

11-1-1984

The Canadian Constitutional Experiment

Alan C. Cairns

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Constitutional Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Alan C. Cairns, "The Canadian Constitutional Experiment" (1984-1985) 9:1 DLJ 87.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. Introduction

Amidst the staggering array of possible foci for an essay on the Canadian constitutional experiment I have chosen to stress the recent tumultuous struggles for identity and community which have engaged citizens and governments. My perspective is primarily from the bottom up, not because the recent constitutional exercise shows the Canadian peoples as masters of their fate, which it does not, but because who we are and to whom we relate as fellow citizens are important subjects in themselves. Further, the contemporary democratic state cannot function successfully in a vacuum. Its weight and its pressure are such, and its purposes are so intrusive of society, that what we now have is a state-society fusion in which a positive symbiosis between the two is a functional necessity. Otherwise the state will fall into disrepute and disrepair as it faces an indifferent populace. State purposes now require so much popular support and participation if they are to succeed that we have no alternative but to move in the direction of a more participant citizenry, which shares on a day to day basis in the task of governing itself. Thus the community towards which we work is a political community which simultaneously links us with each other and reduces the distance and the differentiation between the governors and the governed.

The first issue to be addressed is our complex evolution as a people. The political identities and boundaries of community which satisfied our grandparents are gone forever. We have been progressively set adrift from our former selves and we need to find a new resting place with meanings which we can all share, which contains and accommodates our rampaging diversities in a

*The author is chairman of the Department of Political Science at the University of British Columbia and is currently Director of Research (Institutions) for the Macdonald Commission on Canada's Future. A Fellow of the Royal Society of Canada, he was the 1982-83 Mackenzie King Visiting Professor of Canadian Studies at Harvard University. This was the third in the 1983 Dorothy J. Killam Lecture Series, "Law on the Eve of 1984", presented at Dalhousie Law School on November 24, 1983. The author warmly thanks Cynthia and Doug Williams for their many helpful suggestions to improve the successive versions of this lecture.

framework of tolerance and civility, and which recognizes that older definitions of nations will no longer work. The world is too much with us, constantly washing over us with waves of interdependence, for us to choose anything other than a non-exclusive partial distinctiveness which attaches us simultaneously to Canada and to mankind.

My task, therefore, is to answer the questions of where we have come from, and who we are now as a people, thrown together in a common space, subject to the same political system, but with our historical senses of identity and community shattered by jolts of change we did not seek. Can we respond with vision to the urgent task of making moral sense of our collective existence? Can that vision of community extend to the creation of more effective participatory links between the citizens and the governments of Canadian federalism?

II. The Decline of Britishness and The Fragmentation of Community and Identity

The definition of who we are as a people has been a moving target for the last half century. The federal state and Canadian society have been caught up in a vortex of pressures between new identities emerging from below and struggling for recognition, and manipulatory government attempts from above to refashion collectivities in the light of state purposes. The transformations in political identity and conceptions of community since the Second World War have already been immense, but the end is not yet in sight.

The prevailing definition up to World War II of Canada as a British country — with a French Canadian minority concentrated in Quebec, little concerned with the positive use of provincial state power, and excluded from all but token and symbolic representation in the federal political elite and the bureaucracy — has been relegated to the museum. The declining psychological significance of Britishness to the Canadian identity is a consequence of the reduced British role in world affairs, the transformation of the Empire into a diluted multi-racial Commonwealth no longer bound by common allegiance to Westminster political traditions, and of the diminished British interest in Canada as British attention shifted to Europe.

The ending of psychological tutelage to the Mother country, proudly described as the move from colony to nation by liberal

nationalist historians, left Canadians with the task of fashioning a more autonomous identity. For a heady but ephemeral interlude the post-war international role of Canada seemed to promise a new and pleasing definition of the country as a middle power whose international significance could provide a satisfying external role while an emerging domestic heterogeneity worked itself out. That interlude ended with the post-war recovery of Europe, the explosion of third world states and the relegation of Canada to a lower position in the international pecking order.

Domestic pressures emanating from a no longer quiescent Quebec further undermined the continued vitality of a British, Anglophone definition of Canada. Concurrent with this phenomenon was a more general ethnic assertiveness outside the two founding nations. The pan-Canadianism of Diefenbaker and the Diefenbaker Bill of Rights were responses to the latter; the dualist emphasis of the Liberals, leading to linguistic reconstruction of the federal bureaucracy and the new prominence of Francophone cabinet ministers, were the first stages of an on-going response to the former. Since then, dualism and multiculturalism, which are not easily compatible, have diminished the Anglophone role in the collective image of Canadian society. Britishness is now only one of the images and traditions in an increasingly variegated and unstable blend of linguistic duality, ethnic pluralism, and social heterogeneity.

The declining Britishness of Canada is also reflected in shifts in the external political models to which we look for guidance. The diminished significance of Britain as a constitutional reference was strikingly evident in the recent constitutional debate. Symptomatic of that erosion was the inability and unwillingness of all but a few to defend the British virtues of parliamentary supremacy against the non-British, almost un-British practice of rights to the people. To a previous generation Sterling Lyon's defence of parliamentary supremacy would have seemed platitudinous and central to the derivative Canadian tradition, rather than a defensive last gasp of support for yesterday's verities, which earned him the label of redneck.

The constitution has grown away from its British roots, not just by the Americanism of the Charter, or by the final ending of the Westminster role in the amending process, but by the more general opening up of Canadians to the constitutional experience of other countries. The Westminster model has seemed of limited relevance

to the problems of federalism which have dominated our agenda in recent decades.

Canadian political elites and academic analysts underwent a recent crash course in comparative government as they ransacked the globe for ideas and institutional suggestions appropriate to the Canadian setting. A Senatorial mission visited Australia to explore the possible utility of an elected Senate for Canada. The British Columbia government's constitutional proposals for Senate reform were inspired by the German Bundesrat, after on-the-spot study of German and Swiss experience. The search for a proportional representation system which might be employed to generate a more regionally balanced party system resulted in a canvass of Continental European, not British, experience where such systems are commonly employed. Finally, in a startling reversal of the historic Canadian attitude of superiority to American political and constitutional practices, the American Congressional system is now often viewed positively. We no longer confidently and automatically consider the fusion of executive and legislative power and the strength of party discipline in the Canadian system to be superior to the American separation of powers and the greater freedom enjoyed by members of Congress.

