Popular Sovereignty and Constitutional Reform in Canada

by

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B.A., Acadia University, 1996

Thesis
submitted in partial fulfillment of the requirements for
the degree of Master of Arts (Political Science)

Acadia University
Fall Convocation, 1997

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Abstract

Sovereignty is a concept well suited to addressing the nature of legislative authority. In this thesis I argue that contemporary proposals for constitutional reform in Canada poorly comprehend the nature of legislative authority. The marriage of the parliamentary form of government to the federal principle makes the determination of legislative authority problematic, at least in part, because it fails to develop an adequate conceptualization of sovereignty. Instead, legislative authority is described in terms of the division of powers between two orders of equal and co-ordinate government, each possessing legislative autonomy as established by the constitution. This description presumes the resolution of the issue of the source of legislative authority in the Canadian political community to the detriment of constitutional resolution.

Acknowledgements

To my advisor, Greg Pyrcz, I wish to say a heart-felt thanks for always providing wisdom and kind words of encouragement on demand.

Introduction

"The outcomes of important political reforms," writes Alain Noel, "remain uncertain...because the implications are so numerous and far-reaching that a utilitarian, rational assessment appears impossible. When a situation becomes impossible to evaluate in terms of individual or social costs and benefits, major political innovations require a leap of faith, a willingness to accept the risks and the costs of untried formulas."[1] For this reason, citizens who are unable to predict their own fate "tend to support reforms that appeal to clear conceptions of justice, but stand wary if they are asked to participate in a large-scale experiment of no intrinsic value and highly uncertain extrinsic value."[2]

In this thesis, I contend that clear conceptions of justice on which to base important constitutional reform are available to Canadians who define their connection to the legislative authority of governments according to the principle of popular sovereignty. Popular sovereignty is a claim that the exercise of legislative authority is legitimate only if it is derived from the people. In turn, popular sovereignty presumes that citizens are equal and autonomous members of the political community. Jennifer Smith writes that "[t]he constitutions of popular governments, are most importantly about the establishment of government institutions, the allocation of power among

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[1] Alain Noel, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992," in *Constitutional Predicament: Canada After the Referendum of 1992,* (ed.) Curtis Cook (Kingston: McGill-Queen's, 1994), p. 71.
[2] ibid.

them, and the decision-making rules they use...The entire arrangement, which must be underwritten by defensible principles of justice, is meant to establish government and secure freedom."[3]

The constitution of the Canadian political community, a constitution whose legitimacy ultimately depends on the popular belief that citizens are themselves sovereign, must ultimately serve the purpose of protecting the equality and autonomy of citizens. This the constitution does by establishing a basic institutional structure which will promote these "popular" principles of justice. Indeed, contemporary constitutional debate does not appear to question the principles of justice which underwrite the constitution; rather, debate concerns the determination of the best way in which to order basic political institutions so as to protect established principles of justice.

Of course, the issue is not so straight-forward for there is more than one way of interpreting the principles of justice which (ought to) underwrite the constitution. For example, Alan Cairns has indicated that advocates of the equality of citizens, provinces, two founding-nations, and perhaps the right to self-government of First Nations Peoples; all vie for constitutional recognition of their interpretation of the very same principle of justice.[4] But how can this be if it is correct that Canadians identify their political community as a liberal democracy and do so by virtue of the principle of

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[3] Jennifer Smith, "The Unsolvable Constitutional Crisis," in *New Trends in Canadian Federalism*, (eds.) Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 1995), p. 86.

[4] Alan Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, (ed.) Douglas Williams (Toronto: McClelland and Stewart, 1995). See chapter nine.

popular sovereignty? How can there be more than one way of interpreting principles of justice when the purpose served by a constitutional arrangement is the protection of the equality, autonomy, and will of the sovereign people?

Indeed, it may well be that competing claims to the constitutional equality of rights-bearing citizens, two founding-nations, and First Nations Peoples, all indicate an absence of consensus on the character of the sovereign people, on the degree of uniformity required of citizenship, and the extent to which cultural diversity can be respected in a liberal democracy. But the equality of provinces? How might one account for competing interpretations of the constitutional principle of equality, for example, which claims both the equality of citizens and the equality of political institutions? Providing an answer to this question is one aim of this thesis; importantly, more rides on the answer than the satisfaction of a cloistered student's curiosity.

As Noel indicated above, important political reforms require a leap of faith, and a willingness to accept the risks of uncertainty which are possible only when such reforms are generated by principles of justice, principles which are interpreted in a manner acceptable to citizens. Today, however, Canadians appear to be unwilling to accept risks during times of constitutional uncertainty; they will not take the leap of faith and trust that politicians will respect the principles of justice which are the concomitant of popular sovereignty. Such reluctance is witnessed in the fact that Canadians

are demanding direct participation in the constitutional reform process. Meanwhile, many Canadians declare scepticism with politicians and the constitutional reform process to the effect that "'parliamentarians have no monopoly on creativity, intelligence, or concern for the fate of the nation.'"[5]

It is my contention that the demand for popular participation in constitutional reform is related not to any particular desire to participate in processes of constitutional amendment; rather it is related to a widespread sense that recent proposals for constitutional reform have, at best, only a tenuous connection to the protection of the equality and autonomy of citizens. As a result, Canadians appear to be declaring their lack of faith in the process by demanding that they be included. Politicians themselves are aware of popular disaffection with constitutional politics as well as the fact that established patterns of debate clearly are not working. After criticizing recent attempts to bring Quebec into the constitutional fold, Alberta Premier Ralph Klein demanded: "We have to scrap all of that and start from the beginning...We need a fresh start on this whole process."[6]

I contend that recent attempts to reform the constitution neglect a fundamental ambiguity regarding the nature of political authority in Canada, an ambiguity which affects the way in which constitutional principles of justice are translated into proposals for reform. Scrapping "all of

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[5] "Minority Report of the Beaudoin-Edwards Committee," p. 74-75. Cited in Janet Ajzenstat, "Constitution-Making and the Myth of the People," in *Constitutional Predicament*, (ed.) Curtis Cook, p. 124.

[6] Jim Brown, "Chretien Cool to Klein's Recipe for National Unity," *Halifax Chronicle Herald*, July 24, 1997, p. B6.

that" and starting over, as Klein suggests we do, will provide an opportunity for Canadians only if it means that we come to terms with what is *not* currently addressed in contemporary constitutional discourse.

For citizens who define the exercise of legislative authority as legitimate only if derived from the people, the protection of individual (and perhaps group) equality and autonomy is the purpose served by the constitution. In Canada, however, popular sovereignty is expressed through parliamentary institutions which possess their own principle of legitimacy. Parliamentary sovereignty is a principle which indicates that a legislature is authorized to make any law whatsoever; laws emanating from a legislature are legitimate not because they are derived from the people but because the institution itself is the dual embodiment of legal authority and legitimacy. In effect, popular representatives are elected to the legislatures yet the electorate itself is not the source of legitimate legislative authority.

That parliamentary sovereignty continues to be a salient feature of the identity of the Canadian political community, despite the common invocation of the principle of popular sovereignty as defining the nature of legislative authority, is not obvious during periods of constitutional peace. During these times, there are myriad other ways to explain popular dissatisfaction with the legislative process such as bureaucratic sclerosis, and the self-interest of politicians. Indeed, only when changes to the constitution are proposed does it become apparent that both parliamentary and popular sovereignty order

the way in which the legislative process (and the constitution which establishes it) is conceptualized.

According to the principle of parliamentary sovereignty, the purpose of the constitution is to divide legislative authority between orders of government which otherwise would be legally authorized to make any law whatsoever. Thus, the constitution represents a compromise between legislatures which have, in essence, abrogated a portion of their unlimited legislative authority. On this account, the principles of justice underwriting the constitution are oriented toward the protection of the equality and autonomy of the legislatures which are themselves the legitimate source of legislative authority. This, of course, is not compatible with the principle of popular sovereignty and its interpretation of constitutional principles of justice as oriented toward protecting individual equality and autonomy.

The tension between popular and parliamentary principles of legitimacy is obscured by the fact that parliamentary sovereignty is a principle held in abeyance by the marriage of the parliamentary form of government to the federal principle, a marriage which can be consummated only if parliamentary sovereignty is rejected as an ordering principle for the exercise of legislative authority in Canada. The federal principle itself, however, indicates only how legislative authority is to be divided in a federal polity; unlike both parliamentary and popular sovereignty, it does not

indicate a principle of legitimacy which provides a justification for a particular configuration for the constitutional division of powers.

Returning to the co-existence, in constitutional discourse, of equality of people and equality of provinces as expressions of constitutional principles of justice, it would seem that the equality of provinces is not necessarily derived from the principle of popular sovereignty; for this reason, it cannot be privileged as an interpretation of the constitutional principles of justice unless it can be shown better to protect the equality and autonomy of people.

I contend that until we address more explicitly the nature of legislative authority in Canada, particularly the co-existence of popular and parliamentary sovereignty, we will not be able critically to adjudicate constitutional reform proposals in order to ensure that they respect constitutional principles of justice which do not frustrate the principle of popular sovereignty. To restate the case positively, facing head on the tension between parliamentary and popular sovereignty will guide political reforms on a program of institutional change, both constitutional and otherwise, which will allow Canada's basic political structures better to express the sovereignty of the people. Until we do so the public cannot be expected to take the leap of faith and believe that parliamentarians will respect principles of justice defined by popular and not parliamentary sovereignty.

To establish the case that the principles of justice which underwrite the constitution derive from both popular and parliamentary sovereignty, I

use the amending formula as a vehicle through which to gain access to the way in which sovereignty is conceptualized in Canada. It is the amending formula which is the formal articulation of the ultimate legislative authority in a federal polity; the authority to change that formula indicates how ultimate legislative authority is organized in a federation. Chapter One begins by addressing the concept of sovereignty itself and indicates that sovereignty is not logically alien to a federal polity (although it *is* alien to a parliamentary federation which privileges parliamentary over popular sovereignty). The concepts of popular and parliamentary sovereignty are shown to diverge not in their respective articulations of legal legislative authority but rather in determining how that authority is exercised legitimately.

The second part of the chapter turns to the way in which the Fathers of Confederation conceptualized sovereignty and indicates that a "parliamentary" conceptualization guided the Fathers' understanding of the purpose served by the constitution. A more compelling re-interpretation of sovereignty is suggested, one which avoids completely the difficulty of lodging parliamentary sovereignty in a federation. By lodging sovereignty in the people, a principle of legitimacy may be re-introduced into the analysis of legislative authority in Canada, a principle which is compatible with popular conceptualizations of the nature of political authority.

In Chapter Two, after identifying popular dissatisfaction with the present process of constitutional amendment, the absence of an amending formula (in the original Constitution Act 1867) is examined as an indication of the uncertainty which plagued the Fathers as they tried to apply the federal principle to the sovereign authority to amend the constitution. Because the Fathers had determined that parliamentary sovereignty could not be reconciled with the federal principle, (and thus had not arrived at an amending formula), it was possible for the provincial legislatures to claim a right to have their consent required prior to securing amendment. This claim became easier to defend as the federation developed in a decentralizing fashion.

The logic of parliamentary sovereignty in a federation necessarily determines one or other order of government to be supreme. The federal principle, however, has come to be interpreted as indicating not only provincial control over local matters (as defined in 1867) but also the existence of two equal and co-ordinate orders of government, each possessing legislative autonomy within its jurisdiction. So defined, parliamentary sovereignty is necessarily replaced by the federal principle as a justification for the inclusion of provincial legislatures in an amending formula. Still, the effect of this conceptual slight of hand is to force sovereignty- the legal *and* legitimate articulation of the nature of legislative authority- into abeyance. That is not to suggest that parliamentary sovereignty does not continue to

inform the way in which Canadian parliamentarians approach constitutional reform. Indeed, they continue to view the constitutional division of powers as a compromise, as an abrogation of their sovereignty, and so are loath to be denied the requirement that their consent be secured prior to any constitutional change. A synopsis of the search for an amending formula is presented to show that the provincial governments, themselves parliamentary in form, have been preoccupied with ensuring their inclusion in an amending formula in order to protect their constitutionally ingrained jurisdiction. This is the legacy of parliamentary sovereignty, a legacy rendered opaque in describing the Canadian federation as entailing autonomous spheres of jurisdiction.

It is the task of Chapter Three to indicate what the introduction of popular sovereignty means for a theory of constitutionalism as well as to show how the dual presence of popular and parliamentary sovereignty affects the character of proposals for constitutional reform. Finally, it is repeated that our current difficulties securing "national unity" through constitutional reform may be especially problematic because parliamentary sovereignty continues to influence the character of debate, a fact inadequately acknowledged. I contend that our fundamental disagreement over how to accommodate diverse peoples in our basic institutional structures may well be rooted in our inability to see that the principle of parliamentary sovereignty continues to provide a foundation on which to build a legitimate

constitutional order. How can we know the extent of our divisions as well as our commonalities as a sovereign people if our sovereignty is expressed through institutions which understand themselves as authoritative independently of the expressed autonomy of "the people?"

Chapter One: Sovereignty

The ends served in changing the terms of the constitution, I argue in this chapter, are dependent on the way in which sovereignty is conceptualized. Sovereignty conceptualized as the legislative supremacy of Parliament is a principle which informed the debates of the Fathers of Confederation over the appropriate terms of the Constitution Act 1867 and this conception continues to be salient today. In more recent times, however, sovereignty conceptualized in this way has become a source of deep political disaffection for Canadians who more commonly appear to define their connection to the legislative process by the principle of popular sovereignty.

Evidence of popular disenchantment with the legislative process may be drawn from the findings of the Nova Scotia Working Committee on the Constitution. It its 1991 report, the Committee states: "Nova Scotians feel alienated from politics and from political parties and especially from our current political leaders. There is a mood of scepticism and a sense that our institutions are not making politicians sufficiently responsive to public opinion."[7] I contend that a significant measure of popular discontent with the process of constitutional change may be traced back to a tension between citizens who view legislative authority as legitimate only if it is derived from "the people," that is, those who view sovereignty as resting in the citizenry; and the principle of parliamentary sovereignty/legislative supremacy in

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[7] Nova Scotia, House of Assembly, *Canada: A Country for All. The Report of the Nova Scotia Working Committee on the Constitution,* 28 November, 1991, p. 15.

which sovereignty is defined as residing in the legislatures of Canada. Importantly, these divergent principles of legitimacy are linked to differing ways of conceptualizing the ends of basic constitutional reform. The *legal* sense of sovereignty in a federation refers to the persons or bodies possessing the authority to amend the constitution which, as the "Supreme Law of Canada," formalizes the basic political structures of the political community. Citizens, however, are more likely to consider legitimate the legal authority to amend the constitution on the condition that it is popular and not parliamentary sovereignty which provides an answer to the question of what ends are served by changing the terms of the constitution.

Indeed, simply identifying the tension between popular and parliamentary sovereignty may prove useful in explaining the tendency for many Canadians to assert that "scarcely any reform could be more important than that of involving the public as fully as possible in the constitutional reform process itself."[8] In any case, the fact that Canadians are demanding greater participation in the amending process is evidence of the failure of the legislative process to meet the expectations of citizens with respect to constitutional reform, expectations structured by their apparent belief in popular sovereignty. Andrew Fraser, for example, has written that the political conventions associated with this principle do not, by themselves, a

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[8] ibid., p. 17. The Nova Scotia Working Committee goes on to note that may schemes have been proposed to accomplish this: the referendum, constituent assembly, and compulsory hearings at various stages of the amending process.

democracy make: "the conventions of popular sovereignty have served as a reservoir of political legitimacy for those who continue to act in the name of the Crown."[9]

It is here proposed that legislative supremacy, while appropriate as a rule of construction for the judicial interpretation of statutes, is not a concept appropriate for evaluating the exercise of authority in Canada's federal political structures. It would be more useful, rather, to conceptualize Canadian legislatures as having been delegated jurisdiction over which they have legislative competence, delegated by the sovereign citizens of Canada. Doing so will begin the process of articulating political concepts which structure popular beliefs about the nature of the political process which are both normatively sound and realizable in practice.

There are precedents for such a reconceptualization of sovereignty; the experience of Canada at the time of Confederation can provide a guide. However, John A. Macdonald and other influential Fathers of Confederation debated the merits of the proposed British North America Act while conceptualizing sovereignty according to British custom; as a result, they denied the potential for the reconceptualization proposed here to have greater influence on subsequent constitutional reforms.

Canada's written constitution, comprised as it is of numerous British and Canadian statutes and orders-in-council, provides a schedule of

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[9] Andrew Fraser, "Populism and Republican Jurisprudence," *Telos,* 88 (Summer 1991). p. 99.

individual and political rights for citizens; delineates the basic structures of government; assigns powers of legislation to two orders of government; and provides a mechanism to effect changes to the document itself. Other statutes, orders-in-council, and judicial decisions determine relations between executive, judicial, and legislative branches of government. In addition, the entire constitution includes a number of important informal conventions which have arisen through political practice.

Nowhere in Canada's constitution, however, is there a formal statement of the location of sovereignty.[10] Sovereignty is "a concept or a claim about the way political power is or should be exercised...It is a way of speaking about the world, a way of acting in the world."[11] The concept may be invoked to describe political arrangements or it may provide a normative explanation or justification of them. As such, sovereignty is in a state of continual change as it takes on new meanings even as old ones are retained.

Any conceptualization of sovereignty is a product of particular social and economic conditions, and of particular understandings of space and of relations between people. Most contemporary formulations of the concept originate in the sixteenth to eighteenth centuries and are "closely related to

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[10] R.J.B. Walker and Saul H. Mendovitz point out that analysts from a variety of theoretical traditions advance the claim that profound global economic, technological, social and political transformations are undermining the principle of state sovereignty. See *Contending Sovereignties: Redefining Political Community* (Boulder: Lynne Rienner Publishers, 1990) Admitting of limits to state sovereignty, however, does not invalidate the present discussion of how sovereignty has been, and continues to be conceived in Canada.

[11] Joseph A. Camilleri and Jim Falk, *The End of Sovereignty: The Politics of a Shrinking and Fragmenting World* (Brookfield: Edward Elgar Publishing, 1992), p. 11.

the nature and evolution of the state[12] and in particular to the development of centralized authority in early-modern Europe."[13] Furthermore, sovereignty is closely related to the idea, unknown to a world regulated by the eternal and universal laws of God and nature, that "valid law might be created [posited] by an act of [human] will."[14]

It is with Jean Bodin that the modern legal theory of the state originates in his statement that "[a]ll the characteristics of sovereignty are contained in this, to have power to give laws to each and everyone of his subjects and to receive none from them."[15] However, Bodin accepted limits to state law in asserting that it was morally bound by natural law and the law of God.[16] Furthermore, Bodin's suggestion that the state ought to be obeyed simply because it is a state, was inadequate as a justification in an age which had yet to relinquish the notion that natural law, and the religious freedom it sanctioned, could be curtailed by act of will. The question then remained, on what basis ought one obey positive law?

Understanding the essence of the state to be in the reciprocal relationship between government and citizen, Thomas Hobbes proposed to settle, through his social contract, the question of the limits of natural law to

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[12] The state in this sense is roughly a territorially bounded entity divided into government and society.
[13] Camilleri and Falk, *The End of Sovereignty*, p. 15.
[14] S.I. Benn and R.S. Peters, *Social Principles and the Democratic State*, (London: George Allen and Unwin Ltd, 1959), p. 256.
[15] Harold Laski, *Foundations of Sovereignty* (Freeport: Books for Libraries Press, 1921), p. 17. Bodin's classic work is entitled *De la Republique*.
[16] ibid., p. 18.

the legal authority[17] of the sovereign. Hobbes formulated his theory of sovereignty to "demonstrate the need for power to be located in the state and to undermine the claims of other associations to dispute this on the basis of such justifications as ancient privilege or Christian universalism."[18] He argued that "the only adequate bulwark against division, civil conflict, and chaos within a society was the establishment of a single and indivisible ultimate authority- a sovereign."[19] By postulating that all citizens ought to be understood to have submitted their own will to that of the sovereign in exchange for necessary protection, Hobbes believed himself to have resolved the issue of one's obligation to obey. Still, as Harold Laski indicates, later theorists such as John Locke continued to assert that a state may not possess unlimited legal authority for "there will always be a system of conditions it dare not attempt to transgress."[20]

Thus, contrary to Hobbes' rejection of natural law as a limit to the authority of the sovereign, Locke proposed that any legal theory of sovereignty must respect natural rights (such as that to property). Legal

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[17] In this chapter, authority is restricted in usage to mean roughly the ability to determine another's action by reference to a formal rule (law). For purposes here, a loose distinction is made between legal and legitimate authority, the latter referring to the belief that the exercise of legal authority is justified according to some principle(s); thus, those under the dictates of the sovereign consent to its absolute power. Of course the difficulty during the birth of the modern state was in establishing the basis on which positive law could be considered legitimate for it, unlike natural law, corresponds only inadequately to a correlative duty to obey.

[18] Michael Newman, *Democracy, Sovereignty and the European Union* (New York: St. Marten's Press, 1996), p. 5. See Hobbes' *Leviathan*.

[19] Anthony Arblaster, "Liberal Values," in *Braving the New World: Readings in Contemporary Politics*," (eds.) Thomas Bateman, Manuel Mertin, and David Thomas (Toronto: Nelson Canada, 1995), p. 39.

[20] Laski, *Foundations of Sovereignty*, p. 22.

sovereignty, therefore, must admit of the consent of those few whose rights ought to be protected. Jean-Jacques Rousseau himself was impressed by the fact that "once the final power passes from the people's hands the will which secures expression is always a will that represents a special private interest."[21] For this reason, Rousseau, who sought to retain a Hobbsian conceptualization of absolute state power, reconciled it with the explicit expression of the will of all. This he did by equating the sovereign with the unalienated general will of society. Such a reconciliation, however, proved to be impossible to effect in practice; the increasing size and complexity of the modern state required some form of representation.

This short introduction to the concept of sovereignty shows the way in which the classical theorists of the concept believed a sovereign legal authority could actually be realized in a state while simultaneously asserting normative claims to the proper exercise of that authority. Importantly, they appear to fuse the legal authority to make law, the coercive force necessary for its enforcement, and the consideration of whether or not such authority is legitimate.

Nevertheless, in the contemporary world, "[p]ractice...limps painfully behind the theory it is to sustain."[22] For this reason, this chapter is concerned not only with applying the legal aspect of the concept sovereignty to the Canadian polity, but also with the interplay of such legal authority with the

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[21] ibid., p. 24.
[22] ibid., p. 228.

belief that such exercise is legitimate. In Donald Smiley's words, sovereignty[23] "denotes the circumstance that within a particular territory there is a determinate legal superior to which all individuals and private groups and all the specific institutions of the state and exercises of state authority are subordinate."[24] William Blackstone, a leading eighteenth-century English jurist, emphasized its indivisible nature: "In every state, there is and must be a supreme, irresistible, absolute, uncontrolled authority in which the rights of sovereignty reside."[25] But why must sovereignty, in this sense, be indivisible? In his estimation of the work of Hobbes, Anthony Arblaster indicates that "sovereignty [is] indivisible by definition; for if authority [were] divided, a further authority would be needed to arbitrate between the parties in case of dispute, and that authority would therefore be the effective sovereign."[26]

Defined in such a way, it would appear problematic to make use of sovereignty as a tool of analysis of legal authority in a federal state such as Canada. The Select Committee on Constitutional Matters of the Nova Scotia House of Assembly, for example, denies the utility of the concept sovereignty by indicating that "the essence of the federation is to identify and agree upon the assignment of specific duties to separate and co-ordinate governments

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[23] This thesis limits the use of the concept of sovereignty to an articulation of the legal exercise of political authority and to the issue of popular legitimacy; aspects relating to coercive force and political influence are not directly addressed.
[24] Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill, 1987), p. 12.
[25] Philip Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Kingston: McGill-Queen's Press, 1990), p. 106.
[26] ibid.

possessing autonomy in two separate and co-ordinate communities."[27] For the Select Committee, the concept autonomy[28] is preferable for the reason that sovereignty is perceived to have "no application to a federal arrangement," and as being "alien to federalism because it necessarily implies a condition of inferiority in terms of law and the constitution between different levels of government."[29]

There are, however, at least two reasons why it is not appropriate simply to do away with sovereignty altogether in the study of the exercise of legal authority in a federal system. First, the Nova Scotia Select Committee, in proposing the ill fit of sovereignty to an analysis of the Canadian polity, simply assumes that were the analyst to insist on an application of the concept, he or she would search for it in Parliament and the ten provincial legislatures "which exercise sovereignty on behalf of the total Canadian nation."[30] It is precisely such an assertion which this thesis seeks not to ignore. The second reason, articulated by W. J. Rees, is that sovereignty is in at least one particular sense not alien to federalism.

