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...Meech Lake to the Contrary Notwithstanding (Part I)

Roderick A. Macdonald

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...Meech Lake to the Contrary Notwithstanding (Part I)

Abstract

In this essay, which will be published in two parts, the author argues that the Meech Lake Accord was more than a hastily cobbled together political deal between the Prime Minister and ten provincial premiers. Despite the unattractive process by which the Meech Lake Accord was struck, and especially defended, despite the disingenuous character of the arguments most often advanced for its adoption, and despite its close connection with other aspects of the federal government's political agenda which many Canadians found suspicious, the Meech Lake Accord did respond to an important issue in post-patriation constitutionalism. A review of Canadian constitutional history, the evolution of French and English linguistic minorities in Canada, and the complementary motifs of French-Canadian and English-Canadian survivance leads the author to conclude that the forces which generated the Meech Lake Accord have been perennial features of "British North American" political life since 1759. The symbolic purpose of the Meech Lake Accord was to illustrate that, notwithstanding significant demographic and economic changes in Canada, and notwithstanding that the patriation exercise operated a profound transformation of the complex underpinnings of Canadian federalism, these traditional forces would still play a significant role in defining the values of the country. The failure of the Meech Lake Accord does not mean that these forces are now spent. Rather, it means only that the present "federal" structure within which they have been accommodated since 1867 probably is no longer appropriate for the task. The author concludes with a prognosis for what the institutional redesign likely to emerge over the next few years will be - a framework he characterizes as "heteronomy."

Keywords

Meech Lake Accord (1987); Constitutional law; Canada

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... MEECH LAKE TO THE CONTRARY NOTWITHSTANDING (PART I)^o

RODERICK A. MACDONALD*

In this essay, which will be published in two parts,¹ the author argues that the *Meech Lake Accord* was more than a hastily cobbled together political deal between the Prime Minister and ten provincial premiers. Despite the unattractive process by which the *Meech Lake Accord* was struck, and especially defended, despite the disingenuous character of the arguments most often advanced for its adoption, and despite its close connection with other aspects of the federal government's political agenda which many Canadians found suspicious, the *Meech Lake Accord* did respond to an important issue in post-patriation constitutionalism.

A review of Canadian constitutional history, the evolution of French and English linguistic minorities in Canada, and the

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This essay is an extended version of the *Laskin Lecture on Public Law* delivered at Osgoode Hall Law School on 8 November 1989. Given that the Lecture immediately preceded the Annual First Ministers' Conference in Ottawa, many references in the Lecture text presupposed the imminence of that meeting. These references I have left more or less in their original form despite the fact that various revisions to this essay occurred some time after the First Ministers' Conference.

In preparing the lecture for delivery and in revising this text for publication, I benefitted from the comments of many colleagues at Osgoode Hall and at McGill. I should like to thank especially Professors Peter Hogg, Allan Blakeney, Richard Janda, Nicholas Kasirer, Peter Oliver, Wade MacLauchlan, and Daniel Jutras for their several suggestions about both matters of form and substance. I also wish to record my appreciation to Dean Donald Greig and the Faculty of Law of the Australian National University in Canberra for providing me with the opportunity to teach a comparative constitutional law graduate seminar during the early months of 1990, at which time I was rewriting the Lecture for publication. The challenge of learning the politics of a new (and strongly centrist) federal structure was particularly rewarding and greatly assisted me in sharpening the argument of this essay. Finally, I should like to thank my research assistant, Geneviève Saumier, who worked tirelessly during the last edit of this text.

¹ Part II will appear in the forthcoming issue of the *Osgoode Hall Law Journal*: Volume 29, No. 3.

complementary motifs of French-Canadian and English-Canadian *survivance* leads the author to conclude that the forces which generated the *Meech Lake Accord* have been perennial features of "British North American" political life since 1759. The symbolic purpose of the *Meech Lake Accord* was to illustrate that, notwithstanding significant demographic and economic changes in Canada, and notwithstanding that the patriation exercise operated a profound transformation of the complex underpinnings of Canadian federalism, these traditional forces would still play a significant role in defining the values of the country.

The failure of the *Meech Lake Accord* does not mean that these forces are now spent. Rather, it means only that the present "federal" structure within which they have been accommodated since 1867 probably is no longer appropriate for the task. The author concludes with a prognosis for what the institutional redesign likely to emerge over the next few years will be – a framework he characterizes as "heteronomy."

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I. INTRODUCTION

Some twenty years ago, in the fall of 1970, I remember attending a "teach-in" in Osgoode Hall's Moot Court Room, where I listened to a distinguished group of professors assess the implications of the recent proclamation of the *War Measures Act*² by the Trudeau government. My recollection is that the vast majority of my fellow students came to the meeting fully supportive of Cabinet's attempt to suppress the "apprehended insurrection," even with the Army, if that were to prove necessary. By contrast, the unanimous opinion of those on the podium, whatever their position on the political spectrum, was that the *Public Order*

² R.S.C. 1970, c. W-2.

*Regulations*³ issued under the *Act* were offensive to received ideas about civil liberties and constitutional practice in Canada. Indeed, most Osgoode professors had already signed a telegram of protest sent to the Prime Minister. Much of the discussion that day focused on freedom of association and the right of dissent, the protection of minorities against majorities, and the proportionality of the legal remedy deployed to the political crisis then at hand. On these issues of constitutional policy, the cleavage between speakers and audience was most apparent.

But there was another strand to the debate which highlighted what, for lawyers, is usually thought to be a more basic issue. Implicit in the delegation of wide regulation-making powers to the federal cabinet, and in their sub-delegation to the state's coercive agencies such as the R.C.M.P. and the Canadian Army, was an affront to the Rule of Law values informing Canadian constitutionalism. Here, greater consensus between professors and students seemed to emerge. For, in this respect, the concern about the invocation of the *War Measures Act* could be seen to track the concern expressed by Quebec civil libertarians during the 1940s and 1950s about the use of governmental power by the Union Nationale regime of Maurice Duplessis to suppress proselytizing by communists and Jehovah's Witnesses.⁴ In both instances it was felt that the realities of the Parliamentary system were such that a strong Prime Minister or Premier could induce passage of legislation under which both police and administrative powers could be wielded, without meaningful judicial scrutiny, against groups and unpopular minorities. This second concern, therefore, was not so much with safeguarding traditional civil liberties *per se*, as it was with controlling unregulated and unchecked exercises of governmental power.

Interestingly, the rhetoric of freedom of speech and capricious executive power sometimes heard in critiques of the Quebec government's invocation in December 1988 of section 33 of

³ SOR/70-444.

⁴ For example, *Switznan v. Elbling*, [1957] S.C.R. 285; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299; *Lamb v. Benoit*, [1959] S.C.R. 321; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

the *Canadian Charter of Rights and Freedoms*⁵ to legitimate the prohibition of outdoor commercial signs in English as set out in Bill 178,⁶ is very similar to that which accompanied civil liberties protests of the 1950s, 1960s, and 1970s. It is also similar to the overblown language which was used to express the abuses said to attend the inclusion of the "distinct society" clause in the *Meech Lake Accord*.⁷ Of course, although other constitutional lawyers have explicitly made this connection in their analyses of contemporary events in Quebec, the spectre of Maurice Duplessis and the October Crisis are raised here not because I equate Bill 178 and the *Meech Lake Accord* with either of these dark constitutional moments. Rather, what I wish to signal by this introductory juxtaposition of past and present are a number of other points.

To begin, I mean to draw attention to the important contribution which has been made by law professors — for example, McGill's F.R. Scott in the 1950s, the entire Osgoode teaching faculty in 1970, and former Chief Justice Bora Laskin throughout his lengthy academic career — to the pivotal constitutional debates in Canada. University professors in general, and law professors in particular, have a duty to take positions on issues of public concern in a manner which rises above purely party-political partisan advocacy.⁸ They are charged with helping Canadians discover the foundations of their constitutional order, the nuances of their constitutional history, and the promise of their constitutional future. Each one of us in the law teaching community has a responsibility to state honestly and openly the present lessons which we judge our

⁵ Part I of *The Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁶ *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54.

⁷ What is popularly known as the *Meech Lake Accord* comprised a "political Accord" announced on 30 April 1987, and a "legal Accord" negotiated at the Langevin Block meetings on 3 June 1987. The latter Accord comprised a "Motion for a Resolution" and the "Schedule to the Resolution" setting out specific amendments to the Constitution. For a brief history of the *Meech Lake Accord* and a text of the various documents see P.W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

⁸ I am aware that not all academic commentary on the *Meech Lake Accord* was "non-partisan." For a thoughtful discussion of the co-optation of the academic community by political interests see, A.C. Cairns, "Ritual, Taboo and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style" (1990) 54 Sask. L. Rev. 121.

constitutional past teaches, even when, as in the present political context, the personal cost may be quite high.

I also advert to this key event in my own intellectual development as a lawyer as a clue to one of the unstated themes of much current constitutional discourse. This is the tendency among a number of Canadians to see the different voice emanating from Quebec not as enriching the country's social and political life, but as somehow constantly working against it. It is no accident that Bill 178 has been equated by many commentators outside Quebec to the suspect legislative programme of Maurice Duplessis, rather than to those of Ontario's Mitchell Hepburn and Alberta's William Aberhart. It is also no mere coincidence that purported civil liberties' problems with the *Meech Lake Accord* were seen primarily in the light of the political instability of the October Crisis of 1970, rather than that attendant upon the Winnipeg General Strike in 1919 or the *War Measures Act* displacement of Canadians of Japanese origin in the early 1940s. An especially troubling feature of much public discussion of Quebec politics elsewhere in Canada is its implicit presumption that French-speaking Canadians have never really internalized the values of democratic liberalism like other Canadians. This mistaken presumption, unfortunately, has discoloured aspects of our constitutional practice from at least the time of Lord Durham's recommendations for assimilating Quebec's "priest-ridden hewers of wood and drawers of water."⁹ Moreover, if the popular interpretation (as revealed in public opinion polls of English-speaking Canadians) of the salient events of the *Meech Lake Accord* ratification process is any guide, it has still not been exorcised.

There is a third reason why I juxtapose the constitutional moments of my former Osgoode teachers with those I now am living

⁹ This memorable phrase has entered popular discourse as summarizing Lord Durham's characterisation of the French-speaking *habitants* of Lower Canada. See G.M. Craig, ed., *Lord Durham's Report*, (Toronto: McClelland and Stewart, 1963) at 27-33. The view that French-speaking Canadians did not understand the requirements of democratic citizenship gained widespread academic currency outside Quebec in the late 1960s with the publication of Pierre Trudeau's book *Federalism and the French Canadians* (Toronto: Macmillan, 1968). I refer in particular to the essay "Some Obstacles to Democracy In Quebec" at 103, which is usually read as an indictment of French-speaking Canadians rather than the critique of the attitudes of both linguistic communities which the author intended.

in. I want to contrast the unsurprising continuity of certain cultural and linguistic features of Canadian federalism with the surprising continuity of the vocabulary and conceptual structure which English-speaking lawyers and law professors have deployed, over the last thirty years especially, to address them. Our present scholarly peril is mistaking the inevitability of the latter for the permanence of the former. In other words, I believe that a principal reason that we keep getting what can only be seen as partial answers such as the *Meech Lake Accord* (and before it the *Constitution Act, 1982*) to our constitutional dilemmas, is because of the partiality of the questions we ask.¹⁰ Moreover, unlike many constitutional commentators in cognate disciplines, jurists seem generally disinclined to search for larger patterns. True to our training we have sought comfort in our ability to think about something which is intimately connected to something else, without thinking about the thing to which it is connected.

In the pages that follow I attempt to trace the outlines of alternative ways of conceiving certain of our continuing constitutional quandaries, inspired largely by the insights of other branches of the Academy.¹¹ The special focus of the analysis is the

¹⁰ I purposely use the word "partial" in its two distinct senses here. All human endeavours are partial in the sense of incomplete; it would, in fact, be difficult to conceive how any constitutional amendment could be otherwise. But constitutional documents need not, however, always be partial in the sense of partisan or biased; the art of constitutional amendment is precisely the art of studied ambiguity which, at the same time, recognizes all existing fields of view, and yet, leaves open the possibility of new perspectives and interpretations constantly emerging.

As an illustration of this point it is helpful to focus on two phrases which are bandied about by Canadian political leaders: "national unity" and "national identity." Now whatever the symbolic utility of these phrases in discourse outside Quebec, they are totally dysfunctional within Quebec. For unity and identity imply sameness, and a failure to accommodate diversity. French-speaking Quebecers have no illusions about the model of "sameness" which underlies the call for unity, and for this reason are rightly suspicious of the call for national unity. A similar partiality is reflected by the word "national," which in English has typically been used as a synonym for state. In French, however, nation connotes "a people" or "a race." Hence, the 1960s plea about *deux nations* (now transformed in the neutered and translatable *calque deux peuples fondateurs*) and the policy of the Parti Québécois in the 1985 provincial election which was labelled *affirmation nationale*.

¹¹ Many of the best analyses of Canada's recent constitutional dilemmas have been advanced by historians, political scientists, economists, sociologists, and public administrators. Two of the most evocative studies (both of which antedated the 1980s round of constitutional amendments) are R. Cook, *Canada and the French Canadian Question* (Toronto: Macmillan,

contribution which the *Meech Lake Accord* could have made to the dynamic of relations between French and English-speaking Canadians. Most of the essay's historical allusions are, to this aspect of Canadian constitutional politics, viewed primarily from the perspective of the smaller community of which I am now a member — English-speaking Quebec. Let me emphasize that I do not assume either that linguistic conflicts are Canada's only important constitutional issue, or even that their resolution must control all other processes of constitutional renovation. But I do believe that my narrowly focused observations on this fundamental question can be extrapolated to all dimensions of Canadian constitutive practice — including such other contemporary conundrums as equality rights, Aboriginal rights, multiculturalism, federal/provincial relations, regional economic disparities, Western alienation, and Northern disaffection with central Canadian paternalism. Much more so than the patriation exercise of 1982 — which apart from the *Charter* focused more on constitutional means than on constitutional ends — the institutional readjustments proposed in the *Meech Lake Accord* required Canadians to consider exactly what kind of polity they wished to establish or to preserve.¹²

1966), and E. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal: McGill-Queen's University Press, 1975).

Without pretending in any way to offer a comprehensive list, I should like to mention several other sources which have influenced my own thinking on problems of Canadian constitutionalism: D. Johnson, *Egalité ou indépendance*, Montreal, Homme, 1965; R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen's Printer for Canada, 1969); M. Seguin, *L'idée d'indépendance au Québec: Genèse et historique*, Trois Rivières, Québec, Boréal Express, 1971; F. Dumont, *La vigile du Québec: octobre 1970: L'impasse?*, Montreal, Hurtubise HMH, 1971; D.V. Smiley, *Canada in Question: Federalism in the Seventies* (Toronto: McGraw-Hill Ryerson, 1972); A. Breton & R. Breton, *Why Disunity?: An Analysis of Linguistic and Regional Cleavages in Canada* (Montreal: Institute for Research on Public Policy, 1980); G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, rev'd ed. (Toronto: Gage, 1982); D.V. Verney, *Three Civilizations, Two Cultures, One State: Canada's Political Traditions* (Durham, N.C.: Duke University Press, 1986); R. Simeon, *Intergovernmental Relations* (Toronto: University of Toronto Press, 1985); D.V. Smiley & R.L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985); R. Gibbins, *Conflict and Unity: An Introduction To Canadian Political Life* (Toronto: Methuen, 1985); and D.V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987).

¹² Let me also make explicit a subsidiary point. I do not want to be taken as claiming that constitutionalism ought to be just about the distribution of organizational power among discrete geographic, religious, cultural, or linguistic groups. Constitutions ought also to be

Three main themes inform this essay. They are, first, the dualist foundations of Canadian constitutional law and practice and the relation of the *Meech Lake Accord* to these traditional assizes; second, the special importance of linguistic minorities, and the very concept of social groups, to Canadian self-definition; and third, the unique character of nonrevolutionary, as opposed to revolutionary, constitutionalism and its implications for this country's political agenda. Woven into these general themes are several other filaments. I seek to analyze the particular circumstances in which the English-speaking minority in Quebec now finds itself, suggesting its central role in helping to shape the political accommodations which are certain to arise in the years ahead. I also attempt to illustrate the various ways in which the *Meech Lake Accord* could have been understood as having made a positive contribution to Canadian constitutionalism. I try to parry the several criticisms of the *Meech Lake Accord* which were advanced during the ratification process, including those expressed most forcefully in reports and position papers emanating from Manitoba, New Brunswick, and Newfoundland.¹³ I then assess in retrospect the legal and political options that were open to those who sought between November 1989 and June 1990 to salvage the Meech-Langevin agreement, either in its original form or in a modified form. Lastly, having initially ended the Laskin Lecture with a modest plea for ratification of the *Meech Lake Accord* in a spirit of generosity and inclusiveness, I now conclude with an equally modest plea for candid recognition that the political dynamic which produced the *Meech Lake Accord*

about responses to poverty, radical disparities in income distribution, violence, alienation, marginalization, and victimization. But, and this is the point being made in the text, in constitutional law (even despite our modern fixation on Charters of Rights) it is primarily through questions of institutional design that we begin to work towards articulating fundamental values. For an excellent illustration of the importance of institutional arrangements in constitutional law to the promotion of substantive values, see L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988).

¹³ Manitoba Task Force on Meech Lake, *Report on the 1987 Constitutional Accord* (21 October 1989) (Chair: W.N. Fox-Decent); New Brunswick, Legislative Assembly, Select Committee on the 1987 Constitutional Accord, *Final Report on the Constitution Amendment 1987* (October 1989) (Co-Chairs: R. Simpson & B. Thériault); Newfoundland & Labrador, *Constitutional Proposal: An Alternative to the Meech Lake Accord* (9-10 November 1989).

cannot be willed away, but must be dealt with as a matter of constitutional priority.¹⁴

II. THE RHETORIC OF THE MEECH LAKE DEBATE: CONSTITUTIONAL MYTH-MAKING

It is appropriate to begin this assessment of the *Meech Lake Accord* episode in Canada's constitutional history by reviewing briefly the rhetoric generated in connection with the ratification exercise. I do so, notwithstanding the historical and sociological flavour of much of the essay, in order to highlight the unreality of the ratification debate, to expose the poverty of most pro-*Meech Lake Accord* political discourse, and to suggest from what sources the justifications for adoption of any similar constitutional agreement

¹⁴ It would be dishonest if I were not to disclose that my own position on the *Meech Lake Accord* changed between 1987 and 1989. In a lecture delivered in November 1987 I was concerned to show that the *Meech Lake Accord* was a premature exercise of constitutional revision. Even after acknowledging the defects of the *Charter* (see R.A. Macdonald, "Postscript and Prelude – The Jurisprudence of the *Charter*: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321 [hereinafter *Postscript and Prelude*]) I claimed that "by failing to recognize the subtle interplay of made law and implicit law the Meech Lake negotiations have prematurely crystallized alternative allocations of authority before the actual exercise of power under previous constitutional allocations has been evaluated": see R.A. Macdonald, "Of Canoes and Constitutions: Paddling on Meech Lake" in J. Raffan & B. Horwood, eds, *Canexus: The Canoe in Canadian Culture* (Toronto: Betelgeuse, 1988) 161 at 169. Shortly afterwards, in February 1988, I argued against ratification of the *Meech Lake Accord* on the basis that it, together with the *Free Trade Agreement*, reflected an American view of government and the state, in which the idea of politics as constitutive practice was cast aside. See R.A. Macdonald, "Tears Are Not Enough" in J. Whyte & I. Peach, eds, *Re-forming Canada?: The Meaning of the Meech Lake Accord and the Free Trade Agreement for the Canadian State* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989) 9.

