Of Federalism, Secession, Canada and Quebec

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I. Introduction

This article does not seek to examine comprehensively either the political or the legal intricacies of the possible secession of Quebec from Canada. To either task, the author's knowledge would be unequal. In general terms, all that is aimed at here is the very modest goal of bringing to bear upon the present Quebec-Canada scenario perceptions garnered from a consideration of similar (though different) situations which have arisen in other federations, and especially in the Australian federation.

More specifically, what is attempted is three things. First, a brief discussion is undertaken of the concept of secession as such. Second, secession is considered as a phenomenon within the context of federal states. Finally, an account is given of some of the typical features of a secession crisis within a federal state. Throughout, an effort is made to relate this more general discussion specifically to the situation of Quebec and the possibility that it will seek to secede from Canada. Regrettably, the most obvious theme to emerge from this piece is that Canada and Quebec show many signs of treading the same well-worn path towards secession that has been followed by so many federations and their constituent regions.

II. Secession

It is, perhaps, cold comfort to a Canadian that secession is in the air not only on the streets of Quebec. From its usual place as an unobtrusive foot-note in texts of political science and international and constitutional law, secession has lately barged its way to the forefront of national and international affairs. Thus, not only is the possible secession of Quebec a cocktail party subject around Canada, but the apparently imminent
disintegration of the Soviet Union enlivens the food queues of Moscow and Kiev. The U.S.S.R., always in theory federal — and even possessed of a Constitution guaranteeing a right of secession to its constituent republics⁴ — had until recently represented for most practical purposes the paradigmatic monolithic state. Now, however, there are secessionist movements afoot in virtually all of the republics. While the best known of these movements are in the Baltic republics, there exist similar pressures in the Ukraine, throughout the Moslem south, and even the Russian republic itself has threatened to secede from the Union. There is every chance that the U.S.S.R. as we now know it will cease to exist as a result of the secession movements presently unfolding.

Meanwhile, Russia’s near neighbour, Yugoslavia, appears irrevocably destined for dismemberment at the hands of its quarrelling member republics. Even as far away as the South Pacific, New Guinea is facing the gravest crisis of its short nationhood as the copper-rich island of Bougainville seeks to break away — taking its wealth with it — in a scenario displaying similarities to that played out between Katanga and the Congo during the period 1960-1963. Canada is thus not the only state facing the danger of secession at the present moment, nor are the separatist tendencies of Quebec the most (or the least) profound presently to be discerned around the world. It is conceded, of course, that company offers but little reassurance in such circumstances.

'Secessio' is not a term much bandied about in general conversation, and it is as well to fix its meaning at this early stage. It derives from the Latin secessionem, a withdrawal.⁵ In its more general application, it can be used to refer to an attempt by any group of a state’s citizens to withdraw themselves from the constitutional authority of that state and to found an independent polity of their own.⁶ Indeed, as applied to unitary states, the term will frequently be applied in precisely this sense, as is the case with the secession movement of Bougainville against New Guinea, or the perennial attempts of the Kurds to found their own State.⁷

However, in its application to federal states, ‘secession’ will ordinarily have a distinctively different meaning. In these states, a secession will comprise the attempt by one of the formally constituted component regions of the state to withdraw from the federation and to maintain its

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6. This is the sense in which the term is used in such works as G. Buchheit, Secession: the Legitimacy of self-Determination (New Haven: Yale University Press, 1978).
identity as an independent political entity. Such an attempt by some more informally defined group of citizens, however clearly that group might be delineated in terms of race or territory occupied, will more properly be termed a ‘separation’. There may lurk some at least symbolic significance in this apparently unimportant terminological difference. Perhaps owing to its use by such sophisticated pre-Civil War thinkers as Calhoun, secession in its federal context carries with it echoes of a compact theory of federation, and a greater flavour of internal constitutional legitimacy than the notion of mere ‘separation’.

So, the American Civil War is notoriously ‘The War of Secession’, not ‘The War of Separation’, and the Australians invariably talk of the ‘Western Australian Secession Movement’. Curiously, in the case of Quebec, references to Quebec or French ‘separatism’ are about as common as those involving the use of the term secession. Whether this arises from some desire to down-play the legitimacy of any action which Quebec might take, or from a recognition that a claim by Quebec of a right to leave Canada will ultimately draw upon considerations far broader than its formal constitutional status as a constituent region, it is difficult to say. Nevertheless, in conventional usage, when a federal unit seeks to leave its parent federation it is attempting to secede, and so the question of whether Quebec can or will leave Canada is one of its secession, rather than its separation.

The essence of secession as the term is used here, both in relation to federal and non-federal states, is that it will involve the attempt by a section of an existing state to take itself outside the constitutional, political and legal structures of that state. It is, in short, a bid for independence: after a successful secession, the new polity will not be subject to the laws and governmental actions of the state of which it formerly was part. It is important to realize that secession can be achieved in a variety of ways. Usually, the spectrum of secession is rather clumsily divided into the ‘legal’ and the ‘illegal’. A legal secession is said to occur when the relevant territorial unit leaves the parent state in accordance with the legal norms of that state. There are a number of possibilities here. The constitution of the state concerned may — especially if it is federal in character, and the claim for secession is made by a constituent region — confer an express right of unilateral secession, as did the former

8. See e.g. Secession, p. 4.
9. See e.g. J. Brossard, L’accession à la souveraineté et le cas de Québec: conditions et modalités politico-juridiques (Montréal: Les Presses de l’Université de Montréal, 1976), p. 94.
10. As to which, see infra.
constitution of the Soviet Union. Alternatively, there may be some implied constitutional right to secede unilaterally, the claim to which is again most commonly raised by the component regions of federal states. The best example of such a claim is that articulated by the Southern States during the American Civil War. Finally, there will usually be at least the theoretical possibility, in both federal and unitary systems, of a constitutional amendment which would permit the secession of a territory in accordance with the internal law of the state concerned. Such an amendment will usually require the co-operation of other authorities within the relevant constitutional order. This was the (unsuccessful) course pursued by both Nova Scotia and Western Australia in seeking United Kingdom amendments to the British North America and Commonwealth of Australia Constitution Acts respectively.

An 'illegal' secession occurs when part of the territory of a state simply asserts its independence in defiance of the legal structures of the state. Clearly, such a secession is unlawful as a matter of that state's own domestic law, but the wider legal position is notoriously more complex. In the first place, in any given case, there may well be a complicated intersection between domestic law on the one hand, and international law — in the form of the right of peoples to self-determination — on the other. It is not the object of this piece to enter the convoluted debate over the extent to which this right may modify the operation of municipal law, but it is clear that its existence can significantly complicate the claim that a particular secession is 'illegal'. Secondly, while a secession may be unlawful at the outset, it is a jurisprudential commonplace that such action may nevertheless produce an ultimately 'legal' regime, in the sense that successful revolutions by definition make good law.

Consequently, the distinction between a legal and an illegal secession, however profound in theory, may in practice be a matter of a few days, or even hours.

It is important to appreciate from the preceding analysis that the common tendency to automatically equate 'unilateral' with 'domestically illegal' secession is unduly simplistic. While unilateral secession will typically be illegal, in the sense that it will not accord with the internal

12. See supra, note 4.
15. See Secession, ch. 3.
16. As to which see e.g. Buchheit, supra, note 6, chs. 1-2; Brossard, supra, note 9, pp. 77-92; Matas, supra, note 11, pp. 399-401. For a discussion of the right of self-determination as grounding a right of secession see infra.
law of the parent State, it is (as already stated) by no means inconceivable that a given constitutional order, and particularly a federal constitutional order, will concede an explicit or implied right of unilateral secession.\textsuperscript{19} Thus, before stigmatizing such a secession as illegal in this domestic sense, one must consider very carefully the constitutional norms in question. In the case of a federal state, where the issue of secession will in all probability go to the very root of its constitutional structure, such a consideration will need to be more broadly cast than a narrowly legalistic construction of the bare words of the constitutional text. Here, it should be remembered that the trump card of the Northern States in America's famous conflict over secession was artillery, not logic,\textsuperscript{20} and that there is nothing in the nature of federalism as such which is inherently inconsistent with a right of unilateral secession.

