

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

Roderick A. Macdonald

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

Abstract

In this essay, which has been 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."

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

RODERICK A. MACDONALD*

In this essay, which has been 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 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"

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* Of the Faculty of Law and the Institute of Comparative Law, McGill University.

Given that the entire essay is a revision of the Laskin Lecture on Public Law delivered on 8 November 1989, its organization and tone continue to reflect the argument in favour of the ratification of the *Meech Lake Accord* that was then made. Nevertheless, many of the points raised in this half of the essay have been rewritten into the past tense, even though they were, in fact, signalled prior to the failure of the *Meech Lake Accord*. On occasion this rewriting into the past tense causes me some embarrassment (in that the text is both more discursive and more polemical than would be appropriate in a footnoted essay published as a post-mortem), but I have decided to leave the text more or less as originally written. Where it has been necessary to rewrite parts of the essay to reflect the failure of the ratification process (which is especially the case in section VII – originally devoted to assessing various strategies for achieving ratification between 8 November 1989 and 23 June 1990), this rewriting is clearly indicated, and the original arguments are summarized in the footnotes.

¹ Part I, comprising sections I - III, appears in (1991) 29 Osgoode Hall L.J. 253. Addendum to Part I: an important bibliographic source was omitted from footnote 92. R. Rudin, *The Forgotten Quebecers: A History of English-Speaking Quebec, 1759-1980* (Quebec: Institut Québécois de recherche sur la culture, 1985) provides a comprehensive account of the role and influence of Quebec's English-speaking population and provides detailed graphs and charts showing the demographic evolution of that minority.

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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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IV. LA SURVIVANCE AND ITS IMPLICATIONS: CONSTITUTIONAL MOTIFS

In an ideal polity there would be few bigots and fewer xenophobes. People would rejoice in linguistic and cultural diversity.² Members of majorities would even attempt, through their support of various cultural activities, to cross-subsidize minorities, rather than by their passivity, allow the reverse to occur. Policy-makers would be able to distinguish real threats to weaker cultures from harmless bogeymen, and having done so, would propound

² For a superlative analysis of the difference between language and ethnicity, and the implications for political theory of recognizing the claims of "ethnicity," see W. Kymlicka, "Liberalism and the Politicization of Ethnicity" (Address to McGill University, October 1990) [unpublished paper on file with the author]. See also, for a more detailed treatment of these underlying themes, W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) [hereinafter *Liberalism*].

national motifs which call forth openness, not defensiveness. Most importantly, politicians would not seek to curry popular favour by simply refusing to carve out an identifiable position, or by playing to the fears and prejudices of their electorate.

Such, however, is not the Canada within which we live today. Indeed, many popular movements and organizations – for example, the Alliance for the Preservation of English in Canada and the Confederation of Regions Party on the one hand, and Société Saint-Jean-Baptiste and the Mouvement Québec-Français on the other – seem to share an eagerness to uncover dark linguistic conspiracies and, by ricochet, promote ignorance and intolerance. Moreover, it is rare, even among those English-speaking Canadians outside Quebec of tolerance and good will, that the effort is made to support French-language endeavours in their communities; only a few regularly listen to or watch Radio-Canada, purchase records and books published in French, or attend concerts, movies, or exhibitions offered in that language, with the consequence that the market for the cultural products of Canada's minority official language remains perilously small. Finally, a disturbing number of politicians in both majority and minority language groups pursue formal rather than substantive legislative goals. In their quest, they typically seek to limit, control, and suppress perceived threats rather than to nurture or promote the threatened object.

It is this last feature of Canadian political life, as translated by a preoccupation with the formal over the substantive, which will be addressed particularly in this section. Some commentators claim that it is the pursuit of purely formal symbols which lay behind the agenda which resulted in the *Meech Lake Accord*, just as it was the desire to suppress perceived, but not real, threats which grounded language legislation such as Bill 101³ and Bill 178⁴ in Quebec.⁵

³ *The Charter of the French Language* R.S.Q. 1977, c. C-11 [hereinafter *La Charte de la langue française* or Bill 101].

⁴ *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54 [hereinafter Bill 178].

⁵ For a thorough demolition of these pretexts see P. Fournier, "L'Échec du Lac Meech: un point de vue québécois" in R.L. Watts & D. Brown, eds, *Canada: The State of the Federation, 1990* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1990). See also, P. Monahan, *After Meech Lake: An Insider's View* (Kingston, Ont.: Institute

Thus, it is argued that both these initiatives of the Quebec government — the one ostensibly directed to enhancing Quebec's constitutional position, the other ostensibly directed to promoting French language and culture within Quebec — generally fail to address the most pressing challenges faced by French-speaking Canadians. To test the accuracy of these assessments of Quebec's present political agenda (an agenda it has pursued relentlessly over the past thirty years), and to analyze the long-term impact of this agenda on Quebec's English-speaking minority,⁶ it is helpful to recur to the motif of *la survivance*. This powerful motif has shaped the consciousness of French-speaking Canadians ever since the conquest in 1763.⁷

A good point of entry for any discussion of the relationship of *la survivance* to contemporary (that is, post-*Charter*)⁸ political

of Intergovernmental Relations, Queen's University, 1990) [hereinafter *After Meech Lake*] for a further discussion of this theme.

⁶ It should be remembered that this essay is conceived, not as a complete analysis of Canada's current constitutional conundrums, but rather is intended to evoke these dilemmas from the perspective of English-speaking Quebec, and to serve as a counterpoint to the "media-generated" image of this community as an embattled and oppressed minority.

⁷ The classic source is L. Groulx, *Histoire du Canada-français* (Montreal: Fides, 1960). For a superb analytical essay which situates this theme in historical context see C. Dufour, *Le défi Québécois: Essai* (Montreal: Hexagone, 1989). Surprisingly, while French-speaking Canadians have always been open about their fidelity to the idea of survival, English-speaking Canadians have been more reticent to acknowledge this groundwork of their nationalism. Yet the same idea has also shaped the consciousness of English-speaking Canadians since the late eighteenth century. In the form of the United Empire Loyalist myth, survival of a British North America against the American empire is the *raison d'être* of the country. See for representative examples, G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1965); W. Gordon, *A Choice for Canada* (Toronto: McClelland & Stewart, 1966); T. Lloyd & J. McLeod, eds, *Agenda 1970: Proposals for a Creative Politics* (Toronto: University of Toronto Press, 1968); I. Lumsden, ed., *Close the 49th Parallel* (Toronto: University of Toronto Press, 1968); and P. Berton, *Why We Act Like Canadians: A Personal Exploration of Our National Character* (Toronto: McClelland & Stewart, 1982). See also M. Atwood, *Survival* (Toronto: McClelland & Stewart, 1981). The impact of the survival motif on the reaction of many English-speaking Canadians outside Quebec to the *Meech Lake Accord* will be examined in the next section of this essay. For the moment, it is sufficient to note that while Pierre Trudeau understood how to play to English-speaking Canadian nationalism, he never did reconcile himself to Quebec nationalism. Conversely, while Brian Mulroney early on reconciled himself to Quebec nationalism, he never understood English-speaking Canadian nationalism. For further discussion, see below at 561ff.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

activity is the list of Quebec's minimum demands as set out in the *Meech Lake Accord*, and the threats to French language and culture in Canada which these demands were thought to palliate. In the paragraphs which follow, the initial concerns of the Quebec government will be kept separate from those advanced by other provinces, and from those provisions of the *Meech Lake Accord* which might be seen to have had their origin in unsolicited federal largesse.⁹ As a reflection of the survival motif, there is no doubt that the most important symbolic concern of the Quebec government was the recognition, through the "distinct society" clause, of the province's social and constitutional uniqueness.¹⁰ The function of this clause in providing a structure of interpretation for the constitution which would acknowledge the special responsibility of the Quebec government in promoting French language and culture in Canada will be addressed in the next section of this essay. For the moment, attention will be directed to four of the other five issues which Quebec brought to the First Ministers' Meeting at Meech Lake in 1987: immigration, the Supreme Court, the spending power, and the amending formula.¹¹ Each of these will be briefly noted, followed by an assessment of the extent to which the terms of the *Meech Lake Accord* actually address the concern in question.

The reason for including the first of these issues, immigration, flows from apprehension about the demographics of a declining birth rate in Quebec and the relation of immigration to

⁹ For a statement of the position of the Quebec government see the declaration by Gil Rémillard, Minister of Intergovernmental Affairs, presented at Mont Gabriel on 9 May 1986.

¹⁰ The concept of "société distincte" was, in effect, the mid-1980s version of a long succession of slogans meant to signal the constitutional importance of the compact view of the British North American political state. It thus has strong emotive roots with the "deux nations" concept of Daniel Johnson, *infra*, note 47, but not with the "deux peuples fondateurs" motif of the post-1968 federal government. For a more detailed elaboration of the constitutional consequences of these motifs see section II of this essay, *supra*, note 1 at 261.

¹¹ There were initially six points raised by the Mont Gabriel declaration. But one, that provincial governments recognize in the Constitution the rights of French-speaking Canadians outside Quebec, was abandoned because of the opposition of the Western Premiers during the negotiations at Meech Lake. In other words, the sacrifice of this condition was a further reflection of the transformation of the initial compact idea into a more states rights theory of English-French relations in the federation. See *supra*, note 1 at 298-306.

these demographics.¹² What in many European countries is euphemistically called "population policy" currently falls within provincial jurisdiction as a matter of property and civil rights. But under section 95 of the *Constitution Act, 1867*, immigration is a shared jurisdiction in respect of which federal legislation is paramount. How, it has long been argued in Quebec, can the province organize its population policy, and thereby maintain its linguistic and cultural distinctiveness (that is, its *visage français*) in the face of massive immigration over which it has little effective control? Two aspects of this concern about Canadian immigration policy predominate even today. In the first place, whether due to federal immigration initiatives or not, for several decades Quebec has failed to attract a population-proportionate share of immigrants to Canada. Hence the fear that the weight of its voice in the national political arena, as measured by its number of seats in Parliament, will steadily diminish.¹³

But the problem for Quebec is not just that most immigrants to Canada seek to join what they perceive as the economic mainstream, and, therefore, do not settle in Quebec. It is also that most immigrants even to Quebec (especially in the post-World War II period) have wanted to learn English and to affiliate with that culture by becoming English-speaking Quebeckers. Canada is conceived by most immigrants as an English-speaking country, and this is a perception which, it is claimed, federal immigration offices overseas often unconsciously promote. These two consequences of Canadian immigration policy have been apparent at least since Clifford Sifton's initiatives in the century's first decade. They were to provoke profound disagreements between Quebec City and Ottawa during the late 1940s and early 1950s, as well as from the late 1960s to the present.¹⁴

¹² For an excellent analysis see D. Bonin, "L'immigration au Québec en 1990: À l'heure des choix" in Watts & Brown, *supra*, note 5 at 137 and D. Latouche, "Le pluralisme ethnique et l'agenda public au Québec" (1989) 61 *Rev. inter. d'action communautaire* 11.

¹³ Between 1867 and 1980, Quebec's share of the population of Canada declined from well over one-third to just over one-quarter, and its representation in the House of Commons from 65 of 181 seats to 75 of 292 seats.

¹⁴ For a summary of Canadian immigration policy, see J. Atchison, "Immigration in Two Federations" in B. Hodgins *et al.*, eds, *Federalism in Canada and Australia: Historical*

Compounding the Quebec government's purely numerical concerns about immigration policy is a major social concern about the "assimilation" of immigrants. Only since the late 1940s, and especially only since the 1970s, has Quebec experienced a major wave of non-British Isles immigrants, almost all of whom settled in the Montreal region. Moreover, although most new immigrant groups were from southern European countries where the Roman Catholic religion was dominant, these groups nevertheless found their primary attachment within Quebec to the English-speaking minority. As a result, to a degree not experienced in the United States and most of the rest of Canada over the same decades, French-speaking Quebec (even in the Montreal region) remained an essentially unicultural society. This means that the province does not have a history of accommodating itself to immigrants. Even in more recent years, when French-speaking immigrants from South-East Asia, Lebanon, North Africa, or Haiti have begun to become established in Quebec, there have been difficult problems of assimilation (or *intégration*).

The standard problems of assimilating immigrants are exacerbated in the case of Quebec because many French-speaking Canadians see both their language and culture as being directly threatened by immigration. It is, unfortunately, widely believed that a multicultural *francophonie* in Quebec may lessen the capacity of French culture to resist domination by English-Canadian and American culture. For many French-speaking Quebecers, the notion of multiculturalism, like the notion of bilingualism which accompanied it, is believed to be an English-speaking North American colonizing concept. Several events during the latter stages of the *Meech Lake Accord* ratification exercise revealed this fear of multiculturalism: the president of the Québec Chambre de Commerce questioned whether the French-Canadian race can survive current levels of non-white immigration; the Commission des Écoles Catholiques de Montréal circulated questionnaires asking parents whether they would prefer that immigrant children be segregated into separate classes; and a former cabinet minister hosted a major

television documentary about immigration provocatively entitled "Disparaître."

Whether or not one is prepared to dismiss at least some of these concerns and incidents as flowing from ignorance based on a lack of exposure to the phenomenon, it is clear that the issues of immigration and immigration policy are of real concern in Quebec. The imbalance in English and French-speaking immigration, and the understandable desire of many allophone immigrants to Quebec to learn English, is both a cause and a symptom of Quebec's demographic apprehensions. Yet it is also clear that, in the absence of an evolution in the attitudes of French-speaking Quebec towards the multicultural *francophonie* likely to result from the assimilation of more immigrants, the provisions of the *Meech Lake Accord* would not adequately have addressed these concerns. For example, while the Cullen-Couture formula¹⁵ may assist the government of Quebec in recruiting French-speaking immigrants to Quebec and integrating them into Quebec society, it is difficult to see how a constitution can guarantee that a specified minimum percentage of immigrants will either choose to locate in Quebec, or decide to remain there and to retain an identification with the French language and culture. Nor is it immediately apparent how constitutionalizing the Cullen-Couture formula through the proposed addition to the *Constitution Act, 1867* of sections 95A through 95E would have overcome fears of multiculturalism and the possible transformation of North American Francophone culture through immigration.¹⁶ Nevertheless, the further specification of already shared jurisdiction over immigration which the *Meech Lake Accord* offered did acknowledge the special importance of immigration policy to Canada's linguistic minority. It was, therefore, a powerful symbol to a Quebec preoccupied with demographic issues.

¹⁵ The Cullen-Couture formula was an intergovernmental agreement signed on 20 February 1978, by Jacques Couture, Quebec Immigration Minister, and Bud Cullen, Federal Immigration Minister. It was renewed every three years thereafter. Its basic principles were picked up in the *Meech Lake Accord* in the proposed sections 95A through 95E of the *Constitution Act, 1867*.

¹⁶ This point is all the more evident since proposed section 95B(3) subjects any intergovernmental agreements on immigration to the *Charter*, and, in particular, to section 6 on "mobility rights." For commentary, see P.W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) at 21-25.

A second threat to *la survivance* thought to have been addressed by the *Meech Lake Accord* relates to the structure of federal institutions, and to Quebec's place in the country's political arena. With a shrinking percentage of Canada's population, many provincial politicians came to fear that Quebec's influence in Canadian public affairs was declining and would continue to do so even more rapidly in the future. This perception existed notwithstanding that with the exception of less than twenty years since Confederation, and only two years in the past seventy, the party holding the most seats in Quebec had formed the federal government.¹⁷ Indeed, for all but twelve of the last forty-three years the Prime Minister of Canada has represented a Quebec constituency.¹⁸ Moreover, as Western Canadians are quick to point out (wrongly in fact), the federal political agenda often seems to be driven by the need to cater to Quebec, as witness the special treatment of hydroelectricity in the National Energy Program, and the allocation of the F-18 contract to a Montreal aerospace company. Nevertheless, Quebec provincial politicians do not see either of the above federal decisions as relevant to the claims they make about their declining influence in Canadian affairs.¹⁹

The perception of a lack of real power, despite the Trudeau-era slogan "French power" feeds the demand for additional non-"rep-by-pop" constitutional adjustments to purely federal institutions. Rather than political empowerment through constitutional guarantees visited upon individuals, Quebec elites typically have sought institutional redesign as a means of compensating for an anticipated waning in the political influence

¹⁷ The exceptions were the Mackenzie government (1873-1878), the Borden governments (1911-1921), the Bennett government (1930-1935), the first Diefenbaker government (1957-58), and the Clark government (1979). For a statistical analysis of elections prior to 1972 see J.M. Beck, *Pendulum of Power: Canada's Federal Elections* (Scarborough, Ont.: Prentice-Hall, 1968).

¹⁸ None of John Diefenbaker (1957-63), Lester Pearson (1963-68), Joe Clark (1979), or John Turner (1984) represented a Quebec constituency.

¹⁹ The failure in many parts of Western Canada to dissociate the federal agenda of Prime Minister Trudeau from that of the Quebec government means that many common sources of frustration with the federal government go unrecognized. For a brief discussion see G. Robertson, *Does Canada Matter?* (Kingston, Ont.: Institute of Intergovernmental Relations, 1990) at 4-7.

which can be wielded by MPs from Quebec. Those who hold to the just recited facts about the base of support of parties holding power federally is evidence that Quebec's fear of marginalization is unjustified need look no further than the United States between 1840 and 1860 for a lesson that population ultimately drives politics. Even as late as the *Dred Scott*²⁰ decision in the 1850s, the South's political hegemony looked reasonably secure. Ten years later the Confederacy was devastated and the South's influence on national affairs was negligible.

The claim that several federal institutions are in need of restructuring reflects one response to this concern. In this respect the *Meech Lake Accord* themes of Senate reform and Supreme Court reform actually share a common root, even though the former was never on the Quebec agenda. The result of the *Meech Lake Accord* process as concerns the Senate was, moreover, hardly responsive to Quebec's position on the reform of federal institutions.²¹ If anything, the *Meech Lake Accord's* provisions respecting the Senate would likely have resulted, in any future round of constitutional negotiations, in a direct conflict between Alberta and Quebec over the political function of the Senate and the representative structure needed to fulfil that function. In 1867, the Senate was conceived, at least in part, to reflect regional, not provincial, interests in such a way that Quebec would always control about one-third of its membership. Given the minimal political role the Senate soon came to play, Quebec could afford to see its relative representation within that body decline over the past century. But a Triple-E Senate²² — especially were it to be equal (on a provincial, not regional basis) and effective (in shaping the Parliamentary legislative agenda) — would be directly opposed to

²⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For a review of this era in American political life, see J. MacPherson, *Battle Cry of Freedom* (New York: Ballantyne Books, 1988) c. 1-7.

²¹ For analysis, see Hogg, *supra*, note 16 at 16-20.

²² For a brief explanation of the Triple-E Senate Plan and the relationship of the *Meech Lake Accord* to it, see D. Elton, "The Enigma of Meech Lake for Senate Reform" and P. McCormick, "Senate Reform: Forward Step or Dead End?" in R. Gibbins, ed., *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing and Publishing, 1988) 22 and 33, respectively [hereinafter *Perspectives From the West*].

Quebec's interests. For it would rest on a "states rights" (or provincial egalitarian) rather than a compact (or compact tempered with regionalism) view of Canadian federalism, a conception which denies Quebec's special role as a province within the federation. More importantly, a Triple-E Senate would also further diminish the already declining influence of Quebec representatives in the federal legislative process.

As for the redesign of the Supreme Court, the proposals set out in the *Meech Lake Accord* show very clearly the complexity of Quebec's concerns.²³ For over twenty-five years, Quebec had sought some extended and formalized input into Supreme Court appointments, or even some restriction on the Court's jurisdiction over private law matters, primarily on the basis of the distinctiveness of the civil law and the particular impact of the Court's division of powers jurisprudence on Quebec.²⁴ With the advent of the *Charter* and the "publicization" of the Court's agenda, the need to legislate a limitation on private law appeal rights or to increase the number of civil law jurists on the Supreme Court has diminished in importance. But, at the same time, the *Charter* means that a new and important dimension of policy-making in relation to language and education has devolved to the Court. This increases, as far as Quebec is concerned, the reasons for substantial input into the appointments process.²⁵ Indeed, since 1949, there has sometimes been a discernible cleavage in the constitutional, quasi-constitutional, and civil law opinions of Quebec and non-Quebec judges, even when the former are drawn from among elements in the Quebec bar most sympathetic to the federal agenda. Ensuring that Quebec's

²³ Once again, for analysis of the entire panoply of amendments relating to the Supreme Court, see Hogg, *supra*, note 16 at 27-36. For a Quebec perspective, particularly on the appointments process, see G.-A. Beaudoin, *La Constitution du Canada: Institutions, partage des pouvoirs, droits et libertés* (Montreal: Wilson & Lafleur, 1990) at 830-34, and sources cited at footnote 34 therein [hereinafter *La Constitution du Canada*].

²⁴ See G.E. LeDain, "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level" (1967) 2 R.J.T. 107.

²⁵ The various aspects of this question are addressed in G.-A. Beaudoin, ed., *La Cour suprême du Canada* (Cowansville, Que.: Yvon Blais, 1986), especially by the papers by François Chevette and Yves de Montigny therein.

distinctive voice continues to be heard in the policy discussions of the court became, consequently, an important objective.

From the 1960s onward, there appear to have been at least three dimensions to Quebec's plea for reforming the Supreme Court. Historically, the most cogent of these has been its concern with preserving the integrity of civil law as such.²⁶ Yet, even acknowledging that common law jurists on the Court have frequently misinterpreted the Civil Code, there is no absolute reason to require the conflation of the goal of preserving the civil law with the interests of the government of Quebec in its role as protector of French language and culture. This is especially true given that the civil law of Quebec is not a pure tradition and given that it has been developed and practised by both French and English-speaking Canadians.

The second dimension of Quebec's distinctiveness claim as it has related to the Supreme Court concerns language. If Quebec is the primary locus of the French language and culture (including legal culture) in Canada, then it should have a particular responsibility for ensuring the number and the quality of French-speaking jurists appointed to the Court. Once again, however, there is no reason to conflate this concern with the interests of the Quebec government. While in the past, one of the three civil law seats on the Court was typically held by an English-speaking jurist, since the retirement of Justice Douglas Abbott twenty years ago, all three Quebec seats have been filled by Francophones. Moreover, the case for Quebec exercising a special role in the nomination of Francophone jurists is less compelling today in view of the recognition of the constitutional status of Acadians, Franco-Ontarians, and Franco-Manitobans. Today members of each of these minorities serve on provincial courts of appeal in all three provinces.