More telling, when I first began to prepare the Laskin Lecture in September 1989 I still held these views, and was preparing to condemn the *Meech Lake Accord* anew. Notwithstanding the reaction of the Quebec government to the Supreme Court judgment in *A.G. Quebec v. La Chaussure Brown* (1988), 54 D.L.R. (4th) 577 [hereinafter *Chaussure Brown*], I felt that the time for formal constitutional change was not yet at hand. In addition, the re-election of the Mulroney government in the fall of 1988 and the implementation of the *Free Trade Agreement* left me even more convinced that the *Meech Lake Accord* reflected an unwelcome political ideology. But as I worked on the lecture, and especially after I began to discuss the *Meech Lake Accord* with various English-speaking constitutional lawyers opposed to it, I came to the conclusion that, despite what I felt was the continuing validity of my earlier criticisms, on balance the *Meech Lake Accord* should be ratified. If anything, events since last 23 June have convinced me of the preferability of the revised position I took in November 1989.

ultimately will have to be drawn. Structurally, the debate between proponents and opponents of the *Meech Lake Accord* had three distinct phases: a predominantly political phase dominated by the *Meech Lake Accord's* supporters from May 1987 through December 1988; a predominantly legal phase dominated by its detractors from December 1988 until the spring of 1990; and a final political phase in the months leading up to 23 June 1990.¹⁵

Many who favoured adoption of the *Meech Lake Accord* at first grounded their case solely in the claim that the agreement was necessary in order to "bring Quebec back into the constitution with honour and enthusiasm." That is, with few exceptions, early *Meech Lake Accord* proponents tended to backstop their position with unspecific political arguments, the self-evidence of which they took for granted. Few even thought a traditional legal defence of the provisions of the *Meech Lake Accord* might be necessary. The fact of executive agreement between First Ministers was held to be not only a necessary precondition to, but also a sufficient justification for, legislative ratification. Most of those who opposed the *Meech Lake Accord*, by contrast, did not attempt to meet these political arguments, but directed their critique to what they perceived as its regressive legal and constitutional features. This mutual confess and avoid strategy meant that rarely in the ratification debate could thoughtful Canadians evaluate the respective arguments of the *Meech Lake Accord's* supporters and detractors. In order, therefore, to suggest at least some basis for the joinder which will be attempted in later sections of this essay these conflicting political and legal perspectives will be canvassed in some detail.

In arguing the case for ratification, defenders of the *Meech Lake Accord* displayed especial naivety about the political sophistication of the general public. They also underestimated the extent to which the *Charter* had, by 1987, legalized and personalized

¹⁵ The division of the ratification debate into these time frames is, I acknowledge, impressionistic. Whether those who advanced a legal critique of the *Meech Lake Accord* began to gain the initiative in the late summer and early fall of 1988, or whether it took Bill 178 to tip the balance is open to debate.

Moreover, my use of the terms "political" and "legal" requires clarification. I use neither expression as a pejorative. By political, I mean to emphasize arguments about symbols and entitlements; by legal, I mean to emphasize arguments about discursive texts and outcomes.

many Canadians' conceptions of the constitution.¹⁶ Contempt for the public's new political awareness was no better revealed than in the constant assertion that the *Meech Lake Accord* would bring Quebec back into the Canadian constitutional family; for supporters of the *Meech Lake Accord* just as constantly failed to explain how, and why, it was that Quebec got out of the constitution in such a way that it became imperative to bring it back in.

This aspect of pro-*Meech Lake Accord* rhetoric was most distressing in its incompleteness. After all, absent a unilateral declaration of independence, the political entity called Quebec, is and always was, constitutionally a part of Canada. In addition, most Canadians could not understand how Quebecers felt excluded by the patriation exercise when there was little evidence that the province was worse off, either politically, or in respect of its legislative jurisdiction, after passage of the *Constitution Act, 1982*. For example, it appeared that even though the court challenges to the federal proposals in 1982 led to Quebec discovering that it never had a legally enforceable veto over constitutional amendments,¹⁷ as a practical result of the patriation process, it effectively received something closer to a full veto in the amending process which resulted, than it had under the Supreme Court's pre-patriation jurisprudence.¹⁸ Again, the argument that Prime Minister Trudeau's centralizing *Charter* unilaterally limited the legislative powers of the

¹⁶ In this sense, it is remarkable how successful the former Liberal government had been in its creation of what has been described as "*Charter* patriotism." For a superb analysis of this dimension of the patriation struggle see P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30. The transformation effected by the *Charter* is also carefully explored in A.C. Cairns, "The Politics of Constitutional Conservatism" in R. Simeon & K. Banting, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) at 41; and in A.C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Can. Pub. Pol. 21 (special supplement).

¹⁷ See *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (patriation reference); and *A.G. Quebec v. A.G. Canada*, [1982] 2 S.C.R. 793 [hereinafter *Quebec veto*].

¹⁸ Of course, while it is true that sections 38-49 of the *Constitution Act, 1982* re-establish a Quebec veto over section 41 matters, they do so by giving such a veto to all provinces. Moreover, a number of items appearing under section 42 are among those for which Quebec had long insisted that it be accorded a right of veto. Hence, there was some merit to the claim that Quebec had come out of the 1982 process with a diminished voice in the constitutional amendment process.

Quebec National Assembly seemed disingenuous because, as a result of objections in 1981 from Alberta and Manitoba, the section 33 override was made applicable to most of the *Charter* having application to the provinces. And, had not Quebec systematically availed itself of section 33 since 1982?¹⁹ In other words, those who advanced the argument about the need to bring Quebec back into the constitutional fold were required to show that it was the question of legitimacy — and not either strict legality or substantive result — which lay at the root of the sentiment of exclusion. Yet this crucial issue of political legitimacy, and its symbolic importance in Quebec, was seldom explored in any meaningful way in early pro-*Meech Lake Accord* commentary.²⁰

A second failing of *Meech Lake Accord* supporters was their inability to address the more detailed legal issues raised by it. By 1987, Canadians had come to believe that the constitution (or at the very least, the *Charter*) belonged to them. But proponents of the *Meech Lake Accord* failed to argue that the constitutional arrangements established by it had an impeccable federalist pedigree. Nor did they attempt to show how these arrangements could be seen, in themselves, as a positive constitutional development. No one appeared willing to argue the merits of decentralizing some federal political authority to provinces by preference to counties, municipalities, communities, or even to individual citizens. Similarly, the case was never made that the constitutionalization of the Supreme Court and the establishment of a consultative nomination process, the co-operative federal/provincial formulation of national policy on immigration, and the balancing of the national symbolism

¹⁹ The insertion of the override into all existing Quebec statutes was achieved retroactively by *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21, and was continued in each subsequent statute until 1985. In the text I say "most of the *Charter* having application to the provinces" because the override cannot apply to provisions relating to "minority language educational rights" (section 23). Of course, there is a special exception for Quebec in relation to section 23(1)(a) rights, an exception of which the province also availed itself prior to 1985.

²⁰ There is, in fact, a good case to be made that both the *Charter* and the amendment formula of 1982 were not, substantively, contrary to Quebec's interests; some even argue that the five *Meech Lake Accord* themes would not have unravelled the 1982 agreement. See L.E. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" [forthcoming, (1991) U.T.L.J.]. If this is the case, the neglected argument for "political legitimacy" could have been made forcefully by the *Meech Lake Accord's* supporters.

of universal social programmes with the special needs and possibly innovative solutions of particular provinces reflected a communitarian vision of the Canadian state more consistent with its history. Partisans of the *Meech Lake Accord* also neglected to promote its contributions to the fashioning of a viable scheme of intra-state federalism in Canada, under which provincial interests would be directly incorporated into the operations and institutions of the central government. Nor, finally, did they even attempt to make the case that this form of federalism was better suited to Canada's constitutional situation than the post-War centralist and administrative model which became increasingly dominant during the 1960s, 1970s, and early 1980s.²¹

A large part of the reason for these two failings, it appears, was a belief that the *Meech Lake Accord* was self-evidently desirable. The majority of its early supporters held, almost as an article of faith, that the agreement successfully reconciled the "political aspirations" of Quebec Francophones with the reality of Canadian federalism in a way that frustrated the centrifugal tendencies of separatism and sovereignty association. From this belief came the dubious claim that the *Meech Lake Accord*, and not the patriation package of 1982, was the true Canadian answer to the promise of renewed federalism held out to Quebec during the referendum debate of early 1980.²² But those supporters of the agreement usually did not show how these political aspirations in Quebec were more than a power struggle between centralist and decentralist Francophone political elites.²³ In fact, the frequent claim that the *Meech Lake Accord* was an acceptable compromise actually reinforced the perception that nothing more than an in-house power

²¹ For a brief discussion of what such arguments could have looked like, see Smiley & Watts, *supra*, note 11.

²² While it could be argued that the *Meech Lake Accord* was a necessary complement to the 1982 patriation package in order to fulfill the promise of renewed federalism, most Canadians were not prepared to believe that there was nothing in the *Constitution Act, 1982* which responded to the pre-referendum promise.

²³ This perception was reinforced by the interventions of former Prime Minister Trudeau, who delighted in painting Mulroney as being "soft on separatism." See, for example, the text of Mr. Trudeau's presentation to the Senate which is reproduced in D. Johnston, ed., *Pierre Trudeau Speaks Out on Meech Lake* (Montreal: General Paperbacks, 1990).

struggle was at issue. Further, political advocates of the *Meech Lake Accord* seldom attempted to demonstrate how its substance might be understood as a rational response to the menacing socio-economic context faced by a modern, predominantly French-speaking Quebec in a largely English-speaking North American environment. In brief, it was difficult to discern in the various political aspirations arguments in favour of ratification, any criterion for distinguishing the constitutional model of renewed federalism under the *Meech Lake Accord* from sovereignty-association itself.

Perhaps the most resonant argument advanced by *Meech Lake Accord* proponents in the initial stages of the ratification debate was that relating to a change of style in federal/provincial politics. The *Meech Lake Accord*, it was claimed, signalled a new co-operative era of Canadian constitutionalism, and promoted a spirit of "national reconciliation" among all governments and among peoples of all regions. By contrast with the argument of meeting Quebec's political aspirations, the argument for national reconciliation was intended to have a pan-Canadian thrust. It bears notice, however, that the concept meant at least two different things, depending on whether one was in Quebec or elsewhere in the country.

As far as the situation in Quebec was concerned, national reconciliation was somewhat misleading as a characterization of some deep need in the popular consciousness in the years following patriation. According to pre-*Meech Lake Accord* opinion polls, most Quebecers did not need to be formally reconciled to Canada and to its federal government: while they saw the 1982 amendment process as devious and incomplete, and, while they had outstanding political aspirations not addressed by that process, nevertheless they embraced patriation and the general idea of a *Charter* from the beginning. Indeed, shortly after the *Meech Lake Accord* was announced about ninety per cent of the Quebec population did not see it as a terribly important constitutional initiative. More cogently, just as almost all Quebec Members of Parliament voted in favour of the *Meech Lake Accord* in 1987, seventy-three of the seventy-five Quebec MPs in 1982 supported the patriation package. Thus, prior to the initiation of the *Meech Lake Accord* round, it could be reasonably argued that it was less the people and the federal politicians from Quebec than Quebec's provincial political leaders for

whom reconciliation was important. For it is they (and by implication the entire provincial political process) who suffered the loss of credibility when the federal government acted over their opposition.²⁴

The theme of national reconciliation did, however, have a certain cogency for many citizens and politicians in the rest of the country, especially in the West. Even more intensely than Quebeckers, Westerners had come to feel alienated from the federal government. Yet, despite the potential of this idea to ground a renewed and more explicit vision of at least some of the country's fundamental commitments and ideals, its actual content for several of the more vocal *Meech Lake Accord* proponents was rather vacuous. National reconciliation seemed to be not much other than a complaint that Pierre Trudeau's concept of a bilingual country with a strong and aggressive central government was a misguided moment in Canadian constitutional history. Some early supporters even praised the *Meech Lake Accord* as a way of de-bilingualizing the country, by conceding that Quebec should be a French-speaking province as against an acknowledgment that the rest of the country should be exclusively English-speaking. Others saw it as an anti-Ottawa document which would prevent further "tax-grabs" such as the National Energy Policy. Despite the appeal of these arguments in certain quarters, the incoherence of this essentially negative conception of national reconciliation with the constitutional

²⁴ The argument set out in this paragraph needs to be nuanced slightly. While there were certain indications that "national reconciliation" of the people as a distinct issue was less significant in Quebec than *Meech Lake Accord* proponents attempted to claim, it is nevertheless true that memories of the "nuit des longs couteaux" were still vivid. Moreover, it is difficult to untangle the extent to which Premier Lévesque's refusal to negotiate in the months leading up to 5 November 1981 was understood by ordinary Quebeckers as a reason for the hard line taken by the federal government during the final patriation negotiations. Finally, it is probably the realities of party discipline which offer the best explanation of why seventy-three of seventy-five federal MPs from Quebec supported the patriation package. It is probably these same realities that led Quebec Liberals in 1982 to support the *Charter* and Parti Québécois MNAs in 1987 to oppose the *Meech Lake Accord*.

Nevertheless, it would be wrong to conclude that, even prior to the attempt by the federal government to convince the province (and the rest of the country) of Quebec's hurt, there was no sense of unease or disquiet among French-speaking Quebeckers. The *Charter's* education provisions, the timing of the Supreme Court decision on the *Quebec Veto* (in my view a questionable decision), and the incomplete "opting out with compensation" provisions of the *Constitution Act* were all very real grievances.

reform agenda of 1987 was soon obvious. This incoherence was no better revealed than in the paradox that it came eventually to lurk in the position of many who opposed the *Meech Lake Accord*. Nevertheless, because no alternative content to the expression national reconciliation was ever advanced, and because many constituencies claimed to be disaffected by the *Meech Lake Accord*, this pro-*Meech Lake Accord* argument quickly became a parody of itself.²⁵

From this summary of the opening arguments offered in support of the *Meech Lake Accord*, it is apparent that the cause of ratification was not well served by its official proponents. Rather, the strategy adopted did little else than create a "political necessity" myth about the rationale for the *Meech Lake Accord* which, thereafter, ensured that its supporters remained on the defensive, ever increasing the stakes of the debate by predicting disaster for Canada should ratification fail.²⁶ Indeed, those constitutionalists who opposed the agreement gradually came to wrest away the public relations initiative by painting the *Meech Lake Accord* simply as a politician's deal which all thoughtful Canadians should oppose. By the fall of 1988 five separate legal critiques of the *Meech Lake Accord* had gained currency.²⁷

²⁵ In many respects partisan political rhetoric came to control the meaning of the expression. As the ratification debate proceeded, "national reconciliation" became the federal government's catch-phrase for "Trudeau-bashing." While Prime Minister Mulroney's openness may indeed have brought Quebec back to the constitutional negotiating table, and may also have given Westerners a sense that their concerns would be taken seriously in future constitutional rounds, the constant rehashing of Trudeau's machiavellian strategies was overplayed, especially since most Canadians quickly perceived that the *Meech Lake* negotiating process was essentially of the same nature, if not even more machiavellian.

²⁶ By the fall of 1989, this perception was generally shared by thoughtful Canadians, many of whom had good reasons for opposing the *Meech Lake Accord* on substantive grounds. One of the first commentators to recognize how the process itself was generating its own "necessity" mythology was Ivan Bernier. See "Meech Lake and Constitutional Visions" in K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 239.

²⁷ An illuminating early analysis of the legal and constitutional defects in the *Meech Lake Accord* was presented in B. Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987). Many of the arguments of the next few paragraphs are drawn from this book. See also the papers collected in Swinton & Rogerson, *ibid.*

The first of these to emerge was the "progressive" critique, in which the *Meech Lake Accord* was condemned for the succor which it offered to the discredited constitutional agenda of federal/provincial relations, language rights, and provincialism. The *Meech Lake Accord* was also criticized on this basis for reinforcing the political ethic of executive federalism and elite accommodation. Implied in this critique was the more general claim that traditional (or pre-1982) constitutional politics in Canada was outdated because it served only the interests of the country's political and economic elites. Those who advanced this claim were especially anxious to argue that the 1982 round empowered ordinary Canadians and enfranchised previously excluded constituencies.

Closely linked with this first critique was a second — the "Charter" argument. These skeptics of the *Meech Lake Accord* were deeply troubled by the "distinct society" clause. They feared, notwithstanding their quasi-entrenchment in 1982, that modern and more fundamental concerns about the relationship of individual and state were being moved once again to the bottom of the constitutional agenda. This critique found support in the refusal at the Langevin meetings to amend section 16 of the Schedule so that the "distinct society" clause would be made explicitly subordinate to all sections of the *Charter*. This, it was claimed, revealed that Canadian and Quebec politicians had conspired successfully to recapture legislative authority to override recent constitutional gains relating to respect for individual liberty, to the promotion of equality, and to the greater enfranchisement of women.

The "distinct society" clause also provided a focus for the third, or "provincial egalitarian" critique of the *Meech Lake Accord*. On this view, the clause was inimical to a true federalism. By creating a special status for one province it fundamentally undermined the notion of equality of citizens, regardless of provincial residence, upon which Canadian political institutions were argued to have been built. Many who took this position also suggested that the clause would confer additional legislative jurisdiction on Quebec, not exercisable by other provinces.

A fourth criticism of the *Meech Lake Accord*, the "centralist" critique, found its roots in the belief, first advanced by Sir John A. Macdonald a century ago, that the federal government must be ascendant for Canada to resist assimilation by the United States.

Critics argued that the spending power provisions of the agreement would enfeeble the federal government. These provisions would also operate a massive power shift to larger and more economically self-sufficient provinces such as British Columbia, Alberta, Ontario, and Quebec at the expense of the country's poorer provinces. Coupled with this critique of the spending power clauses was the assertion that, by giving up exclusive control over national institutions such as the Senate and the Supreme Court, the central government was destroying, in a manner even more complete than the Judicial Committee of the Privy Council, the quasi-unitary model of federalism upon which the country was built.

A final objection advanced by opponents of the *Meech Lake Accord* may be characterized as the "paralysis" critique. Many early *Meech Lake Accord* opponents argued that the extension to all provinces of a constitutional veto over amendments relating to federal institutions such as the Senate would nullify all hope for their reform. Reform of these institutions was seen as necessary to permit non-central regions of the country to acquire a meaningful voice in national policy-making. Also connected with this concern was the belief that other pressing items of constitutional reform — Western alienation, Aboriginal rights, the accession of the territories to provincehood, multiculturalism, and regional economic disparity — would never be addressed if every province were given an enlarged veto power.