Drawing all this together, and applying it to the specific case of an attempt by Quebec to secede from Canada, it is clear that before a determination could be made as to the domestic legality of such action, a careful examination would first need to be made of Canada's own constitutional structure and precepts. The object of this examination would be to determine whether a 'legal secession' were possible, either through utilization of an amendment process — resort to which would admittedly be unlikely, in view of the Federal and Provincial cooperation that would most probably be required\textsuperscript{21} — or by way of unilateral declaration. As has already been suggested, in assessing this domestic lawfulness of a unilateral secession, more will be required than a narrow, legalistic analysis of the terms of the Canadian Constitution. In times when the old sovereignty of the Imperial Parliament has had to be discarded as so much constitutional myth, the basis of the Canadian federation and its constitution, and the place of so fundamental an issue as Provincial secession within them, will require a more sophisticated treatment than mere textual elaboration.\textsuperscript{22} Such questions are returned to later in this article.\textsuperscript{23}

\textsuperscript{20} The victory of the North has tended to be interpreted as a crushing legal blow against unilateral secession in federal states. In fact, the arguments of the secessionists as a matter of law (rather than of morality) were probably superior: see \textit{Secession}, pp. 67-8; J. Bryce, \textit{The American Commonwealth}, 2nd ed. (New York: Macmillan, 1891), I, pp. 409-10.
\textsuperscript{21} This is on the assumption that the relevant amendment would require at least the consent of both Houses of the federal Parliament, and two-thirds of the Provinces comprising fifty per cent of the Canadian people under section 38 of the \textit{Constitution Act 1982}; see P. Hogg, supra, note 18, pp. 102-3. The matter is further considered infra.
\textsuperscript{22} Although a more or less rigid textual analysis has hitherto been common: see e.g., Hogg, supra, note 18, pp. 101-2; D. Matas, supra, note 11; R. Mayer, "Legal Aspects of Secession (1968-69), 3 \textit{Man. L. J.} No. 1, 61; J. Claydon and J. Whyte, "Legal Aspects of Quebec's Claim for Independence" in R. Simeon, ed., \textit{Must Canada fail?} (Montreal: McGill-Queen's University Press, 1977), p. 259.
\textsuperscript{23} See infra, p.258.
To return to a discussion of secession generally, it is in one sense even possible to conceive of a ‘partial secession’, again particularly in relation to a federal state. Under the simplest version of such a scenario, a region would simply declare itself to be beyond the reach of this or that aspect of the jurisdiction of the parent state. This could involve, at its broadest, a denial of competence over whole areas of action (such as criminal law or immigration) or could operate more narrowly through the assertion of a right of self-exemption from particular laws. Either way, the unit in question could reasonably be said to have partially seceded (i.e. withdrawn) from its parent legal system. Perhaps the best example of this sort of reasoning is to be found in America’s pre-Civil War doctrine of nullification, which in propounding the right of a State to ‘nullify’ unacceptable laws had the practical effect that the State concerned was within the Union for some purposes, but not for others. The sovereignty-association once proposed between Quebec and Canada by the Parti Quebecois could, on one view, be seen as a rather extreme variation upon this same theme. A ‘secession’ of this type will be attractive to a unit which wishes to continue to adhere to its original status for some purposes, but not for others. Thus, in the hypothetical case of a polity like Quebec, there might well be attractions in staying within the original state structures for some purposes, but in being free to pursue an independent course of policy where those structures proved unduly restrictive. It need hardly be said that this type of reasoning does not recommend itself to parent states, and that it would be difficult to imagine such a partial secession which did not mature over time into a fuller withdrawal.

It is appropriate at this point to note that while the natural outcome of secession ordinarily will be the creation of a new nation state, recognized as such by the international community, this question of international recognition is logically distinct from issues pertaining to the right of a territory to secede. It arises only once the process of secession is complete, and does not directly bear upon the legal legitimacy of secessionist action in a domestic or even in an international sense, although recognition or non-recognition may well have practical consequences. Moreover, it does not even follow that a seceding territory will seek admission to the

24. Of course, a partial secession might also be achieved by amendment.
27. For example, the secession of Bangladesh from Pakistan, and the secession of Syria from the United Arab Republic.
community of nations: it may content itself merely with having thrown off the yoke of its perceived oppressor.\textsuperscript{28} In any event, this piece is concerned primarily with the internal ramifications of secession, rather than its inter-play with principles concerning the international recognition of new states.

One of the most important questions concerning secession movements relates to the issue of why they arise.\textsuperscript{29} The short answer is that such movements are almost infinitely various, and that their causes are correspondingly disparate. This said, however, it is in fact possible to divide secession movements into two broad categories on the basis of the factors prompting secessionist feeling in each particular case. The distinction thus produced is between secession movements which are 'ethnic' and those which are 'regional' in character.

The term 'ethnic secession movement' is in many ways inadequate to describe the phenomenon to which it relates, but it is the best available.\textsuperscript{30} Such a secession movement occurs where a group claims essentially that it is a distinct ethnic society within a state, possessed of insufficient ties of common culture and interest to justify continued membership of that state. 'Ethnicity' in this context may be understood as comprising a broad compendium of racial, cultural, social, linguistic, religious and other characteristics. Consequently, the group concerned wishes to withdraw in order to pursue its individuality unfettered by membership of a broader political community. As the name makes clear, the mainspring of such a movement will be a feeling of ethnic difference. It is precisely this sort of feeling which largely underlies the principle of self-determination of peoples, and the basic claim of the ethnic secessionist is to a great extent that what is involved is the realization of the wishes of a distinct 'people'. Of course, economic considerations will frequently also be involved, and it would probably be impossible to discover a 'pure' ethnic secession movement. Nevertheless, in such a movement, a feeling of ethnic difference in the broadest sense will lie at the heart of the desire for an independent polity.\textsuperscript{31}

There are many obvious examples of successful, unsuccessful and not yet successful ethnic secession movements. Those currently under way in both the Soviet Union and Yugoslavia are classic examples of ethnic minorities struggling to achieve the creation of individual polities through

\textsuperscript{28} Buchheit, \textit{supra}, note 6, pp. 230-5.
\textsuperscript{29} For a good general discussion of this and related issues see R. Watts, "Survival and Disintegration" in Simeon, \textit{supra}, note 3, p. 43.
\textsuperscript{30} An alternative might be 'societal secession movements'.
\textsuperscript{31} See Watts, \textit{supra}, note 3, pp. 43-8.
secession. Of course, subsidiary non-ethnic political and economic elements are also present. The attempted secession of Biafra from Nigeria was fuelled largely by ethnic considerations, as is the little known attempt of the Nagas to withdraw from India.32 Even the successful secession of Bangladesh from Pakistan essentially involved the separation of two ethnically disparate groups.33 The list could be multiplied without effort.

Regional secession movements do not proceed on the basis that what is involved is the withdrawal of a distinct ethnic group from a wider polity. There is no real suggestion that a separate ‘people’ is involved. All in all, the typically less passionate claim is made that while the territory in question does not constitute a distinct society, it possesses interests and needs, and faces problems sufficiently different from those of the remainder of the parent state, that they may best be dealt with as an independent policy. The claim is less one of national fulfilment than of self-management. Regional secession movements typically have a strong economic flavour, and are replete with allegations that the central government favours other territories over that which seeks to secede, and that the territory concerned is economically exploited by the remainder of the nation.34

An excellent example of a regional secession movement is the attempt of Western Australia to secede during the 1930s.35 The claim was not that Western Australians were distinctively different from other Australians (which would have been highly implausible) but rather that the more populous and industrialized eastern states were exploiting a primary-producing Western Australia as a source of cheap raw materials and as a dumping ground for heavily protected second-class eastern goods (which was entirely accurate).36 The interests of west and east were said to be incompatible, and so a parting of the ways was proposed. There are, in fact, striking resemblances between Western Australian secessionism and the occasional outbursts of secessionist feeling in western Canada,37 which is similarly regional in character.

It is, of course, perfectly possible to have a hybrid movement which is difficult to classify. The attempt of Katanga to secede from the Congo had a tribal (and hence an ethnic element) but was also heavily fuelled by considerations as to the relative wealth of Katanga when compared

32. Buchheit, supra, note 6, pp. 189-98.
33. Ibid., pp. 198-201; Watts supra, note 3, pp. 43-4.
34. See Watts supra, note 3, pp. 46-7.
35. See supra, note 3.
with the remainder of the country. Secession in Bougainville might be said to have a similarly ethno-economic character. The almost paradigmatic Southern secessionist movement in the United States is itself problematic, in the sense that while it is most properly characterized as a regional movement turning mainly upon the vastly differing economies of North and South, there was a dimension of societal difference between the two protagonists which is difficult to dismiss as merely ‘regional’. However, such interesting questions cannot be pursued here. Suffice to say that secession movements are generally ethnic or regional in character, according to which factors are primarily responsible for their occurrence, and that it is possible in a given case for a movement to display characteristics of both types in different degrees.

As a general observation, ethnic secession movements are likely to be the most dangerous to their host states. Founded as they are in deep feelings of separate identity, often strengthened by linguistic and religious factors, and fuelled by a ‘peoples’-based rhetoric, such movements are perfectly capable of enduring long periods of adversity, only to break out with renewed vigour when circumstances are more propitious. It is perhaps the most basic characteristic of such secession movements that, like the ethnic feeling upon which they are based, they do not readily ‘go away’. So much is obvious to any person who has watched in perplexity as the apparently cohesive Soviet Union has resolved itself into a collection of mutually mistrustful republics, among whom the intensity of secessionist feeling does not seem to be greatly affected by the length of Russian domination. Of course, Irish determination to separate from the British Empire has continued for seven hundred years, while the Kurds have been seeking to found their own state for millennia. Of all the tactics for dealing with an ethnic secession movement, therefore, a reliance upon its natural dissipation is perhaps the least likely to meet with success.

