

THE ECONOMICS OF CONSTITUTION- MAKING

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[W]e've always accommodated jurisdictional intrusions in the past by agreement I come out of the private sector. I've had success as defined by my ability to agree—that's called making deals. Successful businessmen always know when the time has come to make a deal.¹

I

INTRODUCTION

Despite a reputation as the only provincial premier who speaks neither of the official languages of Canada, William Bennett, in the interview quoted above, provides a succinct rationale for the economic analysis of constitution-making, a theme for this article, and an accurate paraphrase of the history of Canadian constitutional affairs over the last twelve decades. Although there have been occasional court cases and preemptive intrusions, the dramatic realignment of responsibilities across the three levels of government since 1867 has been accomplished mainly by intergovernmental negotiation. As Alan Cairns has argued, "[m]uch of the change which has occurred has not been formally designated as constitutional, and it has not been accompanied by fanfare. It has simply represented the handiwork of busy men attempting to work an on-going system of government."² Humble tools sometimes accomplish great things, however, and the metamorphosis of Canada's Constitution has been remarkable.³

Since, in large part, economics is the study of exchange, the negotiation of constitutional accommodations seems a natural subject for economic analysis. The purpose of this article is to see what light an economic analysis may throw on the process by which constitutions are made and remade. The term "constitution" is used here to mean the rules, written and unwritten, that govern the division of responsibilities among the different levels of government in a federal state,⁴ while "economic analysis" refers to an approach based on the assumption that people's main motivation, at least in their public relations, is to "maximize their utility."⁵ The actors whose "utility maximization" is examined in this article are politicians,

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1. The Financial Post, Oct. 31, 1981, at 3, col. 1. (Interview with the Hon. William Bennett).

2. Cairns, *The Living Canadian Constitution*, in CANADIAN FEDERALISM: MYTH OR REALITY 143, 144 (J. Meekison ed.) (2d ed. 1971).

3. As Professor Sabetti correctly notes, John A. Macdonald's constitution predeceased its author.

4. Indeed, a crucial question discussed in what follows is whether a state should become federal in the first place.

5. See generally G. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

bureaucrats, and ordinary citizens.⁶

The idea that economic analysis can be used in the study of politics is of course not new.⁷ In the last twenty years, large numbers of economists have ventured into areas that traditionally had been the exclusive preserve of political scientists. Whatever effect this may have had on political science, it has greatly increased the sophistication of economic analysis. Economists no longer content themselves with seeking out market failures which they then leave to government to remedy. Instead, they have taken up the twin concerns of how political systems actually work and how they can be made to work in ways more consistent with economic efficiency.⁸

Until recently, however, the economic study of the problem of federalism has been conducted largely in the traditional manner. Economists have focused on the problem of precisely which distribution of powers and responsibilities would maximize overall utility, and they have paid scant, if any, attention to how such distributions actually are decided. In other words, the economic analysis of constitution-making has been almost exclusively normative; in fact, one recent reviewer of the literature on "fiscal federalism" concluded that "[t]he distinction between the positive theory of fiscal federalism and the normative theory tends to become blurred since governments are treated as if they behave optimally."⁹

To a great extent, this shortcoming has been removed by the recent work of Breton and Scott, who, in addition to a new elaboration of the normative treatment of the "assignment problem," offer a positive discussion of the pressures that bear on constitutional dealmakers.¹⁰ Still, as will be argued below, even Breton and Scott tend to blur the distinction between positive and normative in the theory of federalism.¹¹

This article sets itself three tasks: (1) a discussion of the traditional (normative) economic approach to the problem of the assignment of jurisdictions and responsibilities, (2) a critique of Breton and Scott's critique of the traditional approach, and (3) an elaboration and application to the Canadian case of Breton and Scott's positive theory of constitution-making. One conclusion emerging from this exercise is that, following "patriation," there probably will not be a second round of constitutional revision dealing with the division of powers and responsibilities.

6. Perhaps it is best to make clear at the outset that the subject here is what economics has to say about how constitutions are made, and not what the present (or any future) Canadian Constitution has (or will have) to say about the conduct of or division of responsibilities for economic policies. Although occasion to comment on the appropriate or likely division of purely economic responsibilities may arise, the purpose here is to illuminate the process by which jurisdictional assignments—whether of responsibility for economic, social, or any other policies—are made.

7. Although the intensive use of economic analysis as a tool for the study of politics is fairly recent, dating from Downs, A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957), the notion that rulers pursue their own interests is a constant theme in a literature to which Macchiavelli is the most famous though not the original contributor.

8. *E.g.*, Wolf, *A Theory of Nonmarket Failure: Framework for Implementation Analysis*, 22 *J. LAW & ECON.* 107 (1979).

9. R. BOADWAY, *PUBLIC SECTOR ECONOMICS* 407 (1979).

10. A. BRETON & A. SCOTT, *THE ECONOMIC CONSTITUTION OF FEDERAL STATES* (1978).

11. Their blurring of the two is explicit, however.

Rather, the process of constitution-making is now likely to proceed, much as it has for a century or more, on an almost daily basis.

II

THE NORMATIVE THEORY OF FEDERALISM

A. The Traditional Analysis

The traditional (normative) economic analysis of federalism consists of a straightforward extension of the economic literature on "externalities" and "public goods," especially "local public goods." In economic parlance, a "private good" is a good whose consumption affects only its consumer. A "public good," by contrast, is a good which, if consumed by one person, is consumed by all. The traditional example of a public good is a lighthouse. If person A puts up a lighthouse, person B can navigate by it, and so can C, D, E, and many others, even though they have made no contribution to its finance. Public goods pose a "free-rider" problem; everyone will wait for someone else to purchase them. Thus, despite the widespread benefits such goods can produce, the market may fail to provide sufficient amounts of them. Only by collective and presumably coercive action (i.e., tax-finance) will public goods be supplied in efficient amounts.¹² Thus, the usual economic rationale for the existence of government is the need to provide public goods.

The usual economic rationale for federalism is a simple extension of this argument, focusing on the problems posed by "local public goods." A "local public good" is a public good whose "publicness" is confined to a given area. For example, malaria spraying is of use only over the region sprayed, and the services of a policeman are of use only along his beat. "Local public bads" exist as well; pollution is the most obvious example. The analysis is the same, however, whether "goods" or "bads" are being dealt with: consumption is more or less "joint" within the locality, while outside the locality no effect is felt.

The existence of local public goods may make it difficult for society to achieve an optimal allocation of resources. One of the necessary conditions for such an optimum is that goods with any publicness be produced only to the point where the sum of the benefits brought about by further production is just equal to its costs. If these costs increase with each extra unit of output, and the corresponding benefits decline, then once equality of marginal costs and benefits is reached, producing either more or less of the good in question will involve losses of utility. The difficulty with local public goods is that when their effects extend beyond the jurisdiction making the consumption decision these spillovers will not be taken into account. More precisely, too few resources will be invested in activities that create benefits outside the jurisdiction of origin, while too many will be invested in activities that create "external" costs.

