rights is an essential part of the liberal democratic package in contemporary Western societies. There have to be acknowledged *rights* to vote, to assemble, to organize parties, etc. Where these are being denied, they have to be recoverable in the courts, as, for example, the voting rights of Southern blacks in the United States. Moreover, the rights element in our political cultures has been greatly strengthened in recent decades, thanks to an international movement, reflected in the 1946 United Nations Universal Declaration of Human Rights, the constitutions of the ex-colonial states, the increasing saliency of rights tribunals, and the like.

Virtually every polity today claims to be a rights society, and all liberal democratic ones effectively are. But this uniformity leaves room for a number of important issues. One concerns the objects of rights claims. Should they be confined to the centuries-old schedule of negative service rights, whereby individuals are protected in their life, freedoms, inviolability, etc.? Or should we try to entrench other goods — equality, the social promotion of disadvantaged groups, economic security, and the like? The postwar climate has seen a definite move towards extension. Some have welcomed this as a valid expansion of the traditional Western culture of rights. Others have seen a dangerous "inflation," a dangerous distortion of the concept into domains where it is unfitted, which threatens to dislocate the political process.[18]

The distinction I want to draw is closely related to, without collapsing into, this latter issue. It is naturally a feature of what I call rights model societies that they tend to try to attain certain ends — such as the social promotion of disadvantaged groups, or the ensuring of equality — by court action based on rights claims, rather than through mobilizing a majority for legislative action. In the United States, for instance, courts impose electoral redistribution schemes on state governments in the name of equality of citizens and impose detailed plans of affirmative action on hiring institutions in the name of racial and sexual equality. Such decisions in many other countries would have to be made by legislatures.

I am trying to look through these differences about the scope and content of judicially recoverable rights to the underlying understandings of what the citizen's dignity consists in. What I call a rights model society is very likely one where broad social goals are pursued through the courts. But the crucial feature I want to designate is a more elusive one, touching the self-understanding of members' political identity: what are the capacities which mainly define the dignity of a free individual? In this

kind of society it resides crucially in the ability to secure one's rights, even against the political will of the majority.

It should be obvious therefore that a participatory society in this sense is not one where rights pleas have no place (there are no such societies in the modern democratic world). Nor is it even *defined* as one where these pleas are given relatively narrow scope, although it is overwhelmingly likely that it will tend in this direction. That is because what defines this model is that the sense of citizen dignity is based on having a voice in deciding the common laws by which members live. This naturally presupposes that the institutions and practices by which the whole corpus of common laws are established, as well as this corpus itself, enjoy a profound respect in the society, so that our identity is defined in relation to them and dignity is conferred by taking part in them. Special importance attaches to the fact that we as a whole, or community, decide about ourselves as a whole community.[19]

Thus the participatory model clearly presupposes a strong sense of community identity. I cannot identify my efficacy with my participation in common decisions unless our common lot, the fate of the community, matters a lot to me. By contrast, the first, or rights, model goes very well with a more atomist consciousness, where I understand my dignity as that of an individual bearer of rights. Indeed — and here the tension surfaces between the two — I cannot be too willing to trump the collective decision in the name of individual rights if I haven't already moved some distance from the community which makes these decisions. The culture of rights pushed to a certain point, the habit of circumventing majority decision through court judgments, both presupposes and further entrenches taking a distance from community decision-making.[20]

This may cast some light on the growth in political litigation in recent decades in America. Of course, the habit of litigation, and the elements of atomist consciousness which go along with it, are deeply rooted in American history. But it may be that the recent increase in reliance on the courts is both product and then also once again cause of the growing bureaucratic distance of American politics, and the consequent citizen alienation which the declining voting figures seem to reflect.[21]

By contrast, Canada has been more identified with the participatory model. By this I do not mean to imply that Canada has an advanced or model democracy or has something to teach the world in republican virtue. I mean only that over the postwar decades, as the sense of citizen dignity has developed in all modern societies, it has tended in Canada to take the participatory rather than the rights forms. This is not to say that it has developed as much as it might or as much as it ought. It can be argued that there is still too much deference in Canadian politics. Indeed, it has been argued that crucial elements of the participatory model in our country, for instance, our legislative institutions and the

widespread respect for established law, have their origins in the hierarchical and deferential past of "British North America," in contrast to the republic to the south. That is as may be. This brief paper does not argue the interesting question of origins or take a stand on the Hartz-Horowitz thesis about the "Tory" origins of English Canada.[22]

Whether the origins are in such long-standing traditions of political culture or in the relative weakness and vulnerability of Canadian regional societies, the undoubted consequence has been a greater respect for government and a more welcome acceptance of government initiative and action than south of the border, from the Canadian Pacific Railway in the nineteenth century through to Medicare and the National Energy Policy. Whatever the causes, the Canadian frontier was policed by the Mounties[23] rather than the free-lance figures dramatized in our day by John Wayne or Ronald Reagan (not only, alas, in his earlier profession). All this cannot be without effect on our sense of citizen dignity and has turned it without doubt toward the participatory model. Whether this has also restrained or even crippled it is another question, which I will not go into here, except to say that claims to this effect seem to me at best vastly exaggerated. The Canadians of today are not an excessively deferential people.

Does the fact that we have just taken on for the first time an entrenched bill of rights, and hence immensely increased the scope of judicial decision (potentially at least), mean that we are deserting this tradition for something closer to the American model? Only time will tell, but I doubt it. Or rather, an entrenched bill by itself couldn't lead to the massive transfer of our understanding of the dignity of free agency from the participatory to the rights mode, which would align us with current American practice.