Each of these critiques of the *Meech Lake Accord*, while reflecting genuine policy concerns, could have been met immediately by powerful counter-arguments. Yet the response of political leaders who supported the *Meech Lake Accord* was often neither well constructed nor comprehensive. Even after the *Meech Lake Accord's* opponents had seized the initiative, much could have been said, but was not, for a renewed politics of federal/provincial relations, an explicit national politics of language rights, and an enhanced politics of provincialism as central items of Canadian constitutionalism.²⁸ Moreover, *Meech Lake Accord* defenders failed

²⁸ In large measure the root problem with the defence of the *Meech Lake Accord* was a failure by the Prime Minister to understand, in any principled way, the political and constitutional values that were at stake in the *Meech Lake Accord* amendment process. All he seemed to be offering was a change of political style, and a few patchwork amendments

to point out the various confusions and inconsistencies in the standard critiques of it. The special financial and legislative arrangements put in place to accommodate the Maritime provinces (and the recent section 92A amendment put in place for the West) were rarely mentioned in counter-argument to the "provincial egalitarian" critique of the "distinct society" clause. The difference between equalization and shared cost programmes was seldom raised in rebuttal to those advancing the "centralist" critique who feared for the financial viability of small provinces. Finally, three smaller provinces opposed to the amending formula because it invited constitutional "paralysis" were themselves paralysing an amendment supported by seven provinces with approximately ninety per cent of the country's population. This paradox never rated much commentary by the *Meech Lake Accord's* defenders. As a result of this failure to confront the legal arguments against ratification directly, a second *Meech Lake Accord* myth developed – the claim that the agreement was effecting an unprecedented and dangerous constitutional revolution.

Proponents of the *Meech Lake Accord* among constitutional lawyers and scholars did, however, feel compelled to launch a more sustained counter-attack against the *Charter* critique. Initially, it appears that this was because the critique focused directly on the "distinct society" clause, an element of the *Meech Lake Accord* most closely associated with the key political and symbolic goal of "bringing Quebec into Confederation with honour and enthusiasm." Typically, one of two approaches was taken in addressing those who feared that the *Charter* was being compromised.

Some left-leaning jurists, clearly acting independently of the "official" position, responded to the invocation of a return to the fall prior to *Charter* redemption by arguing that the *Charter* was itself the fall, and the *Meech Lake Accord* really signalled the return to Eden. In support of this thesis, they noted that the *Charter*

to deal with specific grievances. Because he did not attempt to provide, as did Prime Minister Trudeau earlier in the decade, an appeal either to the historical forces which were at the root of the proposed amendments or to arguments drawn from political theory, his defence of the *Meech Lake Accord* always appeared to be grounded in political pragmatism rather than constitutional principle. Not surprisingly, most constitutional lawyers and commentators who supported the rationalizing project of the *Constitution Act, 1982* took particular affront to this conception of constitution-making.

constitutionalized what may be considered the "old property of private holdings" and the "old personality in which corporations counted equally with private citizens," just at a time when Canadians were finally escaping the enslavement of industrial capitalism and its legal offspring. These writers observed, for example, that the most successful deployment of the *Charter* had been by large corporations and that due process guarantees had often been invoked in aid of challenges to social welfare schemes, rather than in aid of the privately oppressed. Again, *Charter* skeptics on the political left pointed out that when one operates a constitutional "cram-down" by means of an entrenched Bill of Rights, all political questions become merely definitional. In consequence, they argued, one saddles Canada's unrepresentative and unelected courts with intractable claims, like those thrown up by the *Daigle*²⁹ litigation, which should be settled by Parliament. For those who defended the *Meech Lake Accord* on this basis, the *Charter* should have no presumptive primacy in Canadian constitutional law, and should not be permitted to elevate judicial rhetoric to the canon of Canadian constitutional discourse. To the extent that the *Meech Lake Accord* agreement could be read as effecting a rebalancing of Parliamentary and judicial initiative, it was to be welcomed.³⁰

The second, and official, tack advanced by those who sought to meet the *Charter* critique of the *Meech Lake Accord* was to argue for the reconciliation of the two constitutional texts. Nothing in the *Meech Lake Accord*, they claimed, not even the "distinct society" clause, actually compromised any *Charter* rights. At best this clause provided an interpretive tool and a symbol by which the Quebec government could proclaim its special role in the Canadian federation. According to those who took this view, the "distinct society" clause would not trump, but rather, would need to be read into, section 1 of the *Charter*. Despite the *a contrario* implication of section 16 of the Schedule to the *Meech Lake Accord* Resolution,

²⁹ *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C.).

³⁰ The most persuasive statement of this *Charter*-sceptical position is that of M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989). But, unlike some of the *Meech Lake Accord*'s defenders on the political left (for example, Andrew Petter), Mandel does not claim that the *Meech Lake Accord* redresses this defect of the *Charter*. He, in fact, asserts the contrary.

there were, consequently, no new *Charter*-contrary justificatory arguments which could be advanced under section 1 as a result of the "distinct society" clause. More generally, there could be no new legislative jurisdiction flowing to the Quebec National Assembly under the clause. As a symbol, the clause merely confirmed a well-understood political reality in an inclusive manner. It acknowledged the special situation of the French language in Quebec and the singular responsibility of the provincial government for "preserving and promoting" Quebec's linguistic and cultural distinctiveness.

In view of this targeted counter-offensive and partial joinder of issue by the *Meech Lake Accord's* defenders, the second phase of *Meech Lake Accord* discourse assumed an enhanced profile among constitutional lawyers and scholars as debate came to focus on the legal relationship of the *Meech Lake Accord* to the *Charter*. Opponents of the agreement asserted the unreality of believing either that, as a whole, the *Meech Lake Accord* would do anything to redress the so-called constitutional dislocation generated by the *Charter*, or that the "distinct society" clause would not significantly colour *Charter* interpretation. They argued that even if the *Meech Lake Accord* were to put a minor brake on government by the Supreme Court, and even if this were desirable (a point they contested), the specific terms of the *Meech Lake Accord* were still a reflection of brokerage politics of the worst kind. Far from emerging as a consensus proposal out of an open and public dialogue among those who had a direct interest in certain sections of the *Charter*, the *Meech Lake Accord* arrived half-baked from the closed sessions at Meech Lake and was not significantly improved by the also secret Langevin Block meetings.³¹

³¹ Because debate was finally engaged on the *Charter* issue, a significant part of the academic critique of the *Meech Lake Accord* came to focus on its "political" character. A typical reaction was to characterize the *Meech Lake Accord* as the result of "high stakes horse-trading" or "wheeling and dealing." However true this might have been, it is not itself a reason for believing that the "distinct society" clause compromises the *Charter*. Further, many who objected to the failure to make the "distinct society" clause subordinate to the *Charter* were reacting to a sense of having had their "property" (*Charter* rights) dealt with without their consent. Be that as it may, far from engaging a legal dialogue, the very accusation of brokerage politics gave momentum to the re-emergence of a political phase in the debate which culminated in the "hard-ball" strategy unveiled in the last months of the ratification process.

These critics also advanced a substantive rebuttal. They claimed that the refusal to make the "distinct society" clause subject to the *Charter* amounted to no more than constitutionalizing uncontrolled provincial "majoritarianism" in Quebec. In making this part of their case, they invariably attempted to link the clause with Quebec's language legislation. This linkage was assisted by Premier Bourassa's own peculiar statement in the spring of 1989 to the effect that, if the *Meech Lake Accord* had already been ratified, the Quebec government would not have needed to invoke the notwithstanding clause in order to protect the French language in Quebec through Bill 178. Surely, constitutionalists suggested, this admission proved the dangers of the *Meech Lake Accord* to the *Charter*. It is hardly a reason to support a constitutional amendment that it permits civil liberties to be infringed, and indeed facilitates their infringement. Further, is it not better for a government which seeks to override the guarantees of the *Charter* to be compelled to do so explicitly through section 33? Finally, to override *Charter* guarantees through an interpretive device would necessarily lead to interminable standardless litigation and the further politicization of Canadian courts. From these various thrusts and counter-thrusts about the relation of the "distinct society" clause to the *Charter*, a third *Meech Lake Accord* myth emerged. This was the belief that ratification of the *Meech Lake Accord* would send an unmistakable signal to Quebec that a cavalier attitude towards the *Charter* would be acceptable to the rest of the country.

Such then were the dominant themes and myths advanced by lawyers and politicians during the first two phases of the ratification debate — that is, at least until the late autumn of 1989.³² As one commentator lamented, the discourse was often ill-informed and peevish. Few of the myths that sustained both the defence and the

³² While it is impossible to cite all the articles and books generated by the *Meech Lake Accord* ratification process, the list which follows gives a representative perspective on the debate as it unfolded between June 1987 and December 1989. See R.A. Forest, éd., *L'adhésion du Québec à l'Accord du Lac Meech: Points de vue juridiques et politiques*, Montreal, Thémis, 1988; Whyte & Peach, *supra*, note 14; Swinton & Rogerson, *supra*, note 26; R. Gibbins, ed., *Meech Lake and Canada: Perspectives From the West* (Edmonton: Academic Printing and Publishing, 1988) [hereinafter *Perspectives From the West*]; (1988) 14 Can. Pub. Pol., special supplement "The *Meech Lake Accord*"; "Forum: Meech Lake" (1989) 38 U.N.B.L.J. 217; and L. Ingle, ed., *Meech Lake Reconsidered* (Hull: Voyageur Press, 1989).

critique of the *Meech Lake Accord* were exposed as such. Worse, by the time of the First Ministers' meeting in early November 1989, the *Meech Lake Accord's* meaning had been reduced to a series of superficial antinomies. The most powerful among these were paired first, as the "if you are against the *Meech Lake Accord*, you are anti-Quebec" versus the "if you are in favour of the *Meech Lake Accord*, you are anti-Charter" dual monologue; and second, as the "the *Charter* which was a people's constitution" versus the "the *Meech Lake Accord* is simply a politician's ploy, reflecting only the present exigencies of a self-serving deal between Canadian First Ministers" dual monologue.

While few serious critics believed that Quebec's aspirations and the goals of the *Charter* were irreconcilable, or deprecated the *Meech Lake Accord* as being no more than a politician's ploy, the ahistoricism which these two sets of antinomic claims reflected led to another myth that captured many legal analyses of the *Meech Lake Accord*. This is the myth of constitution as definition.³³ While such a view typically has broad popular appeal, it is apparent even in certain aspects of the governmental documents emanating from Manitoba, New Brunswick, and Newfoundland in the days leading up to the First Ministers' meeting. Together these three reports offered a critique of the *Meech Lake Accord* which took up and sharpened the legal arguments advanced in the middle stages of the ratification debate. But each also got sidetracked into exhaustive analyses of particular words such as "distinct society" — suggesting linguistic reformulation (much as one re-writes the ambiguous terms of a contract or attempts to use detailed regulations to define the words of a statute) as the solution to most of the *Meech Lake Accord's* supposed flaws.³⁴ In retrospect, it seems clear that these linguistic analyses often missed the larger meaning of the agreement which the offending words necessarily only partially captured. However, the leader of the Parti Québécois, Mr. Parizeau,

³³ For a cogent critique of this view of constitutions, and an examination of alternate views, see R. Cook, "Nationalism and the Nation State" in R. Cook, ed., *The Maple Leaf Forever* (Toronto: Copp Clark Pitman, 1986).

³⁴ See, for example, the suggested preamble and section 2 of the Constitution set out in the Newfoundland proposal, *supra*, note 13 at 2-3.

understood very well both the destructive power of ahistorical linguistic critique and the political value of historically-rooted symbols. He foresaw the force of the symbol "distinct society" in Quebec, and in order to devalue its appeal he vigorously campaigned to reduce its meaning to definitions. Hence, his constant challenge to Premier Bourassa to state whether the clause would override the *Charter* and to opine whether it actually would give Quebec any new legislative jurisdiction. This technique for transforming a symbol into a sign was also adopted by many academic critics of the *Meech Lake Accord* outside Quebec, who sought to have proponents define "distinct society" in detailed terms which would never have been expected from those promoting the *Charter's* equally symbolic expression "fundamental justice."

Despite their occasional lapses into "definitionalism," the three provincial reports presented in the fall of 1989, together with the Ontario response to the Manitoba and New Brunswick documents³⁵ and its assessment of the Newfoundland constitutional proposal,³⁶ did begin, however briefly, to reorient substantive debate about the *Meech Lake Accord* among politicians. There was even hope that sufficient momentum for continuing reflection would make the drafting of a "parallel Accord" inevitable. Yet as the deadline for ratification approached a few months later, defenders of the *Meech Lake Accord* increasingly came to rest their case on the basis that it was a "done deal" which could not be amended. Rather than actively create a positive *Meech Lake Accord* symbolism of dialogue and responsiveness in the same manner as a positive symbolism was created to sanctify the *Charter* in the public mind, they reverted to the same back-room political manoeuvring which tarnished the case for ratification at the outset of the debate.³⁷ This tactic generated

³⁵ Ontario, Ministry of the Attorney General, *Assessment of the Manitoba and New Brunswick Reports on the Meech Lake Accord* (Staff Paper) (2 November 1989).

³⁶ Ontario, Ministry of the Attorney General, *Assessment of the Newfoundland Constitutional Proposal: An Alternative to the Meech Lake Accord* (Staff Paper) (27 November 1989).

³⁷ Some of the Prime Minister's own statements in the spring of 1990 were most curious. To attack the *Charter* ("It's not worth the paper its written on") because of section 33, to claim that all Canadian constitutional amendment processes were the result of backroom deals, to attempt to manipulate the premiers through the media in early June, to retreat from the

a fifth, and ultimately devastating *Meech Lake Accord* myth: the view that because the constitutional process was sordid, the *Meech Lake Accord* should be rejected on this basis alone.

The most unfortunate consequence of this last-minute effort was not, as many first thought, the failure of ratification of the *Meech Lake Accord*. It was to be its effect on future efforts at constitutional renovation. However flawed the delegitimizing myths propounded by certain *Meech Lake Accord* opponents, they have all gained currency as constitutional truths. And, however sound the legitimating ideas sustaining the *Meech Lake Accord*, they have now been thoroughly discredited in public opinion.³⁸ Regrettably, the absence of a theory of Canadian constitutionalism patent in the agreement itself, or in any of the supporting documents circulated by the federal government, or in any public arguments made by either federal or provincial politicians, placed an impossible burden on those who attempted, despite the indifference of the *Meech Lake Accord*'s political proponents, to explain its genesis and to justify its overall tenor. The rhetoric of the ratification debate, and the myths that emerged from it, have seriously harmed Canadian constitutionalism by undermining the public's confidence that there is a history, symbolism, and vision of the country which is capable of sustaining it in the future. In the next sections of this essay, what these various themes might have been in relation to the *Meech Lake Accord*, and why they have continuing relevance in post-*Meech Lake Accord* Canada will be addressed in detail.

view that the *Meech Lake Accord* had to be ratified within three years on the day before these three years were to expire; all seemed unworthy of a Prime Minister attempting to ensure the success of a constitutional amendment process. As one media commentator put it, the reason there could be no further substantive negotiation is that the Prime Minister had no overall vision of what he was trying to accomplish.

³⁸ I am not claiming that there were no good reasons for opposing the *Meech Lake Accord* – only that the bad ones have gained the status of constitutional truth; similarly, I am not claiming that there were no bad reasons given for ratifying the *Meech Lake Accord* – only that the good ones have now been completely discredited. These two consequences of the politicking in the final stages of the ratification debate also mean that future exercises of constitutional amendment undertaken to respond to Quebec's concerns will be badly tarnished before they even begin.

III. TWO THEORIES OF CONFEDERATION: CONSTITUTIONAL INTERPRETATIONS

In order to situate better the political events which culminated in the *Meech Lake Accord*, it is important to recall that the claims advanced by the Quebec government between May 1986 and May 1987 did not (as many of the *Meech Lake Accord's* politically-partisan defenders wish to imply) first arise only in reaction to the patriation process of 1982. Nor were they (as many of the *Meech Lake Accord's* detractors asserted) merely the "thin-edge-of-the-wedge" of the post-Quiet Revolution independence agenda promoted by Quebec nationalists. On the contrary, these claims were the late twentieth century version of fundamental Canadian constitutional concerns having an ancient pedigree. Indeed, those concerns were manifest not only in the *British North America Act, 1867*³⁹ but even earlier, in the *Act of Union, 1840*,⁴⁰ the *Constitutional Act, 1791*,⁴¹ and the *Quebec Act, 1774*.⁴²

The reason for their persistence, I believe, can be at least partly clarified by a brief review of the usual components of a liberal constitution. Admittedly, political scientists and lawyers have advanced a wide variety of models for the design of constitutions.⁴³ In almost all, however, the following items appear as basic components, whether expressed in a written document or documents, or whether implied by practices and conventions. First, constitutions usually define — by a formula such as "we the people" — who is

³⁹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 (formerly *British North America Act 1867*) [hereinafter *Constitution Act, 1867*].

⁴⁰ Reprinted in R.S.C. 1985, App. II, No. 4.

⁴¹ Reprinted in R.S.C. 1985, App. II, No. 3.

⁴² Reprinted in R.S.C. 1985, App. II, No. 2.

⁴³ See, for a brief summary of salient features of the English constitutional model viewed from a Canadian perspective, G.-A. Beaudoin, *La Constitution du Canada: Institutions, partage des pouvoirs, droits et libertés*, Montreal, Wilson & Lafleur, 1990 at 5-50, and P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 1-308. As leading examples of Anglo-Canadian theorizing about basic constitutional issues, see G. Marshall, *Constitutional Theory* (Oxford: Clarendon, 1980); A. Breton & A. Scott, *The Design of Federations* (Montreal: Institute for Research on Public Policy, 1980); and W.E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989).

establishing the new constitutional order, and enumerate which groups, and which individuals, form a part of the political community. Second, they normally explain, by preamble or by an independent but allied document such as a Declaration of Independence, a Declaration of Rights, or a Report of a Founding Convention, the leading principles and goals upon which the new, or renewed, state is to be erected. Third, and typically closely associated with the second objective, is the announcement or proclamation of political sovereignty. A fourth constitutional component is the structuring of the organic functions of government, including the relationships of executive, legislative, and judicial branches. Fifth, especially since the U.S. precedent of 1789, constitutions will express a choice about whether a unitary, federal, or confederative system is to be adopted, and if either of the latter, about what intra-state institutions are required, and about what powers should be assigned to each constituent. Sixth, independent of division of legislative powers issues, modern federal constitutions usually allocate the getting and giving of revenue: taxation, borrowing and spending, including transfer payments and equalization. Seventh on the list of constitutive elements in modern liberal constitutions is the imposition of counter-majoritarian constraints on legislative and governmental activity through entrenched, or partly entrenched, civil liberties guarantees. Eighth, and finally, constitutions typically establish special institutions for their interpretation and provide for complex processes governing their amendment.

