

Practice and Principle: Asymmetrical Federalism in Canada

By:

Cameron D. Bodnar
Canadian Studies Fellow
Mount Allison University
cbodnar@mta.ca

**Prepared for the 2003 Annual Meeting of the Canadian Political Science Association
Dalhousie University**

“Canadian academics, it is sometimes said, have an obsession with Canada’s constitution and proposals for its reform.”

James Bickerton and Alain-G Gagnon¹

Introduction

James Bickerton and Alain-G Gagnon wrote these words in 1994, in the immediate aftermath of the Charlottetown referendum. The intervening years have not dulled their validity, even if there was relatively little formal activity. Recent events, however, suggest constitutional and institutional reform issues may return to centre stage. The election victory of the Liberal Party of Quebec, the Royal Commission on Renewing and Strengthening our Place in Canada by Newfoundland and Labrador, the 2003 Alberta government Speech From the Throne, and the call for a “new deal” for Canadian municipalities either promise or could result in formal demands for constitutional change going forward.² To a large extent, these events are continuations of established struggles over the relationship between Quebec and the rest of Canada, regarding Quebec’s place in the constitutional order and the legal status of separation,³ and the representative features of Canada’s federal system, especially in the west⁴ but also in Atlantic Canada. Though unmentioned thus far, aboriginal peoples are among the foremost proponents of a

Acknowledgment: Thanks to Andrew Nurse, Fred Fletcher, Lori Turnbull, and Alain Noel for their helpful advice on various aspects of this paper.

¹ James P. Bickerton and Alain-G Gagnon, "The Study of Canadian Politics," in *Canadian Politics*, ed. James P. Bickerton and Alain-G Gagnon (Peterborough: Broadview Press, 1994).

² Not to mention interest on the part of British Columbia, Quebec, Prince Edward Island and the Law Commission of Canada in electoral reform, which does not necessarily require constitutional amendment to go forward though it would certainly be a substantial change.

³ The *Quebec Secession Reference* notwithstanding.

⁴ See: Roger Gibbins, "Western Canada: "the West Wants in"," in *Beyond Quebec: Taking Stock of Canada*, ed. Kenneth McRoberts (Montreal and Kingston: McGill-Queen's University Press, 1995).and Roger Gibbins, "Constitutional Politics," in *Canadian Politics*, ed. James P. Bickerton and Alain-G Gagnon (Peterborough: Broadview Press, 1999).

restructured Canadian federation.⁵ That so many issues remain unresolved is not due to a lack of effort. As Peter Russell so famously describes, Canadians have made five attempts at “mega-constitutional change” over the last forty years.⁶ With the partial exception of 1982, all have failed. With the likelihood of formal demands thus rising, it be interesting to explore a few aspects of these attempts to see if anything can be learned.

Although my paper’s axis remains the present impasse, my argument centres on English Canada, or the Rest of Canada, or Canada Outside Quebec and First Nations.⁷ The general topic is asymmetrical federalism. My aim is to call into question the viability of asymmetrical federalism for resolving Canada’s constitutional impasse. My objections are both theoretical and practical. However, the discussion is informed by a more substantive argument. In short, I raise the question of whether the current most popular way of resolving the impasse, re-founding Canada a multinational state, can accomplish the task set for it. I begin with a general discussion of asymmetrical federalism in Canada, follow with the theory and end with a discussion of recent proposals. My focus lies principally with the academic literature. In s my aim is to explore how the academic literature in English Canada understands the ‘impasse’ and its possibilities for resolution.

The Context

Although it is widely held that asymmetrical federalism holds little popular support, this has not prevented discussion and debate over its merits in academic circles. Especially prominent in the wake of the Charlottetown failure, the proponents draw a

⁵ These issues do not exhaust the field. Non-territorial identities, such as gender, race, ethnicity, sexual orientation, and religion also test, in a variety of ways, the capacity of Canada’s political institutions.

⁶ See: Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Second ed. (Toronto: University of Toronto Press, 1993).

⁷ To somewhat facetiously characterize the complexity of one aspect of the present situation.

relatively consistent picture. The tone of this literature is one of its most remarkable features. Simply put, it is one of lament for missed opportunity.⁸ The opening, and its potential to resolve Canada's difficulties is, perhaps, best described by Reg Whitaker:

The case for asymmetrical federalism would be that everyone wins and no one loses: Quebec gets exclusive powers that no other province wants or needs, while the rest of Canada gains an effective national government that is not rejected by Quebec.⁹

The collection where Whitaker articulates this argument contains similar treatments by Peter Hogg, Judy Rebick, Maude Barlow, Peter Lougheed and Kenneth McRoberts.¹⁰ Such sentiments, moreover, are not limited to a single volume. Scholars as diverse as Alan Cairns, Alain Noel, and James Tully come to similar conclusions in the immediate aftermath of the 1992 referendum.¹¹ Guy LaForest, Samuel LaSelva, Kenneth McRoberts, Philip Resnick, Charles Taylor, and Jeremy Webber devote entire volumes to Canada's constitutional crisis where the issue of asymmetry is prominently discussed.¹²

⁸ Martin Westmacott makes a similar point, although he limits his references to the Whitaker piece cited below. See: Martin Westmacott, "The Charlottetown Accord: A Retrospective Overview," in *Challenges to Canadian Federalism*, ed. Martin Westmacott and Hugh Mellon (Scarborough: Prentice Hall Canada Inc., 1998), 108.

⁹ Reg Whitaker, "The Dog That Never Barked: Who Killed Asymmetrical Federalism?," in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 108.

¹⁰ See the respective chapters in: Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).

¹¹ Alan Cairns, "Constitutional Change and the Three Equalities," in *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas Williams (Toronto: McClelland and Stewart Inc., 1995).; Alain Noel, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992," in *Constitutional Predicament: Canada after the Referendum*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen's University Press, 1995).; James Tully, "Diversity's Gambit Declined," in *Constitutional Predicament: Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen's University Press, 1994).

¹² Guy LaForest, *Trudeau and the End of a Canadian Dream*, trans. Paul Leduc Brown and Michelle Weinroth (Montreal and Kingston: McGill-Queen's University Press).; Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal and Kingston: McGill-Queen's University Press, 1996).; Kenneth McRoberts, *Misconceiving Canada*: (Toronto: Oxford University Press, 1997).; Philip Resnick, *Thinking English Canada* (Toronto: Stoddart Publishing Co. Limited, 1994).; Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy LaForest (Montreal and Kingston: McGill-Queen's University Press,

An edited volume by F. Leslie Seidle also directly addresses the issue.¹³ More recently, Alain-G Gagnon, Jane Jenson, and Will Kymlicka added to the chorus of academics sympathetic to asymmetry.¹⁴

As Whitaker points out, these discussions take place against the reality that “actually existing federalism [in Canada] has always been asymmetrical in practice.”¹⁵ Of course, taken by itself, this neither explains the existence of this aspect of Canadian federalism nor justifies it. It does, however, point to the potential existence of an incongruity between how the constitution is understood and how it is lived on a daily basis. As such, it may be useful to briefly explore the concept and its history in Canada. It is useful, if not particularly exciting, to begin with Peter Russell’s definition of the concept: “...asymmetrical federalism... means that the provinces do not all exercise the same powers.”¹⁶ As he continues, there are two formulations: hard/direct asymmetry, involving the allocation of powers to one, or more but not all, province(s); and soft/indirect asymmetry, where the specific allocation of powers proceeds at the request of individual provinces.¹⁷

There are a few examples of ‘hard’ asymmetry in the history of Canadian federalism. One of the more obvious, and problematic lies with the fact that Manitoba,

1993).; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's University Press).

¹³ F. Leslie Seidle, ed., *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options* (Montreal: Institute for Research on Public Policy, 1994).

¹⁴ Alain-G Gagnon, "The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada," in *Multinational Democracies*, ed. Alain-G Gagnon and James Tully (New York: Cambridge University Press, 2001).; Jane Jenson, "Recognising Difference: Distinct Societies, Citizenship Regimes and Partnership," in *Beyond the Impasse: Toward Reconciliation*, ed. Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy, 1998).; Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998).

¹⁵ Whitaker, "The Dog that Never Barked," 107. Peter Russell makes the same point in Russell, *Constitutional Odyssey* 178.

¹⁶ Ibid.

¹⁷ Ibid.