12. The "free-rider effect," however, does not suggest that the market will not provide any of the public good. If, for instance, a firm suffers expected shipping losses greater than the cost of a lighthouse, it may decide to put one up on its own. There is also the possibility that people will behave altruistically, though this renders economic analysis difficult.

One obvious solution to this problem is to try for a perfect mapping of jurisdictions against local public goods, so that for each good there is a jurisdiction that completely includes the area over which its spillover effects are felt.¹³ A second solution is to establish some fairly small number of jurisdictions and to provide for interjurisdictional subsidies and/or taxes designed to control the external effects of the public goods in question.¹⁴ Subsidies to the "emitting" jurisdictions would encourage the production of goods with positive external effects, while taxes on the output of offending goods would discourage their production. In this way, all external effects could be "internalized;" the producers of harmful externalities would suffer as a result of these externalities and presumably would cut back on them, while producers of beneficial externalities would be encouraged in their (theretofore unintended) good deeds.

The logical awkwardness of the traditional approach to federalism was first pointed out by J. C. Weldon.¹⁵ The trouble is that a prescription for assigning responsibilities across jurisdictions that relies solely on internalizing external effects offers too many solutions to the problem. In fact, with such an approach, the number and size of jurisdictions is indeterminate. External effects can be internalized with many levels of government, with only one government per country, or even with a single world government; for, in principle, a world government can see to it that spillovers are corrected. Thus, the local public goods problem provides no guidance to the would-be constitution writer. In and of itself, the existence of goods with external effects does not require the existence of separate jurisdictions within a society.¹⁶

B. Transaction Costs As a Further Necessary Condition for Determinacy: Breton and Scott's Normative Model

A natural objection to this line of thought, even for the noneconomist, is that complete centralization may be overly expensive. A single national government may find it more costly than some hierarchy of governments to undertake the allocations described above. In fact, Breton and Scott argue that it is only in a world in which transactions are costly that the problem of optimal jurisdiction will have a determinate solution.¹⁷ So long as government is costless, however, there is no reason to prefer one constitutional assignment over another. One big government could acquire all the information required to produce the optimal amounts of all local and pure public goods, or many small governments could trade happily among each other to adjust their outputs to the optimal level. The world would be

13. See Breton, *A Theory of Government Grants*, 31 CAN. J. ECON. POL. SCI. 175 (1965).

14. See *id.*

15. Weldon, *Public Goods (And Federalism)*, 32 CAN. J. ECON. POL. SCI. 230 (1966).

16. It should be noted that even the argument of Tiebout—that if different local governments can provide different levels of public goods, and citizens move to satisfy their preferences, this will provide an optimal allocation of local public goods, Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956)—is not sufficient to establish the need for separate jurisdictions. In theory, a central decisionmaking agency could arrange matters so that different quantities of local public goods were provided in different areas of even a very large jurisdiction.

17. A. BRETON & A. SCOTT, *supra* note 10, at 47.

entirely indifferent to the structure of government. Indeed, government itself would not be necessary:

[W]ith organization costs equal to zero, individuals will not be asked to register their preferences by voting, since these preferences are known or can be known without effort. Furthermore, no other decision rule can exist except unanimity. The entire notion of representative democracy is therefore superfluous and must be discarded.¹⁸

The reference to unanimity is mysterious—clearly all decisions *could* be unanimous, but *must* they be?—but the rest of the citation is true to the literature on transactions costs. As George Stigler has written, “The world of zero transaction costs turns out to be as strange as the physical world would be with zero friction. Monopolies would be compensated to act like competitors, and insurance companies would not exist.”¹⁹ Without transactions costs, public agencies clearly need not exist. Spontaneous coalitions of citizens would purchase those goods more easily consumed collectively and, with all preferences fully known, free-riding and games-playing on the public goods question would be impossible.²⁰

That the existence of transactions costs is necessary for a determinate solution to the assignment problem is the central theme of Breton and Scott’s work.²¹ Of course, the existence of transactions costs is necessary for most economic problems to become interesting. In the frictionless world of Arrow and Debreu,²² which so amuses noneconomists when they hear about it, a grand *tâtonnement* takes place on the first day of existence and the entire economic future is predetermined by means of elaborate contingent contracts. To say that Arrow and Debreu’s world is different when foresight is imperfect and transactions consume resources is true, no doubt, though not especially provocative. In fairness to Breton and Scott, however, it is only recently that economics has granted transactions costs the attention due them.

The force of Breton and Scott’s criticism of the traditional theory of federalism is undercut more severely by the fact that without local public goods any determinate solution to the assignment problem will normally involve the existence only of a national government. This point is important if their purpose is—as they declare it to be—to investigate the optimal structure of government.²³ Unitary government is obviously one such structure. However, the traditional preoccupation of

18. *Id.* at 35.

19. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 12 (1972).

20. Dahlman cites Calabresi’s axiom on this point, which bears repeating: “[A]ll externalities can be internalized and all misallocations, even those created by legal structures, can be remedied by the market, except to the extent that transactions cost money or the structure itself creates impediments to bargaining.” Calabresi, *Transaction Costs, Resource Allocation, and Liability Rules: A Comment*, 11 J. LAW & ECON. 67, 68 (1968), quoted in Dahlman, *The Problem of Externality*, 22 J. LAW & ECON. 141, 142 n.3 (1979). Dahlman develops the point about public goods as a corollary of this axiom. It may be more useful, however, to appeal to recent literature on the public goods question that provides several methods for dealing with the free-rider problem. See, e.g., *supra* note 12 and accompanying text. The common denominator of these methods is that they are all very costly, though in a world of zero transactions costs this obviously is not a problem. See R. BOADWAY, *supra* note 9, at 143-49 (1979), for a review of this literature.

21. See A. BRETON & A. SCOTT, *supra* note 10.

22. See Arrow, *An Extension of the Basic Theorem of Classical Welfare Economics*, in PROCEEDINGS OF THE SECOND BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 507 (1951); Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 PROC. NAT’L ACAD. SCI. 588 (1954).

23. See A. BRETON & A. SCOTT, *supra* note 10, at 4-5.

the literature, of which their work is an extension, is to try to explain why federalism may be an optimal governmental structure. An argument based solely on transactions costs is not sufficient to accomplish this purpose. Both transactions costs and the existence of local public goods will be necessary, for without local public goods there is no reason—and perhaps no way—not to make all decisions at the national level. Thus, Breton and Scott’s essential contribution to the literature is to demonstrate that the existence of local public goods is neither a necessary nor a sufficient condition for determinacy of the governmental structure. Rather, the existence of both local public goods and transactions costs in government is necessary, though, as will be seen, even this is insufficient for determinate federalism. Figure 1 summarizes the discussion of conditions for determinacy.

Figure 1

Necessary and Sufficient Conditions for (Normative) Determinacy

	<u>Necessary</u>	<u>Sufficient</u>
Determinate governmental structure	Non-neutral transactions costs in government	Non-neutral transactions costs in government
Determinate federalism	Non-neutral transactions costs in government and local public goods	Local public goods and particular non-neutral transactions cost functions in government

Perhaps a more interesting proposition about transactions costs is that only some of the costs of conducting government contribute to the determinacy of the governmental structure. Breton and Scott distinguish four costs of government, or “organizational costs:” the costs of administration, coordination, signalling, and mobility.²⁴ The first two are incurred by governments themselves, though the bill is picked up by the taxpayer. The second two, citizens incur directly.