Regional movements will tend to be rather less rooted in the psyche of the populations concerned, and to this extent, are less threatening to the integrity of existing states. As has been noted, such movements are often driven by economic considerations, and to this extent tend to wax and wane according to economic circumstances: if the territory in question is enjoying prosperous times, all is well; if not, the allegedly unresponsive national government bears the blame, and secessionist feeling is renewed. Thus, the Great Depression was a major catalyst in the Western Australian secession movement. This said, the process will occasionally work in reverse, so that a territory which is enjoying particularly

prosperous times may wish to rid itself of what it sees as indigent fellow citizens. A strong element of this was present in the case of Katanga[^40] and also plays its part in sporadic proposals for a separate state in Western Canada.[^41] The most important point remains, however, that such movements are generally more transitory than their ethnic counterparts. Of course, this should not be over-stressed. Economics is a profoundly powerful motivator, capable of stirring strong emotions and resentments, and the fact that regional secession movements may come and go will be no consolation to a state which has in fact lost part of its territory through an appropriate conjunction of circumstances. Here, it should be recalled that at the heart of the American Civil War lay a largely economically driven regional secession movement.

Whatever other features it may exhibit, it is clear enough that the case of Quebec falls squarely within the general category of ethnic secession movements. Overwhelmingly the most important factor prompting a withdrawal of Quebec from Canada is a feeling among the Quebecois that they are a different 'people' from English Canadians. The fact that the delineation of the relevant 'peoples' depends heavily upon linguistic factors does not act to diminish this feeling of difference, which is reinforced by religious and cultural factors, as well as an by undeniable history of oppression. As Brossard puts it, ‘... la nation canadienne-française constitue un “peuple” au sens le plus plein du terme ...’.[^42] This is not to say that there are not other elements in Quebec's grievance against Canada, and the rhetoric of provincial rights may also be discerned alongside that based on notions of a separate people[^43]. Nevertheless, it is entirely apparent that any movement for the secession of Quebec is properly described as an 'ethnic secession movement' in the sense that the term is used here. It follows from the preceding analysis of such movements, both that the secessionist impulse in Quebec belongs to that class of secession movement which has historically been the most troubling, and that the feeling upon which that impulse is based is unlikely to simply dissipate over time. Neither of these conclusions can be particularly surprising.

Before concluding this description of the broad phenomenon of secession, an obvious but important point should be made as to its general basis, and the implications of that point briefly considered.

[^40]: See supra, note 38.
[^41]: Cf Burns, supra, note 37, pp. 64-6; and see generally D. Kilgour, Uneasy Patriots: Western Canadians in Federation (Edmonton: Lone Pine, 1988).
[^43]: See e.g. Brossard, supra, note 9, pp. 204-26; Morin, supra, note 42, pp. 21-2.
Ultimately, a desire for secession is based upon a particular strand of human feeling, namely, an affection for the like over the unlike, a preference for the familiar over the unfamiliar, an identification which the smaller and more local over the larger and more generalized. In short, secessionist feeling is ultimately based on the tendency of humans to identify with and feel loyalty to, primarily if not exclusively, the social, political, cultural and even geographical construct of which they most immediately form part. Many things, other than secession, draw heavily on the same idea: a notable example is federalism itself, with its concern to preserve local decision-making capacity and self-government, conformably (of course) with wider national interests.

The point made here is that it is thus quite wrong to dismiss the feeling upon which secession movements are based — and hence such movements themselves — as intrinsically ‘stupid’, ‘foolish’, ‘backward’ or ‘unenlightened’, as is so often done by protagonists of nation states threatened with territorial disruption. There is nothing inherently unintelligent, let alone unnatural, in the idea that one’s life would be happier in a polity more intimately connected with one’s own and one’s neighbours’ hopes, values and priorities. Of course, particular secession movements may be both mad and bad, but so are some nation states. It is largely our own ‘nation-centricity’, itself a comparatively recent phenomenon, that tends to make us automatically regard secession in so negative a light.

Indeed, if one wishes to talk of ‘unnaturalness’, it is the concept of the nation state which will often have more of a case to answer than either local feeling or secession. Only too often, that state is an essentially artificial abstraction, far removed from the experience and values of the different groupings which go to make it up. Even when a state does exert a hold on the minds of its people, their identification with it may be less profound than their identification of it with them, and theirs. Thus, a British Columbian may well love Canada, but when thinking of Canada picture Vancouver and the mountains, just as a Canada-loving Nova Scotian will love the Canada of Halifax and the Atlantic. It is when this localized vision of the nation becomes inconsistent with the actions of the nation state as such that trouble will occur. The basic point, however, is that secession is neither necessarily illogical, nor inherently regressive. It

44. See Buchheit, supra, note 6, pp. 9-11.
45. See e.g. B. Galligan and C. Walsh, “Australian Federalism: Yes or No’ in G. Craven, ed., Australian Federalism — Towards the Second Century (forthcoming, Melbourne University Press).
should be noted here that many respected nation states have at one point or other withdrawn from larger political entities: the United States of America, Norway and Ireland, to name but three. Thus, in the specific context of Quebec, it should be remembered and remembered firmly that when a Quebecois says that Quebec should leave Canada, that person does not automatically stand condemned as a monster or a fool. They may be wrong, but the matter is one for serious and considered argument.

As a final point, it may be objected that much has been made here of the present prevalence of secession as an international phenomenon, but nothing said of the great movements towards increasing integration currently underway. Here, one might point not only to the inexorable movement of the European Economic Community towards a state of 'quasi-federalism', but also to the re-unification of the two Germanies, and the real possibility that at least some of the previously communist states of eastern Europe will find their destinies together within a form of federal union. The importance of all this being acknowledged, however, its exact relationship with such broader issues as 'regionalism' and 'localism', and the possibility of secession based thereon, is more problematic.

It may be that as nation states increasingly become part of supra-national entities, and as those entities become increasingly significant in the lives of persons living within their boundaries, regionalism will increase, rather than decrease. What is meant here is that in a three-cornered contest for the loyalty and identification of citizens between the super-nation, the nation and the region, the nation — as an entity neither of the grass-roots nor of the mountain tops — may well lose out. In this sense, it may be more important to a person to be a Breton and a European than Breton and French, or to be an East European and a Croatian than an Yugoslav and a Croat. It may be observed in this connection that expecting people to juggle three equal sets of communal loyalties might be expecting too much. Moreover, as super-nations move to consolidate their existence at the expense of national independence, it may suit their interests to favour a diversity of regions and localities over cohesive nation states, especially where a history of animosity exists between the two. Thus, what we could see gradually emerging would be necessarily looser super-national structures which are more tolerant of regional feeling than the traditional nation state. Of course, the ultimate direction of regional feeling within such a structure, and the ability of that structure to accommodate it free of movements for secession, remains to be seen.47

III. Secession and Federalism

Passing to a consideration of secession specifically in the context of federal states, the most often debated issue is whether federalism — as an allegedly inherently 'weak' form of government — promotes secession. This is an ancient charge, and was vigorously prosecuted by that champion of unitary systems, Albert Dicey.48 In more recent times, federalism has been similarly condemned on the basis of its admittedly undistinguished record as a stable form of government among emergent nations, particularly in Africa.49 The allegation that federalism fosters secession is thus both long-standing and current, and is only likely to be put with increased intensity in light of recent world events.

It must be admitted that as a simple matter of statistics, the picture for an ardent supporter of federalism is not an encouraging one. Put bluntly, virtually every federal state of any standing has had sooner or later to face a concerted bid for secession by one or more of its component regions.50 Such is true, for example, of the United States, Canada, Australia, and the Soviet Union. Even the federations of antiquity had similarly antique secession movements.51 Against this, however, must be set the undeniable fact that not only federal states are plagued with secession: separatist attempts by the territories of unitary states are also by no means uncommon, with Bangladesh and Katanga being relevant examples. Moreover, it is difficult to blame federalism for the current troubles of the Soviet Union, when that state was until recently widely dismissed as being federal in name only.52 All this said, however, and conceding that the matter does not lend itself to strict statistical analysis, one is still left with the impression that secession is more prevalent in federal, than in unitary states.

This, of course, does not of itself conclude the case against federalism. One is faced here with a 'chicken and egg' situation: does secession occur in federal states because there is something inherent in federalism which leaves its host state exposed to secessionist feeling; or is a federal rather than a unitary form of government adopted in the first place as a recognition of pre-existing and divergent local interests which would not bear a more centralized rule? If the latter is the case, it will be unfair to blame federalism as such for outbreaks of secessionist feeling, unless of course it could be shown that federalism acts to foster and inflame that

50. Secession, pp. 4-7.
51. Ibid.
feeling. The question is, in a sense, whether federalism causes secessionism, or secessionism causes federalism?