Alberta and Saskatchewan did not initially hold jurisdiction over natural resources, as was the case with all other provinces upon entering Confederation. Often, this provision is cited as evidence of intent to control economic development in the west in a manner primarily to the advantage of central Canada and is, thus, often linked with ‘Western alienation.’¹⁸ Control over natural resources was extended to the three prairie provinces in 1930. Although the conditions of Manitoba, Alberta, and Saskatchewan’s entry are exceptional in some respects, they are not completely so. As Jennifer Smith describes, “the terms on which each of the provinces entered the union varied, as did the instruments that authorized their entry, which ranged from imperial statutes to imperial orders-in-council to federal statutes.”¹⁹ Nova Scotia even managed to get the terms of its entry changed, in order to address a range of grievances some of which extended to the pre-Confederation period.²⁰

Section 94 is among the other clauses legitimizing a degree of ‘hard asymmetry’.²¹ The main part of the clause clearly excludes Quebec,²² granting the federal government the power to “make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights,” with the consent of the provinces involved. The most immediate explanation for excluding Quebec from this clause is its distinct civil legal system, itself protected under section 129, although Samuel LaSelva argues

¹⁸ See: Don Braid and Sydney Sharpe, *Breakup: Why the West Feels Left out of Canada* (Toronto: Key Porter Books, 1990).

¹⁹ Jennifer Smith, "The Meaning of Provincial Equality in Canadian Federalism," in *Institute of Intergovernmental Relations Working Paper Series* (Queen's University, Kingston, Ontario: 1998), 1.

²⁰ See: Del Muisse, "Railroaded into the Union," in *Readings in Canadian History: Pre-Confederation*, ed. R. Douglas Francis and Donald B. Smith (Toronto: Holt, Rinehart and Winston of Canada, Limited, 1990).

²¹ Including section 93(2), on denominational schools, which applies only to Ontario and Quebec, and sections 25 and 35 of the *Charter of Rights and Freedoms*, on Aboriginal rights.

²² The clause refers specifically only Ontario, New Brunswick, and Nova Scotia. It is interesting to note, if, as F.R. Scott suggests, the clause can be extended to all provinces outside Quebec, it would have, if utilized, resulted in an asymmetrical framework similar to, but not nearly as expansive, as the one promoted in recent years. See: F.R. Scott, *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 122.

that it also, potentially, justifies Quebec's historic claim to a veto over constitutional amendments.²³ Section 94A, however, is not consistent with hard asymmetry. Added in 1966, it gives the federal government jurisdiction over "old age pensions and supplementary benefits," but grants all provinces the ability to opt out. Quebec, of course, is the only province to make use of this clause. The Quebec Pension Plan, as a result, is probably the most well known example of asymmetry in Canada. Its adoption, moreover, went relatively smoothly, though the process was not entirely without intergovernmental conflict.²⁴

The constitutional amendment granting the federal government jurisdiction over old age pensions is thus best understood as an example of 'soft' asymmetry.²⁵ The amendment allowed Quebec to adopt its own scheme, but the clause provides the same opportunity to the other provinces. This approach to intergovernmental relations and institutional reform was consistent with the federal government's general manner of accommodating the rise of Quebec nationalism and the Quiet Revolution. As McRoberts describes, Lester Pearson's Liberal government recognized the specificity of Quebec by "enter[ing] into a wide variety of federal-provincial arrangements that enabled Quebec to take full responsibility for programs that in the rest of the country were managed jointly by the federal and provincial governments or even by Ottawa alone."²⁶ Pearson's successor, Pierre Trudeau, did not share this philosophy, and worked, over time, to lessen the impact of such asymmetrical arrangements, if not eliminate them.²⁷

²³ LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*.

²⁴ On this point see: McRoberts, *Misconceiving Canada*: 41-42.

²⁵ Jennifer Smith also makes this point. See: Smith, "The Meaning of Provincial Equality in Canadian Federalism," 1.

²⁶ McRoberts, *Misconceiving Canada*: 41.

²⁷ *Ibid.* 141-42.

While Trudeau's initial efforts were directed at the various arrangements Pearson entered into, he also sought to prevent future 'problems' by "insist[ing] that [the federal government] must play the same role in all provinces."²⁸ If the direction of this argument is unclear, I mean to point to Trudeau's emphasis on provincial equality in intergovernmental relations. This did not always result in perfectly symmetrical policy developments, as the various federal-provincial immigration agreements signed during the 1970s shows.²⁹ At the same time, however, the moves were consistent with a developing emphasis on provincial equality.³⁰ For present purposes, the most significant, and possibly most controversial, move in this context was the implementation of the Established Programs Financing Act (EPF) in 1978. Although the reasoning behind the move is contested, there is little debate over its long-term significance to the evolution of social policy in Canada. It represents the first, in a series of moves, undertaken by successive federal governments, that not only sought to standardize treatment of the provinces, but fundamentally alter the approach to fiscal intervention in areas of provincial jurisdiction, by shifting from shared-cost financing through transfer payments to systems of block grants and tax points.³¹

²⁸Kenneth McRoberts, *English Canada and Quebec: Avoiding the Issue* (Toronto: Robarts Centre for Canadian Studies, 1991).

²⁹ The Cullen-Couture Agreement, on immigration, was signed in 1978. Five other provinces quickly signed similar, though not nearly as expansive, agreements. On this point see: McRoberts, *Misconceiving Canada*: 152-53 and 43.

³⁰ One which was certainly not limited to Trudeau and did not originate with him.

³¹ Though, as Yves Vaillancourt points out, the use of 'tax points' does not begin with Established Programs Financing. The original agreement between the Lesage and Pearson governments that allowed "Quebec to opt out of social, health and employment training" made extensive use of this mechanism. See: Yves Vaillancourt, "Remaking Canadian Social Policy: A Quebec Viewpoint," in *Remaking Canadian Social Policy: Social Security in the Late 1990s*, ed. Jane Pulkingham and Gordon Ternowetsky (Halifax: Fernwood Publishing, 1996).

To be clear, these measures may have reduced the amount of soft asymmetry in Canada, but they have not eliminated it.³² Nor, for that matter, has hard asymmetry. Although the Charter of Rights and Freedoms and the amending formula, both adopted in 1982, assume provincial and individual equality,³³ a number of provisions apply only to one, or more provinces, but not all. Many of these provisions address the accommodation of minority groups, linguistic minorities in general, and the circumstances of Quebec in particular. More recent measures were implemented primarily at the request of New Brunswick.³⁴

It is questionable, however, whether any of these provisions result in, as Hogg puts it, “differences... so marked as to justify the description of ‘special status’ for any province.”³⁵ Instead, the variations are probably better understood in terms of a general recognition of the need for flexibility when addressing local circumstances.³⁶ To be clear, the amount of difference sanctioned by this recognition does not go so far as to establish ‘special status for any province,’ then Canadian federalism does not violate the parameters of “modern constitutionalism,” to borrow a term from James Tully.³⁷ In short, Canadian federalism embodies a linear conception of equality, albeit one that is more substantive than is perhaps generally recognized. At the same time, flexibility speaks to acceptance of difference as a matter of degree rather than principle. That is,

³² For a summary see: David Milne, "Exposed to the Glare: Constitutional Camouflage and the Fate of Canada's Federation," in *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, ed. F. Leslie Seidle (Montreal: Institute for Research on Public Policy).

³³ Assuming no tension between these two equalities.

³⁴ Referring specifically to the amendment making New Brunswick ‘officially’ bilingual.

³⁵ Peter Hogg, *Constitutional Law of Canada*, 2002 Student Edition ed. (Toronto: Carswell, 2002) 108.

³⁶ Milne, "Exposed to the Glare: Constitutional Camouflage and the Fate of Canada's Federation."

³⁷ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995).

divergences are tolerated only to the extent that they remain consistent with established parameters (i.e., national standards).

Canadian federalism could thus be thought of as incorporating a variation of the subsidiarity principle. To quote Hogg, “subsidiarity is a principle of social organization that prescribes that decisions affecting individuals should be as far as possible, be made by the level of government closest to the individuals affected.”³⁸ Canada’s adherence to this principle, however, is not complete, at least outside Quebec and aboriginal communities. Although it may be the case “that the laws that impact most directly on individuals are for the most part provincial,”³⁹ it is hard to deny the centralizing thrust of intergovernmental relations, especially prevalent since World War II, that has resulted in a relative decline in jurisdictional autonomy. On the one hand, there is a functional aspect to this decline that can be attributed to the tasks associated with creating and maintaining a comprehensive welfare state in a country with both wide regional economic disparities and sharply delineated taxation powers. On the other hand, there is a political cultural aspect to the decline best illustrated by the tendency, noted as early as 1962 by James Corry, for the nine English speaking provinces to simply accept “transactions with a strongly centralizing effect, increasing the leverage of the national government on the policies of provincial governments as well as on the economy of the country.”⁴⁰ This is not to suggest that resistance to federal incursions in areas of provincial jurisdiction is absent outside Quebec, but only that such resistance does not, typically, challenge the legitimacy of such moves.