If, however, the concern is with protecting Quebec's distinctive political interests in the *Charter* era, the mechanics of the Supreme Court nomination process assume a major significance in

²⁶ For an elaboration of this theme see J.L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975) 53 Can. Bar Rev. 715.

maintaining Quebec's place in federal institutions.²⁷ Yet, as with the immigration issue, it is far from obvious that the appointment formula of the *Meech Lake Accord* actually addressed this third issue (or indeed any of the three concerns raised in the text) in a meaningful way. For unless the ultimate object of the exercise was to reduce the role of the Court to that of a legislative delegate, it is uncertain that a doubling of political input into judicial selection would ensure a Supreme Court more responsive to Quebec's special concerns. As long as jurists from other provinces have an adequate understanding of the French language and a keen awareness of the particularities of the civil law, the existing reservation of three seats to members and former members of the Bar of Quebec ought to meet adequately the systemic concern.²⁸ Furthermore, it is uncertain that even three seats on a court of nine will generate either a significant rebalancing of the Court's division of powers jurisprudence or a heightened sensitivity to those linguistic and cultural preoccupations of Quebec which might seem to conflict with *Charter* rights, even were these three judges to be radical decentralists. Here again, however, the symbolism of participation in the appointment of federalism's umpires is of major importance to a Quebec government concerned with encroachments on its legislative jurisdiction (especially through the oblique vehicle of *Charter* interpretation) and with the possibility of a declining role in Canadian political institutions.

Yet another perceived threat to *la survivance*, a threat which is of particular significance in periods of large government deficits, is the loss of control over the agenda of social and economic programmes which an essentially unrestricted federal spending power implies.²⁹ The first aspect of this concern has only recently been

²⁷ See *supra*, note 25, particularly the introductory essay by G.-A. Beaudoin.

²⁸ I leave it to the reader to determine whether recent appointments to the Supreme Court have evidenced the commitment of the federal government to ensuring respect for these two preconditions.

²⁹ Ironically one of the earliest critics of the federal spending power was Pierre Trudeau. See P.E. Trudeau, "Federal Grants to Universities" in P.E. Trudeau, ed., *Federalism and the French Canadians* (Toronto: Macmillan, 1968) 79. For an interesting analysis of the economic implications of the spending power and of the fiscal agenda of the current government see T. Courchene, *Forever Amber* (Kingston, Ont.: Institute of Intergovernmental

perceived outside Quebec as the federal government attempts to reduce its deficit by off-loading a greater share of the cost of maintaining shared-cost programmes it essentially imposed on provinces. The second aspect of the spending power, control over the agenda of social programmes, has not attracted much attention outside Quebec and indeed, in many parts of the country, federal spending in such fields is seen in the opposite light. The federal government *ought* to establish national standards for social programmes and use its financial power to enforce these standards.

For Quebec, an unrestricted federal spending power has meant that the central government was able to institute its own programmes that neutralized provincial social initiatives at the same time that they led to smaller unrestricted transfer payments. Additionally, shared-cost programmes have been deployed even more directly to set provincial social and fiscal priorities. The continuing threat represented by the federal spending power is its capacity to cripple provincial economic initiatives by committing (as in the cost of legal aid, medical insurance, pensions, or day care) an inordinate share of provincial revenues to federal priorities, or to federally determined structures for achieving shared priorities. Compounding this loss of control is the fact that the cost of all pan-Canadian tax expenditures falls disproportionately on wealthier provinces. To the degree that federal shared-cost programmes become linked with the idea of equalization, then provinces not wishing to support such programmes are double losers. Through cost-sharing they must commit their own resources to federal priorities. At the same time they are squeezed from the taxation field by the higher revenue demands of national tax authorities who must finance the federal contribution to these shared-cost programmes.³⁰

Relations, Queen's University, 1990). See also, R. Boadway, J.M. Mintz & D.D. Purvis, "The Economic Policy Implications of the *Meech Lake Accord*" in K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 225.

³⁰ For a sustained critique of the spending power along these lines see A. Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 *Can. Bar Rev.* 448. Petter also signals the important difference between equalization and shared-cost programmes, noting that most of the political arguments against restricting the federal spending power are misdirected – being in fact arguments in favour of equalization.

Here also, it is not clear that the provisions of the *Meech Lake Accord* successfully addressed the real economic threat posed by the spending power. For what the federal government would not have been able to achieve administratively through shared-cost programmes, it could still have accomplished through other tax expenditures such as income tax rebates and deductions (along the lines of the Canadian Home Insulation Programme), or through direct transfers to individuals (along the lines of the Family Allowance scheme), or even through declarations under section 92(10)(c), Crown Corporations and like vehicles. It also bears notice that existing constitutional conventions as well as the extensive deficit are such that the occasions for unilateral federal *dirigisme* in fields of provincial jurisdiction are probably limited, by contrast with the virtually unrestricted federal power of tax expenditure or direct payments. The symbolic threat for several provincial politicians in Quebec seems rather to be the possibility of creating too many programmes partly bearing the Maple Leaf flag in fields of exclusive provincial legislative jurisdiction. Nevertheless, without at least some notion of cost-sharing flexibility and restrictions on federal spending in provincial fields, the *Caisse de dépôt et de placement*³¹ would not have been established and the economic benefits it has produced for Quebec never realized. The example of the *Caisse* illustrates that there can be a positive side to opting out and that a major part of the concern in Quebec relating to federal agenda-setting through the spending power is the opportunity-cost it entails.³²

³¹ For an assessment of the performance of the *Caisse* see S. Brooks & A. Tanguay, "Québec's Caisse de dépôt et placement: tool of nationalism?" (1985) 28 Can. Pub. Admin. 99, who argue that it has been a remarkable success, and has not been deployed as a tool of Quebec nationalism. Many commentators, such as the above authors also suggest that the Canada Pension Plan would be in much better shape today if it had been organized along the lines of the *Caisse*.

³² Several opportunity-cost examples come to mind: (i) the different priorities of Quebec's Fonds de recherche et de l'aide à la recherche and the federal government's SSHRC, NSERC, and MRC; (ii) the different schemes for delivering Legal Aid and Medicare in Quebec, which do not always fit well with federal presumptions; and (iii) Quebec's inability to get the federal government to adjust its income tax rebates to reflect provincial investment priorities as shown in the Quebec Stock Savings Plan.

The final perceived threat to the agenda of *la survivance* which the substantive provisions of the *Meech Lake Accord* were designed to palliate, is typified in the so-called "scandal of the midnight deal" of 1982. This event confirmed Quebec's worst fears about being excluded from crucial constitutional decisions and drove home perceptions of the provincial government's political disempowerment. A revised amending formula which responds to Quebec's desire to gain a veto over constitutional amendments relating not only to the division of powers but also to changes to major pan-Canadian political institutions and to structures of federalism therefore came to be perceived as essential. The object of an extended veto power in this second sense would be to control changes to the federal features of the Constitution. These include the principle of proportionate representation in the House of Commons, the composition and powers of, and method of selection for the Senate, the Supreme Court, and the evolution towards provincial status of the federal territories. Each of these features of the Constitution bear directly on Quebec's traditional concern about protecting its role in Canadian political institutions.³³

Yet this interest of the Quebec government — the key institutional player at Meech Lake defending French language and culture — was transformed by other provinces into an issue of straight provincial power through a revised amending formula grounded in the unanimity principle. More than any other feature of the constitutional amendment process, this shows how the fact of the Quebec government coming to embody one party to the Confederation compact has led, under the 1982 formulae, to a reconception of the compact as a "state's rights" motif. Tragically, as the reluctance of at least two provinces to endorse the *Meech Lake Accord* reveals, a unanimity rule can often lead to constitutional consequences directly contrary to Quebec's interests. In the negotiations leading to the *Meech Lake Accord*, Quebec's

³³ It is true, of course, that in the April Accord of premiers (April 1981), the Lévesque government appeared ready to give up the veto which had always been claimed by Quebec governments to that point. This was probably a strategic error since it later paved the way for the agreement between all the other provinces which excluded Quebec later that year. Nevertheless, it is worth noting that the conditions under which Quebec appeared prepared to surrender its veto claim were so narrow that, had the other provinces respected its terms, the "midnight deal" would never have been negotiated.

interests could have been accommodated by readjusting the 7/50 per cent formula currently in place for the various contentious matters in section 42 of the *Constitution Act, 1982* to a 7/75 per cent formula, or even by giving Quebec a special power to veto certain categories of amendment. What is clear in the current context, however, is that the concept of a Quebec veto over proposed amendments to the constitution addresses legitimate concerns about the possibility that, on some key issues which may not even directly deal with language and culture, the provinces will divide not by region, not by size, not by the nature of their economies, but by the language of their majority. The symbolism of a veto, then, even if it would have to be shared, in certain cases, with other provinces, cannot be discounted as a key feature of Quebec's constitutional agenda.

These four issues, then, are the political concerns which were at the root of the Mont Gabriel declaration and which subsequently, formed the basis of Quebec's constitutional reform agenda pursued at the Meech Lake and Langevin Block negotiations. As reflecting threats to *la survivance*, they can be reduced to a single substantive theme with two variations. The theme is that the cultural and linguistic specificity of Quebec makes it a province unlike the others, regardless of its relative share of the Canadian population. The variations are, first, that this distinctiveness requires special accommodation of its jurisdictional claims in relation to population policy and finances; and second, that this distinctiveness demands special accommodation of its interests in federal institutions and processes, including processes of constitutional amendment. Given the political climate in Quebec since 1960 and Trudeau's promise of renewed federalism in the referendum debate of 1980, these were not only important substantive goals, they were highly charged political symbols.³⁴

But, however important these items may be symbolically, and however necessary it may have been to enact them as constitutional amendments rather than deal with them through political

³⁴ One of the best short statements of the various symbolic dimensions of the *Meech Lake Accord* process can be found in Monahan, *After Meech Lake*, *supra*, note 5 at 14-19. See also, P. Fournier, *A Meech Lake Post-Mortem* (Montreal: McGill-Queen's University Press, 1991).

accommodation, they do not effectively address the main threats to the survival of French language and culture in Canada. For, despite the impression given by ill-tempered comments of certain groups in Ontario and Western Canada, the most pressing threats to Francophone culture do not come from any particular constitutional arrangements now existing in Canada, or from the unilateral action of the federal government. Rather the principal threats to *la survivance* are, on the one hand, internal (or psychic), and on the other hand, largely external to Canada, and are grounded in the global economy.³⁵ Surprisingly, with the possible exception of the more general "distinct society" clause — which might conceivably have been deployed to support a political claim by Quebec for shared jurisdiction or at least special input into co-operative agreements — the *Meech Lake Accord* did not speak to many of those matters of federal jurisdiction, especially in connection with economic policy, which would be most important to generating a confidence among French-speaking Quebecers about *la survivance*.³⁶ It is important, therefore, to recognize the important symbolism of the *Meech Lake Accord*, yet acknowledge that it would have been only a part of the required political response to the agenda of *la survivance*. Just as the *Constitution Act, 1867* was not the final word on issues of French/English relations across Canada — of interprovincial affairs, and of federal/provincial jurisdiction as it relates to Quebec — neither could have been the *Meech Lake Accord*.

So much for this sketch of the *Meech Lake Accord* as a response to the motif of survival. Similar, and more cogent, points can be made about the reality of many of the threats to which Bill 101 (*La Charte de la langue française*) and Bill 178 appear to be addressed. Even less than current constitutional arrangements and legislative actions of the federal government can it be said that the

³⁵ What are identified here as internal, or psychic, threats are concerns relating to self-perception and self-confidence: to the sense of commitment to a common project. They will be examined in greater detail in the next two sections of this essay.

³⁶ The kinds of jurisdictional transfers which, ultimately, came to be perceived as necessary once Quebec federalists lost confidence in their ability to wield any influence in the federal arena, are those listed in the *Allaire Report*. See Liberal Party of Canada (Quebec), *Un Québec Libre de Ses Choix (Allaire Report)* (Quebec: Liberal Party, 28 January 1991) [hereinafter *Allaire Report*].

day-to-day activities of ordinary English-speaking Quebecers directly threaten the French language or culture. Yet, several aspects of Bill 101 seem to confuse largely external and economic threats with the ordinary routine of private individuals. Some of these merit explicit mention, if only for illustrative purposes.

The small shopkeeper who displays English commercial signs to an overwhelmingly English-speaking clientele in a largely English-speaking neighbourhood in western Montreal (in contravention of section 58 of the *Charte de la langue française*) is not a threat to the survival of French culture. But Johnny Carson, American movies, major league baseball, and the National Football League certainly are. Bluntly put, the affection of French-speaking Quebec for the products of the US cultural industry is one of the major challenges to the flourishing of indigenous culture.³⁷ Once again, the elderly couple who wishes to receive in English the government social services for which they have largely paid is not a threat to the delivery in French of Quebec's social programmes. But the culture of McDonald's hamburgers, the preference for imported consumer goods, and a branch-plant economy designed to serve the North American market are. In a word, the foreign technological dominance of key aspects of Quebec's economy, especially since so much of this technology is packaged for export in English, poses a palpable challenge to the attempt to maintain a viable French-language technology. Finally, the young, Francophone, upwardly mobile parents wishing to educate their children in English schools so as to gain an advantage on those who are learning English as a second language in Quebec are not directly an assimilationist threat. But inferior primary and secondary education in French, the devastation of Quebec universities through significant underfunding, and the substitution of post-secondary educational quantity for

³⁷ Interestingly, sections 51-71 of the *Charte de la langue française* implicitly recognize this by their attempted prohibition of movies in English unless French-language versions are also available, by their attempt to require that French-language versions of games and toys be available, and so on. But the difficulty of controlling culture itself (be this high culture or low culture) means that the prohibitions can realistically only touch "permanent" media: print, film, videotape, and so on. For similar observations made in the context of English-language Canadian culture, see the sources cited, *supra*, note 7. The Canadian content regulations of the CRTC and the *Income Tax Act* prescriptions in respect of advertising in "foreign" periodicals are of the same piece as sections 51-71 of the *Charte de la langue française*.

quality are. That is, the continental economy as promoted by the Autopact, hydroelectric exports, the Free Trade Agreement, and various other economic policies, including their rhetorical underpinnings, are what primarily drives the anglicization of immigrants and the entrepreneurial classes.

The citation of these counter-examples to a number of the ambitions of the *Charte de la langue française* should not be taken as an argument that it is fatally flawed. Many of its provisions relating to the language of the work place in large enterprises (sections 41-50), to the educational obligations of non-Francophone immigrants (sections 72-88), to the language requirements placed on those holding a professional qualification (section 35), to restrictions on the merchandising of movies, toys, and games where French-language versions are unavailable (section 54), and even to the language of outdoor commercial signs and advertising (section 58), can be explained and justified as being genuinely directed to the political agenda of *la survivance*. But Bill 101's symbolism also has a negative and repressive undertone which, in many places, seems purely spiteful. In these respects, the Honourable Dr. Camille Laurin's psychiatric prescription has a hidden "double-whammy" for the survival of the French language and culture.³⁸ It desensitizes one to real threats, and it equates the cultural flourishing of the majority with the cultural repression of the local minority. In other words, the legislative cure of Bill 101 is sold as being virtually painless and cost-free: you do not have to assume personal responsibility for your language and culture because the government is taking all necessary steps. Moreover, it would seem that certain aspects of Bills 101 and 178 are designed less to promote the French language and culture in Quebec than to rewrite history by denying that the English-speaking community was one of Quebec's founding European peoples.³⁹ This denial of its minority's role in fashioning a modern Quebec, as much as the denial by certain English-rights extremists of Canada's French-language minority's role

³⁸ See C. Laurin, *Le français langue du Québec* (Montreal: Éditions du Jour, 1977) for a collection of the Minister's speeches between May and October 1977 which clearly show this undertone of intolerance.

³⁹ See, for example, *ibid.*, at 123-140.

in fashioning a modern Canada, is tragic in the eyes of those who celebrate heterogeneity and cultural diversity.⁴⁰

Notwithstanding the concerns expressed in the last two paragraphs, any realistic assessment of the situation of the French language and culture in Canada would acknowledge that it is under threat. Similarly, any realistic assessment would lead to the conclusion that, to palliate this threat, various legislative measures directed to Canada's majority language and its cultural products might well be necessary. Even though it is doubtful either that the *Meech Lake Accord* did, or that some of the more restrictive aspects of Bills 101 and 178 as directed to private individuals do, adequately address the most pressing threats to *la survivance*, their important symbolic value for Quebec political elites and for French-speaking Quebecers generally must be conceded. This symbolism — of recognition and validation — was a presumptive reason for not rejecting initiatives such as the *Meech Lake Accord* outright. It is now also a reason, in the case of the more misdirected aspects of Bills 101 and 178, for responding to them not with the arbitrary "NO" of law and guaranteed constitutional rights, but with a dialogue encompassing both form and substance.

I hold this view (along with a large number of my fellow English-speaking Quebecers), for several reasons — some emotional, some perhaps, more rational. The most important of these reasons flow from an acceptance of the following pragmatic assertion advanced by those Francophones who are federalists but who are not unsympathetic to Bill 101 and who supported the *Meech Lake Accord*. The assertion is that without a vibrant Francophone element to Canada's self-definition, the country is doomed as an independent political state; and without a dynamic Francophone society in Quebec, all Canadian Francophones are doomed. The first half of this assertion will be developed in detail later in this essay. The second bears some expansion here. While the contributions of Franco-Ontarians, Franco-Manitobans, Acadians, and other Francophone groups outside Quebec to the survival of the French language and culture in North America should not be

⁴⁰ For a recent plea for recognition of the contribution of Quebec's English-speaking community to the flourishing of the province see R. Scowen, *A Different Vision: The English in Quebec in the 1990s* (Don Mills, Ont.: Maxwell Macmillan, 1990).

minimized, there are several indicia of the vital role played by French-speaking Quebeckers and French-language institutions centred in Quebec. Why is it that the Fédération des francophones hors Quebec sometimes complains that Radio-Canada is really only Radio-Montréal? How often do non-Quebec Francophones win Governor-General's culture awards (by comparison with those won by Anglophone Quebeckers)? What is the relative wealth and standing of l'Université Laval and l'Université de Montréal, for example, by contrast with the Université de Moncton, l'Université Laurentienne, le Collège St.-Boniface, or l'Université St.-Paul? In the fields of art, music, dance, film, theatre, and even hockey, one sees that the contributions of Francophones in Quebec (and more particularly in Montreal) are central to the flourishing of the French-language cultural industry in North America.

Given the relationship between the particulars of the *Meech Lake Accord* and Bills 101 and 178 to perceptions and misperceptions of the socio-economic threats to *la survivance*, it is important to assess the implications of these responses for English-speaking Quebeckers over the next few decades. Is there a way in which their presence in Quebec can come to be perceived by French-speaking Quebeckers as a positive contribution towards, rather than as a threat to, *la survivance*? How can they come to be valued within the new Quebec without being forced to themselves assimilate? The parallels between the survival agenda of English-speaking Quebeckers and French-speaking Canadians at times can be striking. While much of the onus must be on French-speaking Quebeckers of good will to stand up to their more xenophobic compatriots and to respond positively to the overtures of Quebec's linguistic minority, the initial moves must still rest with the English-speaking community itself. In arguing passionately, but vainly, for ratification of the *Meech Lake Accord*, a first step was taken by many. Now, at this critical juncture in Canada's constitutional debates, there are at least four facets to the role which should be played by English-speaking Quebeckers — each of which reflects a different aspect of the changed socio-economic context in Quebec since the early 1960s, and the changed political context of the 1980s.

A first and most important response to the challenge of *la survivance* demands an effort to modernize the rhetoric of Quebec and Canadian politics. It is hard to accommodate oneself to the

new Quebec, as many have attempted, when political discourse is still dominated by outdated, unfair, and hyper-nationalist stereotypes such as "best treated minority," "insensitivity to the future agenda," and "linguistic ghettos." To illustrate the misapprehension sometimes consciously promoted by professional xenophobes and their occasional allies in the mass media, it is worth citing some examples of the reality of English-speaking Quebec today — a reality which gives positive lie to the racist stereotypes which, even in the 1950s, were of dubious accuracy. The City of Westmount, that supposed ghetto populated with people characterized by Keith Spicer as "Rhodesians," is now thirty per cent Francophone. Roslyn Public School in that City — long the flagship elementary school of the entire Protestant educational system — recently proposed the phasing out of its English stream, thereafter to offer only a French-immersion programme. McGill University, the caricatured elite institution for English-speaking Quebecers, enrolls a large number of Francophones (over eighty per cent in agriculture and about twenty per cent overall) and is active in many joint research ventures with French-language universities; in its Faculty of Law, moreover, about one-quarter of the syllabus is taught in French, even by English-speaking professors. Most younger Anglophones in Quebec read at least one French-language newspaper, frequently watch programmes on Radio-Canada or Télémedia, and regularly go to French-language theatre and other cultural "spectacles."

Yet this new reality, quite at odds with traditional nationalistic dogma, is largely unknown in Francophone circles. To permit government policy to be dictated by the small minority who, for political reasons, conflate (1) the attitude of the ill-informed outside Quebec and (2) the posturing of those very few Quebec Anglophones nostalgic for the splendid isolation and governmental minimalism of the "two solitudes" with the viewpoint of most English-speaking Quebecers is tragic. Sadly, as personal experience in dealings with a number of civil servants at the assistant deputy ministerial level and with ministerial policy advisers (not to mention with one or two members of the section 96 judiciary) attests, these stereotypes still have a powerful hold in the provincial capital. To overcome them, English-speaking Quebecers can no longer pursue their traditional policy of institutional parallelism. Relics of the prior *modus vivendi* such as the "English-speaking Bar of Montreal"

should be quietly abandoned. Stereotyping is most often a function of ignorance rather than malice; and institutional parallelism — in the arts, the professions, and business — facilitates ignorance rather than understanding.

A second task of English-speaking Quebeckers will be to assist all Quebeckers to appreciate where the true threats to French language and culture lie. It is a constant source of amazement that even the well-educated often see — perhaps for reasons of scapegoating — those English-speaking Quebeckers who founded (and funded) la Bibliothèque de Montréal, l'Orchestre symphonique de Montréal, le Musée des Beaux-Arts, le Théâtre du Rideau-Vert, Centraide, l'Association montréalaise des aveugles, and so on, as being opposed to the promotion of French culture and social services. It was the opening to Francophones of these initially English-language secular institutions, especially in Montreal, that helped to fill the vacuum produced with the collapse of the social role of the Roman Catholic Church in the 1960s. Notwithstanding certain misapprehensions of the French-speaking elite, it is through continued active participation in these cultural endeavours that English-speaking Quebeckers can ensure that the lessons of the past will not be forgotten.