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[27] Nova Scotia, House of Assembly, *Report of the Select Committee on Constitutional Matters. Part I,* June, 1981, p. 5.

[28] defined as "the power of self-government in its own area of duty." Nova Scotia, *Report of the Select Committee,* p. 5. Sanford Lakoff notes that the word *autonomia* meant for the ancient Greeks: "the independence and self-determination of the community in its external and internal relations" but referred as well to "self-government by citizens and self-determination by citizens." See "Autonomy and Liberal Democracy," *The Review of Politics,* 52, 3 (Summer 1990), pp. 388-89.

[29] ibid.

[30] Nova Scotia, *Report of the Select Committee,* p. 5.

He states that it is logically necessary for sovereignty to be indivisible in the sense that "it would be self-contradictory to hold that there could be more than one final decision on any legal question."[31] Still, it is neither logically nor causally necessary that the sovereign be indivisible "in the sense that every legal question should be finally decided by one and the same legal authority."[32] Sanford Lakoff reiterates this point in claiming that Bodin made the idea of sovereignty a central consideration in an attempt "to settle the question of *how*, not necessarily by whom, the territorial state must be organized for the sake of order."[33] It would seen, then, that there is no logical requirement that sovereignty be banished from an analysis of legal authority in a federation. How then might sovereignty be applied to the analysis of legal authority in Canada?

Again, it is a complex endeavour to employ sovereignty as a means of ascertaining the location of ultimate legal authority in a federal polity; the Canadian marriage of a parliamentary form of government with the federal principle ensures some degree of conceptual confusion. Ian Greene describes the British parliamentary notion of sovereignty in the following way: "...the legislature is the supreme law-making body at any point in time; a current legislature cannot be limited by the laws of a previous one...Legislative

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[31] W.J. Rees, "The Theory of Sovereignty Restated," in *In Defence of Sovereignty*, (ed.) W.J. Stankiewicz (New York: Oxford University Press, 1969), p. 235.
[32] ibid.
[33] Sanford Lakoff, "Between Either/Or and More or Less; Sovereignty Versus Autonomy Under Federalism," *Publius*, 24, 1 (Winter 1994), p. 66. Emphasis added.

supremacy implies that any valid enactment of a legislature must be recognized by the courts, regardless of the wisdom of the legislation."[34] Of course, such a definition of sovereignty cannot be considered adequate if applied to the central and provincial orders of government since the constitution limits the supremacy of Canadian legislatures to formally specified jurisdictions. In addition, the legislative supremacy of any legislature is further restricted by limits prescribed by the Charter of Rights and Freedoms. For these reasons Canadian legislatures cannot be considered sovereign in the same manner as Parliament is in the United Kingdom.

Reg Whitaker makes this point in noting that, in the Canadian case, "federalism actually meant a more specific limitation on...the British doctrine of the supremacy of Parliament. By dividing powers between legislative jurisdictions in a written constitution, the BNA Act limited both the supremacy of any Legislature and the scope of national majority will."[35] As a result, as Smiley recognizes, "all the agencies of the state, including...the central and regional governments, derive their power from the constitution, [and so] it might be said that the constitution is sovereign."[36] Yet the Constitution Act 1982 stipulates an amending formula through which it may be changed; thus, sovereignty, according to Smiley, must reside "in the

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[34] Ian Greene, "The Myths of Legislative and Constitutional Supremacy," in *Federalism and Political Community: Essays in Honour of Donald Smiley*, (eds.) David Shugarman and Reg Whitaker (Peterborough: Broadview Press, 1989), p. 269.
[35] Reg Whitaker, "Democracy and the Canadian Constitution," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, (eds.) Keith Banting and Richard Simeon (Toronto: Methuen, 1983), p. 242.
[36] Smiley, *The Federal Condition in Canada*, p. 12.

authorities who have the power to determine the procedure by which subsequent amendments to the constitution can be made."[37] In order, then, adequately to conceptualize sovereignty in Canada, it would appear necessary to look to Part V of the Constitution Act 1982 (in which the amending formula is stipulated). Doing so would seem to indicate that, in its legal sense, sovereignty resides in the "aggregate legislature" consisting of Parliament (the Senate and House of Commons) and all ten provincial legislatures for only it is authorized by the Constitution to amend the amending formula itself.[38]

Nevertheless, as Greene suggests, "[t]he question of who controls the constitution is an exceedingly complex one, and ultimately it would be wrong to describe any entity- a government institution, the people, or the constitution itself- as being "supreme" in any absolute sense."[39] In this regard, the complexity of applying the concept sovereignty to the analysis of legal authority becomes evident; more importantly, limiting sovereignty to a delineation of aspects of legal authority is not sufficient an analytical device through which to make sense of popular disapproval of its exercise. In the

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[37] ibid.

[38] Section 41 lists five Constitutional matters the amendment of which require the unanimous consent of Parliament and all provincial legislatures; nevertheless, this does not detract from the assertion that it is the aggregate legislature which is the legal sovereign in Canada. Still, this assertion remains contentious for it is the Constitution Act 1982 itself which authorizes the aggregate legislature to effect amendments to the Act. This tension between the sovereignty of the Constitution and of those bodies authorized to amend it is not settled in this thesis, although it is indeed an interesting an important issue, particularly with respect to the way in which law itself can legitimize legal authority.

[39] Greene, "The Myths of Legislative and Constitutional Supremacy," p. 285.

analysis of political problems, writes Laski, "the starting point of inquiry is the relation between the government of a state and its subjects. For the lawyer, all that is immediately necessary is a knowledge of the authorities that are legally competent to deal with the problems that arise."[40] In a similar vein, Charles McILwain claims sovereignty always to be a "purely juristic term...having no proper meaning if carried beyond the sphere of law and into the sphere of fact."[41] However, McILwain writes neither as a political scientist nor as a political philosopher; as Laski goes on to assert, for political philosophers, "legal competence is no more than a contingent index to the facts it needs."[42]

An analysis, then, of the connection between supreme legal authority and actual power would necessarily take heed of the limits to the sovereign of a constitution (partly written and partly conventional) with four attributes: "the rule of law, a federal distribution of powers, a charter of rights, and democratic accountability."[43] As Greene indicates, in practice, legislatures are normally executive-centred; the judiciary may interpret the constitution but "the aggregate executive, within the practical limits imposed by public opinion, has substantial real power to control constitutional amendment and development."[44] Greene provides an important point of departure for an

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[40] Laski, *Foundations of Sovereignty*, p. 229.
[41] Charles McILwain, *Constitutionalism and the Changing World* (London: Cambridge University Press, 1939), p. 30.
[42] ibid., p. 230.
[43] Greene, "The Myths of Legislative and Constitutional Supremacy," p. 285.
[44] ibid.

analysis of some political limitations on the exercise of sovereignty. In this thesis, however, of particular interest is an analysis of the basis of legitimacy for the exercise of legal authority.[45] In order to undertake such a task, it is necessary to visit more carefully the parliamentary tradition of government and its connection to the concept sovereignty.

In Britain, the struggle to establish sovereignty over the territorial state was concluded when it was lodged in the institutions of Parliament. Parliament, of course, is not a single entity; rather, it is a tripartite combination of Commons, Lords, and Monarch, each with equal influence over the legislative, magisterial, and executive functions of government. Ultimately, parliamentary sovereignty evolved into the "legal superiority of measures enacted by Commons, Lords and Monarch acting collectively over both the actions of either House, of the Monarch acting under prerogative powers, or of the courts acting under common law."[46] Recalling the essence of Blackstone's doctrine of an indivisible sovereignty, Parliament "'can in short do everything that is not naturally impossible...True it is, that what the Parliament doth, no authority can undo."[47]

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[45] McILwain is not insensitive to the practical requirement of legitimacy in a regime based on the constitutional rule of law (with a juristic sovereign). In fact, he notes that "[o]bedience rendered to a power without right will be rendered only in so far as it is compelled. Such a power to be really sovereign must have some right to receive obedience, and in the long run, this right will be conceded by those who obey." ibid., p. 27.

[46] Ian Loveland, "Parliamentary Sovereignty and the European Community: The Unfinished Revolution?," *Parliamentary Affairs*, 49, 4 (October 1996), p. 533.

[47] ibid.

Ian Loveland offers an insightful analysis of the reason behind Blackstone's advocacy of an indivisible sovereignty *in Parliament*. By contemporary standards, the Parliament of 1688, for example, was an institution neither representative nor democratic. Still, it was one "which could be relied upon to resist the temptation to enact laws which favoured the interests of particular sections of society at the expense of the national interest as a whole."[48] For seventeenth-century English constitutionalists such as Blackstone, "it was accepted that only the King, the aristocracy, the Church, and the affluent merchant and landowning class which elected the House of Commons, had any legitimate role to play in fashioning the laws within which society was governed."[49]

As Loveland argues, Blackstone and his contemporaries were advocates of the principle of parliamentary sovereignty for the reason that "they could conceive of no more broadly based mechanism for ensuring that laws enjoyed the consent of the people."[50] Indeed, Gil Remillard reminds the reader that "for a state to exist, it is essential that the people accept that its behaviour be regulated by a higher authority responsible for ensuring the respect of the public interest. Sovereignty is the juridicial expression of this power situated above individual interests."[51] Parliamentary sovereignty,

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[48] Loveland, "Parliamentary Sovereignty," p. 534.
[49] ibid.
[50] ibid.
[51] Gil Remillard, "Legality, Legitimacy and the Supreme Court," in *And No One Cheered*, (eds.) Keith Banting and Richard Simeon, p. 197.

then, must be understood as more than an articulation of the supreme legal authority to legislate over a given territory; parliamentary sovereignty also expresses a normative claim to the legitimacy of the legal exercise of that authority. For Blackstone, the sovereignty of Parliament was legitimate because it reduced the likelihood that the English people[52] would be subject to arbitrary legislation, and to legislation representative of only a particular faction.

Turning now to the present decade, Deborah Coyne encapsulates a contemporary understanding of sovereignty as a claim to the legitimate source of legislative authority in Canada: "sovereignty rests with the *people* of Canada, not with the governments or First Ministers."[53] It is difficult to imagine that Coyne conceptualizes sovereignty in a juristic sense; rather, she is making a normative claim to the effect that the ultimate source of legitimacy for the exercise of legal legislative authority resides in people, not in institutions, governments, or politicians. Such a claim is, of course, commonplace. For example, David Bercuson and Barry Cooper invoke this way of conceptualizing sovereignty when they state: "Today Canada is a full fledged democracy. Its people are sovereign. It is axiomatic that whatever else liberal democracy may be, it is surely a system of government in which

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[52] Of course, Blackstone defined the "English people" as Monarch, Lords, and those represented in the House of Commons.

[53] Deborah Coyne, "Brief to the Special Joint Committee," p. 3. Cited in Alan Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake,* (ed.) Douglas E. Williams (Toronto: McClelland and Stewart Inc., 1991), p. 132.

the people are sovereign and in which the people choose elected representatives to legislate on their behalf."[54]

In fact, this particular way of conceptualizing the people as sovereign appears to find formal expression in the constitution. Section 3 of the Charter of Rights and Freedoms declares that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Surely it is this "democratic" right which justifies Bercuson's and Cooper's claim that the Canadian people are indeed sovereign. Of course, such a claim is accompanied by a particular belief about the nature of the connection of the sovereign people to the legal sovereign. Such a claim, however, cannot draw on the nature and source of Canada's parliamentary tradition of responsible government for conceptual support.

In any case, Peter Russell provides a useful definition of the principle of "popular sovereignty."[55] Rather than presenting it as a description of the location of legal authority in Canada, popular sovereignty is described by Russell as a "theory of political obligation which holds that political authority is legitimate and ought to be accepted only if it is derived from the people."[56]

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[54] David J. Bercuson and Barry Cooper, "From Constitutional Monarchy to Quasi Republic: The Evolution of Liberal Democracy in Canada," in *Canadian Constitutionalism: 1771-1991*, (ed.) Janet Ajzenstat (Ottawa: Canadian Study of Parliament Group, 1991), p. 17.

[55] Contrary to McIlwain's assertion that a doctrine of legitimacy cannot be referred to as a sense of the concept sovereignty, this thesis will continue to use "popular sovereignty" in the sense proposed by Russell.

[56] Peter H. Russell, *Constitutional Odyssey: Can Canadians be a Sovereign People?* Second Edition (Toronto: University of Toronto Press, 1993), p. 7.

He goes on to suggest that in societies where popular sovereignty prevails as a principle of government, "the people can be said to be the moral sovereign if not the political, coercive, or legal sovereign."[57]

But, if the exercise of legal authority is legitimate only if it is derived from the people, indeed, it is also the case that the sovereignty of the people is expressed through representative institutions which do not themselves trace their traditional basis of legitimacy back to the people.[58] Indeed, elected politicians may ultimately refer to some version of popular sanction through periodic election as an indication of the legitimacy of their legal authority; however, it remains the case that Canada's parliamentary tradition "has looked to elected politicians and appointed ministers as the ultimate repositories of power and legitimacy."[59] For this reason, claims Philip Resnick, "...elected, members have a mandate that is beyond reproach and a power of decision-making, be it on routine matters or monumental ones, that is unlimited."[60]

Of course, as Russell has indicated, popular sovereignty does not profess to describe where legal authority actually resides; this fact, however,

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[57] ibid.

[58] Such an assertion presumes to some extent that it is not possible for regularized practices, structured by a particular belief system and normalized into a (political) institution, to change completely their content without also changing their form. In other words, it is necessary to refrain from presuming automatically that the addition to the practices of the institution of parliamentary and responsible government of the universal ballot as a means of electing popular representatives is sufficient to change the basis of legitimacy of the parliamentary system.

[59] Resnick, *The Masks of Proteus*, p. 88.

[60] ibid.

illuminates a notable tension in the concept popular sovereignty as it is expressed in Canadian political institutions. Again, this is so for the reason that the sovereignty of the people is actualized through the election of popular representatives to parliamentary institutions which are themselves the "ultimate repositories of power and legitimacy."

This tension illuminates two different ways of conceptualizing the relationship between citizen and the legal sovereign: the aggregate legislature. If the people are sovereign, then "[g]overnmental authority is, at best, contingent, [and] subordinate to the overriding will of the people, which, at frequent intervals, makes itself known."[61] If, however, legislatures themselves are sovereign, then "[t]he people, indeed, are presumed to consent to what ever the legislator ordains for their benefit...This they owe as an act of homage and just deference to a reason, which the necessity of government had made superior to their own."[62] These quotations by Resnick may indeed overstate the case; however, a parliamentary conceptualization of legitimacy has long been resonant in Canadian political discourse.

For example, three Fathers of Confederation, George-Etienne Cartier, Alexander Galt, and John Ross write in 1858: "It will be observed that the basis of Confederation now proposed...does not profess to be derived from the people but would be the constitution provided by the imperial parliament..."[63]

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[61] ibid., p. 90.
[62] ibid. In the first quotation, Resnick draws on J.J. Rousseau; in the second, from Edmund Burke.
[63] Russell, *Constitutional Odyssey*, p. 3.

For these Fathers, belief in the *legitimacy* of the constitution and the regime on which it is based "derives from the sovereign Parliament of the empire."[64] At the same time, of course, the *legality* of the constitution and the regime on which it is based is derived from the same origin. Thus, there was no wide discrepancy between the legitimate and legal exercises of political authority at the time of Confederation. Naturally, this coincidence was not complete,[65] but today it is much less so. The legal basis of legislative authority has changed since Confederation as the Canadian Parliament and provincial legislatures assumed from the imperial Parliament the role of supreme legal authority. However, Canada's parliamentary tradition continues unimpeded, co-existing with the contemporary basis of legitimacy in Canada: popular sovereignty.

The Constitution Act 1867 professes to be a Constitution "similar in Principle to that of the United Kingdom." Irrespective of the fact that the British parliamentary model of government evolved into the Westminster Model in the United Kingdom,[66] the parliamentary tradition in Canada

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[64] ibid., p. 4.

[65] David Laycock, for example, in his study of Western populism, shows "radical democratic populism" to be a theory of government and state which rejects the British Parliamentary model, and one which enjoyed more than marginal support in Canada. See *Populism and Democratic Thought in the Canadian Prairies, 1910-1945* (Toronto: University of Toronto Press, 1990)

[66] Blackstone would not have anticipate that the powers of the Monarch would become much less significant, nor did he foresee that the House of Lords would voluntarily acquiesce in the removal of its co-equal powers in the legislative process. Furthermore, with the expansion of popular representation in the Commons, and particularly the emergence of highly disciplined political parties, parliamentary sovereignty narrowed in definition as the balanced tripartite entity came to be controlled by the House of Commons which in turn came to be dominated by the Cabinet. See Loveland, "Parliamentary Sovereignty," p. 534. This development was, of course, even more pronounced in Canada.

developed its own identity. This is due to the former status of British North America as a group of colonies governed by appointed executive councils with powerful governors possessing independent sources of income such as customs and Crown lands.[67] Briefly, the executive-led governments in Canada's parliamentary tradition developed contrary to Walter Baghot's description of the British cabinet as a "buckle which fastens the legislative part of the state to the executive part of the state." Instead, in the Canadian system of responsible government, "the cabinet no longer fastens the executive to the legislature; it becomes the executive."[68]

In Britain, limited representation in the House of Commons has always been an integral aspect of balanced parliamentary governance. This is not the case in Canada where, prior to 1848, colonial executives were responsible not to the elected assemblies but rather to the imperial authorities in the Colonial Office and to the imperial Parliament. Although responsible government was introduced to British North America by convention in 1848, the executive governments never developed a strong degree of responsiveness to the elected legislatures to which they were responsible. Because the normative claims of popular sovereignty provide the contemporary basis of legitimacy for the exercise of legal authority, and

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[67] Mark Sproule-Jones has written that "[t]he major institutional arrangements of the original colonies and territories were Crown and executive dominated," a phenomenon which has not abated. The result is that Canada "has not enjoyed a period when parliamentary sovereignty was seriously practiced." See "The Enduring Colony? Political Institutions and Political Science in Canada," *Publius*, 14, 1(Winter 1984), p. 93.

[68] David E. Smith, *The Invisible Crown: The First Principles of Canadian Government* (Toronto: University of Toronto Press, 1995), p. 65.

because the success of the doctrine of popular sovereignty (as a justification for citizens to assume the burdens of citizenship) depends on the degree to which the claims of popular sovereignty are realized in practice,[69] it is worth exploring in greater detail the historical connection between voter and legislative authority in Canada.

First, Robert Vipond points out that, at the time of Confederation, the legal sovereign- the imperial Parliament- passed the basic laws by which the various colonial legislatures governed; served as the ultimate appeal for colonial legislation; and reserved the right to involve itself in the affairs of the colonies when its own interests (as the imperial Parliament itself defined them) were at stake. It is equally true, however, that the colonial politicians had, by 1864, come to expect that Britain would not normally interfere in colonial politics.[70] As a result, Canadian politicians "understood quite well that sovereignty and legislative power, the source of legitimacy and actual governance, need not be identical."[71] Vipond goes on to remark that "as the citizens of a largely self- governing colony, the Canadians came in their own way and through their own experience to appreciate the ambiguity of

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[69] Indeed it is here asserted that the belief that popular elected legislatures should (and could) represent the interests of Canadians, and that those interests are taken into consideration in policy formation, provides a basis for the belief in the legitimacy of the regime. It cannot be ignored, however, that habit, apathy, fear of sanction if laws are disobeyed, and expectations of material benefit from the regime, all may also preserve the stability of an industrialized liberal democratic regime such as Canada.

[70] Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), p. 30.

[71] ibid.

Blackstonian [British Parliamentary] sovereignty."[72] While Canadian politicians knew the imperial Parliament to be the legal sovereign, its distance from British North America meant that "this sovereignty did not express itself as directly or with the same bite as in Britain."[73] In effect, the colonies themselves were commonly considered (though not quite accurately) to be "sovereign" in regards to domestic affairs. But, again, what of the nature of Canadian legislative authority which came to be distinguished from imperial Parliamentary sovereignty?

Admittedly, some vestiges of the balanced tripartite concept of parliamentary sovereignty did become a part of the Canadian legislative process after the introduction of responsible government. However, Crown powers such as dissolution, prerogative, and the veto- once held by imperial governors- came to be exercised only on the advice of the executive governments. As David Smith suggests, "there had been [in the colonies] governors, and executive councils, and following the grant of responsible government the latter had come more and more to conduct their business without the respective governors present."[74] The withdrawal of the Governors' influence over the executives was not complete, but the separation of governmental from monarchical Crown[75] continued uninterrupted. What

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[72] ibid.
[73] ibid.
[74] Smith, *The Invisible Crown*, p. 38.
[75] This withdrawal suggests that the prerogative powers held in right of the Crown by the appointed Governor General came to be controlled by the political executive (Cabinet). Prerogative legislation is "that body of law enacted by virtue of the king's pre-eminent power to make law independently of statute and the courts....the relevant enactments pursuant to

this separation indicates is the joining of Crown and executive power into one institution which came to dominate the legislatures of the colonies. To put it another way, in Canada, the phrase Queen-in-Parliament came to suggest the "telescoping of Crown, cabinet and legislature."[76] Thus, when it is noted that legislative supremacy and not parliamentary sovereignty defines the character of parliamentary institutions in Canada, no more is indicated than that the legislature is the dominant aspect of the ancient tripartite arrangement of Parliament.[77] However, as is suggested here, the Cabinet indeed dominates the legislature.

In fact, analysis of the parliamentary tradition in Canada suggests that it is only with extreme caution that responsible government be equated with popular sovereignty: "Responsible government is the heart of Canadian democracy: not representation by population, hobbled by grandfather clauses and other insurances to protect areas of declining population, and not popular sovereignty- the weakness of the concept of constituent power is a consequence of the principle that the Crown is the source of authority."[78] Smith provides evidence of the lingering influence of the belief that it is the Crown, and not the voters who elect the members of the legislatures to which

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this power were, first, the individual royal commissions and instructions to the several governors, and second, certain royal proclamations applying to all colonial governments." Bruce Clark, *Native Liberty Crown Sovereignty: The Existing Right of Aboriginal Self-Government in Canada* (Kingston: McGill-Queen's University Press, 1990), p. 58.

[76] Smith, *The Invisible Crown*, p. 38.

[77] Mark Sproule-Jones, *Canadian Parliamentary Federalism and its Public Policy Effects* (Toronto: University of Toronto Press, 1993), p. 101.

[78] ibid., p. 30.

cabinets are responsible, is the source of legitimate (as well as legal) authority in Canada.