Administration costs are “the costs of setting up governmental institutions and of running them,” while coordination costs are those “that apply to the task of coordinating activities between governments.”²⁵ Signalling involves lobbying, “joining social movements, . . . regulating one’s own private economic behaviour, . . . voting,” and like activities.²⁶ Mobility refers to “the act of moving from one jurisdiction to another”²⁷—the ultimate recourse of dissatisfied citizens.

Breton and Scott argue that the existence of administration costs does not contribute to the determinacy of the governmental structure.²⁸ This runs contrary to a common line of argument in the literature on federalism that increasing (or decreasing) returns in the provision of goods and services will require greater (or lesser) centralization.²⁹ Breton and Scott’s reason for disagreeing is that it is pos-

24. *Id.* at 7.

25. *Id.*

26. *Id.* at 32.

27. *Id.*

28. *Id.* at 41-47.

29. The few existing studies suggest there may be constant returns to scale in the provision of many

sible to imagine one big government deciding to operate in a decentralized way.³⁰ While the actual provision of goods would be undertaken by departments or administrative units large (or small) enough to take advantage of the economies (or diseconomies) of scale, the overall pattern of consumption could be determined by a unitary government. With the cost of plumbing consumers' preferences still zero, there obviously would be no efficiency loss to making decisions at the center.

This reasoning serves also to illustrate precisely what Breton and Scott mean by "coordination costs." These clearly are not the costs of sending directives between different departments of government. If they were, the unitary government run on divisional lines might well be more expensive than a hierarchical system designed to take advantage of the diseconomies of scale. Rather, by arguing that administration costs leave the assignment indeterminate, Breton and Scott imply that coordination costs do not include the costs of sending orders to local administrative divisions of a unitary government, but instead are the costs incurred in coordinating the activities of different decisionmaking units.³¹ Thus, coordination costs only exist when the plans of different jurisdictions have to be made consistent.³²

The obvious question, then, is why a country would decide to incur coordination costs by setting up different jurisdictions. The answer Breton and Scott provide is that setting up different jurisdictions may reduce the signalling and mobility costs incurred by citizens.³³ Although in a world in which all four kinds of transactions costs exist, the least-cost governmental structure may be the unitary state, it is possible that a more elaborate structure will save resources in the conduct of government. As a corollary to this argument, it appears that the true necessary condition for a determinate, nonunitary governmental structure is the existence of signalling and mobility costs.³⁴ Otherwise, there would be no incentive to incur coordination costs. Of course, if signalling and mobility costs are low, there may be situations in which incurring coordination costs does not cause savings sufficient to justify an extra level of government.

In the final analysis, many observers are likely to be inherently uncomfortable with an analysis of federalism running along these lines. Breton and Scott phrase their rejection of the argument that administration costs are a sufficient condition for the determinateness of a multilevel solution in a telling way: "Would such costs really give rise to a public sector with a structure in a world in which signalling and mobility costs were zero, and in which, therefore, preferences were known

public services, so that on empirical as well as theoretical grounds the existence of administration costs leaves the governmental structure indeterminate. *See, e.g.*, W. HIRSCH, *THE ECONOMICS OF STATE AND LOCAL GOVERNMENT* (1970).

30. A. BRETON & A. SCOTT, *supra* note 10, at 41-47.

31. *See id.*

32. Of course, in some forms of centralized decisionmaking—though none which would be used in a costless world—the task of the central authority is to coordinate decisions made at the departmental level. Coordination costs would therefore have to be incurred even in a system in which final authority resided at the center. It is hard to say how Breton and Scott would categorize such a governmental structure.

33. A. BRETON & A. SCOTT, *supra* note 10.

34. As suggested above, Breton and Scott are not interested in this question but rather in the necessary conditions for determinateness—pure and simple.

and Lindahl prices consequently feasible?"³⁵ In other words, all arguments about transactions costs reduce to the single proposition that the optimum governmental structure is the one that best solves the local public goods problem, taking into account the costs of coordination and administration. Breton and Scott's proxy for the ability of a governmental structure to solve the local public goods problem is the level of expenditure required to operate the structure, including the expenditures citizens make lobbying governments or moving from one jurisdiction to another.³⁶ Why this should be so is not clear, however. It is perfectly possible to imagine a governmental structure that gives rise to very few expenditures on signalling and mobility, not because citizens are happy with the level of public goods supplied, but because they are desperately unhappy yet believe that protest and/or mobility are futile. As a general rule, many different levels of dissatisfaction with the governmental structure can be associated with a single level of "organizational" expenditures.

In summary, Breton and Scott's model will justify the existence of a multilevel structure of government only if the increased costs of coordination are offset either by reduced administration costs or by the greater ease with which lower level governments can assess the true strength of consumer preferences. Since the problem of public choice posed by public goods is not simply one of collating responses to questionnaires or interviews, but also one of assessing the validity of these responses, it is not clear why one level of government should be expected to play the public goods game better than another. Nor is it clear how the ability of different governments to play games successfully could be tested. As suggested, the level of expenditure on signalling and mobility associated with each possible governmental structure seems an imperfect proxy for "solution" of the local public goods problem. If the assignment of responsibilities is indeterminate when the public goods problem is trivial, it must also be indeterminate when the problem is insoluble.

III

THE POSITIVE THEORY OF CONSTITUTION-MAKING

Perhaps by now it is evident that normative analysis of the problem of constitution-making may be of dubious value. In the first instance, the costs of signalling, mobility, administration, and coordination, while calculable in theory, are not likely to be calculable in practice. To state only the most obvious difficulty, the relevant data will be difficult to disentangle from general data on mobility, coordination, and signalling. Moreover, it will be hard to estimate data for other governmental structures than presently exist. Second, in a model in which participants seek out the least-cost solution to the assignment problem, but do this subject to several sets of constraints, there are likely to be many local optima. The nature of a local optimum is that any movement in the immediate neighborhood of the

35. A. BRETON & A. SCOTT, *supra* note 10, at 46-47.

36. *See id.*

optimum involves losses. How a society should grope its way from one of these local optima to the optimum optimorum is hard to say.