It follows that, far from devoting political energy to the rabid defence of their own acquired rights, English-speaking politicians in Quebec need to help their Francophone associates to formulate effective socio-cultural policies in Quebec City and in Ottawa to promote "la francophonie." Examples of those who have done so in the recent past would include Eric Kierans who contributed mightily to the design of the *Caisse de dépôt et de placement*, Robert Shaw who was general manager of Expo 67, Phyllis Lambert who founded Héritage Montréal and who organized and funded the Centre canadien de l'architecture, and the Molsons and the Bronfmans whose financial resources have helped to maintain Montreal's identity as a "major league" city. To show how support in the English-speaking community can be marshalled to promote the French language and culture not only within Quebec, but across North America, is a formidable but necessary challenge in the years ahead.

Third, it will be necessary for Quebec's English-speaking population to develop a better conception of its own long-term

interests. This is no more urgent than in relation to its expenditure of political capital. Certainly, in the abstract, the *Charter* rights to freedom of expression, due process, and so on, are those usually associated with constitutional government in the liberal state, and with pluralism. But linguistic minorities are always poorly placed to defend such interests in the political arena, as Riel in 1870 and 1885, Laurier in 1917, and Camilien Houde in 1942 each discovered. Until French-speaking civil libertarians in Quebec are willing to tackle the theoretical conflict between majoritarianism and certain "fundamental freedoms" — a conflict which flows from the political agenda of *la survivance* — there is little good to be accomplished by responding to this conflict in such a way as to create in the minds of most people (who often do not appreciate the legal implications of political pluralism) a direct association between civil liberties and "anglo-rights." Rather, as Pierre Trudeau saw in the 1950s and early 1960s, it is a political culture of tolerance which must precede any particular constitutional expression of its consequences.⁴¹ In the present context it is the defence of the rights of others — visible minorities, the handicapped, women, prisoners, the poor, victims of family violence, Native Canadians — and not the advancing of language claims *per se* which must serve as the immediate vehicle by which English-speaking Quebecers can promote a more universal culture of diversity and pluralism in the province.

There is a further point about long-term interest which needs to be made to those "rights claimants" who seek to invoke the *Charter* on behalf of all English-speaking Quebecers. On any realistic scale of valuation it is hard to conceive the language of outdoor commercial signs — the target of the vilified Bill 178 — as involving crucial expression. The role of English-speaking Quebecers as a community is neither to don the mantle of civil libertarian virtue in defence of their own interests, nor to lecture the government of Quebec through indiscriminate discourse such as "a right is a right is a right." On the contrary, it is to distinguish between public and symbolic negative liberties and private and substantive positive, or dignitary, liberties. The preservation and

⁴¹ See P.E. Trudeau, "Some Obstacles to Democracy in Quebec" in Trudeau, ed., *supra*, note 29 at 103.

enhancement of governmental and social services, educational and cultural institutions are where the real long-term interest of English-speaking Quebecers lies. It is also an important legal terrain where conflicts with those French-speaking political liberals who do believe in abstract rights — except where these relate to English rights which are believed to threaten French symbols — can be avoided. Unfortunately, the message now emanating from many quarters in English-speaking Quebec is one of victimization and unfairness, a message hardly guaranteed to build bridges of linguistic tolerance in the rest of the country. This message also carries the implication that the government of Quebec is not to be trusted, either with greater influence in the Canadian federal political arena, or with the symbol of characterizing its territorial constituency as a "distinct society."

A fourth challenge confronting English-speaking Quebec relates to its relationship to the rest of Canada. The challenge is to play an effective role in educating all Canadians to the particular circumstances of the country's French-speaking population, both within Quebec and elsewhere, and to help educate Quebec about the rest of Canada. Most importantly, it is necessary to show how legislative responses like Bill 178, while untimely, unfortunate, and perhaps even petty, are nonetheless grounded in perceptions of economic and political circumstance. Without this effort by English-speaking Quebecers it is entirely foreseeable that political elites and ordinary citizens in the rest of the country may conclude that the political will to continue to build a Canada in which French-speaking and English-speaking communities can coexist is no longer present in Quebec — with the consequence that they will simply tell Quebec to go it alone. Moreover, without this effort, it is likely that these elites will consciously neglect the aspirations of French-speaking Canadians outside Quebec, and postpone responding to the legitimate claims of their own linguistic minorities. Put bluntly, how can the more extremist leaders of the English-speaking community in Quebec claim that the symbolism of Bill 101 is misdirected because it does not address positive socio-economic questions, when their own political agenda is driven by the very same misdirection?

As Premier Bourassa rightly perceives, in the wake of Bill 178 and the failure of the *Meech Lake Accord*, neither he nor Mr. Remillard can carry Quebec's message to the rest of Canada with

any credibility, not even by resorting to "sabre-rattling" demands such as those set out in the *Allaire Report*. While other premiers have a major role to play through the accommodation of French-speaking minorities in their provinces and through their statement of a positive vision of linguistic tolerance for the country, fundamentally it is English-speaking Quebec and its political leaders who have become the psychic linchpin of Canada's future.⁴² The overall weakness of its Cabinet presence in Ottawa in recent years has deprived the country of valuable political input. Further, the inability of English-speaking ministers in the Quebec Cabinet to help shape the position of the Quebec Liberal Party and to craft the details both of the Meech Lake proposal and the policy process leading to the province's follow-up position has had most unfortunate consequences. The estrangement produced by the invocation in 1988 of the override in Bill 178 and reflected in the election of four Equality Party candidates to the National Assembly in 1989 suggests that this fourth contribution of English-speaking Quebecers may prove the most difficult to realize.

Mistrust between linguistic communities is easily generated; trust is long in the nurturing. On this particular issue, the policy implications of the motif of *la survivance*, politics is the art of nurturing trust through candour and moderation. The failure of Anglophones and Francophones in Quebec and elsewhere in Canada to listen to each other's truth has led politicians to tell their own truths only to each group. Such a strategy is guaranteed to generate policy distortions and feelings of betrayal when the inevitable political compromise, which is translated into legislation, reveals the presence of another truth to which one has not previously been exposed. French-speaking Quebecers need to hear from their own leaders the truths about the real threats to their language and

⁴² In claiming that the English-speaking minority in Quebec is a psychic linchpin, I do not mean to say that its voice is more important than that of others. The claim is rather that the reaction of this community to initiatives of the government in Quebec City has an important influence on how these initiatives are viewed elsewhere in Canada. If English-speaking Quebec carries on like an oppressed minority, then it is only understandable how public opinion elsewhere will reflect a negative view of the province's politicians. If English-speaking Quebec, by contrast, seeks to explain the socio-economic context which induced Quebec to take certain political decisions viewed with suspicion in other parts of the country, then the chances for maintaining an interprovincial dialogue are enhanced.

culture, and the costs which pseudo-solutions impose on themselves as well as on others. They also need to hear from these same leaders, different truths about xenophobia, multiculturalism, and a constitutional culture of tolerance. English-speaking Canadians outside Quebec need to hear, again from their own leaders, the truths about assimilation and distinctiveness, and about the costs which their indifference imposes on themselves as well as on others. They also need to hear contrasting truths about the premises upon which the country was founded, about its constitutional history, and about the enrichment which a politics of bilingualism provides. French-speaking Canadians outside Quebec need to hear the truths about the constraints which their qualified support of the repressive elements in the language policies of the Quebec government impose on a federal government at last coming to recognize its historic responsibility for protecting their interests in the maintenance of the Confederation compromise. Finally, English-speaking Quebecers need to hear (and not merely listen to) the truths about the costs which their self-indulgent carping impose; they also need to hear truths about the positive contributions they can make to contemporary Quebec society and, through it, to Canada's future. If English-speaking Quebecers in particular can come to see this opportunity, they will be able to contribute to all Quebecers and all Canadians hearing a truth other than their own, and will help to ensure that the overtones of defensiveness surrounding *la survivance* stand a chance of becoming a harmonics of openness about *l'épanouissement* as one of Canada's primary constitutional motifs.⁴³

⁴³ In focusing on this aspect of the constitutional challenge confronting the country, I do not mean to imply that other policy issues which have little to do with language, culture, or governmental organization are unimportant. In the concluding section of this essay, I address the relationship of constitutional renovation to concerns such as citizen empowerment, poverty, violence, the environment, and *anomie* consequent upon our inadequate responses to industrialization. Perhaps because I am not a constitutional lawyer, I believe that responses to these issues really do have an important constitutional dimension. For the opposite opinion, however, see Monahan, *supra*, note 5 at 37-8.

V. THE MEANING OF MEECH LAKE: CONSTITUTIONAL SYMBOLS

In the previous section it has been argued that the motif of *la survivance* powerfully lay behind the six constitutional proposals of the Quebec government and dominated debate about the *Meech Lake Accord* in Quebec. Indeed, it is the recognition of the seriousness and complexity of the various threats to French language and culture in Canada (and not a general hostility to the political agenda of recent Quebec governments) that motivated the juxtaposition of the *Meech Lake Accord* and the invocation of the "notwithstanding clause" in Bill 178 in the title of this essay. For both the *Meech Lake Accord* and Bill 178, while constitutionally independent of each other, are politically quite closely linked through the theme *la survivance*. In the next section of this essay, the relationship of the "override clause" of Bill 178 to the "distinct society" clause of the *Meech Lake Accord* will be explored in detail. For the moment, however, it is important to reflect on how the *Meech Lake Accord* came to be perceived in Quebec, and why. In other words, it is necessary, in complete abstraction of any of its particulars, to assess the *Meech Lake Accord* as a constitutional symbol for Quebecers and, in consequence, for Canadians. To appreciate current Canadian constitutional politics, one must first attempt to unpack the symbolism of the *Meech Lake Accord* as a whole, and work through how it came to acquire the symbolic weight that it did.

The *Meech Lake Accord* was generally perceived in Quebec, through its distinct society clause, as legitimating the claim that Quebec was the homeland of French-Canadians and as legitimating the efforts of the provincial government to promote the French language.⁴⁴ Hence the explanation of Premier Bourassa's constitu-

⁴⁴ The literature on this topic in Quebec is extensive. For representative samples, see I. Bernier, "Meech Lake and Constitutional Visions" in Swinton & Rogerson, eds, *supra*, note 29 at 239; P. Blache & J. Woehrling, *L'Accord Meech-Langevin et les compétences linguistiques du Québec*, Quebec, Conseil de la langue française, 1988, Document No. 68; and J. Woehrling, "La modification constitutionnelle de 1987, la reconnaissance du Québec comme société distincte et la dualité linguistique du Canada" (1988) 29 C. de D. 3. See also G. Bergeron, *Pratique de l'Etat au Québec* (Montréal: Quebec/America, 1984) at 173ff.

tionally dubious claim, that he would not have needed to invoke the notwithstanding clause of the *Charter* to sustain Bill 178 were the "distinct society" clause of the *Meech Lake Accord* in place. No doubt, the "distinct society" clause was itself a type of notwithstanding clause, although not of the pre-emptive force of section 33. It was, rather, an interpretative injunction much like section 27 of the *Charter*. In this guise it would have ultimately had a bearing on the section 1 calculus undertaken by courts. For this reason — while invoking the "distinct society" clause as a justification for *Charter*-offensive legislation could be seen to have had the disadvantage of producing less shock value and, therefore, less political outrage than invoking the section 33 override — it would have had the advantage of engaging a dialectic of reasonableness, proportionality, and rationality, rather than fiat. Even though it is doubtful that the actual terms of Bill 178 would survive *Charter* scrutiny on the basis of the "distinct society" clause, it is clear that in the eyes of the government of Quebec at least, the clause was consonant with, and more or less sufficient to enable it to discharge legislatively, its special responsibilities to French-speaking Canadians without having systematically to invoke the section 33 override.⁴⁵

The *Meech Lake Accord* was also seen by political elites in Quebec as an attempt to restore a balance in Canadian constitutionalism which was disrupted by the processes leading up to, and by the political purposes of, the *Charter*. That balance was the recognition in the *Constitution Act, 1867* of the concepts of society, of two founding peoples, and of linguistic minorities (both French and English) as major themes in constitutional politics.⁴⁶

⁴⁵ This point bears some elaboration. In the Bill 101 case, which provoked Bill 178 (*Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712 [hereinafter *Ford*]), the Supreme Court left open the possibility that a statute mandating the use of French on outdoor commercial signs and restricting the relative size of information provided in other languages would have been *Charter*-inoffensive. Hence, the invitation, through section 1 analysis, to the Quebec government to proceed otherwise than by invoking section 33. Were the "distinct society" clause in place, a similar (and perhaps more generous invitation) would presumably also have been issued.

⁴⁶ For a careful examination of this theme, written long before the *Meech Lake Accord* was even negotiated, see C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" [hereinafter *Alternative Futures*] in A.C. Cairns & C. Williams, eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 183 at 216.

These elites did not claim (as revisionist nationalist discourse now has it) that the *Charter* and the *Constitution Act, 1982* which gave rise to it were an unmitigated error. Indeed, some politicians, including Quebec's Minister of Intergovernmental Affairs, Gil Rémillard, even conceded that, taken as a whole, the constitutional package of 1982 could be judged in a positive light. But the failure of the *Charter* in particular to give adequate expression to the late twentieth century aspirations of all French-speaking Canadians, and the unseemly process by which it was engineered over the opposition of the Quebec government have fatally compromised its status as a constitutional symbol in that province. While *Charter* patriotism may hold sway elsewhere in Canada, sadly, for the French-speaking majority in Quebec, the patriation exercise now evokes not a spirit of nationhood achieved but of nationhood betrayed.⁴⁷ For this same majority, the *Charter* does not now evoke a notion of the protection of individual rights as much as it does the suppression of group rights. Thus, for those who believe that the *Constitution Act, 1982* ought to play a major role as a pan-Canadian constitutional symbol, the *Meech Lake Accord* assumed an important place as an *ex post facto* legitimating vehicle.

A third aspect of the symbolic function of the *Meech Lake Accord*, also tied to the *Charter*, was the vindication which it seemed to give of the view that group rights require as much constitutional protection as individual rights. This perception is especially evident in relation to how the override is viewed in Quebec. Because the 1982 political process came to be seen by many Quebecers as insensitive to the basic values of Canadian federalism, the specific terms of the Canadian (as opposed to the Quebec) *Charter* never entered popular consciousness as comprising constitutional guarantees of legislative propriety. Hence, the Parti Québécois government was able to deploy the section 33 override indiscrimi-

⁴⁷ Again, it is interesting to note how the very word "nation" conveys the constitutional ambiguity. For many non-French-speaking Canadians, the Canadian nation is identical to the Canadian state. For many French-speaking Canadians, the state may be Canada, but the *nation* is the French-speaking people. For a sense of this second use, see D. Johnson, *Egalité ou indépendance* (Montréal: Homme, 1965) at 123: "Canada ou Quebec, là où la nation canadienne-française trouvera la liberté, là sera sa patrie." A similar theme is traced in Bergeron, *supra*, note 44 and in L. Balthazar, *Bilan du nationalisme au Québec* (Montreal: Hexagone, 1986).

nately without the political cost which even a single invocation was assumed by its proponents in the rest of Canada to entail. Indeed, the deployment of the override in Bill 178 illustrates a central paradox in the attitude of English-speaking Canadians towards the *Charter*. Most Canadian political elites have already opted once, in 1982, explicitly for the concept of an override and by their failure to remove it, since then, implicitly continue to opt for its maintenance. Why, then, should its deployment in Quebec be viewed so negatively (especially since 1987, when the systematic protest insertion of the override was allowed to lapse)? It is one thing to have expected the Quebec government to let the general override lapse in counterpart to the constitutional rebalancing effected by the *Meech Lake Accord*. It is quite another to suggest that the override should never be used (as in Bill 178), especially when the protection of important majority symbols such as the *Charte de la langue française* is at stake. To say that the negotiation of the *Meech Lake Accord* gave legitimacy in Quebec to the 1982 patriation exercise and to the *Charter* is accurate; but it must be remembered that this legitimacy also includes the legitimacy of using section 33 for targeted purposes.⁴⁸

Yet another reason why the symbolism of the *Meech Lake Accord* was so powerful in Quebec lay in the fact that it was, like the *Charter*, a constitutional document. During the ratification debate, one often heard that it was not essential that the specific terms of the *Meech Lake Accord* be given the status of constitutional amendments because what really mattered (especially in connection with the issues it actually treated) were the pragmatic accommodations associated with co-operative federalism. The argument was as follows. If the practice of federalism is such that the Cullen-Couture formula solves Quebec's immigration concern, that consultation with the Attorney-General of Quebec does take place on Supreme Court appointments, that there is a *de facto* opt-out with compensation on all new shared-cost programmes, and that

⁴⁸ No doubt the reaction of many in the rest of Canada to the Quebec government's invocation of section 33 came as a surprise to Premier Bourassa, for he believed that his government's decision to let the general override lapse in 1987 was a sign that his government was committed, in exchange for the legitimation of Quebec's position in the *Meech Lake Accord*, to accept the *Constitution Act, 1982*. But to say that his government accepted the 1982 amendment package was not to say that it promised never to invoke section 33, which after all, was a part of that package.

after the exclusionary process by which the *Constitution Act, 1982* was proclaimed over its opposition, Quebec probably does have at least a political veto on future constitutional amendments, why then the desire for constitutionalization? Nevertheless, there were at least five reasons why the *Meech Lake Accord* as a *constitutional* vehicle was thought by the general population of Quebec and by the Quebec government to be a necessary symbol. First, the *Charter* precedent. If constitutionalization is as unimportant as is claimed, why was the *Charter* constitutionalized? Second, the minority mind set. However much practices develop and understandings are nurtured, minorities and other disempowered groups typically feel that getting constitutional recognition of their status is a needed protection. Third, the federal argument. If Canada is truly a federal state, why should these important political arrangements be made subject to the sufferance of Ottawa? To constitutionalize in this sense means to overcome, especially on issues of language and culture, the psychological inferiority attaching to the role of supplicant (which had been Quebec's fate since 1867). Fourth, the civilian legal mentality. Notions of constitutional convention, the common law, and judicial law-making are closely linked with the Anglo-Canadian legal tradition. To ask those trained in the civil law to accept such informal processes on issues of fundamental concern is analogous to asking an advocate trained in the common law to accept blanket codification of the law of contracts and torts. The uniform resistance of Supreme Court judges trained in civil law to the notion of an "implied Bill of Rights" and the life-long crusade of Pierre Trudeau to enact the *Charter* speak volumes to this point. Fifth, the recognition argument. Practices, however settled and however complete, are essentially discrete. They never demand an explicit statement of underlying principle. To state the linguistic duality of Canada and the special role of Quebec in Canada is to at last achieve a recognition which would have made the Manitoba *Official Language Act*, Ontario's Regulation 17, the imposition of conscription in 1917, and the midnight deal of 1982 impossible. So to resist the constitutionalization of the *Meech Lake Accord* by advancing arguments about "pragmatics" and "practices" misses one of the most important symbolic features which French-speaking Quebecers saw as attaching to it.

A further facet of the symbolic meaning of the *Meech Lake Accord* is tied to its role as a pan-Canadian (and not just a Quebec) symbol. This facet also points up the short-sightedness of many political leaders about the place of both official languages in Canada. Few would deny that for two hundred years the French-speaking population of Quebec has, in some measure, needed Canada. As early as 1775, it was largely the British military which repelled the American continental army seeking to make Quebec the fourteenth colony. The fate of Louisiana attests to what the result of any successful invasion would have been. Moreover, the weight of the federal government in requiring, *inter alia*, bilingual packaging, bilingual merchandising, and bilingual industrial standards across the country has given the French language an economic clout it would never have achieved with a population of less than six million. Again, it is worth noting that the whole of Nouveau-Quebec — the site of the James Bay Power developments — was never part of New France, even in 1760; it was a part of the former territory of Rupert's Land ceded to Canada after Confederation and transferred to the province only in 1912. Finally, a separate French-speaking Quebec would not have seen Montreal develop as the major port for central Canada, as a railway centre, or as a manufacturing centre, given its large English population. Indeed, it is doubtful that Montreal would even have become a metropolis at all under such circumstances. So the point can be made that for two hundred years, what is now French-speaking Quebec has needed Canada, even if today there is a plausibility to the claim that, economically, it no longer does. From this confession of historic need can be derived a counterpoint to hyper-nationalists who ignore the 224 years between 1763 and 1987. To those French-speaking political leaders in Quebec who systematically denigrate their English-speaking community with epithets such as "best treated minority," section 2(1) of the *Meech Lake Accord* — "the recognition that the existence of English-speaking Canadians ... present in Quebec, constitutes a fundamental characteristic of Canada" — was an important reminder of their province's essential duality. It served, as a complement to the "distinct society" clause, to symbolize bilingualism in Quebec.

But, there has also been and, despite desperate attempts in certain parts of the country to deny it, there still is a reciprocity in

this need of each linguistic community for each other. English-speaking Canada has also needed its French-speaking minority. In 1775 and 1812, the *habitants* contributed to the defence of the territory. But more, the presence of a French-speaking minority influenced government economic policy and helped produce political arrangements which are now more sensitive to cultural and community diversity. While it may be that the Tory refugees from the American Revolution also brought with them organicist tendencies, these were reinforced by Lower Canadian clericalism. Today it is recognized that social organicism, now consecrated in ideas such as multiculturalism, substantially contributes to defining the country.⁴⁹ The paradox, for those who claim that multiculturalism is necessarily the converse of bilingualism, is that, without the social and political structure thrown up by bilingualism, multiculturalism on the Canadian model would be impossible. It follows that despite the current federal government's attempt to fix the country in the US socio-economic orbit – with a bilateral, rather than a multilateral, freer trade deal; by joining the Organization of American States, by renewing the NORAD agreement at a time when anti-Russian air defence is a relic of the 1950s – if the country is to persist as a multicultural, constitutional democracy, with a rich constitutional heritage, it will probably need a predominantly French-speaking Quebec as one of its major components. Once again, the *Meech Lake Accord* was a powerful symbol of this need. Section 2(1)(a) came to be seen in Quebec as an expression of the institutional framework needed to maintain Canada's self-definitional duality. In this sense, the *Meech Lake Accord* was understood as a recognition by the rest of the country not only that Quebec was different than other provinces, but that this difference was treasured.⁵⁰

⁴⁹ The classical citation for this idea is G. Horowitz, "Conservatism, Liberalism and Socialism in Canada: An Interpretation" (1966) 32 *Can. J. Econ. & Pol. Sci.* 143. Its implications for constitutional doctrine are traced in P. Macklem, "Constitutional Ideologies" (1988) 20 *Ottawa L. Rev.* 117.