Most of these items can be found (albeit not always explicitly) in those eighteenth, nineteenth, and twentieth century Imperial statutes which together comprise the written part of the Canadian constitution. Others are captured by the salient events of English history which comprise the "common law of the constitution." Many find their deposit only in the elaborate conventions and political accommodations which have grown up since 1763, and in the myths and symbols of Canadian self-definition.⁴⁴ It follows that Canada's constitutional documents and

⁴⁴ One of the best summaries of these sources is S. Scott, "The Constitution, Government and Legal System of Canada" in H.H. Stikeman *et al.*, eds, *Doing Business in Canada* (London: Oyez, 1985) c. 2.

practices often conceal their true import.⁴⁵ Despite the significance of each of the several components just noted to understanding and interpreting the whole Canadian constitution, in the concrete, it has been through the single lens of federalism that all the other basic issues have usually been perceived since 1867. Until recently, Canadian constitutional lawyers have been compelled, by the limits of their own constitutional vision, to collapse almost all these items into variations on the theme of federalism and the "distribution of powers" provisions of the *Constitution Act, 1867*.⁴⁶ Indeed, the initial confederative statute, which created a federal state from the ashes of the 1840 Union of Canada East and Canada West, has had a powerful hold on the imagination of constitutional scholars and commentators. While the *Meech Lake Accord* could, and should, have been understood in terms other than those of classical federalism, and while pre-Confederation Imperial Statutes have many important lessons for contemporary constitutionalism, these other texts will not be the focus of the present section. Faithful to received tradition (even while acknowledging its limitations), the analysis which follows immediately is grounded in federalism issues, and in the *Constitution Act, 1867*.⁴⁷

Over the past century and one-quarter, various approaches to Canadian federalism have found expression in currents of

⁴⁵ For an attempt to exhume several of these hidden themes see R.A. Macdonald, "Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice" (1987) 39 U. Fla. L. Rev. 217 at 218-230.

⁴⁶ The best illustration of this traditional predominance was the decision by the editor of the fourth edition of Laskin's *Canadian Constitutional Law* not to include a concluding chapter on civil liberties in the casebook. See A. Abel, ed., *Laskin's Canadian Constitutional Law*, rev'd 4th ed. (Toronto: Carswell, 1975) at iv, where the editor explains that, notwithstanding his preference for omission, in the revised edition a final chapter on civil liberties (comprising, however, less than one-tenth of the material) had been added. In the same casebook, there is not a single other chapter devoted to non-federalism issues. For a further illustration of the attempt to conceive all issues in terms of federalism, this time in the context of a new constitutional document, see A. Abel, "Albert Abel's Constitutional Charter for Canada" (1978) 28 U.T.L.J. 261.

⁴⁷ Part II of this essay will involve a closer look at other constitutional themes, and other constitutional documents, in order to show the corrupting influence on Canadian constitutionalism of the preoccupation with classical "federalism" issues and with the *Constitution Act, 1867*, and to illustrate the scope of the challenges now facing those who would redesign the country's political institutions.

interpretation relating to the *Constitution Act, 1867* and its predecessor Imperial Statutes.⁴⁸ Today it is commonplace among constitutional scholars that these Imperial Statutes are capable of at least two distinct thematic understandings, a centrist, unitary conception known conventionally as the statute (*loi*) theory, and a decentralist, pluralist conception usually labelled the pact or compact (*pacte*) theory.⁴⁹ To focus attention on two understandings, which have had some currency in Canadian constitutional scholarship, is not to imply that alternative or complementary interpretations – administrative federalism, co-ordinate federalism, dualist federalism – are descriptively invalid.⁵⁰ Nor is it to dismiss other contemporary concerns – about Native Canadians, multiculturalism, regionalism – as unimportant or unworthy of constitutional recognition. In other words, the object is not to signal the entire range of federalist theories which might legitimately claim attention in future processes of constitutional redesign. Rather, it is to explore those two understandings which plausibly capture the particular themes and jurisdictional allocations in the various Imperial Statutes (including, it is suggested later in this essay, the *Canada Act, 1982*) by which the Canadian state was fashioned, between 1763 and 1982, out of a French Royal colony.

The predominant of the two leading views just noted argues that these key constitutional texts are simply regulatory statutes of the Imperial Parliament. As such, they are no more than a legislative fiat by which certain functions and attributes of government were established and allocated: in 1774, between Westminster and Quebec City, and between governor and legislative

⁴⁸ For a general discussion see A.R.M. Lower, "Theories of Canadian Federalism – Yesterday and Today" in A.R.M. Lower & F.R. Scott, eds, *Evolving Canadian Federalism* (Durham, N.C.: Duke University Press, 1958) at 3; and A. Johnson, "The Dynamics of Federalism in Canada" (1968) 1 *Can. J. Pol. Sci.* 18.

⁴⁹ One of the most accessible expositions of these conflicting themes is G.F.G. Stanley, "Act or Pact? Another Look at Confederation" in Canadian Historical Association, *Report of the Annual Meeting* (Ottawa: C.H.A., 1956) at 2.

⁵⁰ Black, *supra*, note 11, argues that there have been five major models of federalism advanced since 1867. The concern here is not to take a political science approach to these models in action, but rather to sharpen the two thematic views of the Canadian federal system upon which they are ultimately grounded. For this reason the vocabulary of federalism used in this essay departs slightly from that typically deployed by political scientists.

council; in 1791 and 1840, between Upper and Lower Canada, and between legislative assembly and legislative council; and in 1867, between provinces and the new federal government, and between executive and legislature. This view emphasizes the role of the *Constitution Act, 1867* as a strictly legal instrument contributing to the evolution of full Canadian nationhood, and to the final achievement of responsible government in a British colony — a process which commenced in 1763 with the proclamation issuing from the Treaty of Paris, and which went through several pre-Confederation reconstitutions, as well as later reformulations in 1931,⁵¹ 1949,⁵² and 1982.⁵³ The statute theory also places great emphasis on the non-cultural and linguistic explanations for Confederation. These include, notably, the external threat (defence) rationale and the economic motives for a British North American Union. Nation-building out of disparate and geographically scattered colonies was a convenient mechanism for establishing a polity capable of resisting an invasion from the United States and for enlarging the commercial empire of the St. Lawrence by acquiring the soon to be surrendered territory of the Hudson's Bay Company.⁵⁴ Briefly, on this view the *Constitution Act, 1867* is understood as "constituting" for the first time a political entity called Canada.

Given their preoccupations with differentiating the institutional arrangements of what they perceived as the *new* country called Canada from the United Kingdom and the United States, it is hardly surprising that the statute theory and its various themes have been the intellectual presupposition of most English-language constitutional histories. Primarily centrist and statist in political

⁵¹ *Statute of Westminster, 1931* (U.K.), 22 Geo 5, c. 4.

⁵² *British North America (No. 2) Act, 1949* (U.K.), 13 Geo. 6, c. 81.

⁵³ *Canada Act 1982* (U.K.), 1982, c. 11.

⁵⁴ For a general discussion of the motives for Confederation, see P.B. Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America* (Toronto: University of Toronto Press, 1962); Lower & Scott, eds, *supra*, note 48; R. Gibbins, *Regionalism: Territorial Politics in Canada and the United States* (Toronto: Butterworths, 1982); and K.H. Norrie, R. Simeon, & M.R. Krasnick, *Federalism and Economic Union in Canada* (Toronto: University of Toronto Press, 1986).

ambition, this understanding sees the *Constitution Act, 1867* as the key step in Canada's emergence from colony to nation.⁵⁵ It calls forth sections 55, 58, 90, section 91 *in fine*, section 92(10)(c), sections 93-95, section 96, and section 132 of the *Constitution Act, 1867* as evidence that a quasi-unitary state, and not a true federation, was really intended. Moreover, as reflected in its antipathy to the Privy Council's constitutional jurisprudence, it only reluctantly abandons the vision of the federal government's role anchored in Macdonald's cherished proposal for a legislative union.⁵⁶ In its extreme forms, the statute thesis even dismisses federalism as the unfortunate price which had to be paid for breaking the political deadlock in the United Canadas, for accommodating the previous autonomy of the colonies of New Brunswick, Nova Scotia, and Prince Edward Island, and for inducing other British North American settlements, such as those emerging in what soon became British Columbia and Manitoba, to join the new nation.⁵⁷ On this view, whatever the subsequent constitutional history of Canada, the agreements reached at Charlottetown and Quebec City were designed to relegate the provinces to the status of glorified English County Councils, and more importantly, were intended fundamentally to treat the new province of Quebec just as any other province.⁵⁸

This understanding of Canadian constitutional history, and of Quebec's role in the federation, it is reasonably clear, is also the primary vision of Canada reflected in the *Charter*, and more generally in the *Constitution Act, 1982*. The themes of patriation

⁵⁵ I take this phrase from A.R.M. Lower, *Colony to Nation: A History of Canada* (Toronto: Longmans, Green, 1946). For an assessment of this motif in the writing of Canadian history see J.M.S. Careless, "Frontierism, Metropolitanism, and Canadian History" in R. Cook, C. Brown, & C. Berger, eds, *Approaches to Canadian History* (Toronto: University of Toronto Press, 1967) at 63.

⁵⁶ For a discussion of this tendency in English language constitutional histories, see A.C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301.

⁵⁷ This perspective is carefully explored in several essays by F.R. Scott, who personally displayed some sympathy with it. See F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951) 29 Can. Bar Rev. 1095.

⁵⁸ In recent years it is rare for any scholar to take such an uncompromising view of the *Constitution Act, 1867*. But, for a recent reiteration of this interpretation, see E.A. Forsey, *A Life on the Fringe: The Memoirs of Eugene Forsey* (Toronto: Oxford University Press, 1990) at 208-15.

and coast-to-coast rights and freedoms resonate with the nation-building interpretation of Confederation. Of course, some commentators claim that the *Canada Act, 1982* was really a Quebec deal, and that Quebec did get preferential constitutional treatment. Such a mistaken view is usually grounded in a failure to distinguish the agenda of Pierre Trudeau, Jean Chrétien, and André Ouellet (who signed the final proclamation on Canada's behalf) from that of the Quebec government.⁵⁹ Politically, the patriation exercise was strongly centralist, and bore little connection to the constitutional reform agenda promoted by Quebec during the previous two decades. Even despite its vision of a bilingual federal government throughout Canada, and entrenched minority language educational rights under sections 16-23 of the *Charter*, the *Constitution Act, 1982* primarily bore the mark of the statute thesis in its completion of the process of achieving Canadian sovereignty, in its treatment of Quebec as a province just like the others, and in its fundamentally individualistic approach to constitutional side constraints.

To be contrasted with the statute perspective on early Imperial legislation, on the events leading up to the *Constitution Act, 1867*, and on the subsequent evolution of the *Act*, is the pact or compact theory of the Canadian constitution. This theory understands the Confederation agreement reached in 1867 essentially as one which involved a solemn undertaking between Canada's "two founding peoples" (*deux nations*).⁶⁰ The richness of the expression

⁵⁹ The fact that three French-speaking Quebecers promoted the 1982 reform, and that it was supported by almost all Quebec M.P.s did not, however, make either patriation or the *Charter* a Quebec project. The Quebec government, it will be recalled, never accepted the deal. It manifested its dissent by seeking to have the Supreme Court recognize its veto power over constitutional amendments (see *supra*, note 17) and, when that failed, by systematically inserting the notwithstanding clause in all provincial statutes (see *supra*, note 19), and finally by declining to assent to the issuance of a proclamation respecting section 23(1)(a) contemplated under section 59 of the *Constitution Act, 1982*.

⁶⁰ For powerful expositions of this theme see, F.-A. Angers, *Essai sur la centralisation: Analyse de principe politique et économique dans les perspectives canadiennes*, Montreal, Presses de l'École des hautes études commerciales, 1960; P. Ferland, "Reflexions sur la Constitution canadienne," Institut social populaire, *Publication mensuelle*, no. 460 (June 1952) at 11; and R. Arès, "La confédération: pacte ou loi?" *L'action nationale*, 34 (1949) (II) at 194-230 & 243-277. The historical significance of this idea was explored long before its renaissance in the 1950s by A.R.M. Lower, "Two Ways of Life: The Primary Antithesis of Canadian History" in Canadian Historical Association, *Report of the Annual Meeting* (Ottawa: C.H.A., 1943).

"founding peoples" in this understanding of Confederation should be noted. At a time when language seems to have taken over all discussion of relations between French-speaking and English-speaking Canadians, it is important to remember that the initial concept of "two founding peoples" was neither statist (referring to governmental structures), nor merely linguistic. In its first acceptation, that reflected in the *Quebec Act, 1774*, the particularity of this non-Britannic founding people was recognized through the restoration in New France of pre-Conquest language rights, laws and customs, and religion. For compact theorists, the *Constitution Act, 1867* is a further, and more nuanced, legislative expression of the historic compromise worked out between 1763 and 1774. The *Act* perhaps sought to advance the agenda of national defence, economic expansion, decolonization, and responsible government. However, it was primarily designed to break the political deadlock in the United Canadas by respecting, in the institutional arrangements adopted, the linguistic and cultural duality of mid-nineteenth century Canada. For proponents of the compact thesis, then, the *Constitution Act, 1867* is not merely the arbitrary federative fiat of the Imperial Parliament; it is the legislative recognition of a covenant between two societies and between two peoples. It is not, as statute theorists would have it, the "constituting" moment of the country called Canada, but is simply another "reconstituting" of the territory which had been officially called Canada since at least 1791.⁶¹

Since the compact theory as understood in Quebec is less well known among English-speaking constitutional lawyers, it merits a brief statement here. The basic argument in relation to the *Constitution Act, 1867* runs as follows. In exchange for their agreement to participate in a new polity comprising (with the

⁶¹ At the risk of repetition, it must be emphasized that the compact theory, and the notion of two founding peoples which lies behind it, is a theory about the political origins and the deep structure of the *Constitution Act, 1867*. It does not presume, any more than the statute theory, that Aboriginal Canadians were not also a (if not the) founding people of the country. Like the statute theory, which is equally unresponsive to Native claims, the compact theory is advanced by its adherents only as an interpretive tool for understanding how French/English relations were accommodated in the confederative *Act*. It is not propounded as a prescriptive thesis for the future of the Canadian federation in order to deny the status of founding people to other groups.

addition of New Brunswick and Nova Scotia) an overwhelming majority of English speakers, and in exchange for giving up the representational parity of Canada East with Canada West in the Parliament of the United Canadas, French-speaking Canadians (the overwhelming percentage of whom lived in the province of Canada East) demanded the establishment of a federal, rather than a legislative, union. Notwithstanding Macdonald's initial reluctance, they insisted that substantial governmental powers be delegated to at least one political unit where they would constitute the majority. They also demanded institutional and linguistic guarantees at the federal level in order to protect their position in the national political process. Lastly, they saw in the powers of disallowance and reservation, as well as in the Imperial connection generally, an external assurance that the terms of the compact would be respected in those political arenas where they comprised only a minority. This decentralist and anti-statist view, not surprisingly, has in the past been most frequently and successfully advanced by French-language constitutional scholars in Quebec.⁶²

It bears emphasis that the compact in issue was not an agreement between the government of Canada East and that of Canada West, or even between the United Canadas and the Maritime Provinces. Rather, it was a compact between French and English-speaking peoples. That the compact has come to be understood as almost exclusively an arrangement between governments is in part due to an evolution in the notion of the state since 1867, and in part an unfortunate consequence of federal policies between 1885 and 1925 which never differentiated "compact" and "states rights" theories of federalism.⁶³ That this latter version

⁶² See for example, P. Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950); R. Rumilly, *L'autonomie provinciale*, Montreal, Arbre, 1948; J.-C. Bonenfant, *La naissance de la confédération*, Montreal, Léméac, 1969; G. Rémillard, *Le fédéralisme canadien: Tome I, La loi constitutionnelle de 1867*, Montreal, Quebec/Amerique, 1983; and A. Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Ottawa, Université d'Ottawa, 1967.

⁶³ It is not without importance that the first exposition in Canada of the "states rights" view of the compact occurred at the same time as the squabbles between Honoré Mercier and Sir John A. Macdonald concerning the scope of federal jurisdiction. See T.J.J. Loranger, *Letters Upon the Interpretation of the Federal Constitution Known As the British North America*

gained any currency at all outside Quebec is attributable to the polemical success of Ontario Premiers Mowat in the 1880s and Ferguson during the 1920s.⁶⁴ As noted, in its original understanding, the 1867 compact was understood to be between French-speaking Canadians (principally Quebeckers, but in more modern versions of the thesis, Acadians and Franco-Ontarians also) on the one hand, and English-speaking Canadians (including English-speaking Canadians in Quebec) on the other. Only after the Manitoba Schools Question put the potential difference between the two theories starkly before the federal government was the compact thesis collapsed into nothing more than a linguistic states rights thesis by English-language and most French-language constitutional scholars, aided and abetted by statist-liberal politicians such as Mowat, Mercier, and, although to a lesser extent, Laurier.⁶⁵

Political and legal theorists who adopt the compact thesis in its original form point to several features of the *Constitution Act*,

Act, 1867 (Quebec: Printed at the "Morning Chronicle" Office, 1884); and P.B. Mignault, *Manuel de droit parlementaire ou cours élémentaire de droit constitutionnel*, Montreal, A. Périard, 1889.

⁶⁴ Ferguson, in particular, was reacting to the discussions that were to culminate in the *Statute of Westminster, 1931*. Fearing that the federal government would obtain power to unilaterally amend the constitution, he attempted to marshall other premiers into a united front against Ottawa. Writing to the prime minister, Ferguson forcefully argued for the requirement of provincial consent in any constitutional amendment given that the document was fundamentally a treaty between provinces. Significant extracts of the letter and memorandum are published in R.M. Dawson, *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933) at 156.

⁶⁵ Mowat and Mercier first articulated this "states rights" view at the interprovincial conference of 1887. The resolutions adopted at this conference called for a modified federalism with restrictive disallowance powers and consequent freer reign to the provinces along the lines of the U.S. model. For a documentary record see Canada, *Dominion Provincial and Interprovincial Conferences from 1887 to 1926* (Ottawa: King's Printer, 1951) at 15.

The most interesting change in perspective was that of Laurier. In his convocation address to the McGill Law Class of 1864 he stated: "l'étude des lois a continué ce rapprochement, nous nous sommes familiarisés avec les juristes de la France et de l'Angleterre nos mères-patries; nous allions ensemble les génies de ces grandes nations." Twenty-five years later he was to say the same thing at a St. Jean Baptiste day rally (see M. Wade, *The French Canadians, 1760-1945* (London: Macmillan, 1955) at 427-428. But, when forced to choose between the racial and states-rights views of the compact during the election of 1896, he chose the latter. For a brief summary of Laurier's electoral position see J.M. Beck, *Pendulum of Power: Canada's Federal Elections* (Scarborough, Ont.: Prentice-Hall, 1968) at 72-85.

1867 as examples of the kinds of special institutional arrangements and legislative jurisdiction which were essential to securing the assent of French-speaking Canadians to the Confederation arrangement. These features include the preservation of the Civil Law in Quebec by the adoption in section 92(13) of the *Quebec Act, 1774* formula "property and civil rights" as the touchstone of provincial jurisdiction; the exclusion of Quebec from section 94; the special guarantees of section 98, section 133, and section 144; the provision for a Legislative Council in Quebec under sections 71 *et seq*; the confirmation of Roman Catholic Schools in Upper Canada by section 93; and shared provincial jurisdiction over immigration under section 95. Compact theorists also point to these provisions as evidence that, in the ensuing federal political state, Quebec was expressly constituted to be a province unlike the others.