The concurrent and related decline of the Britishness of our constitutional tradition and of our basic identities has been accompanied, in both cases, by an internationalization of the forces and ideas feeding into our constitutional system and to our self conceptions. Put differently, our particular Canadian past has a diminished hold on us as the contemporary world external to our border increasingly pervades our consciousness.

Our openness to the practices and experiences of the outside world is everywhere apparent. The aboriginal peoples who can claim a prescriptive right to privileged treatment as the first Canadians, are deeply frustrated by their low socio-economic status. They are fortified in their demands by various aboriginal international organizations which meet periodically for consciousness raising, the exchange of political information and the generation of cross-national solidarities. Additional demands for equitable treatment are raised by the growing communities of non-white immigrants who reject white supremacy in all its forms, and whose emerging political importance is revealed by the existence of a House of Commons Special Committee now holding

hearings on the Participation of Visible Minorities in Canadian Society.

The group pressures for recognition and for the redefinition of Canadianism do not stop here. The profound and powerful demands of the women's movement for a non-sexist society is a socio-political phenomenon immensely challenging to the status quo. They too feed on international roots. Finally, the explosion of alternative life-styles born of the sexual revolution in the western world elicits domestic claims for non-discriminatory treatment by lesbians, gays, single parents and co-vivanting couples.

This bewildering procession of diverse demands for recognition is accompanied by the emergence into popular consciousness of group labels — Québécois, Inuit, Dene, Aboriginal Peoples, Gays and Lesbians — which were unknown to our grandparents but which are now part of popular discourse. The political significance of these identity transformations is not trivial, for they all result in claims on the state for recognition, for fair treatment, often for affirmative action, and for representation in the governing councils of the nation. Their successful accommodation into a new pluralist and integrated understanding of what it means to be a Canadian will not be easy, for each typically seeks a supportive use of state power, either to accelerate their movement to equality of status, or to provide temporary or permanent privileged treatment as compensation for past injustices.

These issues of identity and group rights may seem far removed from discussion of the health of that abstraction called the Canadian constitutional system, but they are not. To the extent they do not elicit positive responses, the citizen base of political authority will be fragmented and unstable. On the other hand, a maladroit response to the proliferating claims for recognition and group rights could result in a rigidified society of exclusive and often ascriptive group identities stressing the parts at the expense of the whole. The increasing use of the word nation — the Dene nation, the Inuit Nation, the Indian Nation of First Peoples, and the Quebec nation capped by the state of Quebec — is a key indicator of escalating group identities for which the comfortable label of 'mosaic' is too insipid to be appropriate.

Since the satisfaction of these group claims typically involves refashioning and restricting the identities of others, as well as increasing the competition for public and private goods in circumstances in which not all can be winners, they are initially

divisive in their impact. From the perspective of society and the state, therefore, these emergent group identities are not without their costs and ambiguities. The emphasis on dualism based on charter groups of British and French descent, for example, was not received with acclaim by the various Third Force groups, especially in western Canada, who saw themselves as relegated to a second class citizen status. Ottawa responded with its policy of multiculturalism, indicating the troubling tendency for each response to generate new sets of claims and a further set of responses.

For political authorities, these fissiparous tendencies, whatever their justification and sociological explanation, immensely complicate the state's task in generating consent and legitimacy. The psychic integration of these mushrooming diversities into a common harmonious Canadianism is one of the central contemporary challenges facing the Canadian federal state. The failure of the state to meet this challenge will not leave the populace unmoved. We will be left floundering if no overarching sense of community emerges.

The response to the societal fragmentation just described was, and is, conditioned by our political fragmentation. Concurrent with the developing fragmentation of community deriving from both domestic and international forces, the federal and provincial governments were engaged in often competing attempts to restructure the contours of community and identity for their own purposes.

III. Federalism and the Fragmentation of Community

Nothing in the three decades from the stock market crash of 1929 to the assumption of office in Quebec by Jean Lesage in 1960 prepared Canadians for the nature of the debate which has periodically convulsed the country in the last quarter of a century. The class focussed debate on the inequities of capitalism, for which we had been waiting since the thirties, never happened. As late as the mid-1960s leading scholars continued to predict the demise of the provinces. Others predicted and hoped that a creative, country-wide class politics organized by a simplified two-party system — conservative versus democratic socialist — would break through the anachronistic barriers of a fossilized federal system. That system, it was held, sustained an irrelevant debate which exaggerated the significance of regionalism/provincialism. In the economic determinism of this analysis, capitalism and technological change were

to be the dynamic agents. The class system would provide the relevant cleavages, and a new party system based on those cleavages would moderate the injustices of an economy based on the profit principle. Implicit in this perspective was the assumption that economic change had made us one people and that accordingly the central government was to be the ultimate and clearly dominant master of our collective fates. Neither provincial governments nor the sentiments of provincialism on which they allegedly were based were accorded any prominence in such analyses, except in the form of a scarcely concealed irritation at their inexplicable and too long delayed departure from the Canadian scene.

To explore the events which led to the unravelling of this vision, which was not without a certain nobleness of purpose, would be to write the history of the past half century, a task which limitations of time and space thankfully preclude. Briefly, however, the explanation is found at the intersection of two phenomena, the unpredicted quiescence and intellectual disorganization and weakness of the left, and the equally unpredicted growth of a positive state-centered nationalism in Quebec, which, in conjunction with a resurgent government-led provincialism in much of the rest of Canada, shattered the centralist federal framework we had been bequeathed by World War II.

Consequently, our controversies have been about federalism and the boundaries of community, not about the class system and the injustices of capitalism. For two decades our most vigorous public debates have sought answers to the pre-eminently political questions of who we are as a people and what constitutional framework is appropriate for a harmonious future co-existence of our national and provincial selves.

The debate was not a derivative of other issues. It was not a mask for a debate which was really about the role of the state in the economy — although the question of which state has clearly been central — nor, to put it slightly differently, was it a debate in which economic actors behind the scenes manipulated political puppets whose language concealed the real goals and purposes of competing economic interests. The debate was what it professed to be on the surface. It was a political debate about those political issues central to our existence — how our federal and provincial selves could be reconciled at the level of community and at the level of government.