A politics of rights can combine easily with another feature which has been in evidence in the United States, and elsewhere in recent years — the growth of single-issue politics. What both these trends have in common is that they are less concerned with the overall set of decisions about the common affairs of society, which have to be arrived at and made minimally consistent, than they are about the outcome of the issue in question. Both combine all too easily with a disinterest in, even contempt for, the institutions and practices through which these decisions are hammered out and rendered consistent — e.g., parties and parliaments. Participatory politics, on the other hand, presupposes that these institutions and practices are valued and cherished as the locus of the citizen life. In contrast to this, the slogan for much contemporary politics in America could be the motto of that dynasty which the colonies had to rebel against to found their Republic: "Dieu et mon droit."

Nevertheless, the developments I described above may suggest that a transfer of this kind is inevitable — either because it will ineluctably come to pass or because it is our best hope. If modern society is heading

for irreversible bureaucratization and centralization, and if this is inescapably accompanied by an increasing atomization, then maybe the best way to rescue and give expression to the dignity of free agents is a greater and greater emphasis on the defense of rights through court action. Seen in this perspective, the new Constitution of 1981 comes at exactly the right moment to provide the legal framework for this new departure. It will provide something that has been missing in Canadian history hitherto, and will make up for what must be seen as our incredible backwardness in exploiting the penalties of redress through the courts.[24]

Before we can say whether this kind of transfer is either inevitable or advisable, what we need to do is understand something more about the bases of the participatory model in Canadian society. The condition for a successful participatory model is a strong identification with the fate of the community. In the long history of analysis and discussion of the bases of republican self-rule in our civilization, from Greek times through the Romans to those moderns who took up this tradition, this sense of community identification has been variously described —sometimes as "patriotism," sometimes as "virtue" (Montesquieu's word), sometimes in terms of its opposite, "corruption" (Machiavelli's description). It is the elusive factor which is thought to make a participatory regime viable while its absence beyond a certain point makes despotism inevitable. The reasoning behind this belief in its many forms is that only such a strong identification with the society could move citizens to assume willingly the heavier burdens of a free regime,[25] while the failure of this identification would require that even the lesser burdens of a despotism be imposed by force.

This identification can perhaps be described in this way: it exists where the common form of life is seen as a supremely important good, so that its continuance and flourishing matters to the citizens for its own sake and not just instrumentally to their several individual goods or as the sum total of these individual goods. The common life has a status of this kind when it is a crucial element in the members' identity, in the modern, Eriksonian sense of the term; hence my use of "identification."

But it is useful to separate analytically two elements in this common identity. First, the common life must be one partly defined in terms of the political formula of participation itself. The subjects of a divinely appointed despot may identify as such, and be moved to feats of self-sacrificial dedication on the battlefield, but this has nothing to do with the maintenance of a republican regime. That is why, in the literature and rhetoric of republican regimes, the common life which is the focus of identity is so often described as "the laws."[26] There is an inner connection between the common focus and the dignity which accompanies citizenship: the institutions and practices of equal participation are the common condition of the dignity of each, while this dignity in turn is defined in terms of contribution to the health and survival of these laws.

The second analytically separable aspect of a common identity is that these laws must in fact serve to unite a specific community. It is not sufficient, in other words, that one simply live in a society where participatory institutions and practices prevail, even if one values them. Unless there is a common sense of a determinate community whose members sense a bond between them from this common allegiance, an identification with the *common good* cannot arise.

Of course, in ancient poleis and republics, these two conditions went naturally together. It seems artificial to separate them. In modern liberal society, however, they can come apart. Contemporary societies can be strongly bonded by a sense of common life, where this is not defined in terms of the institutions of liberal participation or sometimes not even in terms of any political institutions. Most spectacularly, they can be bound together by a national or ethnic identification. On the other hand, people can live together under a common liberal democratic regime, and prize this, without feeling a strong bond of community with the other members as members, but perhaps with a stronger identification with some subset of its citizens or perhaps some supra-national community. Living in Canada, of course, makes one acutely aware of the various ways in which institutional and community allegiance can be out of phase with each other.

Rather schematically, one can say that the two important poles of common identification in the Western liberal world are participatory institutions on one hand, and ethnic or national appartenance on the other, where national identity is frequently defined in terms of language — at least in European-derived cultures. How these two relate in any given society matters a great deal to the form, the health and ultimately to the survival of democratic regimes.

In some sense, the happiest relationship is that found in Britain or the Netherlands, where participatory institutions are thought to be an integral part of the national culture. A kind of happy chauvinism can have free reign here, where representative government can be seen as a national invention imitated in more or less botched form by lesser breeds of foreigners. At the other extreme are countries like prewar Spain and Italy, where powerful political forces espoused a definition of the national culture which vigorously excluded democratic institutions. France throughout the post-Revolutionary period up to the aftermath of World War II, suffered from a lack of national consensus on the basic political formula. For important strands of opposition during the Third Republic, the true French national identity demanded the overthrow of republican institutions. Another kind of historic lack of fit is evident in the Federal Republic of Germany today. There is a strong attachment to democratic institutions, but this sits so uneasily athwart significant strands of modern German history that the attachment to democracy goes along with a deliberate distancing from national sentiment and

affirmation, which is at once the wonder of foreigners and a cause of continuing anxiety lest it suddenly give way to the opposite extreme.

Something like this division with a national culture over the identification with democratic institutions exists in the past of French Canada as well. As with the European societies of Latin culture, which strongly influenced us, this rejection of democracy was deeply discredited by the experience of Fascism and World War II, and the welding of liberal democracy and national identification is as complete in Quebec today as in any other Western society.

In contrast to Latin cultures, where national identity and liberal representative institutions had to be brought to fusion, in some cases through struggle and civil war, and to the British case, where these institutions are seen as a feature of the national identity, the United States seems to offer the example of a nation which owes its identity to the common acceptance of a political formula. This produces something analogous to the British case — a strong sense of national identity inextricably defined in terms of certain political institutions, known roughly as "the American way of life." But the fact that the political formula has been the original pole of allegiance, rather than the institutions, has made a big difference. It has given American liberalism that militant quality which has produced the best and the worst in U.S. history — both the ability to integrate millions of new citizens from other, non-Anglo-Saxon cultures and to undertake great reforms like those achieved by the Civil Rights movements in our time and also the propensity to prosecute deviants for "unamerican activities." This militancy has had important effects on American foreign policy as well, very notably but not exclusively in the rhetoric of moral universal which informs it. No one can deny that this difference in rhetorical self-perception has had important consequences for world history, all the way from Woodrow Wilson's Fourteen Points to Reagan's ravings about the "evil empire."

