POST-CHARLOTTETOWN CONSTITUTIONALISM: A REVIEW ARTICLE*

A CANADIAN MYTH: QUEBEC, BETWEEN CANADA AND THE ILLUSION OF UTOPIA. By William Johnson. Robert Davies, 1994. Pp. 416. ($21.95).

CANADA: RECLAIMING THE MIDDLE GROUND. By Donald G. Lenihan, Gordon Robertson & Roger Tassé. Institute for Research on Public Policy, 1994. Pp. 161. ($16.95).

CANADA: THE STATE OF THE FEDERATION 1993. Edited by Ronald L. Watts & Douglas M. Brown. Queen's Institute of Intergovernmental Relations, 1993. Pp. 256. ($20.00).

THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA. Edited by Kenneth McRoberts & Patrick J. Monahan. University of Toronto Press, 1993. Pp. 361. ($24.95).

CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992. Edited by Curtis Cook. McGill-Queen's University Press, 1994. Pp. 320. ($17.95).

GROUP RIGHTS. Edited by Judith Baker. University of Toronto Press, 1994. Pp. 208. ($17.95).

PLAN B: THE FUTURE OF THE REST OF CANADA. By Gordon Gibson. Fraser Institute, 1994. Pp. 217. ($19.95).

PROTECTING RIGHTS AND FREEDOMS: ESSAYS ON THE CHARTER'S PLACE IN CANADA'S POLITICAL, LEGAL, AND INTELLECTUAL LIFE. Edited by Philip Bryden, Steven Davis & John Russell. University of Toronto Press, 1994. Pp. 272. ($18.95).

REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION. By Jeremy Webber. McGill-Queen's University Press, 1994. Pp. 364. ($19.95).

SEEKING A NEW CANADIAN PARTNERSHIP – À LA RECHERCHE D'UN NOUVEAU CONTRAT POLITIQUE POUR LE CANADA. Edited by F. Leslie Seidle. Institute For Research on Public Policy, 1994. Pp. 231. ($15.95).

THINKING ENGLISH CANADA. By Philip Resnick. Stoddart, 1994. Pp. 144. ($19.95).

I. INTRODUCTION

The popular rejection of the Charlottetown Accord on October 26, 1992 brought an end to a period of continuous constitutional crisis that dominated Canadian public life for almost five years. The Accord was an enormously complex document that contained changes to virtually every part of the Constitution. It had provisions on the division of powers, the federal spending power, the mechanics of executive federalism, Aboriginal self-government, senate reform, and special status for Quebec (the distinct society).

* See Richard Johnston's reply "Comment: Deliberation, Participation, and the Constitution".

The requirement to take a stand either for or against such a complex agreement divided the legal academic community, just as it did Canadian society more generally. Many legal academics were involved, in one way or another, in the negotiation of the Charlottetown Accord, or the federal constitutional proposals[1] that preceded it. Others took a strong stand against the Accord in the referendum campaign.

My own involvement in the debate was intense and continuous throughout the campaign–I co-founded Deborah Coyne's "Canada for All Canadians" NO Committee, and spoke against the Accord in virtually every public forum I could find. Some of my colleagues, such as Lorraine Weinrib and several other members of my own Faculty who signed a legal opinion on the impact of the Charlottetown Accord on the *Charter of Rights and Freedoms*,[2] clearly had some of the same concerns that animated my own opposition to the Accord. Other colleagues argued strongly in its favour.

In reviewing the literature on Canadian constitutionalism that has emerged since the referendum, I have tried to exorcise the partisanship that was an inevitable result of the kind of either/or stance entailed in the Charlottetown debate. I believe that academics should normally address the issues at some distance from the intensity, polemics and factionalism that are a natural part of the hurly-burly of democratic politics – not as an escape from democratic responsibility but rather with a view to making the unique contribution that comes from seeing "plus loin que les partis".[3] As Alan Cairns suggests, academics "have an obligation to step back, to adopt a longer-run perspective, and to raise issues that the more directly involved may overlook or prefer to leave unexamined."[4]

II. The Referendum: Towards Direct Democracy as a Technique of Nation-Building?

Among the most novel aspects of the entire Charlottetown episode was the submission of the constitutional proposals to Canada-wide referenda. Under the 1982 Constitution, approval by referendum plays no role whatever in the legal formula for amending the Constitution. Many commentators now see the vote on the Charlottetown Accord as a kind of binding precedent with respect to future constitutional change. According to Michael Adams, the Accord "marks the end of the era of élite accommodation in matters constitutional and the beginning of a new era of public consultation and ratification."[5] Jeffrey Simpson suggests: "A future prime minister, or set of first

---

[1] Privy Council Office, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991).

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] See A. de Tocqueville, *De la démocratie en Amérique* in J.-C. Lamberti & F. Mélonio, eds., *Alexis de Tocqueville* (Paris: Laffont, 1986) at 51: "[J]'ai entrepris de voir, non pas autrement, mais plus loin que les partis; et tandis qu'ils s'occupent du lendemain, j'ai voulu songer à l'avenir."

[4] A.C. Cairns, "The Charlottetown Accord: Multinational Canada v. Federalism" in C. Cook, ed., *Constitutional Predicament: Canada After the Referendum of 1992* (Montreal & Kingston: McGill-Queen's University Press, 1994) 25 at 25.

[5] M. Adams, "The October 1992 Canadian Constitutional Referendum: The Socio-Political Context" in K. McRoberts & P.J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 185 at 192.

ministers, could decide to forgo a referendum, but excellent explanations, not expedient ones, would be required for discarding the precedent."[6] Maude Barlow goes much further: "Canadians have decided to claim direct democracy as our preferred system...."[8]

The adoption of the referendum was done in a manner that permitted minimal national debate concerning the rules of the game for such a democratic exercise. Should there be spending limits? How much free air time for participants in the campaign, and assigned on what basis? Perhaps most fundamentally, how should the vote be interpreted in terms of the legitimacy of proceeding with the reform package? Were provincial majorities required or merely a national majority?

Regrettably, whether they are enthusiasts for referenda or sceptics, almost none of the commentators whose work is reviewed here take up the challenge of addressing the appropriate rules of the game for constitutional referenda. Nor, generally speaking, do they address the relationship between referenda and other forms of public input into the process of constitution-making, such as Constituent Assemblies,[8] legislative committee hearings and so forth.

Several of the authors who are not hostile to direct democracy in constitution-making do raise concerns about an important feature of referenda: that they demand a yes-no response, and therefore preclude more differentiated expressions of public opinion. As Shelagh Day suggests: "a referendum is a blunt instrument. Either yes or no was too simple an answer to the Charlottetown Accord, and being offered only a choice of a yes or no response to this complex political package was not politically productive."[9]

Yet, as Watts (a key architect of the Canada Round) suggests, one of the major strategies of the negotiators was to create a "Consensus Report sufficiently inclusive to accommodate all conceivable forms of constitutional disaffection."[10] The theory was that, in order to realize gains for itself, each group would have to buy into all the other aspects of the Accord. The extent to which this log-rolling approach to constitutional reform was misguided is shown by the fact, noted by Johnston *et al.*, that the one key element in the Accord supported in both Quebec and the rest of Canada was Aboriginal self-government, a proposal around which a strong normative consensus had emerged with some remaining concerns about the *Charter*, but which did not address the particular or regional interests of most Canadians.[11] Johnston *et al.* find this fact "odd",[12] because they begin from the assumption that constitutional reform really is about the brokerage of particular interests rather than agreement upon compelling principles.[13]

---

[6] J. Simpson, "The Referendum and Its Aftermath" in McRoberts & Monahan, *supra* note 5, 193 at 193.

[7] M. Barlow, "The Referendum and Democracy" in McRoberts & Monahan, *supra* note 5, 159 at 161.

[8] An example of important recent work on Constituent Assemblies is J. Elster, "Constitutional Bootstrapping in Philadelphia and Paris" in M. Rosenfeld, ed., *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994) at 57-83.

[9] S. Day, "Speaking for Ourselves" in McRoberts & Monahan, *supra* note 5, 58 at 67.

[10] R.L. Watts, "Overview" in *Canada: The State of the Federation 1993* (Kingston: Institute of Intergovernmental Relations, 1994) 3 at 5.

[11] R. Johnston *et al.*, "The People and the Charlottetown Accord" in *Canada: The State of the Federation 1993, ibid.*, 19 at 25-26.

[12] *Ibid.* at 26.