The debate transformed our understanding of federalism. Since the depression of the thirties the division of powers had been viewed

as the essence of Canadian federalism. Debate about constitutional change was directed to jurisdictional questions, and it was a pervasive assumption that the provincial level was the outlet for provincial concerns. By contrast, national politics, focussing on the central government, was seen as an arena where Canadians debated their future as Canadians, where they analyzed problems as a single people and focussed on their national existence. There was an assumed, neat bifurcation of identities and communities. As the citizen lifted his eyes from the behaviour of politicians in the provincial capital and turned towards Ottawa his provincial identity was thought to be left behind as he partook of a Canadianism which was different from and much more than the sum of its provincial parts.

This Canadianism was always more of an English than a French Canadian phenomenon. Indeed, it rested on a too easy equation of Canadianism with the outlook and interests of the Anglophone side of duality. Nevertheless, until the Quiet Revolution challenged the centralization of power in the federal government, and by so doing drew attention to the insensitivity of Ottawa as a national capital and to the Anglophone bias of the national bureaucracy, the ethnic and linguistic composition of the federal government was not a salient issue. More general regional concerns were assumed to be adequately melded into a composite national policy in the privacy of caucus and Cabinet. From the depression until the early sixties, therefore, the sensitivity of the central government to provincial interests or linguistic dualism was not a major issue.

So profound was the subsequent transformation of basic assumptions that by the seventies a new conventional wisdom asserted that the major 'structural weakness' in the federal system was the insensitivity of the institutions of the central government to the territorial particularisms of which the country was allegedly composed. Accordingly, one significant stream of proposals for constitutional change aimed to modify the institutions of the central government, such as the Senate, the Supreme Court, the bureaucracy, and various boards and commissions, so that provincial orientations would have a greater impact on policy decisions. This approach, labelled intrastate federalism by Donald Smiley¹, was often described as 'federalising' central institutions.

1. Donald Smiley, "The Structural Problem of Canadian Federalism," *Canadian Public Administration* 14 (Fall 1971).

A federal system viewed almost entirely in terms of the division of powers and one viewed from the intrastate perspective of the regional sensitivity or insensitivity of central institutions are very different animals. In the former, regional interests are confined to provincial containers. In the latter, they spill over into national politics, pervade the institutional structure of the central government, and in their most elaborate form threaten to transform the centre into little more than a broker for the resolution of interprovincial or interregional conflict.

The joining of these debates produced a dramatic confrontation between rival conceptions of Canada. These conceptions structured the debate on the Charter, the amending formula, the economic union, official bilingualism, a reformed Senate, the position of Quebec within or without Canada and other more peripheral issues.

The federal government position, after some hesitation, confusion, and vacillation (and discounting the short Conservative interlude,) was to reassert the traditional Ottawa approach. This included the basic premise that Canada was more than the sum of its parts, not just an aggregation of provincial and sectional interests. Further, although sectional and provincial concerns might need to be more accurately reflected in reformed central institutions — including the bureaucracy — the federal government was to relate directly to Canadians as individuals and as members of provincial societies. To the extent that regional/provincial interests were to receive greater recognition that was not to be done by making provincial governments their spokesmen in Ottawa in areas clearly subject to federal jurisdiction, but by enhancing the representativeness of federal government institutions. Also, given the new penetrative capacities of the provincial state to draw the communities and interests subject to provincial jurisdiction into networks of dependence on provincial authority, further decentralization of power to the provinces was to be shunned. Finally, since the positive state at the provincial level threatened to balkanize both the economic and the political union, the federal government sought institutional mechanisms to limit the ability of provincial governments to create territorial diversities of citizen treatment capable of subverting the overriding Canadianism dear to federal policy-makers. Both the Charter and the federal desire to protect the economic union sprang from the same basic objective of limiting provincializing tendencies.

In essence, the federal strategy was one of contestation with provincial definitions of the country which threatened to undermine the centrality of the federal government in citizens' eyes. There was nothing novel about this approach. There has been a consistent, natural, almost inevitable federal tendency to protect and exalt the national community, the national identity, and the national interest whenever they are threatened by provincial fragmentation, even if the latter reflects the entirely legitimate use of provincial powers. In areas central to its evolving vision of Canada, the central government has recurrently tried to diminish the capacities of provincial governments to create provincial diversities of citizen treatment. For Ottawa to so act is like breathing, requiring no second thoughts as to purpose, but only careful calculation as to means and timing.

This policy tendency was inherent in the very meaning of Confederation with its creation of a central government which took possession of the key jurisdictional areas of the former colonies. The centralized federalism of 1867 was to provide a framework within which growing sentiments of loyalty and identification with the new central government would flow from the exercise of its authority. The subsequent national policy was a set of policy instruments designed to integrate the separate societies and economies of the new country around a national transportation system and tariff which, along with massive immigration to the west, would tie the country together in networks of interdependence.

After the Rowell-Sirois Report and the onset of the Second World War Ottawa moved to eliminate the clashing federal provincial tax jungle of the thirties by preemptively occupying the direct tax field in return for payments to provincial governments. Ottawa took over unemployment insurance in 1940, after securing a constitutional amendment, and followed this in 1951, by gaining the constitutional authority to establish its own old age pension program, followed by another tidying up amendment in 1964 which added supplementary benefits such as survivors' and disability benefits to Ottawa's constitutionally legitimate base of legislative authority. The latter were all part of a basic drive to give the federal government leadership in the creation of the Canadian welfare state, even although the basic jurisdictional authority for most of its component parts rested with the provinces. The federal government sought to minimize the centrifugal consequences of predominant provincial

responsibility in the welfare area by purchasing, with conditional grants, a degree of uniformity which otherwise would not have prevailed, at the cost of a *de facto* weakening of provincial autonomy. These centralizing initiatives were legally based on the use of the spending power. Politically they were based on the federal desire to provide a uniform base of welfare entitlements for Canadians regardless of province of residence. The consistent thrust of federal policy was to reduce the barriers to citizen mobility by eliminating the cost to citizens of crossing provincial boundaries.

In 1960 the Diefenbaker Bill of Rights represented a further attempt to mould a Canadian citizenry by providing an equal floor of rights for Canadians for matters in federal jurisdiction. This was followed by the official Languages Act of 1969, a straightforward effort to legitimate the central government for French-speaking citizens in the face of a threatening province-based Quebec nationalism.

To look back at these major initiatives is to see a strong thread of basic purpose: the ever renewed federal effort to proceed incrementally to the evolutionary creation of the symbolic and practical attributes of a single Canadian citizenship. Federal policy in the recent constitutional review process was the contemporary expression of this historic and traditional federal government effort to strengthen the national community and to resist the provincialization of the Canadian people.