³⁸ Hogg, *Constitutional Law of Canada* 114.

³⁹ *Ibid.* 115.

⁴⁰ James Corry, "Constitutional Trends and Federalism," in *Politics: Canada*, ed. Paul Fox (Toronto: McGraw-Hill, 1962), 29-30.

Take, for example, recent efforts to re-legitimize intergovernmental agreements negotiated through the mechanisms of elite accommodation. In short, it would be tough to argue that these are decentralizing in nature. For the most part, they reaffirm, if occasionally limit, the federal government's ability to direct policy developments throughout the country. To quote Robert Howse:

“The [federal] government has successfully pursued and achieved a major agreement with the provinces on the removal of barriers to internal trade [and] it has restructured its policy role in labour market training, developing agreements with the provinces that get the federal government out of service delivery end while vindicating the national interest through performance-based, negotiated national standards.”⁴¹

Since 1997, the federal government negotiated the Social Union Framework Agreement, saw the release of the final report of the Royal Commission on the Future of Health Care in Canada and reached an agreement in principle to implement its recommendations, and ratified the Kyoto Accord. All, of course, are not satisfied with the federal government's capacity to direct policy developments assumed by such agreements. At the same time, only Quebec⁴² has consistently objected to the principle at stake and, perhaps most prominently, informs its rejection of the Social Union Framework Agreement. Whereas the other nine provinces were satisfied with clarifying “the federal government's use of its spending power, in relation to both Ottawa's freedom to launch new programs and its discretion to reduce spending on existing ones[,]” Quebec rejected the agreement on the grounds that “such ‘collaboration’ is a poorly disguised attack on Quebec's areas of

⁴¹ Robert Howse, "Searching for Plan A: National Unity and the Chretien Government's New Federalism," in *Canada: The State of the Federation 1997, Non-Constitutional Renewal*, ed. Harvey Lazar (Kingston: Institute of Intergovernment Relations, 1997), 313.

⁴² It should be noted that this characterization applies to the realm of formal intergovernmental relations, that is between the provinces and the federal government. In short, it does not account for similarly principled resistance to the federal government on the part of Canada's aboriginal peoples, manifested most recently in the logic of the Assembly of First Nations' position on the federal government's Fiscal Management Act.

exclusive jurisdiction.”⁴³ In other words, whereas the rest of Canada appears to have affirmed the legitimacy of federal intervention in areas of provincial jurisdiction by signing the agreement, Quebec once again rejected it.

In short, the recent agreements remain consistent with the general belief, summarized well by Howse, that “the federal government must continue to retain its own distinctive policy stake in the Canadian associative community; it is not merely a facilitator of interprovincial cooperation to sustain that community, but the *democratic* authority that is uniquely responsible for that community in itself.”⁴⁴ As I will show, however, a debate exists over the boundaries, in Howse’s terms, of the ‘Canadian associative community’. The case for asymmetrical federalism, in this context, is that it is possible to institutionally accommodate Quebec, Aboriginal peoples, and the rest of Canada by allowing each community to adopt the powers it requires to promote its interests, while maintaining a common representative framework. At the same time, doing so requires the rest of Canada to accept that asymmetry is more than a convenient administrative apparatus necessary to accommodate local differences, but also an important principle in and of itself.⁴⁵

The Principle

Before entering a more precise discussion of what asymmetry entrenches, I should clarify my earlier characterization of the post-Charlottetown consensus. In short, there was no unanimity. Barry Cooper preserved the critique he and David Bercuson had earlier developed, where they rejected asymmetry on the grounds that it conflicts with the

⁴³ Harvey Lazar, "The Social Union Framework Agreement and the Future of Fiscal Federalism," in *Canada: The State of the Federation 199/2000, toward a New Mission Statement for Canadian Fiscal Federalism*, ed. Harvey Lazar (Kingston: Institute of Intergovernmental Relations, 2000).

⁴⁴ Howse, "Searching for Plan A: National Unity and the Chretien Government's New Federalism," 325.

⁴⁵ Here I echo an argument made by Jeremy Webber that I address in more detail below.

rule of law and advocated separation as the only viable option.⁴⁶ Perhaps most prominently, Pierre Trudeau maintained the critique he applied during the Meech Lake Accord debates. For example, in response to the revised version of the distinct society clause in the Charlottetown Accord he made the following statement:

The charter, whose essential purpose was to recognize the fundamental and inalienable rights of all Canadians equally, would recognize thenceforth that in the province of Quebec these rights could be overridden or modified by provincial laws whose purpose is to promote a distinct society and more specifically to favor “the French-speaking majority” that has “a unique culture” and “a civil law tradition.”⁴⁷

Trudeau was not the only opponent of the Charlottetown Accord, although he might have been its most significant.⁴⁸ A diverse group including, most prominently, the Reform Party and the National Action Committee on the Status of Women also opposed the Accord. As a result, as Russell describes, “the referendum contest was cast primarily in terms of the country’s national political leadership against the highly diverse and uncoordinated efforts of interest groups and activists alienated from that leadership.”⁴⁹ To be clear, however, objecting to the accord was not synonymous with a critique of asymmetrical federalism. Judy Rebick, President of the National Action Committee on the Status of Women at the time, as noted above, supported, and still supports,⁵⁰

⁴⁶ See: Barry Cooper, "Theoretical Perspectives on Constitutional Reform in Canada," in *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*, ed. Anthony A. Peacock (Toronto: Oxford University Press, 1996).

⁴⁷ Pierre Trudeau, "Quebec's Blackmail," in *Against the Current: Selected Writings 1939-1996*, ed. Gerard Pelletier (Toronto: McClelland and Stewart, 1996), 268.

⁴⁸ Support for the agreement, Peter Russell points out, suffered its most precipitous decline immediately following Trudeau’s critical speech at Maison Egg Roll on 2 October 1992. See: Russell, *Constitutional Odyssey* 225.

⁴⁹ *Ibid.* 221.

⁵⁰ Judy Rebick, *Imagine Democracy* (Toronto: Stoddart Publishing Co. Limited, 2000) 31.

asymmetry, but described the accord as “a mistaken compromise.”⁵¹ In her case, and most, if not all, of the aforementioned, support for asymmetry is consistent with a general critique of the terms of the accord precisely because it did not go far enough.

In this context, the structure of the Canada clause, the reformed Senate, the guarantee for Quebec of a specified percentage of the seats in the House of Commons, the revisions to the divisions of powers, and the Aboriginal self-government proposal all drew considerable criticism (add references). At the same time, as mentioned above, all of the first ministers and the leadership of the Assembly of First Nations endorsed the agreement. Thus, as Alain Noel points out, the immediate reaction was to blame the referendum’s failure on an “uninformed, moody, [and] inattentive” electorate manipulated by a group of “strange bedfellows, who had nothing in common besides an interest in defeating the proposed, and probably any, agreement.”⁵² In short, to suggest that the public simply did not grasp the “sound balance,” to borrow a phrase from Peter Lougheed, that had been struck.⁵³

Subsequent research, however, not only calls the empirical basis of this thesis into question,⁵⁴ but also raises substantive theoretical questions about the character of the compromise itself. McRoberts makes the point most clearly, arguing that while “[t]he Charlottetown Accord appears to adopt both English Canada’s and Quebec’s

⁵¹ Judy Rebick, "The Charlottetown Accord: A Faulty Framework and a Wrong-Headed Compromise," in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 106.

⁵² Alain Noel, “Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992,” in Curtis Cook (ed.), *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal and Kingston: McGill-Queen’s University Press, 1994), p. 65.

⁵³ Peter Lougheed, "The Charlottetown Accord: A Canadian Compromise," in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993).

⁵⁴ See: Lawrence LeDuc and Jon H. Pammett, "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum," *Canadian Journal of Political Science* XXVIII, no. 1 (1995). and Richard Johnston et al., *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal and Kingston: McGill-Queen's University Press, 1996)..

constitutional projects,” it “qualifies them very substantially in an effort to make them acceptable to the other side.”⁵⁵ The reformed Senate, on one hand, came at the request of “Outer Canada,” and was consistent, in principle at least, with a “general concern to protect and strengthen the role of the federal government[,]” but was made less than ‘Triple E’ in order to “placate Quebec.”⁵⁶ The ‘distinct society’ clause, on the other hand, was made extremely narrow in scope, in order to satisfy the English Canadian demand, “that the roles of the federal government not be weakened in any fundamental manner.”⁵⁷ And although the limitations of the reformed Senate and the guarantee of twenty-five percent of the seats in the House of Commons can be construed as ‘gains’ for Quebec, such compromises did not respond to its traditional demand “of expanding the powers of the Quebec government.”⁵⁸ Thus, “rather than a mutual accommodation of the two projects we have a mutual frustration of them.”⁵⁹

Nor is McRoberts alone in this assessment. Following a similar logic, Rebeck asserted that the Accord “is a compromise that doesn’t give anyone what they want.”⁶⁰ And among the “reasons of substance” for the failure of the accord offered by Jeremy Webber is that “the negotiators had allowed the proposals to be so whittled down that they ended up satisfying neither their supporters nor their opponents.”⁶¹ Even the Aboriginal self-government provisions, widely perceived as the most ‘generous’ part of the agreement, were not immune from similar criticisms. Menno Boldt, for example,

⁵⁵ Kenneth McRoberts, "Disagreeing on Fundamentals: English Canada and Quebec," in *The Charlottetown Accord, the Referendum, and the Future of Canada*, ed. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 254.