This further claim for special status for Quebec as a Canadian province was not historically necessary to the pre-Confederation "compact between two founding peoples" thesis, and emerged only with the drafting of the *Constitution Act, 1867*. It was, however, clearly present in the minds of the "Fathers of Confederation."⁶⁶ Current revisionist histories which point to the *Quebec Act, 1774* as confirmation of a similar intention to treat the province of Quebec distinctively are clearly wrong (unless the claim is reinterpreted in a non-federal context and is understood as being that the *Quebec Act, 1774* was designed to treat New France differently from all other British colonies in North America, including the thirteen colonies to the south). Moreover, neither the *Constitution Act, 1791* nor the *Act of Union, 1840* were designed to afford Lower Canada (and later Canada East) any special legislative status. The concept of special status for a province only makes sense in the context of a federal union. What these earlier statutes did do, however, was to give recognition to French language and culture, to the civil law, and to the Roman Catholic religion within those parts of British North America formerly comprising New France. To this extent they can be seen as precedents for the

⁶⁶ See the impressive list of documentary sources assembled by Gérin-Lajoie, *supra*, note 62 at App. C. See also the sources reviewed in Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Quebec City: Province of Quebec, 1956) [hereinafter *Tremblay Commission Report*].

unique institutional arrangements relating to Quebec which were adopted in 1867.⁶⁷

Now, whatever the corruption of the initial constitutional reform agenda in 1987, and of the resulting *Meech Lake Accord*, which was produced by the need to gain the assent of other Canadian premiers, it is obvious that some version of the compact theory underlies the original purposes being pursued in the discussions which culminated in the *Meech Lake Accord*.⁶⁸ The use of the words "some version of the compact theory" is intentional. While the main features of the *Meech Lake Accord* could be understood as recognizing Canadian duality, they did so mainly through political institutions and not through the promotion of French and English language and culture *per se*. That is, the *Meech Lake Accord* spoke principally to only one of the two post-Confederation features of the traditional compact thesis. The inclusion of a "distinct society" clause, the establishment of the special process for nominating Supreme Court justices trained in the civil law, and the incorporation of amendments relating to the spending power and to immigration that would likely be deployed only by Quebec, are evidence that the *Meech Lake Accord* responded to the constructive or constitutive jurisdictional elements of the compact. But, except to the extent that the hortatory terms of sections 2(1)(a) and 2(2) stated an ambition, the *Meech Lake Accord* did not address directly the constraining features on government action initially worked out for the protection of

⁶⁷ The point is that, in their haste to make the case for "special status" for Quebec, these commentators forget the transformative effect of the *Constitution Act, 1867*. No doubt, the division of Upper and Lower Canada in 1791 and the union in 1840 both were undertaken for reasons relating to "race." But the notion of special status itself is a post-Confederation concept. See *Tremblay Commission Report, ibid.* Part I at 5-182.

⁶⁸ Even the process leading up to the *Meech Lake Accord* reflects this point. For after Quebec announced its "five conditions," the Prime Minister was able to get the assent of other provincial premiers (i) to negotiate with Quebec on these questions, and (ii) to restrict this first round of constitutional negotiations to Quebec's conditions. Whatever the final form, then, it is reasonably clear that in substance the *Meech Lake Accord* process began as a negotiation between Quebec and the rest of the country. And this response to Quebec's sense of being "left out" of the 1982 agreement can only be grounded in a belief that Quebec had some special claim to be included. For a brief discussion of the discussions leading up to the meeting at Meech Lake see Hogg, *supra*, note 7.

non-Quebec Francophones.⁶⁹ Indeed, the maligned *Charter* was just as important a reflection of this pan-Canadian aspect of the compact thesis as the *Meech Lake Accord* itself.

One might justifiably say, therefore, that in their predominant themes, the *Constitution Act, 1982* and the *Meech Lake Accord* each reflect a partial view of the two hundred year history of Canada, and of its expression in the Confederation exercise – a partial view, which in each case responded primarily to only one of the two principal interpretations of the *Constitution Act, 1867* that had intellectual currency over the past century. Once again, it bears reiteration that other early adherents to the Canadian Confederation – New Brunswick and Nova Scotia in 1867, Manitoba in 1870, British Columbia in 1871, and Prince Edward Island in 1873 – may well have had their own special reasons for joining the union. Seeking a guarantee of bilingualism for at least a part of the North-West Territories, negotiating a transcontinental railway, expelling non-resident landowners, and avoiding governmental bankruptcy, were each among the purposes pursued by colonies which at one time or another joined Canada after 1867.⁷⁰ But the point is that the view of the *Constitution Act, 1867* reflected by non-linguistic "states rights" rhetoric has not received extensive scholarly support, either in the Maritimes, or from other early adherents to the Canadian Confederation. Indeed, apart from a flourish in Ontario between 1885 and the 1930s, it did not figure prominently in constitutional theory until the 1970s. This may have been because the geographic organization of Canadian federalism, for its first few decades, was predominantly one of regionalism, rather than provincialism; or it may have been that, because Quebec was so closely associated with promoting the compact

⁶⁹ See, for suggestions to this effect, K. McRoberts, "The Case for Meech Lake," (December 1987) *The Canadian Forum* at 12-13.

⁷⁰ For a discussion of the mainly economic reasons that led Prince Edward Island to join after over fifteen years of resistance, see Waite, *supra*, note 54 at 179; with respect to Nova Scotia, see Waite, *ibid.* at 193, and to New Brunswick, at 229. For a history of the entrance of Manitoba into Confederation, see G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961).

interpretation, the question of language and culture dominated the framing of the theory.⁷¹

Time will tell whether the contemporary revendications of the provinces later adhering to the Confederation, such as Alberta and Newfoundland, will mature into a full-blown "states-rights" thesis about Confederation of the type implicit in the doctrines of South Carolina's J.C. Calhoun.⁷² Time will also tell whether the concessions to provincialism in Parts III, IV, and V of the *Constitution Act, 1982*, dealing with equalization, constitutional conferences, and the amending formula, respectively, as well as those of the *Meech Lake Accord* dealing with opting out, Supreme Court nominations, and immigration, will lead to the dominance of "states-rights" interpretations in future assessments of the constitutional reforms (and proposed reforms) of the 1980s.⁷³ Be that as it may, the legislative fiat (national centrist) and the compact (French and English founding peoples) theses have been the main starting points for constitutional argument about the meaning of the *Constitution Act, 1867*, about the earlier institutional arrangements from which modern Canada emerged, and about the political and historical legitimacy of the patriation and *Meech Lake Accord* processes.

If each of these two dominant interpretative theses presents only a partial view of Canada's constitutional foundations and subsequent constitutional history, it is clear that neither satisfactorily captures the overall spirit of Confederation. There are some aspects of the *Constitution Act, 1867* which simply cannot be explained by reference to the statute thesis. Similarly, there are other parts of

⁷¹ The history of these various conceptions of decentralist federalism are reviewed in detail in Black, *supra*, note 11, c. 5, 6, & 7. It is to be noted, however, that, at 149-171, Black uses the expression "compact theory" to describe what I have characterized in the text as the "states rights" thesis.

⁷² Calhoun was the most vocal proponent of the "states-rights" doctrine in the United States in the pre-Civil War period. For a compendium of his views see R.K. Cralle, ed., *The Works of John C. Calhoun*, vols 1-6 (New York: D. Appleton, 1851-56), and for a detailed presentation of his "compact" theory of the American federal union see his *Disquisition of Government*, reproduced therein.

⁷³ For an indication that such a perspective may well be gaining ascendancy in certain quarters see the papers in Gibbins, ed., *Perspectives From the West*, *supra*, note 32, especially those at 13-62.

the *Act* for which the compact theory cannot provide a plausible account. But like the particle and wave theories of light, each does seem to render accurately a part of the total phenomenon, and, in combination, both explain most of the relevant data. That physicists have been unable to postulate a unified theory of light, and can tolerate the irreconcilability of their two main governing theses, suggests that Canadian constitutional scholars would not necessarily be wrong to acknowledge the tension, so far irreconcilable, between compact and statute interpretations of Confederation. The experience of physicists also argues that it is preferable for the judiciary to act to maintain a province for each as a vehicle for explaining Canada's constitutional arrangements, rather than for it to approach its interpretive task as if consistency demanded that one thesis ultimately had to vanquish the other. Lastly, the lesson of the coexistence of particle and wave theories of light teaches that, in principle, modern constitutional artifacts such as Charters of Rights and Freedoms should not be designed with an imperialistic or unifying goal in view, and should not seek finally to resolve fundamental interpretive tensions in one way or the other.⁷⁴

This last observation has particular significance today given the predominance which a highly individualistic view of the *Charter* seems to be attaining,⁷⁵ and given important changes to the dynamic of constitutional scholarship only recently emerging. The latter point requires more detailed development. One of the fascinating paradoxes of recent Canadian public law scholarship is the reversal in intellectual perception between a number of English and French-speaking commentators as to the significance of the statute

⁷⁴ I have argued in another place that, notwithstanding the limited vision of contemporary *Charter* patriotism, the 1982 *Charter* is capable of such a pluralist interpretation, and that it was probably designed to be so interpreted. See Macdonald, *Postscript and Prelude*, *supra*, note 14.

⁷⁵ See, for examples of the exaggerated individualism of much *Charter* commentary, the sources criticized in Mandel, *supra*, note 30. The current fascination with repealing section 33 also reflects this truncated understanding of the *Charter*. For a thoughtful defence of section 33, and the broader understanding of rights which it implies, see L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541. A further development of this theme is presented in Professor Weinrib's carefully constructed understanding of section 1 in "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Sup. Ct. L. Rev. 469.

and compact theses. For example, some essentially nationalist French-speaking jurists in Quebec are now saying that Confederation was just another step towards responsible government and decolonialization, and that federalism is, under the *Constitution Act, 1867*, merely a statutory allocation of power and jurisdiction between levels of government.⁷⁶ A federal structure was simply a convenient administrative arrangement given the vast geography of the new country being established, the need for a common defence policy, the imperatives of economic development, and the competition for commercial dominance between established Montreal and upstart Toronto.

The consequences of this claim are then developed as follows. Now that the Quebec government requires more legislative jurisdiction in order to respond adequately to the challenges it faces in the late twentieth century, the former allocation should be updated. That the new province of Quebec, alone among the four initial provinces, should have had a majority of French-speaking citizens was merely an accident of history and territorial convenience dating back to the *Constitutional Act, 1791*. The establishment of Quebec as a province did not primarily result from a peoples' compact between a French-speaking minority and an English-speaking majority to build a Canadian nation. More to the point, it certainly did not reflect any implied compact, binding the Quebec government to protect its own English-speaking minority. Further, that Quebec should have been recognized as a province not like the others (a point some new French-speaking constitutional theorists are even prepared to deny) reflected nothing other than the legal and economic *realpolitik* of the times. Notwithstanding the military threat from the United States, Confederation had no ideological overtones, and in no way committed any colony to the creation of an indissoluble country. On this view, equally as statist as its English-language analogue, should the Quebec government now find it necessary to promote the French language at the expense of the English, there is neither a constitutional nor a moral impediment to its doing so; and should the Quebec government find it preferable

⁷⁶ This sub-text is evident in, for example, C. Dufour, *Le défi Québécois: Essai*, Montreal, Hexagone, 1989, and in P. Fournier, *A Meech Lake Post-Mortem* (Montreal: McGill-Queens University Press, 1991).

to accede to full sovereignty, it is only "natural" (a favourite expression of contemporary Quebec historical determinists) that it should be permitted to do so.

By contrast, a number of English-speaking constitutional commentators are now groping toward the language of compact as a means of explaining the place of English-speaking Quebecers in Confederation.⁷⁷ These scholars suggest that many aspects of the various pre-Confederation Imperial statutes can be best understood as reflecting a carefully considered compromise between the claims of the conquered *habitants* and the later arriving United Empire Loyalists. They argue that the *Constitution Act, 1867* in particular gave legislative form to a political arrangement between English and French-speaking minorities in the United Canadas. But, while acknowledging the primary compact which produced the federal arrangement, the political accommodation these theorists emphasize is that between the English-speaking minority and the French-speaking majority in Canada East. On this view, sections 10 and 11 of the *Quebec Act, 1774* (which instituted freedom of willing and trial by jury) as much as section 8 (which re-established the Civil Law) were the initial proof of the intention of the British Colonial Office to accommodate cultural and linguistic trade-offs. Hence the assertion that the only reason that the English-speaking population of what is now Quebec agreed to a federal union, rather than a continuation in a modified form of the 1840 legislative union, was that the *Constitution Act, 1867* offered significant constitutional guarantees on those matters which were of greatest concern to it.⁷⁸

These guarantees, just like those provided to the French-speaking minority at the national level, were of three sorts: positive,

⁷⁷ Some of these commentators also see in the compact metaphor a justification for promoting Aboriginal claims, and those of French-speaking Canadians in provinces other than Quebec.

⁷⁸ The most persuasive proponent of this view was Sir A.T. Galt, who, coincidentally, was the first high-profile advocate of federalism. See A.T. Galt, *Speech on the Proposed Union of the British North American Provinces* (Montreal: Longmoore, 1864). In this speech Galt defended a highly centralist view of federation which would protect the interests of English-speaking inhabitants of Lower Canada. Apart from D'Arcy McGee, no prominent English-speaking politicians supported any form of decentralized federation. Indeed, Liberals such as Luther Holton, and independent Conservatives such as Christopher Dunkin, vigorously opposed all federalist proposals. For a brief history see Waite, *supra*, note 54, at 134-160.

or jurisdictional; negative, or in the nature of entrenched rights; and supervisory, or appellate. Thus, certain matters which might normally be thought to fall within the ambit of provincial legislative competence were transferred to the jurisdiction of the federal Parliament; second, important limitations favouring the rights of English-speaking Quebecers were placed on the authority of the Quebec legislature; and third, the exercise of certain powers was made subject to external political, as well as legal, control. Jurisdictional guarantees of the first type, it is said, can be found in relation to federal legislative authority over marriage and divorce (subsection 91(26)). This guarantee was intended to ensure that Roman Catholic canon law would not be legislated on Protestant sects in Quebec. Moreover, to protect Montreal's English-dominated commercial interests, extensive federal jurisdiction was established over commerce — whether of an intra or interprovincial character (sub-sections 91(2) and 91(9)-(23), and 92(10) by exclusion). Again, so as to offer partial protection to English-speaking Eastern townships farmers, a shared federal jurisdiction over agriculture (section 95), and guaranteed cantonal representation in the Senate (section 22(6)) was provided. Finally, federal control over the appointment of the senior judiciary (section 96) was understood as a vehicle for insulating the judicial process from undue provincial political influence.

Non-jurisdictional guarantees of the second type are held to be found in the provisions for a legislative upper house only in Quebec (sections 71-79), for the protected representation of certain districts in the legislative assembly (section 80), for language rights in courts and the legislature (section 133), and for the preservation of sectarian school boards (section 93). Supervisory guarantees are seen to reside in the institution of appeals in school matters directly to the Governor General (section 93), and most importantly, for the federal disallowance power (section 60). This three-fold inventory, it is claimed, constitutes direct evidence that the confederative *Constitution Act, 1867* was grounded, at least in part, in a notion of compact, and that the protection of the English-

speaking minority in Quebec was a fundamental part of that compact.⁷⁹

Lying behind the invocation of these two conventional interpretations of the *Constitution Act, 1867* by new scholarly constituencies are present political realities. After all, metaphors typically are found and deployed for rhetorical purposes. In the fall of 1989, for example, Canadians witnessed a televised debate between Gordon Robertson, former Secretary to the Cabinet and Clerk of the Privy Council in Ottawa, and Claude Morin, former Parti Québécois Minister and architect of that party's referendum strategy. In this debate, the former invoked a variant of the compact theory in defence of the *Meech Lake Accord*, and the latter invoked the statute theory in defence of Quebec's right of unilateral secession. Neither would acknowledge the partiality of the metaphor being deployed in support of his own position.

A similar strategic invocation is practiced by those contemporary theorists in both English and French-language communities who concede that there is some merit in each theory of Confederation, but who attempt to marry the two interpretations of the *Constitution Act, 1867* by invoking the compact theory only as a gloss on the statute theory. Their motive, scarcely concealed, is to provide a justification for the post-patriation constitutional *status quo*. Today, an important strand of English-language constitutional scholarship and Parliamentary opinion — still preoccupied with nation-building on the U.S. model and especially sensitive to the centrifugal tendencies of Quebec separatism and of Western alienation — holds that the whole compact (if indeed there ever was one) was spelled out by the *Constitution Act, 1867*. There is, therefore, no residual concept of "distinct society" which is

⁷⁹ Until recently, it was a favorite theme of English-speaking constitutional lawyers to argue for increased centralization. See, notably, the works of F.R. Scott collected in *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977). This was no doubt in part because the English-speaking community never really saw the Quebec government as its political agent, and because it never believed (or wanted to believe) that the provincial government could overcome Quebec's traditional anti-statist politics. Only in recent years, after the Quiet Revolution and with the perception that the English-speaking community was indeed a minority, were arguments about the need for special guarantees, such as those made by Dunkin and Holton, resurrected. For a contemporary expression of this viewpoint see R. Scowen, *A Different Vision: The English in Quebec in the 1990s* (London: Maxwell and Macmillan, 1990).

definitive of Quebec's place in Canada, or which can be invoked at the constitutional bargaining table to revise the specific terms of the initial compact.

Many contemporary French-language constitutional scholars and members of the National Assembly in Quebec — preoccupied with preserving the French language and culture in the one province where it is majoritarian — respond similarly to compact-based arguments from English-speaking Quebecers. They maintain that, even if there were some agreement between the English-speaking minority in Quebec and the French-speaking majority, the complete terms of that covenant were spelled out precisely in the *Constitution Act, 1867*. There are, therefore, no other (implied) terms which can be negotiated at the constitutional bargaining table. What is common to these two modern mixed theories is the claim that whatever importance the notion of compact between founding peoples may have had in the design of the *Constitution Act, 1867*, it no longer has, or ought to have, any relevance to constitutional practice and interpretation. Metaphorically, one might say that the compact theory may perhaps constitute a meaningful device for the interpretation of Canada's pre-contractual negotiations, but since Confederation the operative principle of the *Constitution Act, 1867* has been *pacta sunt servanda*.

Neither of these modern variations on the statute theory comes any closer to capturing the whole meaning of Confederation than their pristine progenitors, even though they have attracted the allegiance of several key political figures. Without a doubt the most persistent and articulate proponent of this type of constitutional analysis is Pierre Trudeau.⁸⁰ On the one hand, he implicitly uses the language of compact to justify the language guarantees of the *Charter*, the federal *Official Languages Act*,⁸¹ and the bilingualization of the federal government; on the other hand, he uses the language of statute to resist claims by the government of Quebec to special status. In both cases, sustaining the claim that Quebec needs no new special powers, is the assumption of a "binding arrangement" in

⁸⁰ See Johnston, *supra*, note 23. See also, P.E. Trudeau, "Say Goodbye to the Dream of One Canada," *The Toronto Star* (27 May 1987) A1 & A12.

⁸¹ R.S.C. 1985, c. O-3.

1867. The moral force of his argument, which was picked up in both the Newfoundland and Manitoba Reports,⁸² lies in its recognition that the concomitant of treating Quebec as a province just like the others necessarily is a commitment to bilingualism at the federal level (and provincially in those provinces where numbers warrant).

Those who take this view have a defensible position as to the implications of Confederation relating to the obligations of the federal government, as the government of all French-speaking Canadians whatever their province of residence. However, this position understates the distinctiveness of the Province of Quebec contemplated by the specific provisions of the *Constitution Act, 1867*, and the role it felt that it was to play in the larger federation.⁸³ It is also a dangerous view of Confederation because it leaves open, if not actually invites, the obverse possibility. This possibility, often argued by opponents of the *Meech Lake Accord*, is that the language of compact justifies a distinct French-speaking Quebec, while the language of statute justifies English-speaking unilingualism in the rest of the country. For these reasons, an interpretive position according full and complete faith to both theses about the nature of the *Constitution Act, 1867* — statute and compact — in which neither is seen as subordinate to the other, must drive the understanding of the confederative agreement, and of Canada's living constitution today.