It would appear that, at least to a significant extent, the latter is true. Federalism is likely to be chosen as a form of government where ethnic or other divisions are such as to make closer union impossible. For example, neither the French Canadians, nor the Biafrans, nor indeed the populations of the American and the Australian states, would have lightly accepted complete merger in a wider political community. The feelings of difference — whether based on ethnicity or interest — which were later to prompt secession movements within these federations were already present at the inception of federalism, and underlay its choice over a unitary system of government. It hardly seems fair to blame federalism too rigorously for a failure to root out difficulties which underlie its own adoption. One gains a strong impression that, at least in the case of deeply-seated ethnic secession movements, such impulses would have continued regardless of the form of government adopted. So much is readily observable in the case of the Soviet Union, and is probably true also of situations like that which arose in Biafra, and quite possibly in the case of French Canada as well.

Nevertheless, the damage to the reputation of federalism having thus been minimized, it must be acknowledged that some facets of federalism will have the potential to assist, if not actually to create, secessionist movements. One's impression is that this effect will be more pronounced in the case of regional than ethnic secession movements, which — being typically less profound — are more in need of support to ensure their continued vitality. Three factors may be mentioned.

First, the dual government implicit in federalism, centred as it is around a concept of 'division', has the potential to embody and continue an existing separation between territories which might otherwise have faded over time. Part of this will involve the existence of an independent state structure capable of competing with the national government for the political loyalty of the citizens of a territory. Any such effect will ordinarily be less critical where deep-seated ethnic feeling exists, which feeling will probably continue without the need for such artificial stimuli as regional borders or legislatures, though this is not to say that such stimuli will not be of assistance. However, in the case of mere regional feeling, the constitutional division involved in federalism is more likely to be a necessary condition for the survival of that feeling. It would, for example, be difficult to imagine secession as even a theoretical possibility

in a country like Australia were not the old colonial borders perpetuated in the form of states boundaries within the Australian federation.

Secondly, federalism will posit the existence of a regional governmental structure, which will be able to act as a collator and articulator of regional grievances against the central government. Such grievances will naturally be channelled towards and through the regional government, providing not only the opportunity for the reinforcement of those grievances through articulation and dissemination, but also promoting the identification of the citizens of a region with their natural champion, the regional government. Moreover, that government will be only too glad to try and deflect blame for adverse conditions from itself onto the central authorities. In these circumstances, secessionist tendencies may well be inflamed. Again, the effect is perhaps greatest in the case of regional movements, but even an ethnically based secession movement will obviously benefit from the capture of a state apparatus capable of advancing its cause and articulating its claims. One need only to turn to the ferocious attacks launched by the governments of the States upon the Government of the Union during the Civil War to appreciate the potential of regional governments in this connection.

Finally, in the event that a secession movement comes to fruition, a regional governmental structure will provide that movement with an existing state apparatus, capable of directing the struggle (if struggle there be) for independence, and of taking up the reins of government thereafter. Thus, there will not be the harrowing necessity of trying to create a state ‘from the ground up’ that will commonly face a secession movement which is not based upon a constituent region of a federal state. This incalculable organizational boon bestowed by federalism upon secession movements is perhaps the factor which operates most equally as between ethnic and regional secession movements. Again, its operation is perhaps most clearly seen in the American Civil War, but may be discerned in virtually all federal secession movements.

How, then, has federalism operated upon secessionist tendencies in Quebec? To the extent that a movement for the withdrawal of Quebec from the Canadian federation comprises an ethnic secession movement of considerable profundity, it must first be observed that it is quite implausible that such impulses would simply have disappeared had Canada only possessed the wisdom to become a unitary state. Indeed, against any sins to be laid at the door of federalism must be set the well-known (though admittedly early) view of Trudeau, that the compara-

54. Ibid.
55. Ibid.
tively decentralized character of Canadian federalism had in reality acted as a safety-valve on French-Canadian nationalism, and that the result of any attempt to impose a more unified form of government would have been to convert Quebec's secession from a threat into a reality.\textsuperscript{56}

However, it would be vain to deny that secessionist feeling in Quebec has, to a significant extent, fed off Canadian federalism. While such feeling would doubtless easily have survived unification, it has — especially in recent times — taken full advantage of the Provincial state apparatus. The governmental structures of Quebec have become the means by which the cause of French Canada is to be advanced, and its government is likewise the outspoken champion of that cause. The existence of the provincial government of Quebec has provided the essentially ethnic movement for that Province's secession not only with a platform, but with an immediate focus for its plans and aspirations. Moreover, French-Canadian separatism has been able to diversify its demands and grievances by tapping into a rich stream of Provincial rights reasoning and rhetoric.\textsuperscript{57} Were Quebec to secede tomorrow, it would be able to function independently in almost every particular as a fully-equipped state structure. Thus, while Trudeau was almost certainly correct in saying that Canadian federalism has played a major role in keeping Quebec at home as part of Canada, it is probably equally (if paradoxically) true that should Quebec leave, federalism will also have provided part of her fare.

Quite apart from an assessment of these very practical means by which federalism may foster secession, one might also be tempted to consider the impact of what could loosely be termed the psychology — or perhaps more accurately the psychosis — of federalism itself. This is a nebulous but important point which is difficult to make with any degree of precision. Put simply, a federal system of government is one which necessarily has an enormous conceptual question hanging over its head. It is not, like a unitary state, an intrinsic whole. Rather, it is a composite entity, made up of different units. Even the laziest political thinker, when faced with such a structure, must eventually ponder the obvious question: 'Those units are in, but can they get out?' The possible disintegration of a unified whole is not a thought that readily occurs: the permanence of bonds between obviously separate entities is a natural subject of speculation. Thus, federalism of its very nature begs the question of secession in much the same way that marriage raises the issue of


\textsuperscript{57} See \textit{supra}, note 43.
divorce, and this question will be particularly acute where a federation is composed of previously sovereign or quasi-sovereign polities who freely consented to combine into the federation in question. In such circumstances the federalism-secession marriage-divorce analogy is compelling, and the entire federal structure and all concerned with it must to some extent absorb this uncertainty as to its enduring nature.

This basic constitutional insecurity in a federal state may manifest itself in diverse forms. Only two are concentrated upon here, chosen partly because they are familiar from experience with Australia’s federal system, and partly because elements of them are discernible in Canada’s own situation. The first, is that many within a federation will be desperately inclined to down-play all suggestions of regional difference and character. Given the manifest conceptual danger of federal disintegration, it is apparently considered safest to comprehensively deny as an article of faith that any feeling which might conceivably be sympathetic to a secession movement could reasonably exist. The cry here is that ‘All Canadians / Australians / Americans are the same, and should be treated the same’. Anyone who suggests that this rather sweeping conclusion might be overstated, or reveals some degree of regional loyalty or affection, is branded as a crank, or worse. This tendency is more marked in Australia than in Canada, where regional feeling is stronger, and therefore more respectable, and where at least some degree of difference between French and English Canadians is self-evident, but its influence may be discerned nonetheless, particularly on the part of the more-determined advocates of expanded Federal power, and among those most opposed to the aspirations of Quebec.

The second, and much more localized phenomenon, concerns the writings of legal commentators. Were one to rely solely upon such writings, it is often the case that one would scarcely know in respect of a given federal state that secession was an issue of even theoretical importance, let alone that such a movement might have arisen in the past and posed a serious threat to national integrity, or that such tendencies continue to subsist. Rather, there is a profound tendency to ignore secession as something distastefully insignificant, or if that is simply not

61. See e.g. R. Hawke, *The Resolution of Conflict* (1979), pp. 18-19.
possible, to give it as scanty a treatment as can decently be managed. The whole process seems to be one of simple denial. This tendency may be noticed in Australia, where legal writers (and historians) have valiantly attempted to expunge a very serious secession movement from our constitutional history, but is just as pronounced in a Canada beset by a secession movement of the utmost seriousness. At a time when legal discussion of secession could not be more timely, interest appears to be desultory, at least among English Canadian legal academics. The same has been true of earlier crises. Thus, collections of writings relating to the failure of Meech Lake will cover in detail every imaginable issue, except the fundamental question of what happens if, as a consequence, Québec decides to leave the federation. It is a phenomenon familiar to anyone who has studied the legalities of secession in Australia, but one none the less remarkable for that.