[13] On the distinction between the brokerage of interests and the achievement of normative consensus, see generally J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts*

Of the authors under review who supported the Meech Lake Accord, few are now prepared to defend the "élite accommodation" or closed-door approach to constitution-making entailed in that exercise. Jeremy Webber usefully contrasts the level of public participation in the 1980-81 repatriation exercise with that entailed in the negotiation of the Meech Lake Accord. Webber makes what to my mind is the crucial point: the democratic deficiency in Meech was not that public debate was absent, but that public debate (unlike in 1980-81) had no influence on the outcome. As Webber suggests, in 1980-81, "the debate had a real effect on the terms of the 1982 Constitution, especially the changes introduced in parliamentary committee and the reintroduction of aboriginal rights and the super-guarantee of women's equality during the period following the November first ministers' meeting."[14]

From the perspective of public influence on the final outcome, the much touted "consultation" exercises of the Canada Round – the Spicer Commission, the Beaudoin-Dobbie hearings, and the Clark Constitutional Fora – were largely a sham. On the one hand, these exercises heightened public expectations of influence on the process, while, on the other hand, their results were largely discarded in the actual process of bargaining among leaders that began in March, 1992. As Patrick Monahan notes: "This intergovernmental phase bore a striking similarity to the supposedly discredited 'elite accommodation' model of constitutional negotiations."[15] Shelagh Day is even more emphatic: "What the public contributed at the constitutional conferences was, in large part, ignored; decisions were made in closed rooms by an unrepresentative group of politicians; the concerns of women and many other groups were trivialized and discounted; the accord was presented as a fait accompli; and Canadians were told to vote 'yes'."[16] As Peter Russell observes, one key element in the Charlottetown Accord, the guarantee to Quebec of 25% of the seats in the House of Commons, was "pulled like a rabbit from a hat" and "had not been put before the country in the two years of public discussion leading up to the accord."[17] What the experience of the Charlottetown "consultations" demonstrates is that no amount of process gimmicks like town-hall meetings can genuinely democratize constitutional negotiations where the élite players are simply unwilling to allow their final agreement to be fundamentally shaped by public debate. In these circumstances, the only effective democratic check is, sadly, a referendum – sadly, because while a NO vote can impede constitutional change unsupported by broadly-based normative agreement among citizens, a referendum does not permit voters to propose alternatives. The fact that referenda are not a panacea for democratic participation in constitutional change lends weight to Michael Stein's argument that "elite bargaining structures in constitutional matters such as ministers' or first ministers' conferences and public input structures such as referendums and interest

---

und des demokratischen Rechtsstaats (Facticity and Validation: Contribution to a Discourse Theory of Law and of Democracy Under the Rule of Law) (Frankfurt: Suhrkampf, 1993) at c. IV. "The formation of compromises cannot substitute for moral discourse, hence the formation of political will cannot be reduced to the formation of compromises" at 206 (my translation).

[14] J. Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's University Press, 1994) at 154.

[15] P.J. Monahan, "The Sounds of Silence" in McRoberts & Monahan, *supra* note 5, 222 at 225.

[16] Day, *supra* note 9.

[17] P.H. Russell, "The End of Mega Constitutional Politics in Canada?" in McRoberts & Monahan, *supra* note 5, 211 at 217.

group consultations should be blended in a logical and coherent manner, in order to enhance the particular values of each."[18] Regrettably, Stein's essay provides almost no discussion of the kinds institutional arrangements (*e.g.* Constituent Assemblies) that would allow for such "blending", and instead focuses heavily on a defence of traditional executive federalism that seems oddly in tension with his overall conclusion about the need to blend democratic and élite processes.

An additional factor that undermined the possibility of a positive democratic outcome from the Canada Round was that of time; the entire process was distorted by the deadline imposed by Quebec's National Assembly for "offers" from Canada. Citizens require time to absorb and sort out the complex issues involved in questions such as Aboriginal self-government and its relationship to the *Charter*. As Long and Chiste note: "the speed and pressure of the negotiations into which Aboriginal Peoples were drawn were antithetical to the consensual and thoughtful nature of many aboriginal political traditions. Given more time, Aboriginal Peoples might have been able to sort out the differences both between and within their respective communities and emerge with accommodating and meaningful constitutional reform."[19] I think this is just as true for the rest of us.

Of all the authors, only Janet Ajzenstat takes direct aim at the very idea of democratizing constitutional reform. According to Ajzenstat, a more open, popular process for constitutional amendment is likely to break down into an all-out struggle for constitutional recognition between competing groups. Ajzenstat seeks what she calls a "neutral constitution"[20]–a framework for governance that is above the competing claims of groups.

What Ajzenstat means here may be something akin to what Rawls in recent work[21] has called "constitutional essentials" – constitutional norms that are grounded in public reason itself and thereby placed beyond contestation in ordinary democratic debate. These include norms implied by the very concept of a democratic debate under conditions of liberty and equality. This being said, it is hard to understand which thinkers Ajzenstat has in mind when she makes the remarkable claim that liberal-democratic theory "warns against popular participation in the process of drawing up a new constitution...."[22]

Ajzenstat appears to see the constitutional debate in Canada as a kind of reversion to a Hobbesian war of all against all – as if the participants in the debate considered the existing Constitution as *completely* illegitimate and therefore considered themselves as in a state of nature with respect to each other, where every rule was up for grabs. It is certainly true that the rhetoric of the federal and Quebec governments may have given

---

[18] M. Stein, "Tensions in the Canadian Constitutional Process: Elite Negotiations, Referendums and Interest Group Consultations, 1980-1992" in *Canada: The State of the Federation 1993*, *supra* note 10, 87 at 111.

[19] J.A. Long & K.B. Chiste, "Aboriginal Policy and Politics: The Charlottetown Accord and Beyond" in *Canada: The State of the Federation 1993*, *supra* note 10, 153 at 163.

[20] J. Ajzenstat, "Constitution Making and the Myth of the People" in Cook, *supra* note 4, 112 at 121.

[21] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[22] Leading contemporary exponents of liberal democratic constitutional theory hold to just the opposite view. See B. Ackerman, *We the People* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1993).

the impression that the Canada Round was a beginning from scratch, or that Canadians no longer had even a skeletal constitutional order that could command a measure of legitimacy. Yet were there not some essential groundrules respected by all the groups who participated in the Charlottetown debate, for instance freedom of expression and association, and a commitment to a solution based on negotiation, not violence? Interestingly, in the penultimate paragraph of her essay, Ajzenstat seems to recognize, if dimly, the lack of correspondence between her grim Hobbesian-Schmittean[23] vision of the new democratic pluralism and the grassroots reality of Canadian society. She remarks: "even 'new politics' presupposes a certain level of prosperity, a secure and ordered social life, freedom of speech, and political debate. In other words, it takes for granted many of the benefits of the old liberal democratic constitution."[24]

III. Interest Groups and Constitutional Reform

What unites Ajzenstat and others such as F.L. Morton, who are only somewhat less overtly anti-democratic in their approach to constitutional reform, is a suspicion of what are often pejoratively labelled as special interest groups or "organized political interests". The *Charter* is often credited, or blamed, for giving rise to a new set of interest groups whose claims have been difficult to square with the tradition of élite accommodation in Canadian political life, and who supposedly place their own narrow concerns above the common good (the common good is usually understood as whatever compromise the élites are able to broker). On the one hand, these groups get blamed for contributing to the 'judicialization of politics', and for avoiding traditional avenues of democratic voice in favour of adversarial litigation.[25] On the other hand, they are blamed as well for being too active or assertive in political debate.

When has it become inappropriate for individuals to associate and promote vigorously some particular goal or interest in democratic debate? Opponents of *Charter*-interest group politics, such as Morton, Ajzenstat and Cooper,[26] like to cloak themselves in the mantle of classic liberal democratic thought, with its concern about the debilitating impact of faction on democratic politics. However, the liberal tradition was most of all concerned about *majority* faction, and viewed more, not less, pluralism as the solution to this problem.[27] As de Tocqueville argued:

> De notre temps, la liberté d'association est devenue une garantie nécessaire contre la tyrannie de la majorité. Aux États-Unis, quand une fois un parti est devenue dominant, toute la puissance publique passe dans ses mains; ses amis particuliers occupent tous les emplois

---

[23] The fear that too much pluralism could destroy the political was first expressed by the fascist political thinker Carl Schmitt (who was deeply influenced by Hobbes and may have coined the expression "pluralism"). See C. Schmitt, *The Concept of the Political*, trans. G. Schwab (New Brunswick, N.J.: Rutgers University Press, 1976) at 39-45.