The most compelling argument against normative analysis, however, is simply that it may have little bearing on decisions actually taken in these matters.³⁷ It is now well established in the economics literature that what is best for a society is not necessarily best for the politicians who preside over that society.³⁸

Breton and Scott's version of the normative argument is to imagine that a "constituent assembly" will attempt to find the least-cost allocation of responsibilities across the various levels of governments (if in fact it is decided to have different levels of government); that the members of this assembly will be perfectly indifferent as to who gets what powers; and that their only concern will be to minimize the total costs of making and acting on public decisions.³⁹ Of course, as Breton and Scott are the first to admit, their version is not a faithful depiction of how such decisions are actually made. Rather, once a governmental structure has been established in a country (or even before),⁴⁰ groups come into being whose interests probably are not best served by a least-cost solution to the constitutional question. Politicians and bureaucrats, for instance, are not likely to be indifferent to which level of government is responsible for which policies. In the case of bureaucrats, whose salaries are almost exclusively responsible for coordination and administration costs, this point is trivial. However, politicians may have their own view of the desirable constitution. Since their immediate aim is to win neither unanimous nor even potentially unanimous support for whatever they do, but only a majority or even a plurality of votes, they need not always give great weight to considerations of Pareto-efficiency in their deliberations. In addition, whether or not a governmental structure exists, ordinary citizens are not likely to be indifferent as to which level of government assumes responsibility for which policies. The desire of many English Quebecers that the federal government take a more prominent role in education arises from a belief, not that this will reduce the costs of government, but that it will better protect what they consider to be acquired rights.

A. What is Optimal Will Be?

Breton and Scott are fully aware that people have other constitutional objectives than minimization of the transactions costs involved in government. Indeed, they make a major contribution to the literature by setting up a model of self-interested constitutional revision. This "positive" model extends the economic

37. What can be construed as references to organizational costs can be found in the public debate on the British North America Act, although such costs can hardly be said to have preoccupied contemporary thinkers. *See* W. WHITE, R. WAGENBERG, R. NELSON & W. SODERLUND, *CANADIAN CONFEDERATION: A DECISION-MAKING ANALYSIS* (1979). John A. Macdonald argued at the Quebec Conference that "[w]ith one general government the expense would be very much less." *CONFEDERATION* 56 (J. Pope ed. 1895). On the question of signalling, he held that, "The people of every section must feel that they are protected, and by no overstraining of central authority should such guarantees be overridden." *Id.* at 55.

38. Breton himself has made a major contribution to this literature. *See* A. BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* (1974).

39. *See* A. BRETON & A. SCOTT, *supra* note 10, at 68.

40. Or even before: disinterested constituent assemblies are seldom allowed a hand in the writing of a country's first constitution.

analysis of democracy not only to the process of governing, but also to the process of establishing the rules by which governments govern.⁴¹ At times, however, it appears that Breton and Scott lose sight of the importance of this contribution to positive economics. They suggest, for instance, that in the long run the difference between a positive and a normative analysis of constitution-making may be insignificant—that, in effect, what is optimal (eventually) will be:

[I]f the institutional structure is such that governing parties must, to remain in office, meet the preferences for public policies of a large number of citizens, then a representative government type constituent assembly will in the long run tend towards an assignment of powers identical to that produced by a least-cost assembly. This follows from the simple fact that politicians are elected by citizens and that citizens who ultimately must carry the burden of both their own and the governmental organizational costs will favor those parties which make these costs as small as possible.⁴²

The premise is unobjectionable: in Canada, at least, governments do occasionally face the electorate. The conclusion to which this is held to lead, however, is not at all obvious. On the contrary, there are likely to be continuing, probably even permanent, differences between the assignment of functions that would minimize the transaction costs of government and the assignment that actually prevails.⁴³

Perhaps this proposition can be elaborated with the help of a real-life example: the continuing constitutional conundrum presented by the persistence of a separate provincial government for Prince Edward Island. For the purposes of argument,⁴⁴ it will be asserted that any normative or least-cost model of federalism that is not tautological cannot justify the continued existence of three levels of government for an island whose population numbers only 125,000.

Before the consequences of this assertion are elaborated, it is important to make clear that in a least-cost model it is irrelevant whether or not the existence of a separate provincial government for the Island gives any special pleasure to Islanders, either in their role as citizens or in the role some of them play as bureaucrats or politicians. The only justification for a separate provincial jurisdiction must be that it reduces the costs of government, as might be the case if signalling and mobility costs were saved by allowing Islanders to make their own decisions regarding consumption of local public goods. The cost of lumping Islanders in with Nova Scotians, or with all Maritimers, would be perpetual dissatisfaction with Nova Scotia- or Maritime-wide decisions on various public questions. Therefore, higher signalling and mobility costs would be incurred as Islanders either petitioned the regional government for differential treatment or left the Island for jurisdictions whose policies were more to their liking. Thus, the assertion here is that doing away with the Island's government would bring about a net reduction in the transactions costs of government.

41. See generally A. BRETON & A. SCOTT, *supra* note 10.

42. *Id.* at 101.

43. This point is not inconsistent with the letter of what Breton and Scott say, though it does appear to conflict with their intent. The purpose of the following discussion is not mainly to criticize Breton and Scott, however.

44. Though, it is hoped, for other purposes as well—factual accuracy, for instance. Assertion is necessary, because, as suggested, it is the nature of such models that the data, if they exist in principle, are unknown in practice.

If this is true, then a positive theory of federalism which held—more or less—that what is optimal eventually will be done should predict that the separate jurisdiction of Prince Edward Island would be extinguished. The phrase itself would be less an affront to common sense if in Canadian history there ever had been a reduction in the number of jurisdictions, but this has not happened.⁴⁵ In Waite's phrase, provinces are "easy to create but difficult to get rid of."⁴⁶ By contrast, a positive theory of federalism that does not take this view has no trouble explaining the continued existence of a separate provincial government for the Island, even if abolition were in some sense "optimal." All that is required is the assumption that Island politicians and bureaucrats have strong interests in the continuation of a provincial government. This assumption is not unreasonable. Although more jobs might be opened up in the Nova Scotia bureaucracy, if abolition were truly an economizing step some people presumably would be left without jobs.⁴⁷ Moreover, citizens may attach value to an Island government per se on the grounds that they can expect to receive indulgences from a local government that might not be forthcoming from a differently located or a different order government. This is especially true when the costs of administration and coordination are paid partly by citizens of other jurisdictions. Finally, local politicians naturally will be biased in favor of the continued existence of their jurisdiction—having made such an effort to reach their present position in it. They also are likely to have an interest in winning the allegiance of bureaucrats, who have the power to make life miserable for them. If befriending their subordinates means departing from the strict constitutional optimum, their reaction is likely to be: "So be it."⁴⁸

The practical difficulties of arranging abolition are therefore likely to be considerable: even if politicians overcame their natural antagonism to the idea, the ordinary complications of democratic processes would intrude. Politicians offer, and citizens respond to, bundles of attributes. Moreover, it often appears that citizens respond to these bundles lexicographically. Thus, the party with the "right" constitutional policy may have the "wrong" inflation, development, or social policy, or even the "wrong" leader. Because there are finite numbers of political parties, the "wrong" constitutional policy may persist for quite some time—perhaps forever—before the constitutional question reaches the top of the political agenda.⁴⁹

Abolition of the separate jurisdiction of Prince Edward Island would require abolitionist agitation on the part of those citizens of the Island who do not owe their livelihood to the existence of a separate provincial government. Unfortu-

45. *See infra* p. 818.

46. P. WAITE, *THE CHARLOTTETOWN CONFERENCE* 4 (1963).

47. When British Columbia entered Confederation, several redundant officials were granted sinecures. *See* G. WOODCOCK, *CONFEDERATION BETRAYED!* 59 (1981).