IV. The Course of Secession Movements in Federal States

What is attempted here is a necessarily brief description of a few features typical of the course of secession movements within federal states. Perhaps the very first point which should be made is that once a constituent region has actually determined upon secession (as opposed to having merely issued ritual threats), it will usually be extremely difficult to persuade it back from the brink. Regardless of the deeper considerations upon which a secession is based, such a course will only be adopted when the citizens of the region concerned cease to have even the modest degree of emotional involvement with the wider state that is necessary to render a federal union supportable. A region may well endure a great deal before this point is reached, when not only have affection and loyalty ceased (if they ever existed), but even passionate anger has tended to give way to steady resentment and settled indifference. Even at a late stage there may be the possibility of rapprochement through accommodation. Once, however, a region has emotionally withdrawn (or as Morin puts it, 'psychologically retired') from its federation, the task of winning it back is — short of the use of force — prodigious. Obviously enough, the preferable time to defuse a secession movement is in fact before the resentment of the region in

63. Secession, pp. 55-60.
64. Hogg, writing before the present crisis, cites only two English articles on the subject, that of Matas (supra, note 11) and Mayer (supra, note 22): Hogg, supra, note 18, pp. 101-2. There is also the contribution of Claydon and White in Simeon, supra, note 22.
65. See e.g. K. Swinton and C. Rogerson, Competing Constitutional Visions: The Meech Lake Accord (Toronto: Carswell, 1988).
66. Morin, supra, note 42, p. 29.
question is firmly channelled into secessionist feeling, or if that is impossible, at least before that feeling and its logical outcome have become inflexible ‘givens’ in regional politics.

Many illustrations might be given, both of this need for a prompt response to any growth in secessionist feeling, and of the consequences of ignoring or misinterpreting that need. The frantic last-minute attempts to save the American Union, and their complete inutility in the face of implacable and long-standing Southern hostility are well-known. To take a less intractable dispute by way of example, one has only to look to the case of Western Australia. Grievance and resentment had been building in that State for almost 30 years before a serious course of secession was embarked upon. Despite repeated and progressively more savage warnings, the Commonwealth Government almost completely ignored the gathering crisis. Only when secession was literally days away, and even then with great ill-grace, was some acknowledgement made that serious problems had arisen, and that some redress might be necessary. By that time, it was too late: the arguments of the Commonwealth were scarcely even heard, and a secession referendum was passed by an overwhelming majority.

Indeed, the example of Western Australia illustrates not only the extreme fragility of last-ditch stands to save federation, but also something of a tendency on the part of central governments to adopt precisely such a short-sighted approach in dealing with secessionist impulses. This tendency is easy enough to explain: no federal government will wish lightly to admit that its territory stands in imminent danger of disintegration, and there will always be a real temptation to characterize a serious problem as mere ‘temporary disaffection’. This will, of course, have the happy effect of obviating the need for decisive action.

Neither of these phenomena, however, can hold much joy for Canada. Even on the basis of a slight acquaintanceship with this country’s constitutional history and politics, it is not difficult to discern a strong tendency on the part of both the Federal authorities and much of English-speaking Canada generally to avoid taking the issue of secessionist feeling in Quebec with anything like the degree of seriousness which it would apparently warrant. Thus, as a matter of recent history, Quebec in 1980 came to the brink of secession, and was pulled back largely by last-minute propitiating promises and reassurances.

67. See e.g. W. Cotton and B. Cotton, The Roads to Sumter (1963), especially chs. 5 and 6.
68. Secession, ch. 3.
of the Quebecois, perhaps predictably, few of these promises came to fruition, and Quebec was in fact dragged through the humiliation of the 1982 patriation of the Constitution and institution of the Charter without its consent.\textsuperscript{70} Not surprisingly, this treatment only increased Quebec's resentment. The wider Canadian response to this resentment was comprised in the attempted Meech Lake agreement. However, the fiasco involved in the failure of Meech Lake, replete as it was with accusations and recriminations hurled against Quebec, can only have served to resolve any doubts on the part of many Quebecois as to the feelings harboured towards their Province by English Canada, and as to the course which they now must follow.

The main consequence of all this is that Canada once again faces the prospect of Quebec's secession, but does so with little apparent realization of the seriousness of its situation, and with no particularly discernible appreciation that — on the assumption the federation in its present form is worth saving — resolute action is needed before it is too late. Rather, the same old arguments over Meech Lake are endlessly rehashed,\textsuperscript{71} the same Provincial Premiers posture as the champions of Canadian unity when their actions in fact constitute one of the main threats to that unhappy species.\textsuperscript{72} The population at large basks happily in a lazy hostility towards Quebec. The appreciation that the preliminary skirmishes are over, and that Canada faces a major threat to her national, institutional and territorial integrity, is as slow reaching Ottawa and Winnipeg as the corresponding awareness ever was in reaching Canberra and Melbourne in 1930. If Quebec secedes, then no matter how often the prospect has been derisorily (and even approvingly) discussed by English Canada in the past, the most common reaction will undoubtedly be one of considerable surprise, and in these circumstances, the chance that timely and thoughtful steps will be taken to defuse the situation is not high. Indeed, one of the more interesting if depressing questions concerning the possibility of Quebec's secession is whether or not it is already to late for it to be avoided.

A second general point of great importance is that secession can be a catching disease within a federal state: there is always the real danger that if one constituent region secedes, it will be followed by others. The pattern here seems to be that once the integrity of a federation is compromised by an initial secession, some psychological barrier is down, and that state's ability to retain its other regions is seriously diminished.

\textsuperscript{70} See P. Hogg, \textit{Meech Lake Constitutional Accord annotated} (Toronto: Carswell, 1988), pp. 2-4.

\textsuperscript{71} See \textit{eg.} Swinton and Rogerson, \textit{supra}, note 65.

\textsuperscript{72} See \textit{eg.} the statements of the premier of Newfoundland to the effect that the proponents of Meech Lake should never be forgiven: \textit{Globe and Mail}, 9 September, 1990.
This is not to say that an individual secession will inevitably be followed by the wholesale disintegration of the federal state concerned, but the potential for further departures is there, and its existence is not hard to explain. A successful secession will not only fracture the constitutional integrity of the federal state, but will aim a humiliating blow at the prestige of the federal government, as well as furnishing an open invitation to any other dissatisfied unit to follow suit. It is thus no wonder that multiple secessions can occur, or that the hostility of federal authorities towards an attempted secession may be sharply accentuated by a species of regional ‘domino theory’.

Again, the secession crisis in the United States is a case in point. Once the irrevocable step of secession had actually been taken by South Carolina, and the psychological barrier crossed, the Union had received a major blow, upon which the secession of the other rebel states followed comparatively quickly.73 So much had been feared from the outset. Exactly the same fear lay behind the Commonwealth of Australia's frenzied reaction to Western Australia's bid to secede, a reaction which (as we have seen) came only after secession was inevitable. The Commonwealth was frankly terrified that Western Australia would take with it at least the states of South Australia and Tasmania, and there was every reason to suppose this could be the case. Both States were watching the course of the attempt with great interest, and had made it clear that they regarded Western Australia's attempt as a test case.74

The particular dynamics of the secession of Quebec are, of course, very different, but it is not difficult to see how such action could conceivably trigger some wider disintegration of the Canadian Federation. To take one scenario only, the departure of Quebec would leave Western Canada stranded in a Federation subject to the almost complete political domination of the much-disliked Ontario. In such circumstances, and on the assumption that Quebec's own secession had been accomplished with a minimum of dislocation, Western Canada might well be tempted to likewise strike out on its own.75 What would happen to the rump of Canada then would be anyone's guess, but it would at least be clear that the Atlantic Provinces, most probably separated from Ontario by Quebec, and reliant upon payments which Ottawa surely could no longer make, could not survive in their present form. One (grimly hilarious) possibility would be union with Quebec. Indeed, it must be conceded that the position of the Maritimes will be problematic enough if Quebec

74. Secession, pp. 56-7.
alone leaves Canada. It is hardly suggested that this scenario represents
the inevitable consequence of the secession of Quebec, but it is far from
being totally implausible. This ‘disintegration factor’ is something which
might be kept in mind by Canadians when considering their attitude
towards the possibility of Quebec seceding, and in determining the degree
of effort which they are prepared to make in order to avoid that
eventuality. While it may or may not be true that Quebec as such would
be ‘no loss to Canada’, the real equation is not nearly so simple.

One of the most obvious questions concerning the course of secession
movements in federal states is as to the most effective means by which a
constituent region may approach secession. Here, there will essentially be
a choice between a unilateral, and what might be termed a ‘co-operative’
secession. In the latter situation, the seceding region will seek to act with
the consent of the central government, and possibly of other component
regions, usually via the mechanism of a constitutional amendment
procedure.

On this question there can be little doubt. Any federal region
absolutely determined upon a course of secession will almost always be
well-advised to pursue its goal by unilateral action. There are a number
of reasons for this. First and foremost, a major factor militating against
co-operative secession is the simple one that a seceding region’s federal
government is highly unlikely to be co-operative. The reasons underlying
this negative attitude towards secession are easy to isolate, and may be
expressed in the language of high constitutional principle or realpolitik
according to taste. The basic truth, however, remains the same: the
governments of nation states generally do not lightly acquiesce in the
serious diminution of their territory. This reaction may vary in intensity
according to the importance attached to the particular territory, and there
undoubtedly have been instances of co-operative secession, but the
reaction of federal states to the secession of a component region will
typically be extremely hostile. The reaction of the Union to the secession
crisis of the 1860s and of the Commonwealth of Australia to Western
Australia’s pretensions are identical in this respect. Such hostility will
naturally be increased where there is any fear that further secessions may
be a logical consequence of the departure of the region in question.