⁵⁶ *Ibid.*, 250-51.

⁵⁷ *Ibid.*, 252.

⁵⁸ *Ibid.*, 250.

⁵⁹ *Ibid.*, 254.

⁶⁰ Rebeck, "The Charlottetown Accord: A Faulty Framework and a Wrong-Headed Compromise," 106.

⁶¹ Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's University Press, 1994).

noted that Aboriginal participation in the process leading up to the agreement was presented by the federal government “as a commitment to Canadian sovereignty; as an ‘interest group’ undertaking to secure a legitimate place for themselves as citizens of Canada[,]” while the Assembly of First Nations leadership “asserted that their involvement in the process was as sovereign nations who are concerned that Canadians should entrench appropriate principles of law in their constitution that will ensure just treatment of Indian First Nations.”⁶² This substantive difference of opinion is particularly important to note, Boldt argues, because the terms of the agreement only entrenched “an undefined principle... with provision of a *process* for defining the principle.”⁶³ And given how ‘successfully’ Aboriginal peoples have negotiated Canada’s political and legal institutions in the past, he is not optimistic their interpretation would win.

All of this, of course, is to suggest that the failure of the accord cannot be understood as a rejection of asymmetry. At the same time, there is precious little suggesting that the concept holds merit in the eyes of the public. The participants at the 1992 Halifax conference on the constitutional future of Canada, as is widely noted, endorsed the concept. The participants were hardly representative of Canadian society, however. Notably, there is evidence showing that the other main possibility, decentralization, was not without support. As Lawrence LeDuc and Jon H. Pammett point out, “[t]he most popular part of the Charlottetown Accord was the plan to reform the Senate.” At the same time, they continue, “[t]here was general support for ‘giving

⁶² Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1994).

⁶³ *Ibid.*

more powers to the provinces in specific areas' and for the plan to establish Aboriginal self-government."⁶⁴

To be clear, this is not to suggest that solving Canada's constitutional difficulties is as simple as offering straightforward alternatives such as asymmetry or decentralization. I would not even be so bold as to suggest straightforward alternatives are available. There are a number of questions that would require answers, whatever option is chosen.⁶⁵ I tend, however, to agree with Reg Whitaker and Kenneth McRoberts, and Alain-G. Gagnon, who all argue that the technical objections to asymmetry are not as overwhelming as they appear.⁶⁶ At the same time, they are not insignificant.⁶⁷ This has not stopped observers from investigating the conditions under which asymmetry could be made acceptable in principle. At the risk of doing violence to what is, in fact, a fairly diverse field, one of the interesting features of these examinations is their tendency to view the political culture of Canada outside Quebec, and Aboriginal communities, as the primary stumbling block. In short, 'its' inclination to define (or want to define) the political community in linear terms (i.e., as a collection of individuals living in a single nation, or as members of ten provinces, or both) misconstrues the 'true' nature of Canada. Prioritizing issues of identity and citizenship, they see the need to rethink, or re-conceptualize, the Canadian political community, and English Canada, or Canada Outside Quebec or the Rest of Canada in particular, as a necessary first, or last, step. The

⁶⁴ LeDuc and Pammett, "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum."

⁶⁵ On this point see: Resnick, *Thinking English Canada*. and Roger Gibbins, "The Institutional Parameters of Canada-Quebec Partnership," in *Beyond the Impasse toward Reconciliation*, ed. Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy, 1998).

⁶⁶ Whitaker, "The Dog That Never Barked: Who Killed Asymmetrical Federalism?," 108.

⁶⁷ Hogg offers one of the bluntest objections, arguing that it "raises difficult questions about the role in the central institutions, especially the federal Parliament, of the representatives of the province or provinces with special status. It seems wrong that they should participate in decisions which in their province are a provincial responsibility. Hogg, *Constitutional Law of Canada* 98.

general assumption being that once this identity is settled, or more clearly defined, the rest will fall out, for better or worse.⁶⁸

The attempt to (re)define Canada as a multinational state is archetypical in this context. Alan Cairns, for example, incorporated this perspective to explain Canada's recent constitutional difficulties. Prior to the Charlottetown accord, he defined Canada's difficulties in terms of the "constraining effect[s]" imposed by competing conceptions of equality.⁶⁹ He concluded that "[t]he symmetry these principles [provincial, individual, and national equality] bring is paid for by a diminished constitutional capacity to provide individualized responses to distinct societies and to distinct situations."⁷⁰ This problem, he argued, is particularly difficult outside Quebec because "the 'rest of Canada' is a mental construct only."⁷¹ As a result, "it is most in need of assistance to address its constitutional concerns."⁷² He expanded this analysis after the referendum, arguing "[t]he process leading up to the [Charlottetown] accord, its contents, and the verdict of the electorate reveal a multinational society struggling for constitutional expression in a federal constitutional order that defines Canadians in the traditional terms of province and country."⁷³ However, whereas the Quebec and Aboriginal identities are relatively settled, in that they perceive themselves as distinct/independent political/national communities,

⁶⁸ In the interests of clarity, I mean to allude to the fact that not everyone sees this process ending 'successfully,' that is with the saving of Canada. Barry Cooper and David Bercuson and Guy Laforest, most notably, though for quite different reasons, argue that the only clear solution for Quebec question is to part ways. See: David J. Bercuson and Barry Cooper, *Deconfederation: Canada without Quebec* (Toronto: Key Porter Books Limited, 1991). and LaForest, *Trudeau and the End of a Canadian Dream*.

⁶⁹ Cairns, "Constitutional Change and the Three Equalities," 218.

⁷⁰ *Ibid.*, 235.

⁷¹ *Ibid.*, 236.

⁷² *Ibid.*, 237.

⁷³ Alan Cairns, "The Charlottetown Accord: Multinational Canada V. Federalism," in *Constitutional Predicament: Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen's University Press, 1994).

the rest of Canada lacks “a positive nationalist... self-consciousness[.]”⁷⁴ And, as long as this remains the case, it will prove difficult to engage with Quebec, and Aboriginal peoples, though to a lesser extent, on the ‘nation-to-nation’ basis necessary for a mutually beneficial compromise.

Kymlicka, more recently, provided a similar breakdown, arguing, what he terms, English-speaking Canada’s inability to come to grips with the multinational reality of Canada as a whole plays a role in generally misreading some social conflicts. In particular, it leads to the equation of demands made by ‘national minorities,’ like Quebec and Aboriginal peoples, with those of other minorities, such as new immigrant groups. Their demands, however, are substantively different. And once this is granted, the character of the compromises required becomes clearer. At the same time, he argues, this process is hindered in English-speaking Canada by the continued desire to maintain a “sense of a common Canadian nationhood.” Consequently, if we are to move beyond the current situation, it is necessary for “English-speaking Canadians to reflect on the interests they share as a language community.”⁷⁵ Kymlicka only hints at what positive benefit might result from an exercise of this sort, arguing that “[w]hat really matters is for English-speaking Canadians to recognize that they have certain common interests as a linguistic group, interests that have historically been taken as definitive of pan-Canadian nationalism but that are in fact not shared by the members of national minorities.”⁷⁶ Importantly, for present purposes, he lists among these attributes the aspiration “to define [a] national identity in terms of certain values, standards, and entitlements that can be

⁷⁴ Ibid.

⁷⁵ Kymlicka, *Finding Our Way* 155.