⁵⁰ It is also worth noting that some now treasured Canadian symbols are a direct result of having had to accommodate the aspirations of francophones. Who today would prefer the Union Jack or the Red Ensign to our current flag? Or "God Save the Queen" to "O Canada"? Or Royal Mail or Her Majesty's service? Only thirty years ago, these were said, by no less than the Leader of the Official Opposition in Ottawa (and many votes), to be

A seventh observation about the symbolic meaning of the *Meech Lake Accord* also has a pan-Canadian dimension. As such, it needs particular emphasis at this juncture in the country's constitutional history. During the ratification debate, there developed a myth that the *Meech Lake Accord* was flawed because it was simply a Quebec deal. Those who took this position — for example, the Premier of Newfoundland — argued that the *Meech Lake Accord* should have been a comprehensive deal for all of Canada. Two responses to this claim suggest themselves. The first is that, whatever the initial intentions of the Premier of Quebec in raising the five conditions for that province's political adherence to the *Constitution Act, 1982*, these conditions, as they were written in the *Meech Lake Accord*, also made it a constitutional amendment exercise valuable for all of Canada. This was true quite independently of those features of the agreement added at the behest of other premiers. This point will be considered more fully below. The second response is that the *Meech Lake Accord* could have best been an amendment valuable for all of Canada by being an exercise conceived primarily with Quebec in view. That is, the *Meech Lake Accord* should have been the Quebec round. Why else was the 1987 constitutional reform process put together? As illustrated earlier, the *Meech Lake Accord* was, at least in some measure, intended to be the "compact" complement to the 1982 constitutional round — a round dominated by concerns reflected in the "statute" theory of the *Constitution Act, 1867*. That constitutional renewal should occur in two or more stages is hardly surprising. The fundamental allocative elements in the Canadian Constitution, and indeed the Constitution itself, have never been seen as a one-shot deal, mythologized as being essentially good for ever and ever, as the American Constitution has been seen.⁵¹

unpatriotic and evidence that the French were taking over the country.

⁵¹ It bears note that, despite the mythology of the U.S. Constitution being unchanged since 1789, it has undergone at least five reconstructive amendments since then: the first ten amendments, the twelfth amendment, the thirteenth through fifteenth amendments, the seventeenth amendment, and the twenty-second amendment. Moreover, the so-called U.S. Bill of Rights — the first ten amendments — constituted a parallel accord to the initial Constitution in that they were adopted by virtue of a promise made upon ratification of the federal Constitution of 1789.

Constitutional readjustment — implying the achievement of responsible government, the reallocation of powers between orders of government, the breaking of colonial bonds, and the reconstruction of the basic values and institutions of the polity — is a permanent feature of non-revolutionary societies. Canada has had its share of such adjustments, typically, although, not always proceeding in pairs.⁵²

To characterize the 1987 *Meech Lake Accord* as not being for all of Canada, and to have scuttled it on the basis that it was not perfect, or that it was partial and incomplete, or that it ignored the legitimate claims of the territories, or that it failed to address the rights of Aboriginal peoples, of women, and of visible minorities, or that it was oblivious to the multicultural agenda is to misunderstand profoundly the dynamic of Canadian constitutional reform.⁵³ No constitutional document since 1763, up to and including the imperfect and incomplete *Charter*, has ever addressed "all the issues". Given Canada's constitutional past, the only issue ought to have been the following: on the basis of its limited intentions — to accommodate within the traditional framework of Canadian constitutionalism Quebec's special concerns, and, in particular, to redress an imbalance in Canadian constitutionalism brought about by the 1982 process — was the agreement a reasonable one, which would have advanced the iteration of the country's self-understanding? To the extent that the *Meech Lake Accord* achieved this objective it was an amendment which served all of Canada and, as such, could have been understood as an important pan-Canadian symbol.

The symbolic meaning of the *Meech Lake Accord* in Quebec was also conditioned by incredulity in the province that opponents did not appreciate the myriad ways in which the agreement was not just directed to Quebec's concerns. Most of the specific legal and constitutional objections to the *Meech Lake Accord* actually had little

⁵² These have been, as noted in the first part of this essay, those Imperial statutes and proclamations of 1763, 1774, 1791, 1840, 1867, 1905, 1927, 1931, 1947, 1949, 1965, 1982, and the failed effort of 1987. As will be argued later, there is a striking parallelism in the pairings of 1774 and 1791; 1840 and 1867; and 1982 and 1987, the most important of the various listed Imperial statutes.

⁵³ A similar point is made by Monahan, *supra*, note 5 at 20.

to do with its being a "sell-out" to Quebec's constitutional demands. Indeed, as many as five of the six points in the *Meech Lake Accord* to which objection was taken were only marginally relevant to the agenda advanced by the Quebec government. What were these points of objection for which Quebec was wrongly being held accountable? To begin, the Senate proposal. But Quebec did not seek Senate reform and could easily have lived with the present system until a totally new arrangement was made. The second, third, and fourth objections related to the presumed decentralization of national power to the provinces in the immigration, Supreme Court, and spending power amendments. Again, radical decentralization was not Quebec's agenda, for it sought these various forms of power sharing for itself alone, on the basis of arguments it has made at least since the late 1940s and especially since Trudeau's proposed formula in the June 1971 *Victoria Charter*.⁵⁴ Moreover, on each of these three items, a strong case can be made for Quebec evincing a special concern. If no such case can be made for other provinces, then the objecting provinces (who after all were at the root of these generalizations) could simply have declined to exercise the power they were given. In other words, the *Meech Lake Accord* could have come to symbolize the constitutional maturity of Canada's provinces through their ability to resist the temptation to exercise political power simply because it was proffered.

This last point suggests at least two further, and positive, observations to be made about the symbolism of the four jurisdictional proposals set out in the *Meech Lake Accord*. On the one hand, the consequences thought to be attendant on them, insofar as relations between provinces are concerned, were misdirected. The only one of these proposals having any significant interprovincial effect — the restrictions on shared-cost programmes — would have had little bearing on the financial viability of such programmes. To claim otherwise misconceives both the unequal sources of federal programme funding, and confuses equalization (or unconditional

⁵⁴ For a discussion of the constitutional amendment process since the second World War viewed from a Quebec perspective, see *La Constitution du Canada, supra*, note 23 at 233-49. The best short summary of Quebec's objections to the Victoria Formula was offered by Jacques-Yvan Morin. See J.-Y. Morin, "Modifier la Constitution ou momifier le Québec" *Le Devoir [de Montréal]* (15 May 1971) 5.

grants) with cost-sharing (or conditional grants).⁵⁵ Even if a "rich" province were to have opted out of a new cost-sharing programme, the disproportionate federal share of general tax revenue drawn from that province would still be available for redistribution to poorer provinces, whether or not they joined the programme or themselves opted out. On the other hand, the minor decentralization in the *Meech Lake Accord* would itself have been a constitutional gain. It would have reversed the magnetic forces of the federal government by creating a model of what has been called intra-state federalism, in which each province gains a larger input into national political institutions.⁵⁶ Further, the cost-sharing provision would have enhanced the ability of each province to pursue its own policy course without the incentive of federal *dirigisme* limiting the range of policy options.⁵⁷ To conclude on this point, while the *Meech Lake Accord* may have seen light as an accommodation offered to Quebec, it represented through its generalization of the items Quebec brought to the negotiating table, more of a pan-Canadian arrangement. It was, in fact, especially important for the first explicit constitutional recognition which it gave to the latent "states rights" theory of the Canadian federation lying at the heart of Western alienation.

A final comment on the symbolism of the *Meech Lake Accord* is a variation on the previous point, and relates specifically to the amending formula and to the "distinct society" clause. For here one sees the real foundation of Quebec's concerns. Take first the proposed amending formula. As with each of the other features of the *Meech Lake Accord*, the precise content of the modifications to the amending formula were not of Quebec's making. Why Quebec's understandable insistence on regaining a semblance of a

⁵⁵ For a detailed elaboration of this point see Petter, *supra*, note 30.

⁵⁶ For a discussion of this model of federalism, see D.V. Smiley & R.L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985).

⁵⁷ It should be remembered that many of the most distinctive policy programmes in Canada had their origins in provincial initiatives: Ontario Hydro (an energy initiative picked up federally only in the 1970s with the creation of PetroCanada); hospitalization and medical insurance (which had its origins in Saskatchewan twenty years before Ottawa climbed on board) and the *Caisse de dépôt et placement* (an extremely successful Quebec initiative established in 1965, which Ottawa has not yet had the wisdom to copy).

veto on a number of key points had to translate into a veto for all provinces on each of the section 42 matters is, unlike the other generalizations of Quebec's concerns, difficult to understand or to accept. As the failure of two small provinces which together comprise less than ten per cent of Canada's population to ratify the *Meech Lake Accord* revealed, a unanimity formula may be unworkable if constitutional change is desired. But some accommodation of the concept of a Quebec veto was required, and on this ground of objection there may still be a conflict between Quebec's minimum expectations and the irreducible opposition of some of the *Meech Lake Accord's* erstwhile opponents.

Similarly, there appears to have been direct conflict over the very idea of recognizing Quebec as a distinct society. Yet, in the final analysis, it is the symbolism of Quebec's distinctiveness which, fundamentally, is what the *Meech Lake Accord* was about. As will be argued in the next section, there were, and still are, unimpeachable reasons for adopting a constitutional amendment by which Quebec is so recognized. For the moment, it bears repeating that it was unfair to criticize the *Meech Lake Accord* as being only a Quebec project on the four other grounds which have little to do with the specific objectives advanced by the Quebec government. In view of such misguided critiques, one can well understand the anger and frustration of Quebec politicians and the general public who saw some of the last-minute, off-the-shelf, pseudo-objections from critics in provinces initially signatory to the Langevin text as no more than devious ways of expressing anti-Quebec sentiment in another form. As is now apparent, the symbolism of rejection which such reversals implied is far more dangerous to Canada's future than the costs thought by some to attend what have been canvassed here as the other positive *Meech Lake Accord* symbolisms.

The points made in this section can be summed up with some general observations about the *Meech Lake Accord* as a constitutional symbol. To begin, independently of its specific content, the very concept of the *Meech Lake Accord*, became in Quebec an important expression of constitutional faith. It became

a symbol of recognition, of acknowledgment, of acceptance.⁵⁸ In Canada as a whole, it could also have become a powerful symbol, as well as an invitation to further reconstruction of the federation. These symbols – the one acquired, the other never discovered⁵⁹ – comprised one key aspect of the real meaning of the *Meech Lake Accord* for Quebec and for Canada. The second aspect of the *Meech Lake Accord's* symbolic meaning is more subtle. Every feature of the *Meech Lake Accord*, apart from the "distinct society" clause itself, reflected the attempt to recognize that Quebec is a province unlike the others without appearing in so many words to say so. Hence, all particular items, except the minor concession of a Quebec monopoly on recommendations of nominees to the Supreme Court trained in civil law, were addressed equally to every province. The tacit recognition of this specificity, in fact, has been the consistent theory of Canadian constitutional arrangements since the *Quebec Act, 1774*:⁶⁰ accommodate Quebec's particularity as far as possible by provisions which, on their face, apply indiscriminately, but which, in their conception and their expected execution, are designed with Quebec in mind.⁶¹ For the art of Canadian constitutionalism has been to find the formulae and the practices⁶²

⁵⁸ One of the best expositions of this feature of the symbolism of the *Meech Lake Accord* is G. Laforest, "The Meaning of Centrality and Recognition" in Gibbins, ed., *Perspectives From the West*, *supra*, note 22 at 73.

⁵⁹ It is not a mere coincidence that the failure of the *Meech Lake Accord* (an acquired symbol within Quebec) to achieve such symbolic recognition in the rest of Canada parallels exactly the failure of the *Charter* (an acquired symbol outside French-speaking Quebec) to be discovered and internalized as a constitutional symbol within Quebec.

⁶⁰ (U.K.), 14 Geo. 3, c. 83.

⁶¹ This theme, though understated, has been acknowledged in the political science literature about Canadian federalism. See, for example, 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).

⁶² The various formulas in the *Constitution Act, 1867* which reflect this ambition have been canvassed in the first part of this essay. The relevant constitutional practices are many. Only a few need be mentioned to make the point: (i) the notion of a Quebec-lieutenant whenever a non-Quebec M.P. holds the leadership of one of Canada's major federal political parties; (ii) the alternation since 1951 in Governors-Generalship between English and French-speaking appointees; (iii) a similar, but less rigorously observed, alternation in the Chief Justiceship of the Supreme Court of Canada – since Duff, an alternation only not observed when Dickson succeeded Laskin; (iv) patterns of federal Cabinet-making which ensure that

by which these two basic federative themes – distinctiveness (compact) and equality (statute, and latterly states-rights) – can be reconciled. In the final analysis, it is difficult not to agree that the *Meech Lake Accord*, especially when read in conjunction with the *Charter*, would have been faithful to this received tradition.

VI. BILL 178, THE SECTION 33 OVERRIDE, AND THE DISTINCT SOCIETY CLAUSE: CONSTITUTIONAL VISIONS

The previous four sections present a reading of the constitutional, historical, emotive, and symbolic contexts of the *Meech Lake Accord*, especially as these contexts were understood in Quebec. They were initially intended, at the time the Laskin Lecture was delivered, to speak to the legitimating myths of past and present in the construction of an overall *Meech Lake Accord* mythology. Yet the agreement failed to achieve ratification. Hence they cannot now serve as a perspective on the *Meech Lake Accord* in terms of the Canada which would have resulted from ratification. Nor can they offer much solace to those who sought to save the *Meech Lake Accord* during the spring of 1990. But they can illumine what the various strategies for achieving ratification then proposed would have told us about the kind of polity Canadians actually had, or were in the process of creating. Moreover, given the likelihood of yet another constitutional round in which concerns particular to Quebec will play a central role, these questions retain their importance.⁶³

all major sectors – the economy, trade and commerce, agriculture, justice, *et cetera* – have at least a junior minister from Quebec; (v) the practice that either the Speaker or the Deputy-Speaker of the House of Commons is always from a Quebec constituency. That such practices are known and recognized – in the legislative, judicial, executive, and political spheres – suggests their importance to the functioning of the country.

⁶³ Since the above text was written, *Meech Lake Accord* post-mortems have become an industry on their own. See, for example, Monahan, *After Meech Lake*, *supra*, note 5; Courchene, *supra*, note 29; Robertson, *supra*, note 19; Fournier, *supra*, note 34; P. Resnick, *Towards a New Canada Quebec Relationship* (Montreal: McGill-Queens University Press, 1991); R. Simeon, "Why Did the *Meech Lake Accord* Fail?" in Watts & Brown, eds, *supra*, note 5 at 15; Council on Canadian Unity, *Looking Forward, Looking Back* (Montreal: Council on Canadian Unity, 1990). The first three of these texts are reprints of speeches delivered

As a preliminary to this reconstructive exercise, however, the several concerns with the process by which the *Meech Lake Accord* was generated, as expressed by thoughtful commentators, should be noted.⁶⁴ First, it is troubling that the entire endeavour should have been stage-managed by the Prime Minister as a "response to Quebec's demands."⁶⁵ Again, one might reasonably object to the manner in which the Langevin text was drafted out of the Premiers' Accord at Meech Lake. One might also have wished that, once that draft had been completed, Parliamentary and provincial legislative hearings were held prior to the negotiation of a final draft. Further, one might regret that the defenders of the *Meech Lake Accord* steadfastly presented the agreement as unamendable. Finally, one might take issue with the absence of a mechanism for obtaining popular approval of the *Meech Lake Accord*. Yet, given Canada's existing precedents, up to and including the 1982 round, and given the mechanisms for amending the Constitution put into place by the *Canada Act 1982*, it is hard to find legal fault with the process actually followed. No doubt, in view of criticisms directed against

at various universities during the fall of 1990. While I agree with much of what is said in them, I also disagree with much. For this reason, I am confirmed in my view that a perspective from English-speaking Quebec on the *Meech Lake Accord* affair, and on Canada's present conundrum, merits explicit statement. For an earlier attempt at such a statement, see R.A. Macdonald, "Exiting From Meech Lake: Are There Lessons for Australia?" (1990) 1 Pub. L. Rev. 299. See also C. Taylor, "Collision Courses Quebec-Canada" [hereinafter *Collision Courses*] in *Conference on the Future of Quebec and Canada* (Montreal: McGill University, 1990) 7 [hereinafter *Conference*].

⁶⁴ Perhaps the most articulate of such commentators has been Alan Cairns. See, for his most recent view, A.C. Cairns, "Constitutional Minoritarianism in Canada" in Watts & Brown, eds, *supra*, note 5 at 71. Two very careful but slightly divergent discussions and ultimate dismissals of these concerns have been presented by Monahan, *ibid.*, at 22-24, and Simeon, *ibid.*, at 27-31.

⁶⁵ I mean to signal three ideas here which have not been picked up in other analyses. They all relate to the partisan political dimension of the *Meech Lake Accord*, and to the influence of the personal style of the key players. It is hardly surprising that a labour negotiator would want to get the constitutional process untracked in 1985 by seeking an agreement against the backdrop of claims asserted by one party. But there was nothing inevitable about this means of attempting to address what has come to be known as Quebec's exclusion in 1982. Second, it is also hardly surprising that the process should then have been structured as a "trade-off" between players, in which the federal government (on any realistic evaluation, also a player) was cast in the role of mediator. Third, it is hardly surprising that the process should have been set up as a non-ideological and purely pragmatic exercise – in counterpoint to the previous process, orchestrated by a committed ideologue.

the *Meech Lake Accord* process, its replication in future constitutional rounds is unlikely.⁶⁶ But, for the precedential and legal reasons just recited, these process concerns ought not to have constituted a compelling reason for blocking ratification of the *Meech Lake Accord*.

It follows from the above that none of those objections raised to the specific content of the agreement or to the process by which it was negotiated, should have stood in the way of ratification. Yet, the attempt at major constitutional amendment which it represented, like every other attempt apart from that of 1982, ultimately was unsuccessful. A large part of the reason, it now seems clear, was the reaction in the rest of Canada to the decision in December 1988 of the Quebec government to enact Bill 178 in order to counter the judgment of the Supreme Court in the Bill 101 case, and to invoke the section 33 override in so doing.⁶⁷ For many observers in the popular press, Bill 178 simply confirmed their apprehension that the "distinct society" clause would permit and perhaps even encourage the Quebec government to oppress its English-speaking minority.⁶⁸ Any evaluation of the "distinct society" clause and the vision of Canada which it projected must, therefore, commence with a discussion of Bill 178 and the override clause in the *Charter*.

This is not the place to argue for a political theory under which the concept of a limited Parliamentary override would be defended as a legitimate constitutional device, although such an

⁶⁶ Those who claim that, while legally correct, the process was politically flawed ought to consider whether, had the government referred the issue to the Supreme Court, that body would have found the process to be offensive to "convention," as it did with Prime Minister Trudeau's first patriation attempt in 1981. In the text as initially written, it was recommended that a key item of future constitutional negotiation would have to be the development of a text specifying the actual processes by which future amendments are proposed, debated, and ratified. Obviously, in view of the failure of ratification, the amendment process itself has become an issue of major concern – a concern reflected in the Parliamentary Commission on the amendment formula which sat throughout the winter months of 1991.

⁶⁷ Ford, *supra*, note 45. For discussion of the override in the context of Bill 178 see L.E. Weinrib, "Learning to Live With the Override" (1990) 35 McGill L.J. 541.

⁶⁸ On the complexities of the relationship between Bill 178 and the demise of the *Meech Lake Accord* see Fournier, *supra*, note 34 at 42-55.

argument could be, and has been made by others.⁶⁹ Moreover, the decision by the Quebec government to invoke the override in December 1988 was constitutionally unimpeachable. Both the form and the substance of the override provision were respected. Bill 178 was a targeted, rather than a generalized, override. It was not preemptive, but was deployed only following a declaration of invalidity by the Supreme Court. It was not retroactive, but only prospective, in operation. And the *Charter* infringement it was designed to cover could not be characterized as disproportionate to the legislative objective being pursued. Surely, if one is to have an override, this is the way in which it should be deployed. As a final point, given the time and place of its deployment, the invocation of the override in Bill 178 was politically defensible, even if politically unwise. Here is why.

Once Premier Bourassa failed to revise Bill 101 immediately after the 1985 provincial election, or at the latest when the existing override clauses lapsed in the spring of 1987, he was compelled politically to await the judgment of the Supreme Court before acting. Presumably, and in retrospect, most commentators would agree that the wisest strategy, once the unfavourable Supreme Court decision was rendered, would have been simply to re-enact Bill 101 with the override.⁷⁰ This would have given the government the time to work out a new "Bill 1"⁷¹ which would address other concerns — the real threats to French language and culture discussed above — as well as to seek an accommodation on the language of signs, in the calmer political climate likely to emerge after the ratification process for the *Meech Lake Accord* was completed. In this sense, the Premier was right to argue that with the constitutional accord ratified, the deployment of the override may not have been necessary — not to salvage Bill 178, but to serve as a symbolic

⁶⁹ See Weinrib, *supra*, note 67 and also P.C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U. Mich. J.L. Ref. 51.

⁷⁰ Indeed, when asked about this question during an administrative law conference in the fall of 1988 prior to the decision of the Supreme Court in *Ford*, *supra*, note 45, this was the response I gave to a co-panellist who was a senior public servant in the Quebec Ministry of Justice.

⁷¹ It should be remembered that Bill 101 was initially presented as Bill 1, but that procedural bungling forced its withdrawal and reintroduction as Bill 101.

surrogate and to support its likely replacement. For it is worth noting that, for most opponents of Bill 178 (both in Quebec and elsewhere), the actual substance of the legislation was not relevant; once the government imposed any restriction on "rights" other than within the limits traced by the Supreme Court, the political damage was done. By 1988, the *Charter* had become an inviolate symbol, just like the corresponding charter in Quebec, *La Charte de la langue française*, had become an inviolate symbol.⁷² Thus, to have used the override was a very costly error in the context of the *Meech Lake Accord* debate, especially since Bill 178 was Premier Bourassa's own Bill and not one he inherited from the Parti Québécois.