The bi-polarity of focus — institutional and national — exists everywhere in the modern advanced world where any form of common life is recognized as a pole of political identity. This duality seems to be ineradicable; or if one pole were to go, it would be the institutional. Perhaps certain Latin American societies, e.g., Argentina, offer examples of unipolarity, where the only possible focus of common identity is national favour, mobilized at such moments as the World Cup or the Malvinas War. But these are not happy models, and they seem for the moment fortunately distant from us.[27]

I hope that the above discussion has set the terms in which we can come to grips with the historic conditions for the participatory model in Canada. The obvious dilemma it poses for us is that the two poles of identity cannot now and perhaps ever be simply superimposed. It is not even that we have national identity which does not line up with our

institutional allegiances, as in earlier Latin cultures. Within a general consensus about democratic liberal institutions, we do not have, and cannot develop a single national identity.

The biggest single reason for this is the existence of Quebec. Quebec has a strong sense of national identity, but of a kind which the majority of English-speaking North Americans find unfamiliar — connected to a national language, and moreover one which is under threat. Because of this threat, the preservation and health of this language will always be one of the major national goals of French-speaking Canadians. This involves the continual development of the language as a medium of expression for the full gamut of activities which define modern civilization — politics, technology, art, economic management, communications media, and so on.[28]

By contrast, in the rest of Canada language cannot be understood in these terms and it seems strange that it should be a central object of policy as it inevitably is for Quebeckers. Since English is virtually the world hegemonic language today, it is difficult for those who speak it even to understand what it could be to live under linguistic threat. Rather than seeing language as the indispensable basis of self-expression and self-realization, anglophone North Americans tend to see it as an unproblematic medium of communication. This attitude is strengthened by the fact that both English Canada and the United States are immigrant societies which have received and integrated into the dominant culture countless immigrants from a host of different cultures and languages of origin. The experience of being an assimilating culture tends to change the status of the dominant language. By the very nature of things, it is not everyone's original home language or language of cultural memory, prayer, or continuing ethnic identity. It is these things for many, of course, but the only status it has for *everyone* is that of the publicly established medium of communication. The idea that *any* language could be recognized as the publicly supported medium of self-*expression* seems in this context bizarre, if not unjust.

To make the misunderstanding complete, until recently French Canada has not had the experience of assimilating masses of immigrants, so the distinction between ethnic and public language has yet to be forced into consciousness in Quebec. Thus we have the makings of the kind of cross-purposes and deeply felt mutual misunderstanding which recent events in Manitoba once more brought to the fore. What is seen by one group as the indispensable minimum of public recognition essential to their survival as a linguistic community, is seen by others as the imposition of one community's language on all the rest. In fact, the status demanded for the French language cannot fit into the categories of an immigrant culture as this is understood in North America, because it clearly cannot be the common medium and francophones are not content to have it remain merely a language of ethnic identity. That French Canadians should fight so strongly

against the kind of marginalization of the language that the latter status entails seems unwarranted and unjust according to the ground rules of an immigrant society as hitherto understood.

Up to this day there has never been a commonly understood formula of national identity in Canada. Various political arrangements have been negotiated, and something like common understanding of what these involve has existed among those political elites who negotiated them, but no common formula has ever been accepted across Canada by the population at large. In French Canada, the traditional interpretation of the Confederation was as a pact between "two nations." In this understanding, Canada was a bi-national state and allegiance to the whole was via allegiance to the part — one adhered to the larger entity because this was the political home which the nation had chosen for itself.[29] The rest of Canada is seen in this view as making up another "nation," which would similarly be the primary focus of allegiance for its members and the channel through which they belonged to the larger whole. But that has never been the way the rest of Canada sees the country. Certain deeply rooted historical communities, perhaps only Newfoundland today, may see themselves as Canadians only via the adherence of their community to the federal union, but by and large non-French Canadians have a sense of belonging to Canada which is on the same level if not more fundamental than their sense of belonging to a regional or ethnic society. "Unhyphenated" Canadianism is an allegiance beyond and unconditioned by membership in any partial community. Anything less than this seems a formula for break-up in an immigrant society.

This is our great historic misunderstanding, which has shaped Canadian politics for the last century. Each side would require the other to be something which it is not in order to fit the formula within which it can itself be comfortable. Ideally for French Canadians, "English" Canada should be a nation, in the sense of a constituent entity of a bi-national state. For the rest of Canada, the problem would be solved if only French Canadians would see their French identity as another ethnic identity, enriching but not undercutting an unconditional Canadian allegiance.

This way of putting it is over-simplified, and understates the progress which has been made on both sides in recent decades toward understanding the other's viewpoint. But a lot yet remains of our historic misunderstanding, and the day when we come to a common definition of the Canadian union which is complex enough to encompass these two quite different perspectives is still a long way off.