[24] Ajzenstat, *supra* note 20 at 126.

[25] F.L. Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992" in Cook, ed., *supra* note 4 at 132.

[26] B. Cooper, "Looking Eastward, Looking Backward: A Western Reading of the Never Ending Story" in Cook, ed., *supra* note 4 at 89.

[27] See J. Madison, A. Hamilton & J. Jay, *The Federalist Papers*, I. Kramnick, ed. (London: Penguin, 1987) No. 10 at 127-28: "a greater variety of parties and interests" is the best hedge against the danger of majority faction.

> et disposent de toutes les forces organisées....il n'y a pas de pays où les associations soient plus nécessaires, pour empêcher le despotisme des partis ou l'arbitraire du prince, que ceux où l'état social est démocratique.[28]

It is often insinuated that the newer interest groups wield disproportionate and therefore illegitimate power, subverting the normal process of representative democracy based upon multi-party rule. Yet, although their constitutional litigation activities have sometimes been supported with public funds, these groups have little money or direct access to circles of power, relative to traditional business or labour groups. Their weapons are of a kind that should be regarded as democratically benign; namely the powerful principles they invoke to advance their conceptions of equality and justice. This leads to the further observation that equality-seeking groups actually are less narrowly "special interest" groups than many of the more traditional groups – in fact, they appeal in many instances to causes with an arguably universal ethical content, such as environmental protectionism or gender equality.

Perhaps the one criticism of the new equality-seeking groups that carries some weight, at least in the short-term, is that their tendency to articulate a wide range of claims in an absolutist language of rights makes accommodation with competing social concerns very difficult, and therefore fractures democratic debate into a kind of zero-sum struggle.[29] However, much of the absolutist language in which some equality-seeking groups articulate their claims is probably attributable not to the *Charter*, which guarantees rights subject to reasonable limits, but to the impatience and frustration that result from long-standing marginalization or exclusion from the mainstream political process. The traditional political élites have not helped matters, either, by trying to broker all of our differences at the top; there is as yet little experience in Canada with a direct conversation between citizens with competing understandings and divergent group-allegiances (*i.e.* a conversation that is not mediated by the political élites).

As Alain Noël suggests: "When voters fail to deliberate, when federalism remains essentially a power game between governments, and when elite accommodations alone make the country work, then, of course, a democratization of the constitutional debate appears perilous. If, however, voters act as responsible citizens, are concerned by rights, and stand ready to discuss their different conceptions of justice, then the politics of constitution making becomes....a formidable learning opportunity."[30]

Noël sees the promise of such deliberation as having emerged in the Clark Constitutional Fora, only to be betrayed by a return to "old-style secret bargaining".[31] In his brilliant essay, he manages to articulate a concept of deeper democratic deliberation with much persuasiveness, at least at the level of generality. It is less clear what kinds of formal institutional innovations Noël sees as required to achieve such a debate. Noël's best insight, however, comes at the end of his essay, where he suggests that Quebeckers'

---

[28] de Tocqueville, *supra* note 3 at 192-93.

[29] See J. Simpson, "Rights Talk: The Effect of the Charter on Canadian Political Discourse" in P. Bryden, S. Davis & J. Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994) at 56-57.

[30] A. Noël, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992" in Cook, ed., *supra* note 4, 64 at 70.

[31] *Ibid.* at 79.

effort to define their place within Canada cannot occur without engaging in dialogue with others. Twice, the Mulroney Government frustrated the possibility of such a dialogue – in the case of Meech Lake, by presenting the rest of Canada with a series of non-negotiable Quebec demands, and in the case of Charlottetown, by presenting Quebeckers with a set of barely-negotiable "offers" from the rest of Canada.

IV. Where Do We Go From Here?

Three schools of thought emerge concerning the prospects for future constitutional reform. The first suggests that any attempt to re-open the issue of major constitutional reform in the foreseeable future is either undesirable or unrealistic or both. We should turn to non-constitutional means to try and remedy the country's ills, but whether these means are sufficient to prevent the break-up of Canada is far from certain. To those who take this view, Charlottetown represents the collapse of the thirty-year-old constitutional reform project, and final proof that Canada is fractured along permanently irreconcilable visions. This is the outlook of, among others, Ron Watts,[32] Patrick Monahan and Jeffrey Simpson.

The second school of thought takes a more hopeful view of the possibilities for constitutional change. In the short term, some of the goals of the Charlottetown process can and should be advanced by non-constitutional means. As these non-constitutional changes (for instance, political agreements on Aboriginal self-government) are expressed in federal practice, a gradual effort should be undertaken to solidify support for their entrenchment in a broader framework of constitutional change. Moreover, we should not give up on the exercise of articulating a vision of Canada based on shared values and principles, a vision within which competing constitutional (and non-constitutional claims) can be re-conceptualized and mediated. This second school of thought finds its fullest expression in the work of Lenihan, Robertson and Tassé. A similar vision seems to underpin the essay of Alain Noël.[33] Something of this vision also characterizes Peter Russell's view that the referendum does not suggest the impossibility of constitutional politics, but instead the appropriateness of a return to "ordinary, one-reform-at-a-time, constitutional politics."[34] Advocates of this school of thought point, as well, to the inherent dynamism of the existing Constitution, which, as Katherine Swinton suggests, "is continuously being restructured through various mechanisms such as intergovernmental agreements, tax and spending policies and judicial decisions."[35]

The third school of thought suggests or advocates the possibility of a last-ditch type of constitutional negotiation, following a pro-sovereignty vote in a Quebec referendum. This point of view is most clearly articulated in Gordon Gibson's *Plan B*.[36] There are hints of it as well in the essay by Reg Whitaker.[37]

---

32 R.L. Watts, "The Reform of Federal Institutions" in McRoberts & Monahan, *supra* note 5, 17 at 34-35.

33 Noël, *supra* note 30.

34 Russell, *supra* note 17 at 219.

35 "Concluding Panel" in F.L. Seidle, ed., *Seeking a New Canadian Partnership* (Montreal: Institute for Research on Public Policy, 1994) 201 at 203.

36 G. Gibson, *Plan B: The Future of the Rest of Canada* (Vancouver: Fraser Institute, 1994) at 205-06.

37 R. Whitaker, "The Dog that Never Barked: Who Killed Asymmetrical Federalism?" in McRoberts & Monahan, *supra* note 5 at 107.

I myself find the second school of thought the most persuasive. The view that Charlottetown represents the decisive test as to whether constitutional reform can succeed in Canada lacks historical distance or perspective. First of all, as already noted in this review, there were features of the Charlottetown process that contributed to failure that need not be (and should not be) adopted in future attempts at constitutional agreement, including inordinate time pressure due to an artificial deadline, use of threats or blackmail tactics (Leon Dion's "knife to the throat"), a yawning gap between the image of public consultation and the reality of a deal whose key terms and trade-offs remained a matter of backroom dealing among politicians, and entirely separate processes of constitutional deliberation in Quebec and the rest of Canada which, as Peter Russell suggests, made a genuine dialogue between Quebeckers and other Canadians largely impossible.[38]

Secondly, adherents to the first, pessimistic school of thought assume that the constitutional log-roll technique adopted in Charlottetown has now become a kind of convention or precedent to be followed in future rounds of negotiations. Even as thoughtful a scholar as Mary Ellen Turpel seems to accept this premise: "The breadth of the Charlottetown Accord can be attributed to the political nature of deal-making in Canadian federalism. With the current amending formula, there must be a give-and-take, all-or-nothing bargain in order for there to be an agreement."[39] Yet the Canada Round log-roll was not a product of the amending formula as such. It was a response instead to the unpopularity of certain key features in the Meech Lake Accord, such as the distinct society and spending power provisions, and the Quebec veto. Where a particular set of constitutional amendments commanded widespread public support throughout Canada (as did the Aboriginal package in Charlottetown), I think it would be difficult for the provinces to withhold their support in the end, *even if other grievances were not addressed in the same package*. This is a matter, to some extent, of political leadership.