⁷⁶ Ibid. 165.

upheld from sea to sea only through federal intervention in areas of provincial jurisdiction.”⁷⁷

In essence, Kymlicka argues that Canadians outside Quebec need to more closely link an already existing understanding of the common good with a more narrowly defined conception of political community. This, Kymlicka hopes, will lead us to “some form of asymmetrical multinational federalism.”⁷⁸ Again, Kymlicka is not alone in preferring this solution. Nor, it should be pointed out, is its popularity limited to English Canada. As McRoberts notes, elites in Quebec have picked up on the language of multinationalism, arguing that it reflects the reality of Quebec society.⁷⁹ This development should not be surprising. To the extent that Quebec society has internal dimensions similar to that of Canada as a whole,⁸⁰ the logic of multinationalism should have a similar intuitive appeal. It is also consistent with the expressed desire to define Quebec nationalism more inclusively. On the political level, as Whitaker notes, this desire is epitomized by the efforts of the Parti Quebecois to “[distance] itself from a narrow, exclusionary nationalism based on the core ethnic group” by adopting “a concept of territorial sovereignty.”⁸¹ To be clear, this transition has not always gone smoothly and remains contentious. Nor is it, to reiterate, an affirmation of multinationalism, of which, as in the rest of Canada, there is little indication that it holds appeal beyond the academy.⁸²

These arguments raise a host of questions regarding the place of communal attachments explored most fully by Charles Taylor. According to Taylor, individual

⁷⁷ Ibid. 166.

⁷⁸ Ibid.*

⁷⁹ Kenneth McRoberts, "Canada and the Multinational State," *Canadian Journal of Political Science* XXXIV:4, no. December (2001).

⁸⁰ Comment on demographics

⁸¹ Reg Whitaker, "Sovereignties Old and New: Canada, Quebec and Aboriginal Peoples," *Studies in Political Economy* 58, no. Spring (1999): 80.

⁸² McRoberts, "Canada and the Multinational State."

identity develops out of and in association with a particular community. Although an individual may find himself part of a community within a larger community, his identity will only be directly related to the former, even if it is influenced, to a certain extent, by the latter. In Canada this relationship plays itself out most noticeably, Taylor argues, in the way Quebecers accept Canada, but have always reserved "genuine patriotism" for "*la nation canadienne-française*."⁸³

According to Taylor, "people need a group identification," the most obvious group being "nationality based on language."⁸⁴ As a form of patriotism, nationalism in this sense arises from "a strong identification with a community." Requiring "self-rule" in order to express itself properly, in order to be self-determining, the community must "be given some sort of political personality."⁸⁵ The most easily recognizable form of "political personality" available to the community is the sovereign state. It is not necessarily the case, however, that all communities qualifying as nations require a separate sovereign state to be self-determining. "Political expression" can be achieved in other ways. A federation, for example, can provide a 'national community' with the necessary institutional features to be self-governing.

For Taylor, "[s]elf-determination is the right of a nation, because it is the condition of self-rule of the people who form the nation."⁸⁶ When a nation's ability to rule itself is threatened, either by overtly coercive methods, such as the sort of physical confrontation that took place during the American Revolution, or by more subtle, but

⁸³Charles Taylor, "Shared and Divergent Values," in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy LaForest (Montreal and Kingston: McGill-Queen's University Press, 1993), 168.

⁸⁴Charles Taylor, "Why Do Nations Have to Become States?," in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy LaForest (Montreal and Kingston: McGill-Queen's University Press, 1993), 42.

⁸⁵Ibid.

⁸⁶Ibid., 43.

nonetheless obvious, means (at least to the nation concerned), such as the potentially hegemonic position held by the English language in North America and the precarious cultural position that the French occupy as a result, then the nation is perfectly justified in taking protective action. However, it is not necessary that a nation become a state in order to protect itself. "If you are a colony," Taylor argues, "you have as a nation no choice."⁸⁷ Quebec, Taylor contends, is certainly not a colony in the traditional sense of the term and is, hence, not threatened in the same way, as were, for example, the Thirteen Colonies. Nevertheless, Quebec

needs an independent political instrument in order to ensure participation in economic direction, a role in technology design and the like either because of the overwhelming force of the neighbouring Anglo-Saxon culture of 250 million, the richest and strongest economy in the world, or because of the greater political clout that the English-Canadian majority inevitably exercises in Canada; or for both reasons.⁸⁸

Is this protection achievable, however, within the current Canadian federal system?

Taylor suggests that it is, but that fundamental changes are necessary. The most important of these does not involve the redistribution of powers, but recognition. To be recognized in modern liberal democratic societies, Taylor argues, is to be accorded a particular status, that of an equal and autonomous citizen. To be recognized as such is to have one's identity, and its component parts, its values and allegiances, accepted by others as legitimate.⁸⁹ To demand recognition, is to demand to "be acknowledged and

⁸⁷Ibid., 44.

⁸⁸ Ibid., 51.

⁸⁹Ibid., 45.

valued for what [one is]."⁹⁰ For Taylor, the demand is a natural impulse. "All people," he argues, "want to be recognized for what they are, but this need takes on a peculiar importance in modern society, where our sense of identity—what we want to be recognized as—is being defined in new and often original terms."⁹¹ Importantly, recognition is not solely an individual concern. "Mutual recognition between groups has come to be a crucial issue in modern politics because of the very nature of modern society."⁹²

For Taylor, this is the root of Canada's problems. When a demand for recognition goes unfulfilled, problems arise. Within the confines of a modern democratic state, for example, the perceived inequality that comes with the lack of recognition suggests to the individual or group that "one's own voice does not count, or is weighed at a discount, in the decisions of this sovereign entity."⁹³ Lack of recognition as a perceived inequality is particularly problematic because "even where obvious modes of discrimination have been neutralized, the issue of recognition can still arise."⁹⁴ This occurs, for example, when "what is important to us in defining who we are may be quite unacknowledged, may even be condemned in the public life of our society, even though all our citizen rights are firmly guaranteed."⁹⁵ This failure of others to accept this identity, if it should result in a "prolonged refusal of recognition between groups in a society can erode the common understanding of equal participation on which a functioning liberal democracy crucially

⁹⁰Charles Taylor, "Impediments to a Canadian Future," in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. Guy LaForest (Montreal and Kingston: McGill-Queen's, 1993), 192.

⁹¹Ibid., 188.

⁹²Ibid.

⁹³Ibid.

⁹⁴Ibid., 190.

⁹⁵Ibid.

depends."⁹⁶ In this light, the consistent failure of Canadian society to recognize the French nation within it—a nation given political expression through the province of Quebec—has led to the current constitutional impasse and calls into question the legitimacy of federalism in Canada. If it cannot be resolved, Quebeckers may be forced to look internationally for the recognition they seek, through separation.

What, however, is it that Canada currently fails to recognize? What sort of recognition is it that Quebeckers seek? "[T]he recognition they seek," Taylor argues, "is of societies."⁹⁷ Distinguished from demands "to recognize a category of citizens with a particular life-situation,"⁹⁸ societal demands for recognition cannot be reconciled within a constitution that only "protects the rights of the individual in a variety of ways" and "defends against discriminatory treatment on a number of irrelevant grounds."⁹⁹ With regard to the Canadian situation, Taylor argues that adopting collective provisions in the constitution allowing Quebec to pursue policies designed to preserve and promote its cultural distinctness, to preserve and promote *la nation canadienne-française*, is essential. To do so would show Quebeckers "that *la nation canadienne-française* [is] recognized as a crucial component of the country, as an entity whose survival and flourishing was one of the main purposes of Canada as a political society."¹⁰⁰

Achieving such recognition will not be easy. So, while it may be the case that Quebec is not disadvantaged in the same way that a colonial society is, the lack of recognition it receives within the Canadian federation may "make it such that the only

⁹⁶Ibid.

⁹⁷Ibid., 191.

⁹⁸Ibid.

⁹⁹Taylor, "Shared and Divergent Values," 172.

¹⁰⁰Ibid.

road to genuine self-rule lies through independence."¹⁰¹ The Canadian Constitution, following the American precedent, provides protection for individual rights and includes clauses outlawing discrimination. But it does not include collective provisions. In fact, "[f]or a number of people in English Canada, a political society's espousing certain collective goals threatens to run against both of these provisions of our Charter, or indeed any acceptable bill of rights."¹⁰² Including collective provisions in the Charter, it is feared, "may require restrictions on the behaviour of individuals that may violate their rights," or may even "be inherently discriminatory."¹⁰³

According to Taylor, the arguments against collective rights involve two sorts of claims. The first involves "the view that individual rights must always come first and, along with non-discrimination provisions, must take precedence over collective goals." This view, Taylor argues, finds its clearest formulation in the works of liberal democratic political theorists who hold "that a liberal society is one which... adopts no particular substantive view about the ends of life. Rather, the society is united around strong procedural commitments to treat people with equal respect." Such a society cannot incorporate collective provisions because "this would involve a violation of its procedural norm; for, granted the diversity of modern societies, it would unfailingly be the case that some people and not others would be committed to the favoured conception of virtue." Even if the individuals desiring substantive provisions represent the majority of the population, their demands, according to this view, should not be met because "in

¹⁰¹Taylor, "Why Do Nations Have to Become States?," 45.