Moreover, when the *Constitution Act, 1867* is viewed equally through the lens of statute theory and compact theory much of Canada's post-1960 political and constitutional malaise acquires a new and richer meaning. In particular, what emerges from such an approach to the several agenda of contemporary constitutional amendment exercises — from the *Victoria Charter* through to the *Meech Lake Accord* — is the realization that they have been shaped

⁸² See *supra*, note 13.

⁸³ As examples of this perceived role, one could cite the views of the Quebec government in respect of the prosecution and hanging of Louis Riel, the suppression of the teaching of French in Manitoba and Ontario, and the enactment of *An Act to authorize school commissions to make contributions from their funds for patriotic, national or school purposes*, S.Q. 6 Geo. 5 (1916), c. 23, s.1, by which the Quebec legislature undertook to assist in the financing of patriotic, national, or scholarly endeavours, in Quebec or elsewhere.

by one overriding concern. The concern is that the kinds of political arrangements which the weaker of the two parties to the initial confederative compact (and especially French-speaking Canadians in Quebec) thought adequate to protect its interests in 1867 have proved to be insufficient one hundred years later. This parenthetical assertion, of course, does imply that French-speaking Canadians outside Quebec have not been important actors in recent constitutional discourse, and that they too have reason to feel that the arrangements put into place on their behalf are now unsatisfactory. But dissatisfaction with the terms of Confederation has been especially acute among French-speaking inhabitants of Quebec, and by ricochet, among the province's English-speaking minority. Interestingly, this feeling of the insufficiency of linguistic and cultural guarantees calls forth claims for exactly opposite constitutional remedies: French-speaking provincial political leaders in Quebec typically seek more positive or "constitutive" jurisdiction for the province; while English-speaking provincial political leaders in Quebec typically seek more negative or limiting "side constraints," like Charters of Rights, on even existing provincial jurisdiction.

Why is the constituted jurisdiction of the National Assembly of Quebec believed by French-speaking provincial political elites to be insufficient? Why should a variant of the "states-rights" view of the original compact have come to predominate? To answer these questions requires examining the specific jurisdiction actually claimed by Quebec. It is notorious that, for forty years in Quebec, provincial politicians of all persuasions have sought to expand section 92 legislative jurisdiction over matters such as trade, telecommunications, pensions, financial institutions, and immigration. They have also claimed the need to enlarge the jurisdictional competence of provincial courts and administrative tribunals, and to gain greater input into decisions about the federal judicature (both in relation to the Supreme Court and appointments to provincially constituted section 96 courts). The five proposals presented by Quebec's Minister of Intergovernmental Affairs, Gil Remillard, in May 1986 which led to the *Meech Lake Accord* are only the latest example of the Quebec government's "non-negotiable minimum jurisdictional requirements" for preserving and enhancing the national identity of the *peuple québécois*.

Before this idea of enhanced provincial jurisdiction is developed, it is important to note how the concept of two founding peoples and the labels by which each is identified have evolved since Confederation, and especially since 1960. The present conflation of people with territorial state has meant that one of the founding peoples of Canada — *le peuple canadien* — has now become, at least in the eyes of the government of Quebec, *le peuple québécois*. In 1867, when English-speaking Canadians called themselves British subjects, French-speaking Canadians were simply *canadiens*. With the rise of Canadian nationalism following World War I, British subjects became English-speaking Canadians, or Canadians, and the *canadiens* became *canadiens-français*. The crusade over the past thirty years for unhyphenated Canadianism has led to a self-recharacterization of *canadien-français* as *québécois* and the concomitant labelling marginalization of *francophones hors Québec* and English-speaking Quebecers. The increasing identification of French-speaking Canadians as *québécois* is also a reflection of statism spawned by the Quiet Revolution in Quebec, under which all residents of Quebec — including English-speaking residents — must become *québécois* if they are to be true Quebecers. It is also a reflection of the relative unimportance of French-speaking non-residents of Quebec to the politics of Ottawa-Quebec intergovernmental negotiations on jurisdictional and other constitutional questions that they can no longer call themselves *canadien-français* (in parallel to *canadien-anglais*) but must be content with the label *francophones hors Québec*. The upshot of this re-labelling is that twice since 1867, English-speaking Canadians have appropriated the term by which French-speaking Canadians identified themselves, and compelled the latter to redefine their *appartenance*.⁸⁴

To return to the principal point, there are a number of reasons why the Quebec government should now see the scope of its jurisdiction as the central element of the Confederation compact. History teaches that once political states are constituted, peoples,

⁸⁴ For this reason it does not lie well in the mouths of English-speaking Canadians to accuse French-speaking Canadians in Quebec of disloyalty when they identify themselves as Québécois. The theme of group labelling, and its impact on identity will be developed in detail in the next two sections of this essay.

as a sociological fact, generally tend to drop out of the constitutional equation — to be replaced with the notion of a people as a political fact. This is most apparent in the way that members of legislative bodies conceive of their representative role. While pre-Confederation discourse in the United Canadas was between individual members of Parliament arguing about the claims of their respective linguistic constituencies, after 1867, constitutional negotiation about language rights was being conducted primarily between governments. After a century of relative quiescence, the role of French-speaking members of Parliament from Quebec constituencies has, since the 1960s, increasingly been constitutive of national political debate and federal policy on questions of language. Unfortunately, however, the role of English-speaking members of the National Assembly in Quebec City has, after the Quiet Revolution and the rise of cultural statism at the provincial level, become largely formal and not, as previously, constitutive. The former explains why French-speaking Quebec MPs are often perceived, wrongly, outside Ottawa as mere delegates of Quebec City. The latter tends to explain why it is the voice of the Quebec government, and not that of the political representatives of French-speaking Canadians wherever their location in the country, which has been heard most loudly across the country in relation to language and culture. Thus, the anguished cry from those of good will who seek to understand questions of language rights has become not "what can be done to enhance the French language and culture in Canada?" or even "what do French-Canadians want?" but rather "what does Quebec want?"

This perception of contemporary language politics as an intergovernmental affair between Ottawa and Quebec also arises because of the changing dynamic of federal/provincial relations generally. At the same time that the growth of Quebec nationalism was fuelling the engines of statism during the Quiet Revolution, other provinces — notably Ontario, Alberta, and British Columbia — began to escape their subservience to Ottawa in matters of policy and to assert claims for increased jurisdiction over resources and more taxation powers to sustain the emerging welfare state. For the first time, strong provincial rights movements emerged across the country and the various strands of Canadian federalism — regionalism, linguistic dualism, and equalization — came to be collapsed into a single axis of federal/provincial relations. In such a

context it is not surprising that the Quebec government should be seen as the key French-language player in Canadian linguistic politics.⁸⁵

The second reason for the intergovernmental focus of language rights claims can be traced to the interplay of Quebec nationalism and its changing socio-economic dimensions. The end of anti-statism, rapid urbanization, the rise of a middle class, and the decline of the Roman Catholic church were important features lying behind Quebec's constitutional proposals. Given the contemporary role of the state, the Quebec government constantly asserts that an expanded legislative jurisdiction is necessary in order for it to protect French language and culture — be this in Quebec or elsewhere. Much of this jurisdiction, however, falls within subject-matters about which the power to legislate initially was assigned to the federal Parliament, or with respect to which the federal government has substantially deployed the spending power. Whether Ottawa has done a good job at the economic, cultural, and linguistic enhancement of French-speaking Canadians with these powers — as in the case of the Canada Council, Radio Canada, the Canadian Radio-television and Telecommunications Commission, and the National Film Board — or has, arguably, not — as in the case of transportation policy, immigration, tertiary education, and research and development — their allocation for the future is constantly on the negotiating table between Ottawa and Quebec City.⁸⁶

There is still another reason that Canadian language politics are seen as predominantly driven by the Quebec government. Many Canadians outside Quebec have their primary contact with the

⁸⁵ Apart from New Brunswick, and more recently Ontario, governments in English dominated provinces of Canada have used language politics as a vehicle for asserting provincial claims. Rather than recognize a responsibility to their own linguistic minority, they have used autonomy as an excuse to resist federalism language policies. Even Quebec has adopted this intergovernmental perspective in its legal briefs against French-language educational rights in Alberta.

⁸⁶ One of the most important, yet overlooked, reasons for the recent predominance of intergovernmental conflict was the decline in the status and authority of the Roman Catholic Church. As long as the Church was perceived as the principal defender of language and cultural rights, these revendications had no territorial limitations, and their negotiation took place between two different orders of social institution. For a development of this theme see Breton & Breton, *supra*, note 11.

French fact in Canada as a consequence of federal politicians — many of whom, such as Trudeau, Marchand, Pépin, Chrétien, and Lalonde, sponsored economic initiatives unpopular especially in the West — as a consequence of federal language policy — bilingual cereal boxes, bilingual signs in National Parks, bilingual announcements in airport and train stations. But they attribute these economic initiatives to the demands of the Quebec government acting on behalf of French-speaking Quebecers, and not to the imperatives of national government. Similarly, they attribute these language policies to the unfair dominance of Quebec MPs in the national Liberal Party governments, and not to the legitimate expectations of all French-speaking Canadians, wherever their province of residence. Hence, both within and outside Quebec, modern language politics is usually misunderstood as being exclusively about, and fundamentally the result of, federal/provincial jurisdictional squabbles.⁸⁷

To put the point slightly differently, the *Constitution Act, 1867* constituted *un état québécois*, in which French-Catholic culture could find its initial political expression. The French-speaking population was, for the first time since 1763, not either in a position of political powerlessness (as was all non-elite and non-British culture in the "pre-responsible government" era up until *circa* 1841), or in a more or less minority position within governmental institutions of the early "responsible government" period (as was the case from 1841 through 1867). That this *état* should have come to see itself as the French-speaking state within Canada was inevitable as long as Quebec remained both the only province with a French-speaking majority, and a predominantly French-speaking province. That its political elites should come to conflate the interests of all French-speaking Canadians with those of Quebec, and more generally with the scope of provincial legislative jurisdiction — trading off the former against the latter whenever they

⁸⁷ This failure to distinguish between federal and provincial governments drives the association of revisions to the *Official Languages Act*, with the "distinct society" clause, with Bill 178, and with the awarding of the CF-18 contract to Canadair in Montreal rather than Bristol Aerospace in Winnipeg. Each of these events resulted from a separate political logic and a separate political process; yet all are lumped together as evidence of how French-Canadians in Quebec wield disproportionate power in Canada.

conflicted — is a predictable consequence of establishing a federal system comprising discrete territorial units.⁸⁸ Finally, that the Quebec government should seek greater and greater legislative jurisdiction for the National Assembly in this self-constitution of *l'état québécois* is merely a corollary of twentieth century concepts of *l'état providence*. For these various reasons it is understandable how the initial conception of a Confederation compact between "two founding peoples" should have become transformed in the eyes of the country's political elites into an agreement between states; and it is also understandable how the idea of an agreement between states should come to be understood in Quebec as an agreement between the state of French-speaking Canadians (Quebec) and the state of English-speaking Canadians (the federal government). Given these transformations, one can appreciate why at least shared jurisdiction over certain powers allocated exclusively to the federal government by the *Constitution Act, 1867* should now be seen by the provincial political leadership as necessary to permit the government of Quebec to fulfill in 1991 its "historically mandated" role.

But the other linguistic group in Quebec — since 1867 constitutionally (along with Francophones outside Quebec) Canada's only true minority in the sense that it possesses no state to generate its own legal institutions — has also come to feel that the agreement reached in 1867 is incomplete and unsatisfactory. No doubt, there is much truth in characterizing Quebec's English-speaking minority as Canada's "best treated." For the neglect of the special needs of Franco-Ontarians and Acadians in the 1867 negotiations, and the fact that it required the Riel revolt of 1870 to generate recognition of these needs in Manitoba, are travesties for which the country has long suffered. Nevertheless, it is also true that English-speaking Quebecers have reason to regret the arrangements to which their ancestors agreed in 1867. The original Confederation compact presupposed plenary provincial powers in section 92 matters, and at

⁸⁸ How different the situation would now be had the federating principle been that of a personal jurisdiction defined by language and culture (regardless of geographic location). For a discussion of this and other variant forms of federalism, and the political institutions which they would imply, see J.A. LaPonce, *Langue et territoire*, Quebec, Presses de l'Université Laval, 1984.

the same time provided significant protection for the English-speaking community of Quebec in several fields which normally would be thought to fall within the realm of "matters of a local or private nature." Yet apart from assigning these areas of contentious jurisdiction to the federal Parliament, or prohibiting Quebec legislative modification to the basic formal incidents of governments (representation in the Assembly, the language of courts and legislatures, and education), very little attention was paid to erecting general negative barriers such as those associated with bills of rights against provincial government action. The federal disallowance power and educational appeals to the Governor-General, it was believed, would accomplish, just as effectively, the same goals that more detailed judicially enforced side constraints on government action had provided elsewhere. However, because the disallowance and executive appellate powers have now fallen into disuse, over the past fifteen years the English-speaking minority in Quebec, like French-speaking Canadians outside Quebec,⁸⁹ has increasingly sought judicial, rather than political, enforcement of its perceived rights under the Confederation compact.⁹⁰ Put slightly differently, the failure to secure group rights in the political arena has generated an increasing recourse to claims of individual right such as those promoted by the *Charter* in judicial forums. For English-speaking Quebecers, the initial Confederation founding peoples' compact, or "collectivities agreement," has thus been transformed into a series of separate citizen-state compacts, or "individual social contracts."

⁸⁹ See, for example, *A.G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032 [hereinafter *Forest*]; *Bilodeau v. A.G. Manitoba*, [1985] 1 S.C.R. 721; *R. v. Mercure*, [1988] 1 S.C.R. 234 [hereinafter *Mercure*]; *Société des Acadiens du Nouveau-Brunswick v. Assn of Parents*, [1986] 1 S.C.R. 549; and *Mahé v. Alberta*, [1990] 1 S.C.R. 342.

⁹⁰ For a history of the disallowance power see G.V. La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Canada Department of Justice, 1965). The power has not been used since 1943, and despite claims by some (for example, E.A. Forsey, *Freedom and Order* (Toronto: McClelland and Stewart, 1974) at 167-171) that it should be resurrected to protect civil liberties, it is probably spent. See the discussion in *Re Resolution to Amend the Constitution of Canada*, [1981] 1 S.C.R. 753 at 802. For examples of litigation to enforce language and educational guarantees see *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Chaussure Brown*, *supra*, note 14; *Devine v. A.G. Quebec*, [1988] 2 S.C.R. 790; *Quebec Assn of Protestant School Boards v. A.G. Quebec*, [1984] 2 S.C.R. 66; and *Forget v. A.G. Quebec*, [1988] 2 S.C.R. 90.

With the benefit of hindsight, it can be said confidently that neither the French-speaking minority in Canada, nor the English-speaking minority in Quebec, foresaw exactly what types of constitutional arrangement would be necessary in order to protect and advance its interests adequately in the twentieth century. Indeed, neither minority could have predicted that the metaphor of compact would have proved insufficient to arrest the constitutional equivalent of Maine's dictum — the progression from a pre-Confederation social and communitarian relationship between peoples, to a post-Confederation legal and institutional relationship between government and government, and between citizen and government. The constitutional concerns of French-speaking Quebeckers as articulated by successive Quebec governments over the past fifty years are, of course, fundamental to understanding the content of the *Meech Lake Accord*. Yet it is noteworthy that, by contrast with the concerns of French-speaking Canadians outside Quebec — which are directed to positive acts of ill-treatment or conscious neglect by provincial (and to a lesser degree, federal) governments — most complaints emanating from Quebec (with the exceptions of the imposition of conscription, the extensive deployment of the federal spending power, and the patriation of the Constitution in 1982) are not grievances about "oppressive" federal action. They are, rather, grievances about inaction, disempowerment, or a failure to take the special situation of French-speaking Canadians into account in federal policy-making.⁹¹ Until recently, the concerns of the English-speaking minority in Quebec have not been widely publicized. This has occurred mainly because, unlike the case with French-speaking Canadians outside Quebec, it has not been necessary. But with a loss of economic and political power comes a startling recognition of minority status. Like Acadians, Franco-Ontarians, and Franco-Manitobans, English-speaking Quebeckers now neither control, nor have direct political influence over, any government apparatus. Because this minority has no constitutionally recognized institution to serve as its mouthpiece, its concerns are, consequently, not as well understood as those of the French-speaking majority in Quebec.

⁹¹ The nature of these grievances, and the relationship of the *Meech Lake Accord* to them, will be discussed below, sections IV, V, and VI.

One of the great paradoxes of Canada's contemporary constitutional conundrum — a paradox revealed most starkly by looking at the *Constitution Act, 1867* through the lens of compact theory — is that the root cause of the dissatisfaction of French and English-speaking Quebecers is identical. This cause is the different socio-economic context which now prevails in Canada compared to that which existed in 1867. In order to address the precise political consequences flowing from this common cause, and the relationship of the *Meech Lake Accord* to them, it is necessary to trace a brief social history of Quebec over the past century. The Section immediately following presents, first, a picture of Canada East on the eve of Confederation. It then highlights some of the salient socio-economic changes which have occurred in Quebec and links these to various post-War legislative initiatives of the National Assembly. This historical background to the institutional arrangements of Confederation is useful for two other reasons. It will help to show why many of the issues now contributing most to the alienation of English and French-speaking Canadians from each other may not have received explicit consideration in 1867. And it will assist in explaining why the current grievances of the two language communities in Quebec (and of the French-speaking minorities outside Quebec) can neither be resolved in identical ways, nor with identical fidelity to re-establishing the underlying terms of the initial Confederation compact.

IV. THE EVOLUTION OF CANADIAN LINGUISTIC MINORITIES: CONSTITUTIONAL HISTORIES

If one were to return to 1867, one would encounter a Quebec with a vastly different geography and ethnography than that of today; in this Quebec, the English-speaking minority played a dominant role.⁹² Apart from the towns of Quebec, Montreal, and

⁹² The synopsis set out in the following five paragraphs is drawn from standard accounts of Canadian and Quebec sociology and history. In the present context, the best of these are M. Rioux & Y. Martin, eds, *French Canadian Society*, vol. 1 (Toronto: McClelland & Stewart, 1964) and M. Wade, *supra*, note 65. But compare, M. Brunet, "The British Conquest: Canadian Social Scientists and the Fate of the *Canadiens*" in Cook, Brown, & Berger, eds, *supra*, note 55 at 84, who contests even some of the data reported by English-Canadian

Sherbrooke, the province was sparsely populated, and had an almost exclusively agricultural economy, buttressed in the winter months by forestry and trapping. Geographically, the province comprised only the St. Lawrence basin; most of its current territory (what is now called Nouveau-Quebec) was under the administration of the Hudson's Bay Company. The city of Quebec was still the major governmental centre for the United Canadas, and had a substantial English-speaking population; it remained the site of the Governor-General's summer residence. Montreal itself was half English-speaking, and within the province generally about one-third of the population was non-Francophone. Much of what is today known as the Eastern Townships, the South Gaspé, the Lower North Shore, and the upper Ottawa river was initially settled by English-speaking farmers, loggers, and fishermen.