77. See e.g. Hogg, supra, note 18, p. 103.
78. E.g., that of Norway from Sweden.
79. See supra, p. 251.
Secondly, if a region seeks the permission of other authorities within its federal structure to secede, normally on the basis that such permission is a legal requirement, it runs the serious risk that, in the event that permission is refused, secessionist action will be delegitimized in the eyes of its own people, as well as the remainder of the federation. The effect of this may well be to make the goal of secession immensely more difficult to achieve, especially if there is significant opposition within the region itself. This is perhaps the greatest lesson to be learned from Western Australia’s bid for secession, where that State rested all its hopes upon the favourable reception by the Imperial Parliament of a petition for the amendment of the Commonwealth of Australia Constitution Act. The rejection of that request effectively stigmatized any attempt by Western Australia to secede by other means as unconstitutional, and fatally undermined further efforts in that direction.\textsuperscript{80} Of course, the more determined a region is to secede, the less likely it is to be balked by such considerations, but the significance of this sort of delegitimation in a volatile political context should not be underestimated.

A third factor promoting unilateral over co-operative secession is that it will fit better with any secession movement which is ultimately based upon a notion of the inherent right of individual peoples to found their own community.\textsuperscript{81} It will sit uneasily with such notions, and more particularly with the political and rhetorical momentum based thereon, for a seceding region to nevertheless go cap in hand to the federal and other authorities seeking permission to leave. The logic of such secession movements is inevitably biased towards unilateral action.

Finally, unilateral secession offers the incalculable tactical advantage of placing an enormous burden of reaction upon the central government. As long as a discontented region merely threatens secession, its central government will usually prove more than able to match its efforts at bluster. If the region seeks permission to secede, that can easily be denied. But when a region actually does secede, an agonizing choice faces the central authorities. What are they to do? Should they use force? Should they resort to economic measures? Should they open negotiations? Any step is fraught with difficulty, and likely to be the subject of conflicting opinions. In such circumstances, a seceding region might reasonably hope for, if not rely upon, at least an initial degree of paralysis on the part of the central authorities, and possibly for long-term inaction. Such a hope will be all the more reasonable if the federal state is a traditionally stable and peaceful one, unused to the taking of stringent measures. The

\textsuperscript{80}. Secession, p. 59.
\textsuperscript{81}. See supra, p. 238; and see infra, p.255.
The dithering response of the Union to the initial secession of the Southern States, with the situation being rescued only at quite a late stage by the efforts of those such as Lincoln, is an object lesson here.\textsuperscript{82}

Of course, none of this is to deny the real advantages of co-operative secession where this is possible. Not only will such action ordinarily accord with the domestic law of the federal state in question, but it will clearly have the potential to produce a more amicable and considered settlement than that which might follow upon a unilateral action. However, given, in particular, the extreme unlikelihood of federal cooperation, and the adverse consequences which may attend the failure of an attempted secession by co-operative means, a determinedly secessionist region will usually find unilateral secession to be the more practical course. Consequently, the temptation for such a region to secede first and talk about it later will often be compelling. It should be appreciated, of course, that a unilateral secession need not entirely preclude negotiation. A region might be perfectly willing to discuss the precise terms of its secession before the event, as opposed to seeking permission for such action, and might subsequently care to enter into detailed discussions consequent upon its secession with the state of which it formerly was part, with a view to resolving outstanding constitutional, political or economic difficulties. But these negotiations will be from a position of strength, and in an atmosphere where the position of the region cannot conceivably be misunderstood.

There is no obvious reason to suppose that these general propositions would not hold good in the specific case of an attempt by Quebec to secede from Canada. It can hardly be doubted that any Federal Government would be implacably opposed to the secession of Quebec.\textsuperscript{83} To the extent that it is relevant, the opposition of the English-speaking Provinces could also confidently be predicted. Some very limited discussion of the domestic legalities of the secession of Quebec occurs later in this article, but it may be noted at this point that the most obvious means of a ‘legal’ secession would be via an amendment to the Constitution of Canada, involving both Federal and Provincial consents.\textsuperscript{84} Given the extreme unlikelihood that such consents would be forthcoming; that their refusal, once sought, would potentially compromise the legitimacy of secessionist action; that the position of a Canadian government faced with an accomplished secession would be excruciating; and that any claim by Quebec for withdrawal from Canada

\textsuperscript{82} See Agar, supra, note 73, pp. 405-13; 419-26.

\textsuperscript{83} See Hogg, supra, note 18, p. 103; Mayer, supra, note 22.

\textsuperscript{84} See infra, p. 258.
would draw deeply upon an inherent right of peoples to found their own polity: who could deny that unilateral action presents a highly attractive option to anyone committed to Quebec's secession? The alternative of protracted and probably futile negotiation must seem particularly unpalatable in light of the failure of Meech Lake.

Thus, if Quebec ever determines upon secession, its most plausible course would be to move calmly and deliberately towards the achievement of that goal by unilateral act. Doubtless, the rest of Canada would be informed of its intentions, and invited (as appropriate) to take part in discussions as to how the course of secession could be followed with the least dislocation to all concerned, and indeed, what the terms of that secession might be. But these discussions would not in any sense be in the nature of a request for permission to secede. Secession would go ahead with or without some wider Canadian blessing, and if discussions as to final terms were ineffective before it occurred, they might prove more fruitful thereafter.

It is worth briefly mentioning one invariable facet of secession movements in federal (and for that matter in non-federal states), and that it is the development of a secessionist rhetoric. Secession movements will typically produce a diverse oral and literary infra-structure aimed at justifying secession to the population of the region concerned, the federation at large and even the world in general. So much is clear enough of the secession movements currently percolating within the Soviet Union, and the secessionist literature produced by the Southern States was both voluminous and sophisticated. During the 1930s, Western Australia went so far as to produce a long publication intended for consumption both within and without Australia, entitled *The Case of the People of Western Australia for Secession*, which roundly blamed successive Commonwealth governments for all the woes of the seceding state. It is significant in this context that any movement for the secession of Quebec already has a strong political-constitutional literature upon which it may draw, including the work of such writers as Bourassa, Morin, Vallières and Brossard.

It is appropriate at this point to consider the significance of specifically legal argument in attempts by regions of federal states to secede. We are

86. An analysis of this document is undertaken in *Secession* pp. 36-46.
88. See supra, note 42, note 46.
89. See e.g. P. Vallières, *Nègres blancs d'Amérique* (Montreal: Editions Parti-Pris, 1968).
90. See supra, note 9.
here primarily concerned with arguments as to the legality of unilateral secession, both because there will ordinarily be little doubt that some authority or combination of authorities would be able co-operatively to effect a constitutional amendment permitting secession, and because it will be precisely such a constitutional amendment that it will be beyond the power of the seceding region to secure.

The significance of legal argument in this context is often misunderstood, usually in one of two ways. The first approach is to regard law as virtually dispositive of the entire issue. Here, the tendency is to triumphantly demonstrate that unilateral secession is consistent or inconsistent (usually inconsistent) with the relevant constitutional instrument, and then to assume that this concludes the matter. The second approach is to assert that law really has no relevance whatsoever in relation to unilateral secession, except to the extent that it is self-evidently true that a successful secession, as a completed revolution, will create a new legal regime. The flavour here is that unilateral secession is exclusively a matter of brutal political reality into which the niceties of legal argument do not significantly intrude. Somewhat paradoxically, these two approaches are often adopted sequentially by the same commentators, so that after it is concluded that unilateral secession is illegal as a matter of constitutional law, it is then conceded as a 'throw away line' that a revolutionary secession will create its own legality.91 Both these approaches misconceive the real role of legal argument in unilateral secession.

Legal argument will neither be dispositive of any issue of unilateral secession, nor will it be practically irrelevant. Rather, its role is as a crucial if highly specialized rhetorical and moral weapon on each side of the debate,92 but particularly in the hands of those favouring secession. Secession movements in federal states will go to great lengths to produce complex arguments justifying not only the political morality of secession, but also its legality. It is not difficult to understand why. It will be of enormous importance to a seceding region to be able to assert the legality of its action, first, so as to reassure its own population as to the wider legitimacy of that course, but secondly, so that any attempt by the central authorities to hinder secession may be portrayed not only as wrong, but as illegal according to the very norms of the constitutional structure that those authorities are pledged to support. An ability to achieve victory, or at least an honorable draw in this legal debate will be of great use to a seceding region in the wider moral and political controversy surrounding

91. See e.g. Hogg, supra, note 18; Matas, supra, note 11.
the legitimacy of its secession. It is as much for these reasons as upon any strictly ‘legal’ considerations that writers like Calhoun and Taylor were at such pains to justify the legality of southern secession, and it is its potential for use in such a debate that has helped make the principle of self-determination such a bug-bear to existing nation states.