¹⁰²Taylor, "Shared and Divergent Values," 173.

¹⁰³Ibid.

espousing this substantive outlook the society would not be treating the dissident minority with equal respect.”¹⁰⁴

Taylor, however, in contrast to the 'procedural view', argues that "[a] society with strong collective goals can be liberal... provided it is also capable of respecting diversity, especially when this concerns those who do not share its goals, and provided it can offer adequate safeguards for fundamental rights."¹⁰⁵ In Quebec, Taylor argues, "the survival and flourishing of French culture is a good" which "is not neutral between those who value remaining true to the culture of our ancestors and those who might want to cut loose in the name of some individual goal of self-development."¹⁰⁶ Since the goal is not the momentary survival of the French language and culture, but to ensure "that there is a community of people here in the future that will want to avail itself of this opportunity," strict procedural guarantees must be relaxed even while adequate protection for those who do not share the goals of the collective must remain. "According to this conception, a liberal society singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good; and, above all, by the rights it accords to all its members."¹⁰⁷ However,

[o]ne has to distinguish between, on the one hand, the fundamental liberties—those which should never at any time be infringed and which therefore ought to be unassailably entrenched—and, on the other hand, the privileges and immunities which are important but can be revoked or restricted for reasons of public policy (although one needs a strong reason to do so).

This approach is not without problems. The potential exists for wide disagreement over the exact composition of the fundamental liberties that should never be infringed, and,

¹⁰⁴Ibid., 174.

¹⁰⁵Ibid.

¹⁰⁶Ibid., 175-76.

¹⁰⁷Ibid., 176.

depending on how they are itemized, over their relation to one another. Nevertheless, Taylor contends that if the restrictions are placed carefully, with respect for the other, any tensions that do develop will not likely be any "greater than those encountered by any liberal society that has to combine liberty and equality, for example, or prosperity and justice."¹⁰⁸

The second sort of claim Taylor identifies sees the procedural guarantees contained within the Canadian Charter of Rights and Freedoms as a strong unifying element in Canadian society. It provides, for the diverse citizens of Canada, an answer to the question: What is the country for? "As the country gets more diverse," Taylor argues, "we are more and more acutely aware of the divergences in our conceptions of the good life. It then appears that what can and ought to bind us together are precisely the procedural norms that govern our interaction."¹⁰⁹ When this 'procedural nationalism' runs up against the collective claims for recognition of another group, something has to give. For Taylor, if Canada is to stay together, "[p]rocedural liberals in English Canada just have to acknowledge, first, that there are other possible models of liberal society and, second, that their francophone compatriots wish to live by one such alternative."¹¹⁰

This, it may seem, is simple enough, In his view, what Canada needs is not division in the name of preserving liberal democracy, but a conception of citizenship which allows for what he calls 'deep diversity': a type of difference that extends beyond general considerations of 'culture', 'background', and 'outlook', affecting one's sense of place within, or belonging to the larger community. Taylor contrasts deep, or second-level diversity with first-level diversity, where the sense of belonging is uniform. They

¹⁰⁸Ibid., 177.

¹⁰⁹Ibid., 178.

¹¹⁰Ibid.

are thus distinguished not by their general ability to accommodate difference, but by the way in which they understand the relationship between the individual, or group, and the larger political community. As Taylor explains:

[s]omeone of, say, Italian extraction in Toronto or Ukrainian extraction in Edmonton might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. His or her belonging would not “pass through” some other community, although the ethnic identity might be important to him or her in various ways. But this person might nevertheless accept that a Quebecois or a Cree or a Dene might belong in a very different way, that these persons were Canadian through being members of their national communities. Reciprocally, the Quebecois, Cree, or Dene would accept the perfect legitimacy of the “mosaic” identity.¹¹¹

Deep diversity thus accommodates multiple citizen loyalties within a common body politic through its insistence that a ‘self-governing nation state’ need not be ‘culturally homogeneous’ nor offer ‘a set of uniform legal and representative political institutions in which all citizens are treated equally, whether their association is considered to be a society of individuals, a nation or a community’ in order to maintain itself. Instead, it maintains that “a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due, so that all would freely consent to this form of constitutional association,”¹¹² if it remains sensitive to deep diversity.

The success of this conception of citizenship and nation depends on maintaining a clear understanding of the differences between first- and second-order diversity. On the one hand this is problematic. There is no guarantee that the necessary distinctions will be acceptable to any of the parties involved. Its success, then, potentially, depends on the

¹¹¹ Ibid., 183.

¹¹² Tully, *Strange Multiplicities*, 7.

existence of a level of reciprocity among the participants that may or may not be present. Institutionally, Taylor's ideas lead back to the concept of asymmetry. At the very least, any attempt to recognize deep diversity would demand that it be considered. As we saw, asymmetry's potential is considerably contested. However, carefully measured support for one form of asymmetry comes from an interesting source: David Bercuson and Barry Cooper. Although they reject asymmetry as a means of reconciling the relationship between Quebec and Canada, their opposition is not complete. They too recognize that Canada's aboriginal populations present a unique set of complications, arguing that because "they entered into direct legal relationships with the Crown under the terms of which they surrendered their aboriginal title to the land...[,] it would be a violation of both law and moral standards to attempt to apply the same legal and constitutional status to them as to other Canadians."¹¹³ While their conclusions are rather unspecific, they "advocate working towards local self-government for native people" and consider provincial status a possibility. To this they add the caveat "within the limits of economic reality,"¹¹⁴ presumably suggesting a willingness to consider asymmetrical alternatives.

One should be careful not to read too much into this. Although it is clear that Bercuson and Cooper consider the situation of Canada's native peoples to be anomalous with respect to the principle of citizen equality they advocate, this does not necessarily entail support for asymmetry. For example, provincial status might be dependent on the existence of a set of economic conditions consistent with the ability to implement the current division of powers (or the division of powers constructed in the wake of separation). In this way the impact of any apparent inconsistencies in treatment may be

¹¹³Bercuson and Cooper, *Deconfederation: Canada without Quebec* 169.

¹¹⁴Ibid. 169-70.

reduced, and citizen equality relatively maintained. That said, Bercuson and Cooper's willingness to treat Canada's native peoples separately is not without consequence: it serves to highlight the importance of their claim that a direct discussion of the future of Quebec and Canada would recognize the need for and benefits of separation.

Again, while Bercuson and Cooper may accept that special arrangements are necessary to accommodate Canada's native peoples, they are not interested in replicating the same logic as a means of reconciling Canada and Quebec. Others, however, take the opposite position. Jeremy Webber, for example, in explicit contrast to Bercuson and Cooper, argues that by "treat[ing] our diverse and complex institutional structures as the product of nothing more than the politics of power, as compromises of our conceptions of national identity and citizenship that may have been necessary, but were hardly admirable... we have failed to see how those structures were good or how they could work together to make a country."¹¹⁵ As a result, Canada is "caught between a practice [asymmetry] that can be responsive to the complexity of our community and a theory that makes us profoundly doubt that practice."¹¹⁶ Essentially, Webber calls into question the inherent undesirability of asymmetry that Bercuson and Cooper rely upon to demonstrate the benefits of independence, arguing, instead, that asymmetry "is most consistent with the actual shape of political community and political allegiance in Canada."¹¹⁷

Webber, like Taylor and Kymlicka, takes issue with singular or exclusive understandings of political community and political allegiance. Such conceptions, he argues, are not reflective of reality, Canadian in particular. Multiple allegiances are more often the norm. Webber ties resistance to the concept of multiple allegiances to the

¹¹⁵Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* 23.

¹¹⁶Ibid.

¹¹⁷Ibid. 254.

predominant status of the term “nation.”¹¹⁸ More specifically, he objects to the way in which “the term often leads to an easy equation of membership in a political community with ethnic identity,” and to the fact that “[t]he term usually carries the assumption that an individual can only have one nation.”¹¹⁹ Such presumptions, he contends, lead naturally to the dialogically destructive position that Quebec, and the First Nations, must decide which community will hold their allegiance.¹²⁰ In contrast, Webber argues that “[i]t doesn’t matter that they have strong allegiance to [their respective political communities], as long as their allegiance to Canada is also strong.”¹²¹

Webber emphasis on shifting the terms of discourse—from nation to political community—is not without controversy. To be sure, he is more interested in avoiding the negative baggage associated with the term than affecting a revolution in terminology. Reasons exist, however, to resist this recommendation. First, as Will Kymlicka points out, “the fact is that these groups [Quebecers and Aboriginals] are nations in the sociological sense. They are historical societies, more or less institutionally complete occupying a given territory or homeland, sharing a distinct language and societal culture.” Second, “the power to name itself is one of the most significant powers sought by any group in society, and... respecting this power is seen as a crucial test of respect for the group as a whole.” Thus, “any attempt to deny national minorities their claims to nationhood will be counter-productive, since it will be seen as an insult, as one more stage in the long history of denigrating their status as distinct peoples and cultures.” As a

¹¹⁸ I examine the criticisms raised by Will Kymlicka below.