As recently as 1945, when Gordon Graydon, leader of the official opposition, asserted that "'Canada is governed by the House of Commons' and cabinet is its 'committee,'" the acting prime minister J.L. Ilsley refuted the claim replying that it was "'not historically or constitutionally correct...The authority of the government is not delegated by the House of Commons; [it] is received from the Crown...'"[79] Again, central to Smith's analysis is the fact that it is the cabinets (and particularly first ministers) of the provincial and central governments, commanding as they do a majority or plurality of seats in the legislatures (aided by a highly disciplined party system), which control the prerogative powers of the Crown.

Again, to speak of the British North American colonies as self-governing is not to suggest that popular sovereignty describes the basis of legitimacy for the exercise of political authority. Indeed, David Bercuson and Barry Cooper regard as inadequate the indirect connection between voters and legislator in 1867 when they declare: "[a small number of] Canadians certainly had a vote, but in exercising that vote they were *not* the highest authority in the polity- the metropolitan power was. They were *not* sovereign and their vote was of *limited constitutional value* in giving guidance to their legislators."[80] However, the popular assumption that voters today are indeed

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[79] ibid., p. 71.
[80] Bercuson and Cooper, "From Constitutional Monarchy to Quasi Republic," p. 18.

the highest legitimate authority in Canada presumes a substantial connection between voter and the exercise of legislative authority through the mechanism of responsible parliamentary government. In fact, in their own characterization of Canada's democratic credentials, Bercuson and Cooper admit the absence of a firm institutional foundation for the expression of popular sovereignty: "the evolutionary transfer of sovereignty to Canada gave the Canadian voter greater say in the manner in which that sovereignty was exercised....Whether or not it gave greater sovereignty to the people of Canada, it certainly gave the legislatures of Canada the right to exercise sovereignty in the name of the Crown."[81]

Of course, Bercuson and Cooper are correct in asserting that Canada was not a democracy at its birth, and no effort was made to entrench universal suffrage, individual rights, or individual equality in the constitution. Canada was a British colony with limited self-government when it came into existence on 1 July 1867 "born of a British statute- the British North America Act."[82] That Act united the Colonies of New Brunswick, Nova Scotia, and the United Province of Canada, established central and provincial governments, divided legislative authority between two levels of government, created courts, and set out numerous other terms and conditions of government in the new "Dominion."[83] However, the British North America

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[81] ibid., pp. 19-20.
[82] ibid., p. 17.
[83] ibid.

(BNA) Act did not give the new Dominion of Canada any more independence from the legal sovereignty of the imperial Parliament than the three colonies had previously possessed. Bruce Clark, for example, notes that "colonial governments were held not to be sovereign; as bodies politic they possessed no inherent legislative jurisdiction, merely a delegated one."[84]

The Canadian polity in 1867 has been described by Douglas Verney as governed through a form of what he refers to as "imperial federalism," imperial because the British Parliament retained its sovereign legal authority over Canada and provided "three umpires, one for each of the branches of government."[85] In principle, the three imperial umpires possessed the power of veto: "For the executive there was the Colonial Secretary and British Governor-General: for the legislature, Parliament at Westminster; and for the judiciary, the Judicial Committee of the Privy Council."[86] Frank Scott makes explicit the constitutional implications of the relationship between Canada and the imperial Parliament: "...it follows that the constitutions of the various Dominions and colonies, created by laws enacted in this Parliament, are binding upon the courts and people of the territory covered by them, and can only be 'made or unmade' by the same authority which first gave them the force of law."[87]

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[84] Clark, *Native Liberty*, p. 58.
[85] Douglas Verney, "Incorporating Canada's Other Political Tradition," in *Federalism and Political Community*, (eds.) David Shugarman and Reg Whitaker, p. 189.
[86] ibid.
[87] Frank Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics*, (Toronto: University of Toronto Press, 1977), p. 245.

What is interesting in emphasizing the role of the imperial Parliament as the ultimate legal sovereign over Canada from the time of Confederation (indeed until 1982) is its implication for the way in which the constitution and the two orders of government created by it are conceptualized.[88] Vipond indicates that the "Canadians of the 1860s took Blackstone's understanding of sovereignty as their base...and they therefore typically identified sovereignty with legislation, the power to make laws."[89] However, constituents of the Reform press such as the Toronto *Globe*, bearing in mind the "conceptual wedge"[90] which existed between legal sovereignty (vested in the imperial Parliament) and the legislative power of the self-governing colonies, argued that "one could easily conceive of a government that was sovereign but which exercised little legislative power, having delegated 'a very wide range of duties to some other authority.'"[91] By the same token, one could "imagine a local government that legislated on a host of subjects even though it was not nominally sovereign."[92] After all, as Vipond points out, this was more or less how the British Empire worked in practice.

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[88] Both Whitaker and Resnick have placed great emphasis on the anti-democratic nature of the Confederation bargain, and on the dearth of democratic values in the BNA Act itself (and Canada in general). Whitaker writes: "Canada's origins have little to do with democracy, and a great deal to do with a consciously anti-democratic ideology." See "Democracy and the Constitution," p. 243. In the same vein, Resnick asks: "Does the legitimacy of Parliament simply serve to render a more participatory version of politics illegitimate?" after citing a passage by Hans Kelsen: "If political writers insist on characterizing the parliament of modern democracies, in spite of its legal independence from the electorate, as a 'representative' organ...they...advocate a political ideology." See *Masks of Proteus*, p. 96.

[89] Vipond, *Liberty and Community*, p. 30.

[90] ibid., p. 31. This is Vipond's term.

[91] ibid., p. 30-31.

[92] ibid., p. 31.

Were the constitution of 1867 to be conceptualized as an imperial statute delegating authority to two orders of government in Canada, the result would be that a central government which possesses a broad range of legislative authority would be conceptualized as a powerful government, but not a sovereign government in the Blackstonian sense: "It did not create the provincial governments and could not destroy them; it could not unilaterally change the terms of the agreement, and was not the final authority to which an aggrieved party could turn for redress."[93] Of course, such a conceptualization is possible because the imperial authorities had retained the role of federal umpire for the two orders of government.

One of the Fathers of Confederation, Joseph-Edouard Cauchon, gave voice to this conceptualization of sovereignty in Canada. Because only the imperial Parliament is sovereign, he said, "[t]here will be [in Canada] no absolute sovereign power, each legislature having its distinct and independent attributes, not proceeding from one or the other by delegation, either from above or from below."[94] Vipond adds that "as the ultimate source of both federal and provincial power, the Imperial Parliament- not one of the constituted governments- would have the final authority to judge on questions pertaining to the Canadian Constitution."[95]

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[93] ibid.
[94] ibid., p. 35.
[95] ibid.

Such a position was supported by the *Globe* because the Reformers of the 1860s were in the position of supporting a strong central government able to develop the West, build industry, and promote trade; yet, at the same time, they were "committed by ideology and tradition to some form of decentralized government."[96] As a *Globe* writer noted: "We desire local self-government in order that the separate nationalities of which the population is composed may not quarrel. We desire at the same time, a strong central authority. Is there anything incompatible in these two things? Cannot we have both? What is the difficulty?"[97]

The difficulty, of course, was the extent to which the Fathers followed Blackstone's conceptualization of legal sovereignty as a supreme, irresistible, absolute, and uncontrolled authority as they considered the union of the colonies of British North America. Importantly, it was clear to the Fathers that, "[f]or the leaders of the French-speaking community in the eastern section of the Province of Canada," the "security of local jurisdiction" was the "non-negotiable condition in return for which they were prepared to concede the principle of representation by population in the lower house of the new parliament, a principle that would institutionalize their minority status within the new nation."[98]

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[96] ibid., p. 26.
[97] ibid., p. 27.
[98] Jennifer Smith, "Canadian Confederation and the Influence of American Federalism," *Canadian Journal of Political Science* XXI:3 (September 1988), p. 454.

This non-negotiable condition would require some form of federalism, and, as is well documented, "[n]o understanding of Confederation is possible unless it be recognized that its founders, many of its supporters, and as many of its opponents, were all animated by a powerful antipathy to the whole federal principle."[99] Why? The example at hand- the American federation- seemed to the Fathers to be a source of instability, perhaps even a cause of civil war. Common among the British North American Fathers who cared to comment on the American federation was the assertion that "in declaring 'by their Constitution that each state was a sovereignty in itself,' [they] had begun 'at the wrong end.'"[100] As Jennifer Smith suggests, when the Fathers observed the American federation, they did not mimic in national institutions federal elements such as the Senate to the same degree as the Americans; instead, they were "preoccupied with two features of [the federal principle], state sovereignty and the residual power, and they were convinced that by reversing US practice in relation to them, they could avoid the disintegrative pressures to which federal arrangements appeared vulnerable."[101]

This preoccupation with the "problem" of indivisible parliamentary sovereignty in a federal institutional arrangement may be explained by the Fathers' Blackstonian understanding of sovereignty. From such a conceptual perspective, it was imperative that sovereignty be lodged in either the central

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[99] ibid.
[100] Vipond, *Liberty and Community*, p. 15.
[101] Smith, "Confederation and the Influence of American Federalism," p. 461.

Parliament or in the provincial legislatures. As John A. Macdonald, himself a strong supporter of legislative union, contended, the Americans mistakenly "declared by their Constitution that each state was a sovereignty in itself, and that all powers incident to a sovereignty belonged to each state, except those powers which, by the Constitution were conferred upon the general government and congress."[102]

For Macdonald, the corrective which found its way into the proposed constitution was to allot to the central government "not only...all powers which are incident to sovereignty, but...all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, [which would also] be conferred upon the General Government and Legislature."[103] What this meant, in fact, was a recreation of the relationship between the imperial Parliament and the colonial legislatures but at the level of central and provincial governments. Although the central government itself could not alter the division of powers between orders of government,[104] the (imperial) powers of disallowance and reservation were "placed at the disposal of the general government in relation to bills passed

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[102] ibid., p. 450.

[103] Scott, *Essays on the Constitution*, pp. 19-20.

[104] The jurisdictional integrity afforded the orders of government in Section 94 gave formal substance to the federal principle. Scott recalls the formula agreed upon: "To the General government, all matters of common interest to the whole country; to the local governments, all matters of local interest in their respective areas." See ibid. p. 19. In fact, proponents of provincial rights were liable to look to the imperial Parliament for protection. As Paul Gerin-Lajoie indicates, it was clear to the Fathers that the imperial authority was to be considered "the ultimate safeguard of the rights granted to the provinces granted to the provinces and to minorities by the Constitution." See Paul Gerin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), p. 38. This topic is explored again briefly in the next chapter.

by the local legislatures."[105] Among other powers, the central government was given a general residual power to legislate for the "peace, order, and good government" of the country; as well as the power to "claim jurisdiction over 'local works and undertakings' by declaring them to be 'for the general advantage of Canada.'"[106]

Naturally, such a scheme was anathema to those Fathers who were supporters of a true confederation, and who doubted the assurances of Macdonald that provincial legislatures would have "full, indeed 'exclusive control over local affairs."[107] For them, "'all the sovereignty is vested in the General Government'; conversely, 'all is weakness, insignificance, annihilation in the Local Government.'"[108] What is of particular significance in indicating that the Fathers were generally supporters either of legislative or federal union, is that they appear limited in ability or desire to regard sovereignty as located anywhere but in either the central Parliament or in the provincial legislatures. This conceptual limitation, of course, influenced the way in which the nature of the constitution was understood by the Fathers.[109]

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[105] Smith, "Confederation and the Influence of American Federalism," p. 451.
[106] Vipond, *Liberty and Community*, p. 22.
[107] ibid., p. 22.
[108] ibid., p. 24.
[109] The next chapter will indicate that the uncertainty over how to reconcile the federal principle, which preserved local autonomy, with the sovereign authority to amend the Constitution, which for the Fathers rested with the central government, prevented the Fathers from determining an amending formula.

As Vipond indicates, whether lodged in Parliament or the legislatures, the sovereign power would "delegate" law-making authority to some "subordinate" body.[110] In a legislative union, authority would be delegated to the provinces in a fashion similar to the "imperial" delegation of legislative authority to colonial legislatures. Conversely, in a (con)federal union, legislative authority would be delegated by the sovereign provincial legislatures to the central Parliament. In either case, the constitution was necessarily regarded as a restriction on the sovereignty of one or the other order of government.[111] What was not possible, according to this way of conceptualizing sovereignty in a federal polity, was an understanding of the constitution as simultaneously empowering two orders of government with limited legislative jurisdiction.[112]

For example, J.H. Gray, himself one of the Fathers, declared that the provinces prior to Confederation "recognized a paramount and sovereign authority, without whose consent and legislative sanction the Union could not be framed."[113] Indeed, such a statement could be so construed as to indicate an affinity to a way of conceptualizing the Confederation scheme

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[110] Vipond, *Liberty and Community*, p. 23. The next paragraph is similarly drawn from Vipond's own insight.

[111] This was difficult to reconcile with "Blackstonian" sovereignty. Of course, such a dilemma is possible only if one disregards the role of the imperial Parliament as the ultimate legal sovereign of Canada. The "conceptual wedge" between sovereignty and legislative power explains the fusion, in discourse, of Canadian legislative power with sovereignty as legislative supremacy.

[112] Only imperial judicial review made such a conceptualization possible as will be indicated later.

[113] Frank Scott, *Essays on the Constitution*, p. 25.

which did not privilege one or other order of government by indicating a legal sovereign external to either order (in the imperial Parliament). However, Gray's intention in making such a statement was to do no such thing. Instead, his aim was to contrast the American experience in which the states "recognized no paramount or sovereign authority" (resulting ultimately in the disintegrative "states rights" doctrine), with the Canadian experience in which provincial rights were to be "transferred by the paramount or sovereign authority" to the central government.[114] The sovereignty of the imperial Parliament, therefore, was invoked only to justify the transfer of provincial rights to the central government without such action being understood as indicating the action of a "compact" between sovereign provinces; it was not intended to preclude sovereignty from being lodged solely in the central government.

It is by now clear that this portion of the chapter contrasts an interpretation of sovereignty lodged in either the central Parliament or in the provincial legislatures, with an interpretation which accentuates the role played by the imperial sovereign as delegating legislative authority to two orders of government. But why the emphasis on this contrast? The answer begins with a response to a simple yet leading question posed by Robert Vipond: what does the constitution exist to protect? In Frank Scott's words, a

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[114] ibid., p. 25.

constitution "distributes authority, authorizes various activities, and above all proclaims certain social and political values."[115]

In considering the emphasis placed on the "problem" of sovereignty in the Confederation debates, clearly, one such value which the Fathers struggled to protect in the constitution was that of the sovereignty of the central Parliament. More importantly, in emphasizing sovereignty as they deliberated the nature and terms of the constitution, the Fathers appear to have viewed the constitution as an ambiguous compromise entailing a limited (and conceptually suspect) loss of legislative supremacy at the centre in order to protect the security of local jurisdiction.[116]

Of course, the constitution came to be interpreted as protecting the legislative authority of each order of government from the encroachment of the other.[117] In this vein, Reg Whitaker suggests that "Canada may be the only country where the primary role of the constitution is to maintain peace between governments rather than between people, or between the people and their governments."[118] Today, however, the people beg to differ. "Their most basic message," writes Alan Cairns, in assessing the impact of the Charter on

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[115] ibid., p. 366.
[116] Evidence for the claim that this compromise was ambiguous may be found in the fact that the Fathers were unable to reconcile the federal principle with amendment.
[117] The interpretation the Judicial Committee of the Privy Council gave to the Constitution Act 1867, which expanded the jurisdictions the provinces while contracting those of the central government, made increasingly implausible an understanding of the nature of the Act being the protection of the legislative supremacy (i.e. sovereignty) of the central government alone.
[118] Reg Whitaker, "Democracy and the Canadian Constitution," p. 240.

Canadians, "is that governments do not own the constitution."[119] But if governments do not own the constitution, then who does? The principle of popular sovereignty provides an obvious answer: the sovereign people of Canada own the constitution. Such an answer, of course, would seem to indicate that the purpose served by the constitution cannot be only to maintain peace between governments; it must also be to enable governments to maintain peace between people, or between people and governments.

In fact, the foundation of an alternative way of conceptualizing the nature of the Constitution has already been indicated, a way which is in keeping with this alternative answer to Vipond's question of what the constitution serves to protect. Indeed it is possible to conceptualize the Constitution Act 1867 as an imperial statute delegating legislative authority to both Parliament and provincial legislatures. Were the Constitution Act 1982 to be conceptualized in a manner compatible with popular sovereignty, it would be considered representative of a delegation of legislative authority by the sovereign people of Canada.[120]

Such a conceptual feat is necessary so as to affirm that Canadians are themselves the legitimate source of legislative authority; after all, for the

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[119] Alan Cairns, *Disruptions*, p. 132.

[120] In 1982 the UK Parliament abrogated its legal sovereignty over the Constitution. Prior to that time, the UK Parliament exercised its sovereignty only on the advice of the Canadian Parliament (often in conjunction with the provincial governments although this convention was less clear). The "conceptual wedge" between legislative power and legal sovereignty indicates a way similar to that in which the people could be conceptualized as sovereign. However, the fact is that no such transfer took place. The aggregate legislature assumed legal sovereignty over the Canadian political community without a concomitant (necessary) clarification of the legitimate nature of that authority.

bulk of Canadians, legitimacy cannot derive from the authority of the Crown-in-Parliament. This suggestion is not presented in order to clear the way for a perpetual requirement of direct popular participation in the legislative process, and more importantly in basic constitutional reform; rather, it is to affirm the existing belief among Canadians that they are the "'ultimate authority' by which governments are constituted and 'the common superior' to which all duly constituted governments are answerable."[121] Indeed, Canada's constitution is about ordering basic governmental institutions and protecting rights; however, the purpose served by the constitution, according to the principle of popular sovereignty, is to protect governments from each other only to the extent that such protection is determined better to express the sovereignty of the people. In this way, the ultimate purpose served by the constitution must refer to citizens, not to governments.

Vipond notes that, indeed, such a transfer of sovereignty from legislative institutions to the people-at-large has enormous implications for both the theory and practice of politics because it enables a conceptualization of government derived from, though not immediately controlled by, the people.[122] He goes on to quote Judith Schklar who has noted that the effect of such a transfer of sovereignty in the United States "was to make the people the only legitimate source of authority; but the effect was also to replace the unmediated will of the people- their sovereignty- with a complex set of

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[121] Vipond, *Liberty and Community*, p. 29.
[122] ibid.

political and legal processes, federalism included, that could operate without constant popular initiative."[123]

In short, the purpose served in affirming the sovereignty of the people is to begin the necessary reconstruction of the connection between the legal exercise of legislative authority and the way in which that exercise executed so as to be considered legitimate; this reconstruction is particularly important in the realm of constitutional politics because it affirms that the protection of governments from each other ultimately should serve a "popular" end. In Alan Cairns' words, "those who govern us may have to relearn the ancient democratic message that they are servants of the people, and learn the new message that the Constitution under and by which we all now live does not belong to them."[124]

Such a proposal, however, has not gone uncriticized. Samuel LaSelva, for example, would caution against any reconceptualization of the purpose of the constitution which is connected to the sovereignty of *one* people over its government. He claims that, as a principle of moral legitimacy in a heterogeneous society, the sovereignty of the people "may turn out to mean little more than the tyranny of the most numerous or the most powerful."[125] Such an admonition must indeed be taken seriously; however, through his

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[123] ibid.
[124] Cairns, *Disruptions*, pp. 137-138.
[125] Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Kingston: Queen's-McGill University Press, 1996), p. 90.

retrieval of the thought of Lord Acton, LaSelva's own preference must ultimately be deemed inadequate. He notes that the English system "provided for the existence of several nations within the same state, promoted diversity rather than uniformity, and sought to establish harmony instead of unity."[126] Perhaps, but the analysis of the principle of popular sovereignty presented in this chapter prevents an endorsement the claim, subsequently made by LaSelva, that "[the English system] recognized that the people were sovereign in the sense that government was the servant of the people..."[127]

LaSelva indicates that "[v]irtually all the Fathers of Confederation acknowledged the necessity of federalism; yet it is the sovereignty of the people that has become the constitutional ideal which enjoys the widest support among Canadians."[128] In order to establish the tension between these two principles, LaSelva contrasts popular sovereignty as a spectre marked by a homogenous and tyrannical general will, with federalism, a principle he appropriately deems more respectful of diversity.

Ultimately, however, the establishment of such a dichotomy is not injurious to the present work for no veiled claim is being made as to the desirability, appropriateness, or descriptive accuracy of a conceptualization of the Canadian political community populated by a homogenous people characterized by uniform needs and interests. The invocation of the

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[126] ibid., p. 91.
[127] ibid.
[128] ibid., p. 119.

sovereignty of the people need not be accompanied by the dismissal of the federal principle. LaSelva's analysis, in recalling George-Etienne Cartier's statement that both French and English "desired to live under the British Crown"[129] is reminiscent of Frank MacKinnon's work on the Crown in which is written: "A sense of community, both provincial and national, is essential to federalism...Maintaining a sense of community feeling is a major function of the Crown as the non-partisan location of executive power, and of the twelve people who represent in everywhere..."[130] MacKinnon suggests that the Crown in Canada "is designed to make the community feeling a national one, as well as a collection of local ones."[131] According to this view, the sovereignty of the people, because it threatens to erode the potentially unifying symbolic features of the Crown, would seem to be something to fear in the heterogeneous political community which is Canada.[132]

This thesis, however, grants the assumption that Canadians have available to them a sense of community other than that which is provided by the symbolism of the Crown, a sense of community which need not dismiss

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[129] ibid., p. 25.

[130] Frank MacKinnon, *The Crown in Canada* (Calgary: Glenbow-Alberta Institute. McClelland and Stewart West, 1976), p. 169.

[131] ibid.

[132] Instead, I am more interested in combating the tendency, noted by William Livingston, "to credit the central government with an abstract existence wholly apart from the people it represents; similarly the provinces are considered as being separate from and in opposition to this central government. What this conception of federalism ignores is the essential fact that both central and local governments are instruments of the same group of people." I do not see such an assertion requiring that same group of people to be considered homogenous. See *Federalism and Constitutional Change* (Oxford: Claredon Press, 1956), p. 105.

the diversity of the sovereign people.[133] Furthermore, in dissecting the way in which Crown authority co-exists only uneasily with the principle of popular sovereignty in the Canadian legislative process, this chapter ultimately must conclude that Mackinnon's appraisal of the benefits of the Crown in Canada must be tempered by an appraisal of its implication for democratic practices. The absence of an explicit break from the conceptualization of the legitimate basis of legislative authority residing in Crown-in-Parliament continues to perpetuate an institutionally oriented conceptualization of legitimacy not amenable to the principle of popular sovereignty.

Still, in his interesting and elegant study, LaSelva captures "Cartier's noble vision" that Canadians develop a new kind of "political nationality" based on the desire to live apart and live together, the desire to enjoy "different ways of life, [but] also live a common life together."[134] I contend that it is possible to imagine Canadians as capable of capturing Cartier's vision were the Constitution reconceptualized as a "supreme law" expressing the delegation of their sovereignty to multiple orders of government. Importantly, such a conceptual innovation would make more problematic the assumption that constitutional reform is an affair of governments legitimately engaged in the struggle to maintain control over their respective

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[133] I prefer to follow the lead of Jeremy Webber who identifies a conceptualization of community based on the unique character of our public debate, our "national conversation," in which we "come together, deliberate about the objectives we should pursue, as take steps as a society to achieve them." See Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Kingston: McGill-Queen's University Press, 1994), p. 192.