Almost all Lower and Upper Canadian industry and finance, including banks, railway, canals, shipping, trading, and manufacturing, were based in Montreal. These mercantile operations were conducted predominantly (if not exclusively) in English. Many Montreal merchants, it will be recalled, signed a manifesto urging annexation by States in the late 1840s, and only reluctantly accepted the placement of the City of Montreal in the Province of Quebec in 1867. The English-speaking community, through its long-standing Royal Institution for the Advancement of Learning, organized and financed its own primary and secondary schools. The Anglican and Presbyterian churches initially sponsored Bishop's and McGill University respectively. These religious organizations also established orphanages, poor houses, and hospitals. The equivalent educational and social institutions for French-speaking Canadians, and English-speaking Irish Catholics, were run by the Roman Catholic church, and not by any government.

From the perspective of the late twentieth century, when Toronto has clearly emerged as the centre of the Canadian economic universe, it is hard to imagine either the powerful dominance which Montreal initially exercised in industry, banking,

historians. See also, Séguin, *supra*, note 11, for an alternative interpretation of the story here summarized. For a careful examination of the different strands in English-Canadian historiography, see C. Berger, *The Writing of Canadian History: Aspects of English-Canadian Historical Writing, 1900-1970* (Toronto: Oxford University Press, 1976).

and finance, or even that this dominance lasted until well after World War II. Thus, it was only in the mid-1950s that the Toronto Stock Exchange first traded more value than the Montreal Exchange. Again, it is estimated that as late as the 1940s, the vast bulk of Canadian wealth was controlled by mostly English-speaking families living in the "Golden Square Mile" district of Montreal. Given its numbers, its economic clout, and its close association with the pre-responsible government and early responsible government levers of political power, it is not surprising that English-speaking Quebec, and especially English-speaking Montreal, had such a large influence on the Confederation arrangements.⁹³

For most of its first ninety post-Confederation years, moreover, Quebec's English-speaking community was, in its private affairs, largely a self-contained, self-reliant, and self-financing minority which asked for, and received, few services other than concessions and franchises from the provincial government. Yet, by contrast with the situation of linguistic isolationism which developed toward the turn of the century, during the initial twenty years following Confederation the elites of the two linguistic communities in Quebec interacted reasonably comfortably in the great construction of public institutions within the province. After about 1885, however, the English-speaking community was consciously excluded from many French-speaking circles and non-governmental institutions, and French-speaking Canadians were usually welcomed into the English-speaking commercial elite only if they assimilated. Through much of the twentieth century, English and French-speaking groups in Quebec largely pursued separate, but parallel, interests (right down to their two Montreal hockey teams — the Maroons and the Canadiens) with the English continuing to predominate in finance, commerce, and industry. Only in agricultural communities in the Eastern Townships, in the smaller

⁹³ One of the most evocative pictures of this influence is painted by G. Blaine Baker in "Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1948-1968" in C. Wilton, ed., *Lawyers and Business in Canada, 1830-1930* (Toronto: Osgoode Society, 1990) at 45. See also, M. Taylor, *Promoters, Patriots, and Partisans: Historiography in Nineteenth-Century English Canada* (Toronto: University of Toronto Press, 1989). For further confirmation of the influence of this community, and its representatives such as McGee, Galt, Dunkin, Holton, Huntingdon, one need only read the Confederation debates in the Province of Canada. See, Waite, *supra*, note 54.

mill-towns in the St. Lawrence valley, and in "high-brow" cultural circles in Montreal and Quebec City, did the early pattern of mutual tolerance and co-operative interaction generally persist.

In such a context, the minimalist governments of Taschereau and Duplessis (with their low taxes — the lowest in Canada — their welcoming attitude to out-of-province business investment, and their hands-off policy towards English-language religious and educational institutions) suited the interests of Quebec's English-speaking community. The anti-statist and anti-interventionist provincial government was preoccupied throughout most of the 1920s, 1930s, and 1940s with local religious, cultural, and linguistic issues, rather than with economic matters. Thus, little policy conflict developed between the provincial government and the Montreal-centred business elite (with which it maintained a cosy client relationship), and until the post-War reconstruction initiatives of the late 1940s, between the provincial government and the federal government. Aside from its persecution of unpopular political and religious minorities, the policies of the Union Nationale were even supported in many English-speaking business circles, as attested by the fact that, throughout this period, several important economic portfolios in the Quebec government were filled by English-speaking members of the provincial assembly.⁹⁴ In brief, Hugh MacLennan's characterization of the *Two Solitudes*⁹⁵ accurately captured the social situation between English and French-speaking urban communities throughout the province during the first half of this century.

But the Quiet Revolution of the early 1960s radically altered this *laissez faire* pattern of co-existence.⁹⁶ Relationships with both the English-speaking community and the federal government became strained. The "rattrapage" and "maitres chez nous" slogans championed by the Lesage government signalled a break from those assumptions about the role of government underlying the division of

⁹⁴ See H.F. Quinn, *The Union Nationale: A Study in Quebec Nationalism* (Toronto: University of Toronto Press, 1963).

⁹⁵ (Toronto: Collins, 1945).

⁹⁶ For a general assessment of the influence of the "Quiet Revolution" on the dynamic of relationships between French and English-speaking Quebecers, see J.-L. Roy, *Maitres chez nous (Dix années d'action française, 1917-1927)*, Montreal, Leméac, 1968 and J.-L. Roy, *Le choix d'un pays: Le débat constitutionnel Québec-Canada, 1960-1976*, Ottawa, Leméac, 1978.

legislative powers negotiated in 1867. These slogans also heralded a changing social agenda for the constituted state of French-speaking Canadians; henceforth, the provincial government would take an active role in ensuring not just the economic and cultural survival, but the flourishing, of French-speaking Canadians. Finally, with the acceleration of various public policy trends which initially emerged in the 1930s, the Quebec government found itself in need both of more "tax room," and desirous of greater legislative authority over the economy and social affairs. Four main points of contention emerged in the legislative programme of the Lesage government.

First, at Confederation, the role of the government in owning and managing the economy to the extent known today, and especially with the policy instruments which are now predominant – regulatory agency and nationalization – was inconceivable. That regulation of the details of the work place such as collective bargaining, workers compensation, pensions, unemployment insurance, and work place safety would be a matter of direct provincial governmental concern, was not contemplated by the political representatives of the English-speaking minority. These representatives, it will be remembered, arranged for most finance, business, and commercial jurisdiction which was then thought significant to be vested in the federal Parliament. In the 1960s and 1970s this market regulation progressed, as elsewhere in North America, from economic and social matters to political regulation through expropriation to create various Crown corporations, and through controls over the language of corporate names, the language of business, and commercial advertising, to give only a few examples. It became increasingly apparent that the notion of language-indifferent unregulated, or even government-aided, corporatism upon which the 1867 division of powers was negotiated, was no longer grounding provincial economic policies. If anything, the focus of government regulation became socio-linguistic. By the mid-1970s, the policy goal of state assistance to business was explicitly stated to be the creation of a French-speaking entrepreneurial elite.

A second area of extensive provincial legislative involvement not within the contemplation of the drafters of the *Constitution Act, 1867* was a consequence of accelerating industrialization and urbanization. These trends led to a breakdown of social support systems, with an attendant demand in the second half of the

twentieth century for standardized governmental services. Notwithstanding the grant of jurisdiction over hospitals, asylums, charities, and municipal corporations to the provinces under sections 92(7)-(9), it was assumed that this jurisdiction would be largely supervisory and indirect, or exercised through grants-in-aid to local agencies and institutions, rather than being direct, pervasive, and centralized. In a local, agricultural economy the two linguistic groups in Quebec were able to exist by and large independently of each other on the day-to-day level without much conflict. Moreover, the stability of farming communities was such that many consumer and social services were locally generated, and cultural artifacts were more or less *folklorique*. Just as importantly, those social services not provided by municipalities were not offered by the provincial government, but were the prerogative of the churches. Except for Montreal, Quebec City, and Sherbrooke, towns and cities tended to be linguistically either English or French-speaking with local services provided in one or the other language only.

With urbanization and industrialization, it became common for the provincial government to assume responsibility for regulating land use, municipal services, water, power, transport, and police. This pan-North American development meant that local control — that is, for the English-language communities, English language control — was gradually replaced by provincial control, exercised through mainly French-speaking administrative agencies which upgraded standards throughout most of the province by enacting general "norms." Thus, the local autonomy of municipalities, which insured for smaller English-speaking communities in the Eastern Townships, the Gaspé, the Outaouais, the Lower North Shore, Abitibi, and the Montreal region a measure of self-government, was gradually transferred to Quebec City where the priorities of the majority rightly dominated the political agenda.

Third, it was also beyond conception in 1867 that the provincial legislature would be required to take an interventionist and comprehensive role in relation to education. More to the point, it was inconceivable that the province would claim the power to enact regulations governing the language of instruction in primary and secondary schools. As section 93 attests, the initial concern of the English-speaking community was to protect sectarian control over schools, on the assumption that if sectarian school boards were

preserved, the content of the curriculum of, and the eligibility criteria for admission to, local schools could be locally controlled. This assumption was not ill-founded, since it was only after World War II that Quebec even established a full-blown Ministry of Education. That this Ministry should soon redesign secondary education by creating a CEGEP system in part to make up for the lack of French-language universities,⁹⁷ and then compel the Protestant school boards to adopt this system; that it should feel obligated to restrict access to English-language education among immigrants and French-speaking residents of Quebec; and that it should be required to use federal transfer payments disproportionately to build up what was, until the early 1970s, a grossly inadequate French-language university network; all would have been unthinkable in 1867. Of course, control over nonsectarian aspects of public education was also on the mind of those who negotiated the Confederation deal. For evidence, one need look no further than Schedule Four to the *Constitution Act, 1867*, by which the Normal School, the University Permanent Fund, the Royal Institution, and the Lower Canada Superior Education Fund were deemed to be joint property of Ontario and Quebec. But it was generally believed, at the time of Confederation, that each language group would retain autonomy over its own educational system, right up to, and including, its universities.⁹⁸

Finally, a much more sympathetic understanding and acceptance of the social role of religion prevailed at the time of Confederation. The *Quebec Act, 1774* clearly contemplated that the principal non-governmental institution for ensuring the cultural survival of French-speaking Canadians was the Roman Catholic Church.⁹⁹ Moreover, in Quebec much of the private law of "property and civil rights" was grounded in sectarian assumptions

⁹⁷ What are known as CEGEPs (College d'enseignement général et professionnel) are junior colleges straddling secondary and tertiary education. They were a creation of the *Report of the Royal Commission on Education* (Quebec: Queen's Printer, 1963-67), popularly known as the Parent Report, and were intended initially to bridge the educational gap between Quebec and the rest of North America.

⁹⁸ See, for example, the statement by John Rose in Waite, *supra*, note 54, at 99-100.

⁹⁹ See A.L. Burt, *The Old Province of Quebec, vol. 1: 1760-1776* (Toronto: McClelland & Stewart, 1968) at 171 ff.

(witness the submission of a draft of the Civil Code of 1866 to the Vatican for approval).¹⁰⁰ The key for English-speaking Quebecers in 1867, therefore, was to protect the position of their dissentient Anglican and Protestant churches, and to guarantee the autonomy of the socio-cultural activities of the church such as schools, orphanages, poor houses, hospitals, and so on. This was no misplaced concern, for the importance of religious institutions to minority culture is starkly revealed by the contribution of the Roman Catholic Church to the survival of the Acadians, Franco-Ontarians, Franco-Manitobans, and Fransaskois.¹⁰¹ The erosion of the social role of religion in the late twentieth century, and the necessary replacement of sectarian social institutions by governmental programs, was unthinkable in 1867. Yet the rapidity of the church's decline in French-Catholic circles in the 1960s once again had the indirect consequence of leaving the English-speaking community in Quebec without effective control over the activities of its previously independent, and initially religiously-based, social welfare institutions.

It follows that the socio-economic context which has evolved within Quebec over the past thirty years changed many of the fundamental social and institutional assumptions upon which the political compromises in the *Constitution Act, 1867* were originally grounded. Necessarily, the government of Quebec has been required to assume regulation of an economy that was becoming increasingly industrialized and urbanized. Given its general commitment to the social agenda of the welfare state, it was also necessarily obliged to fill the vacuum created by the breakdown of many French-language non-governmental social support systems. Finally, given that the technological and telecommunications revolution has exposed French language and culture to the hegemony of the English language in North America, there developed a compelling case for provincial regulatory activity over a number of matters previously thought to fall within the sphere of private activity.

¹⁰⁰ The particular context of the codification project is examined in M. Caron, "De la physionomie, de l'évolution et de l'avenir du Code civil" in J. Boucher, éd., *Livre du centenaire du Code civil*, Montreal, University of Montreal Press, 1970 at 10.

¹⁰¹ For a discussion of the role of the church, see R. Arés, "Position du français au Canada: Bilan général," (September 1954) 165 *Relations* 260.

Compounding the impact of these "necessities" on language politics within provincial jurisdiction under section 92 have been difficulties flowing from the socio-political assumptions underlying the division of powers structure established in 1867. For with the rise of Quebec economic nationalism, federal incursions into provincial legislative jurisdiction via the spending power became increasingly a point of contention. Exclusive federal jurisdiction over the national economy – financial institutions, pension schemes, taxation, trade and commerce – and over modern media, such as telecommunications, came to be seen (rightly or wrongly) as largely incompatible with the promotion of Quebec's distinctive linguistic and cultural character. The governing ethos for each of these initiatives and revendications has been the transformation since 1960 of the notion of survival in Quebec nationalist rhetoric. Defensive jurisdictional claims based on an anti-statist appeal to the prescriptive rights of nations which cannot be interfered with by the federal government, has been replaced by expansive jurisdictional claims based on a statist appeal to the right of peoples to self-determination.¹⁰²

In view of this enhanced role which has been thrust upon the provincial government, and the further role which it now claims for itself, there is some justification for the English-speaking community in Quebec to feel that it is no longer an important element in the province. Indeed, the English-speaking minority is now considered by many provincial political elites not even to be a

¹⁰² There are two separate facets of this transformation which bear notice. The first is that jurisdictional boundaries between central and provincial governments tend to be less disrupted by changing socio-economic circumstances where there is general consensus on the political goals to be pursued, a sense of cultural affinity, and of relative empowerment in each government. In other words, while other provinces underwent many of the same socio-economic changes as Quebec, these did not all immediately present themselves as issues of federalism and the division of powers. Indeed, it is only recently that they have appeared in this light in Western Canada, for much the same reason that they did so in Quebec in the 1960s.

The second facet of the transformation in Quebec is that language and cultural policy moved its locus from religion to the secular state. Nationalism is no longer the defence of religious institutions from "foreign" (*i.e.* federal) governmental intrusions; it is the deployment of governmental instruments. The role of the government is no longer to restrain federal initiative so that non-governmental cultural and linguistic organizations can flourish on their own terms; it is, rather, to exercise positively that legislative jurisdiction – a jurisdiction previously awarded to the federal government.

"founding people" of Quebec with a distinctive linguistic and cultural character; it is merely another *communauté culturelle* or ethnic group. There is also some justification for its feeling the guarantees negotiated in 1867 have proved illusory, and that its survival as a linguistic community is also threatened.

The result of recent government language policies in Quebec is that both pre-Confederation linguistic groups in Canada East now justify their constitutional claims against a background of perceived threats to their survival. Of course, and this is a key difference between the threats to English-speaking and French-speaking Canadians in Quebec, the English-speaking community is not threatened with "extinction" *per se*.¹⁰³ For even were the English-speaking community in Quebec to disappear, this would not imply the extinction of the English language in Canada. The disappearance of the French-speaking community in Quebec probably does, however, carry such an implication for the future of the French language in Canada. In this very narrow sense, then, the situation of the English-speaking minority in Quebec is more analogous to that of French-speaking minorities outside Quebec. Its demise does not threaten the continuance of the language in Canada or in North America; it merely impoverishes the majority culture. Yet because the ideas of extinction and survival are such powerful rallying cries, their invocation has led to not very finely calibrated perceptions of the threat actually faced by each language group.

Nowhere do these perceptions of which minority is truly threatened, and of the required governmental response, clash so much as in relation to the direct legislative regulation of language questions. Once again this difference of perception can be traced to changing understandings of the nature and role of government. The implications of these changing understandings of government for language regulation of non-governmental activity will be taken up in the next section of this essay. Of immediate concern here is the understanding which sustained the conception of governmental bilingualism in the *Constitution Act, 1867*. At the time of Confederation, constitutional entrenchment of bilingual courts and

¹⁰³ It is important to understand the emotive power of the notions of *survance* and "extinction" in Quebec language politics. These concepts will be discussed in detail in the next section of this essay.

a bilingual legislative process was assumed to be sufficient, in the federal arena, to protect the public political rights of all French-speaking Canadians, and adequate, in Quebec, to protect the public political rights of the English-speaking minority. In respect of those public services which did exist, section 133 would guarantee a bilingual face for both federal and provincial governments (that is, what is here called official or institutional bilingualism) in Quebec, but probably not elsewhere. In other words, the Fathers of Confederation grounded the language provisions of the *Constitution Act, 1867* in three assumptions: first, that there would be no significant "executive" acts that would touch the daily lives of citizens — no extensive government services in the late twentieth century sense of the expression; second, that only in Quebec need governmental processes be undertaken in both French and English, and services provided in either language according to demand; and third, that section 133 would apply to the most significant of these processes and services at the national level, while permitting regional unilingualism in their actual delivery outside Quebec. As an indication of the intended asymmetry of this bilingualism, it should be remembered that, until comparatively recently, two of the original Confederation partners with substantial French-speaking populations — Ontario and New Brunswick — made little effort to mirror the situation in Quebec. Indeed, in the case of the former, the government often took active steps to promote unilingualism. It is also worth noting that the federal government's own language policies typically were deficient: it was not until the 1930s that paper money and postage stamps were printed in a bilingual format; and well into the 1960s that the federal public service outside Quebec's borders, including the central bureaucracy in Ottawa, were predominantly, if not exclusively, functioning in English.

Since the adoption of the federal *Official Languages Act*¹⁰⁴ in the late 1960s, however, the clear direction of federal policy has been to complement the requirements of section 133 bilingualism with a pan-Canadian programme of bilingual government services, and to deploy government regulation of the private sector (for example, in respect of packaging on consumer goods) to mandate

¹⁰⁴ S.C., 1968-69, c. 54

bilingualism — that is, to pursue a national policy of official bilingualism. Similarly, in recent years the implications of section 133 are being pursued even by provinces, such as New Brunswick and Ontario, to which it does not even formally apply. But in Quebec, far from being understood in its initial sense of implying institutional bilingualism where warranted, section 133 is now taken by most politicians as stating an *expressio unius* maxim for public sector services and as not bearing at all on governmental regulation of the private sector. Ironically, over the last thirty years, as the English-speaking community began to interact systematically with the French-speaking majority in Quebec, that interaction has increased linguistic tension, heightening the perception of a *bona fide* threat to the French language and culture even within non-nationalist political circles. How strange it would seem to the Fathers of Confederation that the conflation of peoples with provinces now means that it is certain English-speaking Canadians (led by the English-speaking minority in Quebec) who are claiming that the compact between French and English requires the extension of bilingual services at the provincial level across the country wherever numbers warrant; and that it is the Quebec government which is arguing against a constitutional, or even moral, right to provincial bilingualism for non-Quebec French-Canadians in Western Canada — presumably in order to minimize its obligations towards its own linguistic minority.