¹¹⁹ Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* 24.

¹²⁰ Samuel LaSelva argues similarly, contending that the differences between Rene Levesque and Pierre Trudeau are not philosophical and are best understood as a “deep disagreement about community.” See: LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* 113.

¹²¹ Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* 25.

result, “our aim should not be to prevent groups from seeing themselves as nations.” Instead, like Taylor, he argues that we should attempt “to break the link between nation and state—to challenge the presumption that an independent state is the only or best form for national self-government.”¹²²

The Critique

Of course, de-linking the concepts of nation and state is also Webber’s aim. Kymlicka’s criticisms are thus particularly important if acceptance of asymmetry is dependent on the change of vocabulary Webber advocates. Not surprisingly, Kymlicka argues that it is not. Instead, he sees many of Canada’s constitutional difficulties as emanating from the starkly contrasting conceptions of federalism held by Quebec and English Canada. English Canada, on the one hand, interprets the purpose of federalism ‘territorially’; that is, as “a means by which a single national community can divide and diffuse power.”¹²³ Quebec, as well as Aboriginal communities, however, reject this interpretation and view federalism in ‘multinational’ terms; that is, as a “system for dividing power so as to enable meaningful [national] self-government.”¹²⁴ According to Kymlicka, because “[t]he Canadian federation has many of the hallmarks of a genuinely multinational federation,”¹²⁵ continued English-Canadian adherence to principles more consistent with a territorial model is a considerable problem. To correct this, he asks “English-speaking Canadians... to accept a truly multinational conception of Canada.”¹²⁶ Although “encourag[ing] English-speaking Canadians to view themselves as a ‘nation’”

¹²²Kymlicka, *Finding Our Way* 132.

¹²³Will Kymlicka, “Multinational Federalism in Canada: Rethinking the Partnership,” in *Beyond the Impasse: Toward Reconciliation*, ed. Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy, 1998), 21.

¹²⁴ *Ibid.*, 20.

¹²⁵ *Ibid.*, 23.

¹²⁶Kymlicka, *Finding Our Way* 143.

is one way to accomplish this task, Kymlicka argues, “the language of ‘nationhood’ is [not] necessary.” Rather, again, “[w]hat really matters is that English-speaking Canadians recognize that they have certain common interests as a linguistic group—interests that have historically been taken as definitive of pan-Canadian nationalism but that are in fact not shared by the members of national minorities.”¹²⁷

At the same time, however, it is questionable whether asymmetrical federalism is the most advantageous framework for those Canadians who do not identify with Quebec or an Aboriginal community. In short, if the non-Quebec, non-Aboriginal identity is as tenuous as many suggest, it may have difficulty finding political space to properly ‘reflect’ on its ‘interests’ as a separate community in an asymmetrical framework. In the present context, this problem, I suggest, tends to be overlooked precisely because it is not only assumed that the Canadian identity exists (i.e., its boundaries evident if poorly grasped), but also that its interests are clear (i.e., a strong federal government with the capacity to effectively enforce national standards). To be clear, this objection is not meant to deny the legitimacy of asymmetrical federalism. By and large, I agree with Alain-G. Gagnon when he concludes that asymmetrical federalism provides “a political solution to changing political conditions, and is also intended as a model of empowerment.” In short, that asymmetrical federalism is consistent with “the quest for justice, equity and equality.”¹²⁸ At the same time, however, if we consider it characteristic of a self-governing, or autonomous, democratic community that it be able to determine, or define, for itself what this ‘quest’ entails, we also need to think about whether, or not, particular institutional frameworks promote it. In the present context, the

¹²⁷ Kymlicka, "Multinational Federalism in Canada: Rethinking the Partnership," 21.

¹²⁸ Gagnon, "The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada," 336.

question is whether asymmetrical federalism or decentralization are appropriate, given that the failure/disinclination, on whatever grounds, of the rest of Canada to develop a more coherent self-identity is considered to be one of the main obstacles. In short, it is not immediately clear that asymmetrical federalism or decentralization would assist in the development of a strong sense of political community based on an explicit recognition of common interests in the rest of Canada. This is not a huge problem, if one assumes that the political community in question already shares some interests, or that determining them is relatively easy once its boundaries are made apparent. In the Canadian case, for example, one might argue that generating an understanding of the interests/preferences of the rest of Canada simply requires one to separate out the interests/preferences of Quebec and Aboriginal peoples. The desire for a strong federal government with the capacity to direct social policy through the maintenance of national standards on the part of the rest of Canada would certainly be worthy of consideration in this context.

At the same time, there is a flaw with this argument best understood by referring to an element of recent debates in democratic theory. Two basic conceptions are at issue: deliberative and interest-based. There are numerous variations of each, and wide disagreement exists both between and among the proponents of each. A rough outline sufficient for present purposes is possible, however. The latter “consider democracy primarily as a process of expressing one’s preferences and demands, and registering them in a vote.”¹²⁹ The former “conceives of democracy primarily as a process that creates a public, citizens coming together to talk about collective problems, goals, ideals, and actions.” Whereas the latter understand “democratic decisions [to be] the outcome of

¹²⁹ Iris Marion Young, "Communication and the Other: Beyond Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996).

successful completion of ideas and coalitions for self-interested votes,” the former take “democratic processes [to be] oriented around discussing [the] common good rather than competing for the promotion of the private good of each.”¹³⁰ To put this point another way, “[w]hen properly conducted[,] democratic politics involves *public deliberation focused on the common good*, requires some form of *manifest equality* among citizens, and *shapes the identity and interests* of citizens in ways that contribute to the formation of a public conception of the common good.”¹³¹ This understanding of the aims of democratic debate is important precisely because it highlights the fact that we should not assume that the common good for a particular political community can be determined simply by measuring interests, or preferences as they already exist.¹³²

Again, this line of thought is presented mainly to raise the question as to whether asymmetrical federalism provides the rest of Canada with sufficient space to develop as a democratic political community, although it can be applied to other potential ‘solutions,’ like decentralization, as well. That is, in other words, whether an asymmetrical framework, can provide the rest of Canada with an enhanced capacity to ‘deliberate’ in a manner that ‘contribute[s] to the formation of a public conception of the common good’ both today and in the future. Certainly, it should not be simply assumed that an asymmetrical framework could not accomplish what is required, but we need to ask the question, if strengthening/articulating the identity of the political community that exists in

¹³⁰ Ibid.

¹³¹ Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, Massachusetts: The MIT Press, 1997).

¹³² In fact, if something like this is the point of democratic politics, as David Estlund points out, participation/debate is unnecessary. It would be more efficient to simply employ “experts” to determine the common good on the basis of “procedure-independent epistemic standards.” See: David Estlund, "Beyond Fairness and Deliberation," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, Massachusetts: The MIT Press, 1997).

Canada outside Quebec and Aboriginal communities is necessarily part of the solution to Canada's constitutional difficulties, either as a good to be pursued for its own sake or as part of a default position created by the refusal of Quebec and Aboriginal peoples to accommodate themselves to the vision of political community held for them by the rest of Canada.