48. The self-interest of Prince Edward Island politicians is not a purely hypothetical concern. It was the inability to accommodate the acquired rights of Island politicians that prevented Prince Edward Island from entering Confederation in 1867. The overriding difficulty was that of fitting five Parliamentary seats into three counties. Earlier, Islanders had ended hopes of a Maritime union by refusing to discuss any plan that did not provide for a capital at Charlottetown. P. WAITE, *supra* note 46, at 19.

49. This phenomenon would stem from the costliness of political organization—an idea that should appeal to Breton and Scott.

nately, the costs of organizing citizens into effective mass movements can be high, in part at least because of the "free-rider" problem.⁵⁰ The benefits of abolition would come in the form of reduced tax and private costs of government. These benefits are likely to be widely spread, however. As noted, part of the gain will accrue to citizens of other jurisdictions, which no longer would have to incur the costs of coordination with the Prince Edward Island government. While, in theory, out-of-province beneficiaries could bribe Islanders to submit to abolition, in practice, such bribes are hard to make.⁵¹ The more important point, however, is that although each Islander might benefit by joining an abolitionist movement, he or she will benefit *more* if someone else does the political dirty work. This point illustrates the difficulty inherent in all collective action.⁵²

Perhaps the point has been labored sufficiently. It is far from obvious that the equilibrium that emerges from real-world constitutional negotiations will coincide with the least-cost assignment of rights and responsibilities, even if that were calculable.

B. What Is Is Optimal?

In brief, the previous argument is that departures from optimality in a governmental structure may persist because the political action necessary to eliminate such departures is costly. The obvious rejoinder is that if the problem is not eliminated because to do so would be costly, then the problem is not a problem in any operational sense. What is must therefore be optimal, or on its way to being optimal. If it is not optimal it will be changed. If it is not changed, this is because it is not worth changing. An argument very much like this has recently been presented by Becker, who suggests that the political system is likely to respond efficiently, not to the dictates of the economist's social welfare function, but to those of what he calls the "political influence function."⁵³ Groups' and individuals' weights in this function are determined by their media impact, their lobbying power, their voting strength, and like variables, all of which are subject to maximization by self-seeking groups and individuals. In a self-interested world, it is hard to see how the political influence function could be other than it is, and since the political system is held to respond efficiently to it, how policy could differ from what it is. If there are to be spontaneous, policy-induced improvements in social welfare, then it would seem, ironically, that the economist must place his faith in essentially altruistic behavior on the part of policymakers—which obviously rubs against the grain. If this is true, the economist's role becomes that of either poet laureate for the status quo, proselytizer for a new order, or seer. The job of seeking out unexploited exchanges, whether political or purely economic, presumably will already have been done by the parties concerned.

50. See *supra* note 12 and accompanying text.

51. Bribes are not impossible, however. The financial settlements made by the Dominion government at Confederation can be viewed as compensation of this sort. Of course, once it is known that bribes are available, Islanders will have every incentive to overstate their opposition to abolition.

52. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

53. G. Becker, *A Theory of Political Behavior* 3 (Oct. 22, 1981) (unpublished paper).

It may yet be possible, however, to find habitable territory between the twin deserts of "What is optimal will be" and "What is is optimal." As is well known, in a world in which transactions costs are the main impediment to the attainment of a theoretical optimum,⁵⁴ governments can do socially useful work by attempting to reduce such costs.⁵⁵ In the present instance, at least, this is not a negligible role. One aspect of that role involves reducing the costs of collective action by subsidizing public interest groups, polling, or simply by intuiting public opinion. There is also the possibility of propagandizing. Since knowledge is at least a partly public good, it is reasonable to suppose that information about constitutional inefficiencies may be underprovided. A second possibility is to aim, not at reducing transaction costs, but at altering the allocation of property rights. The main impediment to optimality in this case is that politicians and bureaucrats have special property rights. If these property rights are denied, one impediment to efficient constitutional change would be removed.

There is every reason to be skeptical on these two points, of course. In the first instance, self-interested politicians will not volunteer to subsidize citizens' groups that aim at reducing their privileges—even at challenging their very (political) existence. While it is true that if reductions in transaction costs were effected and/or the allocation of property rights altered, the world would move closer to the least-cost optimum, this is not likely to happen.

It is also possible that Becker overestimates the efficiency of the political system. In a recent paper, James Dean argues that because of strategic behavior by political actors, the political process may fail to carry through on many politically efficient deals.⁵⁶ In the end, however, the problem may be one of definitions. If the best that can be done deserves the adjective "optimal," then perhaps any constitutional equilibrium that persists should be called "optimal." However, this is not what Breton and Scott—or most economists—intend when they use the word.

IV

APPLICATION OF THE POSITIVE MODEL

Perhaps enough has been said about the relationship of equilibria to optima. A natural next question, and in many ways a more interesting one, is why any constitutional equilibrium that emerges from self-interested "higgling and bargaining" among provincial and federal politicians should not persist forever. In brief, why do constitutional deals continue to be made, and made, if Canadian experience is any guide, with great frequency?

A. Constitutional Prerogatives as Capital Assets

In what remains of this article, it will be useful to view constitutional preroga-

54. "Theoretical optimum" is awkward phrasing, but so long as transactions costs exist, any unattained optimum remains just that.

55. See generally Dahlman, *supra* note 20.

56. J. Dean, Interest Groups, Political Inefficiency and Negative Sum Regulations (Mar. 24, 1982) (unpublished paper).

tives as capital assets, and a particular jurisdiction's set of prerogatives as a portfolio of capital assets. While a country's first constitution gives rise to an initial allocation of portfolios, there is no reason to suppose that jurisdictions will be content with these portfolios indefinitely. In fact, as Alan Cairns has suggested, without much exaggeration, "The day after it is proclaimed, [a constitution's] evolution away from the agreement just reached will commence."⁵⁷ Just as the holders of more conventional capital assets will trade with one another when the actual and expected values of these assets change, jurisdictions can be expected to trade in constitutional prerogatives when their opinions of the actual and expected values of such prerogatives change. In addition, jurisdictions may attempt to seize assets, either by exercising new prerogatives or by challenging other jurisdictions' claims to ownership. As is true in the economic world, however, most transfers of constitutional assets seem to result from negotiated exchanges.⁵⁸ A positive analysis of constitutional evolution must therefore proceed by examination of the reasons why jurisdictions may be tempted to trade in constitutional prerogatives.

B. The Return to Constitutional Capital

The return to ordinary capital takes the form of consumption services or cash accruing to the owner of the capital. The custodians, though perhaps not the "owners," of constitutional capital are the politicians who deal in it. While the return to constitutional capital may ultimately take the form of cash or consumption services accruing to these politicians, for this to occur it is necessary that the politician remain in office. As Douglas Hartle has put it, "A politician without elected office is like a fish out of water, gasping for the air of immediacy, involvement, risk taking, public attention, personal power, income and perquisites."⁵⁹

It may be presumed, then, that politicians will try to deal in constitutional capital in a way that maximizes their chances for re-election. Opinions will differ about what accomplishes this maximization—whether it be doing good, being seen to do good, or merely presiding over good times. They will also differ about what is meant by "doing good." It may mean as little as maximizing the difference between taxes paid and public services and transfers received by forty to forty-five percent of the voting population, or it may actually mean attempting Benthamite or even Paretian improvements. The main point remains, however, that politicians will most prize the constitutional capital that most increases the possibility of their re-election.