In very general terms, two different lines of argument might be resorted to by a component region of a federal state in order to legally justify its unilateral secession. The first would be based upon propositions said to flow from the legal nature of the federal union itself, and may be referred to as ‘the compact theory of federation’, although it has many names, and many variants. The essential idea, however, is clear enough: the constitution of a federal union is a compact between the component regions of that union. In the event of a breach of that compact, a region is entitled to rescind the agreement, and to withdraw from the bargain — that is, to secede. This is the kernel of the theories of writers such as Calhoun. It is clear, of course, that the exact applicability of such reasoning will vary according to the history and circumstances of particular federations. Notably, a compact analysis will be more immediately applicable to a federation composed of pre-existing sovereign communities which freely united, than to a federal union whose regional entities owe their own existence to the act of union. In the latter situation, it is ordinarily much more difficult to speak of a compact.

The second line of argument would look not to federalism for its inspiration, but to international law, and even (to an extent) to natural law. Such an argument would assert the inherent right of ‘peoples’ to form their own polity, a legal right superior to any stipulations of a state’s own constitution. Heavy reliance would be placed on Article 1 of the United Nations Charter, with its reference to ‘self-determination of peoples’. The argument of the seceding region will thus be that its population constitutes a distinct people, who are legally entitled to decide upon their own form of government. This is in fact the argument of secession movements in unitary states around the world, but it is equally open to a federal region, assuming that there is an adequate degree of

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94. See Buchheit, supra, note 6, ch. 2.
95. See Secession, pp. 60-74.
96. E.g. the theory of ‘State Sovereignty’: Bennett, supra, note 25, p. 120.
97. Calhoun, supra, note 13, pp. 300-1.
98. See supra.
100. See generally, Buchheit, supra, note 6, ch. 2, ‘The Search for a Right to Secede’.
identification between the ‘people’ in question and the territory of the region. It is not the purpose of this article to touch upon a very vexed question of whether the principle of self-determination can in fact give domestic legal colour to a secession movement\textsuperscript{101}, but it may be accepted for present purposes that this is one of the broad lines of legal argument open to a seceding region.

Consistently with the comments already made concerning the role of legal argument in the present context, it is important to understand the use to which the lines of argument identified above are to be put. These are not necessarily arguments to be advanced in legalistic form before a court of law, and certainly not before the courts of the parent state. If they can be used successfully to convince such a court, well and good, but they are primarily addressed to a far wider audience, namely, opinion within the seceding region and the federal state, and even internationally. In this sense, such arguments do not have the same need to proceed from a rigorously juridical basis in the relevant federal constitution in the same way as, say, a division of powers argument before the Supreme Court of Canada. Rather, they will serve their purpose perfectly well if they can be founded plausibly in some broad, fundamental vision of the federal polity concerned, or of the rights of peoples generally.

It is interesting to consider the specific question of what legal arguments might be put forward by Quebec to justify its unilateral secession from Canada. The starting point here must be to note that it has been universally assumed that such action would be inconsistent with the \textit{British North America Act} [now the \textit{Constitution Act, 1867}],\textsuperscript{102} and thus that secession would, from a legal point of view, necessitate a constitutional amendment.\textsuperscript{103} Brossard cites an impressive number of provisions which would produce such an inconsistency,\textsuperscript{104} and one need only consider sections 5 and 6, which between them legally create the Province of Quebec as part of the Dominion of Canada, to conclude that any explicitly textual basis for the unilateral secession of Quebec would be impossibly weak. Indeed, given that these two provisions between them reflect the constitutional fact that Quebec as a matter of strict law became a province of Canada not as a result of its own action but by

\begin{itemize}
  \item \textsuperscript{101} Ibid.; and see Mayer, \textit{supra}, note 22, pp. 66-70.
  \item \textsuperscript{102} See e.g. Hogg, \textit{supra}, note 18, p. 102; Matas, \textit{supra}, note 11, pp. 388-9; Mayer, \textit{supra}, note 22, p. 63.
  \item \textsuperscript{103} It is beyond the scope of this article to consider the question of whether such an amendment could be passed simply with the consent of both Houses of the Federal Parliament and two-thirds of the Provincial legislatures representing at least 50\% of the people of Canada (section 38) or whether the unanimity procedure would be required (section 41). On such questions see e.g. Hogg, \textit{ibid}, pp. 102-3.
  \item \textsuperscript{104} Brossard, \textit{supra}, note 9, p. 262.
\end{itemize}
virtue of the superior will of the Imperial Parliament, it might seriously be wondered how an argument based on the compact theory of federation, for example, could even be advanced.

The answer is that the type of reasoning advanced above is part of a particular legal game that a Quebec determined upon secession would not even have to play. It may be conceded that the bare words of the Constitution Act, 1867 and the surface reality of its enactment by the now defunct Imperial Parliament, give little comfort to secession. But Quebec would be appealing not to the letter of the Canadian Constitution but to its substance, not to its surface reality but to its underlying reality. Here, it would be argued that whatever form the Confederation of 1867 may have taken, it embodied a central political and factual reality of the voluntary coming-together of two nations, one English-speaking, the other French-speaking and centred on Quebec. It would be in this fundamental and continuing duality that the true character of the Canadian Constitution and the federalism based thereon would be said to lie, and in an exercise of that duality that a right to secession would be founded.105

As Calhoun himself might have put it, at the heart of Canadian constitutional dispositions lies the reality of a compact between the English and French nations. That compact goes deeper than any mere term of the Constitution itself — such terms pre-suppose its existence and continuation. This compact, having been repeatedly breached by English Canada, is now terminable by French Canada in the form of the Province of Quebec. Again, it must be stressed that this argument, while legal in character, is not one that will ultimately stand or fall according to its reception in a court of law — it's a wider theatre of operation. This said, as a constitutional vision of the Canadian federation, it is at least as plausible as some myopic construction of the terms of the Constitution Act, 1867, as aided by a dogmatic adherence to the erstwhile sovereignty of the Imperial Parliament. To this extent, the recognition by a court, and especially by a Quebecois court, of a right of unilateral secession in Quebec is not outside the bounds of possibility.

Put as it is above, it is easy to see how a legal argument raised by Quebec on the basis of the compact theory of federation could be dovetailed with (and indeed, virtually shades into) one drawing upon the right of a people to self-determination. Once more, the national duality of the Canadian federation would be brought into play, with a view to claiming that French-speaking Canadians, again centred on Quebec, constitute a

distinct people entitled to choose their own form of political organization. In the words of Morin, the French Canadian nation 'est un collectivité naturelle de culture et de valeurs, historiquement constituée ...' As was the case with any argument based upon some version of the compact theory of federation, numerous legal objections could be raised. For example, it is frequently suggested that the principle of self-determination applies only in colonial situations, while the use of a principle of international law to justify the domestic legality of a secession is not free from difficulty. But it may once again be observed both that the demands of law as rhetoric are not the same as the demands of law 'as law', and that as a realistic legal-constitutional vision of the position of Quebec within Canada, such an argument cannot be dismissed as arrant nonsense. As it happens, it is clear enough that the secession of Quebec, if it comes, will in all probability be justified by its supporters primarily upon some such peoples-based reasoning, with arguments centred around breaches of the federal compact playing a supporting, if important role. So much would seem to follow from the essential nature of the grievance of the people of Quebec against English-speaking Canada.

Some Canadian legal writers have devoted attention to the very specific question of the appropriate attitude of the courts within Quebec to the secession of that Province. The gist of their argument has been that the courts would be required to uphold the federal regime until such time as it was 'certain' that a revolutionary secessionist order had been established. It might be suggested that such writers are rather overplaying their hand in stipulating so onerous a requirement as certainty. Be that as it may, such arguments clearly assume — on the basis of a legalistic textual analysis of the Constitution Act, 1867 — that it is inconceivable that a Quebec court would find unilateral secession to be domestically lawful. Of course, were such a finding to be made, there would be no need to await a 'certain' revolutionary success, as there would have been no revolution. The point here is that, in light of the comments made above, there is no absolute guarantee that the Quebec courts would make a finding of domestic illegality. It may be that they would, on one basis or another, uphold such action. Doubtless, the Supreme Court would disagree, but to put the matter bluntly, its

107. Morin, supra, note 42, p. 41.
108. See e.g. Buchheit, supra, note 6, pp. 39-40; Matas, supra, note 11, pp. 399-400.
109. See e.g. Mayer, supra, note 22, p. 68.
110. Hogg supra, note 18, pp 104-5; Matas, supra, note 11, pp. 393-4.
jurisdiction over Quebec would have ceased, both in practice, and in the law of Quebec. Thus, the assumption that the unilateral secession of Quebec would initially be regarded as illegal within that Province itself, with all the consequences that this would entail, assumes rather too much.