The view that any round of constitutional negotiations must now be comprehensive also draws sustenance from what I would call the "myth of the complete constitution". This is the myth that a particular set of constitutional reforms cannot be viewed as legitimate unless the reforms reflect a permanent settlement of the demands of every *bona fide* constitutional claimant. The most powerful invocation of the myth was by the Quebec nationalists, who argued that Quebec was "left out" of the 1982 Constitution. At its crudest level, being left out meant that the National Assembly in Quebec did not consent to the 1982 changes. To this, it seems to me that Pierre Trudeau has always had an effective reply: that as a matter of constitutional law and convention such consent was not required according to the Supreme Court (to which the Quebec government itself had appealed to clarify the rules of the game), and that important informal indicia of consent, such as opinion polls, and the support of federal Quebec MPs for patriation, suggest a significant measure of democratic legitimacy.[40]

However, the more subtle claim was that the 1982 *result* did not reflect the legitimate demands or claims of Quebeckers. This was a substantive, not procedural, claim of illegitimacy. It was dismissed, rather than rebutted, by Trudeau and his

---

38 Russell, *supra* note 17 at 216-17.

39 M.E. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in McRoberts & Monahan, *supra* note 5, 117 at 144.

40 See P.E. Trudeau, "Comme gâchis total, il sera difficile d'imaginer mieux" in B. Lauzière, ed., *Le Québec et le lac Meech* (Montreal: Guerin, 1987) 333.

followers – indeed, Trudeau would write at the time of Meech that, with the 1982 Constitution, the federation was set to last a thousand years! Unlike Trudeau, I would admit that the 1982 Constitution remained an incomplete constitution – reflecting only partly the *revendications* of many Quebeckers and those of Aboriginal peoples hardly at all. Yet the fact of incompleteness does not necessarily lead to a conclusion of *illegitimacy*, especially if there are reasonable future opportunities to change or evolve the Constitution to reflect other important claims.

Psychologically, the response of the Quebec élites was understandable – consent to patriation was always considered the trump card a province could play in any constitutional negotiation. It was assumed that once patriation had been achieved, the federal government would have every incentive to shut the constitutional door to demands from the Quebec government. And indeed, Trudeau's "thousand years" remark confirms this perception was far from simple paranoia. However, it prevented a more nuanced position – namely an acceptance of the legitimacy of the 1982 Constitution combined with an insistence on the evolution over time of a more complete constitution. As well, having felt that they lost the trump card of consent to patriation, the Quebec élites almost instinctively reached, as it were, for the only substitute trump card, the threat of separation. Yet democratic constitutionalism is not about trump cards or minimum "demands" – as Alain Noël insists, it is about the justification of one's claims in public argument and the modification of those claims in response to the justified concerns of others.[41]

Of course, in the Meech debate, the Quebec élites would have the myth of the incomplete constitution thrown back in their faces. Excluding Aboriginal peoples, and the demands of others who claimed to have been marginalized or excluded, how could Meech itself ever attain the legitimacy of the "complete constitution"?

It is time to put an end to the "myth of the complete constitution". As a matter of justice, the claims of many groups to constitutional change can be characterized as pressing. Yet building a democratic consensus around some of these claims may take longer than in the case of others. As long as we do not shut the door on *any* set of justified claims, is partial constitutional reform really illegitimate?

Despite the failure of the Charlottetown Accord as a whole to attract popular support we are closer to the required democratic consensus on some issues – especially Aboriginal self-government – than ever before. I think the relatively greater degree of consensus on self-government is not accidental. Precisely *because* they didn't perceive constitutional negotiations in terms of trumps, Aboriginal peoples staked their claims in terms of justice. In the case of Quebec and of senate reform, where threats and trumps were most pervasively deployed, we are now probably farther away from democratic consensus than before Meech.

Finally, the third school of thought (most clearly represented by Gordon Gibson's *Plan B*), which sees a possibility of a massive constitutional change in response to the imminent secession of Quebec, appears to be completely misguided. It is not only that Canadians have persistently refused to support constitutional changes on the basis of threats; how could a constitutional understanding reached in that way ever acquire the democratic legitimacy needed for it to be durable? The advocacy of such a "third option"

---

[41] On the effects of threats on constitutional deliberation, see J. Elster, "Strategic Uses of Argument" in K. Arrow *et al.*, eds., *Barriers to Conflict Resolution* (New York: W.W. Norton, 1995).

actually risks increasing the likelihood of outright separation, by encouraging Quebeckers to vote for sovereignty in the referendum, based on the illusion that a YES vote would result in the negotiation of some kind of loose asymmetrical Canadian confederation,[42] that would give Quebeckers all of the trappings of sovereignty with none of the costs of a hard choice for outright separation.

V. Asymmetrical Federalism

Among many of the disappointed supporters of the Charlottetown Accord, as well as some critics such as Judy Rebick, one finds the view that the process failed, not because of an inadequate effort to forge a democratic consensus around a shared vision of the Constitution, but in part because the negotiators refused to allow Canadians to agree to disagree, as it were. Why not simply provide a different set of powers to Quebec and to the other provinces, corresponding to the relatively greater degree of interest in a strong federal government outside Quebec? This would obviate the apparently impossible task of reconciling opposed constitutional visions. A significant number of the essays in *Seeking a New Canadian Partnership* are devoted to the consideration of asymmetrical options. The case for asymmetry is well put in the essay by David Milne: "[T]he attraction of asymmetry is that it permits a 'live and let live' climate where the different needs of Quebec and English Canada can find their own satisfaction without unnecessary conflict. With asymmetry, neither side need yield to the values and aspirations of the other."[43] Jeremy Webber devotes an entire chapter of his book to justifying asymmetry, and Lenihan, Robertson and Tassé devote considerable intellectual effort in theirs to criticizing one of the most powerful objections to asymmetry – the notion of equality of provinces.

The argument of Lenihan, Robertson and Tassé against equality of the provinces is deployed in the first instance to oppose the notion of equal provincial representation in the senate, and not to defend asymmetry in the division of powers. However, Lenihan, Robertson and Tassé make two general points about the idea of equality of the provinces that bear noting: the first is that one cannot easily analogize between the equal rights of individuals and those of collectivities such as provinces; and the second is that even if one accepts some notion of provincial equality as normatively coherent, only an abstract notion of formal equality (*i.e.* identical treatment) would necessarily rule out the possibility of assigning different powers or prerogatives to different provinces.

This second point, however, does not imply that asymmetry can simply be, as Milne would have it, an agreement to disagree, or a *modus vivendi* between groups with competing visions. For a non-formal understanding of equality nevertheless would require that differential treatment be justified in terms of differential needs. Showing that in principle equality may require differential treatment, *does not demonstrate that any particular case of differential treatment is in fact merited.*

---

[42] As is advocated sometimes by Philip Resnick. See *e.g.* his *Thinking English Canada* (Toronto: Stoddart, 1994). It is notable that, more recently, Resnick has been more reticent to propose such an alternative, cautioning that it "represents too great a leap into the unknown from the federal system we have; it sets up three potentially discordant actors – English Canada, Quebec and Aboriginal nations – and risks tearing English Canada apart along regional lines." See "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives" in Seidle, *supra* note 35, 71 at 85-86.

[43] D. Milne, "Exposed to the Glare: Constitutional Camouflage and the Fate of Canada's Federation" in Seidle, *supra* note 35, 107 at 114.

In the Charlottetown Accord, a radically asymmetrical treatment of Aboriginal peoples was proposed, and this asymmetry was generally accepted by the Canadian public – with some doubts about the asymmetrical application of the *Charter* (to be explored later in this article). Yet, at the same time, a seemingly mild form of asymmetry with respect to Quebec constituted one of the most unpopular features of the Accord (*i.e.* the guarantee of 25% of the seats in the House of Commons). A crude interpretation of this – one thoroughly exploited by some Quebec nationalists – was that Canadians outside Quebec like Aboriginal peoples but dislike Quebeckers.

The fundamental difference, however, is that the special needs of Aboriginal peoples – based upon the experience of exclusion and colonization throughout Canadian history, with all of its horrific social, economic, and cultural consequences – could easily be invoked to justify non-asymmetric treatment. In the case of Quebeckers, however, who have fully participated for years in the governance structure of Canada as a nation and whose government yields collective power over a wide range of policy fields, a deviation from the general principle of representation by population could, unless carefully explained and justified, seem like an unwarranted special privilege. As well, what was being deviated from here was *not* an abstract notion of equality between provinces, but a concept of democratic representation based upon equality between individuals.

As Stéphane Dion argues in his outstanding contribution to *Seeking a New Canadian Partnership*, the fundamental difficulty with radical asymmetry in the *division of powers* is that asymmetry entails a corresponding reduction of influence at the centre for citizens whose province exercises powers that are exercised in other provinces by the federal government.