Since 1960 a counter, provincializing trend, concurrent with the more recent federal efforts, reflected a new aggressiveness of provincial governments. A province-building phenomenon born not only of the emergence of a positive state-centered nationalism in Quebec, but also of the ambitions of various other provincial governments, saw the latter strengthen their hold on their societies and economies, pulling their citizenry to the provincial sources of authority, discretion and power.

The significance of the province-building phenomenon in general, and in its particular Quebec nationalist expression, was found not simply in the contest of power between the federal government and the provinces which it precipitated. More important was the development of a counter ideology to centralism. As the Smallwoods were replaced by the Peckfords, the Mannings by the Lougheeds, Duplessis by the Lesages and the Lévesques, and elder Bennetts by younger Bennetts, the emergent realities of provincial power came to be clothed in definitions of the country which

emphasized provincial governments at the expense of the national government, and provincial communities and identities at the expense of the national community and the national identity. This provincializing perspective saw Canada more as an aggregation of provincial communities for whom provincial governments were the natural spokesmen, rather than seeing such communities merged and diluted in the larger encompassing and integrating national community responsive to the leadership of a dominant central government. By the late seventies the Pepin-Robarts Task Force described Canada primarily in terms of dualism and regionalism, while the first Conservative Prime Minister in nearly two decades viewed Canada as a vaguely defined community of communities. To the Parti Québécois the federal government was simply illegitimate. To Peckford, Ottawa was the child of the provinces. To Lougheed it was an alien, exploiting centre seeking to deprive Alberta of its new found wealth.

By the time of the constitutional discussions of 1980-81 platform rhetoric had passed over into constitutional demands for a reconstruction of Canada based on these new provincial self images.

The constitutional struggle, therefore, was a contest between competing definitions of Canada which carried in their wake the potential restructuring of the psyche of Canadians. It was for possession of our souls that the contending governments fought. The competing actors sought not only a practical but a symbolic reconstruction of the Canadian constitutional system — a reconstruction designed over the long haul to transform our identities and perceptions and to direct our definitions of who we are and what Canada was all about in ways compatible with the new federalism they were bent on constructing, or in the case of the Parti Québécois, destroying.

The basic federal objective was to nationalize the environment from which the citizenry received its cues so that the future balance of federal-provincial loyalties and identities would shift to the advantage of the central government. The basic objective of the more aggressive members of the provincial 'Gang of Eight' was to do the reverse. We, the citizenry caught in the middle of this constitutional Wimbledon, were mostly audience, occasionally players, and always uneasily aware that our future as a people was attached to the trophy the ultimate winner would triumphantly hold aloft.

IV. *The Amending Formula and the Charter:*

Competing Conceptions of Community

The process by which the recent constitutional settlement was reached has been described elsewhere. The settlement itself was not a triumph for any of the more extreme views contending for acceptance. Sovereignty-association was, of course, repudiated by the Quebec electorate. The more provincialist versions of desired futures were basically thwarted, while the centralizing federal patriation package of 1980-81 was cast aside by the perceived need to obtain extensive provincial government support before proceeding to Westminster for the last time.

Not surprisingly, therefore, the constitutional settlement speaks with divergent voices about the nature of the Canada to which it is to apply and which it is to help create. Its contradictions reflect the clash and subsequent compromise between profoundly antithetical views about Canada. These contradictions are embedded in the Charter and the amending formula, the two major institutional modifications to emerge from our recent protracted struggle.

An intimate linkage between institutional advocacy and conceptions of community pervaded the constitutional debates. While this is self-evident for sovereignty-association with its explicit purpose of sundering the Canadian community to the end of creating a new Québécois nation, it is no less applicable for the other major choices which confronted constitution makers.

The preferred federal amending formula in the unilateralism package was clearly designed to diminish the role of provincial governments in amending procedures, exalt the role of the people with their new referendum capacity, and generally to allow the national will to override recalcitrant provincial wills.

The federal formula was based on a four region Canada, the West, Ontario, Quebec, and the Atlantic provinces and was so constructed that an amendment could pass as long as it had the support of the governments of Ontario and Quebec, governments of any two Atlantic and any two Western provinces, and the federal government. Clearly such a formula did not respect the sovereignty of the provinces. Not only, therefore, was it a relatively flexible formula but it was also a decisive manifestation of a federal desire to give institutional expression to a national will triumphing over (up to four) recalcitrant provincial governments.

The diminished status which Ottawa sought to accord provincial governments was even more emphatically present in a supplemen-

tary amending provision. If the requisite provincial government agreement was not obtained, the federal government could call a national referendum allowing a national voting majority, providing certain regional criteria for support were met, to bypass the opposition, in the extreme case, of all ten provincial governments. This was potentially an immensely significant symbolic and practical redefinition of the constituent parts of the Canadian federal polity. It located ultimate sovereignty in an alliance between the federal government and national referendum electorates conceivably responding to amending proposals mainly of interest to the federal government and answering questions worded by federal officials. It was an incredibly ambitious attempt to strengthen the central government, elevate the status of the people as constitutional actors, and reduce provincial governments to the status of initial, but no longer final spokesmen for provincial interests. The fundamental thrust of the proposal was nation-building, if need be, at the expense of provincial governments whose powers would henceforth be held on sufferance. The federal government, of course, preserved its own veto and had the exclusive power to activate the process, so there was no way in which it could be a loser.

In marked contrast, the Alberta amending formula, and the eight province Constitutional Accord based on it, was a protective package directed to making each province, for which the exclusive spokesman was to be its government, a fortress of rights immune to nationalizing and centralizing pressures which any provincial government wished to resist. The Alberta formula and the Constitutional Accord were based on the triumph of province over region. Both were based on the equality of the provinces and their sovereignty. The formula explicitly repudiated all concepts of regions and regional majorities, and denied power to a national majority, whether composed of governments or voters, to impose its will on a recalcitrant provincial government. Consequently, it expressed a view of Canada as an aggregation of provincial communities and provincial governments, with the latter endowed with indefeasible rights in perpetuity to the jurisdictional powers they possessed.