In addition to this basic Canadian misunderstanding, the sense of national identity in non-French Canada is complex and in some ways not ultimately defined. It is made up of a number of strands which, while they may not be in conflict, have not yet come together into a stable synthesis. One strand is the traditional allegiance which many people in English Canada feel to their British roots. This is of special relevance to our theme

here, because this sense of identity focusses very strongly on the political institutions and practices which are central to the British tradition — for instance, parliamentary government and also, of course, the monarchy. Naturally this is an allegiance which many "ethnic" Canadians don't feel or feel less strongly. Among people of non-British origin, one often finds another powerful strand of Canadian allegiance. This is a sense of Canada's exceptional status as a haven where a certain freedom, dignity and economic opportunity is at least in principle open to everyone, in strong contrast to the conditions prevailing in other parts of the world, and especially some of the countries of origin of these new Canadians themselves. The spirit of this sense of Canada is captured in an anecdote from David Lewis. He recalls his astonishment soon after his arrival at seeing a policeman guiding schoolchildren safely across the street. The idea that uniformed representatives of authority could be anything other than a menace was something radically new to this adolescent from the Pale of Settlement, who had lived through the last years of Tsardom and the early Revolution and Civil War. That policemen could actually do something *benign* seemed almost too much to accept, and it took some persuasion from older relatives before he did so.[30]

This sense of identity is especially important for this discussion, because it centres on political institutions and practices of a liberal society, based on the rule of law, and the defense of rights and self-rule. In this respect it is analogous to the parallel feelings experienced by generations of immigrants in the United States.

But whereas in the United States, a perfect fit prevails between this immigrant sentiment and the dominant conception of the national identity, which was also defined in terms of a political formula, in Canada there is a potential division between the traditional "British" and "immigrant" definitions of the Canadian allegiance. Insofar as the British allegiance is itself defined partly by liberal political institutions, a congruence is possible.[31] But should there ever be a move to "rationalize" our political institutions to bring them more in line with foreign models, or to purge the British element, on the grounds that this only has meaning for part of our population, then these two strands will come apart. It can be argued that the recent Trudeau government was not entirely sensitive to this danger, and made a number of tentative moves in this direction which threatened to embroil us in another controversy over national identity. For the moment, however, this potential source of misunderstanding is quiescent.

Another not fully resolved question in "English" Canada is that of regionalism. Here too, there are conflicting mutual perspectives. It would be tidy if the different regions shared the same views about the relative importance of regionalism, but they don't. By and large, Ontarians see themselves not as constituting a "region" — which is how they are seen from the outside — but as in the centre of Canada. Ontario

seems to be the only province in which the regional government is seen as much less significant than the federal government. If the figures for voter participation are any index, all other regions show at least as strong, and sometimes a stronger identification with provincial governments than with the federal.[32] From the Ontario perspective, provincial governments sometimes appear just as the large-scale municipalities that Henri Bourassa feared they would be reduced to, but this view doesn't seem to be widely shared in the rest of the country.

In fact, Canada is a country of strong regional identities. From the outside, even Ontario stands out as a distinct identity, with the particular feature that it doesn't adequately appreciate from the inside how different it is from the rest. Of course, distinct regional identities are a feature of many societies, particularly in this hemisphere. It is the basis of the federal political solution which so many have adopted, not only in the United States, but also in Mexico and Brazil.

In other federal societies, however, there has been a great concentration of power over the year in the hands of the central government, in response to the needs for development and in some cases for equalization between regions. Regional governments have become subordinate. In Canada, although the federal government has taken large-scale initiatives in development, although regional equalization has become a major theme of Canadian politics, this kind of centralization has always been countered by affirmations of provincial power. The balance has tilted, now toward the centre, now toward the periphery, instead of moving steadily toward concentration.[33]

One major reason for this, of course, has been the determination of French Canada, as incarnate in Quebec, to resist centralization at all costs. But important features of "English" Canada have also contributed to the outcome. In fact, the drive to centralization requires some underlying agreement on national identity, at least some dominant formula, and this has been missing even in "English" Canada. The dominant formula could be either defined institutionally, as in the United States, or in terms of a clearly dominant historic-linguistic identification to which new arrivals are to be unquestionably assimilated as in Mexico or Brazil. But Canada could opt for neither of these. Our origins as British North America preclude the militant identification with a paradigm political definition, and our nature as an immigrant society, as well as the existence of French Canada, preclude making all the new arrivals "British."

In consequence, although there have been moments where central power significantly advanced, the political conditions in the form of a determinate common will — which might have made this irreversible — have always been missing. Canadian provincial governments have by and large kept control of their jurisdictions, including such vital ones as natural resource development. Their budgets are a significant proportion

of public sector activity in Canada.[34] They have real political clout. Nationally sponsored policies in a host of areas have to proceed much more by negotiation between the levels, rather than just through federally-sponsored and financed initiatives, than in other federal systems in this hemisphere.

This peculiar history lies behind the continuing power of regional identification in Canada. But this is also the locus of another unresolved issue in our national identity, because many Canadians experience this strength of the regions as a kind of disunity or disarray. Having a central government which has to proceed so much by negotiation in tackling common problems seems to them synonymous with having a weak central government. The value of having a federal government at all seems to them bound up with having a senior government which can tackle national issues as they do in other federations, particularly in the United States.[35]

It is true that Canadians in general have a rather bewildering combination of political attitudes. We tend to expect a great deal from our federal union in development and equalization policy, while regional identification remains politically significant in a way unparalleled in similar federations. There are times when governing Canada seems as intractable a problem as squaring the circle.

This can be represented as an ambivalence which ought to be resolved, rather than as a duality of focus which is natural to a federal system. It might appear that in this case the logical resolution we should be working toward is the generation of some such common political will as has enabled other federations to concentrate power. But at this point we connect up again with the original concern underlying this discussion of national identity, namely the historical conditions of the participatory model in Canada. How does the prospect of centralization look from this point of view?

The condition of successful participatory politics is a strong identification with the community. This condition in turn can be analytically separated into an identification with participatory forms of politics as central to the community's definition and a strong sense of a particular community as bound together in these forms. The first condition is fortunately present in Canada. Of the three perspectives I described on national identity, two — the "British" and the "immigrant" — are partly defined in terms of liberal politics, and the third — that of French Canada — has moved historically to an identification with this kind of politics.

It is the other analytically separable condition which makes the problem in Canada. If we look at both the unresolved issues in our national identity, and the strands which define these issues, it appears evident that the health of the participatory model in Canada is bound up with

continuing regional decentralization. To put the same point negatively, participatory politics would be endangered by a centralizing move.