[134] LaSelva, *The Moral Foundations of Canadian Federalism*, p. 171.

jurisdiction without reference to needs and interests of the sovereign people. Moreover, rather than determine a particular constitutional division of powers to be appropriate for the "Peace, Order, and Good Government" of respective central and provincial political communities, each order of government would clearly and explicitly be understood to legislate on behalf of Canadians themselves.[135] With respect to constitutional reform, such an orientation would require that proposals be justified by explicit reference to the sovereign people. Only then may we be able to state, without a hint of irony, that it is the interests of Canadians that the constitution exists to protect.[136]

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[135] In spite of the myriad problems encountered in the American legislative system, I doubt there is ever lingering conceptual confusion regarding the legitimate authority in the United States. It is the people.

[136] Although the Charter begins such a reorientation in its formal protection of citizens' rights against governments, and in its articulation of "democratic rights", it remains silent on the source of legitimacy of legislative power (even if democratically achieved via entrenched voting rights). Furthermore, the existence of the notwithstanding clause (section 33) is indicative of the absence of an explicit popular orientation to the source of legislative legitimacy for it asserts the priority of the authority of the legislatures themselves over the right of individuals to claim limits to the exercise of that authority.

Chapter Two: The Federal Principle

Writing after the failure of the Meech Lake Accord in 1990, the Nova Scotia Legislature's Working Committee on the Constitution concludes that "[i]n the field of reforming our democratic institutions, scarcely any reform could be more important than that of involving the public as fully as possible in the constitutional reform process itself."[137] The Working Committee goes on to note that despite the "widespread and strongly held view" that the public ought to achieve full and effective participation in future attempts to change the constitution,[138] "[t]here is almost no public interest in the technical question of the merits of one amending formula versus another."[139] Assuming the accuracy of this assessment, it remains necessary to address the amending formula because any discussion of constitutional amendment implicates directly the existing formal procedures through which change is possible.

Regardless of the particular amending procedures contained in the Constitution Act 1982, it would be useful quickly to present a range of

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[137] Nova Scotia, House of Assembly, *Canada: A Country for All. The Report of the Nova Scotia Working Committee on the Constitution*, 28 November, 1991, p. 17.

[138] Andrew Heard distinguishes between the whole constitution which provides the essential framework for orderly government in a state, and the *Constitution* as the "Supreme Law of Canada:" formal rules entrenched in the documents listed in section 52 of the Constitution Act, 1982, including the Constitution Act, 1867 (hereafter referred to as the BNA Act). A formal amending formula is authorized only to change the Constitution. The broader constitution includes the formal Constitutional rules as well as informal conventional practices, and various statutes and orders-in-Council which pertain to the three branches of government. See *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991). In this chapter, I refer only to the Constitution in its narrower "formal" sense.

[139] Nova Scotia, *A Country for All*, p. 17.

possibilities which might be considered in a federal country; a detailed discussion of actual formal proposals, however, will not be attempted. Still, it may be said that Canadian constitutional debate has produced a wide variety of formal proposals for amending formulae. For decades, such proposals have been a topic of concern for central and provincial governments. This is so because no amending formula was included in the original terms of the constitution. As the need arose to arrive at one, numerous considerations were part and parcel of discussion over the selection of an amending formula.

In the Canadian context, formal proposals for amending formulae normally have required the consent of the central government and of some combination of provincial governments. On rare occasion, an amendment proposal has been submitted to the public for ratification in a referendum. In any case, the very existence of a federal (as opposed to a unitary) system of government in Canada would appear to suggest the appropriateness of securing some degree of provincial consent to proposed changes to the constitution, at least in regard to the constitutional division of powers. In Jeremy Webber's words, "[i]n a large and diverse country, a federal constitution guarantees that some matters will be decided close to home, in a forum in which the inhabitants of a particular area form a majority."[140] If the constitution could be changed by the central government or provinces alone,

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[140] Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston: McGill-Queen's University Press, 1994), p. 82.

the institutional guarantees for territorially based minority interests provided by the structures of Canadian federalism might not be respected.

More recent proposals for an amending formula have tended to assume that all provinces represent interests which are similar, or at least of equal importance, and so endow no province with a special veto over proposed changes to the constitution. Implied here is that if an amendment is opposed by one or several provinces, it is not likely to be supported by any other. Other proposals indicate the presence of divergent interests in each of different regions of the country. Each region, therefore, would be required to consent to proposed constitutional amendments. Occasionally, the government of a province claims a particular interest in preserving or enhancing its control over certain legislative matters. Perhaps a provincial government claims to have interests not shared to the same degree by other provinces or regions and so demands a veto over any amendment (or at least over any amendment affecting the division of powers between governments).[141] Naturally, individual citizens could themselves be consulted directly at any point in the process of constitutional amendment.

Of course, a proper balance between flexibility and rigidity is required of an amending formula in order that constitutional change be possible, yet not too easily achieved. One must be cautious, however, in regarding a constitutional amending formula (following the practice of the Nova Scotia

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[141] The preceding paragraph is adapted from ibid.

Working Committee on the Constitution) merely as a "technical question" addressed to the most efficient means of effecting change, for to do so would be to disregard the full political and particularly theoretical implications of the authority to amend the constitution. After all, an amending formula addresses itself to the question of where to lodge the authority to make changes to the "Supreme Law of Canada;" it addresses itself to the issue of sovereignty. As Donald Smiley states, "legal sovereignty in a state resides in those persons and groups which have the authority to amend the constitution...[and] to determine how subsequent amendments can be effected."[142]

For much of this century, debate over constitutional change (including the amending formula) has been the preserve of government executives which have, for the most part, been unfettered by responsibility to their legislatures. The political experience of seeking an amending formula has been a long one in Canada; it has been exceedingly difficult for agreement to be reached on the appropriate mix of provinces whose consent is to be required before amendment is achieved: those party to discussion "may not agree on how to balance all these interests, on the issues to which they apply, or even on whether distinctive interests exist."[143] As a result, concerted efforts to arrive at an amending formula, begun in earnest in 1927, were not

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[142] Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1986), p. 42.
[143] Webber, *Reimagining Canada*, p. 82.

concluded through central and provincial governmental negotiation until 1982. The conclusion of debate, however, should not be confused with the resolution of the conflict between governments over their inclusion in constitutional amendment. The Quebec government, for example, did not consent to the amending formula arrived at in 1982. In any case, and despite increasing popular dissatisfaction with the process, a central role for governments in constitutional debate has long been a feature of Canadian politics.

For this reason, it is not surprising that Canadians have little interest in the issue of the amending formula. Still, on 26 October 1992 Canadians themselves voted on the acceptability of the terms of the comprehensive package of constitutional reforms contained in the Charlottetown Accord, an event particularly noteworthy because "the Canadian people, for the first time in their history as a political community, acted as Canada's ultimate constitutional authority."[144] Yet a contradiction, or at least a tension, exists between the direct popular act of participation in constitutional change, witnessed in the act of Canadians voting on a package of proposals for broad constitutional reform, and the statement contained within the Canada Clause of the very same accord purporting that "we are the people of Canada / drawn from the four winds / a privileged people / *citizens of a sovereign state.*"[145] Are we a sovereign citizenry, or citizens of a sovereign state? As

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[144] Russell, *Constitutional Odyssey*, p. 190.
[145] ibid., p. 181.

Canadians declare their dissatisfaction with elite-led constitutional change, it becomes necessary to address this question. Indeed, the increasing pervasiveness of the notion that "a constitution to be legitimate must be derived from the people"[146] as well as the growing popular assumption "that liberal democracies require public involvement in the constitutional process"[147] run up against Canada's parliamentary tradition. Briefly, this chapter will show that the "patriation debate"[148] has been an affair of governments;[149] more importantly, however, this chapter will show that the boundaries of debate have been formed by the question of how much provincial consent is to be required prior to securing constitutional amendment. Doing so indicates that Canadian legislatures appear preoccupied with the protection of their constitutionally guaranteed legislative jurisdiction.

For many students of Canadian politics, no problem is posed by governmental control of constitutional amendment. Paul Gerin-Lajoie, for example, wrote in 1950 that "[u]nder Parliamentary institutions, it may seem

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[146] ibid., p. 5. Emphasis mine.

[147] Janet Ajzenstat, "Constitution Making and the Myth of the People," in *Constitutional Predicament: Canada after the Referendum of 1992,* (ed.) Curtis Cook (Kingston: McGill-Queen's University Press, 1994), p. 112.

[148] James Hurley's term for the search for an amending formula through which the British North America Act could be legally domiciled in Canada. Hurley sets the temporal parameters of the debate at the 1926 Balfour declaration and Patriation in 1982. See James Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Ministry of Supply and Services, 1996), p. 25.

[149] Alan Cairns has written much on this topic. For example, he identifies that "the history of the search for a made-in-Canada amending formula has focused almost exclusively on the respective roles of the federal and provincial governments..." See *Reconfigurations: Canadian Citizenship and Constitutional Change,* (ed.) Douglas Williams (Toronto: McClelland and Stewart, 1995), p. 149.

appropriate that the elected representatives of the people should *not be deprived* of all authority to amend the Constitution."[150] Despite the passage of years since his book was published, bearing in mind Canadians' recent participation in the 1992 Charlottetown Accord, it may still appear striking that Gerin-Lajoie goes on to suggest that such a mechanism "is not part of the political inheritance of present-day Canada and there is no major reason for laying the machinery of constitutional amendment exclusively on it."[151]

More recently, but in similar fashion, Janet Ajzenstat suggests that it is not the place for citizens to participate in the process of drawing up a new constitution: "the participation of groups, interests, and individual Canadians in the negotiations is heightening contestation in the constitutional arena and hastening the country's break up."[152] That is not to say, however, that contestation is absent from elite-led constitutional negotiation. Indeed, politicians and government representatives have long shunted the patriation debate onto the well-worn track of acrimonious federal-provincial relations. It may be the case, however, that increased public participation in these patterns of constitutional discourse and negotiation may heighten contestation because it regenerates (at the popular level) established inter-governmental conflicts over powers and jurisdiction, patterns which appear

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[150] Paul Gerin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), p. 275. Emphasis added

[151] ibid.

[152] Ajzenstat, "Myth of the People," p. 112.

increasingly intractable.[153] Furthermore, the forced closure of the patriation debate, in 1982, by all governments except Quebec, may lead to the conclusion that the complicated and contentious issues of sovereignty in Canada's federal system has been successfully resolved. It has not.

It is possible to conceive of popular outrage with elite-led constitutional change as rooted in a dearth of public participation in basic constitutional reform. If it is assumed that the Meech Lake Accord failed because "[e]leven men sat around a table trading legislative, judicial, and executive power...with little regard for the concerns of individual Canadians,"[154] then, indeed, it follows that including citizens in the process of constitutional reform would resolve popular disenchantment with constitutional politics. However, it appears obvious to Canadians that public participation in established constitutional discourse and processes of reform, including the amending process, is not sufficient to redress popular disaffection.

The Nova Scotia's Working Committee on the Constitution reported in 1991 that "Nova Scotians feel alienated from politics and political parties and especially from our current political leaders," and declared that "[t]here is a mood of scepticism and a sense that our institutions are not making

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[153] In her own argument, Ajzenstat proposes that the participation in constitution-making of advocates of "postmaterialist" or "principled" politics (concerned with issues of group recognition and quality of life) heightens contestation in constitutional negotiation because their demands are not amenable to "who-gets-what-when-and-how" bargaining. I wish to focus on the fact that these advocates of postmaterialist issues seek direct inclusion in processes of constitutional negotiation.

[154] Deborah Coyne cited in Ajzenstat, "Myth of the People," p. 114.

politicians sufficiently responsive to public opinion."[155] Despite this, it remains the case that, after broad public involvement in the Spicer commission, the hearings of the Beaudoin-Edwards, and Beaudoin-Dobblie inquiries, even a national referendum, popular dissatisfaction with constitutional politics has not abated. For example, in speaking of his experience participating in discussion on constitutional reform in a Canadian Broadcasting Corporation "Town Hall" broadcast on 10 December 1996, Dr. Frances Lacouvee of Qualicum Beach, notes: "The ordinary Canadian appears to be just as frustrated with our national situation as I am...The French Canadian people I heard speak that afternoon were hurting...I definitely got the message, it's not 'if' Quebec separates, it's 'when,' as far as the Quebecers there were concerned."[156] In order to continue to develop an understanding of the reasons behind this expressed popular disaffection which is driving demands for greater popular participation in constitutional amendment, it would be illuminating to turn to the past, to see from whence we have come.

"In 1867", writes Russell, "there was no need to agree on the fundamental nature of the new Canadian nation...A new country could be founded without having to risk finding out if its politically active citizens agreed to the principles on which its Constitution was to be based."[157] Cairns

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[155] Nova Scotia, *A Country for All*, p. 15.
[156] Judy Reimche, "Exercise in Democracy is a little Unnerving," *The News* [Qualicum Beach B.C.], January 14, 1997, p. B1.
[157] Russell, *Constitutional Odyssey*, p. 33.

concurs with this analysis noting that "a consequence of the deliberate incompleteness of Confederation, meant that for most of our history, and for a dwindling minority still, the boundaries, and hence the very nature, of the Canadian community were ambiguous."[158] But in what sense was no agreement on the fundamental nature of Canada reached? Why was confederation incomplete?

The answer lies, in part, with Smiley's assertion, noted earlier, that sovereignty resides in the authority to amend the constitution, and more importantly, in the authority to change the manner in which the constitution is amended. The Constitution Act 1982 establishes that it is Parliament and the ten provincial legislatures which possess this authority. Prior to 1982, however, the only legislative authority vested with the power to amend Canada's constitution remained the United Kingdom (imperial) Parliament, although the Canadian Parliament (often in conjunction with some combination of provinces[159]) did possess *de facto* authority to achieve amendments. Tracing the origin and development of the patriation debate will indicate why no amending formula was placed in the Constitution (BNA) Act 1867; furthermore, presenting the ensuing search for an amending formula will situate the patriation debate in the context of some early political social and economic influences on the development of the federation,

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[158] Alan Cairns, *Reconfigurations*, p. 104.

[159] Controversy over the nature of conventions regarding provincial involvement in constitutional amendment was, of course, central to the difficulty of achieving a formula.

influences which increased the likelihood of provincial involvement in the debate over constitutional amendment. Again, it will be apparent that the debate over the amending formula has indeed been the preserve of governments. The significance of this fact, however, is less that citizens have been left out of the constitutional reform process; rather, it is that no direct connection has been established between the sovereign authority to amend the constitution and the needs and interests of citizens themselves.

Although the BNA Act did contain the means to effect a few relatively minor changes,[160] there existed within its terms no general provision for its own formal amendment. The lack of such a provision seems odd, perhaps even careless on the part of the Fathers; however, its absence was almost certainly deliberate. Eugene Forsey contends that "[i]t was certainly not the result of ignorance, forgetfulness, absent-mindedness or stupidity. The Fathers of Confederation had before them the United States Constitution, with its very explicit provisions for amendment, and they were close and critical students of that constitution."[161] For purposes here, the preferred explanation of the absence of an amending formula in the BNA Act follows the insight of Jennifer Smith who states that "opinion on the origins of the amending problem tends to take the form of a debate over federalism, that is,

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[160] Jennifer Smith indicates that "[s]ome of its provisions are alterable at the hands of Parliament alone, for example, Section 41 which deals with federal elections. Moreover, under Section 92(1), the provincial legislatures are empowered to modify their constitutions 'except as regards to the Office of Lieutenant Governor." See Jennifer Smith, "The Canadian Amendment Dilemma," *Dalhousie Review*, 61, 4 (Summer 1981), p. 292.

[161] Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart, 1974), p. 228.

a debate between partisans of a strong central government and partisans of vigorous local governments."[162]

Beginning with a centralist explanation[163] of the lack of an amending formula in the original BNA Act, Eugene Forsey contends that it was the expectation of the Fathers that there would be little need for future amendment. He suggests that the jurisdictional residue, which remained after the powers of the federal and provincial governments were divvied out in Sections 91 and 92, was meant to reside in the hands of the federal government in the form of the peace, order, and good government clause (section 91). This "general power," according to Forsey, should have been interpreted by the courts broadly enough so as to concur with John A. Macdonald's assertion that the Fathers were so thorough in their work of drawing a constitution that they "avoid[ed] all conflicts of jurisdiction and authority."[164] Forsey goes on to note that "the Fathers never intended the provinces to bulk very large in the constitutional scheme of things...Almost

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[162] Smith, "The Canadian Amendment Dilemma," p. 292-93.

[163] Students of the constitution who are interested in gleaning from the Confederation debates an understanding of the original intent of the Fathers naturally are not merely neutral interpreters of Canada's past. Although it is ludicrous to suggest that a biography of every commentator cited in this thesis be provided, no analysis of existing works on Canada's constitutional history should deny that "...by and large, the historian will get the kind of facts he [or she] wants." This section is written with this quotation in mind as key to understanding the challenges of constitutional debate. See Michiel Horn, "Frank Scott, the League for Social Reconstruction, and the constitution," in *Canadian Constitutionalism: 1791-1991,* (ed.) Janet Ajzenstat (Ottawa: Centre for the Study of Canadian Parliament, 1991), p. 213.

[164] Smith, "The Canadian Amendment Dilemma," p. 229.

certainly, they saw no need to give these local bodies any say in so important a national matter as amendment of the constitution."[165]

Frank Scott concurs with this portrayal of the original intentions of the Fathers. The fact that Scott summarizes the speeches of Macdonald to the effect that the General Legislature was granted all the powers incident to sovereignty and all matter of general interest not conferred exclusively upon local governments[166] is suggestive of the fact that he would be in agreement with the assertion that the matter of amendment was left in abeyance "in the hopes of prevailing upon the provinces to leave it to the determination of the central government."[167] Forsey's and Scott's centralist analyses of the Father's original intentions undoubtedly were employed to justify their demands for a dominant, even dictatorial role for the central government in future constitutional amendment. The question of why they were such strong proponents of a strong central government in achieving amendments will be addressed below.

After assessing "leading opinion on the amending problem" Jennifer Smith rejects an interpretation tinged with the same centralist streak of Forsey and Scott. In explaining the absence of an amending formula in the Act, she recalls that, prior to 1867, the colonies were well accustomed to the practice of requesting changes to their constitutions "in the only way any

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[165] Forsey, *Freedom and Order*, p. 229.
[166] Frank Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), p. 19-20.
[167] Smith, "The Canadian Amendment Dilemma," p. 298.

British statute can be, that is, by an act of British Parliament."[168] Indeed, this would explain a comment by Thomas D'Arcy McGee (one of the Fathers of Confederation) who stated in 1865: "We hope, that by having that Charter that can only be amended by the authority that made it, that we will lay the basis of permanency for our future government";[169] however, the question remains as to why the newly minted provinces were not averse to maintaining such a practice. It is here that Smith's analysis diverges from that of Forsey and Scott.

She contends that provincial leaders were of the opinion that the imperial authorities would protect provincial constitutional jurisdictions against federal encroachment: an assumption later vindicated by the decisions of the Judicial Committee of the Privy Council (JCPC).[170] Gerin-Lavoie, as Smith indicates, writes that "whatever the framers' view on amendment, the point 'beyond doubt' is that they considered the Imperial authority the 'ultimate safeguard' of the rights and privileges accorded the provinces by the B.N.A. Act."[171] With the knowledge that only the imperial Parliament could amend Canada's constitution, and knowing that the imperial Parliament was sympathetic to provincial jurisdictional interests,

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[168] ibid., p. 292.
[169] William S. Livingston, *Federalism and Constitutional Change* (Oxford: Claredon Press, 1956), p. 21.
[170] Prior to 1949, the JCPC, as Canada's last court of appeal, played a central role in changing the manner in which the division of powers was regulated by the constitution. One illustration of the strengthening of provincial jurisdiction, due to JCPC interpretation of the BNA Act, is the *Hodge* case of 1883. In this case, their Lordships effectively denied the inferiority to the Dominion government of provincial legislatures.
[171] Smith, "Canadian Amendment Dilemma," p. 304-305.

there was little need for provincial governments to be concerned about the lack of an amending formula.

In fact, provincial governments' desire to protect the "rights and privileges accorded to the provinces" was recognized even by Macdonald who exclaimed to those advocates of legislative union: "[t]hat is just what we do not want. Lower Canada and the Lower Provinces would not have such a thing."[172] Thus, far from Forsey and particularly Scott, Smith claims that "Macdonald's interest in a strong central government must be set against his realization that a union of the colonies of British North America has to be devised in accordance with federal rather than wholly unitary principles."[173]

Smith concludes that the Fathers were not prepared to deal with the difficulty which the federal principle held for establishing, within Canada, the sovereign control of the constitution, and goes on to assert that this problem has had lasting implications: "uncertainty over the application of the federal principle to amendment plagued all subsequent efforts to fashion an acceptable formula, [and] also lies at the heart of the controversy...over the proper way to amend the BNA Act in the absence of such a mechanism."[174]

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[172] ibid. p. 305.
[173] ibid.
[174] ibid. Elsewhere, Smith asserts that the federal principle was limited by the Fathers who gave effect to it only at the local level. In essence to the provinces were left "matters of 'private right and sectional interest' while preserving the union on matters common to all." See Smith, "Confederation and the Influence of American Federalism," *Canadian Journal of Political Science*, XXI:3 (September 1988), p. 461. When one recalls that the Fathers conceptualized sovereignty as indivisible and therefore necessarily lodged either in the central government or in the provinces, it becomes clear why they were uncertain as to how to apply the federal principle to amendment: after all, the federal principle indicated that some degree of provincial involvement in amendment was required *in addition to the central government.*

After citing the full record of amendments to the BNA Act from Confederation to the last amendment before patriation, in 1964, Guy Favreau discerns four general principles which emerge from his analysis of amendments secured by convention, that is, without the aid of a formal mechanism. The first principle is that "although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada."[175] No act affecting Canada is passed by the UK Parliament unless it is requested by Canada, and no amendment, requested by Canada, has been refused by that Parliament.

The second principle, not violated since 1895, "is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act...The procedure invariably is to seek amendments by a joint Address of the House of Commons and Senate to the Crown."[176] Conversely, the third principle is that no amendment to the constitution is made "merely upon the request of a Canadian province."[177] The UK Parliament has refused all attempts by the provinces to propose amendments without the sanction of Parliament.

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[175] Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965) p. 15. In 1965, the Union Nationale Government in Quebec did, in fact, petition the Queen to amend a section of the Constitution Act, 1867 in order to "curtail the absolute veto power of the [Quebec] Legislative Council." See Agar Adamson, *The Fulton-Favreau Formula 1960-1966*, unpublished thesis, Queen's University, 1966, p. 231. In 1966, a provincial election, and hence a change in government, relieved the British Parliament of the need to decide whether or not to act on the Lesage Government's request to amend the section of the Constitution Act, 1867 (in which the Legislative Council of Quebec is identified). See pp. 229-235.

[176] ibid.

[177] ibid.

It is the fourth principle which is of particular interest in considering the role played by the federal principle in deciding the way in which the constitution would be amended. It states that "the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."[178] It should be noted that a number of amendments, assumed by the central government to be matters under its own exclusive jurisdiction, were sought without provincial consent. However, three amendments which affect directly the division of powers were not requested until full provincial consent was granted: in 1940 (unemployment insurance)[179]; 1951 (old age pensions); and 1964 (OAP supplementary benefits).

Thus, with respect to amendment, the federal principle appears to have been interpreted as requiring, at a minimum, the act of securing provincial consent for amendments which pertain directly the division of powers between the central Parliament and provincial legislatures. Indeed, at the time of the 1940 amendment, Prime Minister Mackenzie King states: "As a matter of fact, not having received the consent of all nine provinces until this year, we could not before this particular session have introduced in

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[178] ibid.