> En effet, le corollaire de l'asymétrie est que toute délégation exclusive d'une compétence à une province entraîne pour cette province la perte des pouvoirs correspondants, au sein du parlement fédéral. Concrètement, cela veut dire que, une fois l'asymétrie forte adoptée, les députés fédéraux élus par le Québec ne pourraient plus voter sur des matières dont la compétence, pour le Québec, aurait été déléguée en exclusivité à l'Assemblée nationale de cette province.[44]

According to the same logic, key federal Cabinet posts that involved the exercise of asymmetrically assigned powers could not be given to Quebeckers; and how could a Prime Minister be chosen whose democratic base was in a province where many of the decisions of his government do not apply?

As Dion suggests, these kinds of problems do not arise with the kind of modest asymmetry that now exists at the level of the administration of specific government programmes, such as the Quebec opt out of the Canada Pension Plan. This, however, does not mean they would not arise in the event of a much more profound asymmetry in constitutional powers.

VI. Justifying Special Status

Lenihan, Robertson and Tassé argue that a Canadian metavision must encompass not only universal rights and values (which could be used to legitimate allegiance to any

[44] S. Dion, "Le fédéralisme fortement asymétrique: improbable et indésirable" in Seidle, *supra* note 35, 133 at 136.

liberal democratic regime) but also specific historical commitments and entitlements. Some of these historical commitments and entitlements can be justified as a contextualization of universal norms; others, however, must be understood as indispensable ingredients of an overlapping consensus in which all the vital constituent elements of Canadian society are able to recognize themselves. For Lenihan, Robertson and Tassé, the reconciliation or integration of these specific historical commitments with liberal concepts of universal rights is the major task that faces Canadians in the post-Charlottetown era.

Lenihan, Robertson and Tassé see a properly circumscribed conception of language and culture as the legitimate basis for a claim of distinctiveness or special status within the Canadian constitutional order. In the abstract, I think they are successful in making out a case that the preservation and promotion of the French language is a basis for claiming special treatment within the Canadian constitutional order. But where Lenihan, Robertson and Tassé fail is in showing how a *specific* kind of special treatment is actually *required* to satisfy these special needs related to the preservation and promotion of a francophone society within Canada. They support recognition in the constitution of Quebec's distinctiveness, but they don't explain why – without this kind of special status – the scope of the Quebec government to protect francophone linguistic or cultural interests is insufficient, or will become inadequate in the foreseeable future. Indeed, in responding to a document written by Quebec nationalists that suggests the Quebec government unilaterally affirm "the juridical primacy of Quebec in linguistic matters", Lenihan, Robertson and Tassé evince considerable scepticism as to whether there are any measures genuinely necessary to realizing the goal of a thriving francophone society that could not be taken and successfully defended within the existing constitutional framework, including the *Charter*.[45]

Crucial to the defense of special status for Quebec by Lenihan, Robertson and Tassé and also by Webber is the claim that it is possible to conceive of such special status in non-nationalist terms, or at least in terms consistent with a form of nationalism that is tolerant and non-exclusionist. Many critics of Meech and Charlottetown, myself included, maintained that the distinct society concept of special status would almost inevitably be co-opted by the nationalists, as a justification for illiberal policies towards minorities within Quebec (such as the ban on English signs) or as a basis for claiming an unlimited number of additional powers to the point where Quebec's demands would extend to *de facto*, if not *de jure*, sovereignty. Karen Knop and I put the argument in the following way: "Since the nationalist passion for sovereignty lacks any intrinsic limit and hence provides no *principle* by which nationalism may be satisfied through divided or limited power in a federal state, federalism, seen through nationalist eyes, will always remain a second best."[46] When nationalism is understood in this way, federalist nation-

---

[45] D.G. Lenihan, G. Robertson & R. Tassé, *Canada: Reclaiming the Middle Ground* (Montreal: Institute for Research on Public Policy, 1994) at 119-20.

[46] R. Howse & K. Knop, "Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective" (1993) 1 New Eur. L. Rev. 269 at 274. (The case of Aboriginal claims is more complicated – often recently they have been articulated in the discourse of nationalism, but certainly not by all Aboriginal voices). See also W. Kymlicka, "Misunderstanding Nationalism" (Winter 1995) Dissent 130. Kymlicka notes, at 135: "[I]n most nationalist conflicts over devolution of powers, boundaries, political representation, language rights, and so on, the ambitions of nationalists far exceed what is required to ensure the continued existence of the nation as a distinct society."

building cannot be undertaken by accommodating the nationalist thirst for more collective power, but must consist in building counterweights to it, through providing national minorities with rights and with voice in central institutions.

Lenihan, Robertson and Tassé challenge this understanding of nationalism. They claim that a new kind of nationalism in Quebec is emerging which "sees no inherent conflict between a profound attachment to the 'nation' and membership in a large multinational federal state."[47] Moreover, the new nationalism is civic not ethnic; *i.e.* it does not define full membership in Quebec society in terms of ethnic origin. The approach of Lenihan, Robertson and Tassé is consistent with some recent scholarship on nationalism that suggests there is no necessary cleavage between liberalism and nationalism.[48] However, Lenihan, Robertson and Tassé are themselves unsure about the extent to which this new nationalism has taken root or can take root in Quebec society more broadly, whatever its attractiveness to a few good-willed journalists and intellectuals. They note: "Quebec nationalism seems to be at a turning point. But the new direction remains unclear."[49] Most importantly, they observe that "when the discussion shifts to the question of Quebec's place in Confederation", it is the discourse of the old nationalism that continues to dominate.[50]

Unlike Lenihan, Robertson and Tassé, who face directly and honestly the problem that nationalism poses for accommodation of Quebec through special status within the federation, Webber attempts a complete divorce between nationalist rhetoric and the claim for special status.[51] Webber attempts to justify special status based on an argument about the importance of a shared language to the quality of democratic deliberation. According to Webber, language "tends by its very nature to define the boundaries of a political community. Language has this effect because, in addition to being a subject of public debate, it is the medium through which public debate occurs."[52] If public debate, or high-quality public debate, must necessarily take place within a given linguistic context, then it is entirely understandable that Quebeckers would want as much of that debate as possible to take place within a Francophone linguistic context (*i.e.* within Quebec).

Webber's assumption that meaningful public debate is unlikely to occur across linguistic contexts is never explored or demonstrated in his book – perhaps because it relies upon one of the most fashionable axioms in contemporary philosophy, namely that of the hegemonic influence of language on consciousness and discourse.[53]

Yet some leading philosophers of language, most notably Roland Barthes, have challenged this notion of linguistic hegemony, accepting the importance of language to discourse, but claiming also that a kind of linguistic pluralism is possible, which allows

---

47 Lenihan, Robertson & Tassé, *supra* note 45 at 105.

48 Y. Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993). See the review by Kymlicka, *supra* note 46. As Kymlicka suggests, even if one accepts the distinction between civic and ethnic nationalism, there is no guarantee that civic nationalism will always be tolerant or genuinely inclusive.

49 Lenihan, Robertson & Tassé, *supra* note 45 at 106.

50 *Ibid.* at 107.

51 Webber, *supra* note 14 at 23-26.

52 *Ibid.* at 200.

53 As is noted by S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Polity Press, 1992) at 208.

us to expand our horizons by moving back and forth in public discourse between different languages and linguistic contexts. As Barthes suggests:

> Dante discute très sérieusement pour décider en quelle langue il écrira le Convivio: en latin ou en toscan? Ce n'est nullement pour des raisons politiques ou polémiques qu'il choisit la langue vulgaire: c'est en considérant l'appropriation de l'une et l'autre langue à son sujet [...]. Cette liberté est un luxe que toute société devrait procurer à ses citoyens: autant de langages qu'il y a de désirs: proposition utopique en ceci qu'aucune société n'est encore prête à admettre qu'il y a plusieurs désirs. Qu'une langue, quelle qu'elle soit, n'en réprime pas une autre; que le sujet à venir connaisse sans remords, sans refoulement, la jouissance d'avoir à sa disposition deux instances de langage, qu'il parle ceci ou cela, selon les perversions, non selon la Loi.[54]

Webber's response to the ideal of linguistic pluralism suggests the practical impossibility of most citizens being able to participate directly in public debate in more than one language. Is this really required for such a debate to occur? Isn't it enough that there be a critical mass of citizens prepared to, and able to, cross linguistic boundaries, as well as translation and interpretation facilities? Moreover, Webber ignores the possibility that trying to engage a public debate across linguistic boundaries may actually deepen us as citizens, that it may make us aware of assumptions that we need to put in question or perspectives on issues that otherwise we would not fully grasp.