This seems so on two levels. First, greater centralization of power could only bring with it greater identification with the centre if we resolve the issues still outstanding in our common understanding of the national identity. It seems utopian, to put it mildly, to hope that this might happen in the near or even middle future. Even if we imagine the issue about regionalism as resolved by hypothesis, as the precondition for centralization, we are still nowhere near resolving the latent tension between the "British" and "immigrant" identities. As for the misunderstanding between French and English Canada, it is hard to imagine how that could ever by resolved around a formula which would permit greater centralization.

This brings us to the second level. Even if we are very optimistic about the evolution of mutual understanding in this country, it is difficult to imagine viable common resolutions which would not incorporate a healthy dose of decentralized politics. Is there really a viable solution to the regionalism issue in Canada which would just set us on something like the American road, overriding the strong regional political identities of the Maritime provinces or the West? This seems to me wildly out of phase with the way political life has developed in this country. As for a scenario in which Quebec would be happy within a more centralized Canada, this appears utterly beyond the reach of the wildest imaginings.

The fate of the participatory model in Canada, of the continued health of our practices of self-rule, depends on our continuing resistance to centralization — both because we need many more decades in which to work out the outstanding issues in our common understanding as a political entity and because any such successful resolution itself is bound to involve decentralized power. A basic fact about Canada which we often have trouble accepting is that we are still far from achieving a universally agreed definition of our country as a political community, in the rich sense which Donald Smiley, drawing on Aristotle, gives this phrase.[36] Moves toward centralization all too often just seem to assume this lack away. In doing so, they not only court failure, but also risk aborting the long and difficult process through which we may come to this common identity.

These considerations, drawn from our particular case, tell in the same direction as the more general considerations which emerged from the earlier discussion. If our response to the increase of overload and alienation is not to be that of abandoning participatory politics and compensating for this with more effective methods of judicial redress and single-issue campaigning — if our aim is to defend participation — then the only viable policy seems to include some devolution of power, following what I described above as the politics of the ecological Left. If

our aim is to combat, rather than adjust to, the trends to growth, concentration and mobility, and the attendant bureaucratic opacity and rigidity of representative democracy, then some measures of decentralization are indispensable, with the consequent strengthening of more localized, smaller-scale units of self-rule.[37]

These can, of course, take many forms. Decentralized self-rule need not be regional. It may include devolving responsibility for self-management on to employees, giving recipients and beneficiaries a say in the operation of public programs, giving more responsibilities back to school boards, or a host of other measures. But certainly keeping power at the regional level in a federation like ours is one very effective form of decentralization, ensuring that important issues are within the scope of communities which not only are smaller and less unwieldy, but frequently also have a higher degree of community identification than the nation from coast to coast.

Of course, this direction is not without its dangers and difficulties. Canada will face immense problems in the stiffening economic competition of the years ahead. Avoiding de-industrialization, maintaining and increasing our rate of technological innovation, avoiding mutually stultifying internal rivalry such as the fragmentation of the Canadian market through provincial regulations,[38] and finding the resources for the necessary large-scale development projects will all generate a growing need for coordinated activity. This will put progressively greater strain on our resources of political leadership and vision, and on the ability and readiness to generate ever-new consensus. In many ways it would be easier, given the bent of late twentieth century technology and economic integration, to be under the aegis of a more centralized, bureaucratic governmental authority, for all its irrationalities and foul-ups, and for all the alienation of citizens from political power that it entails. If our political leadership is not up to it, we may indeed have to settle for something like this as the only alternative to stagnation and economic regression.

Have We a Choice?

To evoke this troubling perspective is to bring us back to the central theme of this paper. After surveying all the pressures to unchecked growth, concentration and mobility and weighing the threats and challenges which may drive us to premature centralization, we may be tempted to feel that the future direction of our development as a nation is inexorably fixed. We cannot but go the road of greater centralization and bureaucracy, with the inevitable consequences of atomism and citizen alienation. But it is that sense of the inevitability of breakdown, or at least of the tendency to breakdown as implicit in the very identity and

forms of life which have arisen in the modern era, which I have tried to combat throughout this paper.

Perhaps it might be useful here to draw the threads together in order to make this point once more. The discussion of the modern identity was meant to show this as more complex and less one-sided than it is usually portrayed. Certainly, the modern understandings of freedom and efficacy tend to breed atomism and to undermine community. But the same emphasis on efficacy has also helped to create contemporary understandings of citizen dignity, and this has sometimes been the basis of renewed community identification and solidarity around institutions of self-rule. Certainly, modern efficacy has tended to breed an exploitative stance toward nature, heedless of the demands of ecological balance. But the post-Romantic sense of kinship with nature comes, if I am right, from the same complex of self-understandings. Undoubtedly again, the modern conception of self-fulfillment has played havoc with marital stability and the securities of family life. But the same focus on sexual and emotional fulfillment as central to the meaning of life has made us search for new forms and modes of family relationship.

Modern history is not unilinear, not an inexorable progress or decline, or a progress which entails decline. Rather it is made up of movements and counter-movements, in which typically modern dangers have bred typically modern defenses. In this domain, the famous line from Hölderlin, often quoted by Heidegger, seems to hold true: "Wo aber Gefahr ist, wächst/ Das Rettende auch."[39] And so, while it is possible to trace a pattern of breakdown, in which the trends to growth, concentration and mobility reinforce each other virtually without limit, this will almost always be an abstraction from a much more complex reality. Vicious circles are easy to find. There is undoubtedly a pressure to unrestrained production for a higher consumer standard in disregard of ecological and social priorities. This undoubtedly contributes to the higher mobility which undermines traditional local communities, and brings about massive concentration of populations. These factors both contribute to bureaucratic distance, and hence citizen alienation and cynicism, which in turn make people even less inclined to be concerned for social priorities, and hence even more undivided in their fixation on the consumer standards. But at each point in this spiral decline, counterforces — the attachment to the land (sometimes a very strong force in Canada), a sense of threatened community, a new style of family life — may be at work. Supposedly inexorable movements are sometimes surprisingly reversed, such as the drift from smaller towns toward larger cities, which seems to have gone the other way in the United States in the last decade. Even the supposed drive to big bureaucratic enterprise in the name of economic efficiency turns out to be not all that ineluctable either, as is shown by the successes of a new style of management which relies on smaller, more flexible interdisciplinary teams.