C. Changes in the Value of Constitutional Portfolios

An economic asset becomes more or less valuable to its owner as its ability to

57. Cairns, *supra* note 2, at 155.

58. This would also seem to be Richard Simeon's conclusion. R. SIMEON, *FEDERAL DIPLOMACY: THE MAKING OF RECENT POLICY IN CANADA* (1972). On the other hand, Donald Smiley, while possibly also concurring, has suggested that such "exchanges" have often been one-sided: "It can reasonably be argued that until the present decade Canadian federalism has been sustained because at every period either one level or the other has been relatively immobilist with respect to economic policy." D. SMILEY, *CONSTITUTIONAL ADAPTATION AND CANADIAN FEDERALISM SINCE 1945*, at 34 (1970).

59. D. HARTLE, *PUBLIC POLICY DECISION MAKING AND REGULATION* 34 (1979).

earn income changes. Such changes can occur either because tastes or technologies change, or because other peoples' opinions of the asset's value changes. This second factor is not unrelated to the first; other peoples' opinions of an asset may change because technology or tastes change in a way that makes it more valuable to them than to its owner. It is just such asymmetric changes in valuation that make trade in assets possible.

The same considerations enter into the valuation of constitutional prerogatives. Their worth to their custodians will change as tastes and/or technology change, or as other constitutional actors covet them more or less. In the constitutional domain, however, it is useful to define "technology" more broadly than is usual, so as to include the economic, social, and even the intellectual environment, as well as technology in the customary sense.⁶⁰ A series of examples will help to elaborate this point.

The privilege of imposing direct taxes is of slight advantage in an era in which the social and economic environment does not favor income taxation. Thus, Hector Langevin suggested during the Confederation debates in the Parliament of the Canadas that the provinces were to be granted the privilege of levying income taxes because it was not contemplated there would be any.⁶¹ Since then, of course, times have changed and provincial income taxes now amount to seven percent of GNP.

The privilege of imposing taxes on resources is clearly of greater advantage when the resources in question are not timber harvested competitively, but petroleum whose world price is determined by a cartel.

Control over educational institutions means less when school attendance is rare and schools are largely private than when attendance is universal and publicly supplied. As is well known, the British North America Act (BNA Act) granted the provinces access to what were at the time the least important sources of public revenue. Smiley raises the less advertised but perhaps more important point that the provinces were also assigned what were then the least important public responsibilities.⁶²

Control over property and civil rights is less valuable an asset in an era in which—perhaps because computers have not been invented—economy-wide control of wages and prices is prohibitively difficult.

Similarly, control over the money supply is more important—though perhaps not more valuable—an asset in an era in which monetary control is understood to be an instrument of economic stabilization.

D. Trade in Constitutional Capital

Perhaps it should be emphasized that the above changes in value do not necessarily justify the exchange of constitutional capital. That some forms of such capital grow more or less valuable as time passes can explain the enrichment or

60. This broadened definition does not suggest that "technology" will not influence the valuation of ordinary assets, though this often is overlooked in the economics literature.

61. See W. WHITE, R. WAGENBERG, R. NELSON & W. SODERLUND, *supra* note 37, at 71.

62. D. SMILEY, *supra* note 58, at 37.

impoverishment of different jurisdictions, but it will not explain why trade in such assets may occur. For example, if oil stocks go up and automobile stocks down, people holding oil stocks are better off and people holding automobile stocks worse off, though the two groups will not necessarily trade as a result. They will trade, however, if their relative valuation of each other's assets changes. If automobile stocks become more attractive to the person holding the oil stocks, and/or vice versa, an exchange may take place. The essence of the problem, then, is that changes may take place that make an asset less valuable to its owners than to others.

In fact, a couple of the examples cited above do provide clear illustrations of this possibility: In Canada, the legal power to control wages and prices resides with the provincial governments, yet controls—price controls, certainly—do not make much economic sense in a jurisdiction in which interjurisdictional trade is so important, since a large proportion of prices will be uncontrollable. Of course, the desire to control wages and prices on an economy-wide scale is a relatively recent phenomenon, arising from the combined influence of computerization (so that control is possible) and inflationary changes in the structure of the economy (so that it also appears desirable). Thus, as a result of technological change, broadly defined, the federal government is likely to be more jealous of the provinces' control over property and civil rights, without any corresponding increase in the provinces' valuation of this asset. In exchange for lease of the right to control wages and prices, the provinces can reasonably expect some form of indulgence from the federal government, either in the form of cash⁶³ or constitutional capital.

E. Predictions of a Positive Theory of Federalism

The proof of any theory is in its predictions. Unfortunately, in this area of analysis, as in many others in economics and the social sciences generally, prediction is made difficult by the absence of data on relevant costs and preferences. Thus, the speculations that follow cannot properly be called "hypotheses," for it is hard to know how they could be confirmed or refuted. Perhaps the accumulation of historical precedents may give some clue to their usefulness, though if this is the case, the task will have to be left to others more versed in the history of these matters.

1. *The Critical Importance of the Initial Endowment.* The original distribution of Canadian constitutional capital was made in the British North America Act of 1867.⁶⁴ The original distribution of endowments is bound to prove critical in the subsequent development of a country's constitutional practice. In fact, this usually is the intent of the framers of a constitution, although Jefferson, for one, believed that constitutions should be rewritten fairly frequently, while Alan Cairns argues that the Fathers of Confederation had no intentions for the future.⁶⁵ But even if

63. Breton and Scott are quite clear in suggesting that such trades can be on a cash basis. A. BRETON & A. SCOTT, *supra* note 10, at 97.

64. This Act reflected earlier constitutional practices.

65. Cairns, *supra* note 2, at 144.

unintended, some effect of the distribution must persist. The problem posed by an original endowment is that the framers of a constitution generally have little idea of what changes technology (broadly defined)⁶⁶ may effect in the values of the assets they distribute. A problem analogous to the one they face would be to try to reallocate the world's energy resources so as to assure a particular country's affluence two centuries from now.⁶⁷

That the usefulness of different constitutional functions will change over time suggests at least two things. First, the framers of a constitution might do well not to try too hard to worry about the appropriateness of their decisions for future generations. They simply do not have the information to deal with this problem. Second, they should take care to leave means by which a constitution can be amended. Of course, Canadian experience suggests such mechanisms are likely to come into existence no matter what the original authors of a constitution intend. The BNA Act has been notoriously difficult to amend formally, yet in practice it has proved the cornerstone of "one of the most durable and successful constitutions in the world."⁶⁸ In fact, Corry argues that *de facto* amendment has provided "flexibility and an easy adaptability to the dominant winds of the country."⁶⁹ If the constitution will be amended anyway, a formal amending procedure might not be thought necessary. On the other hand, since some measure of inflexibility presumably is wanted in a constitution, it may be preferable, in the long run, to have the constitution altered formally and in the open.