Webber is not alone in attempting to argue that democratic deliberation, if it is to be meaningful, must normally be situated within a single linguistic context. A similar view has been expressed by the European philosopher Paul Thibaud.[55] There is something rather naive in Webber's characterization of the linguistic limits of discourse as non-nationalist – the notion of an identity between language and democratic community is itself a product of 19th century nationalism, in its reaction to the Enlightenment project of thinkers like Kant and Condorcet to build a transnational republican federation. As Todorov has shown, it is the idea of linguistic races, not biological races, that underpins much of 19th century European nationalism.[56]

At the end of the day, Webber is compelled to repudiate some of his linguistic determinism, since – taken to its logical conclusion – it would sustain the notion of an independent Quebec. If democratic deliberation is better when conducted in a single linguistic context, then why should this not be true for *all* policy areas? Webber's attempts to win back some legitimacy for the Canadian project are highly unpersuasive. First of all, he suggests that "there is still considerable willingness to treat at least some

---

[54] R. Barthes, *Leçon: Leçon inaugurale de la chaire de sémiologie littéraire du Collège de France, prononcée le 7 janvier 1977* (Paris: Seuil, 1978) at 24-25.

[55] See the interview with Thibaud in A. Legaré, ed., *La souveraineté: est-elle dépassée? Entretiens avec de parlementaires et intellectuels français autour de l'Europe actuelle* (Montréal: Boréal, 1992) at 126-30.

[56] T. Todorov, *On Human Diversity: Nationalism, Racism and Exoticism in French Thought*, trans. C. Porter (Cambridge, Mass.: Harvard University Press, 1993) at 140-46. See also M. Weber, "The Nation" in J. Hutchinson & A.D. Smith, eds., *Nationalism* (Oxford: Oxford University Press, 1994) at 21-25. Weber notes: "It goes without saying that 'national' affiliations need not be based upon common blood. Indeed, everywhere the especially radical nationalists are often of foreign descent." What is required as a foundation for nationalism is a feature, or set of features, whether culture, religion, race, language or a combination thereof, that creates "a specific sentiment of solidarity in the face of other groups" (at 22).

issues as extending across the linguistic boundary."[57] It isn't clear which issues fall into this category or why. Is the reason that the quality of democratic deliberation is deemed less important, or that the value of a pan-Canadian solution, for example in terms of economic benefits, outweighs the loss for deliberative democracy?

Webber realizes that, so understood, the limits to the logic of linguistic self-determination are highly unstable. And this is when he pulls out of a hat, as it were, what he claims to be the genuine stable benchmark – the division of powers in the 1867 Constitution! Now what Webber appears to mean by the 1867 Constitution is not the intent of the framers, or the contemporary interpretation of the division of powers in that Constitution by the courts and through political practice, but rather the 1867 Constitution as interpreted in highly decentralized fashion by the Judicial Committee of the Privy Council. Webber's 1867 Constitution would exclude the federal government from much of the social policy field – and yet such an exclusion occurred not by virtue of the text of that Constitution, or the intent of the framers, but above all through the determination of the British Law Lords that property and civil rights within the province encompassed much of what today would be considered the domain of social policy. Today, however, the Supreme Court of Canada interprets much the same constitutional text as including a federal spending power that extends to conditional spending in areas of exclusive or primary provincial jurisdiction[58] and a Peace, Order and Good Government power that gives the federal Government wide scope, *inter alia*, for environmental regulation in the national interest.[59] Adoption of the earlier interpretation as the benchmark seems arbitrary, especially since the earlier interpretation is arguably less relevant to the complex realities of contemporary policymaking. Moreover – and this is a point that is very well developed by Lenihan, Robertson and Tassé – it is almost unimaginable that a return to the Law Lords' "watertight compartments" paradigm for constitutional jurisdiction would even be possible today, given the complex interdependence of different policy fields in contemporary circumstances. Even if the 1867 Constitution *could* supply a stable, unchanging benchmark for the division of powers, it is simply mysterious how this benchmark can provide a principled sorting of cases where a single linguistic context is essential to democratic legitimacy, and cases where it can or should be dispensed with. Here, there is an unbridgeable conceptual gap in Webber's argument.

VII. Constitutional Change and the Discourse of Quebec Nationalism

A powerful antidote to the tendency of Webber and others to abstract from nationalism is William Johnson's study *A Canadian Myth: Quebec, Between Canada and the Illusion of Utopia*. As Johnson shows, through a careful historical examination of the rhetoric and political positions of several generations of Quebec nationalists, the differences between the nationalist advocates of special status for Quebec within Canada and the supporters of sovereignty-association are largely attributable to differences about tactics and timing. Both groups "started from the same political postulate, that of a 'collective personality' – which was really just another name for an ethnic state."[60]

---

58 Webber, *supra* note 14 at 205.

59 *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297.

60 *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161.

61 W. Johnson, *A Canadian Myth: Quebec, Between Canada and the Illusion of Utopia* (Montreal: Robert Davies, 1994) at 71.

As Johnson notes, this idea of collective personality is inherently exclusionist. "Those from outside Quebec are not considered part of *nous autres*; nor are English-speaking Quebeckers. French-speaking Quebeckers are *nous*—and not even all of them; only those who feel that they are part of a 'collective personality' that began with the settlement of New France, that includes all the historic nationalist heroes, and includes today all those who share in the 'collective obstinacy' to maintain Quebec as French. That is *nous*. All others don't belong."[61]

Johnson locates the source of Quebec nationalism in what he calls Anglophobia, the tendency to view English Canadians as the mortal enemy, the source of whatever is harmful or threatening to French Quebec. Anglophobia finds its most sophisticated expression in the doctrine of colonization, or the conquest hypothesis. This, to my mind, is the least satisfactory part of his book. While Johnson's candour about the exclusionary character of nationalism is admirable, I disagree strongly with his rather dismissive treatment of the feelings of vulnerability that fuel this nationalism. Johnson seems to view these feelings as little more than a simplistic kind of paranoia or scape-goating of the English. Yet, it *is* a reality that the conquest occurred; that francophone Quebeckers remained economically and socially marginalized not just in Canada as a whole but in their own province for much of the 20th century; and that francophone Quebeckers *are* faced with the formidable challenge of preserving a French-speaking society in predominantly English North America.

The nationalist élites do greatly exaggerate the vulnerability of francophones, and they also overstate the role of English Canadians in creating the problems of Quebeckers. Yet there is a vast difference between the role assigned to English Canadians by Quebec nationalists and the vilification of Jews in the ideology of European fascism, a difference which makes Johnson's analogy between the two[62] quite misleading.

At times, Johnson appears to present Quebec society as less tolerant or open, either historically or at present, than is the case for the rest of Canada. He refers to Quebec before the Second World War as a "rigidly controlled Catholic society".[63] But was the Protestant bourgeois society of Ontario any less rigidly controlled? Johnson writes of Quebec's long tradition of introverted resistance to the surrounding world.[64] But can one not detect as long a tradition of parochialism in English-Canadian society, with its strong rural influences, underdeveloped urban culture, and frequently xenophobic attitudes towards immigrants? (Actually, people of my father's generation say that Montreal, *even under the authoritarian rule of Duplessis*, was the most open and urbane community in Canada.)

In his final chapter, Johnson addresses directly the notion that the new nationalism emerging in Quebec is not really "ethnic" nationalism of the old kind, since it purports to include as members of the Quebec nation, even those who are not francophone Quebeckers by ancestry. As Johnson suggests, it is misleading to describe this new nationalism as genuinely liberal, since the admission ticket to the Quebec "nation" is assimilation to a culture that is largely constructed by a conception of Quebec

---

61 *Ibid.*

62 *Ibid.* at 50.

63 *Ibid.* at 39.

64 *Ibid.* at 74.

francophone identity. He cannot describe a form of nationalism as truly tolerant, when it nevertheless supposes the assimilation of newcomers to a distinctive culture largely defined by the majority.[65]

In this chapter, Johnson examines a range of proposals contained in the sovereignty platform of the Parti Québécois, in order to show the illiberalism of the kind of nationalism that the PQ describes as "territorial" rather than "ethnic". I am far from certain, however, that all of the policies that Johnson describes in this chapter as forms of illiberal nationalism are really illiberal at all. I see nothing illiberal, for instance, in limiting access to *publicly-funded* English language schooling to those cases where such access is a historical right under the 1867 Constitution. Liberal democracies generally do not offer publicly-funded schooling in any language other than the official language, except for the case of historical rights acquired by certain discrete minority groups (this is not to say that a case could never be made for such funding on liberal principles. Johnson, however, does not articulate it). Johnson seems incapable of drawing a clear distinction between measures reasonably connected with the maintenance of an official language in a community, and genuinely illiberal measures, such as the PQ's proposed ban on all language but French on commercial signage and its proposed prohibition on the teaching of English in French schools prior to grade four, which seem aimed at the *suppression* of the use of English as a language in civil society. Johnson seems to suggest that measures to promote French would only be justifiable if French were already "declining or degenerating to the level of a dead language".[66] If one had to wait until that point, it would be probably too late.