Of course, my point is not to replace Spenglerian gloom by Panglossian optimism. I am not saying that every lurch toward destruction will meet its equal and opposite defense. Rather my aim is to argue that the outcome can go either way. If I am right, then the conclusion is not greater security but greater contingency in modern history. Some societies will fall apart, or at least have to regress to more bureaucratized, authoritarian forms to hold together. But none need be considered as doomed beforehand.

This reflection brings us back to Canada. What are our chances in the late twentieth century? To make a global judgment, one would have to look at the whole range of challenges which tend to interlock in their effects on contemporary society. We would have to gauge how ready or able we are to determine the direction of our economic growth in the name of ecological limits and social priorities. We would have to understand more about the evolution of family life in our country. We would have to examine the bases and nature of our sense(s) of political community.

In this paper, I have been addressing myself exclusively to the last question. Even here, the discussion makes no claim to comprehensiveness. It would be a very ambitious undertaking indeed to assess the health and stability of Canadian society across the board. Intuitively, it sometimes appears that Canada on the whole is a society where people care more for their roots than in the United States, and hence where family and local community are under less severe straining. But the future may show this to be a complacent illusion.

We have perhaps no great grounds for complacency in regard to our sense of citizen dignity and identification. But these have developed a particular character in this country, and my argument has been that to fail to respect this is to put us in peril. My case might be resumed in two propositions: (a) that our sense of citizen dignity is closer to what I called the participatory model than the rights model; and (b) that the combination of an unresolved national identity as Canadians and the strength of our historic regional societies makes it virtually mandatory for us to practise a more decentralized style of government than other comparable federations. This, of course, puts tremendous demands on our political leadership and our ability to generate continuing consensus. Should this fail, we may be forced to some more centralized mode.

If we look at Canada's future in the perspective central to this paper, however — that is, in terms of the way in this country can best face the strains of modernity and the dangers of political breakdown implicit in them — then there seems no doubt that the centralizing solution would be an immensely regressive step. Looked at in the light of the full demands of the modern identity, the atrophy of citizen power negates an important dimension of our dignity as free agents, and hence poses a potential long-term threat to the legitimacy of a modern society.

True, the American case shows us a model whereby this can be

compensated by a political culture which allows very wide scope for the defense of rights. If we go the centralizing route, we will undoubtedly have at the same time to approach this model very closely — a development for which our new entrenched bill of rights may have provided the foundation. In a sense, to oversimplify and dramatize, we can see two package solutions emerging out of the mists to the problem of sustaining a viable modern polity in the late twentieth century. One is the route of political centralization, at the cost of some citizen alienation but compensated for by an increasing incorporation of the American model in which dignity finds political expression in the defense of rights. The other is the route of continued decentralization, and a continued attempt to maintain and extend our historic participatory model, at the cost of putting a greater and greater strain on political vision and inventiveness through mechanisms of political coordination.

Perhaps only one of these — or neither — will prove to be viable; perhaps we are already irrevocably embarked on one. These outcomes are hard to foretell. But if we ask which of these solutions is better suited to meet the strains of modernity, then there is little doubt in my mind that the centralizing one has the edge. It is not just that this solution is more in line with our traditional political culture, including the very docility in accepting the law as decided with which Americans (and sometimes even ourselves) reproach us. It is also that severe doubts still hang over the entire long-term viability of the rights model as a safeguard for the dignity of the modern free agent. Can it really substitute for the sense of having a say in the common decision? Could the increasing stress on rights as dominant over collective decisions come in the end to undermine the very legitimacy of the democratic order? As these questions are being asked by thoughtful Americans, it would be reckless for us to force ourselves against the grain of history onto a path whose end point is in such doubt.

Notes

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I would like to thank Alan Cairns, Don Molnar and Cynthia Williams for their suggestions during the preparation of this paper. An earlier version of the second section appeared as "Growth, Legitimacy and the Modern Identity," *Praxis International* 1, (July 1981): 111–25. This theme was also the subject of my Corry Lecture, delivered at Queen's University in January 1980.

1. Cf. his *Capitalism, Socialism and Democracy*, 3d ed. (New York: Harper and Row, 1950). Also Robert Dahl, *Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).
2. Cf. the interesting discussion in Clause Offe: "'Ungovernability': The Renaissance of Conservative Theories of Crisis," reprinted in C. Offe, Contradictions of the Welfare State (Cambridge, Mass.: MIT Press, 1984). Offe shows how much common ground there is between "overload" theories of the Left and the Right. An influential formulation of the former perspective was James O'Connor's *The Fiscal Crisis of the State* (New York: St. Martins Press, 1973). For a recent discussion of the American scene

from the latter perspective, see Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge, Mass.: Harvard University Press, 1981).