It is appropriate here to make some comments concerning the manner in which federal states handle bids for secession by their constituent regions, as opposed to the means by which those regions themselves go about the business of secession. Some matters relevant here have already been considered. For example, it has been noted that the time to 'handle' a secessionist impulse is clearly before the stage is reached when secession has become all but inevitable.\(^{111}\)

Unfortunately, it has also been noted that federal states will frequently not appreciate the seriousness of a secession movement until it is too late, and this important point bears amplification, or at least further illustration, in the specific context of a discussion of the reaction of federal states to secession crises. Thus, in the case of the United States, so informed a player as Seward was very late in the day mocking the Southerners for what he saw as their empty threats: 'Who's afraid? Nobody's afraid; nobody can be bought'.\(^{112}\) Another commentator wrote to the same effect: 'As to disunion, nobody but silly people expect it will happen'.\(^{113}\) These comments have, one hundred and thirty years later, a faint but distinct Canadian echo. In the case of Western Australia's bid, the Commonwealth Government remained convinced of victory in the secession referendum even after the Prime Minister, who had travelled to Perth at the eleventh hour, was literally howled down by jeering crowds.\(^{114}\) This sort of federal optimism is perhaps touching, but hardly facilitates the early recognition of the danger of secession, and the making of a concerted bid to avert it. To an outsider at least, this ready dismissiveness is one of the major strands in the wider Canadian reaction to the intense dissatisfaction of Quebec.

There is a further and exacerbating factor to be considered here, and this is the prevalent tendency of central governments and their supporters to simply inflame secessionist feeling — once the seriousness of that feeling has belatedly been recognized — with bellicose threats, condescension and simple insult. This unhelpful reaction seems to be

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111. See Supra, p. 249.
114. *Secession*, p. 34.
motivated partly by a logical enough dread of the consequences of secession, partly by a genuine incomprehension that any region would wish to leave the joys of the union, and finally by simple anger over the implicit personal and institutional rejection involved in a bid for secession. Such a pattern was observable in the American secession crisis, and was marked in the case of Western Australia. In the latter instance, the Commonwealth government, having been virtually torpid throughout the gathering crisis, was so stung by the vote in favour of secession that it produced (without Parliamentary approval) a book setting out its views on the matter, and entitled *The Case for Union.*

This publication was then distributed to every elector in every conceivably disaffected State, including Western Australia. In both tone and content it was arrogant, dismissive and pompous, and succeeded only in exciting outrage in Western Australia, resentment throughout much of the remainder of the country, and dismay in London.

Naturally, this type of inflammatory behaviour on the part of a federal government will be particularly counter-productive if feeling within a disaffected region is already such that the remainder of the federation is seen as arrogant, domineering and supercilious. There can, of course, be little doubt that such is the feeling of many Quebecois towards the rest of Canada, with references to the 'arrogance satisfaite et dominatrice du peuple majoritaire' being a standard part of the debate over Quebec's future. Moreover, in the wake of the acerbic debate over Meech Lake, with its constant criticisms of the position of Quebec, and with the failure of the agreement rightly or wrongly being seen by many as a rejection by Canada of Quebec, this feeling has only intensified. Regrettably, it will doubtless continue to intensify so long as many leading English-speaking Canadians publicly dismiss the grievances of Quebec with a lofty disdain that seems sometimes to approach contempt.

Of course, real accommodation always remains at least a theoretical option for a federal state faced with a secession movement. Unfortunately, if the danger is appreciated only at a late stage, when secessionist grievance has already become an established fact of political life, and if the federal government has hitherto acted so as only to intensify that grievance, the outlook for careful negotiation leading to thoughtful

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118. Brossard, supra, note 9, p. 240.
compromise is not good. Every attempt to negotiate a settlement before the American Civil War failed in the face of mutual intransigence, while the Commonwealth of Australia was essentially uninterested in negotiations with Western Australia. All in all, accommodation will typically have a hard row to hoe in any fully-matured secession crisis.

Nevertheless, of all the options, accommodation is that which should most closely be examined. Unfortunately, supporters of a federal government are often too blinded by resentment over the seceding region’s ‘treachery’, ‘blindness’ or ‘ingratitude’ to do much more than hurl inflammatory accusations and counter-accusations. Yet, to the federal state, the true question must always be as to the value which it places upon the presence of the dissentient region within the union. If that value is high, then it may well be worth paying a correspondingly high price to retain it. The real issue must therefore be whether there are any steps the taking of which might avert secession, and which would be less painful than the disruption of the federation. If there are, then it follows that such measures, however unpalatable initially, should be adopted. Interestingly, in the case of Australia, after Western Australia’s bid to secede was thwarted by the Imperial Parliament, the Commonwealth found that, on reflection, certain discrete adjustments could be made to the financial structure of the federation which had the effect of improving the position of that State. Western Australia is still part of the Australian Federation.

In the event that the prospect of Quebec’s secession becomes even more threatening, the basic equation for Canadians will be equally simple. On the (large) assumption that accommodation is still possible on both sides, is Quebec worth more to the Canadian federation than the price of keeping her in? In this equation, resentment and irritation towards what may be regarded as Quebec’s irrational behaviour are simply irrelevant. Moreover, any concessions made in the name of keeping Quebec in Canada are, on this analysis, ultimately concessions made for the sake of Canada, not Quebec. Whatever the issue may be for the Quebeois, the issue for English-speaking Canadians will not be whether they are doing Quebec a favour, but whether they will be doing themselves a favour. This is an issue which only Canadians can decide.

There is at least one further option open to a federal state, on the assumption that it has rejected resentful inertia, empty-handed persuasion and serious accommodation. That is for it to use force in order to coerce

the errant region back into the Union, or to prevent it from leaving in the first place. It is popularly supposed that in ‘civilized’ and peaceful federations this grim possibility is a theoretical option only, but this is to rather over-state the position. History in fact shows that hitherto pacific federal governments, when faced with the departure of a significant portion of the population and territory of the federation, may well resort to force to prevent that eventuality, especially if force seems likely to succeed. America is the obvious paradigm case, but Western Australia was subjected to increasingly explicit threats of armed intervention, while the proclamation of the War Measures Act in Quebec in 1970, though actuated by particular and extraordinary circumstances, is not to be ignored. Indeed, in assessing what is to be born in order to avoid the secession of a region, it will always be wise for the population of the federal state concerned to appreciate that the exact course which a secession crisis may take is as unpredictable as any other profoundly disturbing political upheaval, and that more may be involved than terse farewells.

Quite apart from questions concerning the means by which a region may promote secession and a federal government oppose it, any secession will raise a vast number of associated legal and political issues, far too numerous to be considered here. The point is made, however, that were Quebec to secede from Canada, the institutional and other adjustments thereby rendered necessary would be prodigious. Perhaps one of the most difficult questions would be that relating to stranded minorities. When a federal region secedes, it will not infrequently be the case that certain of its citizens will wish to stay within the Union. Such was the position of the people of that part of Virginia which ultimately became West Virginia, and a similar sentiment was present in the eastern part of Western Australia. What would be the position in Quebec? Would some anglophone minority wish to secede from the seceding Province? Might this be true of native peoples? The difficulty for a seceding region will always be that having itself fractured the previous federal union, it will often be in a weak position — both morally and politically — to resist a similar attempt upon its own integrity. However, this is not the place to consider the variety of issues which would inevitably arise consequent

121. Secession, p. 42, 53.
123. It is interesting in this context that some French-Canadian writers go to the trouble of specifically denying the legitimacy of the use of force to return a seceding region to the federal nest. See e.g. Brossard, supra, note 9, p.95.
124. See e.g. Buchheit, supra, note 6, pp. 29-30.
upon the secession of Quebec:¹²⁵ the example of stranded minorities is offered only by way of illustrating the complexity of such issues.

V. Conclusion

This article has merely sought to discuss in general terms some aspects of the problem of secession in federal states, in the light of the experience of federations other than Canada, and in an attempt to make that experience relevant to the present controversy over the future status of Quebec. It offers no predictions as to the outcome of that controversy, and certainly no solutions. What is perhaps suggested, is that there do tend to be patterns in secession crises within federal states. Secession movements are motivated by particular factors, are pursued in certain ways, and provoke similar reactions from their opponents. To this extent, it is not difficult to detect points of similarity between the present situation in Canada, and such events as those which took place in Australia during the 1930s, and even those which occurred in the United States during the 1860s. Given the ultimate course of those events, these similarities are troubling to anyone hopeful of the continuance of Canada. Any such person must hope that all Canadians will carefully consider what lessons may be held by the past, with a view to ensuring that they are not painfully relearned on Canadian soil.

¹²⁵. The entire second part of Brossard's work, (supra, note 9), is devoted to a consideration of such issues.