VIII. Collective vs. Individual Rights

Among the main issues in the debate over Charlottetown was the desirability of entrenching "collective rights" in the Constitution. The distinct society clause in the Meech Lake Accord was seen by many critics of Meech as providing a constitutional justification for illiberal measures in the name of preserving and promoting Quebec's distinctiveness. Supporters of Meech often responded that the clause, much like the multiculturalism provision of the *Charter* (s. 27), would merely play some marginal role in the interpretation of limits to *Charter* rights, pursuant to section 1. Critics were, however, concerned not only about the role of the clause in the judicial interpretation of the Constitution, but also that it would make the invocation of the legislative override politically less difficult.

As Morton[67] notes, what took the debate beyond crystal-ball gazing about judicial and political behaviour was the Bourassa government's use of the override to reinstate, in revised form, a ban on the use of languages other than French on commercial signs. The previous legislation had been held by the Supreme Court of Canada, as well as the Quebec Court of Appeal, to violate the guarantee of freedom of expression in section 2(b) of the *Charter*. In its careful section 1 analysis, the Supreme Court had accepted a requirement that signs be bilingual as a reasonable limit on *Charter* rights, given the importance of the goal of preserving the vitality of French in Quebec, but rejected the notion that suppressing *other* languages was a necessary means to this goal.

---

65 See also Kymlicka, *supra* note 46.

66 Johnson, *supra* note 61 at 384.

67 Morton, *supra* note 25 at 143.

The Bourassa government justified the use of the override as a choice to favour collective rights over individual rights. Bourassa also commented that if Quebec had already had the advantage of the distinct society clause in Meech Lake, on a correct interpretation of the Constitution, the override would not even have been necessary.[68] Thus, by the end of 1988, it was clear for all to see that the Meech distinct society proposal, however moderate its original intent, had been largely co-opted by the nationalists. Many *non*-nationalist Quebeckers had strongly supported recognition of Quebec's distinct society in the Constitution; it seemed to appeal intuitively to their sense of vulnerability within a country with an English-speaking majority, and to afford, however vaguely, an additional margin of protection. Yet the rhetoric of distinct society had easily been captured by the nationalists. The resounding rejection by the Quebec government of the Charest Report recommendations for clarifying the meaning of distinct society and its relationship to the *Charter* illustrated that it was only the *nationalist* version of distinct society that continued to animate at least the political classes in Quebec in their push for constitutional reform.

Since it was now impossible to maintain that distinct society was innocuous from the perspective of individual rights, in trying to justify distinct society in the Canada Round the political classes turned to the idea that, in some circumstances, "collective rights" are required by Canadian constitutionalism. The invocation of this rhetoric of collective rights was aimed at using the moral authority of rights talk to justify a distinct society clause that would, in fact, be used to trump individual rights.

There is a complex range of moral, semantic and legal issues surrounding the granting of rights to groups rather than to individuals. These issues are addressed with considerable clarity and subtlety in *Group Rights*. Particularly valuable are the essays by Joe Carens, Will Kymlicka, Wayne Norman, Denise Réaume and Melissa Williams. As well, an excellent treatment of the issue of collective rights is provided by Lenihan, Robertson and Tassé in *Canada: Reclaiming the Middle Ground*.

In the Charlottetown debate, much of the opposition to collective rights was focused on the possibility that such rights would lead to a weakening of individual rights guarantees in the *Charter*, through legitimating the exercise of *coercive collective power*, particularly in the case of Quebec's distinct society. Moreover, recognizing different groups with a different constitutional status for each would ultimately undermine the core of the liberal concept of equality among individuals, unless differential treatment could be justified in terms of liberal principles.

Some commentators have erroneously extended these criticisms even to rights that have, as Kymlicka[69] suggests, the purpose of protecting minorities *against* the oppressive power of the larger community. Kymlicka usefully refers to a category of rights called special rights, which are "special" in the sense that they are extended only to some limited group in society but which may well be exercised by individuals, and which often do not entail the exercise of coercion by the group over the individual. These special rights would include, for instance the minority language education guarantees in section 23 of the *Charter*, which provide rights to individual members of minority linguistic

---

[68] See R. Yalden, "Liberalism and Language in Quebec: Bill 101, the Courts, and Bill 178" (1989) 47 U.T. Fac. L. Rev. 973.

[69] W. Kymlicka, "Individual and Community Rights" in J. Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) at 17.

communities. These kinds of rights do not purport to establish the priority of the group over the individual, nor do they *necessarily* raise any particular issue for the liberty of non-members of the group. As Kymlicka also stresses, since these rights do treat some groups differently than others, they require a *justification* in terms of liberal equality – they must be necessary to counter the vulnerability of a minority group to tyranny of the majority and/or to reverse a baseline of inequality.

Kymlicka's deft treatment of these issues is somewhat marred by two shortcomings in his analysis. First of all, Kymlicka seems to suggest that *some* special or community rights that are justified in terms of minority community vulnerability nevertheless could include rights entailing the exercise of coercive power over others (*e.g.* distinct society status for Quebec). While Kymlicka's essay is extraordinarily helpful in showing that what are often called collective rights don't entail any risk to individual autonomy, he says little about how to resolve those cases where there is a genuine possibility of conflict.[70]

Secondly, Kymlicka thinks there is a separate case for recognizing special rights that emanate from "historical agreements". Here, he suggests that providing rights to "some form of self-determination" to Aboriginal peoples and French Canadians and not to others may be justified on the notion that immigrants that come to Canada implicitly agree to relinquish certain rights to "cultural protection".[71] Kymlicka is the first to acknowledge the dangers and difficulties with this notion of a voluntary relinquishment of rights. There is perhaps a liberal case for honouring historical pacts or agreements – repudiating such commitments in a sudden or arbitrary manner would give rise to a feeling of insecurity among a significant number of citizens who have relied upon these historical contracts to protect their place in the polity, and as a mainstay against majority tyranny. Here, one could mention Montesquieu's definition of liberty as the peace of mind that comes from each citizen's opinion of their own security.[72] A case for honouring historical commitments based on this notion of political liberty would have the advantage of not precluding (as would a historicist perspective) the evolution or adaptation of these agreements over time, to reflect the changing composition of the polity – provided the changes do not genuinely threaten the sense of security of members of those vulnerable groups that have hitherto been protected by historical rights. This understanding also has the advantage of not entailing the "downgrading" of any additional, legitimate claims by other groups or individuals not caught by the historical pact.

Lenihan, Robertson and Tassé correctly distinguish between rights that are "collective" in the sense that they are actually vested by law in groups, and individual rights that have a "collective" dimension, because their exercise by individuals assumes or requires a community context.[73] This would include linguistic rights, freedom of association and many aspects of the right to freedom of expression. In my view, Lenihan, Robertson and Tassé make a very important distinction here. An overly sharp distinction between collective and individual rights runs the risk of leading to an overly narrow interpretation of individual rights with collective aspects, *e.g.* freedom of association.

---

70 See *e.g.* Kymlicka's response to Knop and myself, *ibid.* at 31 n.15.

71 *Ibid.* at 27.

72 Montesquieu, *L'esprit des lois* (Paris: Didot Frères, 1845) at 129: "La liberté politique dans un citoyen, est cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa sûreté...."

73 Lenihan, Robertson and Tassé, *supra* note 45 at 62-63.

It is often argued that there should be no special rights since there is an infinite variety of group claims to special treatment, and no legitimate or practicable way of weighing or reconciling these claims within a liberal framework. This appears, for instance, to be the position of Barry Cooper[74] and of Janet Ajzenstat.[75] Given the arbitrary selection of groups included in the Canada clause of the Charlottetown Accord, and the kind of chaotic postmodern discourse sometimes used to justify the Accord,[76] such a view is understandable. But as Lenihan, Robertson and Tassé suggest, the complexity and variety of group claims is not a good reason to give up on the search for a distinctive liberal Canadian metavision, which would provide a normative framework for weighing and responding to these claims on a principled basis. This being said, I have doubts about the adequacy of the framework that Lenihan, Robertson and Tassé themselves propose.