The ingenuity of the formula was in its combination of flexibility — seven provinces with 50% of the population being sufficient to pass an amendment — with provincial protection. The Accord allowed up to three provinces to opt out of amendments “derogating

from the legislative powers, the proprietary rights, or any other rights or privileges of the Legislature or government of a province," and required the federal government to "provide reasonable compensation to the governments of such provinces." What was sacrificed in the Accord was the nation-wide uniform application of future amendments. The integrity of the national community was to be sacrificed to preserve the integrity of the component provincial parts.

The Charter and the provincial opposition to it were also based on conceptions of community. From one perspective the controversy over the Charter was simply a straightforward debate over the best way to protect rights, between supporters of a leadership role for the judiciary enforcing an entrenched Charter, and supporters of leaving responsibility in the hands of parliamentarians who could respond flexibly to unpredictable future situations.

However, the real constitutional significance of the Charter becomes clearer when it is noted that those political actors who defended the supremacy of legislatures against an encroaching role of the courts were spokesmen for provincial governments. Nothing was more revealing of the situational determinants of policy position than the fact that, as discussion of the Charter moved back and forth between the federal parliamentary public arena and First Ministers' Conferences, it was alternately strengthened and weakened. From the perspective of provincial governments in the 'Gang of Eight' the Charter was seen not as an instrument which removed power impartially from both levels of government on behalf of the people, but as a tool for the achievement of federal government objectives at the expense of provincial governments. Inevitably, the Charter's goal of ensuring that Canadians had a category of rights immune from governmental interference at either level would restrict the possibility of provincial legislative experimentation with its resultant creation of diversities coincident with provincial boundaries. It was this balkanization of rights which Ottawa sought to prevent, and which paralleled its desire to prevent the balkanization of the economic union. The opposing provinces fought not only to preserve their capacity for legislative experimentation, including the creation of distinctive bundles of provincial rights for their citizens, but Quebec, Alberta and Saskatchewan were also strongly opposed to the enhancement of judicial power the Charter would necessarily bring in its wake.

They saw, or professed to see, the Supreme Court not as an impartial umpire but an instrument of centralization.

The resolution of these contradictory positions on the Charter and the amending formula required compromises on both sides. The extent and direction of change were dictated by the fact that Ottawa's commitment to the Charter was stronger than its commitment to its amending formula. The 'Gang of Eight' by contrast was more committed to its amending formula than it was opposed to the Charter. Consequently, the final week of bargaining was devoted to a provincializing of the Charter and a limited nationalizing of the Constitutional Accord amending formula. The latter contained an opting out clause, which was weakened by Ottawa's insistence that the clause requiring financial compensation to opting out provinces be removed (later partly reinstated with respect to education and cultural matters to placate Quebec.) The Charter was weakened by the insertion of a non-obstante clause with respect to specified sections of the Charter. Section 33 allows Parliament or any provincial legislature to prevent the application of the Charter provisions dealing with Fundamental Freedoms, Legal Rights, and Equality Rights to any federal or provincial Act or provision of an Act, for up to five years, which can be extended for additional five year periods by re-enacting legislation.

Since the two major components of the constitutional settlement, the Charter and the amending formula, derive respectively from nationalist and provincialist positions, only partly modified by concessions to the other side, it is not surprising that the overall philosophic consistency of the constitutional settlement in which they co-exist is negligible. Either the Alberta amending formula and no Charter, or the federal amending formula and a strong Charter lacking a non-obstante clause would have been internally consistent in their basic assumptions about the nature of community in Canada. The constitutional settlement which combines a nationalizing Charter and a provincializing amending formula is a contradiction posing as a compromise.

V. *Was the Game Worth The Candle?*

"But what good came of it last?" quoth little Peterkin: "Why that I cannot tell," said he, "but 'twas a famous victory."

Robert Southey is not around to pass his judgement on the Canadian version of the Battle of Blenheim. Little Peterkin's question, however, deserves an answer.

1. The Constitutional Exercise as a Collective Experience

A constitution is not just a bundle of machinery, a big tinker toy with substitutable parts facilitating easy assembling and dismantling. It is also a body of understandings, norms, and identities of those who live the ongoing constitutional life of the country. From this perspective, we are all part of the constitution, and the evolution of our inner life has a constitutional component and significance. Although I cannot provide rigorous proof, I can at least plausibly argue that the world of inner meanings and understandings which we carry in our heads, and which is no less important than the institutional framework, was profoundly transformed with major consequences for our constitutional future. It is not sufficient, therefore, to look outwards to federalism and parliamentary government as if the skin of our bodies were a shell protecting our inner selves from major changes in the functioning of institutions. We must also look inwards to the rearrangement of our constitutional psyches and assumptions, recognizing always that the overt world of constitutional machinery and our inner private worlds of meanings are connected, if not always harmoniously.

From this vantage point, the constitutional process produced more constitutional change than appears in the formal amendments. In its largest sense the constitution is a collective experience, and a body of evolving understandings and assumptions which interacts with that experience. In this expanded sense there was significant, albeit elusive, constitutional change which was not always deliberately sought but emerged as a by-product of the pursuit of other purposes.

The harrowing constitutional process of recent decades changed our understanding of our political system, modified our civic identities, and adjusted our overall relationship to our constitutional arrangements. We have been simultaneously made aware of the fragility of our constitutional system, with its possible breakup only narrowly averted, and of the tremendous difficulty of fundamental, far-reaching reform despite the titanic efforts of strong-willed leaders.

The taken-for-granted quality of the constitution characteristic of the immediate post World War II decades and earlier periods has been eroded. We now know that our political identity, our sense of community, and the balance of our federal and provincial loyalties are all subject to potential modification by institutional change.

Even although we experienced extreme difficulties in generating formal change, the recognition that political systems can represent acts of choice is now much more wide-spread. We have come to agree with Renan, often quoted by Trudeau, that a nation is a plebiscite of every day. While this was most strikingly evident in Quebec with its traumatic referendum experience, there was a concurrent Canada-wide implicit on-going referendum through which the entire country passed.

English Canadians were made aware that the comfortable frame of placid existence of the post-war King and St-Laurent years lacked the durability and stability that seemed to tinge it with eternity. As the transformations of Quebec politics proceeded through the post-Duplessis years to the installation of an indépendantiste government in 1976, followed by four years of constitutional cold war culminating in the 1980 referendum, those of us who lived outside of Quebec recognized that the Canada we knew might pass away, that we might be Pakistainized against our will. Further, this potential act of separation was driven by an internal dialectic in Quebec, which left those of us living elsewhere only the status of observers. We sat before our television screens and watched our collective Canadian future decided elsewhere. The Parti Québécois goal of destroying the Canadianism of Quebecers would, as a by-product, destroy the Canadianism of the rest of us.