3. Daniel Bell, *Cultural Contradictions of Capitalism* (New York: Basic, 1976), cf. especially chap. 1.
4. For an interesting contemporary theory aimed at the rescue of the goods implicit in modernity, see the recent work by J. Habermas, *Theorie des Kommunikativen Handelns (Theory of Communicative Action)* (Boston: Beacon Press, 1983). The connection of this kind of theory with reform politics is evident in this case, in a form which is entirely freed from the illusions of original Marxism about socialism as the fruit of a breakdown of capitalism.
5. Cf. J. Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975).
6. Cf. L. Stone, *The Family, Sex and Marriage in England 1500–1800* (London: Weidenfeld and Nicolson, 1977).
7. Michel Faucault, *Surveiller et Punir* (Paris, 1976); English translation, *Discipline and Punish* (London: Allen Lane, 1977).
8. Cf. J. Rawls, *A Theory of Justice* (Boston: Harvard University Press, 1971); R. Nozick, *Anarchy, State and Utopia* (Boston: Basic, 1974). Rawls himself is by no means a prisoner of the atomist perspective.
9. Cf. Bell, *Cultural Contradictions of Capitalism*. I think Bell gives too much importance to the signs of a more positive valuation of hedonism in contemporary America. Or better, he puts this valuation in the wrong context. What happened in the 1960s and 1970s was not just a collapse of the old "Protestant ethic" into mere "permissiveness." To see things this way is to look at the whole development from the outside. But this utterly leaves out of account the moral passion and earnestness of this phase of youth culture across the Western world.
10. Fred Somkin, *Unquiet Eagle* (Ithaca: Cornell University Press, 1967).
11. E. Schumacher, *Small Is Beautiful* (New York: Harper and Row, 1973), p. 30.
12. H. Stretton, *Capitalism, Socialism and the Environment* (Cambridge: Cambridge University Press, 1976), p. 224.
13. Arthur Rimbaud, *Une Saison en Enfer: L'impossible* (Paris: Gallimard, 1973).
14. Huntington, *American Politics*, p. 228.
15. I realize that what is often called the "New Right" is a more complex phenomenon than is described here. I have singled out the strand which exalts individual initiative and free enterprise at the expense of government action. But there are sometimes other aspirations, such as revitalization of local government, or volunteer collective action, which overlap with what I describe below as the politics of the ecological left. But this "atomist" strand is worth singling out because a lot of controversial policies of right-leaning governments today turn on it alone.
16. Cf. the interesting argument by Michael Sandel in his "The Procedural Republic and the Unencumbered Self," *Political Theory* 12 (February 1984): 81–96, that the increased emphasis on a definition of liberal democracy in terms of rights follows the centralization of government and the not entirely successful attempts to "nationalize" American politics, i.e., creates strong sense of political community at the national level (esp. pp. 92–93). For a fuller background to Sandel's argument, see his *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).
17. Cf. Sandel's "Liberalism," in *Public and Private Morality*, edited by Stuart Hampshire (Cambridge: Cambridge University Press, 1978).
18. For the "inflation" view, see Tom Pocklington, "Against Inflating Human Rights," *The Windsor Yearbook of Access to Justice*, vol. 2, 1982; cited in Cynthia Williams, "The Changing Nature of Citizen Rights," in *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985). Williams also gives an interesting discussion of this issue. I have tried to distinguish different notions of rights in my "Les Droits de l'Homme," forthcoming in a volume to be published by UNESCO.

19. As Rousseau puts it, the general will is attained only when "tout le peuple statute sur tout le peuple," *Contrat Social*, 11.6.

20. It follows from this that not all the measures associated traditionally with radical demand for "participatory democracy" necessarily strengthen what I call the participatory model. A constitution may call for referenda, recall of legislators, citizens' initiatives, election of judges, and the like. But it can easily be that the use to which these are put, and even the spirit in which they are adopted, involve scant respect for the general will. Rather they may be designed and used to ensure the individual's or subgroup's ability to defend themselves, even against the majority and the highest legislative institutions. Think of the use of citizen initiative in California, for instance, in the tax revolt of 1978 (the famous Proposition 13). This kind of politics takes over and amends the traditional slogan: *fiat justitia, ruat coelum*. In the case of Proposition 13, the amendment might read "let my property taxes decline, though the welfare state collapse." It is hard to imagine something more antithetical to the spirit of community identification.

21. Thus voter participation in off-year congressional elections dropped from 55.4 percent in 1966 to 44.7 percent in 1974, rising somewhat to 48.5 percent in 1982. In presidential elections, the decline seems to have been steady over the last decades, from 69.3 percent in 1964 to 59.2 percent in 1980, (source: Current Population Reports; Special Studies, Series S-23, no. 130, *Population Profile of the United States, 1982*, U.S. Department of Commerce, Bureau of the Census, pp. 23–33). It remains to be seen, of course, what effect voter registration drives associated with the women's movement and the Jesse Jackson campaign will have on the 1984 figures. Two separate points seem to arise from these figures: (a) the trend downward over recent decades, and (b) the generally low level, when compared to other democracies, where voter turn-out is often over 70 percent, and in cases like Saskatchewan provincial elections with turnouts of over 80 percent. It has been persuasively argued that (b) is largely due to the eccentricity of the U.S. political system, that voter registration is generally still the citizen's responsibility, whereas just about everywhere else voters' lists are compiled by public authority. There is evidence that this accounts for a big part of the difference with other democracies. Nelson Polsby and Aaron Wildavsky in their *Presidential Elections: Strategies of American Electoral Policies* (New York: Scribners, 1980), p. 241, point to the case of Idaho, where registration is carried out on public initiative. Here voter turnout in 1968 was 72.8 percent, comparable to Canada and the United Kingdom.

22. Cf. Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968), chap. 1; and Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, Jovanovich, 1962) and *The Founding of New Societies* (New York: Harcourt, Brace, Jovanovich, 1969).

23. Cf. S.D. Clark, "The Canadian Community and the American Continental System," in *The Developing Canadian Community* (Toronto: University of Toronto Press, 1968).

24. In spite of the importance of certain crucial court decisions in Canadian history — think of the Roncarelli case in connection with the Padlock Act or the recent decisions about unilingual Manitoba legislation — Canadians appear to Americans as inexplicably supine and long-suffering when it comes to redress of grievance. Have you tried to explain to an American why, although the violations of Manitoba's bilingual status start in 1890, the first successful challenge only reached the Supreme Court in 1979? From an American perspective it looks as though it took the injured party almost 90 years to take the obvious steps. How does one explain this from a Canadian perspective? I'm not quite sure myself. South of the border, there is only one conceivable explanation — we are accustomed to sitting there and taking it without murmur; we lack a lively sense of our own worth and our own rights. Canadians are just backward.