This last comment might be misinterpreted as an unfair attack on Quebec's current constitutional position relating to minority language educational rights or on its overall legislative program of the past three decades. Therefore, the point should be rephrased in somewhat different terms, which situate the province's language legislation in a pan-Canadian context. It is important to recall the design of the *Constitution Act, 1867* and how its political purposes are understood by present participants in Canada's language debate. On one reading, the political deal of 1867 can be understood as a clever conspiracy to accomplish the assimilation agenda set out in the Durham Report by means of a divide and conquer strategy (given the failure of the 1841 Union to do so by direct political integration). This view is often also attributed to certain Lower Canadian Tory members of the "Chateau Clique," and is the favoured assessment of contemporary Quebec nationalists. On

a second reading, the *Constitution Act, 1867* can be understood as a mechanism for reconciling the various regions of the new country, and especially the Clear Grit faction in Upper Canada, to the permanence of the French fact by limiting its constitutional presence to Quebec and the Parliament of Canada. This, of course, is the view usually ascribed to Sir John A. Macdonald. Some variant of it also seems to sustain the constitutional position of many Western Canadian governments today. On a third interpretation, the Confederation arrangement can be seen as a recognition that assimilation of Canada's French-speaking population was impossible, that mere tolerance of this "quaint" people would only lead to racial conflict, and that, therefore, nothing short of a constituted government should be established to preserve and promote French language and culture in Canada. Such an opinion was rarely heard during the Confederation debates (except from George-Etienne Cartier), although in a modified form it soon became the rallying cry of the *rouges* under Dorion and Mercier, and survives today as the ground for a number of policies pursued by non-separatist Quebec governments.

This third interpretation is preferable, even though the second seems to be a better explanation of why the *Constitution Act, 1867* left non-Quebec Francophones in Nova Scotia, New Brunswick, and Ontario vulnerable to legislative neglect or, worse, to spiteful provincial activity. Before suggesting why the third interpretation is to be preferred, and is actually closer to Macdonald's position than usually thought, it is important to note that the current federal policy of coast-to-coast official bilingualism was not advanced by any participants in the Confederation debates. It is, in fact, largely the creation of the *Royal Commission on Bilingualism and Biculturalism*¹⁰⁵ in the 1960s. Historically, then, section 133 bilingualism was a theoretically important, although in practice often ineffectual, minority guarantee at the federal level for non-Quebec French-speaking Canadians. Further, the potential for assimilation of Francophones outside Quebec as a consequence of provincial legislative activity, or non-activity, was soon perceived. More than

¹⁰⁵ See Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: R. Duhamel, Queen's Printer, 1967-70) (Co-Chairs: A.D. Dunton & A. Laurendeau).

anything else, it was this perception that led to Riel's initiative only three years after Confederation to force the inclusion of a guarantee of provincial section 133 bilingualism in Manitoba by means of section 23 of the 1870 *Manitoba Act*.¹⁰⁶ Of the other jurisdictional transfers and side-constraints on provincial legislative authority in the *Constitution Act, 1867* that were made automatically applicable to the new provinces of British Columbia and Prince Edward Island, it was the federal disallowance power, and the remedial power of section 93 in relation to education, which were seen as serving to compensate for the lack of express language guarantees in provinces other than Quebec and later, Manitoba. Presumably, in 1867, even those English-speaking constitutional negotiators most sympathetic to the position of French-speaking Canadians, obviously unaware of developments on the Red River, thought that the French language and culture outside Quebec was doomed to a largely *folklorique* future and, therefore, did not merit specific protection in provincial constitutions. Only a negative federal power to prevent persecution was seen as necessary. It can only be assumed that a positive obligation upon the other three future provinces to preserve and promote their various French-speaking minorities did not seem either justifiable or politically saleable in 1867.¹⁰⁷

These special federal disallowance and appellate powers were not just understood as political devices for ensuring the hegemony of the national government. They were also intended to function in part as a minority language guarantee. For this reason, it is understandable how the omission to use them in relation to Manitoba's "official languages" legislation¹⁰⁸ in 1890, and shortly thereafter in relation to the Manitoba Schools Question,¹⁰⁹ and

¹⁰⁶ S.C. 1870, c. 3. For a discussion of Riel's initiative, see Stanley, *supra*, note 70, at 107-125.

¹⁰⁷ There is no mention in any of the Confederation debates in the Parliament of the United Canadas of such an obligation being imposed on Ontario or on the Maritime provinces. See Waite, *supra*, note 54.

¹⁰⁸ *An Act to provide that the English Language shall be the Official Language of the province of Manitoba*, S.M. 1890, c. 14, as rep. S.M. 1980, c. 3, s. 7.

¹⁰⁹ For a discussion see, W.L. Morton, "The Manitoba Schools Question and Canadian Nationalism, 1890-1916" in *Canadian Historical Association Report of the Annual Meeting* (Ottawa: C.H.A., 1951).

during the first decades of the twentieth century, in relation to Regulation 17 in Ontario,¹¹⁰ has come to be seen by non-Quebec French-speaking Canadians as the first and crucial breaches of faith by the English-speaking majority in Canada. Coupled with the federal cabinet's refusal to invoke the prerogative of mercy to halt Riel's execution in 1885 following the suppression of the North-West Rebellion, these incidents revealed the limitations of Macdonald's passive view of linguistic federalism. The federal government failed in each case to assert leadership in maintaining the moral underpinnings of the Confederation compromise, preferring instead to acquiesce in the conflation of the notion of French-Canadians with the Quebec government and to sacrifice cultural and linguistic guarantees for federal/provincial harmony through the appeasement of Oliver Mowat and Honoré Mercier.

Thereafter, all such federal and supervisory guarantees were made the hostage of provincial legislative majorities. By declining to act at the end of the nineteenth century, the federal government forfeited its legitimacy to address other issues relating to the political meaning of the Confederation compact, as Laurier was to discover during the conscription crisis of 1917. This legitimacy of the Canadian government as guarantor of language rights has, in the eyes French-speaking minorities outside Quebec, been just partly recaptured by federal policies since 1968, and then only at great cost to national programmes and institutions on the Prairies, and at a corresponding loss of federal political legitimacy in those constituencies. The reason that legitimacy in the eyes of French-speaking minorities outside Quebec has been only partly recaptured is because the federal government has refused, even as recently as 1988, in respect of educational rights on the Prairies, to exercise its supervisory powers under sections 90 and 93, or to deploy the spending power to ensure that provincial governments also respect the spirit of the Confederation compromise.¹¹¹

¹¹⁰ Regulations of the Department of Education (1912-13); Regulation 17 was upheld by the Privy Council in *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell*, [1917] A.C. 62.

¹¹¹ In 1988, the Supreme Court of Canada declared that section 133 of the *Constitution Act, 1867* was not an entrenched right in Saskatchewan despite the inclusion of a similar provision in section 110 of the order-in-council of 1870 that brought the North-West

The early loss of federal authority to act as protector of linguistic minorities has had widely differing consequences across the country, depending on the relative economic and political power of the minority in question. Take first the situation in Manitoba. From a position of significant political power based on its relative equality of population in 1870, the minority community in Manitoba declined to minimal political power based on a small relative population in the late twentieth century. As this occurred, the meaning, if not the very existence, of the legal equality of English and French languages established in the *Manitoba Act* of 1870 was corrupted. Moreover, the decline to disempowerment occurred prior to the rise of the welfare state. At this time the Franco-Manitoban minority was not a financially independent urban population which could maintain its own institutions. Consequently, because it also did not profit from the growth of governmental social institutions at a time when it could assert political power, it was never in a position of attempting to preserve these institutions from governmental neglect. Finally, given the failure of governments and courts to understand section 133 as implying official bilingualism, strict legislative and judicial rights under section 23 of the *Manitoba Act* were all the French-speaking minority could claim by way of a constitutional language guarantee; and it took almost ninety years before the courts declared the validity of even these minor guarantees in the constitutional challenges of *Forest*¹¹² and *Bilodeau*.¹¹³

Yet, as intervenants in these challenges, such as the *Societe franco-manitobaine* (SFM) also saw, to preserve the language and culture of a politically disempowered minority in 1980, the key factors are not complete judicial and legislative bilingualism, even though these also would be desirable. What really counts is, rather, guaranteed French-language social services and institutions. Hence,

Territories (of which the future province of Saskatchewan was a part) into the Union (Rupert's Land and North-Western Territory Order, 1870). See *Mercure, supra*, note 89.

¹¹² *Forest, supra*, note 89.

¹¹³ *Bilodeau v. A.G. Manitoba*, [1981] 5 W.W.R. 393 (Man. C.A.). This case was ultimately disposed of by the Supreme Court along with the *Reference Re Manitoba Language Rights*, [1985] 2 S.C.R. 347 [hereinafter *Manitoba Language Rights*].

under a post-*Bilodeau* compromise, the SFM proposed at one time to trade off at least part of the French-speaking minority's section 23 rights as announced by the Supreme Court, including translation of all post-1890 legislation and official records. These rights were to be exchanged for: first, adequate social, educational, legal, and cultural services; second, institutional recognition of the legitimacy of the French language in the legislature, the courts, and government departments; and third, a commitment to continuing legislative translation of those statutes and regulations in force from time to time. Yet, to date, the government of Manitoba has neither responded to these proposals nor made much progress in complying with the order of the Supreme Court of Canada in the *Manitoba Language Reference*.¹¹⁴

In Ontario, it is this type of functional bilingualization of government services which is the goal now being pursued with some success, even in the absence of a constitutional guarantee along the lines of section 133, by the *Association Canadienne-française de l'Ontario* (ACFO). Thus, despite being left out of the 1867 compromise due primarily to a lack of numbers, Franco-Ontarians are now achieving a degree of political power. Over the century since Confederation, their percentage of the Ontario population has grown, and since their numbers are concentrated in certain regions of the province, functional bilingualization of government services, although probably not official bilingualism across the province, is now a politically viable option. The current situation of Franco-Ontarians in large measure parallels that of Franco-Manitobans. That the constitutional position of the latter is more secure is counterbalanced by its smaller size and less powerful political position. This precarious parallel may not endure, however, since the relative political power of Franco-Ontarians is growing. Coupled with the greater sympathy of Ontario's political elite to minority language guarantees, this growth may well, in some future constitutional negotiations, lead to the achievement of section 133 bilingualism in that province.¹¹⁵

¹¹⁴ *Manitoba Language Rights, ibid.*

¹¹⁵ The improved lot of Franco-Ontarians is evidenced by recent legislation such as the *French Language Services Act*, S.O. 1986, c. 45.

In view of this belated recognition of obligations to their linguistic minorities by the governments of Manitoba and Ontario, why then are efforts in Quebec being marshalled to move in the opposite direction? Once again, it is the relative political power of the minority at Confederation, and, at present, which has shaped legal consequences. By contrast with the situation in Manitoba, judicial and legislative bilingualism at the provincial level was, when coupled with other Confederation arrangements, a sufficient minority guarantee for English-speaking Quebecers at a time of minimal government and the two solitudes. The economic power and numbers of the English-speaking community throughout the nineteenth century enabled it to generate its own social institutions, both in rural areas and in the cities of Montreal and Quebec. Moreover, regardless of whatever position it may have been able to command in provincial political circles, the English-speaking minority in Quebec — unlike the country's other provincial linguistic minorities — was always assured that it would be a part of the linguistic majority in one of the federation's co-ordinate governments, namely that in Ottawa. Finally, even with industrialization and urbanization in the first half of the twentieth century, the economic clout of the Quebec linguistic minority more than compensated for the political disempowerment which accompanied its increasingly smaller representation in the National Assembly.¹¹⁶

In all important respects, the linguistic minority in Quebec, until quite recently, never had to play the diminished public role usually assigned to such minorities elsewhere. Hence, even in the one province where it was in the majority, French language and culture was never as predominant as was English language and culture in other Canadian provinces. The national economic power of the English-speaking business community centred in Montreal, and Quebec's situation in an overwhelmingly English-speaking North America usually meant, therefore, that in situations of interaction

¹¹⁶ The evidence of this relative power was everywhere. Throughout the early twentieth century there was a practice of alternating between English and French-speaking mayors of Montreal; until 1973 there was always one English-speaking civil law justice on the Supreme Court of Canada; even now almost one-quarter of the Quebec Court of Appeal is comprised of English-speaking judges.

with their English-speaking fellow-citizens (conducted, not surprisingly, almost always in English), Quebec's French-speaking population felt on the defensive. In such a socio-political context, it is understandable how section 133 and especially its corollary, official bilingualism, has even come to be seen as a trojan horse within Quebec — not only for the public services which it demands of *l'état providence*, but for the attitude of government towards private economic activity which it entails.

Compare the situation in New Brunswick, where despite being a sizeable minority — proportionately larger than any minority other than the English-speaking community in Quebec — the Acadians in 1867 were economically disempowered. They were unable even to obtain the extension of section 133 to New Brunswick. But this disempowerment began to be overcome in the relatively recent past, aided especially by developments in the 1960s at the federal level which testified to Ottawa's commitment to protecting linguistic minorities outside Quebec. With the recharacterization and revalorization of their status, Acadians were able to accede not only to the constitutional position of a section 133 minority, but to have New Brunswick declared officially bilingual.¹¹⁷

Yet Acadians continue to lack the relative economic power of the English-speaking minority in Quebec. Despite the creation of the *Université de Moncton*, and various other institutions such as the insurance company *l'Assomption Vie*, Acadians have not been able to build up privately a comprehensive French-language social support network. Only a policy of official bilingualism stands a chance of empowering Acadians sufficiently so that French-language social services, hospitals, and welfare agencies are likely to flourish. In a nutshell, because a policy of official bilingualism in New Brunswick is necessary in order to nurture the Acadian community, such a policy can operate without threatening English language and culture in the province.¹¹⁸ It is, moreover, a politically viable policy

¹¹⁷ *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14.

¹¹⁸ Apart from the former Mayor of Moncton, Leonard Jones, most opposition to bilingualism in New Brunswick has been driven by economic, not racial considerations. The overall tenor of the New Brunswick Report on the *Meech Lake Accord*, *supra*, note 13 makes this facet of the language agenda in the province transparent.

given the absolute numbers, relative percentage, and geographic concentration of French-speaking New Brunswickers.

To recapitulate, notwithstanding certain similarities in the constitutional position of Canada's provincial linguistic minorities, the political power exercised by, and social situation of, each of these minorities are quite different. As a result, the practical consequences of the varying models of bilingualism for each province are also different. Canadian practice has shown that there are at least three distinct types of bilingualism. In descending order of intensity they are: official, or institutional bilingualism; section 133 bilingualism; and unofficial, or targetted and pragmatic, bilingualism.

Since the late 1960s, the federal *Official Languages Act* has set the standard for official bilingualism. Given the relative positions of the Acadian minority and the English-speaking majority, this mode of official bilingualism can work (and, given the impetus to include section 20(2) of the *Constitution Act, 1982*, seems to have been made to work) in New Brunswick. While the point is not free from controversy, such a policy, or at least a policy of section 133 bilingualism, could work in Ontario. On the one hand, the Franco-Ontarian community is sufficiently numerous, concentrated and, because of the public services present in Ottawa, urbanized and close to the centres of political power, that it can sustain such a claim. On the other hand, in view of its small relative size (and despite the protestations of the Alliance for the Preservation of English in Canada to the contrary), there is no likelihood that a policy of even official bilingualism will lead the province toward French unilingualism. Furthermore, as of 1990, much of the financial burden of section 133 bilingualism in Ontario has already been borne, and as is becoming increasingly evident, the strong commonality of interest between Canada's initial partners suggests the opportunity for greater constitutional symmetry in their language policies.

By contrast, given current socio-economic realities, complete official bilingualism and its entailments cannot be a viable provincial policy elsewhere in Canada. Nor can even section 133 bilingualism be successful at the provincial level west of Manitoba or in the Maritimes east of New Brunswick. For French-speaking minorities in these provinces and territories, federal official bilingualism, plus federal funding for unofficial or targetted bilingualism at the

provincial or territorial level is probably their long-term constitutional fate. Similarly, for Manitoba, the French-speaking population today appears to be too small, in both absolute and relative terms, to sustain the full panoply of entitlements associated with a provincial policy of official bilingualism. While constitutionally, the French-speaking minority has a right to section 133 bilingualism, as already suggested, the most effective guarantee of its future might well be to compromise across-the-board judicial and legislative bilingualism for judicial, legislative, and especially institutional bilingualism along the lines now pursued in Ontario, although as a constitutionally entrenched right.

For Quebec, as will be argued in detail in the next section, the English-speaking economic and trade context of North America and the continuing robustness of its linguistic minority even in the absence of governmental promotion, are such that official bilingualism, and especially its legislative entailments *vis-à-vis* the private sector, might currently be too high a price for the majority to pay for constitutional sainthood. There are three separate aspects to this point. First, it is not suggested that a policy of official bilingualism will always be a non-viable option for Quebec; times, demographics, and symbols change. Second, section 133 bilingualism can no longer be politically defended as impliedly requiring complete official bilingualism in Quebec — despite the probability that this was intended in the Confederation compromise. Of course, the English-speaking minority in Quebec does have a constitutional right to judicial and legislative bilingualism, and can certainly make a persuasive moral and political case for maintaining the bilingualism of various social and educational institutions where numbers warrant. But at least in the short-term, it has neither the economic nor political clout to demand the full panoply of government services implied by a policy of official bilingualism on the federal model. Third, the legislative programme which official bilingualism presupposes — equal promotion of both languages in all public settings, complete freedom of choice in educational matters, and an absence of regulation relating to language in private sector activities such as advertising, consumer services, and labour relations — is not presently a workable policy option for North America's only jurisdiction which has a French-speaking majority. The reasons for this will be addressed below.

How to reconcile the case for enhanced federal and provincial recognition of the claims of French-speaking minorities outside Quebec (including even the case for intrusive federal action if necessary), with the case for limitations imposed by the National Assembly on certain linguistic claims of Quebec's English-speaking minority (including even increased provincial jurisdiction over matters touching language and culture), will be the principal political challenge in the field of language rights for the 1990s. How to structure constitutional allocations of legislative power and to design the public policy instruments to achieve the latter aspect of this challenge in a spirit of toleration and respect will require almost Solomonic wisdom. The second part of this essay will be devoted to an analysis of why this need for a highly contextualized equality for linguistic minorities has come to arise, and what are likely to be its implications for Canada's future constitutional arrangements in the post-*Meech Lake Accord* period.¹¹⁹

¹¹⁹ It is important to make a further point about the use of the expression "linguistic minority" in this, and subsequent, sections of this essay. It is nowhere suggested that within each province the linguistic minority is a monolith: there are many French-speaking minorities in Ontario, just as there are many English-speaking minorities in Quebec. Indeed, part of the argument of this essay so far is that constitutional lawyers have been insufficiently sensitive to nuances in the categories they invoke. It is also important to note that both within and outside Quebec, there can be no easy identification of language and culture: while the *Constitution Act, 1867* and the *Quebec Act, 1774* may have been drafted with such an assumption in view, nineteenth and twentieth century immigration to Canada has served to dissociate the concept of an "official language" from the concept of the plural cultures which may be represented among those who speak either of those languages. For these reasons, the expression "linguistic minority" should be taken only to refer to the category of persons who, in any particular province, identify themselves with the official language not spoken by the majority.