A final point on the original endowment involves the composition of a constitutional convention. The view is widespread that citizens, rather than politicians, should devise a country's constitution.⁷⁰ The clear implication of the preceding argument is that this is likely to be futile. Once politicians come into the picture, the constitution will begin to change posthaste. In some cases, change has begun with almost embarrassing promptness. The process of constitutional renegotiation began in Canada in 1869—and in the United States in 1783—and it has not stopped in either country since. Unless a citizens' convention writes an airtight document, which would be unwise for other reasons, matters will soon be shaped according to politicians' liking.

2. *Ars Politica Non Facit Saltum.* Alfred Marshall, the father of equilibrium theory in economics, argued that nature did not take leaps. The same is likely to be true of constitutional processes. When new opportunities for dealing in powers and responsibilities open up, deals presumably will be made between levels of government. But unless technology changes rapidly in ways that drastically alter relative valuations of prerogatives, constitutional change can be expected to proceed

66. See *supra* p. 101.

67. One way to accomplish this is to give all resources to that country. Many observers would argue that in constitutional terms the Fathers of Confederation tried to do this. It is well worth reflecting on the drastically centralized regime which the Fathers of Confederation envisaged. See Watson, *Confederation Then and Now*, POL'Y OPTIONS, Dec.-Jan. 1980-1981, at 61.

68. Cairns, *supra* note 2, at 143.

69. Corry, *Constitutional Trends and Federalism*, in A. LOWER, *EVOLVING CANADIAN FEDERALISM* 121-22, quoted in D. SMILEY, *supra* note 58, at 56.

70. See Grubel, *Reflections on a Canadian Bill of Economic Rights*, CAN. PUB. POL'Y 57 (1982).

gradually, regularly, and incrementally. This is not to say that rapid technological change will never induce precipitous constitutional change. The 1850's and 1860's clearly brought such changes. For example, the telegraph and the railway enabled much greater centralization in British North America than could be attained in the age of sail. The rapid industrialization of the Northeastern United States had a similar impact. On the other hand, despite Macdonald's intentions, pre-nineteenth century provincial demarcations proved extremely durable. Similarly, dramatic advances in present day communications and information processing may militate in favor of dramatic constitutional change. It is hard to tell, however, whether these advances will involve greater centralization, as might first be thought, or further decentralization, on the grounds that there now is too much information for any center to process.

Still, the emphasis on gradualism fostered by an economic approach to this problem suggests that the much heralded "second round" of constitutional negotiations dealing with division of powers will not take place. At most, what can be expected is a marginal adjustment in prerogatives and, possibly, a codification of existing constitutional practice. The reason is that if politicians are about their jobs, constitutional change will be their constant preoccupation. In Alan Cairns's phrase, the constitution will be a "continuous creation."⁷¹ If an exchange of prerogatives can increase the chances that politicians at both (or the several) levels of government will be re-elected, it is hard to imagine it not being made at the first opportunity.

3. *A Ratchet Effect.* As already has been suggested at length, once a jurisdiction has been given constitutional sanction, it is unlikely to disappear. Responsibilities can be reallocated across jurisdictions, but the number of jurisdictions, if it changes, is likely only to increase. In this regard, the original surrender of "provincial" power in the 1860's to the new Dominion government is not an example of voluntary sacrifice. There is every evidence that the colonies were pushed reluctantly into Confederation by the Colonial Office, with Quebec acquiescing mainly because it felt federation preferable to legislative union.⁷² Of course, the creation of an entirely new level of government held forth the promise of continued service for many provincial politicians and bureaucrats. In the present era, the atrophy of municipal powers can hardly be cited as self-sacrifice, since the municipal governments have never enjoyed explicit constitutional existence. Significantly, the national association of municipal officials was the one minority lobby of which the Parliamentary Committee on the Constitution made short shrift.

4. *No Trades Without Gains.* An obvious corollary of the proposition that self-interest will play a role in constitution-making is that jurisdictions can be expected to trade in prerogatives only if they expect to gain by this. Constitutional deals that might at first blush appear not to involve gains for one—or perhaps both—of

71. Cairns, *supra* note 2, at 146.

72. See D. CREIGHTON, *THE ROAD TO CONFEDERATION* (1964).

the trading parties may on closer inspection be seen to result from self-interested behavior.

To begin with, self-interest is not inconsistent with some jurisdictions becoming less "wealthy" over time. All trades a jurisdiction makes may involve gains, yet a jurisdiction's portfolio of powers may lose value for reasons beyond the powers of its politicians to control.⁷³ Moreover, what seems to be a giveaway of powers may actually be designed to gain electoral advantage. Powers that are not much use at one level of government may redound to all politicians' benefit, if their effective exercise at another level makes voters less irritable.

The payment of equalization grants by the federal to the provincial governments is an example of what may be self-interested charity. The federal government obviously would prefer to get direct credit for the expenditures equalization makes possible.⁷⁴ If this is not possible, however, a plausible second-best policy is to give the provinces funds to be spent where marginal utilities are high, rather than to add to the total of spending in federal jurisdictions where the marginal utility of funds spent may be low—perhaps even negative. This policy requires either that all incumbents benefit from good government, at whatever level it takes place, or that client provinces look with favor on federal proposals in other areas. Apparently, the latter consideration was of some practical importance in the early days of the equalization program. Dalton Camp describes a meeting between John Diefenbaker and the Conservative premier of New Brunswick during the 1957 federal election campaign, at which the national Conservative leader was persuaded, partly in exchange for electoral support, to endorse the "Atlantic Resolutions"—a set of proposals for greater federal aid to the Maritimes.⁷⁵ In early 1958, with Mr. Diefenbaker at the head of a minority Conservative government, the equalization program was revamped and expanded, and the ad hoc Atlantic Adjustment Grants program was introduced. *Post hoc ergo propter hoc* obviously is not the surest analytical guide, though perhaps it does not always lead the analyst astray.

During the last two years, the argument has been heard that governments, especially governments with lame-duck leaders, can afford to behave altruistically. Thus, Mr. Trudeau's concern with a charter of rights, which on the face of it will limit the powers of all governments and is therefore not something to be expected from a politician, may well reflect a genuine desire to serve the people.⁷⁶ On the other hand, Mr. Trudeau's intention may be to make the Liberals the party of the

73. This is essentially what happened to the Canadian provinces and the American states in the 1930's.

74. John Diefenbaker was characteristically bitter on the provincial reaction to federal transfers:

It is paradoxical but true that whatever assistance we gave to the provinces redounded to the political credit of the provinces. They forgot altogether the assistance that had come from my government. I know of no exception. This was true in Newfoundland. This was true in British Columbia. This was true even in Manitoba.

2 J. DIEFENBAKER, *ONE CANADA: THE YEARS OF ACHIEVEMENT 1957-1962*, at 294 (1976). The premier of Manitoba at the time was Duff Roblin, a staunch Conservative supporter.