[179] Of course, provincial consent does not necessarily indicate enthusiasm for the transfer of jurisdiction from provinces to the central government. For example, despite misgivings about the introduction of federally sponsored unemployment insurance, Premier William Aberhart of Alberta wrote in 1940 that the Alberta Government "has no desire nor intention whatsoever of standing in the way of what the other eight provinces would believe to be an advantage." See Adamson, *The Fulton-Favreau Formula*, p. 302.

a manner which would avoid all questions a measure for the amendment of the British North America Act."[180]

Yet, in the very same speech, there is evidence of uncertainty over the application of the federal principle to amendment: "We have avoided the raising of a very critical constitutional question, namely, whether or not...it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would of itself be sufficient."[181] Whether or not Prime Minister Mackenzie King was successful in "escap[ing] any pitfalls in that direction..." [182] it is clear that, until the amending formula arrived at in 1982, and even if provincial unanimity remained officially unacknowledged as a requirement, any amendment affecting the division of powers was accompanied by full provincial consent.[183]

The early development of the Canadian federation made essential the application of the federal principle to constitutional amendment as provincial governments demanded, with increasing vigour, that their consent be required prior to the Canadian Parliament making a formal request of the

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[180] Canadian House of Commons Debates, 1940, p. 1110. Cited in Gerin-Lajoie, *Constitutional Amendment in Canada*, p. 107.

[181] ibid., p. 108.

[182] The central government, in a 1978 discussion paper, repeated the first three principle set out by Favreau but referred to them as "observations." The fourth observation was qualified: "although not constitutionally obliged to do so, the government of Canada...sought and obtained the consent of all provinces on the three amendments...that involved the distribution of powers." Canada, Federal-Provincial Relations Office, *The Canadian Constitution and Constitutional Amendment*, (Ottawa, 1978), p. 13. Of course, this could be interpreted as a prelude to the central government's proposed unilateral action on constitutional amendment, and the patriation reference case.

[183] Whether or not this constitutes a constitutional convention of provincial unanimity was a question placed before the Supreme Court.

imperial authorities for amendment. In fact, influences of a sociological, political, institutional, and economic nature forced the federation onto a more rather than less centrifugal trajectory; such influences are, of course, of consequence to subsequent attempts to affix an amending formula. Still, the central and provincial governments did not waver in their orientation toward the process of constitutional amendment; they have consistently sought to protect their own constitutionally entrenched legislative jurisdiction.

Contrary to the expectation of the central government that the provinces would not bulk very large, they did not wither away; indeed, the broad constitutional powers of the central government[184] were not unchallenged by provincial governments. Jeremy Webber recalls that "although the governments' role changed as they moved from colonial to provincial status,...essentially the same political units persisted...It is no surprise, then, that the established loyalties remained strong."[185] Indeed, Webber does not suggest that this phenomenon serves as the basis for a moral claim to retain provincial control over local matters; rather, his point is that the existence of colonial loyalties prior to Confederation is important

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[184] Examples of what is meant by centralized control abound. In Section 58 of the BNA Act, the central government is empowered to appoint provincial lieutenant governors as well as superior, district, and county court judges within the provinces as dictated in Section 96. Section 90 outlines the central power to disallow provincial legislation at its discretion, in addition to the power of the centrally appointed lieutenant governor to reserve provincial legislation for the subsequent consideration of the Governor General-in-Council. If the central government feels at any time that a provincial law relating to education contradicts the stipulated terms of Section 93, the same section gives the central government the power to make remedial laws for the proper execution of the provisions of that section.

[185] Webber, *Reimagining Canada*, p. 195.

because it forms a foundation for the strong provincial loyalties which continued after Confederation and continue to exist today, if in modified form. Although Webber is receptive to the argument that provincial positions "are all too often the product of inertia, institutional self-interest, or the tendency of governmental elites to self-aggrandizement,"[186] it remains the case that there is "a solid base for at least some of the claims to a distinctive provincial perspective."[187] After all, claims Webber, the fact that a community is defined "by events lacking strong justification...does not necessarily impair that community's integrity or its significance to its members."[188]

Robert Vipond has expanded upon the notion that the provinces served as poles of identity (even prior to Confederation) to include the symbolism of the long fight of the colonies against arbitrary executive power resulting in all British North American colonies gaining responsible government. First, Vipond establishes that, in the years following Confederation, provincial "autonomists" were not merely advancing their own political interests, but were also concerned "to show how a federal constitution could be fit squarely and comfortably into a larger, preexisting, and deeply rooted cultural system."[189] They believed that the "Macdonald constitution was unacceptable because it was incoherent...that is, it could not be reconciled with the

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[186] ibid., p. 196.
[187] ibid.
[188] ibid., p. 197.
[189] Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), p. 10.

constitutive symbols that anchored their self-identity [as provincial citizens.]"[190] At the same time, as Vipond indicates, the concept of provincial autonomy, understood as one aspect of this symbolic lifeworld, also fit into the prevailing themes of late nineteenth-century liberalism: "To support provincial sovereignty...over its own affairs...was to stand foursquare behind the sort of popular, parliamentary self-government that distinguished the British constitution, the deepest symbol of colonial political life."[191]

This movement gained substance in the compact theory of Confederation which took the origin of the BNA Act to be a founding "pact" between colonies as opposed to a statute of the imperial Parliament. From the perspective of sovereignty, writes Vipond, "the compact theory is an attempt to reconstruct the historical origins of Confederation in a way that [would] explain and justify provincial control of amendments to the constitution."[192] In light of the developing *de facto* role of Parliament in requesting that the imperial Parliament grant constitutional amendments, the compact theory was "born of necessity" for the provinces could not be certain of their inclusion in the process (thus ensuring the protection of their control over local affairs). An explicit articulation of the implication of the compact theory in providing legitimacy for the requirement of provincial

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[190] ibid.
[191] ibid., p. 47.
[192] Robert Vipond, "Whatever became of the Compact Theory? Meech Lake and the New Politics of Constitutional Amendment in Canada," *Queen's Quarterly*, 96, 4 (Winter 1989), p. 794.

involvement in amendment, written in 1888, may be found in the Reform newspaper, the *Globe*: "The Dominion was a creation of these provinces...It [the Dominion] cannot, then, be a party to a revision of the bargain. The power to revise the created body must be in the hands of those who created that body."[193]

The compact theory entered political discourse only slowly until well into the 1930s by which time Quebec politicians had become vociferous supporters. Matters were complicated, however, by the introduction, in Quebec, of a variance to the compact theory "which interpreted the 'pact' of 1867 as an agreement between the two principal cultures or 'races.'"[194] In any case, as noted above, the central government, backed by the Colonial Office of the British Empire, never relinquished its central role in constitutional amendment: "of the 22 amendments made to the BNA Act, none was accomplished without [its] consent...On the nine occasions in which one or more provinces requested action in the absence of federal consent, no action was taken."[195] In light of this political reality, proponents of the compact theory altered it so as to make legitimate the demand that the provinces, now *in addition* to the central government, participate in constitutional amendment. A 1930 memorandum of Hon. G. H. Ferguson, Premier of Ontario, contains a classic statement of the theory as it evolved from a

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[193] ibid., p. 796.
[194] ibid., p. 797.
[195] ibid., p. 800.

justification for the exclusion of the federal government from amendment, to a justification of the inclusion of provincial consent: "...no restatement of the procedure for amending the constitution of Canada can be accepted by the Province of Ontario that does not fully and frankly acknowledge the right of all Provinces to be consulted, and to become party to the decision arrived at."[196] Any notion of impressing upon the provinces the unique role of the central government in amending the constitutional division of powers, without provincial involvement, thus became impossible politically to sustain.

Already mentioned is the influence on federalism of the Judicial Committee of the Privy Council's interpretation of the BNA Act, an influence deepened by its role in informally updating the constitution. Their highly decentralist interpretation of the BNA Act made even less legitimate any attempt by the central government to deny the application of the federal principle to amendment or to assert its legal right to amend the constitutional division of powers without some degree of support from provincial governments.

Alan Cairns claims that "the general congruence of Privy Council decisions with the cyclical trends in Canadian federalism...provides a qualified sociological defence of the committee...The Privy Council's solicitous regard for the provinces constituted a defensible response to trends in

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[196] Livingston, *Federalism and Constitutional Change*, p. 51.

Canadian society."[197] This defence of the Lords' interpretation of the BNA Act as attuned to the vagaries of the politics and sociological realities of the day is countered by an alternative contention that the Lords sought to solidify the line dividing the division of powers as prescribed by the theory of "classical federalism" with its co-ordinate and autonomous spheres of constitutional authority.[198] In an article written to challenge the sociological "fit" interpretation proposed by Cairns, Frederick Vaughan offers the alternative explanation that the JCPC interpreted the constitution "so as to conclude that the terms of the Act were to be ensconced in 'watertight compartments,' that the provinces were to be 'autonomous,' that 'peace, order and good government'...was to be restricted to times of emergency."[199] After citing Lord Haldane in his praise of Watson's "...enormous service to the Empire and to the Dominion of Canada [for] *developing* the Dominion constitution,"[200] Vaughan concludes that Privy Councilors acted as "judicial statesmen." This, of course, was "clearly consistent with the exercise of Imperial power over the colonies."[201]

Another analysis of the intentions of the JCPC in its review of the constitution suggests that the Law Lords' desired to fit the exercise of

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[197] Alan Cairns, "The Judicial Committee and its Critics," *Canadian Journal of Political Science*, IV:3 (September 1971), p. 325.
[198] This, of course, recalls K.C. Wheare's well know and oft cited formulation.
[199] Frederick Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation," *Canadian Journal of Political Science*, XIX:3 (September 1986), p. 513.
[200] ibid.
[201] ibid., p. 518.

legislative authority in Canada into another preconceived theory, this time an economic theory with a neo-conservative agenda. For example, in his criticism of the JCPC, J.R. Mallory proposes that "the force that starts our interpretive machinery in motion is the reaction of a free economy against regulation."[202] In any case, and for whatever reason, it became clear that the choice of an amending formula could not ignore the way in which provincial jurisdictions were supported, even strengthened, by judicial review.[203]

Considering for another moment the claim that economic conservatism was the impetus for the highly decentralist review of the constitution, one can discern, in the works of Forsey and Scott, similar intentions to that of Mallory: to expose the way in which judicial review hindered the achievement of effective national social and economic policies. Economic conditions, such as those encountered during the Great Depression, had a great influence over these commentators' opinion on the amending problem.

During the depths of the depression, Scott called for the virtual eradication of the amending problem, in part, by rejecting the decentralist tendencies of the JCPC. In order to "protect the national economy from the mass misery and widespread dislocation brought about by the world's greatest economic depression,"[204] he believed that the federal government

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[202] Cairns, "The Judicial Committee and its Critics," p. 314.
[203] Cairns has also identified provincial governments themselves as institutions which are infused with endogenous political and policy imperatives, and are influential in shaping the lifeworld of provincial citizens. See Alan Cairns, "The Governments and Societies of Canadian Federalism," *Canadian Journal of Political Science,* X:4 (December 1977)
[204] Scott, *Essays on the Constitution,* p. 188.

required a maximal amount of flexibility to enact policy such as the Prime Minister Bennett's "New Deal legislation."[205] To provide the necessary flexibility in the face of the JCPC sponsored expansion of the provincial powers listed in section 92 of the BNA Act, Scott urged the courts to "draw a more intelligent line, one more in conformity with the clear intentions of the Fathers..." If they did, "they would solve the problem of amendment by rendering it superfluous."[206] Scott's particularly centralist reading of the BNA Act may well have been a consequence of his exposure to the dire needs of the day in which he wrote;[207] indeed, other works written during the depression warrant the same conclusion which is that the growing interest in the amending formula was linked, in part, to dire economic circumstance.

Commenting in 1934, Norman McL. Rogers stated that, prior to the depression, demand for constitutional revision was "concerned mainly with abstract questions of provincial rights..."[208] Greater attention to constitutional amendment, particularly in the case of the central government, was the result of that "critical examination of inherited

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[205] It is important to note that this legislation ran roughshod over the division of powers as interpreted by the JCPC. For example, the Employment and Insurance Act 1935, among others, was declared *ultra vires* of the central government.

[206] Scott, *Essays on the Constitution*, p. 188.

[207] Scott was quick to blame the JCPC for abandoning the "Macdonaldian" constitution but his analysis shows a misjudgment of the strength of the provincial rights movement. In the 1940s he retreated from the centralist position he adopted during the Depression; by 1967, he commented: "...in the early days attention was focused on Ottawa, as the only government capable of leading us out of the morass but as the victory in Saskatchewan came closer...there was seen to be a very wide area of provincial jurisdiction to be used for the socialist cause." See Horn, "Frank Scott, the League of Social Reconstruction, and the Constitution," p. 222.

[208] Norman McL. Rogers, "The Constitutional Impasse," *Queen's Quarterly*, XLI:4 (Winter 1934), p. 474.

institutions which is characteristic of a period of prolonged disturbance."[209] In particular, Rogers pointed to "the rapid growth of social and economic theories which have supported a greater degree of national control over social welfare and business activity than was permitted by the explicit terms of the constitution as interpreted by the Privy Council."[210] Economic necessity, then, as provinces collapsed under conditions of bankruptcy, may be seen to be an impetus for both constitutional reform and support for a strong central government able to achieve constitutional amendments as needed (without regard to abstract questions of provincial rights).

Commentators such as Rogers subsequently linked the need for social reform with the need to achieve "national" autonomy, and did so so as to escape from the obstructive "scholastic niceties of judicial interpretation."[211] Rogers himself was led to declare that avoiding the issue of national autonomy would "provide the most remarkable illustration in history of a national community refusing to trust its own judgment in the determination of its domestic arrangements and its way of life."[212]

This sentiment that Canada should accelerate its development as an autonomous community had already been enhanced by the Balfour Declaration of the 1926 Imperial Conference which confirmed the convention

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[209] ibid., p. 476. Of course this comment indicates the degree to which the issue of sovereignty remained unsettled as the imperial Parliament came to restrict itself, by convention, in its sovereign authority over Canada.
[210] ibid.
[211] ibid.
[212] ibid., p. 486.

that Great Britain and the Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any respect of their domestic or external affairs."[213] The Balfour Declaration, coming just prior to a time of great social and economic upheaval in Canada, brought to centre stage the inability of the Canadian political community to assume responsibility for its own constitution by arriving at an acceptable amending formula. Britain, to be sure, was "more than willing to hand over custody of Canada's Constitution to Canada...[but to] [w]hich people or legislature or combination of peoples or legislatures?"[214] This question still requires an adequate answer in 1997.

The first of a long series of unsuccessful federal-provincial conferences was convened in 1927 to address this very question, thus beginning the search for an amending formula (i.e. the patriation debate).[215] The 1931 Statute of Westminster gave effect to the legal independence of the Dominions, but Canadians, without an amending formula to produce, were unwilling to carry that mantle. On the request of the Canadian delegation, section 7 of the Statute declares: "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America

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[213] cited in Gerin-Lajoie, *Constitutional Amendment in Canada*, p. 186.
[214] Russell, *Constitutional Odyssey*, p. 55.
[215]Some provincial participants at the conference stated a desire to retain Imperial sovereignty, arguing a Canadian formula might make amendment too easy to secure. The central government proposed that ordinary amendments require a majority of provincial consent while amendments involving "provincial rights, the rights of minorities, or rights generally affecting race, language and creed" would require the unanimous consent of the provinces. See Favreau, *The Amendment of the Constitution of Canada*, p. 18.

Acts, 1867-1930, or to any order, rule or regulation made thereunder." Section 7, then, excluded Canada's Constitution from the legal independence extended to all self-governing dominions, thereby requiring Canada to retain the need to ask the imperial Parliament to enact formal amendments to the Constitution. With what degree of provincial consent future requests would require remained unclear, but the die had already been cast for a long period of conflict between central and provincial governments over the issue.

Writing a few years after the Statute of Westminster came into effect, Rogers represents an instance of the desire of Canadians to give weight to Canada's newly achieved independence by patriating the constitution with an amending formula. However, as the previous analysis shows, in the intervening years since 1867, such an endeavour was to become increasingly complex: "The centrifugal pressures deriving from provincial demands for constitutional restructuring were met by a central government that, in the last analysis, viewed constitutional change more as a vehicle for its own ambitions than as one attuned to provincial visions."[216] Of course, these counter-vailing centrifugal[217] and centripetal pressures proliferated at the same time that politicians were attempting to apply the federal principle to constitutional amendment. As has been indicated in this chapter, this struggle was complicated by the existence of vigorous provincial identities

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[216] Cairns, *Disruptions*, p. 66.

[217] By this I mean to suggest that the decentralizing trends indicated above were instrumental in ensuring that later debate over patriation would ensure vigorous local governments at the bargaining table, governments demanding inclusion in the amending process.

which were tapped by provincial premiers in order to provide further justification for the inclusion of provincial governments in constitutional amendment; furthermore, judicial review, guided by abstract theories or political realities in the new Canada, added institutional support to demands for provincial inclusion in constitutional amendment. At the same time, economic and social crises, requiring a highly flexible constitution able quickly to be amended by the central authority to meet demands for efficient and effective government, were an important centripetal influence which, at the very least, did nothing to erode the convention of the mandatory involvement of Parliament in constitutional amendment.

Bearing in mind the influence of these numerous cross-pressures on the success of attempts to apply the federal principle to amendment, this portion of the chapter provides a brief synopsis of the history of the search for an amending formula.[218] It will become apparent that virtually all attempts to negotiate an amending formula have taken place within the context of federal-provincial conferences. In essence, Canada's political tradition of strong cabinet dominated government has enabled the central and provincial governments to assume responsibility for arriving at an amending formula which would make possible the transfer of legal sovereignty from the UK Parliament to the Canadian Parliament and some combination of provincial

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[218] This synopsis draws heavily on Hurley, *Amending Canada's Constitution*. His study presents a compilation of Government documents, discussion papers, and other publications, in addition to insights gained after twenty years of work in the Federal-Provincial Relations Office and the Privy Council Office.

legislatures. Again, conflict over the application of the federal principle to amendment has dominated the debate over the amending formula. The proposed formulae outlined below are not itemized in detail; however, the degree of consent required of provinces before Parliament proceeds with an amendment directly affecting the division of powers is noted, for this matter is suggestive of the degree to which the central and provincial governments have sought to protect their legislative jurisdiction as a condition of agreeing to a formula.

After the participants in a federal-provincial conference, held in April 1931, concluded that the Statute of Westminster should "not be so construed as to permit the powers of the provinces to be curtailed, lessened, modified or appealed,"[219] a special committee was convened unilaterally by the House of Commons in 1935 to report on "the best method of amending the [BNA Act] so that the federal Parliament might be given adequate power to deal effectively with economic problems which were essentially national in scope."[220] As already discussed, this economic impetus for discussing an amending formula added to a growing interest in enabling Canada to become an autonomous political community. The committee sought the opinion of the provincial government executives on an amending formula, but no recommendations were made; however, another committee arose from this

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[219] Hurley, *Amending Canada's Constitution*, p. 26.
[220] ibid., p. 27.

exercise: the Continuing Committee on Constitutional Questions, which proposed an amending formula in 1936.

Responding again to the economic and social challenges of the Depression, the 1936 formula was the first to propose separating the BNA Act into different sections to be amended with procedures of varying degrees of flexibility. This was done, of course, in order to address the need for an amending formula sufficiently flexible to make amendment possible, while retaining the necessity of a high degree of provincial consent for specific matters. The 1936 proposal distinguishes between specially protected matters requiring unanimous consent; matters subject to greater flexibility requiring a special majority of the provincial legislatures (two-thirds) including a majority of the national population (55 percent); matters requiring the consent of Parliament and only those provinces concerned; and matters of concern only to the central government which could be amended by Parliament alone. In recognition of the federal principle, two matters: "property and civil rights in the province and matters of a merely local or private nature in the province- would be subject to provincial opting out"[221] were any provincial governments to be dissatisfied with any amendment.

The 1936 conference established the procedures and principles of constitutional amendment followed in subsequent conferences in 1950, 1960-61 and 1964. According to Guy Favreau, these meetings indicated that "a

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[221] ibid., p. 28.

satisfactory amending formula could only be achieved by negotiation between the federal and provincial governments."[222] Furthermore, they established a "lasting distinction between amendments affecting the federal government only, the provinces only, and the federal government and some or all of the provinces."[223] Finally, the concept of "entrenchment" became a norm of negotiation over an amending formula "in respect of matters directly affecting the fundamental historical and constitutional relationships between the federal government and the provinces, in respect of the rights of minorities and the use of the English and French languages."[224] These matters came to be considered essential to federalism and Canadian unity.

In 1949, the BNA Act was patriated, in part, by unilateral federal government action. A limited power of amendment was granted to Parliament by a 1949 British statute with the addition of section 91(1) to the BNA Act. The procedure for amendment "is expressed in the simple form of a general federal power, subject to certain defined exceptions. The ordinary process of legislation is all that is required..."[225] This power, however, did not authorize Parliament to amend the BNA Act in matters related to the exclusive powers of the provinces or the rights and privileges of the provincial legislatures and governments; provisions respecting English or French language use; or the requirement for an annual session of Parliament (except

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[222] Favreau, *The Amendment of the Constitution of Canada*, p. 22.
[223] ibid.
[224] ibid., p. 23.
[225] Scott, *Essays on the Constitution*, p. 203.

in times of real or apprehended war).[226] In 1949, appeals to the JCPC were abolished and the Supreme Court of Canada became the final interpreter of the BNA Act.[227] At this time, federally appointed judges became the arbitrators of jurisdictional disputes between the central and provincial governments.[228]

With the constitution now partially patriated, Prime Minister Saint-Laurent convened a federal-provincial conference in 1950 to settle the question of a general amending formula; however, once again, no agreement was reached. In fact, the provinces were "highly critical of the unilateral nature of the 'partial patriation' of 1949...[as a result,] Saint-Laurent agreed that section 91(1) could be repealed, but only in the context of agreement on an overall set of procedures to amend the constitution."[229] The section was not repealed, however, until the Constitution Act 1982.

At a First Minister's Conference in July 1960, Prime Minister John Diefenbaker suggested that "the British should terminate their authority over Canada's constitution and provide that amendments be made on the basis of unanimous consent by Parliament and the provincial legislatures."[230] The reasoning of the federal government on this matter was that a more flexible formula could be agreed upon (unanimously) subsequent to

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[226] Hurley, *Amending Canada's Constitution*, p. 30.
[227] Russell, *Constitutional Odyssey*, p. 68.
[228] Also of constitutional significance in 1949 was the inclusion of Newfoundland as Canada's tenth province. Only Newfoundland itself was consulted; both Quebec and Nova Scotia indicated that there should have been provincial consultation. See Adamson, *The Fulton-Favreau Formula*, p. 151.
[229] Hurley, *Amending Canada's Constitution*, p. 31.
[230] ibid., p. 32.

patriation; still, agreement on a formula was ultimately sought prior to asking the UK Parliament to take action. Among other aspects of the proposed Fulton formula of 1960,[231] adherence to the federal principle was reaffirmed in the procedure affecting the division of powers: "laws related to the powers, rights and privileges of the provinces, to the use of the English and French languages, to the minimum representation...of a province in the House of Commons or to the...amendment procedures would require the unanimous consent of the provincial legislatures."[232]

The rigidity of this procedure would be compensated for by the inclusion of a "specific amendment respecting the distribution of powers."[233] Although not part of the amending formula itself, under the proposed section 94A of the BNA Act, "Parliament would be empowered to delegate the power to make laws in any area of federal legislative jurisdiction if at least four provinces agreed to the delegation."[234] Conversely, four provinces could delegate legislative jurisdiction to Parliament; however, "whatever was delegated could be recalled at any time by Parliament or the provincial legislatures."[235]

In 1964, Prime Minister Lester Pearson and the premiers resumed the patriation debate at the First Minister's Conference at Charlottetown.