First of all, Lenihan, Robertson and Tassé tend to elide two kinds of potential conflict between collective rights and liberalism.[77] The first kind of conflict occurs where the exercise of collective rights entails an exercise of collective *power* that may result in an infringement of individual rights. The second conflict is between what Kymlicka calls special rights and a formal notion of liberal equality (*i.e.* treating everyone the same). It is quite possible that a contemporary liberal would not view the second conflict as of great concern, since she might well not accept a purely formal concept of equality (treating everyone the same) as appropriate to liberalism. She will merely insist that the granting of special rights does not itself constitute a purely arbitrary form of discrimination, but rather is justified in terms of a substantive vision of *equality of opportunity*. On the other hand, a contemporary liberal, even if she were satisfied that a given collective right does not violate such a conception of liberal *equality*, might still be reluctant to grant that right, if the right implied exercises of collective power that resulted in the infringement of individual *liberty*.

Secondly, Lenihan, Robertson and Tassé seek to draw a fundamental distinction between collective rights that are defining features of political community, and deserve constitutional recognition, and those that flow from more general existing constitutional norms such as non-discrimination. Here, they come perilously close to a kind of historicism which at the limit threatens to undermine their universalist claim that "respect for basic liberal rights must be viewed as a background condition for the development of any just society."[78]

Lenihan, Robertson and Tassé become vulnerable to the objection that the "original commitment", or the defining features of the political community, merely represent the outcome of power relations at a particular historical juncture. Given that they are products of history, why should the defining features of the community not be up for grabs, and therefore be in need of constant justification and re-justification in terms of a principle of justice that transcends any particular historical claim or interest? Lenihan, Robertson and Tassé clearly fear that some important commitments would appear arbitrary unless they can privilege history with a normative force. However, as I have suggested above, honouring certain historical commitments or compacts may be

---

74 Cooper, *supra* note 26.

75 Ajzenstat, *supra* note 20.

76 A prime example of this kind of discourse is J. Tully, "Diversity's Gambit Declined" in Cook, ed., *supra* note 4 at 149.

77 Lenihan, Robertson & Tassé, *supra* note 45 at 66-67.

78 *Ibid.* at 29.

justifiable on broader liberal terms, where the radical or sudden disruption of these commitments would seriously impair many citizens' sense of security about their place within the polity. In fact, Lenihan, Robertson and Tassé seem to be edging towards such a position when they themselves qualify historical commitments as "quasi-permanent because the political community is changing and evolving."[79]

Whatever shortcomings the discussion of collective rights by Kymlicka and by Lenihan, Robertson and Tassé may have, the strength of their work becomes evident when one considers the confusion on this subject exhibited by commentators such as F.L. Morton and Barry Cooper. Morton describes minority language rights in section 23 of the *Charter* as group rights, and wonders how Pierre Trudeau and Deborah Coyne could argue against collective rights while supporting these kinds of entitlements.[80] This of course misses the point. Coyne and Trudeau criticized "collective rights" (such as distinct society status for Quebec) that may be deployed to excuse the curtailment of individual liberty. But minority language rights do not entail any threat to individual liberty, since, in the last analysis, they are exercised by the individual against the group, and not by the group against the individual.

Cooper muddies the waters even more than Morton by extending the concept of collective rights to any right that involves positive government action.[81] Here, Cooper seems to be invoking the classical liberal tradition; but even in this tradition many rights central to liberty involve positive state action in one way or other (trial by jury and or an independent judiciary, the right to vote in free and fair elections, etc).[82] All of these rights are individual in the sense that they involve claims of the individual against the state.

IX. Cultural Relativism and Collective Rights

In some of the debates about individual and collective rights during the Charlottetown process, a cultural relativist argument was deployed to justify some exemptions to *Charter* rights, particularly the very broad exemptions applicable to Aboriginal self-governing communities in the Charlottetown Accord (which were vigorously opposed by the Native Women's Association, for example). These arguments resurface in essays by Mary Ellen Turpel and by James Tully. According to Turpel, exemption from the *Charter* for Aboriginal self-governing communities is justified because, above all, the values in the *Charter* are foreign to Aboriginal communities.[83] She appears to dismiss the support for the *Charter* by the Native Women's Association by (correctly) suggesting that NWAC "cannot be said to have the monopoly on representing the views of Aboriginal women...."[84] At the same time, Turpel admits: "The views of the Native Women's Association are legitimate and should have been included as one of many perspectives offered from the Aboriginal side of the table."[85] Yet, if these views were

---

79 *Ibid.* at 78 n.12.

80 Morton, *supra* note 25 at 145.

81 Cooper, *supra* note 26 at 103.

82 See *e.g.* Montesquieu, *supra* note 72.

83 Turpel, *supra* note 39 at 135-36.

84 *Ibid.* at 133.

85 *Ibid.*

legitimate, does this not suggest that one cannot simply assert baldly that the *Charter* is in conflict with or alien to Aboriginal cultural identity?

Turpel also takes Lorraine Weinrib to task for pointing out that many *Charter* rights are reflections or expressions of rights that have been accepted at least in principle by many non-Western peoples and therefore cannot be regarded as culturally specific to the European West. It is true, as Turpel suggests, that different societies, or rather the power élites in those societies, have interpreted rights in different (often self-serving) ways, but these interpretive differences hardly show that rights lack any universal normative content. Moreover, in some instances, differences of view between some Western and non-Western countries have less concerned the universality of basic civil and political rights, than whether social and economic rights have the same status.

Of course, as Lenihan, Robertson and Tassé note, the specific *manner* in which certain universal rights, such as democratic rights, are embodied in the *Charter* may speak to institutional forms and practices that are specific to the kinds of liberal democratic regimes historically characteristic of European or North American "white" society. A different set of institutions may also be compatible with, or reconcilable with, the universal norm of government by consent of the governed—for instance the Mohawk practice of selection of leaders by Clan Mothers could be reconciled with the democratic ideal, if the practice itself were subject to periodic review and renewal of democratic consent by the entire community.[86]

As Lenihan, Robertson and Tassé suggest, much of the normative force of the very idea of Aboriginal self-government (at least among non-Aboriginal Canadians) would be largely incomprehensible if one were simply to reject liberal principles of liberty and equality. To attack these principles as reflections of colonialism verges on incoherence, for one is attacking the very principles by virtue of which colonialism itself may be viewed as an illegitimate practice.

This being said, Turpel does raise important concerns about the *Charter* being applied to Aboriginal peoples through a justice system that has often betrayed their needs and interests. One can accept that rights have a universal normative core, and nevertheless worry about the application of those rights on the basis of an interpretative monopoly by the dominant community. A serious dialogue about these complex matters was not really possible given the deadlines and pressures that characterized the Canada Round. But as political self-government agreements are negotiated that allow self-governing communities at least partial control over justice within their societies, such a dialogue is indeed urgent. The result could be the application and interpretation of *Charter* rights in a contextual way *within* Aboriginal legal and political institutions. Once we bracket strong assumptions of cultural relativism or cultural difference, it is even possible that Aboriginal interpretations of and engagements with the *Charter* will deepen the understanding of all Canadians about the possibilities inherent in *Charter* rights.

X. Conclusion

If there is one thing that the post-Charlottetown literature makes clear, it is that a serious and genuine dialogue about many of the issues raised by Charlottetown has only

[86] Lenihan, Robertson & Tassé, *supra* note 45 at 90.

just begun. How can the élite bargaining dimension of constitutional change be blended with democratic participation? How can constitutional change respond to Quebeckers' genuine sense of vulnerability, without being co-opted by nationalist ideology? What are the specific complementarities and conflicts between *Charter* values and Aboriginal institutions and customs? A desperate effort to salvage something from the Mulroney government's earlier aborted efforts at constitutional reform, the Canada Round did not generate answers to these questions able to command a democratic consensus among Canadians. Given the ultimatums, deadlines, misunderstandings, and manipulations that characterized the process, this is hardly surprising. The best of the post-Charlottetown literature provides a basis for beginning the genuine dialogue that never happened during the constitutional crises of 1987-1992. The thoughtfulness and openness of much of this literature is itself a refutation of the separatist myth that, with the deaths of Meech and Charlottetown, the possibilities for Canadian constitutional development are at an end. Such a suggestion is, in its own way, as short-sighted as Pierre Trudeau's notion that, with the 1982 constitution, the Canadian federation was set to last a thousand years.

*Robert Howse**

* Assistant Professor of Law, University of Toronto.