Returning to the "distinct society" clause of the *Meech Lake Accord*, it is important to distinguish two points in trying to meet the concerns of those who fear the consequences of the clause: a defensive or negative point, and an offensive or positive point. The first requires evaluating the relationship, if any, between the invocation of the notwithstanding clause in Bill 178 and the goals which were being pursued by the "distinct society" clause of the *Meech Lake Accord*. It demands an examination of what constitutional impact on the legal powers of the Quebec National Assembly the clause may have had. It also calls for an assessment of whether the clause would have encouraged the National Assembly in Quebec to pursue further the suspect aspects of its language legislation, or whether it would have induced it to reconsider its current understanding of the threats that English-speaking Quebecers really pose to *la survivance*. The second point suggests the importance of providing a positive justification for the inclusion of the "distinct society" clause in the *Meech Lake Accord*. It requires the elaboration of a theory of Canada which acknowledges Quebec's distinctiveness, and which celebrates the contributions of

⁷² It is a paradox that those who fall victim to *Charter* patriotism in the rest of Canada are unable to see how French-speaking Quebecers suffer from the same patriotic blindness *vis-à-vis* their own *Charte de la langue française*. "Ne touche pas à la loi 101" – on buttons, on placards, spray painted on walls, and repeated incessantly on radio and television programmes – is the pendant of the uncompromising attitude expressed by those who cannot accept the use of the section 33 override under any conditions. Yet "Ne touche pas à la *Charte Canadienne*," meaning "do not derogate from its specific guarantees", has a hypocritical ring since section 33 already is in the *Charter*.

French-speaking Canadians throughout the country to Canadian self-definition.

The first of these points scratches the surface of racial intolerance in Canada. During the ratification debate, there was a current of opinion in Quebec and elsewhere in Canada which saw the "distinct society" clause as simply a further example of the xenophobic attitude of certain Quebec political elites which had already led to repressive language legislation. On this view, Bill 22,⁷³ Bill 101, and Bill 178 are interpreted as constituting a direct assault on the English-speaking community of Quebec in a way which makes it the scapegoat for the insecurity felt by the French-speaking population of the province. Whatever the symbolism, however, this feeling of being scapegoated is hard to understand when one evaluates the total effect of various subsections of Bill 101 on the daily life of English-speaking Quebecers. To begin, the regulation of the language of the work place and the professions — in itself a perfectly understandable phenomenon given past practices of senior management in branch-plant factories and given the public service monopoly of professionals — only restricts vocational opportunity among unilingual Anglophones who are unable to pass the most anodyne examinations or unwilling to apply for temporary exemptions. Second, the limitations on access to English-language schools (including access to French-immersion programmes in English schools) are not jeopardizing the continuation of English-language neighbourhood schools nearly as much as the desertion by large segments of the anglophone population of the "public" school system. The regulation of the language of commercial signs and of advertising is a third aspect of Bill 101 which is often held up as provoking insecurity, but which hardly bears on the public life of citizens at all.⁷⁴

⁷³ *Loi sur la langue officielle*, S.Q. 1974, c. 6.

⁷⁴ What seems to trouble many Anglophones is the assertion by Camille Laurin that the prohibition was intended to remove the face of the English language from public places in Quebec. The systematic renaming of parks, streets, and neighbourhoods — including the substitution of René Lévesque for Lord Dorchester (who ironically did more to preserve French-speaking Quebec than any other pre-Confederation Governor) on one of Montreal's main thoroughfares — is another example of what is held out to be the conscious obliteration of the English language from public view in the province. Yet the constant renaming of toponymic features is a routine practice in all countries: even Toronto, it should be

According to its most aggressive proponents, the official agenda of Bill 101 and related statutes was twofold: to make Francophones feel at home in Quebec and to overcome their cultural insecurity; and to impress upon immigrants that French is the operative language of Quebec.⁷⁵ Yet, for some nationalists, there is also a mean-spirited and petty underside to this agenda.⁷⁶ This fact helps to explain why Bill 101 has attracted widespread support in this constituency as a symbol of vengeance for supposed historical wrongdoing and arrogance by English-speaking Quebeckers, and why it is now such a powerful symbol that the government found itself politically unable to accede to the Supreme Court's judgment in the *Ford* case. It is this thinly-disguised xenophobic understanding of Bill 101 among certain "nationalist" sectors, rather than its actual terms, which appears to be most problematic for Quebec's linguistic minority. That is, even though the *Charte* can, on one view, be seen as an undesirable initiative in a liberal democracy, most English-speaking Quebeckers seem to have accommodated themselves to most of its provisions. For they recognize that the vast bulk of the restrictions in Bill 101 will be of only short-term effect. A developing Francophone entrepreneurial class is transforming the economy and the language of the work place. Most Anglophones are enrolling their children in French-language or French-immersion programmes. The need for duplicative English and French outdoor commercial signs is rapidly diminishing. That is, the rapid accommodation of the English-speaking community to the French face of Quebec ought to permit the repeal (as being unnecessary) of most of the provisions of Bill 101 which concern civil libertarians.

But the Quebec government badly misread the political signs among English-speaking Canadians. The ready accommodation of

remembered was once called York; just as Kitchener, Ontario was called Berlin prior to World War I.

⁷⁵ See Laurin, *supra*, note 38.

⁷⁶ It is probably the attitude of some nationalist groups rather than the actual content of Quebec's language legislation which led the Commissioner of Official Languages, D'Iberville Fortier, to characterize the *Charte de la langue française* as "humiliating" English-speaking Quebeckers. See Canada, Office of the Commissioner of Official Languages, *Annual Report, 1987* (Ottawa: The Commissioner, 1987).

many English-speaking Quebecers to Bill 101 misled the Bourassa cabinet in its assessment of the likely reaction of this minority to what it perceived as a too casual attitude towards political promises made to it in the election campaign of 1985. Thus, while English-speaking Quebecers recognized and were largely prepared to accept the cost imposed on them by the legitimate aspirations of the government of Quebec to act as a vehicle for promoting and preserving the French language, they were not prepared to pay an unlimited price. Moreover, the general acceptance by political elites in the rest of the country, through their adherence to the *Meech Lake Accord*, of Quebec's claims for recognition of its distinctiveness also misled the government into thinking that Bill 178 would not be seen as unnecessarily repressive and as reflecting a certain duplicity in the government's position. In retrospect, it appears that there were three principal grounds advanced in the rest of the country for treating the motives of the Quebec government in seeking ratification of the *Meech Lake Accord* as suspect, and it is these suspicions which linked the override in Bill 178 with the "distinct society" clause of the *Meech Lake Accord*.⁷⁷

A first query, which emerged from Ontario in particular, relates to the paradox of the Quebec government seeming to claim that it is a world-class economic competitor not afraid of the unregulated market implied by the *Free Trade Agreement*, and at the same time, claiming that it is threatened by the English language and culture to the extent it must repress them.⁷⁸ But this is only a pseudo-paradox, for the objection fails to distinguish the social and the economic aspects of modern politics. Normally one regulates the economy for protectionist purposes, and assumes (except in Canada where a significant degree of regulation of periodicals, the recording industry, radio and television, movies, and so on has had cultural objectives for a long time) that social regulation is

⁷⁷ For a much more sanguine assessment of the opposition to the *Meech Lake Accord* and its none-too-subtle racist undertones in English-speaking Canada, see Fournier, *supra*, note 34.

⁷⁸ One of the most vocal critics had been Phillip Resnick, a professor of social-democratic political views who goes so far as to characterize Quebec's support of the *Free Trade Agreement* as a sell-out. See P. Resnick, *Letters to a Quebec Friend* (Montreal: McGill-Queen's University Press, 1990).

unnecessary.⁷⁹ That Quebec's resource-based economy should induce the reverse public policy is not inherently implausible. Thus, simply because the government believes that Quebec industry can compete in international markets does not mean that the case for cultural and linguistic regulation is any less strong. One might even point to Ontario's own embrace of the Autopact at the same time that it was restricting the use of American-produced educational textbooks in its primary schools as an analogous policy to that now pursued in Quebec.

A second ground for suspicion of the motives of the Quebec government arose from its apparent failure to distinguish between public and private spheres of regulatory activity. That the government should refuse to put up English-language highway signs is one thing. That it should regulate the use of language in the private sphere is quite another. Yet, this is also not a compelling point. All lawyers accept that the public/private distinction is largely conventional and that its precise frontiers at any given time are politically driven.⁸⁰ For example, would it have seemed appropriate fifty years ago for governments to regulate conditions of membership in social clubs, the discipline of children in the privacy of the home, the occasions for smoking cigarettes in private establishments such as restaurants, or the posting of egress signs in commercial office towers? In an important sense, the present debate in Quebec around the provisions of Bills 101 and 178 is as much about differing conceptions of the locus of the public/private divide for the purposes of governmental regulation as it is about commercial signs. That such differences exist between the policies of the Quebec government and the policies pursued by other governments in Canada in language legislation, as well as in almost all other forms of regulatory activity, should not be taken as evidence of a hidden linguistic agenda. It should, rather, be seen as one more piece of concrete evidence of Quebec's socio-political distinctiveness.

⁷⁹ See, for example, G.B. Doern, *The Politics of Economic Policy* (Toronto: University of Toronto Press, 1985).

⁸⁰ The law review literature on this point is enormous. An important canvassing of the issue in respect of the *Charter* is set out in A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278.

The third reason why many felt the motives of the Quebec government in enacting Bill 178 to be suspect flows from the easy transition that its representatives and spokespersons habitually make in constitutional discourse between questions of form and questions of substance. Sometimes the Quebec government acts for reasons of pure form or symbolism; when it is made aware that its policies have little or no substantive impact, it insists on the importance of form. Yet, when other Canadian political actors make purely formal gestures (especially in relation to linguistic equality), the Quebec government insists that substance is crucial and that mere symbolic efforts are insufficient. This uneasy tension between form and substance in the political discourse of the Quebec government is not intentionally duplicitous, but is consistent with the standard behaviour of political minorities.⁸¹ Not surprisingly, this same tension between form and substance has become increasingly apparent in the political claims of Quebec's English-speaking minority since 1977, which criticizes the government on substantive grounds in connection, for example, with hospitals and education, and on symbolic grounds in relation, for example, to levels of public service recruitment.

This brief discussion of Quebec language legislation (and especially of the invocation of the notwithstanding clause in Bill 178) points to an important lesson for English-speaking Canadians. Whatever has been the position of Quebec "nationalists" on the question, Bill 178 reflects an agenda for the present government which is neither xenophobic nor spitefully repressive. Indeed, one sees evidence that the government is seeking other legislative symbols such as a new Civil Code, an enhanced Human Rights Code, and an explicit Provincial Constitution for Quebec as means of promoting a 1990s variant of the great construction of public

⁸¹ One of the best reflections of this double aspect of minority behaviour is Dufour, *supra*, note 7. See also, C. Taylor, "Why Do Nations Have To Become States?" in S.G. French, ed., *Philosophers Look at Canadian Confederation* (Montreal: Canadian Philosophical Association, 1979) 19 for an attempt to provide a philosophic grounding for the "identity" claims of minorities. But, compare Kymlicka, *Liberalism, supra*, note 2, who rejects Taylor's "quasi-communitarian" claim.

institutions of the 1840-1865 period in Canada East.⁸² If the *Meech Lake Accord* had been ratified, this reconstruction would have soon displaced language from the centre of the political stage. While one might have wished, during the ratification debate, to tell Premier Bourassa to toughen up and to not be intimidated by "ultra-nationalists," xenophobes, and outright racists, his weakness of political leadership on certain aspects of the language question should not be taken as conclusive of the government's basic position on the issue. The government's failure to find the right formula in Bill 178 for reconciling *Charter* rights with a positive legislative programme responsive to aspirations of French-speaking Quebecers does not mean that no such formula exists. Nor does it mean that there is no place for the section 33 override in Quebec language legislation, absent some other vehicle for accommodating the special concerns of the Quebec government. This point can be taken even farther. The transition, contemporaneous with the *Meech Lake Accord* process, from the previous indiscriminate insertion of the override into all Quebec statutes by the Parti Québécois government to its specially targeted and restricted deployment in Bill 178 by the current government was a positive signal. By attempting to induce a general acceptance of the *Charter* ethos within Quebec this transition also suggests that the "distinct society" clause should have been encouraged as a preferred solution to the question of how to balance *Charter* absolutes and practical politics.⁸³

To test this last hypothesis, it is worth speculating about what would have occurred had Bill 178 or its equivalent first come forward for discussion after the *Meech Lake Accord* had been ratified. Presumably, the Quebec government would not have immediately inserted the section 33 override. Rather, it would have argued that the *Meech Lake Accord's* provision, by which "the role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed," would have authorized Bill 178's provisions restricting the language of outdoor commercial signs. On this

⁸² See A.R.M. Lower, *Colony to Nation: A History of Canada* (Toronto: Longmans, Green, 1946).

⁸³ See Laforest, *supra*, note 58 at 84-86 for a similar point.

assumption, it is clear that there would be a conflict between the freedom of expression guarantee in section 2 of the *Charter* and Bill 178. To resolve this conflict it would then have been necessary to read section 1 of the *Charter* in conjunction with section 2(3) in such a way as to produce a new siamese "distinct" but "free and democratic" society test. That is, the role of the Quebec government in preserving and promoting Quebec's distinct identity would have to be understood as a factor to be evaluated in determining whether or not the provisions of Bill 178 constitute reasonable limits on *Charter* rights which are demonstrably justified in a free and democratic society.

It follows that one of the major points of concern about the "distinct society" clause (that it would automatically override the *Charter*) rests on a dubious theory of constitutional interpretation. Moreover, the claim that it was necessary to state explicitly in the *Meech Lake Accord* that the *Charter* would or would not trump the "distinct society" clause seems pointless.⁸⁴ Was such a statement necessary in respect of section 27 of the *Charter*? Constitutional interpretation is not only an exercise in logical pre-emption. The way in which constitutional arguments grounded in the *Meech Lake Accord* would likely have been raised is such that the "distinct society" clause would not have added significantly to the scope of tolerance for legislation that section 1 analysis already contains. For this reason, the various claims advanced by the Quebec government about the impact of the "distinct society" clause on Bill 178 were most unfortunate. For, had the *Meech Lake Accord* been ratified, these claims would have raised expectations in Quebec as to its purport; expectations bound to have been frustrated as often as met. In addition, these claims were often interpreted outside Quebec as suggesting that the principal bearing of the clause would have been its anti-civil libertarian orientation rather than its symbolic and positive implication about the importance to Canada of a province with a French-speaking majority.

⁸⁴ Nevertheless, pointless or not, it exercised Premier Wells and his advisers. It also generated an extensive "commentary" industry during the ratification debate. See, for example, the Alliance Quebec brief, "A Minority's Plea for the Supremacy of the *Charter*" in M.D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 225.

To deny the pre-emptive effect of the clause in relation to the *Charter* — in other words, to dissociate the "distinct society" clause from the override of section 33 — is not to claim that it would have had no effect. For the "distinct society" clause did have an important role to play in signalling, for other political actors in Canada, the cultural and linguistic challenges which Quebec is likely to confront in the years ahead. It may also have had a role in legitimating reasonable arguments, as a matter of constitutional interpretation, in favour of marginally accrued provincial political power, and as a matter of constitutional negotiation, for more informal joint jurisdiction. Thus, in paramountcy questions, the idea of a "distinct society" might well have been capable of being pleaded as an interpretive point to assist the court in finding no conflict between federal and provincial legislation. Again, when balancing the scope of property and civil rights against the federal trade and commerce power in connection with the regulation of federal companies, for example, the clause might also have helped to sustain the constitutionality of provincial legislation. Similar claims conceivably could also have been made about the administration of justice in the province including, possibly, a revised understanding of the meaning of section 96 as this bears on Quebec administrative tribunals. It is apparent, then, that whatever the marginal jurisdictional effect of the "distinct society" clause, it would in no way have disrupted the balance of the Constitution in a manner which facilitated the repressive aspects of the Bill 101 agenda, a point of course, which is expressly noted in section 2(4) of the *Meech Lake Accord*.⁸⁵

Another likely consequence of the "distinct society" clause was the negotiating room which it probably would have given the province in bilateral relations with Ottawa. Undoubtedly, the clause would have had an impact not only in respect of the *Meech Lake Accord's* provisions relating to immigration and shared-cost programmes — where it would have been invoked as a political reason for Quebec to move in its own directions — but also in

⁸⁵ It is also worth noting that not only would the "distinct society" clause not have saved Bill 178, it might well have induced the Quebec government to enact legislation more in keeping with the decision of the Supreme Court in *Ford, supra*, note 45, enlarging only marginally the scope given to it by that decision.

matters not yet on the intergovernmental negotiating table. These matters could have included regulation of government procurement contracts, authority over provincial cable television, the appointment of section 96 judges, income tax points, and so on; all of which, after the demise of the *Meech Lake Accord*, have been demanded as exclusive jurisdiction by Quebec in the *Allaire Report*.⁸⁶ As it related to this type of political negotiation, there is some plausibility to the claim that Quebec might have benefitted from an increased special status under the "distinct society" clause. But the special status it would have acquired was not, as many opponents of the *Meech Lake Accord* thought, new legislative jurisdiction; rather it would have been a further constitutional confirmation of the political special status which Quebec has always enjoyed.⁸⁷

These comments suggest that the "distinct society" clause should have been understood as having, as its primary purpose, a positive constitutive statement affirming the special role which has devolved to the Quebec government and National Assembly in promoting French-language and culture in Canada. It should not have been seen primarily as a negative regulatory clause which could have been deployed to oppress the English-speaking minority in Quebec, or even to provide a non-section 33 justification for *Charter*-offensive legislative programmes. That this was the better interpretation is confirmed by the fact that even English-speaking constitutional scholars in Quebec opposed to the *Meech Lake Accord*, acknowledged that the "distinct society" clause or some similar version of it could have made a positive contribution to constitutionalism in Quebec and Canada.

What this contribution might have been — the second thematic point in relation to meeting concerns about the clause — will now be addressed. What kind of framework could have been developed for understanding the potential of the "distinct society" clause as a pan-Canadian symbol? Given the variety of objections which were raised to the very notion of a "distinct society" clause,

⁸⁶ See *Allaire Report*, *supra*, note 36 at 40-50.

⁸⁷ Moreover, it would simply have been a textual expression of the fact that even though the Canadian Confederation was built on "special status" arrangements for all provinces, the status afforded to Quebec has always been somewhat more "special." For a brief rehearsal of the examples in respect of other provinces, see Hogg, *supra*, note 16 at 13-14.

the case for its adoption can best be built by considering these objections. Both the Manitoba Task Force report of 21 October 1989⁸⁸ and the Newfoundland proposals, circulated only the day before the First Ministers' meeting of 8 November 1989,⁸⁹ stated quite well the symbolic arguments against the clause, as viewed from a particular "national/centrist" perspective. For Manitoba, the basic concern was that the clause was too focused on the particular needs of Quebec and, consequently, was not a "Canada" clause. It was argued especially that there were other Canadian interests — of Native peoples, of women, of multicultural groups — which were deserving of equal constitutional recognition. For Newfoundland, the concern was also that the "distinct society" clause would confound the French language and culture with the Quebec government. In so doing, it would make the position of non-Quebec Francophones more vulnerable, and would unduly enhance the legislative powers of one province beyond those of all other provinces.

The key elements of the Manitoba objection have already been partially responded to in Part I of this essay through the evocation of the compact theory of Confederation, of the changing socio-economic circumstances of Quebec since 1867, and of the feeling of betrayal accompanying the "midnight deal" which put together the 1982 repatriation agreement over the objection of the Quebec government and in perceived disregard of the promise of renewed federalism made during the 1980 referendum campaign. But there are two additional points in response to the Manitoba Report which merit notice. Most importantly, it is to be noted that the "distinct society" clause was only a part of section 2, a section which was also about bilingualism in Canada. Surely this has been such a fundamental characteristic of the country (at least until recently), too long ignored outside Quebec, that a constitutional round in which it predominates was not inappropriate. Second, if the circumstances traced earlier in this essay were not sufficient to

⁸⁸ Manitoba Task Force on Meech Lake, *Report on the 1987 Constitutional Accord* (21 October 1989) (Chair: W.N. Fox-Decent).

⁸⁹ Newfoundland & Labrador, *Constitutional Proposal: An Alternative to the Meech Lake Accord* (9-10 November 1989).

justify a constitutional round also being, for once, largely devoted to addressing the concerns raised by Quebec over the past fifty years, then one should be very pessimistic about the future of the country. Surely it was not necessary, given the unfinished agenda of the *Charter* in respect of Aboriginal rights and regional alienation from the central government, to require that the *Meech Lake Accord* aspired to a comprehensiveness and finality not even demanded of the 1982 amendment. Indeed, as already noted in Part V, as a matter of historical practice, each exercise of Canadian constitutional reform, including the reform of 1867, has never pretended to be comprehensive. Far from the *Meech Lake Accord* constituting a revolutionary step in Canada's constitutional amendment practice, it was the attempt to transform the *Meech Lake Accord* into a comprehensive package that would have been truly revolutionary. As long as the Quebec government expressed a commitment to further constitutional renewal (which was the case), and as long as nothing in the *Meech Lake Accord* directly foreclosed these further amendments (which was also the case), the Manitoba argument, about the "distinct society" clause being too focused on Quebec, ought to have lost almost all its force.

As for the complementary claim, advanced in both Manitoba and Newfoundland Reports, that the "distinct society" clause was flawed because it was not a Canada clause that spoke to the rights of linguistic minorities across the country but just to those of French-speaking Quebecers, there are a number of responses. To begin, it is to be remembered that just such a clause was initially a part of the Mont Gabriel declaration. Second, the claim in the Newfoundland proposal that the concerns of French-speaking Canadians can be met through a system of concurrent majorities in the Senate, and do not require any acknowledgment of the responsibilities of the Quebec government, rests on two dubious assertions: that it is the prevention of federal action which is key to the future of the French language in Canada, and that the *realpolitik* of the English and French languages in the country is identical. Patently, as the previous sections have illustrated, this is not the case. Moreover, the simple fact that a French-speaking majority lives there means that Quebec is, within Canada, a province not like the others. That the government of Quebec has a special role to play in promoting the distinctive identity of the province

means not just that the provincial government is acting for Quebec. A strong cultural industry in Quebec is a *sine qua non* of bilingualism and biculturalism throughout the country, and of the continued flourishing of linguistic minorities in other provinces. Lastly, sections 2(1)(a) and 2(3) did acknowledge the very bilingual character of Canada that the Newfoundland proposal, in respect of the Senate, sought to identify. While the "distinct society" clause did speak to a special role for the Quebec government, this clause was contained within a provision which asserted the bilingual character of the whole country, and which committed all provincial governments to preserving this fundamental feature of Canada.