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[231] For example, the general procedure required two-thirds of the provinces containing 50 percent of the population.
[232] Hurley, *Amending Canada's Constitution,* p. 33.
[233] ibid.
[234] ibid.
[235] ibid.

Earlier that year, attorneys-general, meeting with the federal attorney-general Guy Favreau, developed the Fulton-Favreau Formula which initially was agreeable to all first ministers. The Fulton-Favreau formula included the requirement of provincial unanimity for amendments affecting provincial legislative jurisdiction; the constitutional rights and privileges granted to provincial legislatures or governments; the assets or property of a province; and the use of the English or French language.[236] A number of additional exceptions to the authority of Parliament to amend the BNA Act in matters "in relation to the executive government of Canada, and the Senate and House of Commons," granted under section 91(1), were also detailed: any amendment to these excepted matters would also require the unanimous consent of the provinces.[237]

This attempt at patriation is of particular significance because of the appearance of the practice, in Quebec, of "seeking legislative approval of proposed constitutional amendments before giving its definitive consent."[238] This practice would not, at least in January 1965, lead to the automatic ratification of the Fulton-Favreau formula by the Quebec legislature. Opposition arose not to the formula itself, but rather to the lack of concurrent changes to the division of powers sought by Quebec. At a *colloque* organized by the Universite de Montreal to discuss the formula, Jacques-Yvan Morin

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[236] ibid., p. 185.
[237] These matters are listed in section 6 of Part I of the proposed Fulton-Favreau formula.
[238] Hurley, *Amending Canada's Constitution*, p. 34.

argued that, without a new distribution of powers, the rigidity of Fulton-Favreau "would become a straight jacket that would prevent Quebec from achieving the powers [Morin] deemed essential for its future progress."[239] With public opinion in favour of the position taken by Morin, Quebec Premier Jean Lesage, in spite of his own expressed support for the formula, wrote the Prime Minister in January 1966 "to say that he would no longer seek the consent of Quebec's legislative assembly to the Fulton-Favreau formula, which was a precondition for that province's acceptance of the terms of patriation."[240] This is the first instance of a public role in the patriation debate; the 1964 conference also marks the emerging trend of debate over the amending formula to proceed only in conjunction with demands, particularly of Quebec, for specific changes to the division of powers.

In February 1968 the central and provincial governments initiated a comprehensive (and televised) review of the constitution which covered a wide-range of constitutional issues including the amending formula. Between February 1968 and September 1970, "there were five meetings of first ministers, eight meetings of ministers, twelve meetings of officials and fourteen sub-committee meetings of officials."[241] The Victoria amending formula emerged from three years of such intergovernmental negotiation during which time an attempt was made to "find a more flexible approach to

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[239] ibid., p. 35.
[240] ibid.
[241] ibid., p. 39.

amendment than the Fulton-Favreau formula of 1964, which required unanimous consent for key issues, such as the distribution of powers."[242]

The existing formula for Senate representation,[243] as laid out in the BNA Act, provides the foundation for the Victoria formula. It divides Canada into four regions for the purposes of amending those parts of the Constitution which could not be amended by Parliament acting alone (matters relating to the executive government, Senate and House of Commons, with some restrictions); by the provincial legislatures acting alone (provincial constitutions, with restrictions); and by Parliament and only those provincial legislatures concerned (in the case of bilateral or multilateral amendments).[244]

The general procedure of the Victoria formula, which would be used to amend the constitutional division of powers, would require the approval of the legislature of any province having or having at one time had 25 percent of the population; thus both Quebec and Ontario would be assured a veto in perpetuity.[245] In addition, at least two of the legislatures of the four Atlantic provinces, and the legislatures of at least two of the four Western provinces carrying 50 percent of the population of those four provinces would be

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[242] ibid., p. 37.
[243] Ontario and Quebec each have 24; the four Western provinces have 24 combined (six senators each); the Maritime provinces have 24 combined (10, 10 and 4 for PEI); with the symmetry imbalanced by 6 seats for Newfoundland and 1 each for the territories.
[244] Hurley, *Amending Canada's Constitution*, p. 37.
[245] Of course, any province could gain a veto were its population to grow above 25 percent.

required.[246] This proposal is the first to reject the unanimous consent of provincial governments to amendments affecting at least some matters under provincial jurisdiction (listed in section 92). Provincial unanimity would be replaced by the unanimous consent of each of the four regions. The Victoria formula, however, was only part of a broader package of constitutional reforms called the Canadian Constitutional Charter 1971 (the Victoria Charter), and the Charter, and the amending formula with it, was eventually rejected by Quebec because of disagreements not directly related to the amending formula.

The next exercise was initiated by Prime Minister Pierre Trudeau in 1975. During a private meeting of first ministers, "[t]here was an agreement in principle [reached by] first ministers on the desirability of patriating the Constitution with an amending formula and of leaving the issue of substantive changes to the constitution aside until after patriation had been achieved."[247] Quebec, however, agreed to proceed with discussion only on the condition that the French language and culture receive concurrent "constitutional guarantees."[248] The Victoria formula would provide a point of departure. The process at this time was unusual for "[constitutional] discussions would be 'secret': there would be no public announcement that

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[246] ibid., p. 38. The population stipulation in the Western region is a compromise designed to appease the British Columbia government's desire to be considered a separate region; only if all three prairie provinces supported an amendment would BC fail to have an effective veto.
[247] ibid., p. 41.
[248] ibid.

the patriation debate had been opened up again."[249] Furthermore, discussion concerning a new amending formula would proceed through a series of bilateral meetings between the premiers and the Secretary to the Cabinet for Federal-Provincial Relations, with supporting provincial and federal officials.

Once again, it became clear to the central government that Quebec's assent to any amending formula would likely require significant changes to the division of powers. Premier Bourassa made it known in a discussion with the Prime Minister on March 5 1976 that "the guarantees he envisaged might well relate to changes in the distribution of powers to provide for Quebec jurisdiction over matters deemed essential for the French language and culture."[250] The federal government, however, proceeded to draft a proposed amending formula which would patriate the constitution on the basis of the Victoria formula (without the addition of British Columbia as a separate region as had been advocated by that province).

Failing agreement with Quebec, the Prime Minister stated in March 1976 that "the Government of Canada 'is not prepared to contemplate the continuation' of British legislative authority over Canada's constitution."[251] Prime Minister Trudeau went on to suggest that patriation could be attained by way of an address of the two houses of the Canadian Parliament to the Crown and set out three alternatives for consideration: patriation could be

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[249] ibid.
[250] ibid., p. 42.
[251] ibid., p. 43.

achieved in a similar manner to that proposed in 1960 with amendments requiring provincial unanimity until a permanent formula could be established for those parts of the BNA Act not already amendable in Canada under section 91(1); the Victoria formula could serve as the basis of a permanent formula entrenched at the time of patriation; or the whole constitution could be placed under the unanimity procedure until such time as a formula could be agreed upon.[252] When asked if the UK Parliament would act on a unilateral action on the part of the Canadian Parliament, the British Secretary of State replied that indeed "[i]f a request to effect such a change were to be received...it would be in accordance with precedent...for [the UK] Parliament to enact appropriate legislation in compliance with the request."[253]

In October 1976, after the conclusion of a conference of premiers, Premier Lougheed wrote to the Prime Minister stating that, with respect to the amending formula, not all provincial governments were in agreement: eight approved of the Victoria formula; BC continued its demand for a separate veto; and Alberta maintained that "a constitutional amending formula should not permit an amendment that would take away rights, proprietary interests and jurisdiction from any province without the concurrence of that province."[254]

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[252] ibid.
[253] ibid., p. 44.
[254] ibid., p. 45.

The federal government, however, did not take up discussion concerning an amending formula again until 1978; and not before it had established its own official position on the matter. The federal government tabled a report entitled *A Time for Action* setting out its position on amendment. A first phase, covering matters under federal jurisdiction, would proceed through unilateral federal action. A second phase, covering areas in which provincial consent would be required (including an amending formula), would proceed only with the involvement of the provinces.[255] For the first time since the patriation debate began, the federal government, in a discussion paper know as *The Canadian Constitution and Constitutional Amendment,* "examined the possibility of supplementing the Victoria formula with a public 'appeal procedure': if sufficient provincial [legislatures] supported an amendment so that it would pass in the four regions and Parliament were opposed, an appeal to the people through a referendum could be held..."[256]

Prime Minister Trudeau convened a first ministers' conference in Ottawa in late 1978 at which time it was agreed to continue talks in February 1979 when a Continuing Committee of Ministers on the Constitution (CCMC) could table the results of a series of meetings held in

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[255] Russell, *Constitutional Odyssey,* pp. 100-101.

[256] ibid., p. 48. Similarly, if three regions and Parliament agreed to an amendment, then a referendum could be held in the region with the dissenting government. The paper also considered the possibility of employing the referendum exclusively for certain amendments and of a popular initiative whereby amendments could be proposed by a certain number of registered voters.

Mont Ste-Marie, Toronto, and Vancouver. The Quebec government did not participate in debate regarding patriation with an amending formula for the reason that it "should not be discussed until after agreement had been reached on the substance of a new Constitution."[257]

At the Toronto meeting, the provinces reached a consensus on an amending formula requiring unanimity for the amendment of matters on a short list (including the formula itself, and provincial ownership of natural resources), and the consent of Parliament and at least seven provincial legislatures with 85 percent of the population as the terms of a general procedure.[258] At the Vancouver meeting, the Alberta government presented a general amending procedure much like the one proposed in 1936 (and adopted in 1982). In it, seven provincial legislatures with 50 percent of the population would have to accompany any amendment supported by Parliament, but "a province could dissent and opt out of any amendment affecting the powers, rights, privileges, assets, property or natural resources of the province."[259] When the first ministers reconvened in February 1979, four formulas were submitted for discussion by the CCMC: the Toronto "consensus"; the Vancouver formula; the Victoria formula; and the Fulton-Favreau formula. By the end of the conference, however, there was agreement only that no attempts should be made to change the monarchy.

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[257] ibid., p. 49.
[258] ibid.
[259] ibid., p. 50.

After the May 1980 Quebec referendum on sovereignty-association, negotiations between the central and provincial governments were conducted on a broad range of matters including patriation and an amending formula. Although it was another example of executive federalism, for the first time "[t]he leaders of Canada's Aboriginal peoples were encouraged to make representation to governments on these issues."[260] A first ministers' meeting held in September 1980, however, did not result in unanimous consent on any of the items on the agenda. At this conference, a secret and controversial memorandum to the federal cabinet, known as the "Kirby Memorandum", was circulated among premiers; in it was restated the federal position on patriation: "Parliament may adopt a Joint Address to the Queen with or without the consent of the provinces. This should be maintained and articulated again."[261] However, the memorandum declared the federal government willing to consider the Vancouver formula (preferred by a majority of the provinces) if opting-out were not made available for certain matters of universal applicability such as reform of the Senate. For matters of particular concern to Quebec (such as the Supreme Court, and French and English language use) its consent would be made obligatory (according to terms of the Victoria formula, the Toronto consensus, or perhaps the Vancouver consensus with the addition of Quebec consent).[262]

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[260] ibid., p. 52.
[261] ibid., p. 205.
[262] Interestingly, the federal government reintroduced the possibility that citizens be able to initiate referendums on an amendment proposal as had been suggested in an earlier discussion paper.

In response, all first ministers, in a document called the "Chateau consensus," agreed to support the Vancouver formula for "matter[s] subject to opting-out, with provision for financial arrangements between governments."[263] The Victoria formula, however, would serve as the amending formula for "other matters;" how matters would be divided between the two formulas was not made explicit. In response to the position of the federal government which was to assert its legal ability unilaterally to patriate the constitution, the Chateau consensus expressed support for the delay of patriation until the unanimous approval of all provincial governments could be achieved. When the federal government refused to accept the amending formula laid out in the Chateau consensus, provincial governments no longer considered themselves bound to it: Ontario and New Brunswick rejected the consensus position.[264]

In October 1980, Prime Minister Trudeau decided to proceed with the patriation of the constitution without the consent of the provinces. In its final draft, drawn in April 1981, the federal proposal allowed unilateral patriation to proceed on the basis of future amendments requiring the unanimous consent of provincial legislatures, until such time that a permanent amending formula would be consented to by all provinces.[265] A special joint

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[263] Hurley, *Amending Canada's Constitution*, p. 209.
[264] ibid., p. 54.
[265] ibid., p. 55. Were no formula produced by the unanimous consent of Parliament and the provincial legislatures within two years, the Victoria formula and any proposal agreeable to seven provincial legislatures representing 80 percent of the population would be put to a referendum requiring support in each of the four regions (established in the Victoria formula). Were no alternative to the Victoria formula to be proposed, or if a referendum were

committee of the Senate and House of Commons was assembled to address the Victoria formula, preferred by the federal government; and the Vancouver formula, preferred by a majority of the provinces. Televised hearings began in November 1980 and popular support was mobilized for the federal "unilateral" proposal; such support, not shared by the provincial governments, appears largely to have been based on the notion of entrenching rights in a Charter of Rights and Freedoms which was a major component of the federal proposal. The provincial governments, with the exception of Ontario and New Brunswick, challenged the federal position in the courts resulting in the *Patriation Reference* case.[266] The eight provinces opposed to the federal proposal also published a statement calling for patriation on the basis of the Vancouver formula "complemented with a constitutional requirement for reasonable compensation by Canada to any province that availed itself of the opting-out provision, and special provisions respecting the delegation of legislative authority."[267]

Of course the decision of the Supreme Court, requiring substantial provincial consent, had the effect of de-legitimizing the federal government's proposed unilateral action; only the Ontario and New Brunswick

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not to achieve the necessary consent, then the Victoria formula would become the permanent amending formula.

[266] The courts of last resort in Manitoba and Quebec ruled in favour of the federal government's unilateral action but in Newfoundland, ruled against it. The Supreme Court ruled in favour of the federal position, although admitted a convention requiring substantial provincial consent. In a separate case, the Supreme Court ruled that Quebec enjoys no legal right of veto with respect to patriation and constitutional amendment.

[267] Hurley, *Amending Canada's Constitution*, p. 56.

governments supported the federal government. Thus, a first ministers' conference convened in November 1981 to seek broader provincial support for patriation. Fearing a deadlock between Ontario and New Brunswick, and the provinces opposed to unilateral federal action to patriate the constitution, Trudeau proposed a referendum to resolve the potential impasse over an amending formula: Canadians would be asked whether they supported the Victoria formula or the Vancouver formula.[268] In the case of a stalemate, unanimity would become the general amending formula. Only Premier Levesque of Quebec supported putting an amending formula to a referendum. The support of the other seven premiers for the "Chateau consensus" disintegrated when Levesque expressed his support for the referendum proposal; as a result, the other provincial governments began to negotiate with each other and with the central government. Soon after, a compromise was reached. The federal government accepted the Vancouver formula (with obligation to compensate provinces which opted-out), while the provinces agreed to accept the Charter with the inclusion of the "notwithstanding clause." All provincial governments accepted the compromise except Quebec which had accepted the earlier Chateau consensus only on condition that it receive compensation were it to opt-out of an amendment.[269] Although this compromise led to the entrenchment of an amending formula in the

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[268] To pass, a concurrent majority of all Canadians and a majority in each of the four regions (Atlantic, Quebec, Ontario and the West).

[269] All governments later agreed to provide compensation to a province which opted out of an amendment transferring jurisdiction over education or other cultural matters to Parliament.

Constitution Act 1982, thus facilitating the patriation of the constitution, debate over the amending formula did not cease.

The amending formula adopted at the time of patriation is set out in Part V (sections 38 to 49) of the Constitution Act, 1982. As has been indicated, for many years it has been accepted practice for the constitution to be broken down into component parts with each part requiring an amendment procedure of a varying degree of stringency. The Constitution Act 1982 provides five such procedures for amending the constitution:

The **general procedure** in section 38 requires the consent of Parliament and two-thirds of the provincial legislatures with 50 percent of the population. It applies to all amendments which do not fall under one of the other procedures, including most amendments to the division of powers, the powers of the House of Commons and Senate, the Supreme Court of Canada (except its composition) and the creation of new provinces. It permits opting out for all matters transferring powers from the provinces to Parliament, and compensation for education and culture.

The **unanimity** procedure in section 41 requires the consent of Parliament and the legislative assemblies of all provinces. It applies to changes to the monarchy, the minimum number of members in the House of Commons to which a province is entitled, the general use of the English or French languages, the composition of the Supreme Court of Canada, and any amendment to the amending formulas.

The **bilateral** procedure in section 43 requires only the consent of Parliament and two or more provinces. It applies to an amendment in relation to any provision that applies to one or more, but not all provinces, such as alterations to provincial boundaries or amendments to a provision relating to the use of the English or French language within a province. It cannot be used for amendments to the division of powers.

The **federal unilateral** procedure in section 44 permits Parliament to make amendments related to the federal executive, the House of Commons and Senate of Canada, which do not affect their powers or the method of selection.

Finally, the **provincial unilateral** procedure in section 45 allows the legislature of each province to amend the constitution of the province so long as the amendments do not affect provisions that can only be amended pursuant to one of the other amending procedures, such as the office of the lieutenant governor.[270]

The general or "7/50" procedure described in section 38(1) of the constitution retains a veto for the House of Commons over all 7/50 amendments; none may be proclaimed without its consent. Although the Senate has a suspensive veto over such amendments, "no other legislative body, acting alone, can veto a 7/50 amendment."[271] While it is true that the

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[270] This description of Part V of the *Constitution Act, 1982* (the amending formula) is taken from Canada, Special Joint Committee of the Senate and the House of Commons, *Report of the Special Joint Committee on a Renewed Canada* (Ottawa, 1992), pp. 91-92.
[271] Hurley, *Amending Canada's Constitution*, p. 70

50 percent population stipulation prevents all provinces from enjoying uniform influence over the success or failure of an amendment,[272] it remains the case that no province enjoys an explicit veto over potential amendments;[273] thus, it may be stated that the 7/50 procedure recalls the equality of provinces with respect to the application of the federal principle to constitutional amendment. That the amending formula adopted in 1982 acknowledges the equality of the provinces is accentuated by the inclusion of section 38(3) which stipulates that an amendment "shall not have effect in a province the legislative assembly of which has expressed its dissent thereto..."[274] Finally, section 41 declares the requirement of the consent of the legislative assembly of each province in order to amend the amending formula itself.

Although the achievement of an amending formula permitted the patriation of the constitution, Cairns makes the point that, without the consent of all provinces, the settlement reached between governments in 1982 "was acclaimed more for its temporary closure of the constitutional

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[272] For example, Ontario and Quebec together could prevent an amendment supported by 8 provinces and the federal government. This population stipulation represents the attempt to provide a degree of individual equality in the formula.

[273] While true of the formal amending formula, in 1995, Quebec, Ontario, British Columbia, and, in effect, Alberta, all received a veto on amendments introduced by Cabinet ministers into the House of Commons by virtue of an ordinary statute: Bill C-110.

[274] Hurley, *Amending Canada's Constitution,* p. 261. Of course, provincial equality in the amending process is more obvious in section 41 which requires the unanimous consent of Parliament and all provincial legislatures for a limited range of matters.

debate than for its intrinsic qualities or its likely contribution to resolving the constitutional malaise of a disharmonious federal polity."[275]

The failed Meech Lake Accord of 1987-1990 was an attempt to address the lack of legitimacy of the Constitution Act 1982 in Quebec which, of course, did not consent to the terms of patriation. With respect to the amending formula, the Accord would have effected two changes: it would have provided compensation in all cases in which a province opted out of an amendment transferring provincial jurisdiction to Parliament (which was the condition for Quebec's acceptance of the Vancouver formula); and it would have expanded the list of matters subject to unanimous consent. Senate reform, all aspects of the Supreme Court, the principle of proportionate representation of the provinces in the House of Commons and the creation of new provinces, would require unanimity before amendment could be achieved.[276] In effect, all provinces were allotted a veto over matters where opting-out was not applicable.

The next attempt at broad constitutional change, the Charlottetown Consensus Report of 1992 began the process of broad popular inclusion in the process of constitutional reform, including the amending formula; indeed, before the federal government published its proposals in *Shaping Canada's Future Together,* a great deal of popular consultation was initiated. Like the Meech Lake Accord, Charlottetown proposed obligatory compensation for

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[275] Cairns, *Disruptions,* p. 66.
[276] Hurley, *Amending Canada's Constitution,* p. 110.

provinces which opted out of amendments relating to the transfer of provincial jurisdiction to Parliament. The Accord also proposed a similar expansion of matters requiring unanimity with the following differences: judge selection would remain under the general formula; and the creation of new provinces, changes to the "Senate floor," and changes to the number and qualifications of Aboriginal Senators, would require the unanimity rule.[277] Finally, a procedure was proposed which would have required "the 'substantial consent' of the Aboriginal peoples referred to in an amendment directly referring to or amending a provision of the Constitution that directly referred to one or more of the Aboriginal peoples of Canada or their governments."[278] Any of the Aboriginal peoples of Canada could initiate such an amendment. This proposal was, of course, put to referendum[279] in October 1992 but was not passed.

Three years later, in October 1995, Prime Minister Jean Chretien responded to the Quebec referendum campaign on sovereignty by proposing legislation which would prevent Parliament from proceeding with any constitutional change affecting Quebec unless Quebecers themselves consented.[280] The legislation "provided that no cabinet minister shall present

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[277] ibid., p. 126.
[278] ibid.
[279] As a political matter, first ministers agreed to require that the referendum pass in all provinces before it was considered to have been consented to. By October 1992, both BC and Alberta had enacted legislation requiring a referendum on a proposed amendment before being a resolution is introduced into the legislature (BC) or adopted (Alberta).
[280] Bill C-110, which limits the central government's capacity to introduce an amendment resolution into the House of Commons, was introduced on November 29 1995.

a constitutional amendment resolution in Parliament unless the amendment has first been consented to by a majority of provinces including: Ontario, Quebec, two provinces in the Atlantic region (with 50 percent of the population), and two provinces in the West (again with 50 percent of the population). Whether or not the provincial legislatures would have to be party to that consent was not specified. In December 1995, the federal government introduced further legislation recognizing BC as a fifth region on the same basis of Ontario and Quebec; furthermore, the legislation required the consent of two prairie provinces representing 50 percent of the population of that region (effectively giving Alberta a veto) was also enacted.[281]

In concluding this chapter, it is worth repeating Smith's assertion that "uncertainty over the application of the federal principle to amendment plagued all...efforts to fashion an acceptable formula." This uncertainty, I contend, is linked to the discussion in the previous chapter of the way in which the Fathers of Confederation conceptualized sovereignty. Indeed, they understood sovereignty to be parliamentary and therefore indivisible in nature; they were limited to conceptualizing it as lodged either in the central Parliament (rendering the provinces mere delegates of the centre) or in the provincial legislatures (rendering, instead, the centre no more than a

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[281] Alan Cairns has written of the pervasive distrust participants in constitutional amendment feel for each other. He comment that this distrust "generates a competitive search for ironclad constitutional protection in the form of vetoes...[and] will lead to ingenious attempts...to achieve by political processes what cannot be achieved by formal amendment." See Cairns, *Reconfigurations*, p. 154. Citizens too feel distrust for their elected politicians. One way this is indicated is in their desire to participate in basic constitutional reform.

delegate of the provinces). Of course, the Fathers, though acknowledging provincial control over matters of a local nature, believed themselves to have corrected the mistakes of the unstable American federation by placing all of the powers of sovereignty in the central Parliament. They could see, then, that the sovereign authority to amend the constitution could not be reconciled with the federal principle which necessarily left exclusive control over local matters to the provincial legislatures.[282]

What this suggests is that the application of the federal principle to amendment cannot claim to resolve the issue of the location of sovereignty in Canada. Indeed, the patriation debate raises but does not resolve the issue. Evidence for this assertion is provided by the Supreme Court's ruling on the *Patriation Reference* case. In its decision, the Court employed the federal principle rather than the concept of sovereignty to explain "why as a matter of constitutional convention 'substantial' provincial agreement is required before any constitutional amendment is made."[283]

As Justice Martland stated in defending the Court's ruling, ""The reason for the rule (of substantial provincial consent) is the federal principle...The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by

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[282] This assumes, of course, that the Fathers believed the central Parliament to be the sovereign authority, irrespective of their uncertainty regarding the reconciliation of sovereignty (entailing that no legislature bind a future one) with provincial autonomy over local matters; such an assumption is supported by the letter of the Constitution (BNA) Act 1867.