75. See D. CAMP, *GENTLEMEN, PLAYERS, AND POLITICIANS* 337 (1970).

76. If so, this recent episode will have persuaded many observers that that government is worst which governs most altruistically.

Constitution, just as John A. Macdonald's Tories were the party of Confederation. If the "people's package" ultimately proves more popular than it initially appears to be, then this may be capital well spent. Of course, once spent it is gone; rights presumably can only be bestowed once.

5. *Force Majeure.* In many negotiations, the rights of both parties to the assets they propose to trade are unchallenged. At other times, however, the question of ownership will be in doubt. In such cases—both for ordinary and constitutional assets—there can be appeal to binding arbitration. Ultimate authority on questions of constitutional ownership lies with the Supreme Court. Although the possibility of litigation suggests that the domain of negotiation may be limited, in many cases litigation will be more costly than negotiation.

In the first place, appeal to the courts is risky. The expected value of any outcome may be difficult to assess. In fact, a well respected school of Canadian constitutional law has it that the very nature of Confederation was transmogrified by a careless reading of the BNA Act by the Judicial Committee of the British Privy Council in the last decades of the last century.⁷⁷ Though Canadian judges presumably will not be casual in their interpretation, there may yet be considerable uncertainty concerning the outcome of adjudication. Better, perhaps, to negotiate a sure half loaf than to bet on winning a whole loaf in the courts.

The second major disadvantage of legal appeal is that it invariably takes time. Many of the politicians involved in constitutional negotiations are likely to be operating within a relatively short time horizon. Delay, especially if it threatens to take a decision past the next election, may be dangerous. There may be a temptation to split, say, disputed resource revenues, rather than wait for the courts to decide who rightfully owns the golden goose. Thus, it comes as no surprise that the recent agreement between the federal government and Nova Scotia on offshore energy resources says nothing about ultimate ownership of the resources, or that one of Mr. Peckford's demands in his negotiations with the federal government on the same question is that all claims to ownership be set aside for the duration of the talks. In fact, what is surprising is that Mr. Peckford chose to call an election on the question of oil revenues and, in effect, to run (successfully) against the federal government. From the perspective offered above, his decision to refer the question of ownership to the Supreme Court was also aberrant. In light of the federal government's prompt short-circuiting of the reference, and Mr. Peckford's subsequent request for further talks, it appears to have been a last ditch effort to use delay to make the best of what was a weak hand.

A final argument against constitutional confrontation is that force majeure on one front may spoil negotiations on several other fronts. This argument is the most compelling explanation for the senescence of the federal power of disallowance. As Smiley suggests, "[T]he use of disallowance in any but the most unusual circumstances would almost inevitably inhibit the kinds of federal-provincial collaboration that are necessary if the federal system is to operate in a tolerably effective

77. See F. SCOTT, *ESSAYS ON THE CONSTITUTION* (1977).

manner.”⁷⁸ One clear message from Breton and Scott is that the different levels of government may need each other. Upper levels can provide finance and economies of large-scale operation, while lower levels may find it relatively inexpensive to gather information about citizens’ preferences. Only when the stakes are large, presumably, will a government risk “linkage” of all outstanding issues.

Of course, like it or not, there may be times when politicians are forced into confrontation, especially legal confrontation. The usual occasion for involuntary confrontation is the third party suit, in which private interests raise the problem of jurisdiction in the courts. Professor Mallory has argued that with the advent of the welfare state and the growing congruence of official and corporate interests, business has been increasingly reluctant to take this route⁷⁹ (although there have been exceptions, of which the CIGOL case is perhaps the most notable example). The petroleum companies, for instance, are said to have “worked . . . long and hard to stay out of the dispute” between Newfoundland and the federal government on the question of offshore oil resources.⁸⁰ One consequence of this apparent decline in litigiousness is that the risk of going to the courts has increased; the predictability of the verdict presumably varies inversely with the interval since the last case. As Guy Favreau put it in the early 1960’s: “Gone are the days when constant recourse to the courts was hurriedly made to obtain an interpretation that would . . . resolve jurisdictional conflicts”⁸¹ Mallory argues that it remains to be seen whether the declaration of a charter of rights will prompt a new era of third party litigation.⁸² If it does, the potentially arthritic effect on inter-jurisdictional relations may prove the sad fulfillment of Black and Cairns’s dictum that hasty constitutional revision would be “an act of political immaturity for which succeeding generations would long curse their ancestors.”⁸³

6. *No Market for Albatrosses.* Popular wisdom notwithstanding, there are some powers and responsibilities whose exercise politicians probably do not relish: they have negative value, as it were. In such cases, governments may try to dispose quietly of these assets. If no takers are available, however, it may be necessary simply to deny ownership. Although past federal governments have not been reluctant to take credit for the conduct of macroeconomic policy when economic growth was rapid, employment high, and inflation low, in more recent times, when all three trends have been reversed, attempts have been made to deny responsibility. Nor are other levels of government likely to volunteer for such responsibilities. Were the provincial premiers’ recent demands that they play a role in the conduct of macroeconomic policy heeded, no group in Canada would be more dismayed than the premiers themselves.

78. D. SMILEY, *supra* note 58, at 42.

79. See Mallory, *The Five Faces of Federalism*, in CANADIAN FEDERALISM: MYTH OR REALITY 55 (M. Meekison ed.) (2d ed. 1971).

80. The Financial Post, Feb. 27, 1982, at 6, col. 2.

81. Address given by Hon. Guy Favreau, *Rebirth Through Reason: Cooperative Federalism*, Chamber of Commerce, Matane, Quebec (Feb. 7, 1965) quoted in D. SMILEY, *supra* note 58, at 81.

82. Mallory, *The Politics of Constitutional Change*, LAW & CONTEMP. PROBS., Autumn 1982, at 53.

83. Black & Cairns, *A Different Perspective on Canadian Federalism*, in CANADIAN FEDERALISM: MYTH OR REALITY 83, 98 (J. Meekison ed.) (2d ed. 1971).

7. *No Man's Land.* The often observed tendency of governments to crowd into areas of policy where jurisdiction has not been properly defined is usually ascribed to the inherent rapaciousness of modern governments. From the perspective developed here, however, it is clear that such behavior need not be irrational. When property rights are ill-defined, it makes perfect sense to stake a claim, even if the property in question has no intrinsic value to the government laying claim to it. The reason is that it may have value in exchange. It is the height of economic rationality to attempt to appropriate assets merely for the purpose of trading them. A steady barrage of such claims may serve to keep other jurisdictions honest.

V

CONCLUSION

At the end of what obviously has been a speculative article, it seems appropriate to conclude with a word in support of speculation. Although the view of constitutional processes developed here may provide insights into phenomena that otherwise may seem explicable only as the result of irrational behavior, it is not likely to give rise to testable predictions. This, of course, is the classic difficulty of conducting science when the process studied is complicated, data are difficult to come by, and experiment is out of the question. If insight is all that is possible, however, insight obviously will have to suffice. On the other hand, insight may be all that is desirable. Even if verifiable predictions could be had, it is an open question whether the world could make use of a functional social calculus.