We even lacked an acceptable name for that new political self which might, unsought, have been thrust upon us. We were variously dignified by the label 'the rest of Canada,' or 'Canada without Quebec,' descriptions which did not make our hearts sing. Further than that, it was not clear that Canada without Quebec would continue as a single political entity. In an era of strident provincialism, with an independent Quebec separating east from west, and given the hypothesis of a shattered Ottawa which would follow Quebec's departure, it required little paranoia to see the future of Canada without Quebec as subject to a further fragmentation into a gaggle of provinces posing as states.

For Québécois the experience was very different. From 1976 to 1980 the political dynamism and direction of events seemed to be concentrated in Quebec. Here the great drama of Quebec's future, and therefore of Canada's, was played out. The interaction of the heady wine of nationalism and the charismatic leadership of René Lévesque produced the seemingly incontrovertible truism that Quebec's future would be somewhere in the spectrum from Quebec

independence to a position within a revised Canadian federalism significantly more elevated than existing provincial status.

The political logic which turned English Canada into spectators of unfolding events in Quebec led Quebecers to believe that at least the first act in the political reconstruction of Canadian federalism was theirs alone to make in an atmosphere of nationalist introspection. Provincial leaders outside of Quebec participated tentatively and gingerly, if at all, in the Quebec referendum debate, thus providing implicit support for the thesis that they could only choose between being outsiders or intruders in a process designed to break up their country. Even Prime Minister Trudeau limited his major interventions to four speeches — Although Quebec members of the federal cabinet were quite active — with the command of the “no” forces being handled by the Quebec provincial Liberal leader, Claude Ryan.

The Parti Québécois message was clear, that what was required was a great act of national will, after which Ottawa — the existence of the other provinces was scarcely noted — would bargain with a triumphant nationalist elite with a mandate to negotiate sovereignty association. And yet when it was all over, the result was otherwise. Not only was sovereignty association defeated in the referendum, but the very act of pursuing it, coupled with the surprising re-election of the Parti Québécois in the Spring of 1981 (which kept the elaborate constitutional demands of the Quebec Liberals for renewed federalism off the bargaining table,) deprived Quebec of effective representation in the constitutional process which followed the referendum. A massive psychological commitment to mobilizing nationalist forces behind the goals of a hoped-for independent state precluded the simultaneous preparation of a sophisticated fall-back position of a renewed federalism. The Parti Québécois dilemma rested on the inability to combine passion for their first choice with a carefully calculated strategy for a distant second choice. Admission of the possibility that the renewal of a decrepit federalism had to be prepared for was to admit the possibility of losing, which was politically out of the question.

Thus in the same way that Canada outside of Quebec would have been unprepared to think of itself as a coherent entity bargaining with a victorious Parti Québécois government, the latter was unprepared for the federalist counter-offensive when Pierre Trudeau turned out to be the real winner of a referendum designed to break up the country over which he was Prime Minister. Quebec, because

of the Parti Québécois re-election, was unprepared for what happened. For the rest of us, by a stroke of luck, our unpreparedness was innocuous as it applied to a future which did not happen — the post-referendum situation which would have followed a 'yes' vote.

All Canadians, therefore, live in the aftermath of great political events — of aspirations dashed — of certainties eroded — of strategies which backfired — of too easy assumptions that the world north of the 49th parallel could easily be channelled in the direction of idealistic purposes. We have been alternately frightened by threatened changes we did not seek, enraptured by constitutional visions seemingly within our grasp, and ultimately seared by the recognition of potentialities which continued to elude us.

The sense of loss, of pain, and of incredulity at the hardness of the world was given bitter lament by Claude Morin after the exclusion of Quebec from the agreement between Ottawa and the other nine provinces.

An undeniable fact remains — we are faced with a situation where a (federal) government which is majority English-speaking, associated with nine English-speaking provincial governments, will ask another English speaking government in London to reduce without its consent the integrity and authority of the only French-speaking government in North America. For 18 years now . . . I have been directly involved in the constitutional debate. At no time did I ever think Quebec would end up in the deplorable and painful situation in which we find ourselves today.²

His sentiments, if not his words, would have been uttered by a spokesman for the rest of Canada had the results of the referendum ballot been reversed.

It may be poetic exaggeration to say that we have all been indelibly marked by these revelations of our collective and individual impotence, to suggest that we now know that our immunity from the normal tribulations of our planetary colleagues accustomed to recurrent upheavals was, and always will be contingent. I think otherwise. We have all felt the shaking of the earth, the memory of which will not quickly depart.

We have seen the ruthlessness of democratic politics when the stakes are high. We will not easily forget that major constitutional change is not a parlour game for the faint of heart. As our future was

2. *Vancouver Sun*, March 7, 1981

played out it was made brutally clear that constitutions and changes in them are instruments to fashion and to destroy peoples, and that as citizens and even as leaders we have only a limited capacity to move our little Canadian world in preferred directions, or prevent its movement in directions of which we disapprove. A few short years ago many of us thought otherwise.

Some recent essays of Albert O. Hirschman,³ organized around the general theme of the role of disappointment in private and public life, are relevant here. Hirschman reminds us of the oscillation in human affairs wherein major efforts which fail produce a counter reaction. Exhausted we depart the field of failure and retire to lick our wounds. Thus many who have visited their hopes on the public sphere to improve the political management of our collective existence are induced by disappointment to retreat to family, to the private life, to cultivating their garden. But the taste of victory, too, can be flat and insipid, for the victors seldom win completely, wholly, and convincingly. Even if they do the promised land remains elusive and still beyond their grasp.

So, we may expect a temporary abatement of our constitutional introspection. The subjects which were temporarily crowded off our public agenda by the constitutional exercise have returned. They combine with the changed people we have become, because of what we have been through, to move us on to other issues and to a new balance between our public and our private selves. We approach those other issues against the historical backdrop of a constitutional experience which may be as significant as memory, and hence as control; as was the depression experience of the thirties to a previous generation.

2. Constitutionalism and Democracy

Quite independently, therefore, of the formal changes in the constitution, but rather reflecting the experiences we have lived through, we have become in subtle ways a new political people. Since the constitutional order does not exist in isolation from the evolving nature of its citizenry, this too is a constitutional change in its own way, albeit one difficult to measure and too easy to underestimate.