[283] Robert Vipond, "Whatever became of the Compact Theory?," p. 804.

the unilateral action of the federal authorities.'"[284] This reasoning would also indicate the rationale behind the conclusion of the Nova Scotia Select Committee on Constitutional Matters to the effect that "sovereignty as a concept is alien to federalism because it necessarily implies a condition of inferiority in terms of law and the constitution between differing levels of government. This circumstance is unknown to federal arrangements."[285] The Select Committee resolves this issue by banishing sovereignty from political discourse, choosing instead to conceptualize governments as possessing not sovereignty, but rather autonomy, i.e., "the power of self-government, in its own areas of duty."[286]

Again, it is precisely the fact that sovereignty (as the Fathers conceptualized it) implies the inferiority of one order of government to the other, which made the Fathers so uncertain about the application of the federal principle to the sovereign authority to amend the constitution. As the lack of an amending formula in the constitution suggests, the Fathers' either/or conceptualization of sovereignty forced them to leave unresolved the issue of the location of sovereignty in Canada. This was not overly

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[284] ibid. I believe, however, that this conceptualization of federalism was not yet available to the Fathers even as they recognized that the central government could not unilaterally change the division of powers (as section 94 indicates); for example, clauses such as reservation and disallowance were not obsolete in the early years of Confederation. It was not until the JCPC interpreted the constitution that a federal union could be declared to mean "that power is divided between two levels of government- federal and provincial- each of which is legally independent of the other, and each of which therefore has the right to legislate on matters entrusted to it by the constitution without fear of interference from the other." ibid., p. 803.

[285] Nova Scotia, *Report of the Select Committee*, p. 5.

[286] ibid.

problematic in 1867 because the imperial Parliament was already the *de jure* sovereign. It simply retained its sovereign authority over the constitution. The consequence of holding unresolved the issue of sovereignty in Canada, however, is that the convention of substantial provincial consent to amendment was able freely to develop as a constitutional norm despite the intentions of the Fathers to lodge sovereignty in the central Parliament. Furthermore, as is indicated in this chapter, the decentralizing trends in the early development of the federation reinforced the justification of the necessity of provincial inclusion in constitutional amendment. This, in turn, set the terms of the amending formula entrenched in the Constitution Act 1982. The fact remains, however, that the logical tension in the Canadian federation between the sovereign centre and the sovereign parts has never definitively been settled. Instead, the 1982 amending formula was justified by the Supreme Court as respecting the federal principle. More importantly, the problem of the application of the federal principle to amendment was resolved by describing the federal principle as protecting the autonomy (as opposed to sovereignty) of each order of government.

This seems innocuous enough until one considers that it is only sovereignty which speaks to the purposes for which governmental power will be exercised; autonomy tells us nothing about "what the ends of government are, [nothing] about the source of legitimate power, in short about who owns

the constitution."[287] Indicating the autonomy of the two orders of government speaks only to the legacy of imperial judicial review which is to disregard sovereignty altogether in favour of ensconcing the terms of the constitution into "watertight compartments." As a result, the federal principle has come to mean no more than "the absence of overriding powers, or political ambitions, of the other level of government."[288]

Sanford Lakoff writes that, for the ancient Greeks, the concept of autonomy began as a recognition of the independence of one *polis* from another.[289] At the same time, however, in that age of direct citizen participation in the affairs of the state, autonomy was considered both the essence of democratic citizenship *and* as a personal characteristic: "autonomy, then, in the classical sense, refers both to self-government by citizens and self-determination by individuals."[290] This suggests that, for the ancient Greeks, the autonomy of the polis served the end of individual self-determination. Of course, today's "polis" is necessarily governed by citizen representatives; the claim to autonomy of each order of government, therefore, lacks the immediate connection to individual autonomy. Thus, when the Nova Scotia Select Committee use the term autonomy, it means no more than the supremacy of a legislature over a limited sphere of

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[287] ibid.
[288] ibid., p. 803.
[289] Sanford Lakoff, " Between Either/Or and More or Less: Sovereignty Versus Autonomy Under Federalism," *Publius*, 24, 1 (Winter 1994), p. 73.
[290] Sanford Lakoff, "Autonomy and Liberal Democracy," *The Review of Politics*, 52, 3 (Summer 1990), p. 389.

jurisdiction. Legislative autonomy, however, says nothing about its connection to the enhancement or protection of *individual* self-determination; it asserts only that a legislature is justified in protecting its jurisdiction.

As was noted in the previous chapter, British parliamentary sovereignty was understood by Blackstone to derive its legitimacy from the belief that it served the end of reducing the likelihood that the English people would be subject to arbitrary legislation, or to legislation representative of only a particular faction. On the other hand, Canadian legislatures, constitutionally endowed with legislative autonomy, need serve no end affirmed by a principle of legitimacy; they merely act to preserve their very autonomy.[291]

As Richard Simeon identifies, in Canada, the fusion of executives and legislatures combined with strong party discipline, "powerfully contribut[ed] to the distinctive Canadian pattern of intergovernmental relations known as 'executive federalism' and to policy-making through direct intergovernmental bargaining which has been labelled 'federal-provincial diplomacy.'"[292] I assert that for many Canadians, popular disaffection with constitutional politics is rooted only tangentially to the closed nature of the processes of constitutional negotiation; in fact, Canadians do *not* demand participation in the process of

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[291] An obvious exception to this claim is the Quebec government which is more explicit in linking its position on constitutional reform to the protection of a particular culture and linguistic tradition.

[292] Richard Simeon, "Canada and the United States: Lessons from the North American Experience," in *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World,* (eds.) Karen Knop, Sylvia Ostry, Richard Simeon, and Katherine Swinton (Vancouver: UBC Press, 1995), p. 262.

constitutional reform for the reason that they have come to value more substantive participation as an end in itself. In fact, popular disaffection comes with the realization that the acrimonious negotiation between orders of government over the protection of legislative autonomy bears no explicit connection to citizens themselves. Charles Taylor writes that liberal democracies operate on a common understanding that they are ultimately ruled by the people: "To be a member of a sovereign people is to be one of equal and autonomous citizens."[293] Yet the patriation debate shows little more than the fact that, in Canada, to be a member of a sovereign people is to be one of equal and autonomous provinces.[294]

Philip Resnick has accused Canadians of possessing a deferential political culture which suffers from an excess of institutional legitimacy. He points to the decision to "'perpetuate British institutions on the continent' and 'adhere to the protection of the British Crown'"[295] as instances of this "implicit rejection of more popular notions of sovereignty."[296] This chapter, however, began by indicating that Canadians are now seeking inclusion in the process of constitutional amendment as a more adequate expression of

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[293] Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Kingston: McGill-Queen's University Press, 1993), p. 188.

[294] It is interesting to speculate on what the Reform Party of Canada has in mind in asserting as a first principle: "we affirm our commitment to Canada as one nation, indivisible, and to our vision of Canada as a balanced federation of equal provinces and citizens." See The Reform Party of Canada, *The Blue Book: A Fresh Start for Canadians. 1996-1997 Principles and Policies of the Reform Party of Canada,* 1997, p. 6.

[295] Philip Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Kingston: McGill-Queen's University Press, 1990), p. 91. This lingering political culture could explain why Canadians have for so long refrained from expressing mass public dissatisfaction with elite led constitutional politics.

[296] ibid.

the belief that they are the ultimate source of legitimate legislative authority in Canada. As Cairns points out, "no sooner had the new amending formula been installed than the constitutional culture in which it was to operate began to diverge from the formula's implicitly elitist assumptions."[297] I contend that Canadians no longer suffer from an excess of institutional legitimacy. Thus, the amending process "must be moved in the direction of reconciling the traditional dominance of governments with the emerging challenge of a no longer deferential citizen-body."[298]

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[297] Alan Cairns, *Reconfigurations*, p. 149.

[298] ibid., p. 151. Why the citizen body is no longer deferential is an interesting and expansive question, but one not tackled in this thesis. Cairns himself suggests that this phenomenon is recent and "charter induced." Others such as Juergen Habermas would be just as likely to suggest (in a vaguely similar way) that the "juridification of society" makes individuals more aware of (and thus more concerned about) the role of the state in regulating ways of life previously left to the dictates of tradition, religion, and the neutral equilibrium of the marketplace. I follow Peter Russell in noting that "my concern is not with the details of the change in Canadian constitutionalism but with the simple fact that this fundamental change has taken place." See introduction to Russell, *Constitutional Odyssey*.

Chapter Three:
Popular Sovereignty as a Theory of Constitutionalism

On its front cover the editors of *British Columbia Report* recently described their vision of Canadian federalism as: The Choice- Quebec as a distinct society or Canada as a union of ten equal provinces.[299] Guy Laforest on the other hand, laments what he perceives to be the loss of "the dualist vision of federalism as an agreement between two distinct societies- between two nations, or two founding people."[300] For his part, Jeremy Webber reminds us that, through the eyes of Aboriginal Peoples, Canada "seems unwilling to ensure an honourable place for the First Nations within its contemporary constitutional structure."[301] Alan Cairns adds that the electorate "reveals a multicultural society struggling for constitutional expression in a federal constitutional order that defines Canadians in the traditional terms of province and country."[302] Charles Taylor, sensitive to the "deep diversity" of constitutional visions, urges Canadians to innovate, to suppose that we lived in a country "where the common understanding was that there was more than one formula for citizenship and where we could live with the fact that different people related to different formulae."[303]

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[299] May 26, 1997.
[300] Guy Laforest, *Trudeau and the End of a Canadian Dream* (Kingston: McGill-Queen's University Press, 1995), p. 5.
[301] Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston: McGill-Queen's University Press, 1994), p. 6.
[302] Alan Cairns, "The Charlottetown Accord: Multinational Canada v. Federalism," in *Constitutional Predicament: Canada After the Referendum of 1992,* in (ed.) Curtis Cook (Kingston: McGill-Queen's University Press, 1994), p. 26.
[303] Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Kingston: McGill-Queen's University Press, 1994), p. 199.

Richard Simeon, however, qualifies such claims by declaring that the "first and most fundamental problem with constitutional politics as the politics of vision is that there are so many of them in contention. To ask of a Constitution that it enshrine one is to require it to reject many others. It is therefore to do violence to the genuine diversity and fluidity of Canadian society."[304] Indeed, contemporary Canadian constitutional discourse is preoccupied with enumerating and reflecting upon diverse constitutional visions of the Canadian political community. Although the proliferation of publicly articulated visions may be a relatively new phenomenon, disagreement over the character of the Canadian political community is a long-standing political tradition.

It is my belief that in the present focus on the politics of vision, and on the ways in which competing visions might be eradicated from or accommodated in political structures, we are paying insufficient attention to fundamental political questions which are *absent* from discussions of first principles in Canada. It is my contention that we can no longer leave unexamined a tension in our basic political institutions because so much is being demanded of them at a time of serious self-reflection about the character of our political community. Because the advocates of proliferating constitutional visions demand the inclusion and recognition of their own

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[304] Richard Simeon, "Meech Lake and Visions of Canada," in *Competing Constitutional Visions: The Meech Lake Accord*, in (ed.) K.E. Swinton and C.J. Rogerson (Toronto: Carswell, 1988), p. 299.

particular vision in our basic constitutional structure, it is essential that we admit the existence of persistent questions about the nature and purpose of political authority in Canada, questions which remain unasked and unanswered.

One way to illustrate what is being argued in this chapter is to turn to the teachings of Aristotle. In the words of William Mathie, Aristotle defines a political community as a kind of having or doing something in common: "As human action it must aim at some good. As the political community exercises authority over all things we may have or do, separately or in groups within it, we must suppose that the good at which the political community aims is the greatest or most comprehensive of human goods."[305] This greatest of human goods is, quite simply, a share in living well, in noble activity. For Aristotle, it is the regime which defines precisely what it is that members of a political community have or do in common. Furthermore, it is the regime which comprises the identity of the political community; this identity may be connected to the notion of the political community as existing for the sake of "living well," by indicating that the regime "is a kind of 'deliberate choice' of some concrete realization of living well available to its members under some

[305] William Mathie, "Political Community and the Canadian Experience: Reflections on Nationalism. Federalism, and Unity," *Canadian Journal of Political Science.* XXII:I (March 1979), p. 15.

particular set of circumstances."[306] The regime, then, is both a determination of "who shall rule *and* a way of life."[307]

My claim is that popular sovereignty- the contemporary answer to the question *who shall rule?*- comprises one aspect of the very identity of the political community. The politics of vision, of course, is addressed to the way in which the governmental organs of the political community are to be arranged so as to protect (or at least not obstruct) the diverse ways of life community members may choose to have or do together. In contemporary Canadian constitutional discourse, however, *who shall rule?* is a question which is raised only implicitly, and within the context of debate over different constitutional visions. This is so for the reason that it is assumed that the issue of sovereignty is settled: the people are sovereign.

In this regard, this thesis contests Herbert McClosky's assertion that the danger which is present when a large number of citizens fail to grasp the essential principles on which a constitution is founded is "that they will fail to understand the very institutions they believe themselves defending and may end up undermining them rather than safeguarding them."[308] Instead, I contend that the danger is that citizens will fail to understand that the very

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[306] ibid., p. 16.
[307] ibid. Of course, members of a political community may agree to *not* determine a way of life in common; in Canada, for example, debate over constitutional "visions" appear focused on the most appropriate way to order political institutions so as to ensure that, indeed, they are able to protect citizens' diverse commitments to different ways of life. See Jeremy Webber, *Reimagining Canada*, Part II, for an interesting discussion along these lines.
[308] Herbert McClosky, "Consensus and Ideology in American Politics," p. 376-377. Cited in Simone Chambers, "Discourse and Democratic Practices," in *The Cambridge Companion to Habermas*, (ed.) Stephen K. White (New York: Cambridge University Press, 1995), p. 245.

institutions they believe themselves defending undermine the essential principles on which they believe a constitution is founded. I have chosen the concept sovereignty to assist in the project of throwing into relief the ambiguity regarding the nature of legislative authority in Canada which is the result of the marriage of parliamentary government and federalism. By this I mean to suggest that, because parliamentary federalism necessarily rejects sovereignty as alien, the "conflict of interest" between popular and parliamentary sovereignty remains insufficiently examined. It is my contention that our ability constructively to address competing constitutional visions is obstructed by the legacy of parliamentary sovereignty, a legacy which continues to influence the character of constitutional reform proposals. If we address and resolve the question of who is sovereign in Canada- people or legislatures- we will be better equipped to address the politics of vision because the debate will be less conditioned by Canada's "statist" legacy of parliamentary sovereignty. Of course, for citizens, the issue of sovereignty has already been settled; therefore, it is necessary to engage in the project of building representative institutions which live up to popular expectations, expectations which are determined by the belief that Canada is indeed a democratic regime.

Sovereignty is a concept which makes a claim about the way in which ultimate authority in a state should be organized, *and* the way in which that authority should be exercised so as to be considered legitimate. That

sovereignty is not a "hot" topic in the politics of vision (except in Quebec) is not surprising for, again, it is a concept which has long been kept in abeyance in Canada. According to Michael Foley's definition, a constitutional abeyance "represent[s] a form of tacit and instinctive agreement to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict."[309] The term "conveys both the element of dormant suspension implicit in what appear to be quite explicit constitutional arrangements, and the attitudinal habits of willful neglect."[310] An abeyance, however, is not a "truce" between defined positions. Rather it is a "set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution."[311] It is useful, therefore, to characterize abeyances as "compulsive hedges against the possibility of that which is unresolved being exploited and given meanings almost guaranteed to generate profound division and disillusionment."[312] Indeed, abeyances are important for their capacity "to deter the formation of conflicting positions in just those areas where the potential for conflict is most acute."[313]

Canadians vote and they expect their legislative representatives to be responsive to their needs and interests and accountable for their actions. Governmental institutions are legitimate, on this account, because the legal authority to legislate is integrally connected to the sovereign act of filling out

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[309] Michael Foley, *The Silence of Constitutions* (London: Routledge, 1989), p. 5.
[310] ibid.
[311] ibid.
[312] ibid.
[313] ibid.

a ballot which (somehow) translates into governments legislating on behalf of the people who elect them.

Yet, as I argue in chapter one, parliamentary institutions derive their authority not from citizens (although public opinion indeed limits the breadth of executive autonomy) but from parliamentary institutions themselves. Ministers are politically responsible to their legislatures but legally responsible to the Crown for their powers and actions; they "co-opt the Crown prerogative for their own ease of government and...rely on their majority support in the [legislatures] to prevent any...intrusion into the free masonry of government decision-making."[314] Canadians probably do not know (or care) about the lineage of Cabinet authority, derived as it is from the expansive and ill-defined authority of ancient Crown prerogatives; however, such issues are kept in abeyance not so much because they are issues better relegated to the annals of history, but because they contradict the principle of popular sovereignty. Nevertheless, I believe that citizens are acutely aware of the result of this constitutional obfuscation which is that the principle of popular sovereignty, expressed through parliamentary institutions, does not translate well into practice. This fact is particularly obvious when parliamentarians propose basic reforms to the constitution. Indeed, I believe that this is one reason why Canadians lay claim to a right to participate in constitutional amendment. It is not that Canadians have determined that representative

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[314] ibid., p. 94.

institutions are morally untenable; rather it is because parliamentary institutions do not live up to popular expectations about the relationship between citizen and government, relations which are structured by the belief that citizens (and not the institutions in which they are represented) are the ultimate source of legislative authority. The claim that citizens must participate in constitutional amendment, then, is a claim that parliamentary (representative) institutions are not adequate to the task citizens are led to expect of them.

In 1982, the constitution was patriated with an amending formula. The conventional conceptualization of the location of sovereignty in a federation lodges it in the authority to amend the constitutional amending formula itself. Section 41 of the Constitution Act 1982 posits that it is Parliament *and* all ten provincial legislatures which have the legal authority to amend the amending formula. To the extent that, through the achievement of the amending formula, every legal question in Canada has a determinate answer, legal sovereignty has indeed been established; it is not difficult to find support for such a claim. For example, the Nova Scotia Select Committee on Constitutional Matters, after indicating its discomfort with the very concept of sovereignty, states that sovereignty resides in Parliament and the ten provincial legislatures "which exercise sovereignty on behalf of the total Canadian nation."[315] But if the question of sovereignty is indeed settled

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[315] Nova Scotia, House of Assembly, *Report of the Select Committee on Constitutional Matters. Part I*, June, 1981, p. 5.

at this point in the analysis of the exercise of authority in Canada, why the continued discomfort with the concept? I contend that it is because the issue of sovereignty has not been resolved: it remains in abeyance.[316]

Evidence in support of this claim may be gleaned from another quotation of the Select Committee in which it is stated that sovereignty is "alien to federalism because it necessarily implies a condition of inferiority in terms of law and the constitution between different levels of government."[317] In fact, the presumption that sovereignty implies a condition of inferiority between governments is very much the legacy of a "parliamentary" conceptualization of sovereignty. Briefly, parliamentary sovereignty claims that Parliament itself is authorized to make any law whatsoever within a particular territorial boundary.[318] This authority may, of course, be delegated to a subordinate institution, but such delegation of legislative authority cannot be an indefinite limitation on the supremacy of the delegator, even if the limitation was a statute of a previous legislature. So conceptualized, sovereignty cannot be of much analytical use in a federation in which two

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[316] It is necessary to recall my earlier assertion that legal sovereignty is only one aspect of the sense in which I use the concept in this chapter: to speak of sovereignty is to rivet a principle of legitimacy to the articulation of the ultimate legal authority in the state. It might further be asserted that I have argued that the principle of popular sovereignty is not sufficiently expressed in the institutions of parliamentary government in order legitimately to speak of the exercise of legislative authority as directed and indeed limited by a principle of legitimacy.

[317] Nova Scotia, *Report of the Select Committee*, p. 5.

[318] In its original manifestation, parliamentary sovereignty was considered legitimate because, despite being derived from the authority of the Monarch, it would ensure that the English people would not be subject to arbitrary legislation or to the legislation of a particular faction. In this way is a liberal institution, not a democratic one. Parliament's *representative* function was only secondary.

orders of *parliamentary* government are constitutionally prevented from making any law whatsoever.

In fact, the Fathers of Confederation thought about sovereignty in this way; as a result, they could conceptualize the location of sovereignty in only one of two ways as they debated the issue of where to lodge it in the new dominion. For the Fathers, the only options available were to lodge all legislative authority incident to sovereignty either in the central Parliament, or in the provincial legislatures. It is important to note that, formally, the imperial Parliament was ultimately sovereign over the self-governing colonies and remained so until 1982. However, despite the fact that the Canadian constitution was an imperial statute delegating legislative authority to the central Parliament and provincial legislatures, Canadian governments were left virtually unchecked in their authority to legislate in domestic matters. For this reason, the Fathers considered themselves free to speak of Canadian sovereignty. In fact, it was not long before "autonomous" became more or less an accurate description of the way in which legislative authority was exercised in Canada (at least with respect to the imperial Parliament). This was possible only because the imperial Parliament refrained, according to its own constitutional convention, from exercising its sovereignty unless requested to do so by the Canadians.

In any case, the Fathers preferred to lodge sovereignty in the centre, in Parliament.[319] At the same time, however, they knew that the Confederation project would be acceptable to Maritimers, and especially to French Canadians in Lower Canada, only on the condition that the provinces retain control over matters of a local nature. The Fathers knew that, politically, they had to ensure provincial control over local matters yet they considered the central Parliament to be sovereign. Naturally, this posed quite a dilemma for the Fathers. Although provincial control over local matters would not prevent Parliament from reserving or disallowing provincial legislation, it would indeed prevent Parliament from being able to alter the constitutional division of powers. But, to bind the sovereign Parliament in this way would be to deny it its sovereignty. In fact, as is argued in chapter two, the application of the federal principle to the sovereign authority to amend the constitution caused sufficient uncertainty for the Fathers that they left the issue aside and did not pronounce an amending formula in the Constitution Act 1867.

Inevitably it became necessary to achieve constitutional amendment; the absence of an amending formula, and thus the absence of a resolution to the issue of sovereignty in Canada, did not prevent the possibility of

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[319] Peter Russell cites an insightful quotation supporting this contention. In so far as John A. Macdonald was representative of the opinion which was given expression in the Constitution Act 1867, the Fathers claimed: "The true principle of a Confederation lay in giving to the General Government all the principles and powers of sovereignty, and that the subordinate or individual states should have no powers but those expressly bestowed to them." See Peter Russell, *Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1982), p. 50.

achieving amendment. This was so because the imperial Parliament continued to possess legal sovereignty over Canada. According to convention, the imperial Parliament exercised its sovereign authority to amend the constitution only on the advice of the appropriate legislative authorities in Canada. But which authorities constituted the appropriate ones? Naturally the answer should have been the authority which was supreme in its legislative authority over domestic affairs in Canada, but this issue had yet to be resolved.