25. Rousseau put it with characteristic force in his *Considérations sur le Gouvernement de Pologne*: "La liberté est un aliment de bon suc, mais de forte digestion; il faut des estomacs sains pour le supporter. Je ris de ces peuples avilis qui . . . s'imaginent que, pour être libres, il suffit d'être des mutins. Fière et saine liberté! si ces pauvres gens

pouvaient te connaître, s'ils savaient a quel prix on t'acquiert et te conserve; s'ils sentaient combien tes lois sont plus austères que n'est dur le joug des tyrans, leurs faibles âmes, esclaves de passions qu'il faudrait étouffer, te craindraient cent fois plus que la servitude; ils te fuiraient avec effroi comme un fardeau prêt a les écraser." (Paris: Éd Garnier, 1962, pp. 358–59).

26. The inscription by Simonides on the gravestone at Thermopylae, commemorating the last stand of Leonidas and his Spartans against the Persians, says it with the economy of perfect eloquence: "O stranger, go tell the Spartans that here, obedient to their edicts, we lie."
27. Some of the reasons for the continued force of nationalism, particularly linguistic, I discuss in my article: "Why Do Nations Have to Become States?" in *Philosophers Look at Confederation*, edited by Stanley French (Ottawa: Canadian Philosophical Association, 1978).
28. Cf. "Why Do Nations Have to Become States?"
29. This same understanding conditioned the terms in which the independence issue was recently argued in Quebec. Nobody within the society questioned the right of the community to decide, or the propriety of its making a decision as a community, to stay in or get out of the larger union. Very wisely the leaders of federal parties conceded this point of "self-determination"; the issue was then argued out exclusively on the merits of secession.
30. This incident was described in an earlier draft of his memoirs, but doesn't seem to have been included in the final, published version, David Lewis, *The Good Fight* (Toronto: Macmillan, 1981).
31. This congruence is itself the result of a remarkable evolution in "English" Canada over the last century, during which its ethnic identification as British has steadily given way to a multi-cultural political identity. Cf. the description of this in Kenneth McNaught, "The National Outlook of English-speaking Canadians," in *Nationalism in Canada*, edited by Peter Russell (Toronto: McGraw-Hill, 1966), pp. 61–71. McNaught even makes the (perhaps overstated) claim that "the English-speaking view has always anticipated a Canadian nationality in which the significance of racial origin will diminish rather than increase" (pp. 63–64).
32. For instance, the turn-out in Ontario for the federal elections of 1979 and 1980 was respectively 78 and 72 percent; while the provincial turn-outs in 1977 and 1982 were respectively 65.6 and 58 percent. In Quebec, the participation in the two federal elections was respectively 76 and 68 percent, while that in the provincial election of 1976 was 85 percent, and in 1981 82.52 percent. The corresponding figures for Saskatchewan are federally 79 and 71 percent respectively, and 79.4 (provincial election 1978) and 83.9 percent (provincial election 1982).
33. Thus the move towards centralization which, beginning in the Depression and acquiring intellectual definition from the Rowell-Sirois report, accelerated during the war and carried well into the postwar period, but was substantially rolled back after 1960 by a renewed assertion of provincial powers.
34. For instance in 1981, U.S. government expenditure on all levels broke down in the following way: federal government, $719 billion; state government, $292 billion; local governments $289 billion (source: *National Data Book and Guide to Sources*. Statistical Abstract of the United States, 1984, 104th ed., U.S. Department of Commerce, Bureau of Statistics, Table 452). The corresponding figures for Canada in 1983 are: federal $93 billion, provincial $82 billion; local $30 billion (source: Statistics Canada, *National Income and Expenditure Accounts*, 1st quarter 1984, cat. no. 13-001, Table 6).
35. For a discussion of our federal system from this strongly centralist standpoint, see Garth Stevenson, *Unfulfilled Union* (Toronto: Macmillan, 1979). In general this book is a good antidote to the present paper, since Stevenson tends to dismiss appeals to regional identity as manufactured by politicians for purposes of their own empire building, or even more, at the behest of business and other economic interests, who have been generally concerned with limiting government action, particularly when it is redistributive in effect. I think this approach is deeply misguided, but it expresses one of the (at present irreconcilable) attitudes which we have yet to bring to some synthesis if we are ever to have an agreed formula of national identity.

36. Cf. Donald V. Smiley, *The Canadian Political Nationality* (Toronto: Methuen, 1967), esp. pp. 128–35.

37. This thesis may be challenged, that greater participation in a society like ours generally requires decentralization on the grounds that people can participate at all levels of self-government and the ideal society would be one in which they did so maximally at all levels. In principle that is undoubtedly true. But in practice, in a number of domains, centralized solutions preclude or hamper local variation and hence initiative, and thus intensify the sense that government is of its essence distant, unresponsive and bureaucratic. As an example, draining power from local school boards to a provincial ministry of education has frequently had this effect. There may be no *conceptual* link between participation and decentralization, but there is often a strong *empirical* one.

    Of course, this insight might be the basis for another criticism of my main thesis in this paper. Why be concerned for the power of *provincial* governments, it might be argued? Why not decentralize further to truly local communities? I am very sympathetic to this move if it can be done. But a successful devolution of power presupposes that people identify with the community on which responsibility devolves. It isn't sufficient to note that the people of a given area, say, have common interests or common problems. Unless governing themselves as a unit means something important to them, the institutions of self-rule remain without life, as testified by the appallingly low rate of voter participation in some local governments. This has been one of the major themes of my paper. Historic community identification is a crucial condition of participatory politics. That is why the provinces constitute a crucial level in Canada, whether we like it or not.

38. For a good discussion of the harmful mutual stultification which can result from provincial rivalry, see Stevenson, *Unfulfilled Nation*, chap. 5.

39. From "Patmos": "But where danger threatens / That which saves from it also grows" (Michael Hamburger translation).

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