3. Albert O. Hirschman, *Shifting Involvements: Private Interest and Public Action* (Princeton, N.J.; 1982)

The changes in our knowledge, in our political dispositions, and in the feeling side of our political selves do not exhaust the constitutional transformations we have gone through as citizens. A larger question demands an answer which it is difficult to give. Has the experience and its outcome enhanced that elusive quality of constitutionalism on which the most highly developed political systems depend for the moral quality, civility, and tolerance in the political behaviour of leaders and citizens?

A well functioning constitution is, among other things, an overarching normative order which constrains and ennobles the major actors by relating their roles to the political traditions, contemporary meanings, and future goals of the overall system. Such a normative order strains towards coherence and equilibrium, and is closely connected with ideas of legitimacy. It is the existence of such a normative order whose moral dictates restrain and guide both citizens and leaders that is the essence of constitutionalism.

From this perspective, institutions are not simply pieces of machinery sustained by vested interests, but the embodiment of particular values which in the aggregate define a political system in terms of procedures and goals. Thus to rearrange the constitutional machinery of the state, as we have just done, is to rearrange the normative system of the polity, change the cues transmitted to political actors at both elite and mass levels, and in some cases to adjust the boundaries of political community and the content of political identity.

The capacity of the Canadian state to clothe itself in the garments of constitutionalism is unclear. We no longer have, and cannot return to, a liberal state ruling benignly in a limited fashion, asking little of its citizens and giving little in return. The modern Canadian state intertwines with society and economy in a multitude of ways. While this binds citizens and interests to the state in networks of benefits and obligations, it simultaneously enhances the state's dependence on the citizenry for the successful pursuit of public purposes.

Every increase in state-society interactions increases the requirement for the state to be sensitive, discriminating and caring. Otherwise a growing number of abrasive interactions between state, society and economy can only work to the disadvantage of a constitutionalism which depends on mutual respect.

As is often the case, the need for a more comprehensive, fuller and subtle expression of a particular value in human affairs emerges

in inauspicious circumstances. So it is with the contemporary democratic state. It is a sprawling, diffuse, uncoordinated leviathan whose very nature simultaneously requires and hinders that more developed sense of constitutionalism which is now necessary to keep the genie we have let out of the bottle amenable to our wishes. The centrifugal nature of the operation of the modern state produces a proliferation of uncoordinated interactions with the citizenry. The absence of an effective directing core of power renders the efficacy of responsible government, competing parties, universal suffrage, and so on, no longer adequate to keep the state our servant.

In that reciprocal interdependence between state and society the state, as well as society, is imperilled if it comes to be judged as an inefficient, amoral actor. Democratic capitalist welfare states are challenged by the global interdependence of the modern condition in which capital, ideas, and to a lesser but still significant extent, the citizenry are mobile. The citizens are bombarded with ideas and external models of private and public, individual and collective behaviour which take them out of the protective cocoon of an insulated existence. Many of these citizens are newcomers, immune to the bonds of tradition which help to sustain loyalties in the longer established. Many are potential emigrants prepared to vote with their feet if the possibility of pursuing life goals seems more fruitful elsewhere.

In other words, the citizens' relationship to the political authorities which govern them is increasingly conditional. It is not only our economy which has been internationalized but also our society, as the composition of our metropolitan centres testifies. The state's relations to its citizens could, of course, become analogous to a great railway station in which all are passengers coming and going. No state, however, is likely to adopt this approach to a citizenry whose potential mobility is threatening to political authorities whose domain is fixed by geography.

The stratagems open to the state are various, but essentially they are reduced to the simple thesis that the state has to make its occupation of a particular corner of the world more attractive than other beckoning alternatives. The democratic state commences this task with certain advantages. Mobility is not costless. Further, the instruments of socialization bias the citizen in favour of the political order in which he lives. The more elaborate and complete the version of citizenship which exists in a given state the more the citizen will identify with the state and be reluctant to leave it. In

Hirschman's terms, the state must strengthen the mechanisms of voice and the sentiments of loyalty to limit resort to the mechanisms of exit.

From this perspective the recent constitutional settlement is a mixed blessing. The obtaining of a settlement, almost any settlement, was a positive good, since the total failure of such a massive effort at renewal would have been profoundly dispiriting. However, the process itself, with its incivilities, threats, and competitive brinksmanship was deeply disillusioning and disheartening. Frequent repetition of such intergovernmental acrimony undermines the citizens' confidence in political authority and reduces the hold of the state on the affections of its subjects. Nothing in the recent constitutional agreement addressed that profound weakness of our intergovernmental system, except the amending formula, which at least provides us with rules for that limited class of future intergovernmental controversies focussing on amendments. Another possible contribution lies in the constraining effect of the memories of future political leaders of that disfiguring episode of final bargaining in which our rights were publicly bartered and swapped like sides of mutton. These will not be enough. The world of executive federalism, especially at the summit, still awaits the devising of rules and norms capable of civilizing the intergovernmental process.

Elsewhere, however, there were some hopeful portents in our recent collective constitutional trauma. When brought together they are surprisingly positive for a regeneration of constitutionalism which will contribute to keeping government responsible, strengthening the Canadian community, and enhancing loyalty by elaborating the meaning and practice of citizenship.

Both in terms of its process and its outcome the constitutional exercise strengthened the democratic component in Canadian constitutionalism and moved partially in the direction of vesting sovereignty in the people. This is not the standard interpretation of the process which has been widely castigated by many critics (myself included) for its dominance and manipulation by elites. However, to pull some of the scattered threads together is to glimpse another deeper process at work, pregnant with possibilities for an increasing public role in the Canadian constitutional order.

The Quebec referendum is instructive here. Implicit in that daring exercise was the assumption that such a significant change in political status as a move to sovereignty association could only be

legitimized by a popular majority. Further, not only was the referendum itself an exercise in plebiscitary democracy, but the referendum question made it clear that any possible change in constitutional status as a result of bargaining, consequent on a government receipt of a positive mandate, would itself have to be supported in a second referendum.