Conclusion

Bibliography of Works Cited

- Bercuson, David J., and Barry Cooper. *Deconfederation: Canada without Quebec*. Toronto: Key Porter Books Limited, 1991.
- Bickerton, James P., and Alain-G Gagnon. "The Study of Canadian Politics." In *Canadian Politics*, edited by James P. Bickerton and Alain-G Gagnon, 9-38. Peterborough: Broadview Press, 1994.
- Boldt, Menno. *Surviving as Indians: The Challenge of Self-Government*. Toronto: University of Toronto Press, 1994.
- Braid, Don, and Sydney Sharpe. *Breakup: Why the West Feels Left out of Canada*. Toronto: Key Porter Books, 1990.
- Cairns, Alan. "The Charlottetown Accord: Multinational Canada V. Federalism." In *Constitutional Predicament: Canada after the Referendum of 1992*, edited by Curtis Cook, 25-63. Montreal and Kingston: McGill-Queen's University Press, 1994.
- . "Constitutional Change and the Three Equalities." In *Reconfigurations: Canadian Citizenship and Constitutional Change*, edited by Douglas Williams. Toronto: McClelland and Stewart Inc., 1995.
- Cohen, Joshua. "Deliberation and Democratic Legitimacy." In *Deliberative Democracy: Essays on Reason and Politics*, edited by James Bohman and William Rehg, 67-92. Cambridge, Massachusetts: The MIT Press, 1997.
- Cooper, Barry. "Theoretical Perspectives on Constitutional Reform in Canada." In *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*, edited by Anthony A. Peacock, 217-32. Toronto: Oxford University Press, 1996.
- Corry, James. "Constitutional Trends and Federalism." In *Politics: Canada*, edited by Paul Fox. Toronto: McGraw-Hill, 1962.
- Estlund, David. "Beyond Fairness and Deliberation." In *Deliberative Democracy: Essays on Reason and Politics*, edited by James Bohman and William Rehg, 173-204. Cambridge, Massachusetts: The MIT Press, 1997.
- Gagnon, Alain-G. "The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada." In *Multinational Democracies*, edited by Alain-G Gagnon and James Tully, 319-37. New York: Cambridge University Press, 2001.
- Gibbins, Roger. "Constitutional Politics." In *Canadian Politics*, edited by James P. Bickerton and Alain-G Gagnon, 263-78. Peterborough: Broadview Press, 1999.
- . "The Institutional Parameters of Canada-Quebec Partnership." In *Beyond the Impasse toward Reconciliation*, edited by Roger Gibbins and Guy LaForest, 275-300. Montreal: Institute for Research on Public Policy, 1998.
- . "Western Canada: 'the West Wants in'." In *Beyond Quebec: Taking Stock of Canada*, edited by Kenneth McRoberts, 45-61. Montreal and Kingston: McGill-Queen's University Press, 1995.

- Hogg, Peter. *Constitutional Law of Canada*. 2002 Student Edition ed. Toronto: Carswell, 2002.
- Howse, Robert. "Searching for Plan A: National Unity and the Chretien Government's New Federalism." In *Canada: The State of the Federation 1997, Non-Constitutional Renewal*, edited by Harvey Lazar, 311-31. Kingston: Institute of Intergovernment Relations, 1997.
- Jenson, Jane. "Recognising Difference: Distinct Societies, Citizenship Regimes and Partnership." In *Beyond the Impasse: Toward Reconciliation*, edited by Roger Gibbins and Guy LaForest, 215-40. Montreal: Institute for Research on Public Policy, 1998.
- Johnston, Richard, Andre Blais, Elisabeth Gidengil, and Neil Nevitte. *The Challenge of Direct Democracy: The 1992 Canadian Referendum*. Montreal and Kingston: McGill-Queen's University Press, 1996.
- Kymlicka, Will. *Finding Our Way: Rethinking Ethnocultural Relations in Canada*. Toronto: Oxford University Press, 1998.
- . "Multinational Federalism in Canada: Rethinking the Partnership." In *Beyond the Impasse: Toward Reconciliation*, edited by Roger Gibbins and Guy LaForest, 15-50. Montreal: Institute for Research on Public Policy, 1998.
- LaForest, Guy. *Trudeau and the End of a Canadian Dream*. Translated by Paul Leduc Brown and Michelle Weinroth. Montreal and Kingston: McGill-Queen's University Press.
- LaSelva, Samuel V. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal and Kingston: McGill-Queen's University Press, 1996.
- Lazar, Harvey. "The Social Union Framework Agreement and the Future of Fiscal Federalism." In *Canada: The State of the Federation 199/2000, toward a New Mission Statement for Canadian Fiscal Federalism*, edited by Harvey Lazar, 99-128. Kingston: Institute of Intergovernmental Relations, 2000.
- LeDuc, Lawrence, and Jon H. Pammett. "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum." *Canadian Journal of Political Science* XXVIII, no. 1 (1995): 3-33.
- Lougheed, Peter. "The Charlottetown Accord: A Canadian Compromise." In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 171-81. Toronto: University of Toronto Press, 1993.
- McRoberts, Kenneth. "Canada and the Multinational State." *Canadian Journal of Political Science* XXXIV:4, no. December (2001): 683-713.
- . "Disagreeing on Fundamentals: English Canada and Quebec." In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 249-63. Toronto: University of Toronto Press, 1993.
- . *English Canada and Quebec: Avoiding the Issue*. Toronto: Robarts Centre for Canadian Studies, 1991.
- . *Misconceiving Canada*. Toronto: Oxford University Press, 1997.

- McRoberts, Kenneth, and Patrick J. Monahan, eds. *The Charlottetown Accord, the Referendum, and the Future of Canada*. Toronto: University of Toronto Press, 1993.
- Milne, David. "Exposed to the Glare: Constitutional Camouflage and the Fate of Canada's Federation." In *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, edited by F. Leslie Seidle, 107-31. Montreal: Institute for Research on Public Policy.
- Muise, Del. "Railroaded into the Union." In *Readings in Canadian History: Pre-Confederation*, edited by R. Douglas Francis and Donald B. Smith, 512-17. Toronto: Holt, Rinehart and Winston of Canada, Limited, 1990.
- Noel, Alain. "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992." In *Constitutional Predicament: Canada after the Referendum*, edited by Curtis Cook, 64-81. Montreal and Kingston: McGill-Queen's University Press, 1995.
- Rebick, Judy. "The Charlottetown Accord: A Faulty Framework and a Wrong-Headed Compromise." In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 102-06. Toronto: University of Toronto Press, 1993.
- . *Imagine Democracy*. Toronto: Stoddart Publishing Co. Limited, 2000.
- Resnick, Philip. *Thinking English Canada*. Toronto: Stoddart Publishing Co. Limited, 1994.
- Russell, Peter H. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Second ed. Toronto: University of Toronto Press, 1993.
- Scott, F.R. *Essays on the Constitution*. Toronto: University of Toronto Press, 1977.
- Seidle, F. Leslie, ed. *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*. Montreal: Institute for Research on Public Policy, 1994.
- Smith, Jennifer. "The Meaning of Provincial Equality in Canadian Federalism." In *Institute of Intergovernmental Relations Working Paper Series*, 25. Queen's University, Kingston, Ontario, 1998.
- Taylor, Charles. "Impediments to a Canadian Future." In *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, edited by Guy LaForest, 187-202. Montreal and Kingston: McGill-Queen's, 1993.
- . *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*. Edited by Guy LaForest. Montreal and Kingston: McGill-Queen's University Press, 1993.
- . "Shared and Divergent Values." In *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, edited by Guy LaForest, 155-86. Montreal and Kingston: McGill-Queen's University Press, 1993.
- . "Why Do Nations Have to Become States?" In *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, edited by Guy LaForest, 40-58. Montreal and Kingston: McGill-Queen's University Press, 1993.
- Trudeau, Pierre. "Quebec's Blackmail." In *Against the Current: Selected Writings 1939-1996*, edited by Gerard Pelletier, 262-74. Toronto: McClelland and Stewart, 1996.
- Tully, James. "Diversity's Gambit Declined." In *Constitutional Predicament: Canada after the Referendum of 1992*, edited by Curtis Cook, 149-98. Montreal and Kingston: McGill-Queen's University Press, 1994.

- . *Strange Multiplicity: Constitutionalism in an Age of Diversity*. New York: Cambridge University Press, 1995.
- Vaillancourt, Yves. "Remaking Canadian Social Policy: A Quebec Viewpoint." In *Remaking Canadian Social Policy: Social Security in the Late 1990s*, edited by Jane Pulkingham and Gordon Ternowetsky, 81-99. Halifax: Fernwood Publishing, 1996.
- Webber, Jeremy. *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution*. Montreal and Kingston: McGill-Queen's University Press.
- . *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution*. Montreal and Kingston: McGill-Queen's University Press, 1994.
- Westmacott, Martin. "The Charlottetown Accord: A Retrospective Overview." In *Challenges to Canadian Federalism*, edited by Martin Westmacott and Hugh Mellon. Scarborough: Prentice Hall Canada Inc., 1998.
- Whitaker, Reg. "The Dog That Never Barked: Who Killed Asymmetrical Federalism?" In *The Charlottetown Accord, the Referendum, and the Future of Canada*, edited by Kenneth McRoberts and Patrick J. Monahan, 107-14. Toronto: University of Toronto Press, 1993.
- . "Sovereignties Old and New: Canada, Quebec and Aboriginal Peoples." *Studies in Political Economy* 58, no. Spring (1999).
- Young, Iris Marion. "Communication and the Other: Beyond Deliberative Democracy." In *Democracy and Difference: Contesting the Boundaries of the Political*, edited by Seyla Benhabib, 120-35. Princeton: Princeton University Press, 1996.