In any case, the composition of a request for amendment required an ordering principle through which it would be decided what combination of Canadian governments' consent would be sufficient to send an amendment request to London for ratification. The compact theory, for example, provided an answer based on a conceptualization of Canadian sovereignty lodged in the provinces: only their consent would be required to achieve a constitutional amendment. However, the Fathers had already indicated their belief that sovereignty was lodged in the centre, in Parliament; indeed, that issue remained formally unresolved only because the Fathers were unable to reconcile the federal principle to Parliament's authority to make any law whatsoever. Nevertheless, in the absence of an amending formula formalizing the location of (parliamentary) sovereignty in the federation, the compact theory was able to flourish as a contending interpretation of the nature of the constitution.

Again, because the Fathers had not resolved the issue of sovereignty, a compromise was needed which could determine which Canadian legislatures would be required to consent to amendments before a request was formalized; the federal principle, itself conceptually unconnected to sovereignty, provided such a determination. Indeed, the federal principle- provincial control over local affairs- provided an answer which sovereignty could not: any amendment which altered the division of powers (thus altering the scope of matters under provincial jurisdiction) would have to be accompanied by provincial consent *in addition to* that of Parliament.[320] Whether or not an amendment to the division of powers required unanimous provincial consent was not a matter determined by the federal principle; nevertheless, it served as a guide useful in determining the composition of a request for constitutional amendments without a resolution to the issue of the location of sovereignty in Canada.

The point is to suggest that sovereignty is a concept which has been eclipsed by the federal principle as a fundamental ordering principle of legislative authority in Canada. Indeed, it is the federal principle (and not sovereignty) which justified the amending formula entrenched in the Constitution Act 1982. Indeed, one may be compelled to ask what difference it makes if the federal principle and not sovereignty provides the principle on which the amending formula is justified?

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[320] Recall that parliamentary sovereignty cannot escape an "either/or" choice of centre or parts.

It has already been asserted that Canadians are discontented with parliamentary institutions which are not sufficiently responsive and accountable to citizens; indeed, these representative institutions do not render the exercise of legislative authority legitimate according to the principle of popular sovereignty. In fact, the relative autonomy provided government executives by the exercise of Crown prerogative, strict party discipline, and strong legislative majorities, is exacerbated when sovereignty is replaced with the federal principle as the justification for the authority to amend the "Supreme Law of Canada." This is so because, where sovereignty combines the articulation of the ultimate legal authority in a polity with an articulation of the basis of legitimacy for its exercise, the federal principle, particularly as it came to be interpreted after imperial judicial review, remains silent on the issue of the source and purpose of legislative authority. As Robert Vipond indicates, the federal principle has everything to do with what sort of governmental behaviour is appropriate to a federal union. It addresses the division of legislative authority between two orders of government, "each of which therefore has the right to legislate on matters entrusted to it by the constitution without fear of interference from the other."[321] But the federal principle does not indicate what ends are served by the governmental behaviour appropriate to a federal union.

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[321] Robert Vipond, "Whatever Became of the Compact Theory? Meech Lake and the New Politics of Constitutional Amendment in Canada," *Queen's Quarterly*, 96, 4 (Winter 1989), p. 803.

The Judicial Committee of the Privy Council was influential in changing the meaning of the federal principle from its original sense of local control over local matters. In explaining a 1892 judicial decision, for example, Lord Watson declared: "The object of the [constitution] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."[322] Indeed, following this way of conceptualizing federalism, the federal principle eventually came to be defined as the equal and co-ordinate legislative *autonomy* of each order of government. For example the Nova Scotia Select Committee notes that the Canadian political community relies on the principle of autonomy as a justification for its federal structure: "it is fundamental that federalism involves a guarantee of provincial autonomy....[E]ach of the governments possesses autonomy, i.e. the power of self-government, in its own area of duty."[323]

It is worth recalling that the Judicial Committee of the Privy Council (JCPC), in interpreting the constitution so as to force the division of powers into "watertight compartments," was not claiming *sovereignty* to be divided between two orders of government. Indeed, the JCPC interpreted the Constitution Act 1867 so to render each order of government autonomous in

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[322] Russell, *Leading Constitutional decisions*, p. 52.
[323] Nova Scotia, *Report of the Select Committee*, p. 5.

its own sphere of jurisdiction, and did so by curbing the rather expansive residual powers of the central government. The JCPC, of course, made no mistake regarding the "imperial" nature of Canadian "sovereignty" at that time. After all, it was precisely because the imperial Parliament was itself sovereign that the JCPC was involved in Canadian affairs in the first place. It is rather more likely that the JCPC was preoccupied with the more technical issue of the way in which the exercise of legislative authority in a federation was to be organized.[324]

Importantly, the difficulty with raising provincial autonomy to the level of a justificatory principle for a constitutional amending formula is, again, quite simply that it indicates no principle of legitimacy capable of answering the question of *why* each order of government should be autonomous.[325] Indeed, to fundamental questions regarding the nature of political authority, the federal principle provides no answer. Thus, a situation exists in which governments are able to assert that the constitution

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[324] In reviewing the *Local Prohibition* case, Lord Watson states: "the Judicial Committee does not serve a judicial function." Instead, its function was to "correct the 'deficiencies' of the BNA Act; they viewed their function, therefore, as primarily legislative- to make up for or correct the mistakes of the legislature." Frederick Vaughan, "Critics of Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative," *Canadian Journal of Political Science*, XIX:3 (Spring 1986), p. 514.

[325] This claim hold less weight in the particular case of Quebec which has always connected provincial "autonomy" to the preservation of the French Canadian/Quebec Nation: "[Legislative Union] ...would not meet the assert of the people of Lower Canada because they felt that in their peculiar position...their institutions and their laws might be assailed..." See Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), p. 22. I contend that a two-nation view of Canada is necessarily a derivation of the compact theory and is therefore a claim about sovereignty because Quebec "autonomy is consistently linked to the protection of a distinct culture, language, and so on.

guarantees their legislative autonomy, and that they are justified in protecting that autonomy, for no other reason than because the constitution says so: "The federal view is that each government possesses its own autonomy. It is clear that in the circumstances of 1864 an agreement of federation was explicit in the creation of a federal state by the British North America Act of 1867. In that agreement, and in that Statute, provincial autonomy was very clearly preserved..."[326]

As Vipond notes, however, if constitutional discourse were explicitly to address the issue of sovereignty, it would have to admit that governmental autonomy does not exist as an end in itself: "there is more to politics, even in a federation, than the perpetual tug-of-war between governments; and...deep down to make an assertion of sovereignty is really to make as assertion about the legitimate sources of power in our polity and the ends or purposes for which the polity exists."[327] Of course, indications of this are present in Quebec where parliamentary sovereignty is intimately connected to the end of preserving a threatened culture and linguistic community.

Vaclav Havel states with eloquence the kind of claim I wish to make about the legitimate source of power in the Canadian federation, about who should rule, about what kind of ends the political community should exist to protect: "The sovereignty of the community, the region, the nation, the state- any higher sovereignty, in fact- makes sense only if it is derived from the one

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[326] Nova Scotia, *Report of the Select Committee*, p. 5.
[327] Vipond, "Whatever Became of the Compact Theory?," p. 808.

genuine sovereignty- that is from the sovereignty of the human being, which finds its political expression in civil sovereignty."[328]

For Frank Scott, such an assertion was uncontroversial. In addressing the issue of constitutional patriation in 1950, Scott noted that "till now have had but one *Grundnorm,* one fundamental law...namely the ultimate proposition that all laws emanating from the United Kingdom Parliament must be obeyed." Put differently, "until now all legal rules in Canada...have derived their validity from the elephant of the BNA Act, which stood firmly on the turtle of the sovereignty of the United Kingdom Parliament. Beneath the turtle nothing further has existed to support a stable universe...[Now] we are looking for a Canadian Turtle."[329]

In describing the range of "turtles" from which to choose when the authority of the imperial Parliament is terminated, Scott asks: "Will it be a divine turtle, deriving its authority from God; or a provincial autonomy turtle calling itself the compact theory; or an Anglo-French turtle, calling itself a treaty between races; or will it be a popular turtle, labelled 'We, the People.'"[330] The identity of the Canadian political community- the answer to the question *who shall rule?*- is integrally connected to the principle of popular sovereignty; therefore, the choice is clear: it would be a popular turtle.

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[328] Vaclav Havel, *Summer Mediations* (Toronto: Lester Dennys, 1992), p. 33.
[329] Scott, *Essays on the Constitution,* p. 248.
[330] ibid., pp. 248-249.

For Scott, the choice was similarly obvious. Were the constitution to be patriated, it would contain a declaration of sovereignty in the Canadian people. In 1982, however, what Scott assumed would be necessary to declare were the constitution patriated was not included in the terms of the Constitution Act. We did not "pull out the old turtle and slip in a new one in its place..."[331] Instead, we pulled out the old turtle without replacing it with another. Indeed, since 1982, we have devoted ourselves to taming an elephant (the Constitution Act 1982) which has no turtle to stand on.

What is required of an amending formula, then, if it is to determine the *sovereign* authority to amend the constitution, is an assertion of the principle on which the exercise of legislative authority is to be considered legitimate: it is necessary to declare the sovereignty of the people.[332] Such an assertion may be cause for confusion. In this vein, Jeremy Webber indicates that, in the wake of the failure of the Meech Lake Accord, a number of Canadians responded to the widespread sense of bitterness and frustration by suggesting a return to fundamentals: "We should decide what it means to be Canadian. We should determine what values Canadians hold in common.

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[331] ibid., p. 250.

[332] I believe two implications follow from such an assertion. First a declaration of popular sovereignty provides impetus for parliamentary reforms which emphasize Parliament's representative function, and which focus on open discussion rather than on ensuring party and cabinet solidarity. It would also indicate the appropriateness of a proportional representation electoral system as also making Parliament more regionally representative. Second, popular sovereignty becomes a constitutional principle through which to adjudicate reform proposals: the equality and autonomy of citizens- individually and/or in groups- and not states must be take precedence at the constitutional bargaining table.

Then, when we are clear on our principles, when we know precisely what kind of country we want, it will be easy to redraft the constitution."[333]

In declaring the sovereignty of the people, I too am suggesting a return to fundamentals. However, I do not assert the sovereignty of the people in order to add another perhaps more "authentic" perspective to the politics of vision; nor do I intend the declaration of the sovereignty of the people to provide a warrant to write into the "Supreme Law of Canada" a statement(s) which is reflective of the way in which all Canadians conceptualize the Canadian political community.[334] Indeed, the sovereignty of the people provides little clue to the particular contours of the political community; it does not speak to the variety of territorial and non-territorial collective identities which vie for constitutional recognition; it does not privilege allegiances to province or country; nor does it address the way in which political power is to be distributed among orders of government. Popular sovereignty is the claim that the fundamental purpose of the political community, the *telos* of all legislative authority in Canada, is to serve the needs and interests of the sovereign people. In this way, it is an assertion of the greatest good the achievement of which is the very purpose of the political community.

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[333] Webber, *Reimagining Canada*, p. 183.

[334] Raymond Breton has written on the status competition and anxiety which ensue when the established symbolic order of a society is altered by the replacement or inclusion of new or alternative symbols in the basic political institutions of society with which citizens identify. A constitution is indeed one such institution. See Raymond Breton, "The Production and Allocation of Symbolic Resources: an Analysis of the Linguistic and Ethnocultural Fields in Canada," *Canadian Review of Sociology and Anthropology*, 21, 2 (May 1984)

Such a claim may seem so obvious that its articulation appears rather tedious; this, however, is precisely the point. Canadians likely believe that governments exist to serve the people. They may believe that governments do so poorly, that their authority must be tempered by a basic schedule of rights, that they are insufficiently representative of citizens, that they are suffering from bureaucratic overload; but in the end, to serve the people is purpose for which governments exist. And, of course, in many ways governments indeed *do* serve the people. However, they do so only by leaving in abeyance the tension between popular and parliamentary principles of legitimacy.

For Frank Scott, a constitution is a "framework of law under which the government of the country is carried out. It distributes authority, authorizes various activities, and above all proclaims certain social and political values."[335] Any liberal democratic constitution, for example, is founded upon basic principles of justice; Charles Taylor gives just such an example: "To be a member of a sovereign people is to be one of equal and autonomous citizens."[336] In Canada, however, the principles of equality and autonomy, which the constitution seek to protect, are expressed as frequently at the level of legislatures as they are at the level of individuals (and groups).[337]

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[335] Scott, *Essays on the Constitution*, p. 366.

[336] Taylor, *Reconciling the Solitudes*, p. 188. Taylor, of course, indicates that these two aspects of popular sovereignty may be at odds with each other. The principle of equal respect (dignity); and that of recognition of difference (authenticity), may pull in different directions.

[337] Nancy Fraser notes that, in today's world, claims for social justice seem increasingly to divide into two types: redistributive claims which seek a more just distribution of resources and goods; and claims for group recognition in which "assimilation to majority or dominant cultural norms is no longer the price of equal respect." See Nancy Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation." A paper

That is not to say that individual[338] equality and autonomy are not fundamental values held dear by many if not most Canadians; however, it *is* to say that the assumption that we are indeed a sovereign people is belied by the fact that that sovereignty is apprehended and transformed through its expression in parliamentary institutions. The result is that we are left with an awkward fusion of individual *and* state conceptualizations of constitutional principles of justice, evident in contemporary proposals for constitutional reform.

For example, the 1990 report of the *Citizen's Forum on Canada's Future,* after canvassing the views of Canadians on matters of "Canadian identity and values," indicates that "[f]airness and equality extend...beyond the level of individuals and groups in society to encompass provinces."[339] I certainly do not question the sincerity with which Canadians addressed the Citizen's Forum; however, it is my contention that the equation of equality with individuals on the one hand and provincial legislatures on the other, is indicative of two different way of answering the fundamental question of legislative authority. Furthermore, the former has its source in the principle

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presented at the Conference for the Study of Political Thought, Columbia University, April 1997, p. 1.

[338] I generally refrain from stating "group" from now on, though only as a matter of convenience. Whether or not group rights can indeed be considered compatible with individual autonomy is an interesting issue which is raised by Wil Kymlicka in his *Liberalism Community and Culture* (Oxford: Claredon Press, 1989)

[339] Canada, *Citizen's Forum on Canada's Future: Report to the People and Governments of Canada,* (Canada: Supply and Services, 1991), p. 36.

of popular sovereignty; the latter in the principle of legislative autonomy and ultimately in the principle of parliamentary sovereignty.

Returning for a moment to Aristotle and his assertion that a regime presupposes a definitive answer to the question of *who shall rule?*, it is likely that, for citizens, the answer would be: "we do, through our representatives." Constitutional principles of justice, then, on this account, would be employed in the construction of a constitution which is best suited to the ends of protecting individual equality and autonomy. This would be accomplished by authorizing governments to legislate in the place of citizens themselves, while at the same time protecting the abuses of that authority through the articulation of basic rights and freedoms.

If the people are conceptualized as sovereign, and they express that sovereignty through the institutions of representative government, then each order of government is delegated authority by the sovereign people themselves. That delegated authority, in turn, is expressed through multiple institutions which adhere to the federal principle for the reason that concurrent yet overlapping majorities in central and in provincial legislatures are determined by the sovereign people better to represent its territorially concentrated diversity. As Reg Whitaker notes, a federal polity denies that a single national majority is an efficient expression of the sovereignty of the people, replacing it, instead, with majorities more diffuse, diverse, and

complex.[340] On this account, neither order of government is privileged for both are expressions of the sovereignty of one and the same group of people. Federalism, then, presuming the sovereignty of the people, may be considered to be the best way to protect the plural ways of life members choose to have and do together. It is about "divided jurisdiction, divided loyalties, multiple identities, and intersecting communities of belonging. When it is so understood, it becomes capable of mediating the potentially diverse traditions of Canadian pluralism."[341]

The constitutional mediation of Canadian pluralism, however, if it is the people who are sovereign, must be guided by principles of justice which protect individual equality and autonomy. Indeed, despite the definition of the federal principle as the equal and co-ordinate legislative autonomy of each order of government, Canadians should not presume an *a priori* good of lodging jurisdiction over a particular matter in the provincial legislatures or in Parliament simply because it is so stipulated in the constitution. Because the Canadian regime presumes popular sovereignty, which, in turn, presumes that citizens are equal and autonomous members of the political community, the only adjudicatory measure which can determine the

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[340] Reg Whitaker, "Federalism and Democratic Theory." A paper presented at the Canadian Journal of Political Science conference, June 1982, p. 2.

[341] Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Kingston: Queen's-McGill University Press, 1996), p. 187.

appropriateness of a particular configuration of powers is its relationship to the protection of the equality and autonomy of the sovereign people.

Thus, the legislative autonomy of each order of government must be oriented toward the protection of (1) the equality and autonomy of individuals and groups, so that they may pursue (2) particular commitments to diverse ways of life as members of the same political community. Only if condition (1) is met can the liberal democratic identity of the political community itself be considered secure. Of course, the task of the politics of vision is to address the way in which (1) will be protected so as not to compromise (2); it is not clear that agreement here can be reached. It is the case, however, that (1) is also articulated as the equality and autonomy of provincial legislatures. However, connecting the logic of this developing norm to constitutional principles of justice would seem to indicate that, in Canada, the constitution is believed also to serve the purpose of protecting the equality and autonomy of legislatures. Implicit here, of course, is that, on this reading of the principles of justice, sovereignty is lodged in the legislatures not in the people. For the politics of vision, however, this is troublesome because, in the same way that this interpretation of the constitutional principles of justice transforms individual equality and autonomy into that of legislatures, it determines the members of the political community to be individuals only insofar as they are represented in an individual legislature.

If sovereignty is quietly assumed to be lodged in the Canadian legislatures themselves, then, of course, it is a matter of justice that no Canadian legislature be privileged over another. Each provincial legislature should be endowed with the same constitutional jurisdiction, and each order of government should be considered equal and co-ordinate in its legislative autonomy. This is so because the principles of justice which the constitution exists to protect refer ultimately to the legislatures not to the people. After all, as the Nova Scotia Select Committee asserts, it is Parliament and the ten provincial legislatures which exercise sovereignty on behalf of the Canadian nation. Any alteration to constitutional symmetry in regards to the division of powers, therefore, would necessarily require the consent of all legislatures affected[342] because the legislative autonomy and constitutional equality of each legislature would be threatened by a change to the division of powers.

In this configuration, however, despite the declared equal and co-ordinate autonomy of each order of government, there remains ever unacknowledged the unresolved tension between the sovereignty of the central Parliament and the provincial legislatures. The effect of this irresolution of the location of sovereignty may be indicated by identifying, in constitutional discourse, competing claims to the identity of the political community which necessarily privilege one order of government over the other in a fashion reminiscent of the Confederation debates.

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[342] Of course the general amending formula in the Constitution Act 1982 represents a compromise on the requirement of unanimity in the name of flexibility.

If Canadians are to support a constitutional norm of provincial equality as a fundamental characteristic of the way of life they have and do together, then they must do so knowing that the constitutional protection of individual equality and autonomy of individuals and groups is not necessarily compatible with the constitutional equality of provinces. Still, it may well be the case that many Canadians (outside Quebec) will continue to support the developing constitutional norm of provincial equality because their idea of citizenship, their idea of what it means to be Canadian, demands recognition of the formal equality of provinces. The difficulty with this possibility, however, is that the Francophone majority is not likely to accept the lack of constitutional recognition of their cultural and linguistic particularity, a particularity which, as the Quebec government claims, requires greater legislative jurisdiction.[343] It is my hope that emphasizing popular over parliamentary sovereignty as the basis on which constitutional principles of justice are to be founded, ultimately will dislodge the tenacity of territory as a pole around which to order the plural interests of Canadians. In this way, Canadians may be more disposed to discover the cultural, linguistic, and socio-economic heterogeneity within provincial communities themselves, as well as discover common interests which transcend provincial boundaries. In turn, the equality and autonomy of heterogeneous communities in Canada

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[343] or at least a reduction in the control over program spending possessed by the central government, not according to the terms of the constitution, but rather through its broader taxing powers.

will be constitutionally protected by placing legislative authority in the body most competent to protect the basic principles of justice.

With respect to the possibility of finding popular support for a constitutional arrangement which may require an asymmetrical division of powers[344] among provinces (in order to ensure that constitutional principles of justice- based on the principle of popular sovereignty- are respected) it is necessary to show citizens that the democratic credentials of Parliament are as strong as those of provincial legislatures. For Parliament, the problem is compounded by "a tendency in Canada...to credit the central government with an abstract existence wholly apart from the people it represents; similarly the provinces are considered as being separate from and in opposition to this central government."[345] Yet, as William Livingston identifies, what is ignored in this conceptualization of the federation is that

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[344] Leslie Seidle indicates that "[w]hile the provinces are equal juridically, in practical terms the nature and extent of their responsibilities already vary to some degree...Although some of the present asymmetry arises form specific constitutional provisions (such as protection of the civil law tradition in Quebec), most emerge from political practice under the existing Constitution-for example, Quebec exercises greater authority over the administration of immigration than do other provinces and is the only province that has its own pension plan and collects provincial personal income tax.) See Introduction to Leslie Seidle (ed.), *Seeking a New Partnership: Asymmetry and Confederal Options* (Institute for Research on Public Policy, 1994), pp. 9-10.

[345] William Livingston, p. 105. To combat the abstract concept of the national political community, the central government, for example, initiated a program of citizenship participation in 1969 with hopes of fostering "a greater sense of national allegiance to national institutions through a feeling that those institutions were open to popular forces." Of course, the Charter of Rights and Freedoms, and state sponsorship of multicultural, linguistic, and feminist groups all shared a similar purpose: to strengthen citizens' identification with the national political community. See Leslie A. Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada* (Kingston: McGill-Queen's University Press, 1993), p. 251.

both central and provincial governments are "instruments of the same people."[346]

The point in indicating that both orders of government are delegated authority by the sovereign people, then, is to free the constitution from the rigidity produced by the equation of basic principles of justice with the legislative autonomy of governments. Were this to be accomplished, then it might become more acceptable to Canadians that some provincial legislatures be allotted more legislative authority, while for other provincial communities, such legislative authority would continue to be delegated to Parliament.

In essence, the purpose served in declaring the sovereignty of the people in this thesis has been to employ the concept as a critical tool through which to identify the way in which the misunderstandings and cross-purposes which seem to be commonplace in the politics of vision and which threaten to tear this country apart may be fueled by a fundamental misunderstanding regarding the identity the Canadian political community as a democratic regime. It has been my contention that our basic political structures of parliamentary federalism have held in abeyance the concept of

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[346] ibid. Of course, calls in the West for "regional equality" in proposals for Senate reform, for example, should be interpreted as a demand for greater weight in the decision-making processes of the central Parliament. The problem of regional representation in the central Parliament, and particularly in government must be addressed of citizens are to acknowledge that both orders possess a democratic mandate. For example, it is difficult for someone in British Columbia to be supportive of asymmetrical decentralization (i.e. special status) for Quebec while believing, at the same time, that Ottawa does not listen to the expressed needs and interests of British Columbians. This is so even if the British Columbian is not especially enamoured of greater decentralization of legislative authority.

sovereignty. As Canadians struggle to constitutionalize an arrangement of political institutions which is up to the task of protecting diverse ways of life, they may not realize that popular sovereignty *and* parliamentary sovereignty both structure the character of the debate over the politics of vision. If Canadians define the regime as founded on the principle of popular sovereignty, the task at hand is to render our parliamentary institutions better able to express that sovereignty. Clarifying the answer to *who shall rule?*, I believe, can provide the sovereign people of Canada with constitutional principles of justice which are well equipped to accommodate its diversity.

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