A further instructive lesson of the Quebec referendum was the apparent willingness of Canadians elsewhere to allow the peaceful disintegration of the Canadian state as a consequence of a decisive affirmative vote in a free and fair referendum contest. Admittedly, this was stated more by indirection than explicitly by the federal government. Nevertheless, the almost universal assumption that force should not be employed to keep a recalcitrant Quebec majority in the federation was impressive testimony to the civility and tolerance of a society prepared to allow its own peaceful dismantling. In a constitutional sense this contributes to the norm that the Canadian political system is ultimately based on the freely given consent of its citizenry.

Further indications of a democratizing process can be found in the major impact of citizens' groups on the work of the Joint Committee of the Senate and the House of Commons, and the very effective application of mass political pressure by aboriginal groups and women for the restoration of rights removed in closed intergovernmental bargaining to placate some of the provincial Premiers.

An additional indication of a democratizing process was the elimination of an absolute veto for the Senate in constitutional amendments — an elimination which has paved the way for a reformed Senate more compatible with contemporary assumptions about the necessity for a popular base for political office holders possessed of discretion. Early anticipations of the democratizing consequences of this elimination of a Senate veto capacity are found in the recent government paper on Senate reform supporting elections, and the probability that the Special Joint Committee on Senate reform will propose some version of an elected upper house.

More generally, not only was the elite domination of the constitutional process subject to extensive criticism, but there was a developing intellectual current in the federal government, and in academic commentary, to view the people as the ultimate arbiter when an impasse is reached between governments on constitutional issues. Thus the federal government was seriously tempted to bypass the intergovernmental mechanisms of executive federalism

and resort to the people at various stages in the recent constitutional discussions.

The various federal referendum initiatives⁴ were a mix of strategic considerations, governmental self-interest and belief in the sovereignty of the people. The fact remains that federal politicians were willing to consider sacrificing elite dominance of the intergovernmental constitutional process by a profound redefinition of the basis of ultimate authority in the Canadian constitutional system.

Cynicism about federal government motives is somewhat allayed by the reiterated assertions of Prime Minister Trudeau of the importance of the national will as the ultimate basis of a well-functioning constitutional order. Strategically, the federal government's position rested on the belief that there was a national community waiting to be tapped by Ottawa for nation-building purposes, in defiance of the centrifugal tendencies in the federal system which resulted from the monopoly position of provincial governments as spokesmen for provincial communities.

With the federal government's proposed amending formula, Trudeau sought to change the constitution from being a compact among governments to being a compact between the people and the national government, with provincial governments reduced to ineffective bystanders if they stood in the way of that alliance. In magnitude, the proposed change was almost as profound as the reconstruction of political and governmental power north of the 49th parallel sought by the Parti Québécois. That the referendum amending process might have been infrequently employed would have been less significant than the rearrangement of our constitutional norms which its simple existence would have brought in its wake.

Several other aspects of the constitutional process and its outcome were congruent with the popular role envisaged by the federal government. The rhetorical contrast in the "people versus

4. In the final round of hectic bargaining the federal government threw out the tantalizing possibility that a national referendum might be employed to break the intergovernmental deadlock. Also, as noted above (pp. 134 & 135), the federal amending formula in the unilateralism package contained a referendum option. Further, if intergovernmental agreement was not possible on an amending formula, and if several conditions were met, the electorate would be given the choice by referendum to determine whether a federal government formula, or a competing formula supported by seven provinces with 80 percent of the population, should govern future amendments.

powers'' definition of the issues at stake in federal-provincial constitutional bargaining, with Ottawa's proposals designated as a people's package and the 'Gang of Eight' characterized as only interested in jurisdictional power aggrandisement, was a shrewd, and relatively successful propaganda ploy to portray the demands of the opposing provincial governments as only the squalid interests of provincial governments as only the squalid interests of provincial government elites. This was perhaps a natural perspective for Ottawa — to portray the dissenting provinces as more interested in fish than the rights of the people — but its significance resides in the fact that it was effective. The only counter-claim of the opposing provinces was to assert that their demands were also people demands, and only fortuitously connected with what looked like a self-interested focus on the division of powers or a greater provincial government input into the institutions of the central government.

It may be that these democratizing tendencies and initiatives will turn out to be only ephemeral aberrations from the elitism characteristic of Canadian politics. On the other hand, the Canadian Charter of Rights and Freedoms is now part of our constitutional landscape. Its basic consequence is to give constitutional legitimacy in our political discourse to the language of rights residing in the people. The Charter will not be an unmixed blessing. If it takes hold, it may contribute to an aggressive rights-conscious individualism hostile to fraternity and solidarity. Further, the affirmative action sanctioned and even invited by the Charter may engender disruptive group antagonism.

On the other hand, in the modern world Charters and Bills of Rights are useful mechanisms to attach the citizenry to the state and to generate loyalty both by their symbolism and the capacity to redress grievances which they provide. Further, the citizens of a fragmented society may achieve an integrating collective sense of themselves from their common possession of rights and the availability of a common language of political discourse.

Finally, a society which is strongly rights-conscious is likely to step up demands for participation. This, of course, can be state-threatening. However, if it is the case that constitutionalism in the modern era demands more of governments and more of citizens at the same time, a participant, rights-conscious citizenry is a necessary, if not sufficient condition for a well-functioning constitutional order.

If the possibilities opened up by these democratizing tendencies are to be translated into fact, the federal and provincial governments of the country must facilitate further democratic input. Elitism and hierarchy are less compatible with the people we have become than the people we were. A failure to respond will leave us worse off, for our expectations have been raised, and the Charter will, in all probability, not let them die.

It will not be easy to reconcile the role of the bureaucracy, the elitism of cabinet government and a more democratic polity. Utopia is not on our agenda. Incremental moves in the right direction are all that can reasonably be expected. Fortunately, if this analysis is correct, the functional requirements of the state for legitimacy and efficacy and the democratic value of participation are congruent. In this case, the recognition of necessity is not a burden to be borne, but an opportunity to be grasped. At least at the margins and for once we are not in a zero-sum game.

In the absence of Robert Southey to answer little Peterkin's question of "What good came of it at last?" I cannot provide a ringing answer. However, the Charter and the democratizing tendencies described above are surely hopeful signs. They may help to bind us together by legitimising the political process through which we resolve claims on each other. The holding of rights in common may help overcome the multiple fragmentations of community described earlier. Further, a rights-conscious community may reduce the distance between the governed and the governors, and may contribute to more sensitive government. We may be disappointed, but we have a chance.

Was, then, the constitutional game worth the candle? Throwing academic caution to the winds, I respond with a resounding "Maybe!"