It can also be said, in defence of the clause, that the view according to which the "distinct society" clause was not a Canada clause because it sought to create a hierarchy of *Charter* rights simply cannot be sustained. No doubt, the *Meech Lake Accord* was not elegantly executed in relation to the statement of Canada's essential attributes. Even if one acknowledges that the *Meech Lake Accord* was not the occasion to include specific references to Native Canadians and to the country's multicultural heritage, the later redraft of section 16 in the Langevin text to preserve expressly Aboriginal rights and multiculturalism from the terms of section 2, was unfortunate. For if one were to adopt a literalist (*expressio unius est exclusio alterius*) approach to interpreting the *Meech Lake Accord* (always an unwise strategy in constitutional interpretation), one might be able to make a case that the *Charter* guarantees of legal rights, political rights, and equality rights were to be devalued. The inclusion of section 16 in the Langevin draft was a mistake, and it would have been preferable that the relation of section 1 of the *Charter* to the "distinct society" clause be left for the wisdom of judicial interpretation. But this should not have been a fatal objection to the *Meech Lake Accord*, especially in relation to any negative inferences which might have been drawn about the impact of the clause on section 28 of the *Charter* — the section in respect of which most opposition of this nature emanated.⁹⁰ Would it have

⁹⁰ See, for severe criticisms of the *Meech Lake Accord* along these lines, M. Eberts, "The Constitution, the *Charter* and the Distinct Society Clause: Why Are Women Being Ignored?" in Behiels, ed., *supra*, note 84 at 302-20; B. Baines, "Women's Equality Rights and the *Meech Lake Accord*" (1988) 52 Sask. L. Rev. 265. For a contrasting opinion, from Quebec, see N.

been likely that a government of Quebec — a province with more women MNA's, Cabinet ministers, judges, deputy ministers, and heads of administrative agencies than others (both in absolute and in percentage terms) — would deploy the "distinct society" clause for such purposes? To sum up on this second point, there is no reason that section 16 should not have been understood as the Senate clause in the *Meech Lake Accord* was: not as devaluing unenumerated rights, but rather as an indication that the concerns of Native Canadians and the impact of Canada's multicultural heritage, in addition to the provincial role in the Senate, would have to be addressed in any future attempt at defining the country's fundamental character.

The final objection often advanced against the "distinct society" clause was that it would enhance the powers of one province beyond those of others, and that it would effect the political isolation of Quebec, with the result that two linguistic enclaves would be produced in Canada. The first of these claims has already been addressed in the demonstration that Quebec would have received no additional legislative jurisdiction from the "distinct society" clause.⁹¹ It remains to be considered whether the clause promoted linguistic dualism in Canada. Section 2(1)(a) explicitly recognized the bilingual character of the country, and section 2(2) affirmed the role of all governments and executives (including those of Quebec) to preserve that basic characteristic. If two linguistic "enclaves" were to develop — a thought hardly conceivable given the predominance of the English language in Canada — it would have had to have been despite sections 2(1)(a) and 2(2). Moreover, the "distinct society" clause (section 2(1)(b)) merely recognized that Quebec is the only province in which French-speaking Canadians constitute a majority. In other words, if one accepts the validity of section 2(1)(a) — which all critics of the *Meech Lake Accord* purported to do — a provision like section 2(1)(b) is the inevitable

see N. Duplé, "L'Accord du lac Meech: Les inquiétudes féministes sont-elles fondées?" in R.A. Forest, ed., *L'adhésion du Québec à l'Accord du lac Meech: Points de vue juridiques et politiques* (Montreal: Thémis, 1988) 65.

⁹¹ Almost as soon as the *Meech Lake Accord* was negotiated, this was perceived in Quebec nationalist circles. For a typical reaction, see G. Bouthillier, "L'Accord du lac Meech: Aucun pouvoir nouveau au Québec" (1987) 77 *L'Action nationale* 108.

consequence.⁹² Other provinces are not distinct in a constitutionally relevant sense because there is no constitutional criterion (which rises to the level of constituting a "fundamental characteristic of Canada") out of which their distinctiveness emerges. To illustrate this point, an analogy may be drawn with the claims of Aboriginal Canadians. Suppose a clause stating that the existence of Aboriginal Canadians (assuming the desirability or the possibility of treating Canada's various First Nations as an undifferentiated unity) concentrated in province or territory X or Y, but present elsewhere in Canada, were to constitute a fundamental characteristic of the country. Would it be absurd, divisive, or dualist to characterize that province or territory where they constituted a majority and where they could control the legislature as a "distinct society"? Would it be absurd, divisive, or dualist to charge the legislature and government of that province or territory with a special role in preserving and promoting that identity? Of course not. Indeed, one should think that this kind of constitutional recognition would be an important achievement for Native Canadians and should be promoted. Moreover, to insist that the best way to ensure the survival of the French language in North America is simply to strengthen bilingualism misses the "critical mass" point. Not surprisingly, it is typically advanced by those of majority cultures and, especially in Canada, by Anglophones and Anglophone politicians who are not themselves bilingual. There is nothing at all incompatible with charging a government to take special care in one matter, while imposing general obligations on other governments which can only be fully realized if the first objective is met.⁹³

⁹² The point is put very effectively by J. Woehrling, "A Critique of the Distinct Society Clause's Critics" in Behiels, ed., *supra*, note 84 at 171.

⁹³ One of great misunderstandings of the "distinct society" clause among those opposed to the *Meech Lake Accord* was the belief that it could be easily renegotiated, by redrafting, into something that it was not. While the clause was not elegant, while there were other features of Canada which could have been expressed in it, and while it may have been best stated as a preamble rather than a substantive section of the amended *Constitution Act, 1867*, these options were simply not on the table by the fall of 1989. The only question thereafter was: "Was the clause in its original form inimical to the basic structure of Canada, and did it foreclose further constitutional renovation directed to identifying other fundamental features of the country?" The question certainly was not: "Is this the best such clause that could have been drafted?" — a point Premier Wells never, it seemed, could grasp.

Having addressed the various critiques advanced against the "distinct society" clause and having attempted to show that the negative view of the country which critics attributed to it was patently false, it is now appropriate to state in positive terms the vision of Canada which it, and by implication the entire *Meech Lake Accord*, presupposed.⁹⁴ When one examines globally the basic mythologies sustaining critiques of the "distinct society" clause — that it would have permitted Quebec to override the *Charter*, that it would have encouraged the oppression of linguistic minorities, that it would have devalued other fundamental characteristics of Canada, and that it would have promoted a "two separate states" concept of the country — it is apparent that they all have at their root a peculiar version of the political theory of liberal individualism.⁹⁵ That is, these criticisms all presumed the desirability of a non-interventionist role for the state; and they sought exclusive recognition of discrete persons as political agents. Not surprisingly, adherents of this type of political theory invariably have adopted the statute view of Confederation, have been strong centralists who barely tolerate provincial jurisdiction, and have been consistent supporters of entrenched civil liberties guarantees.⁹⁶ The richness of Canada's constitutional traditions, including its organic or communitarian facets as reflected in Tory and socialist political ideologies, is constantly trivialized by those who would reduce all politics to the relationship of individual to state.⁹⁷ Any mediating

⁹⁴ For a similar analysis of the possibilities of the *Meech Lake Accord*, see Laforest, *supra*, note 58.

⁹⁵ For an analysis of this version of liberal individualism, as applied to Pierre Trudeau, see R. Whitaker, "Reason, Passion and Interest: Trudeau's Eternal Liberal Triangle" (1980) 4 *Can. J. Pol. & Soc. Theory* 5.

⁹⁶ At the risk of lumping together some very disparate types, I would claim that this sort of ideological orthodoxy sustained the critiques of John Whyte, Alan Cairns, Deborah Coyne, Eugene Forsey, Howard McConnell, Bryan Schwartz, and Stephen Scott. For relevant citations to their collective *oeuvre* see, D. Herperger, "The Meech Lake Accord: A Comprehensive Bibliography" in Watts & Brown, eds, *supra*, note 5 at 271-289.

⁹⁷ For alternative perspectives, see C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989), and M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983). See also, M. McDonald, "The Forest in the Trees: Collective Rights as Basic Rights" in G. Lafrance, ed., *Ethique et droits fondamentaux* (Ottawa: University of Ottawa Press, 1989) 230.

social institutions — religion, culture, language (and even smaller political units such as provinces) — are viewed with suspicion. Moreover, any recognition that groups and societies should be the object of constitutional regard is anathema because it suggests an active and constitutive role for a country's political agencies, in which state institutions contribute to the achievement of positive freedom.

This point can be restated by reference to the case for, not against, the *Meech Lake Accord*. Obviously, the *Meech Lake Accord* did not present an unambiguous communitarian vision for Canada. Indeed, it is not clear what such a vision would look like in its detail. Further, the exigencies of political compromise are normally too present in Canada to permit a single ideology to capture any given exercise of constitutional reform. But the primary thrust of the *Meech Lake Accord* was to restate for the post-*Charter* era, the communitarian component of Canadian political life. It was to remind Canadians that representation based on difference as well as abstract equality, that political rationality as well as juridical fiat, that the heterogeneity of "bi" and "multi" as well as the homogeneity of "identity" and "unity," and that "obligations towards" as well as "rights against" are equally important features of Canadian constitutionalism. The "distinct society" clause was an important reminder of these points, not only for Quebec, to which it was specifically addressed, but for all Canadians. For even had the *Meech Lake Accord* achieved ratification, Canadians would soon have been called upon again to give positive recognition in the Constitution to the diversities of gender, region, Aboriginal ethnicity, culture, economic resources, and, perhaps, even religion.⁹⁸ The clause was also a confirmation that governments have positive obligations to legislate in certain matters, as well as negative duties not to legislate in certain others. Despite the homogenizing

⁹⁸ For various explorations of this theme in Canada, see G. Bourque, "La sociologie, l'Etat, la nation" (1990) 14 C. de rech. sociologique 153; D. Howes, "In the Balance: The Art of Norman Rockwell and Alex Colville as Discourses on the Constitutions of the United States and Canada" (1991) 29 Alta L. Rev. 1; 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, Ont.: Institute of Intergovernmental Relations, Queen's University, 1989) 9. See also, more generally, A. Etzioni, "Toward an I and We Paradigm" (1989) 18 Contemp. Soc. 171.

tendencies of the *Charter*, it is apparent that these obligations and duties touch the preservation and promotion both of shared national values, and of the various diversities which together comprise these national values.⁹⁹

The gravamen of this section has been that the recognition of Quebec as a "distinct society" and the acknowledgment of the role of the Quebec government in preserving and promoting Quebec's distinct identity were necessary components of the *Meech Lake Accord*. The explicit recognition of a longstanding constitutional fact which they reflected was made necessary primarily by the disruption in the equilibrium of Canadian constitutionalism brought about by the centralist and individualist character which the now "official" reading of the *Charter* projects. Read as a whole, and understood in its historical context, section 2 was a genuine (if flawed) "Canada" clause. It did not override the *Charter*, nor did it create a hierarchy of rights, nor did it operate like section 33 to permit a variety of regional differentiations in *Charter* rights. It did not vest new constitutional jurisdiction in Quebec and so radically change the Confederation agreement of 1867 as to make Quebec a non-province rather than the province unlike all the others which it has always been. Further, it did not license the government of Quebec to oppress its English-speaking minority, nor relieve the governments of other provinces of their obligations towards their French-speaking minorities. In short, the clause would have recognized the communitarian component which has always been present in Canadian constitutionalism. In doing so, it would also have promoted, rather than impeded, the recognition of multiculturalism and Aboriginal rights in future rounds of constitutional amendment. In this respect, the "distinct society" clause, and section 2 of which it is a part, could have been understood — had its vocation "not been sabotaged by the unfair and irresponsible attacks of the acolytes of Pierre Trudeau"¹⁰⁰ — as a

⁹⁹ In the next section of this essay, an attempt will be made to trace out what these values are.

¹⁰⁰ This particular characterization of the efforts of Pierre Trudeau, widely held in Quebec today, is drawn from Fournier, *supra*, note 34 at 47.

powerful Canada clause contributing positively to Canada's self-definition in the years ahead.

A final observation about the vision of Canada implicit in the *Meech Lake Accord* flows from the relationship between the "distinct society" clause and the override clause in the *Charter*. The recourse to section 33 in Bill 178 — an Act which directly affects English-speaking Quebecers more than most other Canadians — was a constitutionally permissible act under the *Charter* itself. Far from being a reason for objecting to the "distinct society" clause, it should have been seen as an important reason for including such a clause in the *Meech Lake Accord*. For if the "distinct society" clause were to have induced among French-speaking Quebecers the will to adhere to the 1982 process, and to let lapse permanently the blanket section 33 override, and if it were to have impelled the Quebec government to justify colourable legislation (including certain provisions of *La Charte de la langue française*) first on that basis, rather than by means of the section 33 fiat, it would have achieved a major advance in Canadian constitutionalism. After all, is not the dialectic of political discussion — hedged as it is by concepts of reasonableness and proportionality — preferable to the fiat of absolute legal exclusion which is authorized both by the concept of inviolable constitutional rights announced in the *Charter*, and by the idea of their modulation only through the section 33 override? The "distinct society" clause, then, was explicitly non-revolutionary, and unlike both the *Charter* and the override, it would neither have commanded, nor authorized, legal discontinuities. For this reason alone, the *Meech Lake Accord* was truer to Canadian constitutional tradition than the 1982 patriation package. For this reason also, even despite its inelegant drafting, it should have been welcomed as a symbol which offered a promising vision of the country's future.

VII. THE RATIFICATION IMPASSE: CONSTITUTIONAL MOMENTS

If, as has been argued, the case for ratifying the *Meech Lake Accord* could have been made out, what are individual Canadians to

make of the political impasse which led to its failure?¹⁰¹ More generally, how are they to reconcile themselves (given the inevitability of further constitutional discussions) to what seems to be a tragi-comical political process whenever attempts are made to deal with concerns emanating from Quebec?¹⁰² The detached commentator, having observed the ratification process over its three-year history, could be forgiven puzzlement about the wellsprings (and

¹⁰¹ Since this part of the essay also contains a perspective, I would like to state a few caveats to the text so as to avert the reader to the ground on which I (and the analysis which follows) stand. First, I was not a Meech Lake "insider" (as both Alan Cairns and Patrick Monahan have used the term), and am not now an adviser to any government or interest group. Second, I am not a "professional" constitutional lawyer. My interest in the *Meech Lake Accord* process was as an Anglo-Quebecker and as a legal theorist, not as a purveyor of conventional constitutional wisdom. Third, I formally support politically neither the Progressive Conservative government in Ottawa nor the federal Liberal opposition. Neither am I a partisan of either the provincial Liberal government or the opposition Parti Québécois. Fourth, I am white, middle-class, middle-aged, bilingual, male, married with two children, and was born, raised, and educated in central Ontario, and, therefore, carry this pedigree in all claims to objectivity.

¹⁰² How else, but as comedy, can one explain the following paradoxes of the late-1989 through early-1990 ratification exercise. (1) The premier of one province, Alberta, threatening revocation of a prior ratification unless the Prime Minister agreed to appoint a recently elected Senate nominee whose only claim to consideration for the position flowed from the provincial-input nomination scheme of the *Meech Lake Accord* – and yet who is on the record as personally opposing the *Meech Lake Accord*. (2) The premier of another province, Newfoundland, actually revoking a prior ratification in large measure on the bases that the government of Quebec really did not understand what the people of Quebec wanted, and that French-speaking Canadians outside Quebec, who by then overwhelmingly supported the *Meech Lake Accord* initiative, did not know what was in their own best interest. (3) Three parties in the Legislative Assembly with a minority government in another province, Manitoba, which has systematically shown contempt for the constitutional rights of its French-speaking population, even after the Supreme Court reminded it of its constitutional duty, objecting to the *Meech Lake Accord* ostensibly because it did not speak for all Canadians and (if the press releases of the Liberal opposition are to be believed) because Quebec "mistreated" its own English-speaking minority by exercising constitutional rights that were legitimately open to it under the *Charter*. (4) The premier of another province, New Brunswick, which had recognized the fragility of the French language and culture in Canada and which, for twenty-five years, made great efforts to support and nurture its minority Acadian population, nonetheless objecting to the *Meech Lake Accord* partly on the basis that it recognized the special role of the government of the one province where his province's linguistic minority constitutes a majority to take steps to preserve and promote the language and culture of that minority. (5) The premier of a province, Quebec, which strongly promoted ratification, arguing that the *Meech Lake Accord* would have permitted his government to restrict more effectively the rights of its linguistic minority, and that it should, therefore, be supported for this reason. (6) The Prime Minister of Canada twice (in November 1989 and in June 1990) engaging in a public squabble with recalcitrant premiers on national television in an attempt to sell the *Meech Lake Accord* as a vehicle of "national reconciliation."

backwaters) of Canadian political life, and about the ability of Canadian political elites to understand what their country is about.¹⁰³

There are, of course, those who even today argue that the paradoxes of political behaviour displayed during the ratification period were healthy because they illustrated clearly the folly of ratifying the *Meech Lake Accord*, and because they showed unequivocally that the most appropriate means of resolving the constitutional conundrum created by the *Meech Lake Accord* was to do nothing.¹⁰⁴ These commentators also still believe that the *Meech Lake Accord* was so flawed, and that its long-term consequences would have been so pernicious, that it deserved to be scrapped outright, whatever the consequences. In retrospect, it appears that some among this group of academic nay-sayers actually played a key role in advising the Premiers of Newfoundland, New Brunswick, and Manitoba. By hastening to point out flaws in the *Meech Lake Accord* and by proposing "non-negotiable" amendments about cost-sharing, immigration, the Supreme Court nomination process, and the amending formula (which would have effectively gutted the *Meech Lake Accord* of its major operational terms) as a condition of ratification, these advisers sought to ensure that, whatever its terms, the *Meech Lake Accord* would never be ratified.¹⁰⁵

¹⁰³ It is no wonder that most Canadians now express mistrust of politicians and the political process. For a measure of this mistrust, see the article on the Interim Report of the Citizens Forum on Canada's Future (released 20 March 1991) in M. Valpy, "Canadians Demand Radical Change, Spicer Forum Says" *The [Toronto] Globe and Mail* (21 March 1991) A1. See also the Angus Reid poll reported in the *The [Montreal] Gazette* (26 March 1991) 1, which places the popularity of the Prime Minister at less than fifteen per cent of respondents.

¹⁰⁴ For a strongly worded, though well argued, technical presentation of this position, see S.A. Scott, "Remarks prepared for delivery to the Alberta Constitutional Reform Task Force" (30 November 1990) [unpublished].

¹⁰⁵ For an elaboration of this theme, see Fournier, *supra*, note 34. In the text of the Laskin Lecture as delivered in November 1989, I suggested that there may have been hidden motives to some of this opposition. Subsequent events seem to confirm this initial judgment. Let me repeat the three examples of strategic behaviour I offered then. In the first place, many of those who wanted the *Meech Lake Accord* made subject to the *Charter* were really fighting a rear-guard action against the section 33 override, and were more or less attempting to use their opposition to the *Meech Lake Accord* to pursue what they saw as the as yet incomplete *Charter* package. Linking Bill 178 to Quebec's desire for ratification was thus a device to have the override dropped from the *Charter* as part of the *Meech Lake Accord* package. Second, many of those who resisted the "distinct society" clause in section 2(1)(b)

The argument of this essay is, however, to the opposite effect. Whatever the defects of the *Meech Lake Accord* as originally negotiated, the issues it addressed were *bona fide*, and these issues were resolved in a way that would have represented, on balance, an important constitutional gain. Moreover, by late 1989, the *realpolitik* of the constitutional moment was patent. Absent the political dynamic then in play, one might have been inclined to recommend a rewrite of various sections of the Langevin text, and to seek ratification of a revised *Meech Lake Accord*. But by the final months of the ratification period, the attitude of at least three of the key players was so hardened that a strategy of reopening the *Meech Lake Accord* could not have succeeded.¹⁰⁶ Finally, the *realpolitik* in the spring of 1990 was powerfully driven by what have been characterized in this essay as the motifs, symbolism, and vision of the *Meech Lake Accord* in Quebec. Regardless of its actual effects, the agreement came to be perceived in that province as Canada's reaffirmation of its commitment to Quebec. For this reason, any attempt to "reopen" the *Meech Lake Accord* so as to "improve" it would have been seen as equivalent to rejecting the special urgency of Quebec's concerns and, thus, rejecting the idea of the *Meech Lake Accord* itself.¹⁰⁷

were not interested in improving the formulation of French/English relations in the *Meech Lake Accord* by strengthening the injunction to the various governments to preserve and promote bilingualism throughout Canada. Rather, they objected to the entire notion of the Constitution as a compact between "founding peoples" suggested by section 2(1)(a), and sought to have Canada's French-language commitments confined to Quebec, and then only within the provincial sphere. Third, some political leaders saw a redraft of the "distinct society" clause as a means of obliging the federal government to assume a larger share of the cost to the provinces of providing bilingual services.

¹⁰⁶ Both Prime Minister Mulroney and Premier Bourassa invested so much personal credibility in the success of the *Meech Lake Accord* and, by doing so, raised the political stakes of ratification so high with their rhetoric of "no amendments" and "the last chance" that it would have been as ill-advised to redo the deal as it would to explicitly undo it. Moreover, by then Premier Wells had said that he totally rejected the concept of Quebec being a "distinct society," so it is difficult to see what gain would have resulted from tinkering with other provisions of the *Meech Lake Accord* to effect marginal improvements.

¹⁰⁷ It is now common opinion in Quebec, whether or not this is true, that the failure of the *Meech Lake Accord* means that Canada said "no" to Quebec. See P. Fortin, "Quebec's Forced Choice" in *Conference, supra*, note 63. In other words, the *Meech Lake Accord* was seen as an opportunity for French-speaking Quebecers to be both Canadians and Québécois. Most understood its failure as putting them to the choice, and like Robert E. Lee in 1861,

To put the matter slightly differently, those who argued for rejection or radical amendment concentrated on the text of the *Meech Lake Accord* as an abstract exercise of statutory drafting rather than on the meaning of the *Meech Lake Accord* as a constitutional artifact. Concomitantly, they failed to devote sufficient attention to devising an "exit strategy" from a constitutional amendment about the political foundations of Canada which had been ratified federally and by the legislatures of eight provinces containing more than ninety per cent of the country's population. Without such an exit strategy, and without a detailed proposal for cleaning up the political and constitutional debris attendant on explicit rejection or implicit rejection through attempts at radical amendment, talk of either option was highly irresponsible.¹⁰⁸

During the final months of the ratification period, many politicians and commentators suggested (with good reason it is now apparent) that, were the *Meech Lake Accord* rejected, people in all parts of the country would probably lack the political will to restart a meaningful constitutional reform process. For this reason, great energy was devoted to finding mechanisms for modifying the *Meech Lake Accord* in order to achieve ratification. While the political costs of such a strategy were acknowledged to be quite high,¹⁰⁹ they were seen as being less than the cost of failure. Four main types of avenue of escape from the ratification impasse attracted attention in

faced with such a choice, most of them are now saying: "I must go with my section." I do not cite this example to suggest that the country is on the verge of warfare. It is offered, rather, to illustrate the power of "sectional" arguments in federations once the centre forces minority groups to make a choice of "nationalisms." For a thoughtful discussion of the appeal of "section" in moments of constitutional conflict, and of Lee's decision in particular see MacPherson, *supra* note 20 at 280-81.

¹⁰⁸ For further development of this theme, see Macdonald, *supra*, note 63.

¹⁰⁹ At the time the Laskin Lecture was delivered, three such costs were easily identifiable. First, Premier Bourassa would have had to be given very good reasons (such as the promise of more constitutional jurisdiction – and in this case real, not just symbolic, jurisdiction) for retreating from his consistent "no parallel Accord" stance. Second, none of the items reopened could undercut Quebec's minimum demands as formulated in 1986. Third, the ratification of the *Meech Lake Accord* could not be postponed until any such parallel Accord also achieved ratification. I was, consequently, doubtful that attempts to reopen the *Meech Lake Accord* would be welcomed by other premiers; for any proposal for renegotiation would not immediately advance the agenda of any of those who objected, even on reasonable grounds, to the *Meech Lake Accord* as then drafted.

the period between November 1989 and June 1990. These avenues were: (1) negotiating a new side deal with Quebec which would meet the concerns of objecting provinces; (2) negotiating a parallel Accord for the same purposes with provinces other than Quebec; (3) negotiating a series of parallel Accords with various provinces in order to meet their own specific concerns or the concerns of a third province; and (4) having the Governor-General proclaim the *Meech Lake Accord* as a constitutional amendment by virtue of the general amending formula of section 38(1).¹¹⁰ While these suggestions now have primarily a historical interest, they are worth examining briefly, if only because variants upon the first and fourth are being mooted as mechanisms for addressing Canada's current constitutional agenda.¹¹¹

Take first the possibility that the government of Quebec would have been willing to reopen the *Meech Lake Accord* so as to conclude a separate agreement (or "side deal" as it came to be known) to address objections to the *Meech Lake Accord*. Because the principles of the Mont Gabriel declaration were always understood as Quebec's "minimum" demands, it would have been most unlikely that the Quebec government would have assented to other than relatively anodyne modifications.¹¹² Further, the only objection to the *Meech Lake Accord* which would have required an explicit further agreement with Quebec (and could have been achieved on that basis alone) concerned the affirmations contained in proposed section 2, including their relation to the *Charter*. On

¹¹⁰ The mechanics of each of these various alternatives were set out in great detail in the original Laskin Lecture. For obvious reasons, much of this detail has been deleted from this version of the essay.

¹¹¹ See, for example, Monahan, *supra*, note 5 at 32-36. It should also be noted that these same themes are also being addressed indirectly by the joint Senate/Commons Committee on the Amendment Process.

¹¹² These could have included, for example: (i) deleting the proposed section 25 Senate provision; (ii) deleting references to all other provinces in the proposed section 95A immigration clause and the proposed section 106A shared-cost programme clause; (iii) adding the governments of the Northwest Territories and the Yukon to the proposed section 101C(4) in connection with Supreme Court appointments; (iv) deleting some or all other provinces from the unanimity requirement of proposed section 41; and, perhaps, (v) including references to Native Canadians and multiculturalism as fundamental characteristics of Canada, and enumerating special duties of other provinces to preserve and promote these characteristics in additional subsections of section 2.

this question, the agreement of Quebec to anything remotely responsive to Newfoundland's objections would have been next to impossible to obtain. Abandoning the positive statement of Quebec constituting a "distinct society" and of the role of the Quebec government and National Assembly in preserving and promoting Quebec's "distinct identity" was unthinkable. It was also unthinkable that, without major jurisdictional concessions, the Quebec government would be willing to take the political risk of making the "distinct society" clause expressly subject to the *Charter*.

A second strategy for overcoming the ratification impasse would have been for the federal government to approach the deadlock from the other end by attempting to negotiate a parallel Accord with Canada's nine provinces other than Quebec. For example, there was nothing preventing those provinces that wished to re-fight the section 33 battle from unilaterally agreeing under section 45 to amend their provincial constitutions so as to prohibit the future invocation of the override. Nor was there anything preventing them from renouncing their rights under proposed sections 25, 95A, 101A, and 106A of the *Constitution Act, 1867*, or the amending formula under proposed section 41 of the *Constitution Act, 1982*, and individually ratifying such renunciations with federal concurrence under section 43. But it is now apparent that many of the decentralist objections to the *Meech Lake Accord* were primarily strategic and intended to lever financial concessions from Ottawa.¹¹³

Yet another potential ratification strategy would have been for the federal government and any province other than Quebec which was really committed to the success of the *Meech Lake Accord* to agree, by means of a section 43 amendment, to meet the concerns of a third. Ontario was the most likely candidate for

¹¹³ In other words, it is highly unlikely that the other provinces would collectively have given up the decentralist gains they achieved at Meech Lake in order to induce Quebec to make the "distinct society" clause subject to the *Charter*. Once again, the attempt to salvage the agreement by having Canada's nine other provinces renegotiate among themselves those features of the *Meech Lake Accord* not directly applicable to Quebec – either by means of a series of section 43 amendments or a general section 38 amendment (assuming the required 7/50 per cent criterion could be met) mistakes the degree of consensus likely to be achieved between these provinces on the various outstanding issues. It is, for example, difficult to conceive that Ontario, Alberta, and British Columbia on the one hand, and Newfoundland, New Brunswick, and Manitoba on the other, would find much common ground about the centralist/decentralist balance to be struck.

offering such concessions. Thus, should the exclusion of territorial governments from section 101C(4) have been seen as a fatal flaw in the *Meech Lake Accord*, Ontario could have met this objection by offering to accept the addition of a section 101C(5), needing only the approval of the federal Parliament in addition to its own that it would include on its list of nominees for Supreme Court appointment all names submitted to it by the two territorial governments. This same strategy could have been generalized to most other specific objections to the *Meech Lake Accord*.¹¹⁴ But even were each of the concerns of recalcitrant constituencies to be fully addressed by such *ad hoc* adjustments, ratification in hold-out provinces would not necessarily have followed.

Each of the above strategies for salvaging the *Meech Lake Accord* through the mechanism of a parallel Accord or Accords had a certain attractiveness given the political impossibility of formally amending the initial agreement. But each also had a high degree of political unreality about it. Each presupposed a series of difficult federal/provincial and interprovincial negotiations, and the willingness of several governments to manage the passage of these various new resolutions through their respective legislatures. Each also presupposed that substantive agreement on how to make the *Meech Lake Accord* universally acceptable could be achieved in a matter of months — a highly unlikely event in view of the political agenda lying behind Premier Wells' uncompromising opposition to the "distinct society" concept. More tellingly, an eleventh-hour process of patchwork tinkering to meet the objections of particular interests is hardly a model of constitutional reform which has much to commend itself.¹¹⁵

¹¹⁴ Various possible examples were raised in the Laskin Lecture. As a wealthier province and a primary programme funder, Ontario could have agreed never to opt out of national shared-cost programmes; or it could have agreed not to exercise its rights under section 95A relating to immigration agreements; or it could have offered to give up some of its Senate seats to "under-represented" provinces. It is worth noting that something akin to this last suggestion was, in fact, offered by Ontario in the dying days of the ratification period.

¹¹⁵ Indeed, that any of these ideas were proposed (and taken seriously) suggests one of the great weaknesses of the Canadian federal system — the absence of professional intergovernmental affairs bureaucracies. Only Ottawa, Ontario, and Quebec maintain a significant full-time bureaucracy to handle Canadian intergovernmental relations. The absence of such professionals, meeting on an ongoing basis to sound out various proposals and

The final avenue to achieve ratification would have had the Queen's Privy Council for Canada advise the Governor-General to issue a proclamation under section 48 declaring the Constitution of Canada already amended pursuant to the procedure of section 38(1) of the *Constitution Act, 1982*. The constitutional ramifications of proceeding in this fashion would have been fascinating. It would have been necessary to assess both which parts of the *Meech Lake Accord* could be proclaimed under section 38(1) and, if it could not have been so proclaimed in its entirety, whether its provisions could have been severed without the need for a new round of ratification resolutions. Commentators were generally agreed that resort to a section 38(1) proclamation could potentially have had the effect of amending the Constitution so as to achieve five of the six elements of the *Meech Lake Accord*.¹¹⁶ Yet, because the *Meech Lake Accord* had been ratified by Parliament and in each province as a "package deal" — that is, because the formal ratification resolution did not distinguish the various specific amendments to the Constitution set

counter-proposals (constitutional or otherwise), is what permitted both Prime Minister Trudeau (and more particularly, Prime Minister Mulroney) to attempt constitutional renovation by personal persuasion of First Ministers. In view of this, it is not surprising that the three governments which led the opposition to the *Meech Lake Accord* were those where governments changed during the ratification process. The lesson of the *Meech Lake Accord* failure is that personal processes of elite accommodation between politicians will not work any more as a means of constitutional negotiation. The lesson is not, I believe, that "executive federalism" in all its forms will not work and ought not to work. For the establishing of intergovernmental affairs departments is the pendant of a true executive federalism which mediates and is responsive to fundamental provincial and regional interests.

¹¹⁶ Given that the *Meech Lake Accord* proposals relating to the Senate and to the Supreme Court did not touch the question of provincial representation, or the composition of the Supreme Court as provided by subsections 41(b) and 41(d), respectively, but are rather matters contemplated by subsections 42(1)(b) and (d), the general amending procedure under section 38(1) would have been sufficient for their ratification. Moreover, neither immigration nor shared-cost programmes appear on the list of matters set out as requiring unanimity by section 41. They are, consequently, also section 38(1) matters. Finally, the proposed section 2, which includes the "distinct society" clause, is probably not contemplated by section 41. In other words, each of the substantive modifications to federal and provincial legislative powers, and the proposed "distinct society" clause could have been ratified under the general formula of section 38. The major problem with this device for achieving ratification of the *Meech Lake Accord*, however, was that it could not have been used in respect of the proposed modifications to the amending formula which telescope section 42 matters into the unanimity provision of section 41. A Quebec veto over future section 42 amendments, therefore, could not have been generated through the section 38 procedure.

out in its schedule — there is a strong argument that its terms could not have been severed.¹¹⁷

It follows from the above recital that none of the alternatives to outright ratification available in early 1990 were either constitutionally easy to effect or politically advisable. Indeed the unsavoury spectacle of the last-minute negotiations of June 1990 are confirmation of the fact. Each of the "fall-back" positions just reviewed would have implied that good political ends should always trump difficult to negotiate constitutional means; and was it not, after all, just this kind of thinking which produced the *Constitution Act, 1982* that led to Quebec's current discontent? Sometimes catharsis is preferable to deviousness. Since a constitution and its processes have sacred overtones in any polity, any further defilement of Canadian constitutionalism purportedly in the cause of political virtue would have had little to recommend it.

As a final point, it is important to recall the symbolic purpose of the *Meech Lake Accord*. Given its political objectives — first, that the Canadian constitutional *process*, including the patriation exercise of 1982, be legitimated with Quebec's principal political elites, and second, that the rest of the country recognize and reaffirm the impeccable pedigree of the *compact theory* of the *Constitution Act, 1867*, according it its proper place in contemporary constitutional rhetoric and interpretation — anything short of ratification in a spirit of generosity and inclusiveness would have been self-defeating. One does not generate a passion for heterogeneity, a tolerance for difference, and a sensitivity to the importance of constitutional legitimacy in Quebec by artifices such as those advanced by those who sought to save the *Meech Lake Accord* in the spring of 1990. Neither does one reconcile Quebec to the full panoply of other issues in modern Canadian constitutionalism by making its concerns, already once cast aside if

¹¹⁷ While a number of answers might have been given to this objection, it is not necessary to address them here since it is also the case that were there the political will to do so, the *Meech Lake Accord* (minus the amending formula) could simply be re-ratified by resolution of seven provinces having an aggregate of ninety per cent of the population of all the provinces, and of the Parliament of Canada. Assuming such political will to have existed, the obvious political retort of the *Meech Lake Accord's* opponents would then have been that, if re-ratification were necessary, the obvious technical defects in the current *Meech Lake Accord* should be corrected before such a new ratification round was launched.

not directly rejected in 1982, contingent upon the prior or contemporaneous ratification of a parallel Accord oriented to the agenda of a third party. Far from the *Meech Lake Accord* requiring a companion parallel Accord, one might reasonably say that the *Meech Lake Accord* was itself the delayed parallel Accord which ratification of the *Charter* package by all governments other than that of Quebec made necessary.

In order to complete the argument raised in the last paragraph, it is important to acknowledge that outright ratification of the *Meech Lake Accord* would not have settled constitutional conflicts over English/French relations — be these in Quebec or elsewhere, be these federal/provincial or interprovincial — once and for all. These types of issues cannot (and should not) be definitively settled by historically contingent constitutional formulae. The processes of interaction, of accommodation, of maturation, and of mutual understanding between English and French-speaking Canadians would have continued through ordinary processes of political adjustment, complete with the errors of judgment which politics occasionally produces. These processes may perhaps even have led to the negotiation of a *Meech Lake Accord II* or a *Meech Lake Accord III* at some time in the future. But at the very least, a perception of legitimation and recognition would have resulted from ratification of the present *Meech Lake Accord*; and this changed perception would have helped to bring about a more candid dialogue between French-speaking and English-speaking Canadians through which political and constitutional trust could have been built.

Surprisingly, even though it was apparent by late 1989 that there were no acceptable fall-back positions by which the *Meech Lake Accord* could be engrafted onto the Constitution, few political leaders who opposed the *Meech Lake Accord* thought it necessary to work out a viable "exit strategy" once the symbolic deadline for ratification passed. As events in Quebec after 23 June 1990 illustrated, it was naive to believe that the *status quo* would be an acceptable outcome. Several commentators saw clearly that rejection of the *Meech Lake Accord* would not be cost-free, and indeed would

be more costly than the purported costs of ratification.¹¹⁸ Four of the many costs of rejection predicted then are now becoming apparent. First, the feeling of betrayal felt by even strong federalists in Quebec who have waited since 1980 for full delivery on the promise of renewed federalism. Second, the postponing of constitutional negotiations to accommodate other pressing pan-Canadian interests — Aboriginal rights, fisheries, regional economic disparities, Western alienation, provincehood for the territories, the environment, political empowerment for under-enfranchised groups and minorities — legitimately crying for attention. Third, the further confirmation that Canada has moved from a political state of tolerance and rationality to a legalistic state of unchecked spheres of power and absolute individual rights. Finally, the inevitable slide, fuelled by feelings of suspicion and hostility between French and English-speaking Canadians in all parts of the country, to the disintegration of the constitutional framework put into place in 1867. Briefly, ratification would not have put an end to constitutional negotiation over the *survivance* agenda; but it would have kept the debate on reasonably familiar ground. Rejection has irredeemably changed that ground.

Whatever may have been the perception elsewhere in the country, for many French-speaking Quebecers of moderate political tendencies, an emotional commitment to Canada stood or fell on the outcome of the *Meech Lake Accord* process. The uncompromising national centralist discourse championed by Pierre Trudeau no longer is heard on the streets in Quebec; almost all political discussion is carried on in varying degrees of decentralist rhetoric. Rejection of the *Meech Lake Accord* has meant the final rejection of the 1867 model of federalism in Quebec. Rejection of the *Meech Lake Accord* has also put the Quebec government in a difficult political position. If the *Meech Lake Accord* was indeed Canada's *bona fide* response to the promise of renewed federalism, but could not garner enough support in other provinces to achieve

¹¹⁸ I was one of those who attempted to demonstrate what these costs might be. As I noted in the first part of this essay, it was the assessment of these costs which led me to change my position on the advisability of ratification during the autumn of 1989. The next few paragraphs are written in the present tense even though they are an essentially unedited reproduction of the text of the Laskin Lecture delivered in November 1989.

ratification, then another "sovereignty" referendum would seem to be inevitable.¹¹⁹ Further, with between one-half and two-thirds of the population of Quebec (depending on the poll) now saying it would vote yes to even an unequivocal independence question in a projected 1992 referendum, unlike the situation prevailing in the early 1980s, there will be very few French-speaking Quebeckers willing to take up the cause of renewed federalism, whatever be the federalist model selected.

The second cost of the failure of the *Meech Lake Accord* has been constitutional inertia. Most Canadians are "fed up" with the Constitution. Even assuming that the Quebec government does not decide to invoke a process leading to the province's political independence, what incentive does it have for agreeing to any further constitutional negotiations that do not put its concerns first? For those who believed that there was an unfinished agenda of constitutional reform, ratification of the *Meech Lake Accord* was a way of keeping this agenda alive; rejecting the *Meech Lake Accord* has proven to be a way of placing obstacles in the way of further constitutional renovation.¹²⁰ This cost of rejection is especially poignant (and ironic) for Native Canadians who have suffered eight years of constitutional frustration waiting to get to the top of the agenda, only to see the hurdle represented by Quebec's exclusion in 1982 still in place after six years of effort devoted to its removal.

Yet a third element to be factored into any post-*Meech Lake Accord* equation is the fate of Canada's various provincial linguistic minorities, under a legalistic constitutional ethic which denies them standing as objects of regard. For there is no doubt that much of the intellectual resistance to the *Meech Lake Accord* was rooted in an excessively individualistic and rights-based account of political obligation. This revolutionary alteration in Canadian consti-

¹¹⁹ For confirmation, see the positions taken in the *Allaire Report*, *supra*, note 36 and Quebec, National Assembly, *Report of the Bélanger/Campeau Commission: L'avenir du Québec* (26 March 1991)

¹²⁰ While there are many issues - such as Senate reform, multiculturalism, Aboriginal rights, fisheries, and, perhaps, even the accession of the Territories to provincial status - which can be dealt with without Quebec's concurrence under the 7/50 per cent formula of section 38, current events have shown that an unwilling Quebec can severely disrupt the normal processes of constitutional negotiation by which these issues are addressed, or even prevent them from commencing.

tutionalism, given a significant boost by the 1982 *Charter*, augurs badly for the country's various linguistic minorities seen as such. Consider, for example, the case of the English-speaking minority in Quebec. Rejection of the *Meech Lake Accord* has put it in a difficult position. Should it align itself more closely with French-speaking Quebec so as to avoid being marginalized were the province to attempt to withdraw from Canada? Or should it cast its lot unequivocally with Canada in the hope it will be rescued (in the manner of Northern Ireland) following Quebec independence?¹²¹ Similar uncertainties face Canada's French-speaking minorities outside Quebec. With the rejection of the *Meech Lake Accord* comes the rejection of a view of Canada which rests on the celebration of cultural/linguistic duality and distinctiveness. Whatever barriers to neglect and indifference that remain if Quebec withdraws from active participation in the Canadian polity will clearly be insufficient to prevent the rapid assimilation of most Francophones living outside Quebec. The Canada envisioned by many opponents of the *Meech Lake Accord* is a radically different Canada than that which has existed since at least 1774. It is a Canada which rests on the formal equality of individuals qua individuals and not on the substantive equality of persons as members of affective communities.¹²²

A final cost of the failure of the *Meech Lake Accord*, a cost implicit in the three other costs just reviewed, is the rejection of the constitutional structure of the country as it has existed since 1867. There are two points to be made here. First, this rejection, and its resulting transformation of the country need not necessarily occur by

¹²¹ As the election of four Equality Party candidates from West-Central Montreal in the provincial election of September 1989 suggests, already many members of the English-speaking community are hedging their bets on the future of Quebec in Canada. A number are even asking the question only William Shaw, a West-Island MNA in the late 1970s, dared ask in 1980 during the referendum campaign: "[G]iven Quebec's separation from Canada, should English-speaking areas of the province separate from Quebec?" Whatever may be the emotional appeal of such arguments, to my mind, their practical effect is not attractive, as the precedents of racial and religious conflict in some of the world's other divided cities attest.

¹²² It is important to signal that the claim in the text does not depend on one having taken a position on the debate in political theory between "liberals" and "communitarians." There are thoughtful essays in each tradition which provide theoretical support for the claim about substantive equality here argued. See for example, Taylor, *Alternative Futures*, *supra*, note 46 on the one hand, and Kymlicka, *Liberalism*, *supra*, note 2 on the other.

means of a revolutionary event. Quebec now has a sophisticated entrepreneurial class; market-oriented business people as well as social engineers have the ear of the government. One can assume that no precipitous event likely to paralyze the economy, greatly jeopardize Quebec's bond ratings, or significantly disrupt offshore investment will be taken. Rather, Quebec may decide simply to withdraw from the political life of the country. Economic links with the United States, already enhanced by the *Free Trade Agreement*, would be strengthened further. Gradually, through investment from the *Caisse de dépôt et de placement*, Quebec's primary industries would be repatriated and the government would become an aggressive joint-venturer in high-tech sectors, and provincial economic policy would increasingly take its own course. Strict political independence is no longer necessary (or possible) in a world of multilateral trade agreements. The real disintegration of Canada probably will not come irreversibly through an easily recognizable political act. It is already underway, much less perceptibly, through a transition in elite attitudes from attachment, to suspicion, to frustration, to indifference.

Second, the "disintegration of the country" means only the disintegration of the constitutional structure put in place in 1867. The failure of the *Meech Lake Accord* does not signal that the political entity called Canada, nor even the bulk of the territory which comprises it, will disappear. In other words, even those who tried to think an exit strategy for a rejection of the *Meech Lake Accord* through to the point of considering the possibility of the breakup of the country were uncertain exactly how this breakup might play itself out. Many who took a hard line on the *Meech Lake Accord* assumed that if rejection were to drive a wedge between Quebec and Ottawa, the fissure would lie along the Ottawa and Matapedia rivers. Quebec would withdraw from the federation, leaving nine provinces with English-speaking majorities plus the territories behind. But there are several reasons why this may not be the most likely scenario. One of the alternate scenarios merits brief mention here. To the extent that the *Constitution Act, 1867* was not just *the* Canadian confederative document, but was also the fifth reconstitution of the relationship between French and English-speaking peoples of what is now Central Canada, it was also a recognition of the extent to which the fates of Upper Canada

(Canada West, Ontario) and Lower Canada (Canada East, Quebec) are intertwined. If anything, their economies and demographics have become even more closely connected since Confederation. Is it a foregone conclusion that Ontario would (if put to the choice) cast its lot with the Maritimes and the West should Quebec feel that an evolutionary constitutionalism in Canada is no longer achievable? How paradoxical that the United Canadas, having sought Confederation in 1867 in part to break a cultural/linguistic political deadlock, might together be compelled by some of their other partners to threaten withdrawal from the larger federation which they engineered (reclaiming the name which they gave it) because of a cultural/linguistic political deadlock on a question about which they more or less agree.¹²³

The listing of some of the costs which are now flowing from the rejection of the *Meech Lake Accord*, should not be taken as proof that there are no grounds for a more optimistic prognosis. The observations which follow are grounded in a refusal to accept the rhetoric of failure which the *Meech Lake Accord* ratification debate and its aftermath seems to have generated. As a political state, Canada has not failed. While it is true that the ratification debate touched raw nerves about bilingualism in parts of the country, and while it is true that it has also raised a spectre of xenophobia about immigrants and multiculturalism in other parts, the real achievements of the country in these domains and the passion of most Canadians – whether English or French-speaking – for the values of tolerance and diversity cannot be overlooked. In their haste to emphasize the negativity of flag-desecrations, of declarations of municipal unilingualism, of reactions to the accommodation of cultural and spiritual differences of immigrants, Canadians often forget the remarkable sociological feat which is their country. This feat includes: the celebration of diversity prompted by the influx of immigrants, comprising one-third its total population, and two-thirds

¹²³ In presenting this alternative, I am not claiming that this is the most likely outcome. But what would the position of Ontario, and New Brunswick for that matter, be if in the negotiations for Quebec's withdrawal from the confederation, the governments of Manitoba, Saskatchewan, Alberta and British Columbia insisted that the policy of federal official bilingualism be abandoned? In other words, I believe that there are circumstances which would make Ontario's choice quite difficult, and that some of these are not implausible, once the process of negotiating the breakup of the country begins.

in some major metropolitan areas; the successful bilingualization of many government services, and the generation of an ethic of bilingualism which sees a higher percentage of children in second-language immersion classes than anywhere else in the world.¹²⁴ Both of these are remarkable accomplishments which cannot be allowed to drop from popular consciousness in political disputes about responsibility for the failure of the *Meech Lake Accord*.¹²⁵

But this is not to say that there are no important cleavages in Canadian popular consciousness. If anything, the *Meech Lake Accord* ratification process revealed just how powerful these cleavages were.¹²⁶ For most French-speaking Canadians, as the previous sections of this essay have attempted to illustrate, *la survivance* has always been the dominant theme. Since 1867, this theme has had three main variations: federal bilingualism; a degree of autonomy for Quebec's governmental institutions in order to reflect the distinctiveness of the province; and, especially since the Quiet Revolution, the relatively closer identification of the nation with the state. These three variations reflect two important axes of political action: the notion of bilingualism as a commitment of the federal government — to the individual citizen qua citizen; and the notion of the state's responsibility (especially in Quebec) to re-balance socio-economic forces that threaten to assimilate the weaker

¹²⁴ See Canada, Office of the Commissioner of Official Languages, *A Partial Thaw: Annual Report, 1990* (Ottawa: The Commissioner, 25 March 1991) [hereinafter *Partial Thaw*] which tracks these various achievements.

¹²⁵ Of course, to signal these achievements in respect of non-indigenous peoples is also to highlight the tragedy of the treatment of Native Canadians. In celebrating achievements one must always be aware of failings. For a powerful critique of how Canadians have been unresponsive to Native interests, see R. Saganash, "The Clash of Nationalisms" in *Conference*, *supra*, note 63.

¹²⁶ The next six paragraphs of this essay are the only substantive additions to the text of the Laskin Lecture as initially delivered. Their formulation has been heavily influenced by my experiences at two colloquia on Canada's constitutional future held at the Faculty of Law of McGill University in 1990: (i) a symposium sponsored by the Friends of Meech Lake and held on 19-20 January 1990, and (ii) a symposium entitled "Conference on the Future of Quebec and Canada" held on 16-18 November 1990. Many of the ideas developed here are drawn from several conversations I have had during the past eighteen months with Charles Taylor. For a brief summary of his current views, see *Collision Courses*, *supra*, note 62 which was delivered as the keynote address at the above-mentioned November symposium. I should also like to acknowledge the assistance of my colleague, Nicholas Kasirer, whose keen insight helped me to formulate more persuasively the themes of this concluding section.

French-language community. That these two axes need not be incompatible, despite the attempts by political leaders such as Pierre Trudeau and René Lévesque to suggest they are, is an important fact to be recognized in future constitutional negotiations.¹²⁷

For most English-speaking Canadians, the past twenty-five years have seen the transformation of the nationalist "survival myth," grounded in the United Empire Loyalist story,¹²⁸ into a "civic republican" nationalism capped off by the patriation exercise. This nationalism now defines itself in the following three claims: that one of Canada's aims is to create greater equality between regions, or at least establish the governmental redistributive institutions which track those of nineteenth century private charity; that Canada is a socio-cultural mosaic (not a melting-pot) which brings unity and harmony to people of diverse backgrounds; and that Canadians have a common view of citizenship and the relationship of citizen to government — a view which now finds its key expression in the *Charter*. These three claims are the reflection of two ideas, and also suggest two axes of government policy. One is what might be characterized as an individualist liberal view of society which seeks to limit all forms of state activity that might interfere with "rights." The other is a thicker liberal view in which some common goals, as embodied in various social programmes for example, are recognized as being essential to understanding individual rights. Once again, politicians such as Brian Mulroney and Preston Manning have effectively conspired to set a public discourse which suggests the two views of political obligation are incompatible, even though they are not.¹²⁹

¹²⁷ For Trudeau's most recent views on the incompatibility of federal bilingualism and "special status" for Quebec, see the Convocation Address he delivered at the Faculty of Law of the University of Toronto on 21 March 1991, as reported in *The [Toronto] Globe and Mail* (22 March 1991) 1.

¹²⁸ Perhaps the clearest exposition of this conception of English-speaking Canada's traditional "survival myth" is that offered by George Grant. See Grant, *supra*, note 7.

¹²⁹ For a discussion of the relationship between these two views in the context of deficits, deregulation, privatization, and free trade (as these bear on governmental regulatory policy), see R.A. Macdonald, "Understanding Regulation by Regulations" in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals in Canada* (Toronto: University of Toronto Press, 1985) 111.

Just as Canadian political and legal institutions have long been a reflection of the possibility of reconciling the two axes of the *survivance* theme for French-speaking Canadians,¹³⁰ so too they, including the *Charter*, have recognized the dual strains of the survival motif of most English-speaking Canadians.¹³¹ For this reason, none of the surface cleavages between the variations on the nationalist *survivance* theme currently pursued in Québec and the variations on the "civic republican" nationalist theme which is gaining ascendancy elsewhere in Canada should be seen as unbridgeable.

To begin, despite the apparent symbolic conflicts between the themes of pan-Canadian bilingualism and the multicultural mosaic, these goals are not irreconcilable. The possibility of achieving their reconciliation through a bilingual multiculturalism requires only two adjustments in Canadian attitudes. Within Quebec, it demands the embrace of a multicultural *francophonie*; outside Quebec, it compels resistance to attempts to water down or roll back bilingualism. Of course, given that certain Quebec nationalists are still playing the "disparaître" tune, and given that calls for a reassessment of bilingualism now seem to be gaining some currency in the West, the difficulties of achieving such an accommodation should not be underestimated. Nevertheless, there are signs that a consensus on how to marry bilingualism and multiculturalism can be reached.¹³²

The second apparent conflict exists between greater autonomy (now imperfectly formulated and understood as "special status") for Quebec and a concept of shared commitments and solidarity (now imperfectly understood as absolute equality of the provinces) among all regions of Canada. In practical terms, these

¹³⁰ For a detailed inventory of these accommodations, see section III of this essay, "Constitutional Interpretations," and section IV, "Constitutional Histories," *supra*, note 1 at 278 and 307, respectively.

¹³¹ For an early illustration of the tensions within the *Charter*, see R.A. Macdonald, "Postscript and Prelude - The Jurisprudence of the *Charter*: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321. But compare, for an alternative reading of the *Charter*, D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990), who would prefer that the Supreme Court clearly fix the interpretation of the *Charter* in a monist, individualist orbit.

¹³² See *Partial Thaw*, *supra*, note 124 for statistics reporting the progress of bilingualism since 1968.

two themes need not point to irreconcilable constitutional claims. True equality of the provinces does not mean reducing all provinces to the same level. It means treating provinces equally in respect of issues where they are equal. The Senate may well be one of those domains where equal representation would permit the West to achieve a just and proper measure of political influence in Ottawa. The constitutionalization of regional equalization payments may reflect a just and proper means to overcome the economic inequality of the Maritimes and, perhaps, Manitoba. The establishment of Aboriginal self-government on a provincial or even on a more autonomous basis could be a just and proper structure of empowerment for Native Canadians. In other words, complex equality does not mean that those accommodations of Quebec's particularity, arrived at in 1867 (and those developed since), cannot be re-evaluated and, if necessary, extended in the future. Here, what is required is much more subtle discourse of provincial equality than that currently being offered by Premiers Clyde Wells and Don Getty.

The key challenge for Canada's future, however, lies in finding ways of mediating the third surface cleavage: that is, the conflict between the misreading of the *Charter*, which sets it up only as a peon to individual rights, and the misreading of Quebec nationalism which sees it as a thinly disguised xenophobia and racism.¹³³ But to find the terms of reconciliation here, it will be necessary, in any reconstruction of the Canadian Constitution, to accomplish two goals. The moderates among those who espouse what Alan Cairns has called "*Charter* patriotism" will have to come to see that they have been sold an impoverished view of what "rights" are, and that there is room in their conception of the bases of the country, as it now exists, for recognizing Quebec's particularity. It will be crucial to illustrate how the actual text of the *Charter* mandates an interpretation which includes the possibility of it bearing somewhat differently on the activity of the Quebec

¹³³ A classic example of this latter misreading is the report submitted to Gerry Weiner, Minister of State for Multiculturalism on 22 March 1991 which suggests that nationalism in Quebec is just a cover for "racism." See "Racism Alive, Well in Quebec: Report" *The [Montreal] Gazette* (23 March 1991) A1 and P. Wells, "Nationalism Not Racist Landry Says" *The [Montreal] Gazette* (24 March 1991) A1.

government.¹³⁴ Conversely, more moderate Quebec nationalists will have to come to see that their thicker liberal (or even communitarian) view of society does not mean either that there are no "fundamental rights" or that one need not be open and generous to difference.¹³⁵

The current constitutional impasse results because Canadians, and especially Canadian political elites, have been unwilling to depart from the modern versions of the twin nationalist myths — *survivance* as patriotic statism, and *Charter* patriotism — which have structured debate about constitutional renewal for at least twenty years. The reluctance of ordinary Canadians to accept that these myths encompass at least three different cleavages means that something akin to Rawls' notion of overlapping consensus is never advanced as a possible ground for pursuing, or justification for finding, constitutional agreement.¹³⁶ The failure of political elites to depart from patterns of almost cynical manipulation of (as in the 1982 patriation process), or almost wilful disregard for (as in the 1987 *Meech Lake Accord* process), the attitudes and beliefs of ordinary Canadians has exacerbated this monotheistic inclination. In other words, the desire to articulate a single theoretical foundation for all manner of political institutions makes it difficult for Canadians to accept that there could be at least two interpretive positions which might be adopted to justify any particular

¹³⁴ The idea here is that *Charter* patriots need to be offered a theory of the document wherein it is recognized that the attempt to further a particular culture need not necessarily rest on anti-liberal premises. They will also have to accept that certain laws such as Bill 101 do not "override" fundamental rights, and that it is possible to espouse substantive goals in a way which does not discriminate against those who do not belong to the dominant culture. For the roots of the arguments which could be made along these lines, see Kymlicka, *Liberalism, supra*, note 2.

¹³⁵ Put positively, they will have to recognize that the attempt to articulate a series of fundamental rights which are immune to governmental limitation, and the claim for recognition of difference are not necessarily incompatible with the legislative furtherance of a particular culture, even if they constrain some of the mechanisms by which such a goal is pursued. For an attempt to trace out such an understanding, see Taylor, *Collision Courses, supra*, note 63.

¹³⁶ For development of this idea see J. Rawls, "The Idea of an Overlapping Consensus" (1987) 7 *Ox. J. Leg. Stud.* 1; and J. Rawls, "The Domain of the Political and Overlapping Consensus" (1989) 64 *N.Y.U.L. Rev.* 233.

constitutional artifact.¹³⁷ But if Canadians are prepared to seek institutional structures and governmental processes around which an overlapping consensus can emerge, these structures can be invoked to breed reconciliation and creative tension, not anger and separateness.¹³⁸ Whether exercises like the Spicer Commission and its equivalents in various provinces will assist Canadians to see these possibilities and to insist that their governments pursue them, is as yet an open question.¹³⁹

VIII. CONCLUSION

While ostensibly about the *Meech Lake Accord*, and ostensibly in some measure an argument that the *Meech Lake Accord* should have been ratified, this essay has really been about patterns of Canadian constitutionalism. It has evoked the myths, interpretive structures, histories, motifs, and symbols of Canadian

¹³⁷ This, of course, is a claim (at the level of political theory) similar to that made when the analogy of the particle and wave theories of light was invoked as an explanation of the history of Canadian constitutionalism and the underlying structure of the *Constitution Act, 1867*. See Part I of this essay, *supra*, note 1 at 292.

¹³⁸ For a very thoughtful (and prescient) synthesis of the strains which are threatening the fabric of the *Constitution Act, 1867*, and for a series of recommendations for constitutional renovation not unlike those implicit in this essay, see A. Abel, "A Chart for a Charter" (1976) 25 U.N.B.L.J. 20. For further development (although incomplete in many places) of Abel's thesis, see J. Laskin, "Albert Abel's Constitutional Charter for Canada" (1978) 28 U.T.L.J. 261.

¹³⁹ While this essay accepts the "theoretical" democratization of constitutional politics in the post-*Charter* era, it does not accept either that such democratization has actually occurred, or that constitutional Charters are the preferred vehicle for accomplishing this goal. Moreover, the argument of the essay is to deny that what Alan Cairns has called "constitutional minoritarianism" is a sufficient conception of constitutional process. Political leaders (call them elites if need be) are necessary in representative democracies.

But, because none of those leaders who supported the *Meech Lake Accord* have any credibility in the opposing constituency (and *vice versa*), and because it is the people and politicians outside Quebec who now have the initiative, if the constitutional process is to become unblocked (which the Spicer Commission suggests that Canadians really want), it will require a remarkable conversion – not unlike that of Guy Carleton in the 1760s or George Brown in the 1860s – by a hard-line anti-Quebec politician. See J.M. Careless, *Canada: A Story of Challenge* (Toronto: Methuen, 1963) at 102 on Carleton's change of positions, and at 233-35 for a review of Brown's conversion. Unfortunately, however, by contrast with Canada's two constitutional precedents, no such public-spirited and "great-souled" candidate seems likely to emerge in the 1990s.

politics in an effort to illustrate the fundamental duality which has attended constitutional understanding in Canada since 1774. Given its particular focus, the exploration of other themes — be they constitutive, as in the case of Aboriginal rights and Western alienation, or substantive, as in the case of economic redistribution and environmental issues — has been largely implicit. But the significance of these other themes for constitutional redesign is clearly acknowledged.

As in the period between the *Imperial Statutes* of 1774 and 1791, and again as in the period between the *Imperial Statutes* of 1840 and 1867, since the *Canada Act 1982*, Canadians have been engaged in a great construction of their political and social institutions. The pattern of these "great constructions," it seems, is clearly established. A first, centralizing attempt at constitutional design (in 1774, to erect the fourteenth British North American Colony on the model of New France rather than that of New England; in 1841, to make the United Canadas over into a traditional, assimilationist British Colony) was followed by a second, decentralizing attempt at constitutional redesign (in 1791, to permit protestant, English-speaking Upper Canada to carve out a "distinct identity" from Catholic, French-speaking Lower Canada; in 1867, to permit the benefits of Intercolonial Union to be achieved while permitting Catholic, French-speaking Lower Canada to carve out a "distinct identity" from the other three confederating colonies). In the eighteenth century great construction, the institutional framework was colonial and pre-federalist; in the nineteenth century great construction, it was locally post-colonial (and emerging nation-statist) and federalist; in the twentieth century, it will probably be both post-nation-statist (and emerging transnational) and post-federal.

Just as the *Act* of 1840 was an unsuccessful attempt to save certain key elements of the more centrifugal compromise of 1791 by a centralizing strategy which failed to recognize the dual nature of that initial compromise, the *Constitution Act, 1982* was an attempt to save certain features of the more centrifugal compromise of 1867

by a centralizing strategy which also failed to recognize the dual nature of the earlier compromise. Just as the 1791 decentralization was provoked in part by a changing constituency of those entitled to constitutional regard (the arrival of the United Empire Loyalists) from that existing previously, and by a changing structure of constitutional entitlement (the notion of an elected legislative assembly in addition to a wholly appointed legislative council), the 1867 decentralization was also provoked in part by a changing constituency of those entitled to constitutional regard (the addition of two Maritime provinces) from that existing previously, and by a changing structure of constitutional entitlement (the achievement of responsible government). One already knows that the decentralization of the 1990s will be provoked in part by a changing constituency of those entitled to constitutional regard (in particular Aboriginal peoples and Canada's multicultural communities), and by a changing structure of constitutional entitlement (as reflected in the attribution of judicially enforceable "legal rights and fundamental freedoms" through the *Charter*).

It follows that the post-*Meech Lake Accord* pattern of Canadian constitutionalism will most likely depart substantially from that known heretofore. While the 1990s version of Canada's constitution will be quite different from that of 1867, it will be no more so than that of 1867 was different from that of 1841 or 1791. Whether the country that emerges thereafter will redefine itself with greatly increased power to constituent units hedged in by explicit civil-libertarian side-constraints, whether it will emerge as an essentially economic confederation rather than a political federation, or whether it will consciously seek to define itself by reference to an amalgam of liberal and communitarian virtues such as bilingualism, multiculturalism, tolerance, and distinctiveness cannot be predicted confidently. But if Canada is seen fundamentally as a linguistic, cultural, and social redistributive commitment rather than as a purely territorial construct or as a particular nineteenth century constitutional arrangement, then the prognosis for its survival as a heteronomous political community is good.¹⁴⁰

¹⁴⁰ The term "heteronomous" is consciously chosen. It captures the idea that the whole can be "composed of parts or elements of different kinds." See *Chambers Etymological English Dictionary*, entry under "heterogeneous." In the view argued here, the components of the

In the Laskin Lecture of November 1989 the future of Canada was cast in the language of its current constitutional arrangements. It was argued that if the *Meech Lake Accord* were to be ratified, the country would have traversed two of the three constitutional barriers standing in the way of the political reconstruction of post-War Canada: these barriers being, first, the achievement of statehood and the crystalization of those peculiarly Canadian understandings of liberalism through patriation and the *Charter* — a reflection of the statute thesis of the *Constitution Act, 1867*; and second, the achievement of a renewed commitment to a Canada originating in an agreement between French and English-speaking peoples and a revived focus on group interests and claims through the recognition of Quebec's special role in Confederation — a reflection of the compact thesis of the *Constitution Act, 1867*. It would then have remained in the *Meech Lake Accord II*, or whatever the next round of constitutional negotiations might have been labelled, to set about resolving Canada's dilemmas relating to the claims of Native peoples, to the promotion of the country's multicultural heritage, and to overcoming regional (especially Western) alienation — each of these being the pendants of an emerging "states rights" thesis of Canadian federalism.

Now that the *Meech Lake Accord* has failed, all bets for saving either the rhetoric of "federalism" or the interpretive frames of the *Constitution Act, 1867* are off. But assuming the will not to seek a monolithic theoretical ground for constitutional renegotiation, and also assuming the will to approach the exercise with a commitment to preserving the plurality of the assizes of Canadian constitutionalism exist, one should be confident about a successful conclusion to the country's twentieth century great reconstruction. Given these assumptions, one should also be confident that Canada's recent struggle for constitutional renovation will ultimately result in the achievement of a reformed and rewritten Canadian Constitution

polity are heterogeneous, and the political theory which grounds its institutions and processes are heterogeneous. Only its basic texts (its Constitution) need be singular. Two of the best discussions of the influence of language, culture, economics, and geography on the heterogeneous character of the country are, A. Johnson, "The Dynamics of Federalism in Canada" (1968) 1 Can. J. Pol. Sci. 18 and Laskin, *supra*, note 138, *passim*, but especially at 265-73.

responsive to all these various assizes — the present discord about the failure of Meech Lake to the contrary notwithstanding.¹⁴¹

¹⁴¹ Since there are so many key policy issues confronting Canadians which have not been addressed directly in this text, I should like to add, by way of a brief postscript, four observations about the relationship of constitutional renovation to these other concerns.

First, whatever position one takes on the future of relations between English and French-speaking Canadians, the claims of Canada's Aboriginal peoples will have to be addressed. Separation (or renewed federalism) will not "resolve" the Native question either in Quebec or in the rest of Canada. But settling, one way or the other, the internal "white man's squabble," as Romeo Saganash called it (see *supra*, note 125), may be a prerequisite to addressing conscientiously the historically prior "First Nations" question. For this reason, Elijah Harper may have gained a tactical victory but suffered a temporary strategic loss.

Second, while the particular approach to addressing the cultural/linguistic concerns emanating from Quebec chosen by Prime Minister Mulroney may seem to have been of a piece with the "free trade" initiative, the two are severable. Quebec or no Quebec, the issue of international trade policy remains. Free trade or no free trade, the Quebec question remains. Moreover, it is unfair, as commentators like Phillip Resnick have done (see Resnick *supra*, note 78), to blame Quebec for forcing free trade on Canada just because its Premier supported the initiative. Quebec voters had many reasons, including the negotiation of the *Meech Lake Accord*, for voting for the federal Conservative Party in 1988.

Third, the focus on the Constitution rather than on substantive governmental programs is a legacy of the *Charter*. To accuse Quebec of continually pushing the constitutional agenda is to mistake the symptom for the disease, as Michael Mandel convincingly demonstrates [see M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989)]. Constitutional structures allocate power to address social and economic problems; rarely in Canada do they themselves determine legislative policy outcomes, except in matters of language and culture. The mistake is in letting the details of constitutionalism and intergovernmental relations pre-empt discussion on questions of economic and social policy.

Fourth, regardless of the outcome of any future constitutional/political process, Canadians will have to deal with gender inequalities, with discrimination in all its forms, with environmental degradation, with poverty, with public health issues, with family violence, and with racial intolerance. The only question on the table, as Premier Rae of Ontario acknowledged, is whether these issues — which are among the most important of the substantive *raisons d'être* of any political structure — will be addressed by Canada as we know it today, or by some other political structure.

Not losing sight of these issues during processes of constitutional renovation will be an important challenge over the next eighteen months. Using them to avoid embarking on processes of constitutional renovation will mean simply that neither goal will be achieved.

